

Our File: BW-168
July 19, 2011

Mr. James Gregg, Q.C.
Department of Justice (NS)
4th Floor, 5151 Terminal Road
PO Box 7
Halifax NS B3J 2L6
Via email attachment

Dear Mr. Gregg:

RE: Presentation at CBA Luncheon on the Proposed Changes to the Limitation of Actions Act

Thank you so much for presenting at our recent CBA luncheon here at McInnes Cooper. We greatly appreciate the time and effort you put into your presentation. It was very informative.

I understand our Government is working on amending the *Limitation of Actions Act* and hopes to have it tabled for the fall session of legislature.

I further understand the deadline for receiving feedback from our members is July 24, 2011. I thought it would be useful for both of us, if I summarize the key points that were raised by yourself and our members at the recent luncheon. This is not designed to outline every change being proposed, as the discussion paper on the Government website discusses all of the proposed changes in great detail. This correspondence is merely designed to highlight some of the proposed changes to the *Act* along with some of the concerns expressed by our members during our recent luncheon.

Generally, I understand the main purpose of the proposed changes is to modernize our *Limitation of Actions Act* and to make it consistent with similar legislation in other jurisdictions within Canada. The discussion paper notes:

The main change the Department is recommending is to abolish the various categories of claims set out in the current Act, and replace them with a single, basic two year limitation applicable to all claims unless they are otherwise dealt with. This two year limitation period would run from when the *existence of the claim is discovered or discoverable*, instead of when the cause of action arose. This new approach would provide sufficient time for a claimant to determine whether to start an action.

In order to achieve the closure goal of limitations legislation, the new proposed Act would also provide for a *15 year ultimate limitation, running from the date on which the act or omission on which the claim is based occurred*.

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The overall goal of limitation of actions legislation is to balance the interests of claimants to have access to the courts to resolve their legal rights, against the rights of the defendants to have final closure as to potential claims, to avoid the use of stale evidence, and to avoid the need to preserve evidence indefinitely. Another goal is to expect claimants to act diligently and bring their claims in a timely fashion. [Emphasis mine]

Section 1 of the *Act* is the definition section. The definition of “claim” comes from New Brunswick legislation and does not exclude claims in equity.

Section 2 confirms the *Act* applies to a “claim pursued in a court proceeding”, other than a claim dealing with real property or a proceeding for judicial review. The provisions relating to real property within the present *Limitation of Actions Act* are going to be retained and renamed the *Real Property Limitations Act*.

Section 3 of the proposed *Act* is new. This Section confirms the *Limitation of Actions Act* is binding upon the Crown. Previously, the NS Crown was not restricted the limitations within the *Limitation of Actions Act* in bringing an action, but were able to avail themselves of the limitations when they were a defendant. The new *Act* is designed to bind the Crown to the limitation periods like any other claimant.

Section 4 in the new *Act* does not override other legislation. It specifically states that if there is a conflict between the new *Act* and any other *Act*, the other *Act* prevails.

Section 5 of the new *Act* outlines the criteria for the basic and ultimate limitation periods. You advised that all of the criteria noted within section 5 must be met before the limitation period is triggered. Section 5(2) defines when a claim is “discovered”.

One of our members questioned whether the new two year limitation period was supposed to apply to motor vehicle claims. The concern was raised due to the recent auto reform legislation (CAP) which extended the time for bringing claims arising out of auto accidents in exchange for “people giving up some of their rights” to three years. Our members then questioned whether Section 4 would apply to allow the 3 year limitation period for auto accidents, if the 3 year limitation period was referenced in either the *Motor Vehicle Act* or the *Insurance Act*, as Section 4 specifically states if the new *Limitation of Actions Act* conflicts with another *Act*, the other *Act* prevails. My understanding from your presentation was that the 3 year limitation period for auto accidents was one of the main limitation periods that the new *Act* was designed to capture. In fact, you had advised if the other legislation conflicts with the new *Limitation of Actions Act*, that there may then have to be changes to the other legislation to make it consistent with the new *Act*.

There was then a discussion surrounding what constitutes “discoverability”. It was pointed out that the common law definition of “discoverability” deals with “material facts”. It was noted that the common law definition of discoverability appears to be more “open ended” than what appears within Section 5. In relation to CAP claims and the issue of discoverability, it was noted that there was a recent case in Ontario where the plaintiff had originally been captured under the Ontario Auto Regime only to later discover he had a herniated disc. The Courts in Ontario found this “discovery” was enough to take the plaintiff outside the regime. The question was raised as to whether the same would apply here in Nova Scotia. I had understood your

response to be that the CAP legislation was an issue that had not really been factored into consideration in drafting the new *Act*. You welcomed further comments and input on this topic.

Another area of concern dealt with “demand loans” (Section 10). Under the new *Act* the limitation period would start to run once the demand is made. It was pointed out that “demand” and “demand obligation” were not well defined within the *Act*. A concern was raised as to whether creditor groups were consulted in drafting the new *Act*. Under the new *Act*, there would be a two year limitation period, where the law currently is as long as a debtor makes a payment, the limitation period rolls along until the debtor fails to meet their debt obligations.

Some of our members felt the new “discoverability” aspect of the limitation period was a positive change as it relates to Medical Malpractice cases. Previously the limitation period ran from the “date of last treatment”. Under the new *Act*, it will be two years from the date the claimant discovers the connection between their injury and the medical treatment.

Section 15 was another section which generated a great deal of discussion. This is the Section dealing with “incapacity”. The discussion surrounded the portion of 15(1) which states:

- (1) The limitation periods established by this Act do not run while the claimant **is incapable of bringing the claim** because of their physical, mental or psychological condition. [Emphasis mine]

It was noted the burden under Section 15 of establishing a person was incapable of bringing a claim would rest with the claimant. This was felt to be consistent with the “burden of proof” outlined in Section 6. Section 6 notes the burdens as follows:


- (1) The claimant has the burden of proving that a proceeding was started within the limitation established in clause 5(1)(a).
- (2) The defendant has the burden of proving that a proceeding was not started within the limitation established in clause 5(1)(b).

Our members questioned whether it was the intent to narrow the incapacity clause as the previous wording was “reasonably capable” whereas the present wording is “incapable”. Our members felt the new wording was more restrictive than the previous wording. You advised the present wording is identical to that found in the *Uniform Law Act*. A great deal of the discussion surrounded the new wording of Section 15 in the context of sexual assault cases. One of our members gave the example of an abuse victim who was continuing to reside with her abuser, and questioned whether such a claimant would meet the criteria of being “incapable” of bringing a claim. The question was whether an abuse victim who was still capable of working and going out into the community would meet the definition of “incapable” of bringing an action. You welcomed further input on this topic prior to the July 24, 2011 deadline.

Finally, our members raised concerns about getting rid of the safeguard provisions within the current legislation. One of the suggestions raised was to keep the safeguard provision but reduce the time to two years. This would then make the limitation period two years plus a safeguard of an additional two years. It was noted the proposed four years was still well within the ultimate limitation period of 15 years. The level of E&O claims in other jurisdictions without a safeguard provision was also raised as a concern. The potential impact of these increased E&O claims on our members’ insurance rates was also raised as a concern.

I know this does not cover all of the discussions at the luncheon, but I believe it covers the main topics/concerns discussed. I would once again like to thank you for taking the time to present to our members.

Yours very truly,



Debbie L Brown

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cc: Jim Rossiter (via email attachment)