Submission to

The Ministry of
Attorney General of British Columbia
Justice Services Branch
Civil Policy and Legislation Office

Comments in Response to the

"White Paper on Limitation Reform: Finding the Balance"

and proposed amendments to

The Limitation Act

Issued by:

Canadian Bar Association
British Columbia Branch
Vancouver Civil Litigation Section
Limitation Act Reform Committee
November 15, 2010

PREFACE

This is a response to the BC Government's call for submissions concerning proposed amendments to the Limitation Act, set out in its "**White Paper on Limitation Act Reform: Finding the Balance**" (September 2010).

The Canadian Bar Association nationally represents over 38,000 members and the British Columbia Branch itself has over 6,000 members. Its members practice law in many different areas and the Branch has established 69 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The Vancouver Civil Litigation Section has 713 members. The Branch also establishes special committees from time to time to deal with issues of interest to the Branch.

This submission was prepared by an ad hoc committee made up of members of the Vancouver Civil Litigation Section. Committee members include:

William G. MacLeod

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EXECUTIVE SUMMARY

The law of limitations, which governs the time limit when a claim can be brought is fundamental to issues of access to justice. After a limitation period has expired, the law bars a plaintiff from any access to the court no matter how seriously they have been wronged and no matter how culpable a defendant may have been. For the most part the changes proposed in the White Paper propose shorter, more restrictive time limits for plaintiffs to bring claims. The effect of the proposed legislation, if enacted in its present form will be to restrict access to justice in British Columbia. This would exacerbate a problem that is already a matter of very serious concern.

The stated goals underlying the reforms proposed in the White Paper laudable, including increased certainty, and a fair balancing of interests as between plaintiffs and defendants. However, in respect to the balancing of interests between plaintiffs and defendants, the proposals are seriously weighted in favour of defendants.

Most significantly, the proposal for a two year basic limitation period would adversely impact plaintiffs to a disproportionate degree and unduly restrict their access to the civil justice system.

The proposal to shorten the ultimate limitation period is reasonable, but the associated proposal to move from a "date of accrual" approach to a "date of incident" approach for starting the limitation period running is not an improvement and could lead to the extinguishment otherwise meritorious claims before all necessary elements for pursuing a claim have even arisen.

Funding for legal aid has long been inadequate and the scope of matters covered too narrow. Court access fees, while recently modified, continue to represent a significant obstacle to low income litigants. Recent rule changes in Supreme Court have tended to require parties to an action to carry out substantially more legal process at an earlier stage after an action is started than was previously the case. Placing yet another significant obstacle for average British Columbians to access justice is, in our respectful view, unwarranted and a step in the wrong direction.

Our recommendations are:

(a) If the structure of limitation periods which currently applies is to be changed, and a single limitation period is to apply to most sorts of claims, then the basic limitation period be set in the range of 4-6 years;

(b) That the ultimate limitation period be shortened to 15 years, but that the "date of accrual" approach be retained and the "date of occurrence" approach discarded;

(c) That the B.C. Government consider instituting complementary access to justice reforms that will enhance the quality of access to justice for individuals in need, including appropriate funding for and expansion of our system of legal aid, revisiting the threshold and process for suspending court access fees for low income litigants, and expanded legal education and clinical programs.

Allowing parties through the courthouse doors is only the first step. For their access to the justice system to be meaningful, they also need reasonable access to timely legal advice and affordable assistance if it is necessary to prosecute or defend a claim.

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A. INTRODUCTION

The B.C. Government invited comments concerning proposed changes to the *Limitation Act* set out in its "**White Paper on Limitation Act Reform: Finding the Balance**" (the "White Paper"). We appreciate this opportunity to offer our perspective.

According to the White Paper, the primary goals underlying the reform effort include:

(a) Modernization of B.C.'s *Limitation Act*, which was first enacted 1975;

(b) Bringing B.C.'s limitation legislation into conformity with limitation reforms recently enacted in other jurisdictions, based on the *Uniform Limitations Act*;

(c) Bringing greater certainty and predictability to the area of limitations; and

(d) Finding a balance between the rights and interests of plaintiffs and defendants.

We agree that B.C.'s *Limitations Act* can and should be improved.

Care must be taken, however, to ensure that reforms actually improve upon our current system, and that they reinforce and affirm our fundamental right to have fair and reasonable access to justice. Change for the sake of change, or uniformity for the sake of uniformity should be avoided. Change which enhances certainty, predictability and which also fairly balances the rights and interests of plaintiffs and defendants should be embraced.

While many of the proposed reforms suggest constructive changes to the current limitations system, we are deeply concerned that several key aspects, if enacted, would operate to unfairly and disproportionately deprive plaintiffs in particular of their right to have reasonable access to justice.

Limitation periods are an access to justice issue. A limitation period is the first and arguably one of the most critical threshold issues which determines who can and who cannot access our courts and our civil justice system. It is critically important that the BC Government find a fair balance so that otherwise meritorious claims which can be fairly prosecuted and defended have a chance to make it through the courthouse doors.

In this submission we are restricting our comments to four issues, which we consider to be of primary importance:

- Reduction of the basic limitation period to two years;
- Affect of reduced basic limitation period on Class Actions
- Reduction in the Ultimate Limitation Period; and
- Abandonment of the "date of accrual" approach in favour of a "date of incident" approach.

B. REDUCTION OF THE BASIC LIMITATION PERIOD TO TWO YEARS

One of the most significant changes proposed in the White Paper is a substantial reduction of the basic limitation period for a broad variety of classes of claims. The time to start an action would be reduced from six years to two years on most civil claims that are not for property damage and personal injury. These include claims for debt, breach of contract and negligence claims which give rise to economic losses. For breach of trust claims, the basic limitation period would be reduced from ten years to two years.

Generally then, with the new act in force, no one would be able to sue for these kinds of claims two years after the claim is "discovered". Defendants would enjoy legal immunity from liability in those circumstances.

The proposal to reduce the basic limitation period to such a dramatic degree for so many classes of claims presupposes that defendants are currently suffering hardship and being treated unjustly by having to defend claims in a suit brought more than two years after the claim against them is discovered. It is further to conclude that the current system is so unfair to defendants that the law must protect them by barring all legal redress against them after a period of two years. In effect, the legislature would grant them immunity, without regard to the circumstances underlying the claim.

Canadian courts have long been held in high regard, with reason, for their integrity, fairness and the general quality of their adjudication. For so long as courts have operated in Canada, for the majority of the claims before them, limitation periods substantially longer than two years has been the norm.

There has been no broad consensus of which we are aware that the Canadian system has been wrong all these years in thinking that defendants were, generally speaking, fairly treated under the existing law of limitations. There can be no suggestion that the courts are currently being overrun by plaintiffs seeking to unfairly advance claims in a dilatory fashion.

The simple fact that plaintiffs will get no remedy until their case is heard means it is in their interests to advance their claim in a timely fashion. The fact that as time passes memories fade and evidence can be lost works a harder prejudice to them than to defendants, because plaintiffs bear the burden of proving their case on a balance of probabilities in order to obtain any remedy at all. Delay favours defendants in most cases.

Some of the most serious problems of our justice system relate to access to justice - court remedies are too costly, too complicated and can take too long for people needing redress. Average citizens already find it difficult to open the courthouse doors to access justice. Yet this "reform" would lock the courthouse door in a far shorter period of time than has ever previously been applied to many classes of cases in B.C.

The group that would be most affected by the proposed reduction in the basic limitation period are plaintiffs whose rights would be summarily extinguished much earlier than is currently the case. Of those plaintiffs, the sub-group that would suffer the most serious adverse affects are those who are the most vulnerable in society … people who are less educated, less sophisticated and who lack financial resources necessary to get timely legal advice and commence and pursue an action to preserve their rights and protect their interests.

The inadequacy of BC's current legal aid system and the lack of appropriate legal resources for the most needy are well known and we do not propose to expound on that issue here. Taking an already underserviced and vulnerable group and further restricting their access to justice does not achieve the White Paper's goal of fairly balancing the interests of plaintiffs and defendants.

There are also a significant number of deserving plaintiffs who, for various reasons, do not or cannot muster the will, advice and resources necessary to start a claim within two years after what, in many cases, is a traumatic or otherwise significant event in their lives. For example:

- an elderly person who has claims against an adult child or other person they trust and depend on for care and companionship and is thus reluctant to confront that person in a short time frame

- a parent or sibling who loans money to a family member in order to help them get a head start

- a person who makes informal loans to a business of a relative over a period of years in an effort to help it succeed

- a person who has been traumatized or rendered financially destitute by a significant injury, death in the family, failure of a business or the breakup of their family and needs time to heal and regroup before taking steps to enforce their rights

This is not intended to be an exhaustive list. It is unrealistic to expect many people in such circumstances to start legal action within two years, and unfair to deprive them of a remedy should they fail to do so.

That a two year basic limitation period is unduly brief is amply illustrated by the fact that the government proposes to preserve for itself a six year limitation period for pursuing a broad range of claims. On the other side of each of those claims is a defendant who has the same interest in achieving certainty in their financial affairs as do defendants involved in claims where the basic limitation period would be shortened to two years. The claims of individual plaintiffs are as significant to them as is the government's interest in claims relating to social programs.

Simplicity is offered as one justification. Simplicity does not justify the choice of two years as the standard limitation period. Six years, five or four years are equally simple options. A careful reading of the proposed new Act reveals that it is not materially simpler than the old one; just different. Any who differ are invited to read and compare the current Act and the proposed legislation in the White Paper. It must also be kept in mind that the proposed legislation does not affect other important provincial legislation there will continue to be other specific limitation periods that will continue to make this

area of the law one where some considerable knowledge and care will be required to meet the requirements for timely commencement of legal proceedings. Examples include claims under the Local Government Act, R.S.B.C. 1996, c. 323, and the Insurance Act, R.S.B.C. 1996, c. 226.

The cost for defendants to retain records is given as another justification for a shorter basic limitation period. That falls short, however, in an age where document scanning and electronic records storage is commonplace, relatively inexpensive and effectively creates a permanent record. Indeed, the advent of modern technologies such as email and text messaging mean that parties and courts frequently have a better contemporaneous and effectively permanent document trail available now than has ever been the case in the past. These technologies make it easier for the court to arrive at a just result longer.

Another justification given is conformity … that other provinces such as Ontario and Alberta have made similar changes to those proposed in the White Paper. The fact that other provinces have restricted the rights of their citizens to bring claims to court does not speak to the wisdom of that course of action.

Given the prevailing current reality that court has become too costly, too complex and inaccessible to much of the public, reforms which lock the courthouse doors earlier for most types of claims is a step in the wrong direction. At the very least, reforms which so restrict access to justice should be combined with reforms that dramatically improve the ability of citizens to effectively exercise what remains of their access. Examples include expansion of legal aid funding and programs, expansion of legal education and clinical programs and lowering of barriers like court access fees. No such ameliorative measures are included in the White Paper.

It is notable that, with two exceptions, proposed reforms tend to limit access to court remedies and favour defendants' interests in limiting litigation. One such exception (discussed below) is the proposed removal of the six year ultimate limitation for medical negligence claims and replacement with a ten or fifteen year ultimate limitation. The other exception (also discussed below) extends the running of time where there has been willful concealment of the right to bring a claim.

It is not surprising to see wide support for the proposed reforms from groups such as the construction industry and local governments who are most often in the position of having to defend claims for damages arising from distant events. Ironically, these groups are made up of members who tend to be sophisticated, have ready access to legal advice and are better positioned than the average person to take effective steps to preserve records, and otherwise bear the costs and delays of the civil justice system.

Although the White Paper speaks of balance, the proposal for basic limitation period reform effectively runs in one direction – in favour of defendants. The proposed reforms seem to reflect a view that court process needs to be reined in and limited, that certainty, simplicity, and economic efficiency are more compelling considerations than fairness, accountability, and balanced redress for civil claims.

In our respectful submission, a two year basic limitation period does not represent a fair balancing of the rights of plaintiffs and defendants. It does not reflect modern technological realities that claims today tend to be better documented and electronic documents available longer, making it possible to have a fair trial longer. In our submission, if a change is to be made from the current structure of the law of limitations, a basic limitation period of 4-6 years would represent a more fair balance.

C. EFFECT OF REDUCED LIMITATION PERIOD ON CLASS ACTIONS

The use of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 to give justice in cases where otherwise the costs of proceeding would be prohibitive for smaller claims will be adversely affected by the proposed reduction of the limitation period to two years. This effect of the proposed change in the Limitations Act is not addressed in the White Paper.

Classes may only be certified for claimants whose claims have not been statute barred. Thus when a class of claimants is certified by the court, smaller classes of claimants will necessarily be able to claim when the limitation period is limited to two years as opposed to the larger classes of people who could join the class where a six year limitation period applied.

It is possible that in some cases, the economic viability of a class proceeding may be prejudiced by this reduction in the scope of the class such that the class proceeding cannot effectively be brought even for those whose claims are not statute barred.

Another issue arises where it is necessary to prove that a claim has not been statute barred because the claim is subject to an extension of the running of time due to issues of discoverability. Where discoverability is a consideration for a large number of proposed members of the class this is a consideration which may affect the issue whether the class can be certified as the courts have tended to treat such issues of discoverability as issues that need to be assessed in each individual case. Again the viability of access to a class proceeding can thus be jeopardized by this change.

D. REDUCTION OF THE ULTIMATE LIMITATION PERIOD

The 30 year and shorter specialized ultimate limitation periods ("ULPs") were introduced in 1975 as a part of a balanced considered approach dealing with the rights of claimants and would-be defendants. The current ULPs are not subject to any postponement provisions other than because the claimant plaintiff is a minor. [1]

The proposed legislation alters the ULP is several material ways.

A universal ULP is proposed of either 10 or 15 years. The special 6 year ULPs applicable to medical practitioners, hospitals and hospital employees have been eliminated. We support this change for reasons outlined in the White Paper.

Balancing the reduction of the 30 year ULP to 10 or 15 years is the proposal to suspend the ULP from running during the period when a defendant willfully conceals the cause of action from a claimant.[2] While postponement during the defendants' willful concealment (often referred to a fraudulent concealment) of a cause of action has a long history, the current law in British Columbia enacted in 1975 provides legal immunity to those defendants who manage to conceal their wrong doing for long enough (30 years)[3].

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[1] s. 8(1)(c) of the *Limitation Act*, R.S.B.C. 1996, c. 266; *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, 2004 BCCA 379; *Novak v. Bond*, [1999] 1 S.C.R. 808

[2] S. 30 would suspend the ULP during periods where a defendant willfully conceals the fact that: damage has occurred, the damage was caused by or contributed by an act or omission, or the act or omission was that of the person against whom the claim is or may be made. The ULP is also suspended during the period in which the defendant willfully misleads the claimant as to the appropriateness of a court proceeding as a means of remedying the damage.

[3] s. 8(1)(c) of the *Limitation Act*, R.S.B.C. 1996, c. 266; *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, 2004 BCCA 379

The proposal to suspend the ULP from running in favour of defendants who willfully conceal the cause of action is a welcome return to the equitable principles governing this area of limitation law.

On balance we prefer the adoption of a 15 rather than 10 year ULP as it would promote greater access to the courts for claimants to seek remedies for claims about which they discover after the running of the otherwise applicable limitation period.

E. "DATE OF ACCRUAL" VS "DATE OF INCIDENT" APPROACH

The proposed change concerning the ULP which does not seem to be a part of a fair re-balancing of interests is the proposal to change the method of ascertaining when the ULP starts to run. Currently all limitation periods run for a period of years after the date on which the right to bring the action arose, i.e., the date on which all the elements of the cause of action came into existence or accrued. The proposed legislation would abandon accrual in favour of starting the ULP from the date of the act or omission giving rise to the claim. This is said to have the advantage of certainty. The problem is that the improvement in certainty comes at an unfair cost of compromising and, in some cases, eliminating claimants' rights.

In some causes of action such as in contract, the date of the act or omission coincides with the date on which a claimant has a right to an action. Actions based upon a breach of duty of care, however, only become actionable when damages occur as a result of the act or omission. In some cases this might be the same date as the act or omission but in other cases the date when damage occurs can be many years later.

The abandonment of the accrual start date for the ULP raises a significant access to justice issue. This is not a discoverability problem, it is more fundamental than that. Adopting an act or omission start date will eliminate the right to sue in cases where damages caused by an act or omission do not occur before the expiry of the 10 or 15 year limitation period. This is an unfair and indeed absurd outcome - the right to sue will be lost before it even arises.

The Law Society of British Columbia in its comments on the proposed reform of the Limitation Act cited a number of examples where this may occur:

> The proposed changes have the potential to adversely affect several groups of future plaintiffs, most notably, purchasers of real property and the elderly. There is a construction boom in the province. The cost of property is high, and many people are purchasing property at or beyond the limits of their means. Even if the ratio of negligently constructed to acceptable properties remains constant, the number of negligently constructed properties in the province will increase. Profits will be made from the sales of these properties, and both for principles of fairness and for confidence in the market place, consumers should have a reasonable opportunity to pursue a claim once damage has manifested from a negligent act or omission that affects the value of the property.
>
> The second significant group is the aging population of Baby Boomers. We are on the verge of a large, elderly population who will make increased demands on the health care system. Some of these individuals will have been exposed to products or work environments that will cause illness that will not show up until late in life. Running the limitation period on these wrongs from the date of the act or omission will statute bar many of these individuals from being able to pursue a remedy for the harm caused to them.[4]

[4] Submission of the Law Society of British Columbia to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated July 13, 2007.

This problem will also likely arise in professional negligence claims against lawyers who may prepare wills or other documents that may not come into effect for many years. [5] For example, in the case of a drafting or other error by a lawyer in the preparation of a will the client may not die for 10 or 15 years after a will is drafted. The cause of action for such a claimant does not accrue until the testator dies or becomes incapacitated. The difficulty for the intended beneficiary is that it can easily be more than 10 or 15 years from the date the will was negligently drafted to when the testator dies at which point the will becomes operative and the intended beneficiary can sue. Using the proposed act or omission start to a ULP the negligent party in such a case would gain immunity from liability before the claimant even had a right to sue.

At page 32 of the White Paper the comment is made concerning certainty:

> "As well, more certainty results because it does not matter what kind of legal claim is brought: in each case, a claimant has the time within the ultimate limitation period running from the original act or omission to discover the legal problem and start a lawsuit."

This is simply not the case when the act or omission ULP start date has the effect of eliminating or significantly shortening the period of time in which a legal claim can be made once damage has manifested from a negligent act or omission.

Adoption of the act or omission start time for the ULP will have the effect of undoing one of the express aims of other aspects of the legislation – that of eliminating differences in limitation periods depending on the type of legal claim.

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[5] See for example *Whittingham v. Crease & Co* [1978] B.C.J. No. 1229; 88 D.L.R. (3d) 353

Among the proclaimed advantages to fixing the ULP to the start of the wrongful act is the certainty to potential defendants and savings on record keeping and insurance costs. This argument is flawed as the ULP will still be subject to postponement in the cases of minors.

Limitation laws are intended to ***fairly*** balance the rights of claimants to make claims with the defendants' interests in being free of ancient obligations. The legislation should not wipe out actions before a claimant even has a legal right to bring a claim. That does not represent a fair balancing of interests.

The ULP should continue to use accrual rather than the date of act or omission as the date of commencement of the running of the ULP.

F. CONCLUSIONS

Limitations reform is about access to justice. A limitation period is the first critical threshold issue which determines who can and who cannot access our courts and our civil justice system.

The stated goals underlying the proposed reforms are laudable, including increased certainty and predictability and a fair balancing of interests between plaintiffs and defendants. However, it is our view that certain critical aspects of the proposed reforms do not achieve those goals.

The proposal for a two year basic limitation period does not fairly balance the rights and interests of plaintiffs and defendants. It adversely impacts plaintiffs to a disproportionate degree and unduly restricts their access to the civil justice system.

The proposal to shorten the ultimate limitation period is reasonable, but the associated proposal to move from a "date of accrual" approach to a "date of incident" approach for starting the ultimate limitation period running is not an improvement and could extinguish otherwise meritorious claims before all necessary elements for pursuing a claim have arisen.

The restrictions these the changes would create are compounded and take on added significance viewed in context with other access to justice challenges currently facing B.C. Funding for legal aid has long been inadequate and legal aid's scope too narrow. Court access fees, while recently changed, continue to represent a significant obstacle to low income litigants. Recent rule changes in Supreme Court have tended to push forward substantially more legal process to an earlier stage after an action is commenced than was formerly the case.

G. RECOMMENDATIONS

Our recommendations include:

(a) That if the current structure of the limitations law is to be changed, that a basic limitation period be set in the range of 4-6 years;

(b) That the ultimate limitation period be shortened to 15 years, but that the "date of accrual" approach be retained and the "date of occurrence: approach discarded;

(c) That the B.C. Government consider instituting complementary access to justice reforms that will enhance the quality of access to justice for individuals in need,

including appropriate funding for and expansion of our system of legal aid, revisiting the threshold and process for suspending court access fees for low income litigants, and expanded legal education and clinical programs.

Allowing parties through the courthouse doors is just the first step. For their access to the justice system to be meaningful, they also need reasonable recourse to legal advice and assistance in conducting their case.