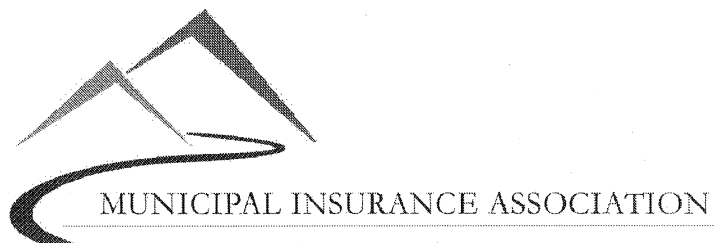
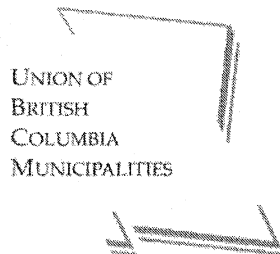


**WHITE PAPER ON *LIMITATION ACT* REFORM:
FINDING THE BALANCE**

**Response to:
Ministry of Attorney General
Justice Services Branch
Civil Policy and Legislation Office**

JOINT SUBMISSION BY:

**UNION OF BC MUNICIPALITIES
AND
MUNICIPAL INSURANCE ASSOCIATION OF BC**



RESPONSE TO THE
WHITE PAPER ON *LIMITATION ACT* REFORM: FINDING THE BALANCE
BY
UNION OF BC MUNICIPALITIES AND
MUNICIPAL INSURANCE ASSOCIATION OF BC

INTRODUCTION

The Union of BC Municipalities (UBCM) and the Municipal Insurance Association of BC (MIABC) are pleased to make this joint submission to the Attorney General in response to the White Paper on "*Limitation Act Reform: Finding the Balance*".

UBCM is the association that has represented the interests of municipalities and regional districts in the province of BC for over 100 years. For over 30 years, all local governments in British Columbia have continued to voluntarily maintain their membership in the UBCM, and depended on the association to represent their interests and concerns.

MIABC was formed in 1988 as a Reciprocal Insurance Exchange within the meaning of the *Financial Institutions Act*. MIABC's membership includes 166 local governments comprising approximately 90% of the population of BC. Its 15 member board of directors is comprised of elected and appointed officials from every region of the province.

For over two decades, UBCM and MIABC have worked both collaboratively and independently on matters related to civil liability reform. The purpose of this paper is to respond to the "*White Paper on Limitation Act Reform: Finding the Balance*". Our response outlines the context, history and rationale for the strong advocacy efforts that have been undertaken by our two organizations as well as our collective local government memberships on the matter of civil liability reform. The paper also summarizes the various policy positions and responses by our associations to the previous reviews and papers that have been issued on civil liability. The recommendations that have been put forward in the most recent White Paper are considered in the context of our established policy positions. In some instances the White Paper asks questions and proposes scenarios that are beyond the scope of the policy positions of our local government members, so we have remained silent.

HISTORICAL CONTEXT - LOCAL GOVERNMENTS AND CIVIL LIABILITY ISSUES

In 1985, a serious liability insurance situation arose that was characterized as an "insurance crisis". Between 1985 and 1986, a survey conducted by UBCM showed that 55% of BC's local governments experienced annual liability insurance premium increases in the range of 3 to 5 times, and a further 38% had increases in excess of 6 times. Deductibles for 62% of those surveyed had increased between 5 and 10 times or more during a single accounting period. The most serious of all the changes was that the insurance policies no longer covered major liability exposures faced by local governments.

It was under these circumstances that local governments began to look at options for addressing the “crisis”. After two years of extensive study, UBCM members resolved to establish the Municipal Insurance Association of British Columbia where subscribers (signatories to the agreement) agreed to share liability losses under a common policy of insurance within a predetermined sharing formula.

During its first 14 years’ experience in claims handling, MIABC saw claims for property damage and economic loss increase by more than 1000%, with the upward trend in the following five years being almost 500%. With these types of increases in property damage and economic loss, many local governments were facing the possibility of being uninsurable. It is within this context that UBCM and MIABC have continued to urge the provincial government to reform the law to reduce the alarming impact of increased civil liability for local governments and to obviate the need to severely curtail the services local government offer and to reduce the significant impact on BC’s local government taxpayers.

This alarming trend in increased civil liability has caught the attention of others besides local governments. While UBCM and MIABC have taken a multi-pronged approach to address civil liability reform, we have also supported the efforts of others that have sought support for one specific component for reform – the ultimate limitation period. In that regard, the former BC Law Reform Commission and its successor, the BC Law Institute put forward papers seeking to reduce the 30-year ultimate limitation period. As well, a broad range of stakeholders from the building design and construction sectors, have also been strong advocates for reform of the ultimate limitation period, with many of them proposing that the limit be changed to either 10 or 15 years.

The focus of this current White Paper is related to reducing the ultimate limitation period to 10 or 15 years based on the feedback, studies and experiences in other jurisdictions. UBCM and MIABC are supportive of this direction (specifically to reduce to 10 years) but would also like to acknowledge that our advocacy efforts around civil liability go beyond the ultimate limitation period and our response reflects this broader multi-pronged perspective in a chronological manner.

JOINT UBCM-MIABC RESPONSE TO CIVIL LIABILITY REVIEW - 2002/2003

As has been noted local governments have been pursuing legislative reforms with respect to liability since UBCM’s first Liability Action Plan in 1986. Numerous resolutions have been endorsed and submissions made over the years on civil liability. The most recent resolutions endorsed by the UBCM membership are found in Attachment #3.

In 2002, UBCM and MIABC’s Joint Liability Task Force presented a policy paper entitled “Response to Discussion Paper on Civil Liability” to the annual UBCM Convention that was endorsed by the UBCM membership. This 2002 Convention policy paper provided the framework and direction for the joint submission by UBCM and MIABC to the Attorney General’s Civil Liability Review.

The joint UBCM-MIABC Response to the Civil Liability Review addressed four areas: joint and several liability; ultimate limitation period; non-delegable duty and vicarious liability. The joint response was premised on the following fundamental principle:

That civil liability reforms should be guided by the fundamental principle that individuals and organizations should be responsible for the consequences of their actions, not for the actions of others; and their liability should be commensurate with their degree of responsibility.

A copy of the Executive Summary and the full recommendations in response to the Civil Liability Review are attached to this presentation as Attachment #1 and #2.

For the purposes of the current White Paper under discussion, please find below an extract of our response to the Civil Liability Review that specifically commented on the Ultimate Limitation Period.

Ultimate Limitation Period

In July 2002, the British Columbia Law Institute presented a report entitled "The Ultimate Limitation Period: Updating the Limitation Act". MIABC and UBCM endorse and adopt the reasoning and recommendations contained in the report on revisions to Section 8 of the Limitation Act summarized at page 33 of that publication. In particular, MIABC and UBCM support the Institute's recommendations that:

- 1. The 30 year ultimate limitation period of general application be reduced to 10 years;*
- 2. The Limitation Act provide a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or willful concealment of facts material to the claim;*
- 3. The provisions of the Limitation Act which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, be repealed; and*
- 4. The Limitation Act be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's action is based on breach of duty, whether that duty arises under a contract, statute or the general law.*

TESTING THE PROPOSED FUTURE STATE – 2007

In March 2007, the Province's Building and Safety Standards Branch released a consultation document entitled "Testing the Proposed Future State". The document outlined general changes that the Province was suggesting to the enforcement of the BC Building Code. Within the document, four key shifts were proposed in order to create a more effective system. One of those shifts related to managing the distribution of liability and risk effectively.

During the consultations on the document some local governments suggested that if local governments were going to be required to inspect and approve the design and

construction of buildings and, in particular the design and construction of high risk areas of buildings such as building envelopes, then it should be insulated from liability for those actions. Furthermore, if local governments were to consider and approve alternative solutions to building construction than that outlined by the Building Code, then it should be insulated from liability for those actions.

The MIABC in its review of the strategy pointed out *“that local governments must have immunity from liability for issuing permits based on the work of others, whether that work is delegated by a local government or is done at the direction of the Province”* and that the current strategy when utilizing third party review mechanisms *“provides a means for local government to reduce their exposure to liability for failures arising from construction but it does not eliminate that exposure.”*

During the consultation sessions the Branch indicated that it recognized the need to address the issue of joint and several liability and that it would make this recommendation to the Minister when it reported back. It pointed out that it could not make any promises that the Province would take any action on the matter.

UBCM noted in its response to the consultation process that it has long advocated the reform of joint and several liability. UBCM also noted that the document’s failure to acknowledge this concern was generally seen as a shortcoming in the process. In its comments, UBCM reiterated the position established in its earlier joint submission.

While it was acknowledged in the consultation process that *“the province will not review joint and several liability at this time”*, the province highlighted the fact that the Ministry of Attorney General was consulting on a proposal to reduce the Ultimate Limitation Period (ULP) from 30 to 10 years.

GREEN PAPER ON LIMITATION PERIODS – 2007

In 2007, the Ministry of the Attorney General issued their Green Paper on Reforming BC’s *Limitation Act*. The Green Paper sought comments on a number of proposals/options but one of the most significant to UBCM members related to the reduction in the ultimate limitation period.

In its response to the Green Paper, UBCM noted that its membership had been advocating a reduction in the ultimate limitation period from 30 years to 10 years. It was noted that this position was consistent with:

- 1990 BC Law Reform Commission paper on the ultimate limitation period;
- 2002 BC Law Institute paper on the same topic; and
- reflected the many other developments in Canada.

In summary, UBCM made the following recommendations to the Green Paper review:

- reiterated our long standing support for the reduction of the Ultimate Limitation Period to 10 years; and
- reiterated our support for a basic two year limitation period.

RESPONSE TO THE WHITE PAPER ON LIMITATION ACT REFORM - 2010

In the Executive Summary of the White paper, the following major changes to the Limitation Act are recommended:

- *moving from a variety of basic limitation periods, based on the type of legal action, to a single two-year basic limitation period for all civil claims;*
- *moving from a general 30-year ultimate limitation period to either a single 10- or 15-year ultimate limitation period. Reforms include changing the commencement model of the ultimate limitation period from an “accrual” model to a model that starts the clock running in the ultimate limitation period based on an “act or omission”; and*
- *eliminating the special six-year ultimate limitation period for negligence claims against doctors, hospitals and hospital employees. All lawsuits will be governed by either a single 10- or 15-year ultimate limitation period.*

The direction proposed in the White Paper is supported by UBCM and MIABC.

Single Two-year Basic Limitation Period

Both UBCM and MIABC have consistently recommended moving to a single two-year basic limitation period for all civil claims.

Ultimate Limitation Period

With respect to the general ultimate limitation period, we note that the White Paper is recommending a change from 30 years to 10 or 15 years. Both associations would reiterate our long-standing policy position that supports the establishment of a 10-year ultimate limitation period. As well we would reiterate that the commencement of the running of time under the ultimate limitation period should be from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's action is based on breach of duty, whether that duty arises under a contract, statute or the general law.

Eliminate Special Six-Year Ultimate Limitation Period

Both associations have recommended that the special six-year ultimate limitation period for medical practitioners, hospitals and their employees be repealed.

In addition to these key recommendations, the White Paper also poses specific questions and identifies a number of different scenarios with the accompanying recommendations as to how the proposed new law would address certain matters. While UBCM and MIABC are able to respond to the key recommendations that have been proposed, we are not in a position to respond to some of the questions and recommendations that have been put forward. We are guided by the endorsed policy of our members and the extent of our long-standing policy is reflected in this submission. We have also encouraged our local government members to respond to the White Paper. There may be instances where our members have adopted more specific policy positions reflective of the questions that have been posed, and we encourage them to share these opinions with the Ministry of the Attorney General directly. What we have presented in our submission is the established policy positions of our local government members. It is reflective of the two decades of advocacy work that UBCM and MIABC have jointly pursued on their behalf.

CONCLUDING REMARKS

In summary, UBCM and MIABC wish to signal our support for the directions that have been proposed in the “White Paper on *Limitation Act Reform: Finding the Balance*”. For over twenty years we have advocated for significant reform to address the alarming trend of expanded civil liability and its negative impact on our local government members. While this White paper addresses only one component of the civil liability puzzle – ultimate limitation period – we are supportive of proposed legislative changes as they will reduce the liability risk for our members.

We commend the Province for their review and work on this matter and look forward to seeing these legislative amendments come to fruition for the benefit of our local government members.

CIVIL LIABILITY REVIEW
Response to the Ministry of the Attorney General
on behalf of
The Union of British Columbia Municipalities and the
Municipal Insurance Association

EXECUTIVE SUMMARY

OVERVIEW

The Attorney General has invited submissions on proposed reform of civil liability in British Columbia. Local Government has elected to make submissions in relation to three of the areas being considered:

1. Support for the abolition of joint and several liability in the case of claims for property damage or economic loss and replacement with the principle of proportionate liability.
2. Reduction of the ultimate limitation period to ten years from thirty years with time to run from the date of breach of a duty owed by a Defendant to a Plaintiff, and not the date of discovery of damages or a cause of action by the Plaintiff.
3. Reform of the law of non-delegable duty so that responsibility for delegated functions remains with the delegated party and not with the party making the delegation.

These reforms are needed to reverse an alarming trend of expanded liability and to enable local government to continue to provide services to the community in an economic and efficient manner.

EXPANSION OF LIABILITY OVER THE LAST TWO DECADES

The last two decades have seen an unprecedented expansion in local government liability. Some of the most striking examples are the following:

1. The allowance for recovery of economic loss. Historically, recovery of this type of loss had been seen as too broad a recovery, with wrongdoers facing "indeterminate liability to an indeterminate class for an indeterminate length of time". In 1984 the Supreme Court of Canada reconsidered this outlook and allowed recovery of economic loss against local governments, denying that it was opening the "floodgates" to liability.

2. As a consequence, local government has since found itself in an ever increasing number of claims involving economic loss, with MIABC's membership alone seeing its annual losses in this area increase almost 1000% over the last fourteen years. The floodgates had opened.
3. With increased population, urbanization and development, local government finds itself as a co-defendant with a number of other parties including service providers, consultants, designers, builders, subtrades and suppliers, many of whom are indigent or without sufficient funds to answer for their proportionate responsibility.
4. Local governments increasing exposure to these claims has resulted in the unavailability of insurance coverage for some claims and in local government withdrawing its services in some areas owing to the resulting high risk exposure.

EFFECT OF EXPANDED LIABILITY ON LOCAL GOVERNMENT

With these changes in the law and legal environment, joint and several liability has increasingly operated to target local government as a "deep pocket". Regardless of the degree of proportionate fault attributed to its conduct in any particular action, a finding that local government is 10% at fault translates to 100% liability for the Plaintiff's loss. This effectively casts local government in the role of the insurer of insolvent or uninsured co-defendants and ultimately, the Plaintiff. This is not a role that local government can afford to continue to fill. Expanded liability magnified by the application of joint and several liability, limitation rules permitting claims decades after the events giving rise to the claim, and the inability of local government to delegate responsibility has seriously impacted on the ability of local government to manage risk and to continue to provide services.

For local government, the outcome of limited or unavailable insurance is the pressure of managing uninsured and unpredictable risks within the confines of budgetary restraints. Unquantifiable risks influence decision making in several ways: cutbacks in services pertaining to high risk activities, in particular, building inspection; allocation of public funds to cover liability risks in view of the provision of services; increased taxes, and in some instances the imposition of per capita assessments, to offset the cost of borrowing to cover liability costs; settlement at levels forced by the threat of uninsured trial costs and the prospect of being the only "deep pocket" remaining at the time of trial.

In the result, where local government is uninsured and the claim exceeds its budget, the cost is borne by taxpayers who have no responsibility for the Plaintiff's loss. In small communities, particularly those facing the prospects of multiple claims for economic loss, the impact on individual taxpayers is significant. In short, local government does not have a "deep pocket". It only has access via taxation and assessments, to the

pockets of individual taxpayers, many of whom reside in areas of the province least able to bear the loss.

When insurance is not available local governments become the insurers of others, including the plaintiff, by default. A reduction of the ultimate limitation period to reduce the exposure of local government to dated claims, and the abrogation of joint and several liability will reintroduce predictability to the insurance rating process and have the welcome effect of improving the insurance market.

Local governments in British Columbia are not seeking to avoid paying the full amount of its proportionate share of any loss attributable to its negligence. Proportionate liability requires that local governments do so, is consistent with the principle of individual responsibility and is analytically defensible. Reform is required to reverse the inherent unfairness in requiring local government to make good the fault of others and to encourage insurers and reinsurers to re-enter the market to the benefit of all, and specifically, the plaintiff.

NEED FOR REFORM

To reverse the disturbing trend of expanded liability, local government proposes the abolition of joint and several liability and its replacement with the principle of proportionate liability; the reduction of the ultimate limitation period to ten years with the time to run from the date of breach of duty owed by a Defendant to a Plaintiff, and reform of the law of non-delegable duty allowing local government to delegate functions to responsible parties without retaining exposure to liability for the provision of that service. These reforms would go a long way to restoring financial stability in local government risk management and the ability of local government to continue to provide services in what have become high risk sectors.

JOINT RESPONSE TO CIVIL LIABILITY REVIEW

RECOMMENDATIONS ON CIVIL LIABILITY (extract from 2002 UBCM Convention Policy Paper)

In response to the discussion paper on Civil Liability and the questions raised by the Attorney General the Joint Task Force recommends:

A Fundamental Principle

a) That civil liability reforms should be guided by the fundamental principle that individuals and organizations should be responsible for the consequences of their actions, not for the actions of others; and their liability should be commensurate with their degree of responsibility.

Joint and Several Liability

b) That the concept of joint and several liability for property damage and economic loss is inappropriate in a modern society and should be abolished.

c) That joint and several liability be replaced by a system of pure several or proportionate liability (such as now exists in cases of contributory liability) under which defendants are responsible only to the degree to which they contributed to the loss.

Ultimate Limitation Period

d) That UBCM support the BC Law Institute July 2002 report on "The Ultimate Limitation Period: Updating the *Limitation Act*". In particular:

i) that the 30 year ultimate limitation period of general application be reduced to 10 years;

ii) that the *Limitation Act* provide a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or willful concealment of facts material to the claim;

iii) that the provisions of the *Limitation Act* which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, be repealed; and

iv) that the *Limitation Act* be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's action is based on breach of duty, whether that duty arises under a contract, statute or the general law.

Vicarious Liability and Non-Delegable Duty

Consistent with the fundamental principles:

- e) That local government not be responsible for intentional misconduct by employees that would not, under any circumstances, be condoned or accepted by local government as the employer.
- f) That the doctrine of non-delegable duty not be retained where there is no fault attributable to local government in the selection of independent contractors to deliver local government services.

Implementation

- g) That the legislation to effect the above be introduced as soon as practicable, but no later than the spring 2003 legislative session.

OTHER ENDORSED POLICY POSITIONS RELATED TO THE ULTIMATE LIMITATION PERIOD

In addition to the joint submissions and responses to various consultation processes and papers on civil liability matters, UBCM members have consistently endorsed resolutions seeking a resolution to these liability concerns. The following resolutions reflect the UBCM membership's most current endorsed resolutions:

2009 - B56 LIMITATION ON MUNICIPAL LIABILITY REGARDING BUILDING PERMITS & INSPECTIONS

WHEREAS all local governments, with the exception of the City of Vancouver, face considerable liability risk and are being financially penalized as a result of legislation which does not provide immunity for building permit and inspection processes;

AND WHEREAS it is unacceptable that all local governments in British Columbia are not afforded the same liability protection through provincial legislation:

THEREFORE BE IT RESOLVED that the Union of BC Municipalities recommend to the provincial government that the Local Government Act be amended to abolish the system of joint and several liability and replace it with proportionate liability, under which defendants are responsible only to the degree to which they contributed to the loss and that the Province reduce the limitation period from 30 years to 10 years.

2007 – B1 ULTIMATE LIMITATION PERIOD

WHEREAS the Ministry of Attorney General is undertaking a review of limitation periods;

AND WHEREAS the UBCM Convention and two law reform commissions have recommended a reduction in the ultimate limitation period:

THEREFORE BE IT RESOLVED that the Union of BC Municipalities support a reduction in the ultimate limitation period from 30 years to 10 years.

2006 – A1 LIABILITY LIMITATION PERIODS AND MANDATORY INSURANCE

WHEREAS joint and several liability can have a devastating financial impact on local governments;

AND WHEREAS local governments have no way of mitigating their chances of a joint and several liability occurrence happening:

THEREFORE BE IT RESOLVED that the Union of BC Municipalities petition the provincial government to reduce the ultimate limitation period from 30 years to 10 years;

AND BE IT FURTHER RESOLVED that the provincial government require all participants in the building system to have insurance.