

November 5, 2014

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

Dear Minister Diab:

RE: Bill 64 - Limitation of Actions Act

Please accept the following submissions on behalf of the Aboriginal Law Section of the Nova Scotia Branch of the Canadian Bar Association on Bill 64, the ***Limitations of Actions Act***.

The Aboriginal Law Section is comprised of lawyers who work in the area of Aboriginal Law within the Province. Many of our members represent First Nations and First Nation members. Collectively we have an in depth knowledge of the legal issues facing Nova Scotia Aboriginal communities and are well positioned to address the potential impacts of the proposed legislation on our Aboriginal clients.

We are concerned about the lack of protection in the proposed legislation for Aboriginal claims based on breach of fiduciary duty and other equitable claims against the Federal and Provincial government. These claims often arise more than 15 years after the events took place. Some date back to the early 1900's. While section 4 of the proposed legislation provides that the Act will not apply to Aboriginal and Treaty Rights that are protected by section 35 of the ***Constitution Act, 1982***, it is not clear that this will be interpreted to extend to claims based on breach of fiduciary duty and other equitable grounds.

We note that the Uniform Working Group which drafted the Uniform Limitations Act warned in its report to the Uniform Law Commission of Canada that it did not have time to consider the application of the uniform legislation on specific types of claims. It named environmental and real property as two examples:

"7. Due to time limitations, the Working Group did not engage in a review of specific claims that should be subject to limitation periods that are different from those set out in the draft Act. However, the Working Group notes that the limitation period in the Uniform International Sales Conventions Act will need to be listed in the schedule if that Act is to be adopted. The Working Group also notes that several jurisdictions in Canada have set out special limitation periods for environmental claims and the Conference is currently considering what applicable limitations rules should apply to claims in the insurance area. Time limitations also prevented the Working Group from fully exploring the applicable limitations rules for real property proceedings and those dealing with prescriptive rights."

We submit that impact of the proposed legislation on Aboriginal claims other than those protected by s. 35 of the ***Constitution Act, 1982*** is one of those areas that requires closer analysis by the Province.

The Ontario limitations legislation specifically exempted equitable claims by Aboriginal peoples against the Crown by adding the following language:

"2.(1) This Act applies to claims pursued in court proceedings other than,

(f) proceedings based on equitable claims by aboriginal peoples against the Crown."

We urge the government to do likewise in Nova Scotia limitations legislation.

We are further concerned that the Province may not have fully consulted with the Mi'kmaq of Nova Scotia on the potential impact of this legislation on them.

Finally, First Nation lands have been historically exposed to environmental contamination as many industries and utilities have been located next to Reserves and traditional Aboriginal territory. We are concerned that the current legislation does not deal adequately with environmental claims and this will disproportionately affect Aboriginal clients. Many environmental claims will only become discoverable more than 15 years after the error or omission that caused them. Those claims will be barred by the current legislation.

We suggest that environmental claims that, by their nature, are undiscoverable by the claimant not be subject to the 15 year ultimate limitation period. The rule of discoverability ought to govern. If defendants want to trigger the start of the limitation periods they can provide the information to potential claimants to make them aware of a claim. The change we recommend would put the onus on defendants to do so if they want an early limitation period. Defendants can insure against such claims whereas claimants cannot. The proposed change would also respect the polluter pays principle.

In summary, we urge the government to ensure that equitable claims by Aboriginal peoples against the Crown be specifically exempted from the operation of the Act and that environmental claims that by their nature cannot be detected by a claimant and only manifest themselves after many years be excluded from the effect of the 15 year ultimate limitation period.

Yours very truly,

BURCHELLS LLP



Jason T. Cooke

JTC/