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November 3, 2014

Halifax Regional Municipality

The Honorable Lena Diab
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Dear Minister Diab and Committee Members,

Re: Bill 64-Limitation of Actions Act

I would like to congratulate you for your work in attempting to bring clarity and increased uniformity to the often unnecessarily complex Limitations of Actions Act. Likewise, the specific exclusion of a limitation period for sexual assault victims signals a willingness to recognize the traumatic nature of these vicious crimes on victims and, ultimately, their families. That being said, I would pose several concerns and some suggested revisions to the present recommended legislation.

Submissions

I have reviewed the submissions made by LIANS and am broadly supportive of their position with respect to particulars. While a two-year time period is not ideal for personal injury claimants, I will restrict my comments, instead, to the often-referenced "safeguard" provision.

My primary issue with this legislation concerns the absence of a "safeguard" provision, a relatively unique piece of law in Nova Scotia. I speak to this in two separate capacities. First, I am a newly called lawyer working almost exclusively in the area of personal injury litigation. Second, I am also the President of the Brain Injury Association of Nova Scotia. Speaking in both capacities, I would suggest that, absent the safeguard provision, this legislation will lead to injustice far outweighing any benefits that may arise from a strict limitation. My reasons for this are briefly summarized as follows:

A. Many individuals, when severely injured, will often focus on their recovery first and foremost before looking into litigation. In the mind of many this is completely reasonable- in general, we do not have a litigious culture in this province, nor should we. In my short time called to the bar I have encountered numerous instances where this approach was advocated by insurance adjusters to otherwise unknowing claimants. This is not a rare phenomenon- I have already met multiple injury victims who did not approach the firm I am presently employed at until after a 2 year period.

B. The other side of the coin involves individuals who are aware of the *Minor Injuries Legislation* and decide it is not worth their time or effort to retain a lawyer and assist in the development of a case. These are potential claimants who are injured but make what at first appears to be an incomplete recovery, but one which allows them to work and go about their day to day lives. Unfortunately, especially in the case of complicated back and ligament injuries, an injury that is at first only mildly symptomatic, but still quite present, can get substantially worse over time, and can lead, ultimately, to disability. I have been exposed to this sort of scenario on multiple occasions.

C. For the brain injury community this legislation is particularly problematic as many individuals who suffer from traumatic brain injury don't become aware of how significant their condition is for many years, while in other situations their cognitive functioning, while not severely impaired, is still compromised. In ideality these people will have a guardian or legal representative, but in our experience this rarely takes place, especially for those who are already established adults. Attached to my submissions is a statement made by Dr. Beverley Butler, a neuropsychologist who sits on the board of the Brain Injury Association of Nova Scotia, providing her own concerns on this point.

D. A critical observation that must be made, especially within the context of current budgetary constrain, is that limitations legislation, insofar as personal injury claimants are concerned, has the effect of transferring expensive replacement of income and medical bills from a private party (usually an insurer) to the government. Individuals who are seriously injured and miss a limitation period will almost always be forced to live off of governmental assistance, especially in the case of a long-term inability to work. Meanwhile, the government will not be able to claim back any of its expenses associated with often expensive and long-term healthcare expenditure. This is a perversion insofar as the taxpaying public is concerned, and should not be countenanced.

There are few consequences brought about by force of law more dire than to have ones legal rights wholly and absolutely stripped without recourse. That is the untempered truth of limitations legislation. Presumably for that reason, Nova Scotians have, for three decades, been able to turn to the judiciary, within an appropriate timeline, to determine whether or not the disallowance of a claim will lead to justice. This system is representative of Nova Scotian's faith in our justice system and our judiciary to ensure that the black letter of the law, while strict, is fair if that is what justice demands. There is something distinctly human and noble about this approach. Absent a saving provision, there is no such recourse available.

<u>Further Considerations</u>

I have written the above recognizing that there are, to the legislation's credit, several provisions which could apply to prevent personal injury victims (amongst other

plaintiff's) from being unduly prejudiced, specifically, s. 8 (s) (d) and s. 18 (1). With respect, these provisions appear to be applicable in only rare circumstances.

S. 8 (2) (d) may be read as suggesting that even if an injury occurs, the claim will only be discovered when it is determined that the injury is "sufficiently serious" to warrant a proceeding. While this may appear to cover paragraph "B" of my submissions, it is not at all clear when an injury or loss will be viewed as "sufficiently serious" and it is quite likely that, in most scenarios, the claim will be discovered when the injury is initially sustained. Supporting this is the fact that a claimant has the burden of proving that a claim was brought within the limitation period.

There is great potential in s. 18 (1) to ward off many of the negative outcomes I have referenced, though at present I would suggest it is too narrowly constructed to be of much value. The provision provides that a limitation will not run while a claimant is "incapable" of bringing a claim due to a claimant's physical, mental, or psychological condition. Unfortunately, the choice of language- "incapable"- would appear to suggest a literal inability to proceed with the claim. Many personal injury claimants are better described as facing a significant difficulty in proceeding to consider, meet with and retain counsel. In some circumstances this will be for strictly medical reasons, in others it will be the conflation of medical, financial, and geographical limitations.

By way of brief example, an individual suffering from a traumatic stress disorder or a mild traumatic brain injury in the wake of a serious collision could, in theory, meet with counsel. However, the combination of stress, resultant depression, financial hardship, and generalized physical pain may make this practicably impossible, even if the person is technically capable. The use of "incapable" will, inevitably, be a flashpoint for future litigation. A more reasonable use of language would replace the phrase "incapable of bringing a claim" with "materially impaired from bringing a claim..." or similar construction. This would provide a good deal of certainty as to what is meant by the legislation, and further the obviously equitable purpose of this section.

Conclusion

It is necessary that Nova Scotia develop a legal and political culture that is open to business- this means providing our business community with peace of mind. That being said, we cannot lose ourselves and our values in that process. A modern safeguard provision need not be four years long. A modern safeguard need not apply to the ultimate limitation of 15 years. However, as a past legislature noticed long ago, the lack of a safeguard provision at all will lead to unfairness and inflexibility in the application of the law- this is not in keeping with the goals of this government, or the ideal direction of our legislation. Indeed, such strict limitations will force the taxpaying public to step into the shoes of the negligent, while severely curtailing the ability of the injured to receive proper treatment and live in financial security.

Thank you for your time and consideration,

Ryan G. Blood

Statement of Beverly Butler (November 02, 2014)

I am writing to express my concern about the proposed changes to the Nova Scotia limitations legislation and to provide support for the maintenance of an extension provision in this legislation.

I am a Clinical Neuropsychologist and as such I see individuals who have suffered a neurological injury or illness that affects their thinking skills (i.e., attention, memory, language, organizational ability). Many of the individuals I have assessed were referred for neuropsychological assessment more than two years after the event that caused their cognitive symptoms (e.g., a car accident). Often these individuals sought legal help only after they had exhausted other avenues and still exhibited an inability to return to their pre-injury level of daily or occupational functioning.

I am very concerned that as a result of the proposed change to the limitations legislation, individuals with mild traumatic brain injuries who do not initially appear to have significant deficits, but who take a long time to recover, will miss out on the opportunity to access medical services, like neuropsychological assessment, that can highlight changes in functioning following an accident and provide important recommendations for rehabilitation. Often times it is only the involvement in legal action that allows a mildly injured person to access services. As such, I find this legislation at odds with the government's recent announcement regarding the development of an Acquired Brain Injury Strategy for the province, particularly as the possibility exists that many individuals with mild traumatic brain injuries who do not immediately recognize the impact of their injury and are unable to expediently access legal services may 'fall through the cracks' and fail to get the assessment and rehabilitation services they require to return to maximal level of functioning after an injury or accident.

Beverly Butler, Ph.D., R.Psych.

Neuropsychologist