

POSITION PAPER

THE ULTIMATE LIMITATION PERIOD

Architectural Institute of British Columbia,
The Association of Professional Engineers and Geoscientists of British Columbia,
Consulting Engineers of British Columbia,
Institute of Chartered Accountants of British Columbia

POSITION

The 30 year ultimate limitation period (“ULP”) in British Columbia’s *Limitation Act*¹ should be reduced to 10 years.

BACKGROUND

The 30 year ULP was introduced into the *Limitation Act* during British Columbia’s last major revision of the statute in 1975. However, subsequent law reform studies and legislative amendment in other Canadian jurisdictions have signalled it is time for change. British Columbia is now lagging behind Alberta, Ontario, and Saskatchewan, where much shorter ULPs have recently been implemented. Law reform studies dating back to 1990 have recommended reducing the 30 year ULP to 10 years.² More recently, in 2002, the British Columbia Law Institute stated:

*An examination of the Limitation Act indicates that the ULP is in need of modernization as it has become outdated and overly complex, with the result that it no longer provides a fair measure of justice for plaintiffs, defendants or society as a whole.*³

The Architectural Institute of British Columbia (“AIBC”), the Association of Professional Engineers and Geoscientists of British Columbia (“APEGBC”), the Consulting Engineers of British Columbia (“CEBC”) and the Institute of Chartered Accountants of British Columbia (“ICABC”) agree, the time for change is now.

RATIONALE FOR CHANGE

It is recognized that limitation laws must strike a fair balance between a defendant’s ability to fairly defend itself and the extinguishment of legitimate claims due to the passage of time. A 30 year ULP simply does not achieve that balance. Claims advanced against engineers, chartered accountants, and architects, 30 years after their professional services have been provided, create significant difficulties for the courts and unfairness to the parties involved.

*Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions.*⁴

This judicial statement speaks to the essence of the need for a reasonable and effective ULP. Over a time period of 30 years professional standards change, new technologies develop, and social values evolve, making the fair assessment of a professional's actions many years after the fact difficult, if not impossible.⁵

Professionals, are particularly vulnerable to stale claims:

*A professional advisor drafts a document or designs a structure and finds himself attacked when, generations later, damage flows from his act. The attack may come at a time when mind and memory have faded or even failed altogether. He may not be able to recall or may have an imperfect memory of instructions or discussions which excluded liability or which redefined in some limiting fashion the duty he undertook.*⁶

The significant passage of time hampers the fair and effective administration of justice as a result of:

- deterioration over time of evidence necessary to prove or disprove a claim;
- memories of witnesses fade or witnesses are no longer available; and
- written records become lost or destroyed.

Studies suggest that the vast majority of legal proceedings, including latent defect claims, are brought within 10 years of the occurrence that gave rise to the claim.⁷ As such, a 10 year ULP strikes a reasonable and fair balance between protecting a legitimate claim for relief and a defendant's ability to fairly respond to, and defend, a claim.⁸ In other words, a 10 year ULP, rather than the current 30 years, provides more effective and fair administration of justice for the parties involved in a dispute, and society as a whole.

Additional strong public policy considerations supporting change include:

Consistency with Other Jurisdictions

Uniformity in limitations law from province to province is desirable. The trend of recent legislative reform is to shorten the ULP. Alberta adopted a 10 year ULP. Ontario and Saskatchewan established 15 year ULPs.

Uniformity provides economic certainty to engineering, accounting, and architectural firms that do business throughout Canada and avoids artificial barriers to business in any particular province. This consideration is of even greater significance in light of the recent signing of the Alberta-British Columbia Trade, Investment, and Labour Mobility Agreement ("TILMA"). TILMA, in essence, contemplates one integrated economy for these two provinces by April 1, 2009. Inequities in limitations law between the two provinces runs counter to the spirit of that agreement.

Consistency with Other Provincial Legislation

In 1999, as a result of the Barrett Commission Inquiry into the leaking condominium crisis in British Columbia, the *Home Owner Protection Act* was enacted. This Act creates mandatory minimum warranty protection for residential construction. The Act provides minimum warranty requirements of 2 years on materials and labour, 5 years for the building envelope and 10 years for structural defects. After 10 years, the developers and builders of the project have no further financial obligation to the homeowner under the Act.

The legislative intent underlying the *Home Owner Protection Act* indicates that 10 years is a reasonable period of time for purchasers to bring forward a claim for building deficiencies and for builders to be held accountable for those deficiencies. A 10 year ULP is consistent with the legislative policy behind the *Home Owner Protection Act*.

Developments in Case Law

Court interpretations of the British Columbia *Limitation Act* have created an accommodating judicial approach towards postponing the commencement of the running of the limitation periods under Section 6(3) when “discoverability” of the cause of action is at issue. The law in this regard has also become complex and difficult. Judicial determinations can postpone the limitation period relative to a claim against a professional for many years.⁹ The potential for stale claims and the difficulty in recognizing when a potential claim has expired emphasizes the need for a clear and effective ULP setting out a maximum period of liability to counter-balance the uncertainty associated with the basic limitation periods.

Recent case law¹⁰ has provided confirmation that the commencement of the running of the current 30 year ULP period is not affected by postponement provisions of the Act and begins to run, in claims relating to such things as a construction defect, from the time of completion of construction. Legislative reform reducing the ULP should ensure that clarity with respect to commencement of the running of the ULP is maintained. In particular, reform should clearly establish the commencement of the running of time under the ULP as the time at which the alleged wrongful act occurs, or in the case of a construction defect, as the time at which construction is complete.

Economic Considerations

The potential for a claim arising against a professional 30 years after services are provided has direct economic implications. Firms and individual engineers, accountants, and architects undertake the expense of maintaining costly liability insurance into their retirement. There is a growing concern about escalating insurance rates and diminishing scope of coverage. Reduction of the ULP will serve only to ease the pressure on insurance rates and make insurance coverage more readily available to professionals, which is of benefit both to the individual professionals as well as society as a whole.

CONCLUSION

The support for reducing the 30 year ULP is considerable. As early as 1988, the office of British Columbia's Attorney General prepared a legal opinion recommending that the ULP be reduced to 10 years.¹¹ Subsequently, in 1990, the Law Reform Commission of British Columbia and its successor organization, the British Columbia Law Institute, in 2002, delivered the same recommendation.¹² Other jurisdictions have also studied the issue: Alberta implemented a 10 year ULP in 1999 and Ontario and Saskatchewan implemented 15 year ULPs in 2005.¹³ Law Reform Commissions in England and Wales,¹⁴ Ireland,¹⁵ Australia¹⁶ and New Zealand¹⁷ and the Uniform Law Conference of Canada¹⁸ support shorter ULPs of 10 or 15 years.

It is the position of AIBC, APEGBC, CEBC and ICABC that the 30 year ULP does not provide effective administration of justice for their members or society as a whole. The 30 year ULP is also inconsistent with recent limitation legislation enacted in other Canadian jurisdictions, as well as other legislation in British Columbia. In order to fairly and effectively serve the societal and economic interests of British Columbians, the 30 year ULP should be reduced to 10 years and certainty with respect to commencement of the running of the ULP must be maintained.

AIBC, APEGBC, CEBC and ICABC strongly support all efforts to bring about these reforms.

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¹ *Limitation Act*, R.S.B.C. 1996, c. 266, s. 8(1)(c).

² Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (Vancouver: March, 1990). [LRC]

³ British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (Vancouver: July, 2002) at 1. [BCLI]

⁴ *Costigan v. Ruzicka* (1985), 13 D.L.R. (4th) 368 (Alta. C.A.) at 377. [*Costigan*]

⁵ It is likely that these considerations factored in British Columbia's decision to implement a 6-year ULP for medical professionals: *Limitation Act*, *supra* note 1, ss. 8(1)(a) and (b).

⁶ *Costigan*, *supra* note 4 at 377.

⁷ BCLI, *supra* note 3, at p.6 and 7; Law Reform Commission of Ireland, Report on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage, Report No. 64 (2001) at 33

⁸ BCLI, *supra* note 3.

⁹ *Strata Plan VR2000 v. Shaw* 55 B.C.L.R. (3d) 103.

¹⁰ *Armstrong v. West Vancouver (District)* (2003) BCCA 73; *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, (2004) BCCA 379

¹¹ Letter from Andrew Pirie to E.R.A. Edwards, Q.C. Assistant Deputy Attorney General (29 April 1988).

¹² LRC, *supra* note 2 and BCLI, *supra* note 3.

¹³ See *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(b); *Limitations Act*, 2002, S.O. 2002, c. 24, Schedule B, s. 15(2); and *Limitations Act*, S.S. 2004, c. L-16.1, s. 7(1).

¹⁴ Law Commission, Report on the Limitation of Actions, Report No. 270, at 66 and 69, 2001.

¹⁵ Law Reform Advisory Committee for North Ireland, *Limitation of Actions* (Belfast: 2002).

¹⁶ Law Reform Commission of Western Australia, *Limitation And Notice Of Actions* (Perth: January, 1997).

¹⁷ Law Commission, *Limitation of Civil Actions* (Wellington: February, 2000).

¹⁸ The Uniform Law Conference of Canada, which has as its mandate the harmonization of provincial laws, adopted a *Limitations Act* in 2005 in which s. 6(2) prescribes an ultimate limitation period of 15 years.