

## **Don't Let the Clock Run Out on Your Claim – Key Limitation Period Practices for Contractors**

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Missing a limitation period recently proved disastrous for an Ontario contractor. After the contractor sued the Town of Tavistock for road, sewer, and sidewalk work, the court threw out the entire \$134,502.71 claim. The court found that the contractor had brought the claim three weeks after the limitation period expired.<sup>1</sup>

In order to avoid falling into this trap, contractors should always consider how limitation periods affect their claims. We set out below the key facts about how limitation periods work, benefits and pitfalls of changing the limitation period, and tips on how to manage your limitation periods so they do not expire.

### **What Are Limitation Periods and How Do They Work?**

Limitation periods set a deadline by which a person must start a lawsuit. If they fail to start the lawsuit by that deadline, they will likely lose their ability to pursue the claim.

The Ontario *Limitations Act, 2002*<sup>2</sup> sets a default limitation period of two years. The two-year period begins when the person with the claim knew or should have known that it had a claim, subject to certain exceptions.<sup>3</sup>

However, parties to a contract in Ontario have significant flexibility to fashion the limitation period that suits their project. They can change the limitation period by choosing a longer or shorter period in their contract. They can also stipulate when the limitation period starts to run.<sup>4</sup>

Similarly, adding a dispute resolution clause that mandates negotiation, mediation, and arbitration can affect when the limitation period begins to run. Ontario courts have held that the limitation period does not start to run until after the parties have fulfilled the mandatory mediation provisions in a contract.<sup>5</sup>

### **Benefits and Pitfalls of Changing Your Limitation Period**

It is important to weigh the costs and benefits before altering a limitation period. A shortened limitation period, for example, may provide some added comfort to at least one of the parties (by closing the door to potential claims against them), but could disadvantage the other party who may find their rights inadvertently lost amid a prolonged investigation or negotiation about a lingering construction problem.

For example, some owners may seek to shorten the limitation period for claims to one year from substantial performance of the work, using language such as:

“The *Contractor* waives and releases the *Owner* from all claims which the *Contractor* has or reasonably ought to have knowledge of that could be advanced by the *Contractor* against the *Owner* under the *Contract*, including, without limitation, those arising from negligence or breach of contract, except only claims for which *Notice in Writing* of claim has been received by the

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<sup>1</sup> 1838120 Ontario Inc., v. Township of East Zorra-Tavistock, 2021 ONSC 3341.

<sup>2</sup> SO 2002, C 24, Sched B [*Limitations Act*].

<sup>3</sup> *Limitations Act*, ss 4-5, 13.

<sup>4</sup> *Limitations Act*, s. 22(5).

<sup>5</sup> *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331.

*Owner from the Contractor within 1 year from the date of Substantial Performance of the Work.”*

Others may require contractors to waive all claims upon receipt of final payment or to provide a full waiver of claims (e.g., an executed final release and indemnity) as part of their application for final payment. For example:

*“Upon receipt of final payment from the Owner the Contractor waives and releases the Owner from all claims which the Contractor has or may have against the Owner under the Contract or related to performance of the Work, except only claims for which Notice in Writing of claim has been received by the Owner from the Contractor prior to the Owner’s receipt of the Contractor’s invoice for final payment.”*

*“As part of the proper invoice for final payment, the Contractor shall include a signed waiver and release in the form attached as Schedule A.”* [Note: the implications of the waiver and release will depend on its terms]

Operationally, such language has a similar effect to a limitation expiring because it will bar the contractor from pursuing any other claims it may have (such as a claim for additional compensation due to changes or owner-caused delay) or claims it may later discover. It is therefore essential that the contractor be very clear about any and all claims for outstanding matters at the time of final payment application, and that it comply with the contractual requirements for pursuing them, including compliance with any notice requirements to the owner.

Generally speaking, the less time available for the contractor to bring its legitimate claims, the greater the risk as it increases the likelihood the Contractor will not have sufficient time to discover and bring the claim.

It is also important for the contractor to ensure that the limitation period in the prime contract is the same as the limitation period in any subcontract it enters into. If the prime contract has a shorter limitation period than that under the subcontract, there is a risk that the contractor will be liable to the downstream subcontractor for a claim for which the owner might have ultimate responsibility, but unable to recover from the owner since the limitation period in the upstream prime contract has expired.

### **Tips for Contractors Managing Limitation Periods**

We recommend that contractors follow these best practices to protect themselves from inadvertently losing their claim:

- 1) **Read your contract:** The contract sets out the road map for handling claims that may arise during the project, including when and how notice of claims must be given to preserve the contractor’s rights.
- 2) **Diarize:** Ensure that the Project Manager uses a calendaring or limitations tracking system to flag any all deadlines relating to a claim. This system should include deadlines to comply with legal and contractual obligations such as notice requirements and the limitation period.

- 3) **Back-date:** Set dates in advance of the actual deadline to allow for enough time to prepare a claim if needed. For example, it is helpful to assume the earliest possible limitation date, then back-date it by a month.
- 4) **Involve Legal Counsel:** Seek legal advice as soon as a potential claim arises. Not only would law firms have a central system for tracking limitation periods, your counsel can also take steps to reserve potential claims by negotiating tolling agreements to extend the limitation period. Tolling agreements give parties the opportunity to investigate claims, prepare for action, and negotiate a possible settlement before incurring significant legal costs. Do not wait until it is too late to involve legal counsel.
- 5) **Be Cautious:** Do not assume the limitation period has expired because the default two-year period is up. The calculation of the starting date for the limitation period can sometimes be contentious. Even when the start of the two-year limitation is clear and a party has commenced an action within that time, parties in Ontario still have an additional six months to serve their claim.
- 6) **Other Ways to Lose Rights:** Keep in mind that letting a limitation period expire is not the only way you might lose your rights. For example, the timelines for preserving and perfecting a construction lien are separate from the basic two-year limitation period discussed above.

As is the case in so many aspects of construction, the watchwords for the contractor when facing potential limitation issues are:

- Read your contract;
- Know your rights and contractual responsibilities and do not sit on them; and
- Get legal assistance early.