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TORONTO OPINIONS GROUP

Limitations Act, 2002 (Ontario) – Proposals for Improving Contract Drafting and Appropriate Opinion Qualification Practice

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Introduction

When the *Limitations Act, 2002* (Ontario) (the "Act") came into effect on January 1, 2004, section 22 of the Act provided that "a limitation period under this Act applies despite any agreement to vary or exclude it". This prohibition on "contracting out" from statutory limitation periods had not previously existed under Ontario law,¹ nor did it exist in most other common-law jurisdictions, in Canada or elsewhere. It created much consternation among business lawyers in Ontario, in particular because it appeared to cast doubt upon well-established practices in drafting commercial agreements of providing for specified negotiated time periods within which claims by the parties to an agreement against each other would have to be brought. For example, in an acquisition agreement, a vendor would often want assurance that its exposure under most of its representations and warranties and indemnities would be limited to a specified

¹ It did not apply retroactively, so that agreements to vary or exclude limitation periods made before January 1, 2004 remained valid: ss. 22(2), 24(8).

period following closing. Such period would typically be no longer than two years (in contrast to the prior Ontario general limitation period of six years²).

Section 22 of the Act appeared to open up the prospect that parties to commercial agreements could no longer achieve the certainty and predictability that they had previously bargained for. Instead, proceedings could be brought by a party to an agreement, in accordance with section 4 of the Act, at any time within two years from when the claim was discovered, or should have been discovered by a reasonable person in the position of such party (subject only to the 15-year ultimate limitation period under section 15 of the Act). The application of the discoverability principle to claims under a commercial agreement would usually not be considered desirable by the parties, because of the uncertainty that it would give rise to. Except with respect to problems that a party could not reasonably be expected to uncover within a reasonable time after the closing of a transaction, such as environmental contamination or fraudulent misrepresentations, commercial parties generally prefer the certainty of a fixed time period within which claims are to be made for breaches of representations and warranties or indemnities.

Various approaches were proposed by practitioners in order to attempt to alleviate this problem, but it was difficult to be certain that any modified drafting technique would necessarily be effective to preclude a court from holding that, despite the provisions of an agreement, section 22 of the Act would make any claim under the agreement subject only to the statutory limitation periods.³

² *Limitations Act*, R.S.O. 1990, c.L.15, s.45(1)(g).

³ For an overview of practitioners' reactions after the coming into force of the Act, see John Cameron, *New Limitation Periods – Contracting in Ontario* (2004), 40 C.B.L.J. 109. There was no consensus whether s. 22 of the Act would actually have the effect of overriding typical contractual provisions limiting, e.g., the duration of representations and warranties. On one possible interpretation, s. 22 would have no impact on such contractual provisions, which do not vary or exclude a limitation period, but merely define the time within which a claim for breach of a representation and warranty can arise under the contract. This argument emphasized that the Act only purports to limit when court proceedings may be brought in respect of a claim, not when the claim itself arises under a contract. Assuming that a breach arose within the time period specified in the contract, the innocent party would have two years within which to sue from the time of discovering the breach, as provided in the Act: see Brian Bucknall, *Limitations Act, 2002 and Real Property Limitations Act: Some Notes on Interpretative Issues* (2004), 29 A.Q. 1 at pp. 11-16. Some commentators also argued that s. 22 only precluded extending a limitation period, not shortening it (an interpretation that seems unlikely to have been intended if, as is generally assumed, the primary purpose of s. 22 was to protect consumers from one-sided time limitations in standard-form contracts). For a further discussion of these issues, see, e.g., Ruth Wahl, *Business Transactions and the Limitations Act, 2002*, Law Society of Upper Canada, Special Lectures 2004: Corporate & Commercial Law, at pp. 3-14 to 3-17; Lisa Kerbel Caplan and Wayne Gray, *Ontario's New Limitations Act: Impact on Commercial Transactions, Lending and Debt Recovery* (2005), Ontario Bar Association, The New Ontario Limitations Regime: Exposition and Analysis, at pp. 24-31. However, because of the lack of consensus among lawyers as to the proper interpretation of the Act, and the uncertainty resulting from the lack of judicial decisions on a new statute, few lawyers were confident that any definitive assurance could be given to clients that contractual "survival" provisions would continue to be effective.

Fortunately, the Ontario government was ultimately responsive to submissions made to it that section 22 of the Act, in its original form, interfered to an inappropriate extent with freedom of contract as between commercial parties, who could have legitimate reasons for wishing to negotiate their own time limits on contractual claims against each other. Effective October 19, 2006, section 22 was amended to create a number of exceptions to the basic rule that the Act overrides any agreement to the contrary. These exceptions apply only to agreements made on or after October 19, 2006.

The most important of these exceptions is that the basic two-year limitation period in the Act can be varied⁴ or excluded in a "business agreement" (clause 22(5)1). A "business agreement" is defined as "an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*" (subsection 22(6)). That definition is "an individual acting for personal, family or household purposes [but not] a person who is acting for business purposes".⁵ Therefore, if all of the parties to an agreement are corporations, it is a "business agreement" for purposes of section 22 of the Act.

Where individuals are among the parties to an agreement, it may be more difficult to determine if it is a "business agreement", since the purposes for which such individuals are acting must be determined. Although the definition seems to assume that "personal, family or household purposes" and "business purposes" are mutually exclusive, in fact these purposes may often be mixed, and it is not entirely clear whether an individual's predominant purpose (if that can be ascertained) would determine whether they are a "consumer". For example, it would be very common for a family-run business to be carried on through a corporation, the shareholders of which are various family members, some or all of whom are also employed in the business. The individuals who are parties to a shareholders' agreement in respect of the corporation would seem to be acting both for business purposes and also arguably for personal and family purposes, so that it is not certain whether the shareholders' agreement would be treated as a business agreement. Similarly, individual trustees of a family trust might be considered to be acting for "family" reasons, even in entering into an agreement as trustees that is otherwise of a commercial nature. It is unfortunate that the definition of "business agreement" turns on the motives of individual parties to an agreement, rather than on the character of the agreement itself.⁶

The 15-year ultimate limitation period under section 15 of the Act, which runs from the day on which the act or omission giving rise to the claim occurs, not from when it is discovered (unlike the basic two-year limitation period), may be varied by a business agreement, but it can be

⁴ "Vary" is defined to include "extend, shorten and suspend" in subsection 22(6) of the Act.

⁵ *Consumer Protection Act, 2002*, s.1.

⁶ Consideration could be given to including in an agreement to which individuals are parties an express acknowledgment that the agreement is entered into for business purposes and not for personal, family or household purposes. Of course, it is difficult to be certain to what extent a court will give effect to such statements.

"suspended or extended" only if the relevant claim has been discovered.⁷ Therefore, there may still be an issue whether a business agreement could effectively provide, for example, that a claim in respect of a fraudulent misrepresentation or a defect in title could be made indefinitely, as acquisition agreements sometimes provide. By definition, when a commercial agreement is entered into, the parties are unlikely to have discovered any potential claim under the agreement at that time. However, there is no doubt that an agreement could provide for claims to be made even after 15 years in respect of environmental matters (as is also sometimes provided in acquisition agreements), because section 17 of the Act provides that there is no limitation period in respect of an environmental claim that has not been discovered.

Another exception introduced in the amendments made to section 22 in 2006 is that the two-year limitation period under the Act can be "suspended or extended" by any agreement, not merely a business agreement (subsection 22(3)). It may be unclear whether this could be literally interpreted to allow parties to negotiate, in any agreement, a period within which claims can be made that is longer than two years.⁸ As previously noted, the 15-year ultimate limitation period under the Act can only be suspended or extended if the relevant claim has been discovered (subsection 22(4)). It can be inferred that these provisions are primarily intended to permit "tolling agreements" that suspend limitation periods while negotiations or settlement discussions are carried on in respect of claims that have already been asserted.⁹

Improving Contractual Language

Therefore, the 2006 amendments to the Act have not completely restored full freedom of parties to contract out of the limitation periods in the Act, nor is their effect completely clear in all circumstances. Accordingly, there are still potential benefits in devising contractual language that might help to achieve the certainty desired by the contracting parties. Furthermore, it would also be useful to improve drafting of provisions in a commercial agreement that limit the time periods within which claims may be made under the contract, because those provisions are often not as clear as they might be.

The traditional contractual language that representations and warranties and covenants in an agreement "survive" for a specified time period (or periods) following closing blends together different concepts and may create unintended ambiguity. In part, such language is stating that

⁷ Clause 22(5)2. This seems to indicate that "varied", in this context, is limited to agreements to shorten the ultimate limitation period. A contrary argument may be possible, however, that "extended" (like "suspended") is intended to apply only to an ultimate limitation period that is already running, not to preclude parties from agreeing in advance in a business agreement on a longer period for certain claims.

⁸ "Suspended or extended" may be intended to apply only to limitation periods that have already commenced to run: see note 7 above. It might be asked why parties to a non-business agreement would still be precluded from agreeing to a period less than two years, but could agree to a longer period. However, the former may be considered to be the greater danger in "consumer" contracts.

⁹ This might strengthen the interpretation that only a limitation period that is already running can be "suspended or extended" by agreement.

the representations and warranties and covenants do not merge on closing, but can continue to be enforced by the parties thereafter. In addition, such provisions are attempting to impose a time limit within which such post-closing claims may be made. Also, the "survival" language often does not unambiguously express the parties' intention as to what must occur within the prescribed time in order to preserve the claimant's ability to recover.¹⁰ For example, is it intended simply that a notice of claim be given to the party in breach within the prescribed period, or must a legal proceeding be commenced against it?

In order to reduce ambiguity and more clearly define and express the intentions of the parties, it would be advantageous for commercial agreements to distinguish between and clearly address three separate concepts:

1. the survival of representations, warranties and covenants past closing (non-merger);
2. the time within which written notice of a claim must be given to the party in breach, failing which such party is released from liability in respect of such breach; and
3. the time within which a legal proceeding must be commenced in respect of a claim that has been preserved by the required written notice.

The time within which written notice of a claim must be given in order to preserve it and the time within which a legal proceeding must be commenced will be matters for negotiation. In most circumstances, the parties will wish the deadline for commencing a legal proceeding to be after the deadline for giving a written notice of claim in order to permit the parties to explore non-litigious resolutions prior to requiring commencement of proceedings.

Attached as an Appendix are sample provisions from a purchase agreement dealing with survival and indemnification, to illustrate how the approach recommended above might be implemented in an agreement. The issue of survival (non-merger) is addressed in Section 7.1. The time limits within which a notice of claim must be given and the release of a party in breach, if such a notice

¹⁰ There are U.S. cases holding that contractual waivers of limitation periods will be strictly construed and refusing to give effect to "survival" language as an effective waiver. In *Herring v. Teradyne, Inc.*, 242 F. App'x 469 (9th Cir 2007), the U.S. Court of Appeals for the Ninth Circuit reversed the decision of the U.S. District Court for the Southern District of California that a survival clause in a merger agreement had the effect of reducing (from four years to one year) the statute of limitations applicable to claims based on alleged misrepresentations in the merger agreement. The agreement used the traditional wording that "the covenants, agreements, representations and warranties of the parties hereto contained in this Agreement . . . shall survive the Closing until the first anniversary of the Closing Date . . .". On appeal, the Court held that this provision did not clearly and unequivocally contract out of the statute of limitations, so that a claim for an alleged breach of representation in the agreement could be made more than one year after the closing. See "Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions", *The Business Lawyer*, Vol. 63, Feb. 2008, p. 531, at pp. 551-52. The same Court reached a similar decision in *Western Filter Corporation v. Argan, Inc.* (2008 U.S. App. LEXIS 18147), in construing similar "survival" language. Although both of these decisions were applying California law, it appears that the same issue could arise under the laws of other states. It is difficult to predict, in the absence of relevant case law, whether a Canadian court might adopt a similar approach.

is not given within the applicable time period, are set out in Section 7.7. The times within which court proceedings must be commenced in respect of claims that have been preserved by giving written notice in accordance with Section 7.7 are dealt with in Section 7.8.

In order to make clear how these provisions would work in their context, the other provisions dealing with indemnification that might be found in a purchase agreement are also included in the sample provisions in the Appendix. The indemnification provisions of acquisition agreements are usually the subject of extensive negotiation between the parties and it is not suggested that the sample provisions in the Appendix are necessarily typical of or appropriate for any particular real transaction. The sample provisions are not the only way in which the objectives set out above of clarifying the drafting of indemnification provisions could be achieved and other drafting approaches could be equally effective.

Opinion Qualifications

When the Act came into force on January 1, 2004, section 22 provided that a limitation period under the Act would apply despite any agreement to vary or exclude it. At the time, no exceptions to this rule were available. Due to the lack of consensus among practitioners regarding the effect of the Act and the unavailability of case law interpreting the new legislation,¹¹ including a separate qualification regarding the Act in transactional opinions became common practice. The qualification addressed the application of the Act to the enforcement of the relevant agreements in general terms, often as follows:

"the enforcement of the [Documents] is subject to the limitations contained in the *Limitations Act, 2002 (Ontario)*."

As discussed above, amendments to section 22 of the Act became effective on October 19, 2006. These amendments included a number of exceptions to the basic rule prohibiting agreements to vary or exclude limitation periods established by the Act. In commercial transactions, the rule in subsection 22(5)1 of the Act that permits parties to a "business agreement" to vary or exclude the two-year basic limitation period will apply in almost all cases. As a result, it is often unnecessary to include a separate qualification in a transactional opinion stating that the enforcement of the relevant agreements will be subject to the Act. However, notwithstanding the new rule for "business agreements", the practice of including the form of qualification described above has continued. Currently, such qualification is usually accepted by an opinion recipient and is not considered objectionable. Given that the limitations in the Act can have a direct effect on the means through which the opinion recipient can obtain a remedy, there may be some merit in drawing such limitations to the recipient's attention. It is also advisable to include the qualification where the intention of the parties to contract out of the limitation periods in the Act

¹¹ See footnote 3 above.

is not clearly expressed, since a court may require that such an agreement be made clearly and unequivocally.¹²

It is not uncommon for commercial parties to allocate risk for long periods of time following the closing of a transaction. For example, an acquisition agreement may provide that proceedings can be commenced in respect of claims that are fundamental to the transfer of the property (such as fraudulent misrepresentations or issues of title) for a number of years, or even indefinitely.¹³ Under subsection 22(5)2 of the Act, parties to a business agreement may vary the 15-year ultimate limitation period. However, it may not be suspended or extended unless the relevant claim has been discovered. To the extent an agreement contains provisions that purport to allow a party to commence a proceeding in respect of a claim for an indefinite period, or a period that exceeds 15 years from the date of the act or omission on which the claim is based, such provisions may not be enforceable. In such circumstances, the following form of opinion qualification may be appropriate:

"the enforcement of the [Documents] is subject to the limitations contained in the *Limitations Act, 2002* (Ontario)(the 'Act') and if a court were to determine that any of the provisions of the [Documents] varied or excluded the ultimate limitation period established by section 15 of the Act, such limitation period would apply despite such provision."

Where a commercial transaction involves one or more individuals, consideration may have to be given to whether the relevant agreements constitute "business agreements" for the purposes of the Act. If an agreement is not a "business agreement", then the parties may not agree to shorten or exclude any applicable limitation periods. The limitation periods may only be suspended or extended and, in the case of the 15-year ultimate limitation period, only if the relevant claim has been discovered. If, in such circumstances, there is uncertainty regarding the extent to which the individuals are acting for "business purposes" and an agreement includes provisions purporting to vary or exclude a limitation period, an opinion giver should consider including a qualification regarding the application of the Act.

¹² See footnote 10 above.

¹³ This is the combined effect of sections 7.7(1)(a) and 7.8(1)(a) in the attached sample provisions.

APPENDIX – SAMPLE PROVISIONS OF PURCHASE AGREEMENT

ARTICLE 7 – SURVIVAL AND INDEMNIFICATION¹⁴

Section 7.1 – Survival¹⁵

All provisions contained in this Agreement and in any other agreement, certificate or instrument executed and delivered hereunder, other than the conditions in Article 6, shall not merge on the closing of the Purchase but shall survive the execution, delivery and performance of this Agreement, the closing of the Purchase and the execution and delivery of any transfer documents or other documents of title to the Purchased Shares and all other agreements, certificates and instruments executed and delivered hereunder and the payment of the consideration for the Purchased Shares.

Section 7.2 – Definitions

As used in this Article 7:¹⁶

- (1) **Damages** means, whether or not involving a Third Party Claim, any and all loss, liability, cost, claim, interest, fine, penalty, assessment, damages available at law or in equity, including loss of value, expenses, including the costs and expenses of any action, suit,

¹⁴ The indemnification provisions of the Agreement provide a framework to set out the periods for which the Vendor will remain liable to the Purchaser (and vice-versa) for claims for Damages that may arise for breaches of representations and warranties (which may be different for different representations and warranties) and covenants. It is also the most appropriate part of the Agreement in which to address limitations on liability such as caps and thresholds with respect to the dollar amounts of Damages. There is no reason in principle why a Party could not pursue a direct action for Damages for breach of representation or warranty or covenant, but many agreements include a provision that limits the remedies to those available under the indemnification provisions. The purpose of this "exclusive remedy" provision (Section 7.15 in this precedent) is to make it clear that a Party cannot attempt to avoid the negotiated time limits and other restrictions by purporting to sue directly for breach of contract rather than following the procedures set out in the indemnification provisions.

¹⁵ The sole purpose of Section 7.1 is to negate any possible application of the doctrine of merger whereby representations and warranties with respect to property "merge in the deed", or are extinguished when the property is actually conveyed, unless the parties otherwise agree to the rights and remedies the Parties have agreed upon. Rather than representations, warranties and covenants "merging" on closing, they remain available to the Parties as the basis of a remedy if a breach is discovered. The exclusion of conditions from survival is because they exist to give the Parties the option to refuse to close if they are not satisfied. Even though the conditions do not survive, the final sentence of Section 7.3 makes it clear that if they are waived, the right of the Party waiving them to recover Damages based upon a breach of representation and warranty or non-performance of a covenant continues despite the waiver of the related condition. This is a matter that might be negotiated by the Vendor who may not wish to put the Purchaser in a position to "close and sue" in the face of a known problem.

¹⁶ It is assumed that capitalized terms not included in Section 7.2 are defined in the general definition provisions of the Agreement.

proceeding, demand, assessment, judgement, settlement or compromise relating thereto (including the costs, fees and expenses of legal counsel on a full indemnity basis without reduction for tariff rates or similar reductions and all reasonable costs of investigation), but excluding loss of profits and consequential damages and excluding any contingent liability until it becomes actual.¹⁷

- (2) **Direct Claim** has the meaning given to it in Section 7.6.
- (3) **Indemnified Party** means any Person entitled to indemnification under this Agreement.
- (4) **Indemnifying Party** means any Person obligated to provide indemnification under this Agreement.
- (5) **Indemnity Payment** means the amount of any Damages required to be paid pursuant to Sections 7.3 or 7.4.
- (6) **Notice of Claim** has the meaning given to it in Section 7.6.
- (7) **Purchaser's Indemnified Parties** means the Purchaser, the Purchaser's Affiliates, the Corporation and their respective directors, officers, employees and agents.
- (8) **Releasees** has the meaning given to it in Section 7.16.
- (9) **Releasor** has the meaning given to it in Section 7.16.
- (10) **Third Party Claim** has the meaning given to it in Section 7.6.
- (11) **Vendor's Indemnified Parties** means the Vendor and the Vendor's Affiliates and their respective directors, officers, employees and agents.

¹⁷ The exclusion of certain types of Damages will be a matter for negotiation. Special, aggravated, exemplary or punitive damages might also be excluded in some agreements.

Section 7.3 – Indemnity by Vendor¹⁸

The Vendor shall indemnify the Purchaser's Indemnified Parties and save them fully harmless against, and will reimburse them for, any Damages arising from, in connection with or related in any manner whatever to:

- (a) any incorrectness in or breach of any representation or warranty of the Vendor contained in this Agreement or in any other agreement, certificate or instrument executed and delivered pursuant to this Agreement;
- (b) any breach or any non-fulfilment of any covenant or agreement on the part of the Vendor contained in this Agreement or in any other agreement, certificate or instrument executed and delivered pursuant to this Agreement;
- (c) defects or deficiencies in **[any product manufactured or distributed] / [any services provided]** by the Corporation, in whole or in part, prior to the Closing Date;¹⁹ and
- (d) any breach or alleged breach of any contract by the Corporation which occurred prior to the Closing Date [or any such breach which occurs after the Closing Date but arises out of a continuation of a course of conduct which commenced prior to the Closing Date], including any contract disclosed in Schedule ●.

The rights to indemnification of the Purchaser's Indemnified Parties under this Section 7.3 shall apply notwithstanding any inspection or inquiries made by or on behalf of any of the Purchaser's Indemnified Parties, or any knowledge acquired or capable of being acquired by any of the Purchaser's Indemnified Parties or facts actually known to any of the Purchaser's Indemnified Parties (whether before or after the execution and delivery of this Agreement and whether before or after the closing of the Purchase). The waiver of any condition based upon the accuracy of any representation and warranty or the performance of any covenant shall not affect the right to

¹⁸ Section 7.3 creates the indemnification obligation in favour of the Purchaser with respect to both representations and warranties (in (a)) and all other matters, including covenants (in (b)), and certain specifically identified matters (in (c) and (d)). The Indemnified Party is required to give a Notice of Claim when it becomes aware of facts that may give rise to Damages for which it may make an indemnification claim. Section 7.7 provides that in the case of claims based on a breach of representation and warranty under Section 7.3(a), the Notice of Claim must be given before a specified general date (or, in some cases, other particular dates negotiated for particular representations and warranties) or the right to indemnification is lost. There is no such time limitation for a Notice of Claim relating to claims under subclauses (b) to (d), although the general requirement that it be given promptly after the relevant facts become known still applies.

¹⁹ The matters indemnified in paragraphs (c) and (d) are examples of the types of matters that are sometimes negotiated as being matters for which the Purchaser will not accept any risk and by specifying them separately, they can be easily excluded from thresholds, caps and time limits. Another example might be particular litigation to which the Corporation is a party and which the parties agree remains the responsibility of the Vendor and is therefore made the subject of a full indemnity.

indemnification, reimbursement or other remedy based upon such representation, warranty or covenant.²⁰

Section 7.4 – Indemnity by the Purchaser

The Purchaser shall indemnify the Vendor's Indemnified Parties and save them fully harmless against, and will reimburse them for, any Damages arising from, in connection with or related in any manner whatever to:

- (a) any incorrectness in or breach of any representation or warranty of the Purchaser contained in this Agreement or in any other agreement, certificate or instrument executed and delivered pursuant to this Agreement; and
- (b) any breach or non-fulfilment of any covenant or agreement on the part of the Purchaser contained in this Agreement or in any other agreement, certificate or instrument executed and delivered pursuant to this Agreement.

Section 7.5 – Monetary Limitations²¹

- (1) No claims for indemnification may be made by the Purchaser's Indemnified Parties against the Vendor under Section 7.3(a) unless the aggregate amount of Damages for which the Purchaser's Indemnified Parties are entitled to be indemnified under Section 7.3(a) exceeds **[\$dollar amount]**, in which event the accumulated aggregate amount of all Damages may be recovered by the Purchaser's Indemnified Parties.
- (2) No claims for indemnification may be made by the Vendor's Indemnified Parties against the Purchaser under Section 7.4 unless the aggregate amount of Damages for which the Vendor's Indemnified Parties are entitled to be indemnified under Section 7.4 exceeds **[\$dollar amount]**, in which event the accumulated aggregate amount of all Damages may be recovered by the Vendor's Indemnified Parties.
- (3) The maximum aggregate liability of a Party for Damages hereunder shall not exceed **[\$dollar amount]**.

²⁰ There is no corresponding provision to this in Section 7.4, because these matters are unlikely to be relevant to the representations, warranties and covenants of the Purchaser. However, the Vendor may insist upon parallel language.

²¹ Monetary limits on recoverable Damages are a matter for negotiation. This precedent contemplates a threshold (applicable only to Damages for breaches of representations and warranties), after which the Indemnified Party may recover from the first dollar. An alternative approach is to provide for a "deductible", which relieves the Indemnifying Party from liability for amounts below that amount. The aggregate limit in Section 7.5(3) might be the Purchase Price, or some other negotiated "cap".

Section 7.6 – Notice of Claim

If an Indemnified Party becomes aware of any act, omission or state of facts that may give rise to Damages in respect of which a right of indemnification is provided for under this Article 7, the Indemnified Party shall promptly give written notice thereof (a "**Notice of Claim**") to the Indemnifying Party. All Notices of Claim shall be given, and all other steps and proceedings pursuant to this Article 7 shall be taken, solely by the Purchaser on behalf of all Purchaser Indemnified Parties and solely by the Vendor on behalf of all Vendor Indemnified Parties. Such Notices of Claim, steps and proceedings so given or taken shall be binding upon all of the Purchaser Indemnified Parties and on all of the Vendor Indemnified Parties, respectively, and the Indemnifying Party may rely conclusively thereon. A Notice of Claim shall specify whether the potential Damages arise as a result of a claim by a Person against the Indemnified Party (a "**Third Party Claim**") or whether the potential Damages do not so arise (a "**Direct Claim**"),²² and shall also specify with reasonable particularity (to the extent that the information is available):

- (a) the factual basis for the Direct Claim or Third Party Claim, as the case may be; and;
- (b) the amount of the potential Damages arising therefrom, if known.

If, through the fault of the Indemnified Party, the Indemnifying Party does not receive notice of a particular claim in time, or does not receive sufficient information respecting such claim, effectively to contest the determination of any liability susceptible of being contested or to assert a right to recover an amount under applicable insurance coverage, then the liability of the Indemnifying Party to the Indemnified Party under this Article 7 shall be reduced to the extent that Damages are incurred by the Indemnifying Party resulting from the Indemnified Party's failure to give such notice on a timely basis or to provide sufficient information that was not available to the Indemnified Party, but such failure shall not otherwise release the Indemnifying Party from its obligations under this Article 7.²³ Nothing in this Section 7.6 shall be construed to affect the time within which a Notice of Claim must be delivered pursuant to Section 7.7(1) or Section 7.7(2) in order to permit recovery pursuant to Section 7.3(a) or Section 7.4(a), as the case may be.

²² The claim for indemnification may arise from Damages suffered directly by the Indemnified Party (for example, breach of a representation or warranty by the Indemnifying Party) or as a result of the assertion of a claim by a third party against the Corporation or the Indemnified Party. In the case of a Third Party Claim, there is not only the issue of liability to indemnify in respect of the claim but also the issue of the validity and the amount of the claim advanced by the third party. The resolution of a Direct Claim involves a determination of whether the Damages qualify for indemnification and, if so, their amount. The resolution of a Third Party Claim requires more elaborate provisions to deal with the mechanics of the defence of the Third Party Claim.

²³ A Purchaser will normally notify the Vendor if and when it discovers a possible claim. Section 7.7 requires the notice to be delivered before an outside date and the only consequence of not delivering it "promptly" is to reduce the amount of Damages to the extent the other Party is prejudiced by the failure to do so.

Section 7.7 – Time Limits for Notice of Claim for Breach of Representation and Warranty²⁴

- (1) *Notice by the Purchaser.* No Damages may be recovered from the Vendor pursuant to Section 7.3(a) unless a Notice of Claim is delivered by the Purchaser on or before the following dates:
 - (a) with respect to the representations and warranties in Sections 3.1, (●), (●) and (●), at any time²⁵ after Closing;
 - (b) with respect to Damages in respect of a claim based on Tax matters set out in Section 3.1(●) arising in or in respect of a particular period ending on, before or including the Closing Date, on the date that is the earlier of (i) 30 days after the relevant Governmental Authorities shall no longer be entitled to assess liability for Taxes against the Corporation for that particular period (which shall not be extended by any waiver given by the Corporation after the Closing Date without the consent of the Vendor, such consent not to be unreasonably withheld) and (ii) the [●] anniversary of the date of this Agreement; and
 - (c) with respect to all other representations and warranties, on or before ***[date that is 18 months after Closing]***.

Unless a Notice of Claim has been given on or before the applicable date set out above with respect to a representation and warranty, the Vendor shall be released on such date from all obligations in respect of that representation and warranty and from the obligation to indemnify the Purchaser's Indemnified Parties in respect thereof pursuant to Section 7.3(a). This Section 7.7(1) shall not be construed to impose any time limit on the Purchaser's right to assert a claim to recover Damages under Sections 7.3(b) through (d), whether or not the basis on which such a claim is asserted could also entitle the Purchaser to make a claim for Damages pursuant to Section 7.3(a).

- (2) *Notice by the Vendor.* No Damages may be recovered from the Purchaser pursuant to Section 7.4(a) unless a Notice of Claim is delivered by the Vendor on or before ***[date that is 18 months after Closing]***. Unless a Notice of Claim has been given on or before ***[date that is 18 months after Closing]*** with respect to a representation and warranty, the

²⁴ Section 7.7 sets out time limits within which the Indemnified Party must give a Notice of Claim if it wishes to assert a claim for indemnification for a breach of representation and warranty. The paragraph contemplates that the times may vary for different representations and warranties as a result of negotiations. Paragraph (a) contemplates the survival forever of certain representations and warranties which might include title to shares and assets, environmental claims and other items as negotiated. Paragraph (b) is typical with respect to tax matters and paragraph (c) sets a general period for other matters. In any specific transaction, different periods, longer or shorter, may be negotiated.

²⁵ Some types of representations and warranties that often continue without time limit are those relating to title to shares and certain environmental matters.

Purchaser shall be released on *[date that is 18 months after Closing]* from all obligations in respect of that representation and warranty and from the obligation to indemnify the Vendor's Indemnified Parties in respect thereof pursuant to Section 7.4(a). This Section 7.7(2) shall not be construed to impose any time limit on the Vendor's right to assert a claim to recover Damages under Section 7.4(b), whether or not the basis on which such a claim is asserted could also entitle the Vendor to make a claim for Damages pursuant to Section 7.4(a).

- (3) *Waiver of Potential Defence.* If the date by which a Notice of Claim must be given as set out in Section 7.7(1) or (2) in respect of a representation and warranty has passed, an Indemnified Party that might otherwise have been entitled to indemnification had such date not passed shall not be entitled to assert a right to give a Notice of Claim on the basis that it did not know and could not reasonably have known of the existence of the breach of that representation and warranty, or of any other element necessary to make a claim for Damages in respect thereof prior to such date. Each Indemnified Party irrevocably agrees not to assert in any proceeding that it should be relieved from any of the provisions of this Article 7 by reason that it did not know and could not reasonably have known of the existence of any breach of representation and warranty, or of any other element necessary to make a claim for Damages in respect thereof. Each Indemnifying Party further irrevocably agrees not to assert in any proceeding, whether by way of defence, set-off, counterclaim or otherwise, that the Indemnified Party knew, or that a reasonable person with the abilities and in the circumstances of the Indemnified Party ought to have known, of any or all of the elements forming the basis of a claim for indemnification in respect of a particular representation and warranty made by the Indemnified Party, at any time prior to the date on which the Indemnified Party gives its Notice of Claim in respect thereof to the Indemnifying Party.

Section 7.8 – Limitation Periods

- (1) *Limitation Periods for Representations and Warranties.*²⁶ Notwithstanding the provisions of the *Limitations Act, 2002* (Ontario) or any other statute, an Indemnified Party may commence a proceeding in respect of Damages arising from any incorrectness in or breach of any representation and warranty of the Indemnifying Party as referred to in a Notice of Claim delivered within the applicable time period stipulated in Section 7.7 at any time on or before the later of:
- (a) the **[first]** anniversary of the last date upon which such Notice of Claim is permitted to be delivered under Section 7.7; and
 - (b) the expiry of the limitation period otherwise applicable to such claim

²⁶ Section 7.8(1) is included to ensure that the limitation period does not expire before the notice period ends and to ensure that the limitation periods are extended to allow the Indemnified Party a reasonable time after notice within which to commence a proceeding if that should be necessary.

and any applicable limitation period is hereby so extended to the fullest extent permitted by law.

- (2) *Limitation Periods for Covenants and Other Matters.*²⁷ The limitation period applicable to any proceeding relating to a claim in respect of any matter in Sections 7.3(b) to (d) and Section 7.4(b) shall be **[determined pursuant to the *Limitations Act, 2002* as if Section 4 thereof referred to the [sixth] anniversary of the day on which the claim was discovered and any applicable limitation period is hereby so extended to the fullest extent permitted by law]/[solely as prescribed in sections 15-17 of the *Limitations Act, 2002* and any other limitation period in respect of such claim (including that provided for in section 4 of the *Limitations Act, 2002*) is extended accordingly.].**

Section 7.9 – Notice of and the Defence of Third Party Claims

With respect to a Third Party Claim, the Indemnifying Party shall have the right to participate in or, by giving notice to that effect to the Indemnified Party not later than 30 days after receipt of the Notice of Claim with respect to such Third Party Claim and subject to the rights of any insurer or other third party having potential liability therefor, to elect to assume the defence of such Third Party Claim at the Indemnifying Party's own expense and by the Indemnifying Party's own counsel, and the Indemnified Party shall have the right to participate in the defence of any Third Party Claim assisted by counsel of its own choosing. The Indemnified Party shall not settle or compromise any Third Party Claim without the prior written consent of the Indemnifying Party.

Section 7.10 – Assistance for Third Party Claims

The Indemnified Party and the Indemnifying Party shall use all reasonable efforts to make available to the party which is undertaking and controlling the defence of any Third Party Claim:

- (a) those employees whose assistance, testimony or presence is necessary to assist such party in evaluating and in defending any Third Party Claim, and

²⁷ Section 7.8(2) may be used if the Parties agree to extend the time within which a proceeding may be commenced in respect of matters other than representations and warranties. There might be two reasons to do this. First, some purchasers may be concerned that two years from discovery (or when a court says there ought to have been discovery) is unduly short. Second, it should remove any concern that delivery of a Notice of Claim with respect to an indemnity for a specific matter in Section 7.3(b) and following could trigger the running of a limitation period (even though there is a very strong argument that no cause of action has arisen then). The period should start to run when the claim is "crystallized" if the Vendor refuses reimbursement under an indemnity claim when it is asserted. The extension time would be a matter for negotiation - either as long as possible (*i.e.*, 15 years, generally speaking) or some shorter time (*e.g.*, six years which was the "old" period for contract claims). These alternative approaches are provided for in Section 7.8(2).

- (b) all documents, records and other materials in the possession of such party reasonably required by such party for its use in defending any Third Party Claim,

and shall otherwise co-operate with the party defending such Third Party Claim. The Indemnifying Party shall be responsible for all reasonable expenses associated with making such documents, records and materials available and for all reasonable expenses of any employees made available by the Indemnified Party to the Indemnifying Party hereunder, which expenses shall be equal to an amount to be mutually agreed upon per Person per hour or per day for each day or portion thereof that such employees are assisting the Indemnifying Party, but such expenses shall not exceed the actual direct out-of-pocket cost to the Indemnified Party associated with such employees.

Section 7.11 – Settlement of Third Party Claims

If an Indemnifying Party elects to assume the defence of any Third Party Claim as provided in Section 7.9, the Indemnifying Party shall not be liable for any legal expenses subsequently incurred by the Indemnified Party in connection with the defence of such Third Party Claim. However, if the Indemnifying Party fails to take reasonable steps necessary to defend diligently such Third Party Claim within 30 days after receiving the notice from the Indemnified Party that the Indemnified Party *bona fide* believes on reasonable grounds that the Indemnifying Party has failed to take such steps, the Indemnified Party may, at its option, elect to assume the defence of and to compromise or settle the Third Party Claim assisted by counsel of its own choosing and the Indemnifying Party shall be liable for all reasonable costs and expenses paid or incurred in connection therewith. Without the prior written consent of the Indemnified Party, such consent not to be unreasonably withheld, the Indemnifying Party shall not thereafter enter into any compromise or settlement of any Third Party Claim.

Section 7.12 – Direct Claims

With respect to a Direct Claim, the Indemnifying Party shall have a period of [30] days from receipt of a Notice of Claim in respect thereof within which to investigate and respond to the Indemnified Party in writing to such Direct Claim. The Indemnified Party shall make available to the Indemnifying Party the information relied upon by the Indemnified Party to substantiate its right to be indemnified, together with all other information as may be reasonably requested by the Indemnifying Party. If the Indemnifying Party does not so respond within such period, the Indemnifying Party shall be deemed to have rejected such Direct Claim, in which event the Indemnified Party shall be free to pursue such remedies as may be available to it.

Section 7.13 – Reductions and Subrogation

If the amount of Damages incurred by an Indemnified Party at any time subsequent to the making of an Indemnity Payment is reduced by

- (a) any net Tax benefit to the Indemnified Party, or

- (b) any recovery, settlement or otherwise under or pursuant to any insurance coverage, or pursuant to any claim, recovery, settlement or payment by or against any other Person,

the amount of such reduction (less any costs, expenses (including Taxes) or premiums incurred in connection therewith), together with interest thereon from the date of payment thereof at the Prime Rate, shall promptly be repaid by the Indemnified Party to the Indemnifying Party. Upon making a full Indemnity Payment, the Indemnifying Party shall, to the extent of such Indemnity Payment, be subrogated to all rights of the Indemnified Party against any third party in respect of the Damages to which the Indemnity Payment relates. Until the Indemnified Party recovers full payment of its Damages, any and all claims of the Indemnifying Party against any such third party on account of such Indemnity Payment shall be postponed and subrogated in right of payment to the Indemnified Party's rights against such third party.

Section 7.14 – Interest

All Indemnity Payments shall bear interest at a rate per annum equal to the Prime Rate, calculated and payable monthly, both before and after judgment, with interest on overdue interest at the same rate, from the date that the Indemnified Party disbursed funds or gave a Notice of Claim pursuant to Section 7.6, to the date of payment by the Indemnifying Party to the Indemnified Party.

Section 7.15 – Exclusive Remedy

The rights of indemnity set forth in this Article 7 are the sole and exclusive remedy of each Party in respect of any misrepresentation, breach of warranty or breach of covenant by the other Party hereunder. Accordingly, each Party waives, from and after the closing of the Purchase, any and all rights, remedies and claims that such Party may have against the other, whether at law, under any statute or in equity (including but not limited to claims for contribution or other rights of recovery arising under any Environmental Laws, claims for breach of contract, breach of representation and warranty, negligent misrepresentation and all claims for breach of duty), or otherwise, directly or indirectly, relating to the provisions of this Agreement or the transactions contemplated by this Agreement other than as expressly provided for in this Article 7 and other than those arising with respect to any fraud or wilful misconduct. The Parties agree that if a claim for indemnification is made by one Party in accordance with Section 7.3 or Section 7.4, as the case may be, and there has been a refusal by the other Party to make payment or otherwise provide satisfaction in respect of such claim, then a legal proceeding is the appropriate means to seek a remedy for such refusal. This Article 7 shall remain in full force and effect in all circumstances and shall not be terminated by any breach (fundamental, negligent or otherwise) by any Party of its representations, warranties or covenants hereunder or under any documents delivered pursuant hereto or by any termination or rescission of this Agreement by any Party.

Section 7.16 – Release

Each Party (together with its successors, assigns, heirs and personal representatives, being herein collectively referred to as the "**Releasor**") hereby irrevocably and unconditionally releases and

forever discharges the other Parties and each of their respective successors, assigns, heirs and personal representatives (collectively, the "**Releasees**") of and from all manner of actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, damages, claims and demands and all other claims whatsoever which the Releasor can have or shall or may in future have against any of the Releasees for or by reason of or in any way arising out of any cause, matter or thing whatsoever save and except as otherwise set forth in this Article 7.

Section 7.17 – General Limitations

An Indemnifying Party shall have no liability to an Indemnified Party hereunder:

- (a) for any liability which arises solely by reason of a proposed or actual enactment or change of any applicable Tax legislation or any proposed or actual change in the interpretation or administration of such legislation after the date hereof;
- (b) for any liability that arises as a result of any legislation not in force on the date hereof which takes effect retrospectively or occurs as a consequence of a change in the interpretation of the law after the date hereof;
- (c) in respect of any matter of thing done or omitted to be done by or at the direction or with the consent of the Indemnified Party;
- (d) in respect of more than one representation, warranty or covenant that relates to the same matter or thing; and
- (e) to the extent that provision or reserve in respect of the matter giving rise to such liability is made in the Closing Financial Statements.