

SEXUAL ABUSE

& Limitation Periods
in Ontario:

SOON

a Thing of the Past?

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Changes coming
to remove
limitations periods.

Change

is in the air. According to the Wynne Government's "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment", released March 2015, Ontario's current *Limitations Act* is to be amended "to remove the limitation period for *any* civil sexual assault claim".¹ With any luck, the promised legislative reform will happen sooner than later and this article's discussion of Ontario's *Limitations Act* will soon be redundant and out of date. If the change is as sweeping as has been suggested and in keeping with the new limitations statute in Nova Scotia,² a significant legal hurdle for sexual abuse survivors seeking redress through our civil courts will have been finally removed.

Two decades ago, when I started working on behalf of plaintiffs in what was then only an emerging area of the law, limitation period defences presented a huge obstacle, especially since so many claims arising from sexual abuse are historical in nature, often dating back decades. It was necessary for plaintiffs' counsel to put aside all risk aversion and bring great ingenuity to bear on these early cases. We characterized the wrong as a breach of fiduciary duty, to which no limitation period applied under Ontario's former *Limitations Act*,³ to escape the application of a statutory limitation period.⁴ We also successfully expanded the common law doctrine of discoverability to take into account the deep-seated and complex nature of the harms that sexual abuse causes in order to postpone the commencement of limitation periods.⁵ We were forced often to expend disproportionate amounts of resources

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on behalf of our clients, not only to prove liability (always a deeply contested issue given the lack of witnesses to most sexual abuse), but also to survive limitation defences advanced by way of pre-emptive defence motions for summary judgment and at trial. Since sustaining a claim is always what is most important, we sometimes were forced to expend limited resources to defeat limitations defences at the expense of developing other parts of our clients' claims, including, most importantly, working up their damages claims.

It thus came as a big relief when, in 2004, Ontario finally rid itself of its antiquated *Limitations Act*,⁶ and the patchwork of limitation periods in other statutes that applied depending on the context and who was being sued,⁷ and introduced the current *Limitations Act*.⁸ For those working in the sexual abuse area, this new statute was a game-changer. For plaintiffs' counsel, serious concerns about expiry of limitation periods, in many cases, disappeared. Defendants and their lawyers were unsure of their footing and, although they continued routinely to plead limitations defences, they proceeded very gingerly to assert these defences in court, no doubt preferring to live with the bargaining leverage that uncertainty about the scope of the legislative changes brought, rather than face the certainty that a negative precedent could bring. Thus, just over a decade after Ontario's

new *Limitations Act* came into force, we see as demonstrated in Table 1, only a handful of reported decisions dealing with the provisions targeting sexual assault based claims, with several of these decisions being quite weak and unpersuasive, and no appellate level decisions.

Those of us working in the area of sexual abuse know where the soft spots and cracks are in the *Limitations Act*, and I will speak to these below. What remains to be seen now is whether the Wynne Government's promise to remove the limitation period for "any civil sexual assault claim" will extend to plastering over and filling in the last soft spots and cracks so that limitation period defences in sexual abuse cases can truly be said to be a thing of the past in Ontario.

Ontario's Current *Limitations Act*

The key provisions of the *Limitations Act*, as these relate to sexual abuse, are summarized in Table 2. What is important to understand is that Ontario's *Act* contemplates two separate categories of sexual abuse: that which occurs within and that which occurs outside a power-dependency relationship. These categories, in turn, are treated differently in terms of exemptions from the normal operation of the *Act*, including its standard two-year and its ultimate fifteen-year limitation periods.

(a) Sexual Abuse in Power-Dependency Relationships

The first category of sexual abuse recognized in the *Act* is that which occurs in a "power-dependency relationship" – what subsection 16(1)(h) frames as sexual assault where one of the parties to it "had charge of the person assaulted", "was in a position of trust or authority in relation to the person [assaulted]", or "was someone on whom [the person assaulted] was dependent, whether financially or otherwise". The kinds of relationships that come to mind include parent-child, clergy-parishioner, health care professional-patient, teacher-student, and youth volunteer-youth member. At least two lower-level courts have held that in order to attract the exemption from any limitation period that subsection 16(1)(h) offers, the relationship must be a fiduciary one.⁹ This restriction is not one the Legislature saw fit to impose, preferring instead to provide an expansive definition of the circumstances when no limitation period will apply, and thus these courts' decisions are, in my view, of questionable authority.

The exemptions under the *Act* are most far-reaching for this first category of sexual abuse. Under subsections 16(1)(h) and (4), there is no limitation period at all that operates in respect of "a proceeding arising from a sexual assault" that occurred in a power-dependency relationship. The language

of subsection 16(1)(h) is broad and robust, extending well beyond simply a claim against the perpetrator of the assault. “A proceeding arising from a sexual assault” encompasses claims of direct liability (negligence, occupier’s liability, etc.) as well as claims of vicarious liability against those whom it is alleged should share responsibility for the sexual assault, such as the religious organizations to which a clergy member who committed sexual misconduct belonged, the public school boards or private schools that employed

teachers who abused their students, and the youth organizations that vested volunteers with responsibilities for their young members.

If the perpetrator of the assault has been deceased for more than two years, such that the *Trustee Act*’s strict two-year limitation period (preserved under subsection 19(1) of the *Limitations Act*)¹⁰ operates to bar a claim against the perpetrator’s estate, a “proceeding arising from” the sexual assault that is brought against, for example, the deceased’s employer, can be

maintained. It will not be subject to any limitation period and, barring expiry considerations (discussed below), can be asserted. This is because the *Trustee Act*’s limitation period only applies in respect of the deceased perpetrator’s estate, and not to others who may be vicariously liable or otherwise share responsibility for the assault.

But even for sexual abuse survivors whose claims fit into the power-dependency category, uncertainties and problems still persist. For starters, the meaning of “sexual assault” in the

TABLE 1: Reported Decisions under Ontario’s *Limitations Act*

<i>Limitations Act</i> Provision	Judicial Treatment
1. (Definition of assault)	<ul style="list-style-type: none"> None
10. (Postponement of limitation period for incapacity in non power-dependency sexual assaults)	<ul style="list-style-type: none"> <i>Morgan v. Kent</i>, [2008] O.J. No. 972 (S.C.) (a.k.a. <i>F.M.M. v. J.K.</i>, 2008 CanLII 10386 (ON S.C.)) – trial: no postponement and action dismissed. <i>Veri v. Mill Creek Motor Freight LP</i>, [2009] O.J. No. 2935 (S.C.J.) – defence R20 summary judgment motion: no postponement and motion allowed. <i>C.S. v. Nigro</i>, 2010 ONSC 3204 – trial: postponement and action allowed. <i>J.R. v. Vickery</i>, 2010 ONSC 1446 – defence R20 summary judgment motion: postponement and motion dismissed. <i>Angelica Choc et al v. Hudbay Minerals Inc. et al</i>, 2013 ONSC 1414 – defence R21 motion to dismiss: postponement and motion dismissed. <i>P.M. v. Vallabh</i>, [2008] O.J. No. 1641 (S.C.J.) – undefended trial: postponement and action allowed.
16.(1)(h) (No limitation period for power-dependency sexual assaults)	<ul style="list-style-type: none"> <i>Morgan v. Kent</i>, <i>supra</i> – trial: no power-dependency relationship so limitation period applied and action dismissed. <i>C.S. v. Nigro</i>, <i>supra</i> – trial: power-dependency relationship so no limitation period and action allowed. <i>J.R. v. Vickery</i>, <i>supra</i> – defence R20 summary judgment motion: no power-dependency relationship but motion dismissed based on s.10 of the <i>Act</i>.
19. (Other Acts)	<ul style="list-style-type: none"> <i>P.T.B.L. v. P.B. Estate</i>, [2010] O.J. No. 531 (S.C.J.), lv. to app. denied [2010] O.J. No. 3275 (S.C.J.) – defence R21 motion to dismiss based on expiry of 2-year <i>Trustee Act</i> limitation period: motion dismissed and leave to appeal denied.
24.(6) (Transition - where no former limitation period)	<ul style="list-style-type: none"> <i>Andrushko v. Matthews</i>, 2013 ONSC 5439 – trial: equitable claim for breach of fiduciary duty discovered pre-2004 so no former or current limitation period and action allowed.
24.(7) (Transition – retroactive revival)	<ul style="list-style-type: none"> <i>Morgan v. Kent</i>, <i>supra</i> – trial: no revival of expired claim and action dismissed. <i>P.M. v. Vallabh</i>, <i>supra</i> – undefended trial: revival of expired claim and action allowed. <i>B.(K.) v. O.(T.)</i>, 2005 CarswellOnt 5136 (S.C.J.) – defence R20 summary judgment motion: revival of expired claim against individual defendant clear, but whether also revived against institutional defendant a triable issue, and motion dismissed.

Limitations Act is narrow, especially when one considers how expansive some other provinces' legislation is and what this other provincial legislation exempts from the operation of the standard and ultimate limitation periods.¹¹ Despite being used repeatedly in Ontario's *Limitations Act*, the term "sexual assault" is not a defined one; instead, only "assault" is. Section 1 of the *Act* defines "assault" simply as "including a battery". One can surmise from this that, under Ontario's *Limitations Act*, a "sexual assault" encompasses only the apprehension of an unwanted and imminent touching of a sexual nature (the common law definition of assault) and an actual such touching (the common law definition of battery). This leaves out a swath of sexual misconduct that falls short of actual or feared physical contact, such as sexual exploitation and the creation and dissemination of pornography, whereby

TABLE 2: Key Provisions of Ontario's *Limitations Act*

Section	Description of Provision
1.	Definition – "Assault" includes a battery.
16. (1)(h)	Exemption from limitation period – No limitation period applies to "a proceeding arising from a sexual assault" if, at the time of the assault, one of the parties to it (i.e., the assault) had charge of the person assaulted, was in a position of trust or authority in relation to the person, or was someone on whom he or she was dependent, whether financially or otherwise.
(4)	No ultimate limitation period – The above exemption also applies to the 15-year ultimate limitation period described in section 15.
10. (1)	Postponement for incapacity – The standard 2-year limitation period does not run in respect of "a claim based on sexual assault" during any time the claimant is incapable of commencing the proceeding "because of his or her physical, mental or psychological condition".
(3)	Rebuttable presumption – For sexual assault, the claimant is presumed incapable of commencing the proceeding earlier than it was commenced.
24. (2)	Transition section – Applies where misconduct took place before January 1, 2004, but proceeding is commenced after that date.
(3)	Expired claims – Where the former limitation period expired before January 1, 2004, no proceeding shall be commenced.
(4)	No limitation period – If a former limitation period applied, but did not expire before January 1, 2004, and, under this Act, no limitation period would apply (e.g., for sexual assault in a power-dependency relationship), then there is no limitation period.
(5)	Applicable limitation scheme depends on discovery of claim (Part 1) – If a former limitation period did not expire before January 1, 2004, and, under this Act, a limitation period would apply, then if the claim was discovered before January 1, 2004, the former limitation period applies, and otherwise, this Act applies.
(6)	Applicable limitation scheme depends on discovery of claim (Part 2) – If there was no former limitation period and under this Act a limitation period would apply (e.g., for breach of fiduciary duty), then if the claim was not discovered before January 1, 2004, this Act applies, and otherwise, there is no limitation period.
(7)	Retroactive revival of expired sexual assault-based claims – If a former limitation period applied and expired prior to January 1, 2004, the claim will be revived if "based on [a] sexual assault" that the defendant either committed (applicable to individual defendants), or knowingly aided, encouraged or permitted its agent or employee to commit (applicable to institutional/employer defendants). Where one or more of these preconditions is met, the following rules then apply: <ul style="list-style-type: none"> 1. If s.10 of this Act would apply if the sexual assault had taken place on or after January 1, 2004, then s.10's rebuttable presumption of incapacity applies; 2. If s. 16 of this Act would apply if the sexual assault had taken place on or after January 1, 2004, then there is no limitation period.

vulnerable persons like children are manipulated into exposing themselves sexually to others, both directly and over the internet.

The other problem area for sexual abuse that occurs in a power-dependency context arises in the transition section of Ontario's *Limitations Act*, section 24, which applies to historical cases where misconduct occurred before January 1, 2004 (when the *Act* came into force), but the claims based on this misconduct are brought after that date. If a plaintiff can legitimately be said not to have discovered her claim until after January 1, 2004, she is home free – by operation of subsection 24(4), there is no limitation period. However, if the claim was discovered and expired before January 1, 2004, then subject to the revival provision, “no proceeding shall be commenced in respect of the claim” (subsection 24(3)).

The “revival” provision, as it is widely referred to by those working in the sexual abuse area in Ontario (even though this term nowhere appears in the *Act*), is found in subsection 24(7). This subsection applies only to physical and sexual assault claims. Interestingly, it refers to “a claim based on [a] sexual assault”, and not to “a proceeding arising from a sexual assault” which is the language we saw above in subsection 16(1)(h) when considering the absence of any limitation period in the power-dependency context. This different wording suggests a potentially narrower scope for the revival provisions of subsection 24(7).¹² The subsection goes on to say that, in the case of the defendant who “committed” the assault, the otherwise expired claim is treated as one to which no limitation period applies and thus, the claim will be revived retroactively. The same applies

to a claim based on sexual assault that a defendant “knowingly aided or encouraged” or “knowingly permitted the defendant’s agent or employee to commit”. This latter language, requiring an element of knowledge, presents a potentially insurmountable hurdle for plaintiffs seeking to recover from institutional defendants, such as religious organizations or employers which are often the only ones with the resources or insurance necessary to satisfy damages awards. If there is one area where legislative reform is necessary to achieve the Wynne Government’s objective of removing the limitation period for “any” civil sexual assault claim, it is subsection 24(7) of the *Limitations Act*.

(b) Sexual Abuse Outside of Power-Dependency Relationships

The second category of sexual abuse recognized in Ontario's *Limitations Act*, which is subject to another set of rules, is that which takes place outside a power-dependency relationship, where the parties are presumed to be on more equal footing, such as sexual assault by a stranger, co-worker, or co-student, or that occurs in another peer relationship. For this category of sexual abuse, capacity to start a proceeding is all important. Subsection 10(1) provides that the standard two-year limitation period under the *Act* will not apply to “a claim based on sexual assault” during any time in which the claimant is “incapable of commencing the proceeding because of his or her physical, mental or psychological condition”. Subsection 10(3) goes on to create a rebuttable presumption of incapacity up to the time when a proceeding is actually started. This puts

the onus of proving capacity on the defendant, which is a reverse onus to the standard one in the *Act* that requires a plaintiff with a non-physical or non-sexual assault claim to prove incapacity (see subsection 7(2)).

The potential thus remains, and this has been borne out in the case law that has considered section 10, for limitation period defences to succeed in defeating sexual abuse claims where the sexual assaults have occurred outside of power-dependency relationships. The result is that, under Ontario's current *Limitations Act*, there is a hierarchy of sexual abuse, with that occurring outside the power-dependency context being subject to a harsher set of limitation rules.

This harsher treatment is carried through in the revival provision, subsection 24(7) of the *Act*, where the same restrictions on when and against whom revival of a claim will be allowed as apply to the power-dependency context are coupled with the rebuttable presumption of incapacity rule in section 10. It is hard to conceive of a claim for sexual assault that expired before 2004 based on the claim having previously been discovered and becoming time-barred under a former limitation period, which, once notionally revived under subsection 24(7), does not then falter once section 10's rebuttable presumption is applied. That is, it will be a rare case in which a claimant had long ago discovered her claim, but then was deemed legally “incapable” of commencing her action sooner. Indeed, this is precisely what happened in *Morgan v. Kent*,¹³ where the plaintiff's claim was based on sexual contact that occurred when he was a teenager and the defendant, an adult male at the time, had served as a volunteer in an organization in which

the plaintiff was also involved. The court found the parties were not in a power-dependency relationship at the time of the alleged sexual abuse. However, the plaintiff's claim was initially revived under subsection 24(7) only to be dismissed ultimately as time-barred by operation of section 10, on the basis that the defendant had successfully proved the plaintiff had been capable of bringing his action many years earlier. The court in *P.M. v. Vallabh*,¹⁴ however, reached the contrary conclusion, finding the claim of the plaintiff who had been sexually assaulted by a stranger should not only be revived, but also was not time-barred because the defendant had failed to rebut the presumption of incapacity.

Conclusion

If the Wynne Government truly intends to remove the limitation period "for any civil sexual assault claim", as stated in "It's Never Okay" Action Plan, it will follow Nova Scotia's and British Columbia's lead. First, it will dispense with the current distinction between sexual assault that occurs in and outside of a power-dependency relationship, and recognize a single wrong. This will result in the removal of the reference to sexual assault in subsection 10(1) and the deletion of the whole of subsection 10(3) of the *Act*. This will also result in a modification to subsection 16(1)(h) so the provision reads simply: "There is no limitation period in respect of a proceeding arising from a sexual assault". Second, it should define "sexual assault" to include "all misconduct of a sexual nature". Third, it will remove from the revival provision, i.e., subsection 24(7), all references to "sexual assault", and instead add a new subsection to section 24 that states simply: "A former

limitation period is deemed not to have expired before January 1, 2004 in the case of a proceeding arising from a sexual assault".

Once amendments of this nature are implemented, the technical-legal hurdle that has long plagued sexual abuse claims in Ontario will once and for all be a thing of the past, and the battleground can then centre squarely around the merits of these often challenging cases.



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NOTES

¹ Government of Ontario, "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment", March 2015. An all-party Select Committee of the Legislature has been receiving submissions regarding reforms and its report is due December 2015. See Ontario, Legislative Assembly, Select Committee on Sexual Violence and Harassment, "Strategy on sexual violence and harassment" in *Official Report of Debates (Hansard)*, 2015.

² *Limitation of Actions Act*, S.N.S. 2014, c. 24, Sch B, as amended.

³ *Limitations Act*, R.S.O. 1990, c. L.15.

⁴ See, for example, *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, a seminal decision in the area of civil sexual abuse, in which the Supreme Court of Canada accepted this characterization where a father had sexually assaulted his daughter.

⁵ *Ibid.* The Supreme Court of Canada in *M.(K.) v. M.(H.)*, *supra*, also applied the doctrine of discoverability in a novel way, which included creating a rebuttable presumption that a victim of childhood sexual abuse has not discovered her claim until she receives therapy.

⁶ *Supra*, note 3.

⁷ For example, the former one-year limitation period under the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18, and the former six-month limitation period under the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38.

⁸ *Limitations Act*, 2002, S.O. 2002, c. 24, Sch B.

⁹ *Morgan v. Kent*, [2008] O.J. No. 972 (S.C.) (a.k.a. *F.M.M. v. J.K.*, 2008 CanLII 10386 (ON S.C.)), and *J.R. v. Vickery*, 2010 ONSC 1446.

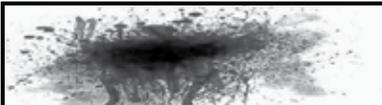
¹⁰ *Trustee Act*, R.S.O. 1990, c.T.23, s.38(3).

¹¹ British Columbia exempts "a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault", if, for example, "the misconduct occurred while the claimant was a minor". *Limitations Act*, S.B.C. 2012, c.13, s.3(1) (i). Nova Scotia's new *Act* exempts "a claim in relation to trespass to the person, assault or battery if the claim is based on misconduct of a sexual nature". *Supra*, note 2, ss. 8 and 11.

¹² At least one court, however, did not agree when it interpreted the same language found in section 10 ("claim based on sexual assault"), holding that a large and liberal interpretation of the legislation was warranted since the *Act's* whole purpose is to make it easier for victims of sexual assault to bring their claims. The court held that the language of "claim based on sexual assault" in section 10 was not intended to be limited to claims against the actual perpetrators of sexual assault and was broad enough to include claims of vicarious liability and negligence against all persons whose acts or omissions contributed to the damage suffered as a result of the sexual assault. *Angelica Choc et al v. Hudbay Minerals Inc. et al*, 2013 ONSC 1414.

¹³ *Supra*, note 9.

¹⁴ [2008] O.J. No. 1641 (S.C.J.).



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