New *Limitations Act* now in effect

By Michael Mastromatteo

Now in force, the *Limitations Act 2002* has simplified a former maze of specific limitation periods and brought certainty to limitation periods affecting engineering.

It has arrived. Don't let the out-of-date-sounding name confuse you. The *Limitations Act 2002* came into force on January 1, 2004.

The new act is the fruit of a decades-long effort by the Ontario government, the now-defunct Ontario Law Reform Commission and others to bring a simpler, up-to-date standard to limitation law in Ontario. It enacts a new Limitations Act and makes related amendments to other statutes by consolidating 69 different limitation laws. The act received Royal Assent in December 2002. It is the most significant change in the province's limitation laws in more than a century.

The act creates a basic two-year limit in which to launch any civil suit after injury, damage or loss is (or ought to have been) discovered by a plaintiff. This is a significant change to the general limitation period–on average six years–under previous law, and takes precedent over any specified limitation periods previously in effect under other statutes.

The act also imposes an ultimate 15-year limitation period for civil action, beginning with the time an act or omission on which the initial claim is based actually occurred. This 15-year ultimate claim period applies regardless of the plaintiff's awareness of when the disputed act or omission took place.

The ultimate limitation allows for certain exceptions for situations involving minors, those who are incapable, sexual assault, and claims affecting the environment. There is also an exception for "real property" claims, in which existing limitation periods will remain in effect. Nonetheless, by circumscribing efforts to contract out of stipulated limitation periods, the new act is said to drastically limit parties' ability to establish their own deadlines in settling legal disputes.

A key feature of the new act is its treatment of "standstill agreements," or other similar arrangements through which litigants agree to extend or reduce stipulated limitation periods. While agreements that were in force prior to Jan. 1, 2004, might still be valid, efforts to opt out of the limitation periods spelled out in the new act are unenforceable.

The new act also "codifies" or defines when "discovery" takes place.

A P.Eng. lawyer's take on the Limitations Act

A Toronto lawyer and professional engineer agrees that the *Limitations Act 2002* is generally good news for the engineering profession.

Colleen Shannon, P.Eng., an attorney with Toronto law firm Borden, Ladner, Gervais, told *Engineering Dimensions* that the new act, which came into force January 1, 2004, will provide more certainty for engineers about time periods during which claims may be brought.

A civil engineer called to the Bar in Ontario in 1989 after spending three years in civil and mechanical design with a major oil company, Shannon specializes in civil litigation involving professional engineering liability, product liability and claims arising from environmental damage.

"Prior to the effective date of this new legislation, engineering professional liability claims were subject to a number of statutory limitation periods, including those found in the old *Limitations Act* as well as the limitation period set out in s. 46 of the *Professional Engineers Act*," she said. "Although the limitation period in the Act ran for 12 months after the date on which the service was, or ought to have been, performed, it was coupled with a discretion, granted to the court, to extend it. In practice, the period of time was frequently extended by the courts."

As a result, she said, the limitation periods generally were the six-year limitation periods for claims based in negligence or contract as set out in the old *Limitations Act*. Those periods began to run from the "time the cause of action arose" and the common law "discoverability" rule was applied to figure out when that happened. Any claim involving, for example, latent design or construction defects could extend the limitation period well into the future.

Shannon said that because the discoverability principle is preserved in the new legislation, engineers should expect the application of a two-year, rather than a six-year, period for claims. She added that the "real certainty" has been introduced by the "ultimate limitation period" set out in section 15 of the new *Limitations Act*. That section prevents the commencement of proceedings after 15 years from the date on which the act or omission on which the claim is based took place. There was no equivalent to that provision under the former *Limitations Act*.

"Another section under the new act that will be of interest to some engineers is section 17," Shannon said. "Under that section, there is no limitation period for environmental claims that have not yet been discovered, so those types of claims do not attract the ultimate limitation period."

Shannon also cited the new act's move to exclude efforts to vary or opt out of limitation periods. "Section 11, however, contemplates extension of the limitation periods in the act by an agreement to have an independent third party resolve the claim," she noted. "Whether these provisions provide more certainty or less certainty is a matter for debate."

Discovery–or discoverability–is key in establishing when the "limitation clock starts running" in legal proceedings. Under the new act, the limitation period begins at the time a reasonable individual discovers that loss or damage has occurred, that it was caused by an act of omission or negligence of the person(s) against whom a claim is made, and that legal action would be an appropriate remedy.

Issues surrounding discoverability could impact on the naming of engineers as third parties, in particular in claims involving the construction or building trades.

Of more immediate significance for P.Engs is the act's repeal of section 46 of the *Professional Engineers Act*. Section 46 stipulated that legal action against a professional engineer, or a holder of a Certificate of Authorization, limited licence, temporary licence or provisional licence, for damages arising from provision of a service within the practice of professional engineering could not be commenced after 12 months from the date on which the service was, or ought to have been, performed.

Sal Guerriero, P.Eng., PEO manager, regulatory affairs, said the elimination of section 46 "should bring more certainty overall to engineers in terms of spelling out limitation time frames."

Bernie Ennis, P.Eng., PEO manager, practice and standards, said the new Limitations Act is a "definite improvement over what occurred before. It gives engineering practitioners a better understanding of time periods so that they can make decisions about winding down old projects, keeping insurance in force or letting it lapse, and in overall planning issues."

Although the new act has repealed section 46 of the *Professional Engineers Act*, Ennis doesn't foresee an immediate need for revision of PEO's professional practice guidelines. He said section 46's one-year limitation period didn't have significant bearing on the number of lawsuits filed against Ontario P.Engs [due to the discretion previously granted the court under the former section 46(2)]. In any case, he said, PEO's guidelines are generally revised at five-year intervals, and any revisions based on legislative changes are incorporated during these updates.

However else the new *Limitations Act* plays out across Ontario, it will likely have its most significant impact on the construction industry. Prior to enactment of the new act, there was no time limit on launching lawsuits based on faulty building practices. In these cases, building practitioners, including engineers as third parties, could be subject to court action stemming from projects completed decades earlier.

Ennis said the older limitation laws often left engineers, whether employed in corporations or as sole practitioners

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"in limbo" against the possibility of lawsuits. "Under the old system, there was no way to plan against certain things. As well, a lawsuit could have arisen at any time."

He said the majority of lawsuits against professional engineers in Ontario occur within 10 years of the completion of projects. While this is still within the new legislation's 15-year ultimate limitation period–with its now clearly spelled out discoverability rules–it is still seen as a positive step for the profession. Under the new act, lawsuits are precluded on the 15th anniversary of when an act or omission occurred. This will end scenarios in which a potential defendant might be liable indefinitely.

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On the other side, however, the imposition of the ultimate 15-year limitation means it will be more difficult for owners or developers to obtain redress for mistakes made in slower-developing construction projects. As legal experts from the Toronto law firm Osler, Hoskin and Harcourt noted in a review of the *Limitations Act 2002*, "This provision [the 15-year ultimate limitation period] could have severe implications for cases involving damage that remains latent for many years prior to discovery, such as a construction defect in a building."