

FOCUS

Civil Litigation

Limitation periods curb delay – not rights – in Charter claims



STUART
ZACHARIAS

JASMINE
AKBARALI



The Ontario Court of Appeal once suggested that claims for damages under the Charter should not be subject to any statutory limitation period. However, the court recently clarified that such claims must be commenced within the limitation period, or not at all. This does not restrict access to constitutional remedies. Rather, it requires Charter claimants to pursue their claims in a timely way—just like other litigants.

In *Prete v. Ontario*, [1993] O.J. No. 2794, the Ontario Court of Appeal considered the six-month limitation period under Ontario's former *Public Authorities Protection Act*. The court stated, regarding the purposes of limitation periods, "Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint."

This broad statement by the



LES CUNLIFFE / DREAMSTIME.COM

Court of Appeal was widely understood to apply not only to the six-month limitation period at issue in *Prete*, but also to the general six-year period under Ontario's *Limitations Act*, which was in force at the time.

Both of the above limitation periods were repealed by the Ontario *Limitations Act, 2002*, which enacted a basic two-year period applicable to all claims. As the Court of Appeal observed in *Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339, the new Act presented a "revised, comprehensive approach to the limitation of actions."

The new approach was put to the test in *Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376. The plaintiff in that case alleged that she was unlawfully detained by the police and the hospital after she sent an e-mail to

the office of the Premier in which she appeared to be contemplating suicide. Her claim, filed more than two years after the events in question, sought damages under s. 24(1) of the Charter.

In response to a motion for summary judgment by the police and hospital, the plaintiff brought a motion to add a physician at the hospital. Summary judgment was granted, and the plaintiff's motion was dismissed, on the basis that the two-year limitation period had expired. The plaintiff appealed, arguing that *Prete* had not been overruled and that it insulated her Charter claim against any limitation period.

The Court of Appeal disagreed. It held that although "a very broad reading of the *Prete* decision would support the [plaintiff's] argument," that decision was confined to the context of the six-

month limitation period at issue in that case. The court also noted that, since *Prete*, the Supreme Court of Canada (SCC) had clearly signalled, in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, that limitation periods of general application—such as the two-year period in Ontario—will apply to Charter claims.

The plaintiff's appeal was dismissed. The plaintiff sought leave to appeal, arguing that this would lead to regional disparities in the applicable limitation period. However, this was apparently not of concern to the SCC, which refused leave to appeal. The law in Ontario is thus settled.

The SCC has also now released its decision in *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, clarifying the test for an award of damages under s. 24(1) of the Charter.

Although no limitation period was in issue in that case, the court unanimously held that "s. 24(1) operates concurrently with, and does not replace, the general law." Consistent with *Alexis*, while courts have a broad discretion in making an award under s. 24(1), this is subject to the relief being sought within the time frames prescribed by provincial legislatures.

Litigants must therefore be diligent in pursuing their claims, but the limitation period should not create a "chilling effect," especially in view of *Ward*, which underscores the court's broad discretion to award remedies under the Charter. As the motion judge held in *Alexis* regarding the plaintiff's contention that any other consequences would deter other individuals from advancing claims against public authorities, "If there is a deterrent consequence to the order it will apply to only those who do not advance their claims in a timely fashion. It is important that parties seeking to advance Charter claims exercise reasonable diligence in pursuing those claims."

This gives effect to the guidance contained in one of the SCC's early decisions under the Charter. In *R. v. Mills*, [1986] S.C.J. No. 39, Justice William McIntyre wrote that the Charter "was not intended to turn the Canadian legal system upside down," but, rather, is to be "fitted into the existing scheme of Canadian legal procedure." ■

Stuart Zacharias is a lawyer at Lerner's LLP in Toronto with a civil defence practice. Jasmine Akbarali is co-chair of Lerner's Appellate Advocacy Group. Lerner's successfully represented the intervenor/respondent in Alexis.