

## Limitation Period for Claims for Contribution and Indemnity – The Ever Unsettled State of the Law

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Despite the fact that the *Limitations Act, 2002* has been in force for nearly two decades now, the law with respect to the applicable limitation period for claims for contribution and indemnity and the availability of the principle of discoverability to such claims remains in flux. Over the past few years, several lower court decisions highlight what may be termed the debatable state of the law in this area.

### ***Miaskowski v Persaud***

In *Miaskowski v Persaud*, a 2015 Superior Court decision, Justice Perell was faced with three summary judgment motions in a slip and fall action, one of which was brought by the third parties contending that the third party claim was statute-barred by application of the *Limitations Act, 2002*. The defendant commenced the third party claim over five years after the subject accident, and nearly three years after the identity of a prospective third party was “discovered”.

Although arguably *obiter*, as Justice Perell granted the other two summary judgment motions that effectively dismissed the plaintiff’s action, he nevertheless quite firmly concluded that section 18 of the *Limitations Act, 2002* (applicable to claims for contribution and indemnity) imposes an absolute two-year limitation period (following the date on which the originating claim is served) with respect to claims for contribution and indemnity. His

Honour found that the discoverability principle had no application to section 18, and accordingly granted the third parties' motion.

Although *Miaskowski* was appealed, Justice Perell's ruling with respect to the third party claim being statute-barred was not a subject of the appeal. Indeed, the Court of Appeal offers no analysis on the issue<sup>ii</sup>.

### ***Demide v Attorney General of Canada***

A few months after Justice Perrell's decision in *Miaskowski* in 2015, Justice Leach was faced with similar issues on a motion by the defendant to advance crossclaims against a co-defendant in another slip and fall action in *Demide v Attorney General of Canada et al*<sup>iii</sup>. Quite interestingly, both parties appear to have ultimately agreed that the presumptive limitation period for claims for contribution and indemnity was subject to discoverability, with the core dispute being the date of deemed discovery. Nevertheless, Justice Leach canvassed the competing viewpoints, as outlined in *Miaskowski*.

Significantly, however, His Honour departed from that viewpoint. He found that section 18 read in context with the other provisions of the *Limitations Act, 2002* (particularly section 5(2)), creates a rebuttable presumption that a claim for contribution and indemnity is discovered on the date of service of the originating claim and that said presumption may be rebutted by proof to the contrary.

In reaching this conclusion, Justice Leach looked to Court of Appeal decisions wherein section 18 was described as creating a *presumed* limitation period, which he considered to mean a rebuttable presumption (i.e., subject to discoverability), rather than a conclusive one. Ultimately, however, his analysis did not affect the outcome of the defendant's motion, as Justice Leach was satisfied that the contemplated crossclaims were barred regardless of his views on the limitation period.

## ***Hughes v Dyck***

Subsequent to the two diverging 2015 decisions of *Miaskowski* and *Demide*, Justice Pierce, in the 2016 decision of *Hughes v Dyck*<sup>iv</sup>, considered the two competing lines of authority, ultimately coming down on the side of Justice Perell in *Miaskowski*, that section 18 creates a standalone limitation period that is not subject to discoverability.

## ***Latest Case Law***

Fast forward to 2018 – two decisions demonstrate the ongoing conflict with this issue, although both reach the same conclusion.

In *Marjadsingh v Toronto Transit Commission v Kahlon*<sup>v</sup>, on the defendant's motion to add a new third party, Master Jolley was confronted with the question of whether the limitation period for claims for contribution and indemnity set out in section 18 is rebuttable or conclusive. As in *Hughes*, Master Jolley reviewed the diverging authorities but quite aptly noted that a determination of the issue requires more than a tallying of the number of decisions that conclude one way or the other.

Ultimately, Master Jolley held that section 18 creates a rebuttable presumptive two year limitation for claims for contribution and indemnity, which is subject to the principle of discoverability. She viewed such an interpretation as not being counter to the principles of efficiency and certainty that underlie the *Limitations Act, 2002*, and as being consistent with the policy consideration of not depriving parties of their right to sue before they are even aware of a claim.

More recently, in *Murphy v Hart*<sup>vi</sup>, the defendants brought a motion to dismiss a standalone action for contribution and indemnity by virtue of the claim being statute-barred. Faced with same issue outlined above, Justice Monahan adopted Justice Leach's reasoning in *Demide*, and articulated two features of section 18: it is an interpretive provision not intended to extinguish or bar claims or impose a standalone limitation period, and it does

not specify a date on which a claim is discovered but deems the “date of the act or omission upon which the claim is based” to be the date of service of the originating claim.

Justice Monahan found that the absence of reference to a rebuttable presumption in section 18 does not negate the presumption set out in section 5(2).

Notably, Justice Monahan cites a 2016 Court of Appeal decision in *Fennell v Deo*<sup>ii</sup>, which he viewed as suggesting that the principle of discoverability applies to claims for contribution and indemnity.

In *Fennell*, the motions judge determined that a defendant’s crossclaim for contribution and indemnity was timely despite having been commenced more than two years from the date that defendant was served with the original statement of claim. He did so on the basis that the defendant ought to have discovered the claim for contribution and indemnity some time after that service date, which was within two years prior to the crossclaim being advanced. The Court of Appeal held that the motion judge’s determination in that regard was entitled to deference and upheld the decision.

However, it is important to note, as Justice Monahan did, that the Court of Appeal in *Fennell* did not expressly address the limitation period for claims for contribution and indemnity or whether the principle of discoverability applies.

### **Conclusion**

There are conflicting lower court decisions on whether there is a fixed and absolute two year limitation period for claims for contribution and indemnity which begins to run from the date a statement of claim is served on a defendant, or whether the limitation period is subject to the discoverability principle.

The more sensible interpretation is that claims for contribution and indemnity should be subject to the discoverability principle. In some cases, the cause of action for a contribution and indemnity claim will not even arise until more than two years after the claim is served.

As an example, suppose a plaintiff was involved in an accident in January 2015 and served a claim on a defendant in January 2017. The absolute two year limitation period for claims for contribution and indemnity would expire in January 2019.

However, if the plaintiff is involved in a subsequent accident in June 2019 and sustains overlapping and indivisible injuries, it would not make sense to prevent the defendant from commencing a contribution and indemnity claim against the tortfeasor in the subsequent accident. There would have been no claim to commence at the time of the expiry of the absolute limitation period in January 2019.

Nevertheless, as it stands, appellate authority on the issue is lacking. Until an appellate level decision is rendered or the legislation is amended, it would be wise for counsel and litigants to proceed on the basis that the limitation period is absolute and cannot be extended by the discoverability principle.

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i 2015 ONSC 1654.

ii 2015 ONCA 758.

iii 2015 ONSC 3000.

iv 2016 ONSC 901.

v 2018 ONSC 1439.

vi 2018 ONSC 1648.

vii 2016 ONCA 249.