Davern v. John Switzer Fuels **(2015) 128 O.R. (3d) 188 (CA)**

The jurisprudence relating to the *Limitations Act, 2002* continues to grow. It seems that almost every week there is a new decision relating to an application of this Act. Much of the recent jurisprudence arises out of motions for summary judgment in which the issue of discoverability is the main issue. "Discoverability" is the "get out of jail free" card in respect of otherwise missed limitation periods. The courts are very strict with a missed limitation; if an action is commenced late, then the courts will not cut any slack on the basis of some plausible or even reasonable excuse on the part of the delinquent plaintiff. On the other hand, courts are reluctant to dismiss an action on the basis of a missed limitation if the facts are not 100% crystal clear, and often, at the motion stage, there is room for a plaintiff to raise a triable issue on the issue of "discoverability". The Act provides that a limitation period begins to run on the day on "which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of" of the claim. Any time there may be some uncertainty or ambiguity in respect of when a reasonable person ought to have known about the existence of a claim, a motions judge will be reluctant to grant a dismissal.

A different aspect of the Act which caused concern when the Act first came into force was the matter of whether and how parties could contract out of the statutory limitation provisions. Initially there was confusion on this point, and at best, there was a legislative gap in the Act. The Act was amended in 2006 so as to allow for parties to agree to suspend [i.e. by way of a tolling agreement] or to extend [i.e., make it longer than two years] a limitation period (see section 22(3)). I use tolling agreements quite often in cases where I am defending in an action where counsel for another defendant and I wish to present a "united front". While we might ordinarily have crossclaimed against one another, in this case, we enter into a tolling agreement to suspend the running of the two year limitation period (in which to bring the crossclaim), so that we can proceed without any crossclaims. After the matter is settled or tried, if we have to pay anything, we can work out amongst ourselves (if we have not already done so) the appropriate contributions. The situation is different in the case of the *shortening* of a limitation period. Section 22 of the Act prohibits parties from agreeing to a limitation period that is *shorter* than the two year statutory period, except in the case of "business agreements". Sections 22(5) and (6) of the Act provide that any parties who are not "consumers" are free to "vary or exclude" by agreement any limitation period established under the Act.

In *Davern v John Switzer Fuels*, there was a dispute between an insurer and its insured in connection with the duty to defend under the terms of the policy. The policy had a one year limitation period running from the date the "loss or damage" occurred. While the insured brought a claim against this insurer, it did not do so within the one year limitation period set out in the policy. The insured and insurer both moved for summary judgment and the motions judge found that the contractual one year limitation period was unenforceable. The motions judge admitted that the language in the policy restricting the limitation period to one year was a "business agreement". The judge held, however, that the cause of action did not arise at the time of the insurer's denial of coverage. The Court of Appeal disagreed; it held that there was no reason not to apply the basic principle that an insured suffers a loss from the moment the insurer has failed to satisfy its legal obligations under the insurance policy; in this case, the date on which coverage was denied. Since the third party claim in this case was issued nearly two years after the insurer's denial, and since there was a one year contractual limitation period, summary judgment was granted in favour of the insurer.