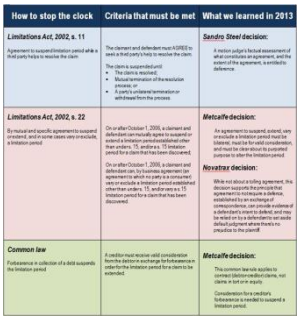
There's a right way and wrong way to stop the litigation clock:

2013 tolling agreement casebook

The limitations regime in Ontario is strict and Rule 48[1] makes it unforgiving. Learn the standstill agreement criteria to stop the clock and preserve your client's rights.

These 2013 cases grappled with what constitutes an agreement to toll an action or waive a defence.



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Hamilton (City) v. Metcalfe & Mansfield Capital Corporation[2]

Standstill agreements require clear language about their intended effect on limitation periods.

The City of Hamilton purchased non-bank-sponsored asset-backed commercial paper (ABCP) notes (the Devonshire notes) from Deutsche Bank Securities Limited on July 24, 2007. The notes were due to mature on September 26, 2007; but the market for ABCP collapsed in early August. On August 23, the City entered into a 60-day agreement (the Montreal Accord) that was intended to mitigate potential losses from the collapse. When the notes matured, the issuers couldn't pay. The Montreal Accord was eventually extended to January 10, 2008, but ultimately failed with respect to the City's notes, and the City was never paid.

The City commenced an action against the issuers on September 25, 2009, but the issuers obtained summary judgment dismissing the action as out-of-time. The motion judge ruled that the limitation period for a recovery action based on negligent misrepresentation had begun to run sometime prior to August 23, 2007, because the City knew, by then, that it was likely to suffer a loss on the notes.

The City appealed, arguing that the limitation period did not expire until September 26, 2009, two years after the notes matured. In the alternative, the City argued, as it had at trial, that the Montreal Accord was a standstill agreement that, while in effect, suspended the running of the limitation period, as provided by s. 22[3] of the *Limitations Act, 2002*; or

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[1] *Rules of Civil Procedure*, R.R.O 199, Regulation 194

[2] 2012 ONCA 156 (CanLII)

[3] 22. (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6).
…(3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006.
… Definitions
(6) In this section,

alternatively, an agreement pending third party resolution as provided in s. 11[4] of the *Limitations Act, 2002*.

The Court of Appeal dismissed the City's appeal, finding that the City's claim was not based on breach of contract such that it arose when the notes matured but weren't paid on September 26, 2007. Instead, the claim was based on an alleged negligent misrepresentation about the nature of the assets underlying the notes: the City claimed it was led to believe that they were traditional credit assets, but instead they were credit default swaps. The City learned about the nature of the notes and was aware of its loss exposure sometime before signing the Montreal Accord on August 23, 2007, and therefore its September 25, 2009 action was more than a month out-of-time.

With respect to the *Limitations Act, 2002* s. 22 argument, the court found that the Montreal Accord was not a business agreement to vary the applicable limitation period; rather, it was merely an agreement not to undertake certain actions with respect to the notes. The unilateral promise on the part of the creditors to take no action to precipitate a default was made in an attempt to protect their own interests, and not in exchange for consideration flowing from the debtors. It also contained no clear language about an intent to vary the limitation period. For this reason, it was not a "business agreement" capable of tolling the limitation period under s. 22.

The court also dismissed the s. 11 argument, finding, as the motions court did, that the Montreal Accord was not a process in which a third party had been asked to resolve or assist in resolving the underlying claim.

Finally, the court found that the common law principle[5] relating to suspension of limitation periods – which provides that a creditor can agree to suspend enforcement of a debt − did not apply to the facts because that principle is applicable to contract claims only, and not to claims that arise in tort (for example, a negligent misrepresentation claim), or in equity. The City's appeal was dismissed.

"business agreement" means an agreement made by parties none of whom is a consumer as defined in the Consumer Protection Act, 2002; ("accord commercial")
"vary" includes extend, shorten and suspend. ("modifier").

[4] 11. (1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,
(a) the date the claim is resolved;
(b) the date the attempted resolution process is terminated; or
(c) the date a party terminates or withdraws from the agreement.

[5] See, for example, *Shook v. Munroe*, [1948] SCR 539

Sandro Steel Fabrication Ltd. V. Chiesa[6]

Court of Appeal: motion court's assessment of the effect of an agreement to suspend limitation period is entitled to deference.

Sandro Steel is a complex claim based on the interruption of construction of a building at Laurentian University after the collapse of steel connections used in the construction. There are a variety of cross-claims as between defendant contractors and sub-contractors.

At the end of January, 2013, the Superior Court of Justice for Ontario ruled that an agreement to mediate the claims suspended the running of a relevant limitation period as provided by s. 11 of the *Limitations Act, 2002*[7]. The defendants Edward Chiesa and Edward Engineering appealed that decision on the grounds that the motions judge erred in inferring, from the facts, a mutual agreement to mediate the issue of remediation damages as they related to Sandro Steel Fabrication Ltd.

In dismissing the appeal, the Court of Appeal held that the motions judge's finding based on the facts was entitled to deference, and was a reasonable conclusion. The court chose NOT, however, to endorse what the appellant felt was a suggestion, by the motions court, that the s. 11(1) suspension of the limitation period would apply even where the existence of an agreement to mediate was "ambiguous".

Novatrax International Inc. v. Hagele Landtechnik et al[8]

Novatrax is not about tolling agreements per se; however, the defendant's success in having a default judgment overturned under Rule 19.08[9] of the *Rules of Civil Procedure* reinforces the message that the court will strive to give effect to parties' agreements as they relate to limitations, as long as the parties' intentions are clear.

A party that mistakenly believed the other had waived the requirement for a defence was entitled to have "secret" default judgment set aside.

The claim in *Novatrax* arose out of problems with a distribution contract for reversible fan components. Plaintiff Novatrax, a Canadian distributor, was suing defendant Hagele, a German manufacturer, over Hagele's alleged default under the distribution contract. Hagele's position was that it was entitled to avoid compliance with the contract because of a significant change in management at Novatrax and problems with engineering services. Hagele had also

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[6] 2013 ONCA 434 (CanLII)
[7] Supra note 4.
[8] 2013 ONSC 4187(CanLII)
[9] 19.08 (2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

taken the position, when the claim was filed, that Ontario was not the appropriate jurisdiction for the resolution of the claim.

Although counsel for Hagele informed the original counsel for Novatrax of the defendant's position with respect to venue, he never filed a motion for change of venue. Fearing that filing a Notice of Intent to Defend or a defence would be interpreted as attorning to the jurisdiction of the Ontario court, counsel for the defendant did not file these either. He did, however, request in writing on February 16, 2010 that the plaintiff agree not to require a defence pending the resolution of the jurisdiction issue, and the plaintiff's original counsel agreed.

Settlement discussions continued between the parties. Hopeful about a potential resolution, the defendant's counsel wrote the plaintiff's counsel again on May 3, 2010, asking for confirmation that the action was still in abeyance. He received no reply until August 13, when, by way of letter from a different lawyer at Novatrax' counsel's firm, he received a copy of a status notice issued by the court under Rule 48.15, requiring that a defence be filed by September 3.

Counsel for Hagele replied to that letter on August 16, reminding the plaintiff's original counsel that the jurisdiction motion was being held in abeyance while settlement discussions continued, and authorizing Novatrax to obtain a consent order to extend the September 3 deadline. While Novatrax alleged that it replied by letter of August 25, Hagele's counsel had no recollection of that reply, although he did have a docket entry about correspondence received from the other party.

Sometime after August 25th but before August 31st, Novatrax changed counsel. No notice of the change of counsel was ever sent to Hagele. The new counsel filed two requisitions, dated August 31 and September 2, to note Hagele in default.

Without advising Hagele that it had been noted in default, despite many opportunities to do so and despite references, by Hagele, to the claim, Novatrax continued with its settlement negotiations. Hagele did not learn of the default judgment until January 25, 2013, when its Canadian subsidiary advised that it had been served with notices of garnishment. Hagele then moved to set aside the default judgment under rule 19.08.

In the motion reasons, the court expressed "concerns about the plaintiff's conduct in moving forward with the requisition and the default judgment in the face of ongoing settlement discussions." The court noted that Novatrax chose not to enforce the default judgment or to otherwise bring it to the attention of the defendant until it was clear that the settlement discussions would not yield favourable concessions: "the plaintiff's actions in these circumstances fairly raise the inference that they deliberately took advantage of the defendants' belief that the action remained on hold."

The court held that should the trial be allowed to proceed, Novatrax would not be prejudiced by the delay, which was "occasioned by the plaintiff's direct and deliberate

conduct." Hagele had demonstrated a "firm resolve to defend" the action, refraining from filing a defence only because it believed the action to be held in abeyance.

The court set aside the default judgment, the enforcement writs, and an associated costs order, and invited both parties to make new costs submissions.

Conclusions

When seeking to rely on a tolling agreement (outside the narrow common law context of creditor forbearance for consideration), or on the waiver of a defence, be sure that the agreement clearly expresses the parties' mutual intentions; and be aware of the specifics of sections 11 and 22 of the *Limitations Act, 2002*.

Even Superman can't stop time, but lawyers can – you just need to put the right pieces in place to make it happen.

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How to stop the clock	Criteria that must be met	What we learned in 2013
***Limitations Act, 2002*, s. 11** Agreement to suspend limitation period while a third party helps to resolve the claim	The claimant and defendant must AGREE to seek a third party's help to resolve the claim. The claim is suspended until: • The claim is resolved; • Mutual termination of the resolution process; or • A party's unilateral termination or withdrawal from the process.	***Sandro Steel* decision:** A motion judge's factual assessment of what constitutes an agreement, and the extent of the agreement, is entitled to deference.
***Limitations Act, 2002*, s. 22** By mutual and specific agreement to suspend or extend, and in some cases vary or exclude, a limitation period	On or after October 1, 2006, a claimant and defendant can mutually agree to suspend or extend a limitation period established other than under s. 15, and/or a s. 15 limitation period for a claim that has been discovered; On or after October 1, 2006, a claimant and defendant can, by business agreement (an agreement to which no party is a consumer) vary or exclude a limitation period established other than under s. 15, and/or vary a s.15 limitation period for a claim that has been discovered.	***Metcalfe* decision:** An agreement to suspend, extend, vary or exclude a limitation period must be bilateral, must be for valid consideration, and must be clear about its purported purpose to alter the limitation period. ***Novatrax* decision:** While not about a tolling agreement, this decision supports the principle that agreement to not require a defence, established by an exchange of correspondence, can provide evidence of a defendant's intent to defend, and may be relied on by a defendant to set aside default judgment where there's no prejudice to the plaintiff.
Common law Forbearance in collection of a debt suspends the limitation period	A creditor must receive valid consideration from the debtor in exchange for forbearance in order for the limitation period for a claim to be extended.	***Metcalfe* decision:** This common law rule applies to contract (debtor-creditor) claims, not claims in tort or in equity. Consideration for a creditor's forbearance is needed to suspend a limitation period.