# UNIFORM LAW CONFERENCE OF CANADA

## CIVIL SECTION

# UNIFORM LIMITATIONS ACT

## Uniform Limitations Act Working Group

**St. John's, Newfoundland**
**August 2005**

# Uniform Limitations Act
# Report

## Background

[1] At the 2004 meeting, the Conference established a Working Group to prepare a draft Uniform Limitations Act and commentaries for consideration at the 2005 meeting. The Working Group consisted of the following persons:

> Mounia Allouch (Canada); Janice Brown (Nova Scotia); John Lee (Ontario - Chair); Peter Lown (Alberta); Gail Mildren (Manitoba); Glen Noel (Newfoundland and Labrador); Paul Nolan (Newfoundland and Labrador); Tim Rattenbury (New Brunswick); Madeleine Robertson (Saskatchewan); Cornelia Schuh (Ontario – Drafter); Vincent Pelletier (Quebec); Sarah Perkins (Ontario); and Natalie Venslovaitis (Researcher).

The Working Group acknowledges the assistance it received from John Cameron and Wayne Gray on various aspects of the draft Act.

[2] The Working Group held monthly conference calls and held one meeting in January. The draft Act is the product of the Working Group's discussions, which were often animated. The draft Act is not a product of consensus, but a document reflecting compromises made in the interest of developing a statute that may be of assistance to jurisdictions wishing to reform their limitations laws. In two specific areas, concerns expressed by the members of the Working Group were such that it was felt the Conference as a whole should be asked to decide on the appropriate approach.

**General Overview of the Draft Act**

[3] Recent developments in the area of limitations law in Canada have seen the coming into force of new limitations statutes in Alberta, Ontario and Saskatchewan.[1] All three statutes are inspired by the work of the Alberta Law Reform Institute on limitations in the late 1980s.

[4] In developing this draft Act, all three statutes were analyzed and consideration was given to law reform materials that were developed prior to and following the enactment of these statutes, the case law and also any commentary that have been produced regarding these statutes. Consistent with the recommendations of the Alberta Law Reform Institute, the draft Act departs from the conventional approach to limitations legislation, which is based on the assignment of different limitation periods to specific categories of causes of action. The draft Act is faithful to the three recent statutes in that it too contains the basic elements of a short basic limitation period which commences from discovery of a claim; a longer ultimate limitation period commencing from the date of the act or omission that gives rise to a claim; and special rules governing the running of time in specified cases.

[5] The draft Act also adopts the Ontario approach of listing special limitation periods in a schedule to the Act. As discussed at last year's meeting, a schedule of special limitation periods effectively consolidates limitation periods found in other statutes that a legislature wishes to be exceptions to the general limitations regime to allow for greater accessibility and transparency. It also imposes a legislative discipline to ensure that the enactment of any new limitation period is assessed in light of the established general limitations regime.

[6] It is worth mentioning that Alberta, Ontario and Saskatchewan repealed many of their special limitation periods as part of the implementation of their new limitations statutes. While it is not clear how many special limitation periods continue to survive in Alberta and Saskatchewan (because these jurisdictions do not have a schedule of special

limitation periods as is available in Ontario), it is apparent that many special limitation periods continue to be in effect in all three jurisdictions. Policy considerations unique to each jurisdiction might ultimately affect a jurisdiction's decision to set out a special limitation period. However, as a matter of general principle, the Working Group is of the view that as many claims as possible should be subject to the general limitations regime.

[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.

**Contracting Out of the Limitations Act**

[8] Alberta, Ontario, Quebec and Saskatchewan have all enacted legislation regarding the contractual variation of statutory limitation periods. The rules in Ontario and Quebec expressly prohibit the shortening of a statutory limitation period. It appears that the rules in Alberta and Saskatchewan also prohibit shortening although this is not explicitly stated. However, all of these rules, other than Ontario's, allow parties to extend the limitation period to some degree or another. The Ontario rule completely bars any agreement to vary the province's statutory limitation periods.

[9] The Working Group was divided as to the appropriate rule to adopt. A majority of the Working Group was of the view that parties should be permitted to extend statutory limitation periods, but should be not be permitted to shorten them. The majority believed that the new limitations regime should impose a minimum limitation period that would be

applicable in all cases. While parties may agree to a longer period if they choose, a mandatory minimum period would guarantee everyone of having at least the statutory limitation period to bring a proceeding.

[10] The majority expressed confidence that the discoverability principle, properly interpreted, would not create uncertainty as to the commencement of the basic limitation period. It noted that the new limitations regime does not in any way restrict the freedom of parties to define their obligations and liabilities. The temporal aspect of these obligations and liabilities, however, may need to be drafted more carefully so that they are not confused with running afoul of the limitations rule.

[11] A minority of the Working Group questioned the imposition of a mandatory minimum period. It has been well established in the common law world that parties should be permitted to agree to the limitation period applicable to their claim despite the existence of a statutory limitation period. Change to this long held common law principle should only proceed if there exists a cogent reason for change. Such a reason is absent despite the numerous law reform reports on limitations. In fact, every law reform report has confirmed the desirability of allowing parties to agree to their own limitation period. The common law principle recognizes that parties should be given the assurance of determining the period when a potentially successful legal proceeding may be commenced against them. The need for this assurance, in fact, has only become greater with the adoption of the discoverability principle. While the discoverability principle is an important and desirable innovation in limitations law, the restriction imposed on parties to design a customized limitations regime that is best suited to their circumstances injects an undesirable degree of unpredictability into their contractual relationships, which inevitably results in heightened costs. These costs are unnecessary given that there is no evidence of mischief associated with shortened limitation periods. In any event, the concern for some potential undefined mischief associated only with allowing parties to shorten limitation periods cannot be explained by the lack of similar concern with allowing parties to lengthen limitation periods or by the recognition that the nature and scope of liability may be limited.

**Conflict of Laws**

[12] The Working Group was divided more evenly on the appropriate conflict of laws rule. Half the group favoured adopting the Ontario rule, which essentially embodies the common law principle established by the Supreme Court of Canada in ***Tolofson v. Jensen***.[2] Codification of the common law rule was viewed as promoting access by foreign litigants to an important conflicts rule. The other half of the Working Group favoured the Alberta rule, which states that Alberta limitations law shall be applied notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction. A discussion of the two rules was presented to the Conference at last year's meeting. That discussion should be referred to in addition to the comments below.

[13] Those in favour of the Alberta rule viewed it as an assertion of local public policy related to when the judicial resources of a jurisdiction should be utilized for the resolution of disputes within its borders. The Alberta Court of Appeal had recently found that the Alberta rule does not alter the principles in ***Tolofson*** and that the rule and the common law can co-exist without inconsistency or uncertainty.[3] However, it was conceded that the Supreme Court of Canada will hear an appeal of this decision and the Court may well overturn the decision and may do so on constitutional grounds.[4] The Alberta rule has been redrafted in this Act for the purposes of avoiding any uncertainty associated with its intent and operation.

[14] Members of the Working Group that favoured the Ontario rule were concerned that the Alberta rule may not conform to constitutional imperatives, which have not been fully explored by the Supreme Court of Canada. Aside from the constitutional concern, and strictly as a matter of policy, these members of the Working Group were of the view that considerations of local public policy related to judicial resources should not outweigh the greater need to support a modern conflict of laws regime that recognizes the easy and necessary mobility of people and goods both nationally and internationally. The guarding

of access to judicial resources by one jurisdiction so as to force litigants to litigate in an otherwise inappropriate forum will not only create additional costs to the litigants, but will also impact the judicial resources of the jurisdiction whose courts would be seized of the litigation.

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[1] See ***Limitations Act***, R.S.A. 2000, c. L-12; ***Limitations Act***, S.O. 2002, c. 24, Sch. B; and ***Limitations Act***, S.S. 2004, c. L-16.1 respectively.
[2] [1994] 3 S.C.R. 1022.
[3] ***Castillo v. Castillo*** (2004) 357 A.R. 288.
[4] Leave to appeal granted January 20, 2005.