

The Law of Limitations

By Graeme Mew

Markham: LexisNexis Butterworths, 2nd Edition, 2004, 408 pages.

Reviewed by Richard W. Bird*

At common law there was no limitation period on a plaintiff's right to bring legal action. This has been changed in every jurisdiction in Canada by legislation. Thus, today, the legal issues are primarily questions of statutory interpretation. In some jurisdictions, some of the arcane language of the *Statute of Limitations, 1623* can still be found in the provisions presently in force.¹ In other jurisdictions, legislatures have been more vigilant in modernizing the language and the legislative approach.² And, in several *Limitations Acts* the results of the fusion of law and equity are not readily discernable. For example, the preservation of the rule in equity relating to acquiescence, and consequently, the doctrine of laches, is anything but clear on first reading.³ And, where the *Limitations Acts* differ, the problems for judicial decision-making are further compounded by the private international law question of what *Act* to apply? Is a limitation period a procedural matter or a substantive one and does it really matter? The questions never seem to end. When does a limitation period commence to run? In the case of a tort, when the act is committed or when the damage is discovered? Can you sue in contract rather than tort and secure a more favourable limitation period? If there are discrepancies in limitation periods, can the *Charter of Rights and Freedoms* be invoked?

The answers depend upon a number of things. First, and foremost since limitations law is a creature of statute, the intention of the legislature must be determined from the language of the act. The task of the courts is to apply a policy established by that other body. In other words, it is a matter of statutory construction. The proper construction

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¹ Compare, e.g., *Statute of Limitations, (1623)* Imp.21 James I, c.16, s. 1 and *Limitations of Actions Act, R.S.N.B. 1973, c.L-8, s. 25.*

² E.g., *Limitations Act, 2002, S.O. 2002, c.24.*

³ E.g., *Limitations of Actions Act, supra* note 1, s. 65. For a good attempt at an explanation, see Joseph Arnold Nathan, *Nathan's Equity Through the Cases*, 4th ed. by O.R. Russell (London: Stephens, 1961) at 648-54.

of the legislative provisions is often a matter of debate. And, since there are significant variations in the *Limitations Acts* in Canada, care must be taken not to assume that the result in a case from one jurisdiction will be readily applicable in another. A different legislative policy may be at issue. Or, maybe the drafter in one jurisdiction simply attempted to express the same legislative policy of another with different language. And as if to add more uncertainty, in the last ten years a number of the provinces have either introduced either new acts or made significant changes to existing acts or have received recommendations for significant change. At the same time the courts have embraced the discovery rule. But, judicial opinion on the exact legislative provision a lawyer is dealing with is often sparse. And then, when more than one judicial decision is found, sometimes the cases are irreconcilable.

For the practising lawyer, any help would be welcomed. A good text is needed. The task for the author is daunting: a technical subject, differing legislation, conflicting decisions, and normative policy questions. How should such a text be organized? Should it be comprehensive, or should it concentrate on general principles? A great text will meet the challenge, and with a style that enthral the reader from the start to the end.

Enter Graeme Mew's second edition of *The Law of Limitations*. How does it measure up? The author's objective is to provide "a useful general resource for lawyers and others faced with limitations issues."⁴ The promotional material from the publisher describes the book as "Canada's leading work on this important topic." Its best feature is its role as a source book. The text is rich with citations. The *Limitations Acts* of "four of the more populated common law provinces" have been reproduced in Appendix A. (Why Newfoundland and Labrador was selected as one of the four of the more populated common law provinces is a bit of a mystery.) Appendix B provides a useful Table of Concordance.

The text is disappointing. For the most part it is a summary of a legislative rule or a judicial decision. For example, the limitation periods in selected jurisdictions for suing architects, accountants, lawyers, chiropractors, dentists, denturists, engineers, hospitals, physicians and surgeons, naturopaths, nurses, occupational therapists, optometrists, pharmacists, and physiotherapists are set out sequentially.⁵ In many cases little more than the legislative rule is provided. Few, if any, will find the style enthralling.

⁴ Graeme Mew, *The Law of Limitations*, 2nd ed. (Markham: LexisNexis Butterworths, 2004), Preface to the Second Edition.

⁵ *Ibid.* at 160-68.

The leading cases are briefed in the manner of a litigator preparing for trial. Sometimes every opinion at every level (including dissenting judgments) of a case are summarized, only to be followed by another case, briefed in the same manner, but that goes the opposite way. The reader is left to determine what to make of it all.⁶ That does not help to make the text a “useful general resource.” In her review of the first edition of *The Law of Limitations*, Nathalie Des Rosiers suggested that, “lawyers need critical assessment of caselaw in order to improve their understanding of the general principles.”⁷ The second edition suffers from the same lack of critical assessment.

The author’s reluctance to give his own opinion is most noticeable where Ontario’s new *Limitations Act* is presented. Since the material in the text is based on the law to September 1, 2003 and the new Ontario *Act* came into force on January 1, 2004, there is no caselaw to paraphrase. Lawyers will have to cope with the new *Act* in Ontario pretty much on their own. The book may, however, help you to find the relevant applicable sections to your problem.

One continuing decision an author must make when writing a new edition is to decide what to cut and what to revise. Of course, there is a third possibility, simply add. This latter approach is undoubtedly the easiest, but also the poorest. Updating *The Law of Limitations* became an exercise in adding. So, for example, when it came to the chapter on the *Charter*, the author has stuck with the past and added the recent jurisprudence. How much do we need to know about *R. v. Ertel*⁸ after *Andrews*?⁹ Even in the first edition the author admitted that the analysis in *R. v. Ertel* (4 pages) “has become largely moot.”¹⁰ The author largely kept all but the last paragraph in the second edition and continued soldiering on for 9 new pages.

One odd change that was made in the second edition was the organization of Chapter 9, Actions in Contract. In the first edition, the Limitations on Deeds was given a separate section that was subdivided into four subsections: Formalities, Escrow, Rectification, and “Actions of Debt on a Statute.” The relationship of the last subsection to deeds is a bit of a puzzle. The subsection commences with a discussion of a claim for compensation based on an implied term under the *Saltfish Act*. That is far removed from deeds. The issue was whether the claim could

⁶ See for example, the presentation of *Alberta (Director of Parentage and Maintenance Act) v. H. (R.)* (1993), 104 D.L.R. (4th) 73 (Alta. C.A.) and *T.(S.J.) v. D.(S.)* (1996), 16 B.C.L.R. (3d) 1 (C.A.) at p.18 of the text.

⁷ (1992) 71 Can. Bar Rev. 642 at 643.

⁸ (1987), 35 C.C.C (3d) 398 (O.C.A.).

⁹ [1989] 1 S.C.R. 143.

¹⁰ Graeme Mew, *The Law of Limitations* (Toronto: Butterworths, 1991) at 259.

be classified as a “specialty.” If one assumes that all deeds are specialties (not necessarily a correct assumption),¹¹ then by analogy, the cases might apply to deeds as well and the puzzle is solved. But since the first subsection deals extensively with documents under seal, it still is a bit of a mystery as to why it was included under a separate subheading. In the second edition all of this was put in a section headed, “Insurance Contracts.” Where was the editor?

A computer search of the Supreme Court of Canada decisions for “Mew” and “The Law of Limitations” revealed no citations, although the first edition has been around for thirteen years. That is not a good sign, and it is in keeping with Nathalie Des Rosiers’ earlier criticism. However, the first edition has been cited frequently in lower courts. Like the first edition, the second edition’s usefulness is as a source book on materials on limitations.

¹¹ See G.H.L. Fridman, “Some Words about Deeds” (2002) 81 Can. Bar Rev. 69.