



Lancaster, Brooks & Welch LLP
BARRISTERS AND SOLICITORS

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Limitations Act – Representations and Warranties
by David Edwards

In January 2004 the Limitations Act of Ontario 2002 ("the Act") came into effect. One of the most significant aspects of the Act was the reduction of the limitation period to initiate lawsuits from 6 years to 2 years (subject to certain specific exceptions). Section 22 of the Act states that if a lawsuit is not commenced within 2 years of the date that the underlying claim was discovered or should have been discovered, the ability to commence an action is statute-barred.

The rights of vendors and purchasers in a commercial transaction are very much affected by the Act.

Representations, Warranties and Covenants

Until the passage of the Act, it was quite common for a vendor and purchaser to negotiate the length of the period during which the representations, warranties and covenants would survive the closing of the transaction. During this time period a purchaser is entitled to bring an action against the vendor for a breach of those representations and warranties. It was not unusual for the vendor to negotiate for a very short limitation period and for the purchaser to argue for the opposite. In addition, it was not uncommon for different warranties to have different post closing survival periods.

Under section 22 of the Act, the two year limitation period applies "despite any agreement to vary or exclude it". Accordingly this type of negotiation will be a thing of the past. The real question will focus on when the underlying claim was discovered or should have been discovered. As a result the limitation period could be substantially longer than 2 years following the closing date. This will strongly motivate a vendor to press for a provision in the agreement of purchase and sale to the effect that all of the representations, covenants and warranties merge or end on closing.

In addition to generally standardizing limitation periods, another section of the Act confirms that the ultimate limitation period is fifteen years in all cases. This section overrides all other provisions of the Act and would prevent a purchaser from pursuing a claim after fifteen years regardless of when the claim was discovered or should have been discovered.

The vendor's best position when negotiating an agreement will be to insist that no representation and warranty should survive closing. This could lead to more extensive due diligence by the purchaser prior to closing so that it can satisfy itself as to the status of the vendor or the status of the vendor's assets rather than relying upon assertions made by the vendor in the agreement. Ultimately, it will be a question of bargaining strength as to what representations and warranties survive closing, but the stakes are now higher for both vendor and purchaser.

The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.

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