



**THE ONTARIO BAR ASSOCIATION**

SUBMISSION ON BILL 14

*ACCESS TO JUSTICE ACT, 2005*

TO THE

STANDING COMMITTEE ON JUSTICE POLICY

LEGISLATIVE ASSEMBLY OF ONTARIO

September 13, 2006

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When Bill 14, “Access to Justice Act, 2005” was introduced in October 2005, the Ontario Bar Association (OBA) welcomed the initiative by Attorney General Michael Bryant and undertook a detailed analysis of the Bill in consultation with its 35 practice-based Sections.

While generally supportive of the initiative, the OBA believes that improvements must be made to this legislation. There are four submissions from the OBA enclosed. Each submission provides expert legal analysis and advice on specific ways this legislation could be improved.

The OBA’s Criminal Justice Section has provided a thorough analysis of both Schedules “B” and “E” of the Bill in its enclosed submission. The submission by the OBA’s Paralegals Task Force, which brings together expertise from a significant number of OBA Sections, outlines three specific ways the government can improve Schedule “C” of the Bill. In addition, the OBA’s Business Law Section has reviewed and prepared advice on Schedule “D” of this Bill.

The OBA’s recommendations are as follows:

- Schedule “B”
  - o All future Justices of the Peace should be holders of a Canadian law degrees and have previous legal experience.
  
- Schedule “C”
  - o Those licensed to provide legal services should be called “paralegals” or “paralegal agents”. Lawyers should not be described as “licensees”.

- A definition of the "practice of law" should be contained within the Bill so that it is clear what lawyers are entitled to do.
  - The Bill should explicitly state that the Law Society can exempt on a class-wide basis.
- Schedule "D"
- The right of anyone to agree to suspend or extend limitation periods in relation to known claims should be moved to Section 11.
  - the requirement in Section 11 for independent third party involvement in tolling agreements can be retained to deem limitation periods suspended or extended where the parties have not expressly so provided in their agreement.
  - Section 22 should be reworded to permit, as a general right, the ability to vary or exclude the limitation periods under the Act by agreement;
  - No exception should be made for consumers in Section 22. If that is not possible, then parties to consumer transactions should be prevented from extending limitation periods as against the consumer.
  - With respect to the question of whether parties involved in non-consumer contracts ought to be able to agree to extend the 15 year ultimate limitation period, the Government must decide between the competing values from a policy perspective.
- Schedule "E"
- Any future amendments that will allow witnesses to be heard by various electronic means such as video conference, audio conference, telephone conference, must allow the defendant to challenge the evidence of these witness(s).

The OBA is pleased that the Ontario Government has made improving access to justice and enhancing protection of the public within the legal system a priority.

We believe that the amendments outlined in these submissions, if adopted, will result in a regulatory scheme that is more transparent and that will greater ensure the protection of the public in its access to legal services.

## ***About the Ontario Bar Association (OBA)***

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Established in 1907, the OBA (formerly the Canadian Bar Association - Ontario) is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents 16,000 lawyers, justices, law professors, and law students.

The OBA is a member-driven association. As 'the voice of the legal profession', the OBA is the largest legal association in Ontario, representing lawyers through its 35 Sections whose membership is based on areas of expertise. The Sections infrastructure at the OBA furthers the educational, advocacy and professional needs of lawyers. No other legal organization in Canada has the scope or depth of expertise in influencing legislative reform and contributing to legal education.

The OBA is governed by an elected Council (221 members) and Executive (20 members). Both Council and Executive represent lawyers from across the province and from all practice areas.

The OBA Council meets quarterly and the OBA Executive meets monthly to discuss issues and initiatives that reflect the interests of Ontario lawyers and the justice system.

Listed below are the members of the OBA Executive for 2006-2007:

President	James Morton (Steinberg Morton Frymer)
Past President	Heather McGee (McGee & Fryer)
Vice President	Gregory Goulin (Goulin & Patrick)
Treasurer	Orlando Da Silva
Secretary	Jacqueline Armstrong Gates
Chair, Professional Development	Jamie Trimble

**AMENDMENTS TO THE JUSTICES OF THE PEACE ACT AND  
THE PUBLIC AUTHORITIES PROTECTION ACT**

The Criminal Justice Section of the OBA brought forward concerns pertaining to qualifications of Justices of the Peace presiding in criminal courts. The work of Justices of the Peace, such as conducting judicial interim release hearings, the laying of criminal information, endorsing search warrants and presiding over criminal courts, directly impact on the liberty and personal security of the citizens of Ontario.

The Criminal Justice Section recommends that all future Justices of the Peace be holders of a Canadian law degrees and have previous legal experience. Justices of the peace preside over bail courts, which is the first stage in the criminal trial process. Due to delays in the court, accused persons can be under strict bail conditions for over a year while awaiting a trial date. In domestic violence cases, stringent bail conditions are usually paired with separation of spouses or parents and children. Because of the long wait for trials, even those with legal defence to their charges, plead guilty in order to shorten the time of family separation and have some certainty and finality to their matter. In tax evasion cases, Justices of the Peace render decisions, which may call for fines in the tens of thousands of dollars. A transparent appointment and complainant process is necessary for stakeholder assurance and consultation.

Currently, there is a backlog in the judicial interim release courts in the Toronto, Peel, Durham, and Halton regional Courts of Justice. It is the OBA’s hope that the priority of the Ministry of the Attorney General will be to ensure that qualified Justices of the Peace are hired and per diem Justices are dispatched to address the back log in these courts.

**AMENDMENTS TO THE LAW SOCIETY ACT AND RELATED  
AMENDMENTS TO OTHER ACTS**

***Background***

The OBA has had a long involvement in the study of and recommendations pertaining to paralegal regulation in Ontario. Since the first paralegal regulation initiative by way of Private Members' Bill 42 in 1986, the Ontario Bar Association has championed the need for a regulatory scheme in Ontario. In 1998, the OBA took the formal step of establishing a Paralegals Task Force (the "Task Force") to seek input and offer recommendations on the need for paralegal regulation in Ontario. The OBA has consistently supported the need for regulation, and endorses the Law Society of Upper Canada acting as the regulator.

The Task Force, under the direction of Steven Rosenhek (Chair) and Virginia MacLean, QC (Vice-Chair), has consulted widely with OBA's membership, other legal organizations in Ontario, and the public, for the purpose of making these submissions. OBA's position on Schedule "C" was communicated by its President, Heather McGee, to the Honourable Michael Bryant by letter dated February 10, 2006. In addition, Ms. McGee wrote to all Ontario MPPs, all Benchers of the Law Society of Upper Canada, and other legal organizations, in the spring of 2006, outlining OBA's concerns.

The position outlined in this submission is advanced in the public interest, with the goal of ensuring public protection and minimizing public confusion in the selection of providers of legal services.

### ***History of OBA's Involvement with Paralegal Regulation***

In September 1986, Bill 42, a Private Member's Bill entitled *An Act to Regulate the Activities of Paralegal Agents* was introduced in the Legislature. Bill 42 defined "paralegal agent" as "a person other than a member or a student member of the Law Society of Upper Canada or a person who acts under the supervision of a lawyer, who acts or holds himself or herself out as acting, on behalf of another person for a fee, in a proceeding in a Court of law or before a Tribunal or other adjudicator in which the person's rights or liabilities are determined".

The Canadian Bar Association-Ontario (CBAO), as OBA was then known, formed a committee to prepare a response to Bill 42. The committee was chaired by the Associate Dean of Osgoode Hall Law School and was composed of lawyers across Ontario, law clerks, a community legal worker and a member of the Law Society of Upper Canada's Practice Advisory Committee. In its May 1987 submission during the Standing Committee on the Administration of Justice hearings on Bill 42, CBAO's position was that it was in the public interest that those performing legal work do so according to defined standards of competence. CBAO argued that those standards of competence were best implemented through the creation of a licensing scheme for a designated group of paralegal agents. Such paralegal agents would thereby be permitted to perform specific legal services independent of lawyer supervision.

Bill 42 died on the Order Paper with the calling of the Ontario general election in 1987. In July 1988, Attorney General Ian Scott established the Task Force on Paralegals chaired by Professor Ianni of the University of Windsor Law School. The Ianni Task Force reported to the Attorney General in September 1990.

Prior to responding to the Ianni Task Force report, CBAO set up an interdisciplinary Paralegals Committee composed of lawyers, non-lawyers, law clerks and teachers, all of whom had experience in dealing with paralegals. The CBAO Paralegals Committee approached the issue of paralegal regulation from the perspective of consumers of legal services and focused on the safeguards required for those consumers. In its report, the CBAO Paralegals Committee stated:

“Accordingly, rather than attempt to identify specific tasks that paralegals should or should not undertake, the CBAO Report chose to identify the risks that the Ianni Task Force and subsequently the Legislature of Ontario must consider to make certain that the people of Ontario are assured that legal services are delivered.

The CBAO’s paramount objective throughout the process has been to assist in the design of a new regulation framework that will more effectively advance and protect the public interest.

The cornerstone of consumer protection in professional regulation is allowing the public to identify different legal service providers. The consumer must be able to make an informed choice and to distinguish regulated professionals from other legal service providers and they should be able to distinguish among regulated legal professionals.

Ontario must be hard-headed when dealing with the legal rights of its citizens and the protection of those rights.”

In 1998, CBAO’s Council established a Paralegals Task Force to report back to Council on the impact of unregulated and unsupervised paralegals, and to make recommendations for their regulation.

In December 1998, CBAO retained Environics Research Group to conduct a survey of 1400 Ontario residents on the public’s perception of paralegals and its ability to distinguish between paralegals and lawyers. The survey found that:

- Ontarians were more familiar with lawyers than paralegals, but did not fully appreciate the differences between paralegals and lawyers.

- Lawyers were perceived as being able to offer a broader range of higher quality services. Paralegals were perceived as adequate for basic legal services, such as traffic offences, wills and real estate transactions
- Lawyers were seen as better educated but more expensive than paralegals
- The public did not appreciate that paralegals were less regulated than lawyers
- There was a widespread support for legislation to govern paralegals (75% of those surveyed)

In 2000, the Attorney General sought input on the role of paralegals in Ontario's justice system and appointed the Honourable Peter Cory to hear from interested stakeholders. The CBAO participated in those hearings and attended everyday and made submissions through Section Chairs. The Law Society also participated and submitted the final report of the Paralegal Taskforce approved by Convocation on March 23, 2000.

Mr. Cory issued his report on May 31, 2000 to the Attorney General entitled "A Framework for Regulating Paralegal Practice in Ontario". The recommendations contained in that report included the establishment of a system for the regulation and licensing of independent paralegals in permissible areas of practice. The report identified the permissible practice areas.

The Law Society prepared a Consultation Paper on the Regulation of Paralegals in May 2004 and subsequently met with legal organizations. The OBA became part of a Legal Organizations Group, co-ordinated by the Law Society, which considered all aspects of the regulation of paralegals.

The OBA was initially opposed to the Law Society regulating paralegals, agreeing with the recommendation of Mr. Cory that paralegals be self-regulated.

However, the OBA ultimately agreed that the Law Society was the most appropriate body to be the regulator since it was unrealistic to expect that paralegals could regulate themselves in the near future. Accordingly, on July 18, 2004, OBA Council passed a resolution ratifying the Consultation Paper. The Council resolution contained the following four provisions:

1. there be enacted an appropriate definition of the practice of law consistent with the paper's recommendation regarding the permitted activities of paralegals, so as to ensure that there can be an effective regulation enforcement of the scope of paralegal activity;
2. the Government of Ontario commit itself to providing the necessary funding to ensure the effective operation and enforcement of regulatory framework, until such time as the effective funding mechanism is available;
3. the Ministry of Training, Colleges and Universities commit itself to developing, in consultation with the profession an appropriate "mentoring and practical work experience program" for paralegal students; and
4. the recommendation concerning paralegals working in Small Claims Court be amended as follows:

"Small Claims Court and an accredited paralegal would be authorized, subject to existing legislation to handle all matters in Small Claims Court and be recognized by the Court for the purpose of costs"

### ***OBA's Position***

When Bill 14 was introduced in October 2005, the OBA stated publicly that it supported the legislative initiative, but would conduct its detailed analysis of the legislation.

As a result of its broad consultations with its members, other legal organizations and the Law Society, the OBA has identified three significant areas of concern, and recommends that the following three changes be made to the Bill:

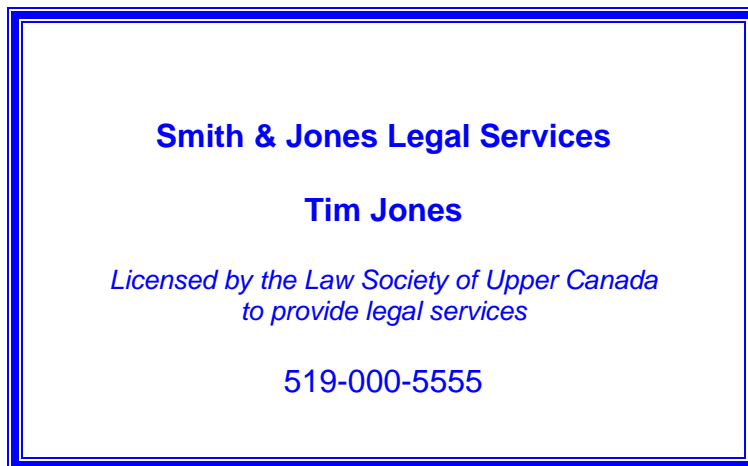
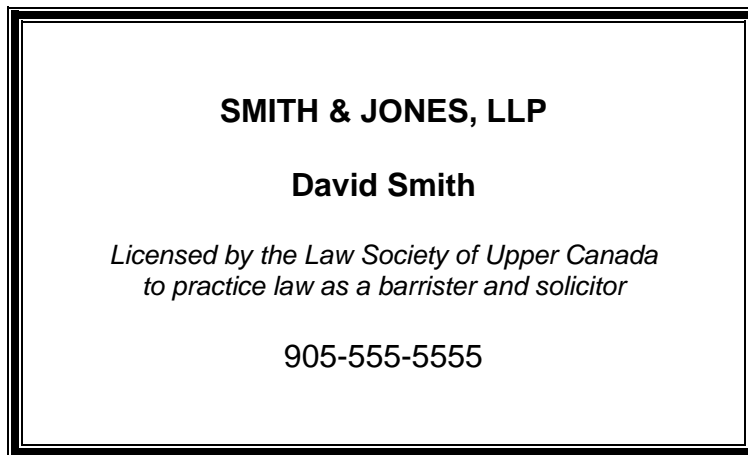
- 1. Those licensed to provide legal services should be called "paralegals" or "paralegal agents". Lawyers should not be**

**described as “licensees”. This will help ensure that the public knows whether it is hiring a lawyer or a paralegal.**

- 2. OBA strongly recommends that the Bill should contain a definition of the "practice of law". This definition would set out what lawyers are entitled to do. The services that paralegals can perform will be determined by the Law Society and outlined in the regulatory by-laws. The public must be able to draw a clear distinction between the two.**
  
- 3. We recommend that the Bill state explicitly that the Law Society can exempt on a class-wide basis (e.g. mediators, trustees in bankruptcy, union representatives, etc.) rather than on an individual, case by case, basis.**

***Two Classes of Licensee will Confuse the Public***

The two hypothetical business cards below demonstrate the confusion that will arise among consumers of legal services as a result of the two classes of licenses proposed in Bill 14:



**AMENDMENTS TO THE LIMITATIONS ACT, 2002**

The current proposed wording in Bill 14 would modify s. 22 of the Act so it would read as follows:

22. (1) A limitation period under this Act applies despite any agreement to vary or exclude it.

**Exception**

(2) Subsection (1) does not affect an agreement made before January 1, 2004.

**Same**

(3) Subsection (1) does not affect,  
(a) an agreement made on or after the effective date by parties who are all acting for business purposes; or  
(b) an agreement made on or after the effective date to suspend or extend a limitation period.

**Definition**

(4) In subsection (3),  
“effective date” means the day the *Access to Justice Act, 2005* receives Royal Assent.

Under these amendments (particularly s. 22(3)(b)), anyone can agree to suspend or extend any limitation period in the Act, whether a claim has arisen or not. Providing they are all acting for business purposes, parties are also permitted to agree to “vary or exclude” (*i.e.* shorten as well as lengthen) any limitation period under the Act. Since s. 15 of the Act, which establishes the 15-year ultimate limitation period, is not exempted from these provisions, parties can agree by contract to indefinitely suspend or extend the ultimate limitation period.

In our view, this issue divides into the following series of sub-issues:

1. What should be the rule where a dispute has already arisen?
2. Should the general rule regarding suspension or extension be limited to where a dispute has already arisen?

3. Should consumers be allowed to “vary or exclude” limitation periods, as is proposed where all parties are acting for “business purposes”?
4. Is differentiating between parties on the basis of “business purposes” practicable, or is there a clearer way of making the distinction?
5. Should parties be able to lengthen the ultimate limitation period?

**Q1: What should be the rule where a dispute has already arisen?**

Once a claim has arisen, the parties may litigate or settle the claim without litigation. In principle, therefore, parties ought be able to agree on anything short of a full settlement without litigation. Before the Act came into force, parties were free to enter into “tolling agreements”, which have the effect of suspending the running of a limitation period by agreement.

Under the Act, parties are still free to enter into tolling agreements that suspend or extend the operation of ss. 4 and 15, except that the validity of the tolling agreement hinges on whether an independent third party (*i.e.* a mediator or arbitrator) has agreed to resolve the claim or assist the parties in resolving it. At best, an independent third party becomes a formalistic requirement that entails expense for the parties. At worst, the requirement for an independent third party forces parties to start proceedings when all parties, and the justice system, would be better off having the parties seek an out of court settlement. It should be noted that creditors (who account for much of the litigation volume in our courts) are generally loathe to provide for mediation in forbearance agreements, forcing them to start proceedings.<sup>1</sup>

Proposed s. 22(3)(b) would allow parties to enter into agreements to “suspend or extend” any limitation period. At a minimum, this allows parties to “toll” known claims without the necessity of having to enter into an agreement to resolve the claim through a third party.

This new provision renders existing s.11 arguably redundant because the new provision obviates the need for an agreement specifying for independent third party resolution in order to suspend or extend a limitation period. On the other hand, the existing s. 11(1) may have a residual function where parties to an agreement for mediation or arbitration do not specifically avert to the suspension

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<sup>1</sup> The main reason for this is that creditors will not want to empower the debtor, particularly a debtor in default. Nor will the creditor want to take the risk of having a debtor-friendly mediator.

or extension of the limitation period, but the period should nevertheless be deemed to be suspended or extended.

Section 11 should therefore be amended to add the broader wording of s. 22(3)(b) which would give parties the ability make an agreement to suspend or extend the ss. 4 and 15 limitation periods. This may mean the formal requirement of having an independent third party for a tolling agreement could technically be deleted (and would also obviate the need for proposed s. 11(2)) but retaining those provisions for deeming purposes may be preferable.

In this way, s. 11 would address known claims and tolling agreements either expressly or by the deeming provision, while s. 22 would not be given a duplicative or overlapping role.

**Q2: Should the general rule regarding suspension or extension be limited to where a dispute has already arisen?**

The function of a limitation period is provide a time-based defence to the defendant. A limitation period does not confer rights upon a plaintiff. The plaintiff's cause of action must be found outside the Act.

Thus, as a principle of statutory interpretation, the concept of “contracting out” of a limitation period should mean purporting to extend the running of a limitation period by postponing the commencement of the limitation period, renewing the limitation period, suspending the running of the limitation period or extending the expiry date itself. All of these methods have the effect of eroding a defence that would have existed in the absence of the contractual provision.

Again, with respect to *known* claims, we agree that the parties should be free to enter into tolling agreements.

With respect to inchoate or unknown claims, there may be a theoretical basis for concern with respect to protecting consumers — leaving aside, for the moment, the definitional problem of what a “consumer” is for these purposes. As a practical matter, however, marketplace experience to date does not suggest that commercial parties in fact seek to vary limitation periods *per se* in contracts with consumers. Thus, the carve-out for consumer or non-business transactions appears to add complexity to the law without remedying any known abuse.

One should not however, conclude that consumers would necessarily be left without recourse if the Act left open the theoretical possibility of an extension of limitation periods beyond those prescribed in the Act and the consumer inadvertently or advertently accepted those terms. At common law, Ontario courts will relieve unfair terms under the unconscionability doctrine, particularly where there is an inequality of bargaining power as characterizes typical

consumer transactions.<sup>2</sup> Thus, even in the absence of specific legislation, a consumer would enjoy some measure of protection against the imposition of contract provisions that unconscionably extend a limitation period that the consumer would otherwise enjoy. Arguably, courts will look to the basic and ultimate limitation periods in measuring a contractual term challenged as unconscionable.

Nevertheless, if the Act must protect consumers, then it should be re-orientated. The Act ought to prevent counterparties from obtaining from consumers extensions of limitation periods for yet inchoate or unknown claims. In the absence of a tolling agreement, consumers would then enjoy the full protection of the Act and the repose that the Act is intended to provide.

In our view, the *general* right of any party (whether a consumer or not) to agree to suspend or extend a limitation period should most certainly apply where a claim has been “discovered”, *i.e.* a dispute has arisen or a claim has been made. The modified version of the current proposed s.22(3)(b) should be moved to s. 11 and should specifically refer to the right to suspend or extend both s. 4 and s. 15 — as s. 11 currently does.

With this modification, any party facing a discovered claim would have the freedom to “toll” the relevant limitation period for such time as the agreement provides.

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<sup>2</sup> See, for example, *Tilden Rent-a-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.) and, more recently, *Solway v. v. Davis Moving and Storage Inc.* (2002), 222 D.L.R. (4<sup>th</sup>) 251 (Ont. C.A.), leave to appeal to S.C.C. refused 224 D.L.R. (4<sup>th</sup>) vii.

**Q3 Should consumers be allowed to vary or exclude limitation periods, as is proposed where all parties are acting for “business purposes”?**

As presently drafted, s. 22(3)(a) would allow all parties acting for business purposes to effectively shorten limitation periods in addition to lengthening them.

By contrast, s. 22(3)(b) would enable consumers only to validly suspend or extend limitation periods by contract. There would be no ability for the parties to a consumer transaction to shorten applicable limitation periods.

As stated in response to Q2 above, it is the function of a limitation period to provide a time-based defence against a claim. It is arguably not the proper function of the limitation period to, for example, regulate the duration of warranties or other contractual rights or remedies. The duration of consumer warranties or other consumer contractual remedies falls into the domain of consumer law, not a limitations statute.

Indeed, both under the Act and under the proposed Bill 14 amendments to the Act, it has been argued that there is a distinction between purporting to shorten limitation periods and setting contractual deadlines for notice of a claim. We accept that there is such a legal distinction and expect that, in time, courts will recognize it.

However, in the meantime, the perpetuation of the distinction between contractual notice deadlines and statutory limitation periods raises three important issues.

First, assuming that there is such a distinction, it very much becomes the triumph of form over substance. It may be legally possible to shorten the period within which a valid claim can be made but it must be done as part of the duration of the warranty or other contractual right, not as an attempt to shorten the statutory limitation period *per se*.

In *Vine Hotels Inc. v. Frumcor Investments Limited*<sup>3</sup>, the Divisional Court stated in *obiter* that, had the Act applied<sup>4</sup>, it would have precluded the parties from contracting out of the application of the discoverability rule as well as the actual limitation period. This suggests that the distinction turns on the language chosen for the contract, which arguably undermines whatever policy prompted the no-contracting out rule and brings the law itself into disrepute.

Since 1994, Quebec has prohibited contracting out of prescriptive periods (the *Quebec Civil Code*<sup>5</sup> equivalent of a limitation period), and this has led to cases such as *Bétons L. Barolet Lac Mégantic Inc. v. Monsieur Fissure Inc.*,<sup>6</sup> striking down as invalid clauses purporting to shorten the 3-year prescription period in the CCQ.

Second, as already alluded to, it is difficult to see how much the restriction against contracting out really achieves. The legal effect on the parties is the same regardless of whether the claim is made after a contractual notice deadline has passed or an action is started after a statutory limitations period has expired. A plaintiff's claim is just as dead whether it is because of the expiry of a contractual notice deadline as a statutory limitation period. Does the plaintiff care why his claim is no longer enforceable?

For example, under an account verification agreement, a bank customer has, say, 30 days to notify the bank of a claim. If she fails to do so, her claim is barred. The basic 2-year limitation period never applies to her claim because there is no contractual right to enforce. If, however, she notifies the bank within 30 days of an improper debit on the statement, she has 2 years from discovering the claim to commence an action in respect of that debit item. Similarly, a consumer with a toaster warranty of 6 months has 6 months to make a claim under the warranty. If she fails to do so, her claim is barred, and the limitation

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<sup>3</sup> (2004), 73 O.R. (3d) 374.

<sup>4</sup> The litigation commenced before January 1, 2004 when the Act came into force. Hence, the Court's comments on the Act were *obiter dicta*.

<sup>5</sup> S.Q. 1991, c. 64.

<sup>6</sup> [2001] R.L.227 (C.Q.) ("CCQ").

period within which to enforce the contractual right never becomes operative. If, however, she complies with the contractual notice provision, then she has 2 years from discovery of the product defect to bring proceedings.

However, this renders the no-contracting out rule in s. 22(1) almost meaningless. The substantive rights purported to be conferred by s. 22 turn on the semantics of legal drafting. The bank or manufacturer, in these examples, must not make the same mistake as the landlord in *Vine Hotels* or the bonding company in *Bétons* appear to have made. Parties must exercise care to not describe the period within which a claim must be brought as a limitation period, even though its expiration has the same legal effect as the expiry of a limitation period. Indeed, as stated above in connection with consumer transactions, it is rare to see contracts purport to vary statutory limitation periods. Given s. 22 of the Act, it will be rarer still to see it. Indeed, s. 22 merely constitutes a trap for the unwary client or his lawyer.

Third, the prohibition against shortening limitation periods only confuses the law and the parties that must deal with it. As already seen in cases such as *Vine Hotels* and Quebec decisions such as *Bétons*, courts will be faced with plausible arguments that contract provisions are seeking to do indirectly what the Act says cannot be done directly. As one learned author makes clear, the *Quebec Civil Code* has been in force for 12 years, and yet there are still significant unanswered questions concerning the interplay between prescription periods and advance variation by contract.<sup>7</sup>

This discussion suggests that the simplest rule would be to allow all parties (including consumers) to vary or exclude limitation periods. There does not seem to be a valid reason to differentiate between consumers and non-consumers – not because it is not theoretically possible to abuse consumers in this way but because there is no evidence of it. Nor did the predecessor

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<sup>7</sup> Martin Boodman “Civil Law Perspective on Limitations” in J. Ziegel *et al.* (Eds.), *The New Ontario Limitations Regime: Exposition and Analysis* (Ontario Bar Association: Toronto, 2005), p. 191 at 196-9.

*Limitations Act*<sup>8</sup> make that distinction. Nor, to our knowledge, is the distinction made in any other Canadian jurisdiction.

If, contrary to this argument, the Legislature is concerned that vulnerable consumers may suddenly be asked to waive statutory defences otherwise available to them (a concern not evident in Bill 14), then the Act should prohibit parties from extracting from consumers a provision that would extend a limitation period.

We, therefore, propose that consumers have the same theoretical freedom to decide on the length of a limitation period and that special statutory protection is not needed. If special protection is needed for consumers, it should only apply to extending limitation periods in advance, not to extending or suspending known claims.

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<sup>8</sup> Now renamed as the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, as am.

***Q4: Is differentiating between parties on the basis of “business purposes” practicable, or is there a clearer way of making the distinction?***

Another problem with the proposed amendment to s. 22(3) is the bifurcation between situations where the parties are “all acting for business purposes” and situations where not all the parties are acting for “business purposes”. This language creates two areas of uncertainty.

First, Bill 14 makes no effort to define when parties are or are not “acting for business purposes”. Instead, it relies on the courts to develop some jurisprudence. Troublesome areas could include:

- Mixed business and personal use situations:
  - A person may purchase or lease a vehicle for either or both purposes.
  - A person having an account with a bank may fall into either or both categories. The bank may be in no position to differentiate whether a customer is maintaining an account for personal or business purposes. Even the signing of an account operating agreement may not be conclusive.
  - Accounts with securities intermediaries may present similar problems. Is an investment through a securities intermediary always for “business purposes” or can it be for both business and personal purposes?
- The activities of municipalities and non-profit corporations. Is it appropriate to define these as being carried on for “business purposes”?

The second area of uncertainty is how the courts are to apply the requirement that parties “are all acting for business purposes”. If, for example, a manufacturer makes a consumer durable such as a toaster which it sells to a

retailer who sells to a consumer, are all parties necessarily acting for business purposes or is the consumer-retailer transaction treated as separate from the previous transactions? The Bill is not clear where the lines of demarcation are to be drawn.

Doubtless, in time and after incurring great private and public expense, the courts will have many opportunities to rule on these matters. In the meantime, uncertainty is created in the law.

As an alternative to bifurcation between business and non-business purposes, the Act could instead choose a simpler, bright-line of demarcation between individuals or natural persons and entities (including corporations, partnerships and trusts) and rely on specific, more precise, existing legislation to further define the subset of individuals that fall into the category of “consumer” requiring the protection from potentially abusive contracts.

At a minimum, the rule permitting “contracting out” should be turned on its head by starting with the proposition that *any* party may “contract out” of the limitation periods under the Act. An exception could then be created *for consumers in transactions to which the Consumer Protection Act, 2002 (Ontario)*<sup>9</sup> *applies*. This would eliminate the concern over the distinction between business and non-business purposes and provide a pre-defined set of transactions that have been recognized as warranting protection for consumers. It would also preserve a measure of legislative consistency between the regime governing consumer transactions generally and the special rule applicable to consumers asked, to their peril, to contract out of limitation periods.

Under this model, the general rule would be stated in s. 22 that any party may vary or exclude a limitation period under the Act, but then it would be qualified by limiting the contractual freedom of parties to impose extensions on consumers in transactions covered by the CPA.

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<sup>9</sup> S.O. 2002, c. 30, as am. S.O 2004, c. 19, s. 7 (“CPA”).

**Q5: Should parties be able to lengthen the ultimate limitation period?**

The issue of whether to allow non-consumers to contract out of the ultimate limitation period involves an apparent clash between two competing sets of values.

On the one hand, economic efficiency dictates that parties be free to agree on their respective contractual rights and obligations, including contractual provisions that allocate risk by excluding recovery under a head of damages (e.g. indirect, consequential or punitive damages), by capping the amount of damages or by imposing contractual claims bar dates.<sup>10</sup>

Legislative interference with freedom of contract prevents parties from allocating risk to the least-cost risk-bearer and, therefore, undermines economic efficiency. It also leads parties to subvert the intent of the legislation, such as by seeking to limit the amount of damages to a nominal amount after the expiry of a warranty period, by choosing a more hospitable legal regime for their contract<sup>11</sup> or, as discussed in response to Q3 above, by recasting provisions as a contractual notice deadline (rather than an attempted variation of a statutory limitation period). Arguments for commercial efficiency and its corollary, freedom of contract, are strongest where the parties are of comparable bargaining strength. Consumers are generally not considered to be of equal bargaining strength and, therefore, are often afforded legal protection not extended to non-consumer parties.

On the other hand, repose from stale claims also has counter-vailing societal value. These values consist of:

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<sup>10</sup> See *Guarantee Company of North America v. Gordon Capital* [1999] 3 S.C.R. 423, per Iacobucci and Basterache JJ.

<sup>11</sup> This technique involves choosing the law of a jurisdiction other than Ontario to govern the contract. Courts generally enforce choice of law clauses provided that the intentions of the parties are *bona fide* and legal and that there is no reason to avoid the choice of law on the grounds of public policy. See *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] 2 D.L.R. 1 (P.C.) and, more recently, *Roy v. North American Leisure Group Inc.* (2004), 73 O.R. (3d) 561 (C.A.).

- the interests of defendants in finality (of not being subject to ancient claims and not having to preserve evidence for an unreasonable time);
- the interests of plaintiffs in having a reasonable time to bring forward otherwise meritorious actions; and
- the goals of the judicial system in ensuring that there is not an undue delay between the time when a cause of action first arises and when an action to enforce a remedy in respect of it is brought.

In both the consumer and non-consumer contexts, the question becomes how are these competing values best reconciled or balanced? If the parties have freely agreed on the applicable limitation period, does this meet the party needs: the interests of the defendants in finality; and the interests of the plaintiff in having a reasonable opportunity to bring a meritorious claim? Or do unalterable periods better respond to the true needs of the parties? If the contractual limitation period meets the needs of the parties, is there an overriding state or community interest in not exposing the judicial system to old claims? Or are the parties sufficiently motivated to preserve reliable evidence to correspond with their privately ordered limitation period?

Other jurisdictions have reached different conclusions on the resolution of these competing principles. The newest limitation statutes of other provinces have allowed the private extension of limitation periods but have taken different views on contracting out of the ultimate limitation period.

Alberta has allowed the extension of limitation periods since its new *Limitations Act*<sup>12</sup> came into force on March 1, 1999. That Act provides for a 2-year discovery period up to a maximum of 10 years for claims. Section 7 provides:

7. Subject to section 9 [which relates to the formal requirements of the agreement], if an agreement expressly provides for the extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

It should be noted that the Alberta statute provides for a shorter “ultimate limitation period” (10 years versus Ontario’s 15 years) and does not have a provision for shortening periods by variation or exclusion.<sup>13</sup>

Like Ontario, Saskatchewan, by contrast, has a 15-year ultimate limitation period established by s. 7 of its new *Limitations Act*<sup>14</sup> which came into effect on May 1, 2005. In terms of extension agreements, the Saskatchewan Act provides:

21.(1) Subject to subsection (2), if an agreement expressly provides for the extension of a limitation period, the limitation period is altered in accordance with the agreement.

(2) Nothing in subsection (1) authorizes an agreement to extend the ultimate limitation period established by section 7.

Extension of a limitation period is therefore allowed, but the ultimate limitation period of 15 years remains intact and not capable of being extended. Saskatchewan does not provide for the “shortening” of limitation periods.

From a business perspective, the flexibility to lengthen or shorten limitation periods by contract, as proposed in s. 22 (3)(a), is very important. That being said, the preservation of the 15-year ultimate limitation period and a prohibition against extending it by contract (except in the case of tolling known claims as discussed above) would present fewer problems than varying the basic 2-year

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<sup>12</sup> Now the *Limitations Act*, R.S.A 2000, c. L-12 (the “Alberta Act”). The Alberta Act served as the model for the Ontario Act.

<sup>13</sup> In the *Justice Statutes Amendment Act*, 2002, S.A. 2002, Alberta initially passed an amendment to the Alberta Act that would have prohibited agreements purporting to shorten limitation periods, but it reversed its proclamation due to concerns expressed as to its effect on commercial transactions.

<sup>14</sup> S.S. 2004, c. L-16.1 (the “Saskatchewan Act”).

limitation period. The majority of business law issues can be expected to fall within and would arise within the 2-year period after discovery.

Nevertheless, commercial parties often want to indefinitely extend the period within which to bring certain claims. Typically, these would include warranties relating to tax claims, title to assets, environmental claims, *etc.* Some of these, such as tax claims, may still have a finite duration tied to the expiry of an applicable tax limitation period. Parties may, however, want others (such as warranties as to title or environmental indemnities) to be perpetual. For example, no ultimate limitation period applies to environmental claims. So, it would be illogical to prevent parties from freely contracting with respect to the allocation of risk for environmental claims. A and B may both be liable for an historical environmental contaminant on a piece of land transferred from A to B. As between the parties, A agrees to indemnify B. B is sued (because, *e.g.*, it is the deep pocket defendant), but, unless the ultimate limitation period can be extended, B may be unable to enforce its indemnity against A.

We certainly do not encourage, or want to see, a return to the bad old days when the duration of a limitation period largely hinged on the legal characterization of the underlying claim. We merely point out some of the issues.

In light of these examples, one cannot say that there would be no impact, particularly in the non-consumer context, if parties were prohibited from extending the 15-year ultimate limitation period—especially given that the ultimate limitation period starts to run from the date that the act or omission took place and not from discovery. The ability to freely allocate certain longer term risks would indeed be constrained.

The question of whether such constraints are outweighed by the societal value of certainty regarding stale claims is a question of policy. At a minimum, to the extent that a prohibition against extending the ultimate limitation period by contract constitutes interference with the policies underlying freedom of contract, the onus arguably rests on those who assert that allowing parties the freedom to

extend the ultimate limitation period will lead to undesirable results to make that case.

## ***Recommendations***

For the reasons given above, we propose the following amendments to Bill 14:

- 1. the right of anyone to agree to suspend or extend limitation periods, including the ultimate limitation period, in relation to known claims should be moved to s. 11;**
- 2. the requirement in s.11 for independent third party involvement in tolling agreements is arguably redundant but can be retained to deem limitation periods suspended or extended where the parties have not expressly so provided in their agreement;**
- 3. s. 22 should be reworded to permit, as a general right, the ability to vary or exclude the limitation periods under the Act by agreement;**
- 4. to avoid unwarranted confusion in the law, no exception should be made for consumers in s. 22. However, if that is not possible, then, as a second choice, parties to consumer transactions should be prevented from extending limitation periods as against the consumer. Consumer transactions would be redefined to be consistent with the CPA. Like everyone else, consumers could validly agree to shorten limitation periods; and**
- 5. with respect to the question of whether parties involved in non-consumer contracts ought to be able to agree to extend the 15 year ultimate limitation period, the Government must decide between the competing values summarized in this submission from a policy perspective.**

**AMENDMENTS TO THE PROVINCIAL OFFENCES ACT**

It is the concern of the Criminal Justice Section of the OBA, that in Schedule "E", Amendments to the *Provincial Offences Act*, that any future amendments that will allow witnesses to be heard by various electronic means such as video conference, audio conference, telephone conference, will allow the defendant to challenge the evidence of the witness(es). Any cost cutting measures imposed, should not impinge upon the defendants' right, to have full answer and defence, including the ability to cross examine, on any and all charges under the *Provincial Offences Act*.