



June 1, 2020

Via email: [David.Lametti@parl.gc.ca](mailto:David.Lametti@parl.gc.ca); [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Honourable David Lametti, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Minister Lametti:

**Re: Draft *Time Limits and Other Periods Act (COVID-19)***

The Canadian Bar Association is pleased to respond to the federal government's effort to provide meaningful relief to parties subject to federal legislation during the COVID-19 pandemic. The draft legislative proposal – *Time Limits and Other Periods Act (COVID-19)* – published on May 19, 2020 outlines potential solutions to important COVID-19 issues, namely the ability of Canadians and Canadian businesses to comply with limitation periods for legal proceedings and key regulatory matters.

The CBA is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The following CBA Sections and Committees (collectively, the CBA Sections) have contributed to the present response:

- **Charities and Not-for-Profit Law Section (Charities)** concerns itself with regulating and administering charities and non-profits;
- **Intellectual Property Section (IP)** examines ownership, licensing and intellectual property transfer and protection rights;
- **Federal Courts Bench and Bar Liaison Committee (FCBBLC)** is a forum for Bench and Bar to discuss mutual issues arising from practice before the Federal Court or Federal Court of Appeal;<sup>1</sup>
- **Competition Law Section** deals with issues related to competition law, policy and foreign investment review at the domestic and international levels.

At the outset, we commend the government's response to the effects of COVID-19 on the continuing applications of statutory filing deadlines and limitation periods which hamper many people from complying with their obligations, and lawyers and law firms from properly carrying out their duties to their clients. In the absence of legislation, the only existing remedy is seeking an extension of time from the Courts or tribunals, which is time consuming and inefficient. Our comments on the proposed legislation are made with a view to making the justice system more accessible and

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<sup>1</sup> Only the CBA members of the FCBBLC contributed to this response.

responsive to the present challenges, including for self-represented litigants who often do not have easy access to the Courts or tribunals.

The CBA Sections appreciate the consultative and flexible approach being used and take the opportunity to raise concerns and offer suggestions below. While the short consultation period does not permit a more detailed analysis of the draft legislation on all areas of law, we would welcome an opportunity to comment at greater length on any potential regulations.

### **Ambit of the legislation**

The vague nature of a broad, general statutory extension scheme runs the risk of creating more uncertainty for litigants. Without clarity, litigants before Courts and tribunals may not know which steps to take as parties. The legislation should clarify with specific language whether s. 6 is intended to apply to all regulations. Alternatively, it could list the federal acts and regulations to which s. 6 applies and recirculate the draft legislation for public review and comment. Unintentionally omitted acts or regulations could then be identified and considered for addition.

It seems that s. 6 will have general application, while s. 7 is *ad hoc* but capable of generating extensions of general application. The government should consider making suspensions or extensions permissive on a case-by-case basis, rather than mandatory in order to prevent unforeseen hardship or confusion in cases where extensions are not required. The two options would be (1) that the suspensions or extensions have general application with parties being able to opt out on a case-by-case basis, or (2) that the legislation make available suspensions or extensions to parties that need and apply for them on a case-by-case basis.

For example, will the order granting power under section 7 permit the Minister responsible to make blanket suspensions or extensions for all corporations subject to the *Canada Not-for-profit Corporations Act*, in addition to permitting them for an organization on a case-by-case basis?

Will the *Time Limits Act* supersede, or simply add to, other initiatives? What is the interplay between the *Time Limits Act* and other acts and regulations, for which suspensions and extensions already exist? Legislation invoking emergency measures such as the *Federal Courts Act* and *Supreme Court Act*, or as the Canadian Intellectual Property Office has applied for Canada's intellectual property statutes consistent with existing legislation, provide deadlines and remain in place. The calculation of time in the suspension period proposed by the *Time Limits Act* is already suspended in those examples. We suggest that the government specifically identify whether the intent of the *Time Limits Act* is to supersede all other initiatives, or, if not, to identify how they will interact.

One approach is that of the Province of Ontario, ordering the suspension of any statute, regulation, rule or bylaw establishing any limitation period or procedural deadline: see *Emergency Management and Civil Protection Act*.<sup>2</sup>

### **Timelines**

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<sup>2</sup> ORDER UNDER SUBSECTION 7.1 (2) of the Act - LIMITATION

1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

Period of time, steps in a proceeding

2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

We question the effect and burden of all deadlines coming due on September 14, 2020.

The CBA IP Section suggests adopting a mechanism where time ceases to be calculated in the suspension period, as it is for certain time periods under the Federal Courts Rules. Assuming that section 6 applies generally to federal regulations, some specific regulations in the IP context pose unique concerns. The timing of the limits also poses unique issues. The government should specify what regulations and what time limits will be extended by amending the schedule to s. 7 with a complete list of relevant suspensions or extensions, particularly to those relating to intellectual property and proceedings in the Federal Court and Federal Court of Appeal.

For its part, the CBA Competition Law Section suggests minimizing the length of any suspensions or extensions. To the extent the Minister is given broad discretion to extend or suspend time periods, those should: (a) be of general application (not case-specific); (b) be as short as possible; (c) not apply to the initial 45-day period that the Minister has to screen investments for potential review; and (d) not apply retroactively. It argues regulatory certainty is important for all stakeholders and makes specific proposals respecting investments in their submission. In their view, no change should be made to the initial 45-day period that allows the Minister to screen investments for potential review. The government has repeatedly urged investors to file notifications early – to give it early warning of potentially problematic investments and to give investors and Canadian businesses increased regulatory certainty.

### **Retroactivity**

According to the CBA Competition Law Section, retroactive application of an extension or suspension to as early as March 13, 2020 would be inappropriate as it would damage Canada's reputation as a predictable, rule of law jurisdiction in which to invest. It would also introduce significant uncertainty for recently consummated transactions, including those that had been intentionally structured to abide by the policy recommendation to pre-notify to ensure there will be no post-closing review. The potential retroactive application of any extension or suspension of current time periods would significantly detract from the objectives of certainty and transparency underpinning the government's guidance and advice.

The CBA IP Law Section notes that retroactivity is only specified through ss. 7(4) to apply to s. 7 extensions. It questions whether retroactivity is contemplated for section 6 timelines. It suggests considering that question and expressly stating in the legislation if retroactivity is contemplated for section 6 timelines.

### **Whether existing powers suffice**

Lastly, the CBA Competition Law Section argues that the COVID-19 emergency does not require granting the government additional time to carry out national security reviews under the *Investment Canada Act (ICA)*. The Minister already has a significant period to carry out these reviews, both in the aggregate and at each stage of the review process, and flexibility to adjust timelines in response to delays that may be caused by COVID-19. Accordingly, it urges the government to reconsider if the amendments are necessary as they pertain to the ICA. Alternatively, if the legislation is passed, they ask to limit the scope of any extensions or suspensions.

The *ICA* currently gives the government extremely broad review powers – including an initial 45-day period to screen potential investments for national security concerns. That period can be extended by the Minister if additional time is required to determine if a formal national security review should be initiated. In total, the government has 200 days to conduct reviews. In the CBA Competition Law Section's view, these time periods are more than adequate to carry out reviews,

even during the COVID-19 pandemic. If the government has difficulty meeting its statutory commitments, it should ensure that relevant agencies are adequately funded and not burden investors or Canadian businesses with the uncertainty associated with extended review periods.

**Conclusion**

We thank you for the opportunity to address these important matters and we reiterate our willingness to assist going forward.

*(original letter signed by Julie Terrien for Erin Best, Theresa Man, Huy Do and Kamleh Nicola)*

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