

McDonald, David S

From: Justice Minister
Sent: November-05-14 2:24 PM
To: LeBlanc-Murray, Nicole M
Subject: FW: URGENT: Bill 64 - Limitation of Actions Act
Attachments: Letter to Minister Diab.pdf; Draft Limitations of Actions Act.pdf

Importance: High

From: Libby Kinghorne [<mailto:libbykinghorne@aptla.ca>]
Sent: Tuesday, November 04, 2014 2:07 PM
To: Justice Minister
Cc: Barry Mason; Brian Hebert
Subject: URGENT: Bill 64 - Limitation of Actions Act
Importance: High

Dear Minister Diab:

I enclose our follow-up to the presentations of APTLA Directors, Brian Hebert and Barry Mason; together with suggested amendments to the proposed Limitation of Actions Act.

We hope that you will be able to review these documents with a view to better understanding our concerns regarding the administration of justice and innocent victims of personal or professional negligence in Nova Scotia.

Best wishes,
Libby Kinghorne, Esq.

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*** Seek Justice For All ***

Be it enacted by the Governor and Assembly as follows:

1 This Act may be cited as the Limitation of Actions Act or the Statute of Limitations.

2 (1) In this Act,

(a) "claim" means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission;

(b) "claimant" means a person who has a claim, regardless of whether the claim has been brought;

(c) "defendant" means a person against whom a claimant has a claim, regardless of whether the claim has been brought;

(d) "undiscoverable safety claim" means a claim to remedy injury, loss or damage for personal injury or death that results from an act or omission that was not with ordinary due diligence discoverable by the claimant.

(2) For the purpose of this Act, a claim is brought

(a) when a proceeding in respect of the claim is commenced; or

(b) where the claim is added to an existing proceeding by a new or an amended pleading that is not an originating process, when that pleading is filed.

3 Subject to Section 4, this Act applies to a claim pursued in a court proceeding, other than a claim

(a) to which the Real Property Limitations Act applies;

(b) in a proceeding for judicial review;

(c) on an appeal; and

(d) in a proceeding for declaratory relief.

4 (1) This Act does not apply to a claim based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in section 35 of the Constitution Act, 1982.

(2) A claim referred to in subsection (1) is governed by the law that would have been in force in respect of limitation of actions if this Act had not been enacted.

5 This Act binds Her Majesty in right of the Province.

6 12.(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

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Comment [1]: This is the language of the Uniform Limitations Act

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Deleted: Where there is a conflict between this Act and any other enactment, the other enactment prevails.

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on the day this Act comes into force, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

(2) Subsection (1) applies despite any other Act.

(3) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.

(4) Sections 7 and 8 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

7 For the purpose of applying the rules regarding conflict of laws, the limitations law of the Province and of any other jurisdiction is substantive law.

GENERAL LIMITATION PERIODS

8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

(3) For the purpose of subsection (1)(b), the day an act or omission on which a claim is based occurred is

(a) in the case of a continuous act or omission, the day on which the act or omission ceases; and

(b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

(4) Notwithstanding section 8(1)(a) a claim arising from the use or operation of a motor vehicle may not be brought after the earlier of

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Comment [2]: This is the exact language from the Uniform Limitations Act. The Uniform Law Conference of Canada, Working Group Report states at p. 3: "5. The draft Act also adopts the Ontario approach of listing special limitation periods in a schedule to the Act. As discussed at last year's meeting, a schedule of special limitation periods effectively consolidates limitation periods found in other statutes that a legislature wishes to be exceptions to the general limitations regime to allow for greater accessibility and transparency. It also imposes a legislative discipline to ensure that the enactment of any new limitation period is assessed in light of the established general limitations regime."

(a) three years from the day the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

9 (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).

(2) A defendant has the burden of proving that a claim was not brought within the limitation established by clause 8(1)(b).

**EXCEPTIONS TO THE
GENERAL LIMITATION PERIODS**

10 Section 8 does not apply to a proceeding

(a) to recover money owing to Her Majesty in right of the Province in respect of

(i) fines, taxes or penalties, or

(ii) interest on fines, taxes or penalties;

(b) commenced by Her Majesty in right of the Province or an agent of Her Majesty in right of the Province in respect of a claim relating to the administration of a social, health or economic program; or

(c) commenced by Her Majesty in right of the Province or an agent of Her Majesty in right of the Province to recover money owing in respect of student loans, awards or grants.

11 Section 8 does not apply to a proceeding in respect of a claim in relation to trespass to the person, assault or battery if

(a) the claim is based on misconduct of a sexual nature; or

(b) at the time of the injury on which the claim is based

(i) one of the defendants was living with the claimant in an intimate relationship, or

(ii) the claimant was dependent, whether financially, emotionally or physically, on one of the defendants.

12 Notwithstanding Section 8, where personal property is converted and a defendant, acting in good faith, purchases the property for value, a claim to recover possession of property may not be brought against the defendant after two years from the day on which the property is converted.

**OPERATION OF THE
GENERAL LIMITATION PERIODS**

13 In the case of claim in relation to a default in performing a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for performance has been made, is

(a) for the purpose of clause 8(1)(b), the day on which the act or omission on which the claim is based occurs; and

(b) for the purpose of clause 8(2)(a), the day on which the injury, loss or damage occurs.

14 In the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer is served with the claim in respect of which contribution and indemnity is sought, or incurs a liability through the settlement of the claim, is, for the purpose of clause 8(1)(b), the day on which the act or omission on which the claim for contribution and indemnity is based occurs.

15 (1) In the case of a proceeding commenced by a claimant claiming through a predecessor in right, title or interest, the claimant is deemed to have had knowledge of the matters referred to in subsection 8(2) on the earlier of

(a) the day on which the claimant first knew or ought to have known of those matters; and

(b) the day on which the predecessor first knew or ought to have known of those matters.

(2) In the case of a proceeding commenced by a claimant who is the principal of an agent, the claimant is deemed to have had knowledge of the matters referred to in subsection 8(2) on the earlier of

(a) the day on which the claimant first knew or ought to have known of those matters; and

(b) the day on which the agent first knew or ought to have known of those matters,

if the agent had a duty to communicate knowledge of those matters to the claimant.

(3) The day on which a predecessor or agent ought to have known of the matters referred to in subsection 8(2) is the day on which a reasonable person in the predecessor's or agent's circumstances and with the predecessor's or agent's abilities ought first to have known of the matters.

16 The limitation period established by clause 8(1)(b) does not run during any time in which the defendant

(a) wilfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was of the defendant; _____

(b) wilfully misleads the claimant as to whether the injury, loss or damage is sufficiently serious to warrant a proceeding; or

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(c) fails to discover an act or omission that could give rise to an undiscoverable safety claim which the defendant ought to have discovered or fails to advise the owners of real or personal property of an act or omission in respect of real or personal property, including public property, that could give rise to an undetectable safety claim.

- 17 The limitation periods established by this Act do not run while a claimant is a minor.
- 18 (1) The limitation periods established by this Act do not run while a claimant is incapable of bringing a claim because of the claimant's physical, mental or psychological condition.
- (2) Where the running of a limitation period is suspended under subsection (1) and the limitation period has less than six months to run as of the day on which the suspension ends, the limitation period is extended to include the day that is six months after the day on which the suspension ends.
- 19 (1) Where, before the expiry of the relevant limitation period established by this Act, a person acknowledges liability in respect of a claim for
- (a) payment of a liquidated sum;
 - (b) the recovery of personal property;
 - (c) the enforcement of a charge on personal property; or
 - (d) relief from enforcement of a charge on personal property,
- the limitation period begins again at the time of the acknowledgment.
- (2) An acknowledgment of liability in respect of a claim for interest is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.
- (3) An acknowledgment of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral is deemed to be an acknowledgment by any other person who later comes into possession of the collateral.
- (4) A debtor's performance of an obligation in respect of a security agreement is an acknowledgment by the debtor of liability in respect of a claim by the creditor for realization on the collateral under agreement.
- (5) A creditor's acceptance of a debtor's payment or performance of an obligation in respect of a security agreement is an acknowledgment by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the agreement.
- (6) An acknowledgment by a trustee is an acknowledgment by any other person who is or who later becomes a trustee of the same trust.

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Comment [3]: This and the added definition of "undetectable safety claim" would address latent defects and environmental contamination and also cover any future inventions or activities that we are not yet aware of that may be unsafe but the effect so which will only come to light more than 15 years after an act or omission e.g global warming, new chemical compound, genetically engineered substances.

(7) An acknowledgment of liability in respect of a claim to recover or enforce an equitable interest in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

(8) Subject to subsections (9) and (10), this Section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even if the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum owing.

(9) This Section does not apply unless the acknowledgment is made to

(a) the claimant;

(b) the claimant's agent; or

(c) an official receiver of or trustee for the claimant, acting under the Bankruptcy and Insolvency Act (Canada),

before the expiry of the limitation period applicable to the claim.

(10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.

(11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the defendant or the defendant's agent has the same effect as an acknowledgment referred to in subsection (10).

20 (1) A limitation period established by this Act may be extended, but not shortened, by agreement.

(2) Subsection (1) does not affect an agreement made before the coming into force of this Act.

CLAIMS BROUGHT AFTER EXPIRY OF LIMITATION PERIOD

21 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim

(a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;

(b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or

(c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

21A A judge may allow a claim which is brought outside a relevant limitation period to proceed provided

(a) the claim is brought no more than two years after the expiration of the relevant limitation period;

(b) the prejudice to the claimant in having the claim dismissed outweighs the prejudice to the defendant caused by the failure to bring the claim within the relevant limitation period; and

(c) it is equitable to do so.

TRANSITIONAL PROVISIONS, CONSEQUENTIAL AMENDMENTS AND EFFECTIVE DATE

22 (1) In this Section,

(a) "effective date" means the day on which this Act comes into force;

(b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.

(2) This Section applies to claims that are based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

(3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of

(a) two years from the effective date; and

(b) the day on which the former limitation period expired or would have expired.

23 Clause 37(9)(b) of Chapter 6 of the Acts of 2001, the Land Registration Act, as enacted by Chapter 19 of the Acts of 2008, is amended by striking out "Limitation of Actions" in the fifth line and substituting "Real Property Limitations".

24 The title of Chapter 258 of the Revised Statutes, 1989, the Limitations of Actions Act, is amended by adding "in Respect of Real Property" immediately after "Actions" in the second line.

25 Section 1 of Chapter 258 is amended by striking out "Limitation of Actions Act or the Statute of Limitations" in the first and second lines and substituting "Real Property Limitations Act".

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Comment [4]: This allows the court to blunt the harsh effects of a state imposed forfeiture of rights (the Working Group notes that the ultimate limitation period is "arbitrary") where it is in the interests of justice to do so.

26 The heading immediately before Section 2, Sections 2 and 3, the heading immediately before Section 4, Sections 4 and 5, the heading immediately before Section 6, Sections 6 to 9, the heading immediately before Section 24A, Sections 24A, 27 and 31, the heading immediately before Section 38 and Section 38 of Chapter 258 are repealed.

27 (1) Clause 7(2)(c) of Chapter 9 of the Acts of 1995-96, the Marketable Titles Act, is amended by striking out "Limitation of Actions" line the last line and substituting "Real Property Limitations".

(2) Subsection 7(4) of Chapter 9 is repealed.

28 Chapter 13 of the Acts of 1995-96, the Personal Property Security Act, is amended by adding immediately after Section 65 the following Section:

65A (1) In this Section, "secured party" includes a receiver.

(2) No proceedings to enforce security pursuant to this Part shall be taken by a secured party or a person claiming through the secured party but within twenty years next after the right to take the proceedings first accrued to the secured party, or if the right did not accrue to the secured party, then within twenty years next after the right first accrued to the person claiming through the secured party.

29 Subsection 6(2) of Chapter 33 of the Acts of 2000, the Sydney Steel Corporation Sale Act, is repealed.

30 This Act comes into force on such day as the Governor in Council orders and declares by proclamation.



November 4, 2014

The Honourable Lena Metlege Diab
Minister of Justice, Province of Nova Scotia
1690 Hollis Street, P.O. Box 7
Halifax, NS
B3J 2L6

RE: Bill 64 - Limitation of Actions Act

Dear Minister Diab:

This is a quick follow up to the presentation by the Atlantic Provinces Trial Lawyers Association ("APTLa") at the Law Amendments Committee on November 3, 2014 regarding Bill 64, the ***Limitations of Actions Act***.

We are concerned that that by requiring parties to file actions sooner, the parties – and the Courts – do not get the benefit of increased opportunities for resolution. More cases will enter the judicial system that might otherwise have been resolved through settlement, thereby increasing the work and burden on court administrative staff and the judicial system. In addition, the shortening of limitation periods in matters of Personal Injury will increase pressure on our already overwhelmed medical system. The requirement for medical testing and reports will have to be undertaken within shorter time-frames, creating an acceleration of costs to meet limit deadlines.

To recap our presentation from last evening, APTLa applauds the government's initiative in putting forward the proposed legislation. In particular the move to codify the principle of discoverability which was part of the Common Law of limitation periods and the attempt at consistency is laudable.

At the same time APTLa believes that the legislation can be improved to provide even more certainty, to improve the efficient use of court resources and to continue the centuries old role of the court in ensuring access to justice where justice requires.

APTLa suggests that the court's historic role in relieving claimants from the effect of an arbitrary limitation period be continued so that a judge could allow a claim to proceed for at least two years after a limitation period expires where the prejudice to the defendant is not greater than the potential prejudice to the claimant of having a claim denied in the circumstances of the case.

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APTLA also suggests that the current 3 year limitation period be maintained for motor vehicle accidents.

APTLA also notes that the current draft omits critical parts of the model Uniform Limitations Act on which it is based. In particular it does not include section 2(b) and (c) of the Uniform Act which clarified that appeals and declarations are not covered by the proposed Act. It is likely that the draft Act does not apply to these based on the wording, but it is better to make it clear in order to achieve certainty.

Also section 12 of the Uniform Act requires that limitation periods in other acts DO NOT apply unless they are specifically listed in a schedule to the Limitations Act. This applies to any future limitation periods. This provides convenient "one stop shopping" where a member of the public could easily see what limitation periods exist by reference to the schedule to the Act. This facilitates access to justice by members of the public who more and more are self-represented. The current act (section 6) preserves limitation periods in other legislation. The problem is that one has to read all other legislation to see what limitation periods apply in Nova Scotia. The Working Group which drafted the model Uniform Limitation Act pointed out that this approach caused confusion and accordingly adopted the language in section 12:

The draft Act also adopts the Ontario approach of listing special limitation periods in a schedule to the Act. As discussed at last year's meeting, a schedule of special limitation periods effectively consolidates limitation periods found in other statutes that a legislature wishes to be exceptions to the general limitations regime to allow for greater accessibility and transparency. It also imposes a legislative discipline to ensure that the enactment of any new limitation period is assessed in light of the established general limitations regime.

Finally APTLA is concerned about hidden errors and omissions i.e. those that cannot be detected by a claimant no matter how hard the claimant tried to discover and which the defendant did not actively conceal as it was not under a duty to disclose or was not aware of its own negligence. These claims can arise in any situation where the problems caused by the person at fault were undetectable for more than 15 years. Here we consider the faulty design or construction of buildings and highways or products or leaks of environmental contamination that may be undetected for many years. Why should these wrong doers who are able to minimize the commercial risks by getting insurance, escape any responsibility while the victims who cannot generally get insurance for this kind of injury, go completely uncompensated. For this reason APTLA recommends a general exemption for undetectable safety claims that give rise to personal injury or death.

We enclose a copy of the proposed legislation with our suggested revisions to address the above noted concerns.

Finally we note with alarm also that the Uniform Law Conference of Canada Working Group specifically pointed out in its report that it DID NOT have the time to consider the impact of this legislation on environmental lawsuits. We have not proposed specific language (other than the exemption for undetected safety claims which related to personal injury and death and not diminished property values) to this effect but it must be pointed out that many environmental claims do not come to light for many years, often more than 15 years. There will be home-owners who discover that their properties

are unmarketable because of oil spills and other contaminants spills that occurred more than 15 years ago. Most homeowner insurance policies do not cover the costs of environmental clean-up that can amount to hundreds of thousands of dollars and even millions in some cases.

Yours very truly,



Elizabeth Ann (Libby) Kinghorne, Esq.
for Brian Hebert, Esq. & Barry Mason, Esq.