Submission to

MINISTRY OF ATTORNEY GENERAL

Justice Services Branch
Civil Policy and Legislation Office

WHITE PAPER

ON

LIMITATION ACT REFORM

Issued by:

Special Committee of the
Legislation and Law Reform Committee
Canadian Bar Association
British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the "CBABC") has over 6,000 members. Its members practise law in many different areas and the CBABC has established 74 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee of the Legislation and Law Reform Committee (the "LLRC") of the CBABC. The LLRC is a standing committee of the CBABC. The LLRC promotes, on behalf of the profession and the public, well-developed, practical laws by ensuring that British Columbia legislation is as comprehensible, workable and unambiguous as possible and that it does not violate the rule of law. The comments expressed in this submission reflect the views of the CBABC LLRC Special Committee (the "Committee") and are not necessarily the views of the CBABC as a whole. The Committee was composed of the following members of the LLRC:

- R. C. (Tino) Di Bella, Chair of the LLRC;
- Eleanor Gregory;
- John W. Horn, Q.C.; and
- H. William Veenstra.

SUBMISSIONS

BACKGROUND

In 2007, the Ministry of Attorney General began a review of the *Limitation Act*, R.S.B.C. 1996, c. 266 (the "Act"). In 2007, the Attorney General published proposals for law reform in a Green Paper, "Reforming British Columbia's *Limitation Act*".[1] The British Columbia government did not proceed with the law reform proposals contained in the Green Paper.

On September 15, 2010, the Attorney General published a White Paper containing commentary and a Draft Act for review and comment by the profession and the public.[2] The Attorney General's deadline for comment was November 15, 2010. The deadline for comment was very short, only 60 days.

The Committee has reviewed the 2007 Green Paper and the 2010 White Paper and Draft Act.

Given the Attorney General's short timeline for comment, the Committee has these general comments. The Draft Act proposes a huge change in limitations law in British Columbia: a single 2 year basic limitation period, a 10 or 15 year

[1] A copy of the Green Paper is available at: www.ag.gov.bc.ca/legislation/pdf/GreenPaper.pdf.

[2] A copy of the White Paper is available at: http://www.ag.gov.bc.ca/legislation/pdf/LimitationActWhitePaperFINAL.pdf.

ultimate limitation period (instead of the current 30 years) and the repeal of the 6 year medical ultimate limitation period. If the Draft Act is enacted, for lawyers, they will need to communicate with clients and act earlier in the civil litigation process in order to preserve their client's rights so their clients' rights are not barred by a limitation period. For clients and the public, they will need to sue sooner in order to preserve their legal rights.

As another general comment, it is generally desirable that there should be uniform laws on limitations in the Canadian Provinces so that persons and businesses who conduct their affairs in more than one Province do not have to make different decisions to accommodate local laws. It is particularly desirable in the field of conflict of laws that limitation laws be as uniform as possible to avoid "forum shopping".

In light of the very short time frame for comments, the Committee has restricted its comments to answering the 10 questions posed in Appendix B of the White Paper.

These questions are:

1. Do you have any comments on the definition of "claim" or the move to a single basic limitation period?

2. Do you have any concerns with the recommended draft provision, which sets out the test for discovering a claim? If so, please discuss.

3. Should the new Act create a single ultimate limitation period of 10 or 15 years? Please explain the reasons for your choice.

4. Should the new Act start the ultimate limitation period running from the first conversion, in order to provide some protection to good faith purchasers for value (or any other defendants) from an undefined period of liability in cases involving multiple conversions? Why or why not?

5. Should the new Act continue to refer to detention of goods lawsuits (also known as the tort of detinue)?

6. Would it be preferable for the new Act to remain silent on the issue of agreements, leaving it up to judges to ensure that agreements that affect the operation of limitation periods do not unfairly target parties with weaker bargaining power?

7. Would codifying only part of the common law (i.e., allowing agreements to extend but not shorten limitation periods) cause any unintended consequences?

8. Which option for reforming the real property provisions do you prefer? Please explain your response.

9. Do you have any comments or concerns with the proposed conflict of laws provision (option 1)? Please explain.

10. Should section 13(2) of the current Act be carried forward to the new conflict of laws provision, to ensure that claims for sexual assault, which will continue to have no limitation period, will also be excluded in cases involving conflict of laws rules? Why or why not?

Definition of "Claim" and Single Basic Limitation Period

1. Do you have any comments on the definition of "claim" or the move to a single basic limitation period?

The Committee recommends that the change to the use of the term "claim" instead of "action", particularly when combined with the proposed new section 31 of the Draft Act dealing with extra-judicial remedies, is appropriate.

The Committee acknowledges that the proposed move to a single basic 2 year limitation period assists in simplifying the law. Nevertheless, the Committee has some concerns that selecting 2 years as the basic limitation period (rather than 3 or 4 years) tips the balance too far in favour of defendants. The concept of significantly shortened limitation periods comes from the United States. We as Canadians are not particularly litigious. Often we are more interested in finding ways to resolve issues without resorting to litigation. The Committee is concerned that a move to a 2 year limitation will lead to a fundamental shift in attitudes and approaches towards dispute resolution, and require people to sue first and ask questions later much more than they currently do. It will also lead to increased situations where those who try to find alternative remedies to resolve issues and treat the judicial system as a last resort will be deprived of access to justice for otherwise legitimate and justiciable claims.

The Committee recognizes that there is significant momentum arising from the number of other Provinces that have already moved to a 2 year basic limitation period. However, it is important to recognize that the question of any basic (and

short) limitation period requires the balancing of the interests of defendants in finality with the important public interest in providing reasonable access to our civil justice system.

The Committee notes the discussion at pages 17-21 of the White Paper with respect to the appropriate basic limitation period for debts and obligations owed to the Crown. In the Committee's view, the public policy interest in ensuring access to justice is the same for both the government and the citizenry. All potential litigants face the concerns about the potential loss of claims, worry about the cost of litigation, and desire to find alternative ways to resolve disputes and collect monies owing. As an appropriate balance, the Committee recommends that a single limitation period should apply to all, including the Crown.

Discoverability Test

2. Do you have any concerns with the recommended draft provision, which sets out the test for discovering a claim? If so, please discuss.

The ULCC *Uniform Limitations Act* (2005) adopts similar language to the Draft Act. The ULCC *Uniform Limitations Act* (2005) is a reasonable approach. The Committee believes that the Draft Act provision setting out the test for discovering a claim is clear. This Draft Act provision does not alter the basic concepts that are currently applied, and, consequently, this Draft Act provision should be part of the new Act.

Ultimate Limitation Period

3. Should the new Act create a single ultimate limitation period of 10 or 15 years?

There is no "right" answer to this question of an ultimate limitation period ("ULP"). The Committee was mindful that in reforming the *Limitation Act* the Draft Act had to achieve as much uniformity as possible among the Provinces. The majority of Provinces with modernized limitation laws and the ULCC have adopted a 15 year ULP.[3] However, by reducing the ULP in the Draft Act as proposed, there will be some confusion and some claims will die prematurely.

In considering the appropriateness of provisions relating to the ULP, it is essential to keep in mind that the provisions as to ULP apply only where a claim has not been discovered – once a claim is discovered, the basic limitation period of 2 years (subject to our comments in response to question 1) begins to run. In the Committee's view, the fact that a claim can be extinguished before a claimant even knows about it raises substantial issues of fairness and access to justice.

A further important factor in considering the ULP is the time when the ULP starts to run. The White Paper considers a move from the current "accrual" model to an "act or omission" model and ultimately recommends such a change.[4] The Committee has reviewed and supports the 2007 submission of the Law Society of

[3] See page 34 of the White Paper.
[4] See pages 32-33.

British Columbia relating to the continuation of the accrual method of the cause of action as the starting point for the ULP.

A reduction in the ULP – whether to 10 years or 15 years – when combined with a move to an "act or omission" model for the commencement of a ULP will have a substantial negative impact on access to justice. Given that damage is an essential element in many claims – without which an action may not be brought – and that damage in many cases does not occur until more than 10 or 15 years after the act or omission giving rise to it, there is a virtual certainty that some claims will become statute barred after the passing of the ULP and before any right to sue on those claims arises. Examples where this may occur include:

a. Cases of negligent construction (we have learned in British Columbia that it is not unusual for construction defects to remain undiscovered for many years);
b. Claims advanced for disease(s) arising from carcinogenic toxins (for example, cancer and other such diseases are often undiscoverable for many years after they are caused); and
c. Cases of negligent drafting of wills (given that testators may live for more than 10 or 15 years after their wills are drafted and executed).

Determining both the starting point and the ultimate length of the ULP starkly raise the balance between access to justice and the rule of law on one hand and the interests of potential defendants in reducing insurance and record-keeping costs on the other hand. While the Committee accepts that a ULP is an accepted part of

a modern limitations regime, given the fundamental interests at play, it is important that the balance not be tipped too far in favour of defendants.

Turning to the specific question posed in the White Paper – whether the ULP should be 10 or 15 years – the Committee notes that the shorter the ULP, the greater the number of claims that will be statute-barred. Most other Provinces have adopted a 15 year ULP. Fundamentally, there is an inherent unfairness to potential plaintiffs arising from the application of a ULP. The White Paper proposes a choice of either a 10 year or 15 year ULP.

In light of our concerns about access to justice and fundamental fairness, the Committee recommends a 15 year ULP should be adopted and this 15 year time period should be reviewed by government after a reasonable time following enactment of the new Act to ensure there are no unintended consequences by moving from a 30 year ULP to a 15 year ULP.

The Committee also supports the recommendation at page 46 of the White Paper that the current special six year ULP for medical claims be eliminated as it is probably longer than it needs to be and in the interest of having a single consistent ULP .

Conversion

4. Should the new Act start the ultimate limitation period running from the first conversion, in order to provide some protection to good faith purchasers for value (or any other defendants) from an undefined period of liability in cases involving multiple conversions? Why or why not?

The question asked is: whether the ULP should start to run from the date of first conversion, or the latest date of a series of conversions? The Committee notes that there is a distinct difference between the protection that should be given to a *bona fide* purchaser for value and that given to other persons in possession of misappropriated property. Although the law should expect purchasers of used goods to exercise some diligence, nevertheless, many such goods are sold without any due diligence. Art galleries and pawnbrokers are good examples. It is contrary to current experience that *bona fide* purchasers take steps to protect themselves by consulting an appropriate public registry. In any case, most chattels do not show up in the Personal Property Registry. The Draft Act does not differentiate between *bona fide* purchasers for value and others. Though not asked in the White Paper, the Committee raises the following question: should the ULP differentiate between these classes? A ULP of 2 years for *bona fide* purchasers for value starting on the date of first conversion is reasonable to protect the innocent and otherwise meet**s** commercial expectations. A 2 year ULP would protect *bona fide* purchasers from an indefinite exposure to liability. The ULP for persons who are not *bona fide* purchasers for value should be the same as for all other defendants.

As to when the ULP should start to run in either case, the first conversion takes place when the rightful owner would normally discover the loss and first conversion is a logical point to start the ULP. If the date of the last in a series of conversions were chosen, then liability would be extended indefinitely as goods passed from hand to hand.

Section 22(2)(c) of the Draft Act provides that the day an act or omission on which a claim arising out of a conversion takes place is the day on which the property was first converted by any person. The Committee recommends that section 22(2)(c) of the Draft Act should be adopted in the new Act, but a 2 year ULP should be prescribed for *bona fide* purchasers for value.

Detention of Goods or Tort of Detinue

5. Should the new Act continue to refer to detention of goods lawsuits (also known as the tort of detinue)?

The Committee recommends that the new Act should not continue to refer to detention of goods lawsuits/tort of detinue. The reason is that section 22(2)(a) of the Draft Act would deal with claims of detention of goods in the same way as continuing nuisances. Section 22(2)(a) of the Draft Act provides that, for the purposes of the ULP and subject to the regulation, "the day an act or omission on which any of the following claims is based takes place is, in the case of a claim arising out of a continuous act or omission, the day on which the act or omission ceases".

Agreements

6. Would it be preferable for the new Act to remain silent on the issue of agreements, leaving it up to judges to ensure that agreements that affect the operation of limitation periods do not unfairly target parties with weaker bargaining power?

The Committee recommends that the new Act should not permit the shortening of any limitation period by agreement. Given the short time-frame for consultation about the Draft Act, the Committee did not have time to fully explore if there ought to be a distinction made in the new Act between consumers and commercial parties regarding agreements to shorten a limitation period. It is too early to know if the Ontario experience with making such a distinction in its limitation legislation is effective. The Committee is reluctant to recommend such a distinction without further consideration of unintended consequences.

7. Would codifying only part of the common law (i.e., allowing agreements to extend but not shorten limitation periods) cause any unintended consequences?

Section 23 of the Draft Act permits agreements to extend or vary limitation periods but not to shorten limitation periods. The Committee recommends that section 23 of the Draft Act be enacted in the new Act.

Real Property

8. Which option for reforming the real property provisions do you prefer? Please explain your response.

The White Paper posits 3 options.

Option 1 carries forward the real property provisions from section 3 of the current Act into the new Act, with minor amendments and moves section 12 regarding adverse possession to a statute that governs real property.

Option 2 moves the real property provisions into a separate statute.

Option 3 repeals the real property provisions in section 3 of the current Act and moves section 12 regarding adverse possession to a statute that governs real property.

Of the 3 options, the Committee favours Option 1 to carry forward the real property provisions from section 3 of the current Act into the new Act, with minor amendments and move section 12 regarding adverse possession to a statute that governs real property (such as the *Land Title Act* or the *Property Law Act*).

The acquisition of ownership by prescription is in most systems of law more fundamental and ancient than the loss of the ability to sue for wrongs because of passage of time. It stems from different needs. Prescription is a simple method of quieting titles. It is implicit in the *Land Title Act* that possession of property cannot morph into title to property by passage of time. Any explicit statement of that principle belongs in that Act.

The Committee recommends that the remaining provisions relating to actions concerned with land in the current Act should be carried forward in the new Act. Under the current Act, section 3(4)(j) provides that actions for the title to property or for a declaration about the title to property by any person in possession of that property are not governed by a limitation period and may be brought at any time. Part of section 3(4)(j) of the current Act seems to have disappeared from section 3(1) of the Draft Act. The net effect is that the wording from section 3(4)(j) of the current Act "for the title to property" is not in the Draft Act. Perhaps this is an oversight and should be appropriately addressed in the new Act.

The Committee was concerned that there could be a legal distinction between "title to property" and "declaration about the title to property by any person in possession of that property". Carrying forward the language of section 3(4)(j) of the current Act in the new Act would preserve the case law interpreting the current section 3(4)(j). Out of an abundance of caution, the Committee recommends carrying forward section 3(4)(j) of the current Act in the new Act.

Conflict of Laws

9. Do you have any comments or concerns with the proposed conflict of laws provision (option 1)? Please explain.

The White Paper posits 2 options.

Option 1: For the purposes of applying the rules regarding conflict of laws, the limitations law of [enacting jurisdiction] or any other jurisdiction is substantive law.

Option 2:

> (1) The limitations law of [enacting jurisdiction] applies to any proceeding commenced or sought to be commenced in [enacting jurisdiction].
>
> (2) Despite subsection (1), if a proceeding commenced or sought to be commenced in [enacting jurisdiction] is to be determined in accordance with the law of another jurisdiction and that jurisdiction's limitations law establishes a shorter limitation period than the law of [enacting jurisdiction], the shorter limitation period applies to the proceeding.

Of the 2 options, the Committee recommends Option 1 regarding conflict of laws. This rule will discourage forum shopping because no procedural advantage could be gained by a litigant in doing so. This rule will encourage a lawsuit to be brought in the jurisdiction whose substantive laws apply to the facts of the case.

10. Should section 13(2) of the current Act be carried forward to the new conflict of laws provision, to ensure that claims for sexual assault, which will continue to have no limitation period, will also be excluded in cases involving conflict of laws rules? Why or why not?

The Committee is not in favour of a different conflict of laws rule in these circumstances.

Extending an invitation to sue in British Columbia on claims which are time-prescribed in the jurisdiction in which the wrong occurred is offensive. Having obtained, in such a case, a judgment in British Columbia the successful plaintiff(s) may, in most cases, be entitled to have the judgment recognized and enforced in the jurisdiction where the claim itself arose but had become statute barred. The Committee recommends that the new Act should not allow or create British Columbia as a destination forum for bringing sexual assault lawsuits.

SUMMARY OF RECOMMENDATIONS

As a result of our submissions above, the CBABC LLRC Special Committee makes these following recommendations.

Definition of "Claim" and Single Basic Limitation Period

1. The change to the use of the term "claim" instead of "action", particularly when combined with the proposed new section 31 of the Draft Act dealing with extra-judicial remedies, is appropriate.

2. The move to a single basic limitation period assists in simplifying the law.

3. The move to a 2 year limitation will lead to a fundamental shift in attitudes and approaches towards dispute resolution in British Columbia.

4. As an appropriate balancing between the interests of defendants and public interests in providing reasonable access to our civil justice system, a single limitation period should apply to all, including the Crown.

Discoverability Test

5. The Draft Act provision setting out the test for discovering a claim is clear and does not alter the basic concepts that are currently applied, and, consequently, should be part of the new Act.

Ultimate Limitation Period

6. The continuation of the accrual method of the cause of action should be adopted as the starting point for the ULP.

   In light of the Committee's concerns about access to justice and fundamental fairness, a 15 year ULP should be adopted and this 15 year time period should be reviewed by government after a reasonable time following enactment of the Draft Act to ensure there are no unintended consequences b**y** moving from a 30 year ULP to a 15 year ULP.

7. The special 6 year ultimate limitation period for medical claims should be eliminated.

Conversion

8. Section 22(2)(c) of the Draft Act should be adopted in the new Act, but a 2 year ULP should be prescribed for *bona fide* purchasers for value.

Detention of Goods or Tort of Detinue

9. The new Act should not continue to refer to detention of goods lawsuits/tort of detinue since section 22(2)(a) of the Draft Act would deal with claims of detention of goods in the same way as continuing nuisances.

Agreements

10. The new Act should not permit the shortening of any limitation period by agreement.

11. Section 23 of the Draft Act should be enacted in the new Act.

Real Property

12. Option 1 should be adopted to carry forward the real property provisions from section 3 of the current Act into the new Act, with minor amendments and move section 12 regarding adverse possession to a statute that governs real property.

13. The remaining provisions relating to actions concerned with land in the current Act should be carried forward to the new Act.

14. Section 3(4)(j) of the current Act should be carried forward to the new Act.

Conflict of Laws

15. Option 1 regarding conflict of laws should be adopted in the new Act.

16. The foreign limitation law in section 13(2) of the current Act should not be carried forward to the new Act since the new Act should not create British Columbia as a destination forum for bringing sexual assault lawsuits.

CONCLUSION

The CBABC LLRC Special Committee would welcome the opportunity to provide further input and dialogue with the Attorney General respecting these submissions.

Any communications can be directed to:

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