

**REFORMING LIMITATIONS IN NEW BRUNSWICK:
A SUBMISSION TO
THE GOVERNMENT OF THE PROVINCE OF NEW BRUNSWICK**

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I N D E X

Page

Preface 1

Background 3

Limitations Law in New Brunswick & Private Statutes 5

Limitations Law in New Brunswick and "Other" Public Statutes 10

 (A) Insurance Claims 10

 (B) Public Statutes With "Notice" Or "Filing" Requirements 15

 (C) Real Property/Easements Act/Executors And Trustees Act/
 Regional Health Authorities Act 18

 (D) Fatal Accidents Act/Survival Of Actions Act 21

The Model Uniform Limitations Act And New Brunswick 23

 Section 1: Definition 23

 Section 4: Basic limitation period 23

 Section 5: Discovery and "discoverability" of claims 24

 Section 6: Ultimate limitation period 26

 Section 6(3): Ultimate limitation period: postponement of
 limitation for concealment or misleading/"tolling" 28

 Section 6(5): Ultimate limitation period: claims for contribution
 and indemnity 30

 Section 10: Successors, principals and agents 33

 Section 11: Acknowledgments 33

 Section 12: Other Acts, etc. 33

I N D E X

Page

Section 13: Amending pleadings	34
Section 14: Agreements	34
Section 15: Conflict of laws	35
Section 16: Transitional provisions	36
Conclusion	37
Summary Of Primary Recommendations	38
Appendices	40

"They have but few laws, and such is their constitution that they need not many. They very much condemn other nations, whose laws, together with the commentaries on them, swell up to so many volumes; for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects."

~ Sir Thomas More, "Utopia", 1516

PREFACE

In making this Submission, CBANB recognizes that any comprehensive revision of limitations law is likely to be contentious. While the process of law reform frequently consists of simply updating legislative frameworks to better reflect the changed conditions of society, limitations law turns, rather, on philosophical questions. When and in what circumstances will the right of a person to seek civil redress in the Courts against other parties be finally extinguished. This submission represents the consensus of the CBA Executive. As such, we hope it might be seen as a representative sampling of the views of our members as to how any such reform of the law should proceed.

CBANB acknowledges the unavoidable factor of self-interest. Lawyers pursue their livelihoods by instituting and defending lawsuits. The Plaintiffs' Bar may welcome any revision which extends limitations or makes their application more flexible. Defence counsel may well disagree. Lawyers are also liable to suit for their own professional negligence, and one of the leading causes of malpractice claims against lawyers is for missing limitations. Extension of limitation periods or increased flexibility in their application will likely result in the reduction of liability insurance premiums for lawyers. The inherent tension created by these dynamics is unavoidable. This Submission, however, seeks to approach these issues from the perspective that in making new law, the preferred guiding principle should be: what is best for the citizens of the Province.

The undersigned is the author of this Submission, although some of the enclosed comments arose through discussion with, or review of this Submission by, other CBA members. I have sought to highlight, in the text, several particular issues where I believe there to be substantial agreement within the practising Bar, and several issues where I perceive thereto be substantial disagreement. Any inaccuracies or mistakes in law to be found in this Submission, however, are solely the responsibility of myself. The research assistance of Nadia M. MacPhee of Barry Spalding is gratefully acknowledged.

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BACKGROUND

1. The present discussion of limitations law in the Province of New Brunswick arose as a result of the culmination of work done in this area by the Uniform Law Conference of Canada. In 2005, the Uniform Law Conference adopted a new *Uniform Limitations Act* which would "reflect the modern approach to limitations law" (see Appendix A: Uniform Law Conference of Canada "Briefing Note", dated August 25th 2005).

2. Following adoption of the *Uniform Limitations Act* by the Uniform Law Conference of Canada, several professional associations approached the Government of New Brunswick with the suggestion that the new model statute be adopted in this Province.

3. In December of 2005, the Office of the Attorney-General advised the profession through its "Law Reform Notes" that it felt it was time to consider reform in this area, and that it would be considering the *Uniform Limitations Act* as the basis for revision of this legislation in New Brunswick. This Submission is a direct response to the expression of interest by the Government of New Brunswick in the model *Uniform Limitations Act*.

4. No formal Bill has yet been introduced into the New Brunswick Legislature on this subject, but the Office of the Attorney-General has previously advised that it is considering using the *Uniform Limitations Act* as a foundation text for new legislation here. Our comments in this Submission are therefore both "general" comments based on experience of members of the practising Bar in New Brunswick with limitations issues, and also "specific" comments with respect to the

model *Uniform Limitations Act*. It is attached for convenience as Appendix B to this Submission.

(Please note the "Comments" regarding specific provisions **in Appendix B** are the comments of the Uniform Law Conference, inserted by them to facilitate consideration of their model statute.)

LIMITATIONS LAW IN NEW BRUNSWICK & PRIVATE STATUTES

5. In New Brunswick, the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8 is the primary public statute governing limitations in this Province. It was based on an earlier model statute of the Uniform Law Conference dating from 1931 (see Appendix A attached). In the New Brunswick Law Reform Notes (Number 23: December 2005) at page 2, it was stated that parts of this statute are close to 200 years old, and "are difficult to understand". Moreover, this statute can no longer be regarded as a comprehensive embodiment of all the limitation periods which actually apply in New Brunswick. Over the years many limitation of actions provisions have been scattered through other public and many private statutes. **The proliferation of "special limitations" provisions in private statutes has itself become a problem in this area of law.**

6. The difficulty of locating the limitations in many private statutes is compounded by the difficulty of locating reliable versions of the private statutes themselves. Private statutes are officially indexed in the sessional volume of the Legislature in which they appear, and will not be found by consulting the Revised Statutes of New Brunswick. The Legislative Library of New Brunswick does maintain an electronic index of private statutes based on the combined collating efforts of P.C. Robinson and Mr. Justice Ronald C. Stevenson:

(<http://142.139.24.21/LegLibBib/pactsfulldisplay.jsp?lang=EN&action=display&xml=true>).

A "caveat" in the electronic index, however, warns that the index **"should serve as a guide only and should not be taken as the final authority on whether a private act has undergone**

amendments". This "caveat" highlights an additional complicating factor: that amendments to private statutes are generally not consolidated in the same fashion as a public statute. Even when one identifies a limitation provision in a private statute, one cannot be certain that the limitation period has not been subsequently revised without examining any and all subsequent amending statutes. The amending statutes themselves may be either "private" or "public" statutes. The unavailability of a comprehensive "official" index of private statutes makes this a worrisome and time-consuming task when certainty is required.

7. Finding and confirming a specific limitation period in a private statute can be a difficult task for solicitors. It is virtually impossible for lay-persons. **The lack of easy accessibility to limitations law in private statutes is simply unacceptable in view of the information management systems which are readily available today.**

8. **It should also be noted that there is a lack of consistency between the limitations in private statutes which govern self-regulating professional associations, even where the governing statutes for such associations were enacted in relatively close proximity (time-wise) to each-other.** As an example, the limitation for lawsuits against physiotherapists in New Brunswick is set out at Section 29 of the *Physiotherapy Act 1985*, S.N.B. 1985 c.74, as follows:

"No person registered under this Act is liable to any action for negligence or malpractice by reason of professional services requested or rendered, unless the action is commenced within 2 years from the date when, in the matter complained of, those professional services terminated".

By way of contrast, the limitation for occupational therapists is found at Section 30 of *An Act Respecting the New Brunswick Association of Occupational Therapists*, S.N.B. 1988, c.76 as follows:

"No action shall be brought against a member or former member for negligence or breach of contract or otherwise by reason of services requested, given or rendered, except within:

- (a) two years from the day when, in the matter complained of, such service is terminated,
- (b) two years after the person commencing the action knew or ought to have known the facts upon which he alleges negligence or breach of contract, or
- (c) where the person entitled to bring an action is, at the time the cause of action arises, an infant, a mental incompetent, or a person of unsound mind, one year from the date when such person becomes of full age, or of sound mind, or as the case may be,

whichever is longer."

These two private limitations provisions, read in contra-distinction to each other, raise some interesting questions. For example, the limitation for occupational therapists governs actions against "*a member or former member*", while the physiotherapy limitation is worded so as to apply only to a "*person registered under this Act*." It is trite law that limitation statutes are to be strictly construed. What, then, is the limitation against a physiotherapist whose *registration has previously been cancelled by the Board of the Physiotherapy Association*? (See s.19, *Physiotherapy Act 1985*, for the power of the Board to do so.) While this specific question may or may not find a clear solution in the wider context of interpretative analysis, the point to be noticed here is that the same issue does

not even arise for consideration under the wording of the *Occupational Therapists Act* limitation, which is worded more broadly so as to explicitly include members and former members.

9. **Quite apart from the obvious differences in the above two provisions, one is rather hard-pressed to conceive of any valid public policy reason for having any different limitation periods for physiotherapists and occupational therapists, or indeed, all other self-regulated deliverers of professional services.**

10. Based upon the foregoing, CBANB recommends as follows:

I. A substantial revision of the law governing limitations of actions is appropriate and desirable at this time in New Brunswick. This revision should encompass not only limitations in the present *Limitation of Actions Act*, and other public statutes, but also limitations provisions in private statutes.

II. Limitations provisions presently contained in private statutes should be more readily discoverable and ascertainable than is presently the case. Improved indexing of private statutes would be of short-term assistance in correcting this situation, but a better long-term solution is desirable, and should include one of the following recommendations (III or IV).

III. "Specific" limitations should be eliminated from private statutes.

As the vast majority of such limitations pertain to the provision of professional services, the limitations law applicable to self-governing groups governed by private statute should be identical. Furthermore, the limitations of actions for professionals should not be any different from the limitations law applicable generally by virtue of a public *Uniform Limitations Act*. (This is the *Preferred Option of CBANB*).

IV. Alternatively, should it be the preference of the Government to continue to permit the ongoing existence and continued enactment of "specific" limitation periods in private statutes, as such private statutes are created or amended over time, all such limitations should be harmonized as much as possible with one "model" limitation. All existing "specific" limitation periods in private statutes should be subordinated to the remedial and saving provisions of the *Uniform Limitations Act*. In the event of any conflict between the two statutes, the Plaintiff should always having the benefit of the more favourable provision.

LIMITATIONS LAW IN NEW BRUNSWICK AND "OTHER" PUBLIC STATUTES

11. As was noted in the "Briefing Note" of the Uniform Law Conference (see Appendix A, page 2), the model *Uniform Limitations Act* "did not and could not take into account the impact of the limitations rules on all conceivable claims".

12. In this section of our Submission, we will however consider limitations provisions in existing public statutes *other than* the present *Limitation of Actions Act* which should also receive attention at this time.

(A) Insurance Claims

13. While not referenced in the attached Briefing Note, the Uniform Law Conference of Canada in their August 2005 conference produced a separate Report on "*Limitation Periods In Insurance Claims*", in which it was noted that **insurance claims** constitute a "proliferation of provisions" which have arisen through the course of history of legislative regulation of the insurance industry. This proliferation is partially due to the fact that a number of these provisions were, at an earlier day, separate statutes enacted to regulate specific forms of insurance activity. (See "*Limitation Periods In Insurance Claims: Report To Uniform Law Conference Of Canada, Civil Law Section, August 21-25, 2005*"). The *Insurance Act* creates limitations which are complicated by being related to various and unique "notice provisions" (proof of loss provisions, the "furnishing of sufficient evidence" in the case of life insurance, etc). These "claims processes" cannot be ignored when considering the revision of such limitations.

14. Insurance limitations ought to be maintained in the *Insurance Act*, due to the interaction of the various notice and proof of loss provisions which are involved. It would, however, make sense as part of the overall limitations revision process to review all limitations provisions in the *Insurance Act* and bring these into consistency with the "basic limitation period" (see below). For example, by virtue of s.230 of the *Insurance Act*, the limitation against an insurer for an action in respect of *loss or damage to the automobile* must at present be commenced "*within 2 years next after the happening of the loss and not afterwards*", and in respect of *loss or damage to persons or property*, shall be commenced "*within 2 years next after the cause of action arose and not afterwards*", (Statutory Condition 6(3) of the auto policy). An action on an *accident and sickness policy (other than* in a contract of group insurance: see s.194), has a limitation of "*one year after the date the insurance money became payable or would have become payable if it had been a valid claim*", by virtue of Statutory Condition 12 under "Part VI-Accident and Sickness Insurance" of the *Insurance Act*. An action or proceeding against the insurer for the recovery of a *claim under a fire policy* is subject to a limitation of "*one year next after the loss or damage occurs*" by virtue of Statutory Condition 14, which is created under "Part IV-Fire Insurance" of the *Insurance Act*. Some careful qualification is, however, necessary in discussing this limitation. The problem which arises is that the limitation in the statutory conditions may or may not apply, depending on whether the "peril of fire" is found to be only an "incidental peril" in the policy under construction. If no peril *other than fire* is "primary", our Court of Appeal has determined that Statutory Condition 14 applies to **all claims** under the policy, no matter that the peril involved in the lawsuit is **not** fire. A detailed discussion of this problem was undertaken by Drapeau J.A., as he was then, for the Court in *Norris v. Lloyd's of London* (1998), 205 N.B.R. (2d) 29 (C.A.), leave to appeal to SCC dismissed at (1999),

218 N.B.R. (2d) 400. Despite the fact that leave to appeal to the Supreme Court of Canada was dismissed in *Norris*, it should be noted that in two decisions four years later, on appeal from the Courts of British Columbia, the Supreme Court of Canada determined that the limitation contained in the statutory conditions in the "Fire Insurance Part" of the **British Columbia** statute was **not** intended to apply to a multi-risk policy: see *Churchland v. Gore Mutual Insurance Company*, [2003] 1 S.C.R. 445, and *KP Pacific Holdings v. Guardian Insurance*, [2003] 1 S.C.R. 433, especially at paragraph 19. These two SCC decisions may be distinguishable from *Norris* due to different wording of the B.C. *Insurance Act*, but again the point to be noted for present purposes is that **there should be no uncertainty to begin with**. In the *KP Pacific* decision, Chief Justice McLachlin, for the Court, examined the British Columbia *Insurance Act* in its historical context. She observed that it was originally designed for an insurance marketplace which has over time evolved to a completely different practice. Chief Justice McLachlin stated at paragraphs 4-5 as follows:

"The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories. The result is continued uncertainty about what rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. The rulings that have emerged have been likened to a 'judicial lottery': Prof. J. A. Rendall . . .

It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies. In the meantime, the task of resolving disputes arising from this disjunction between insurance law and practice falls to the Courts."

This clarion call for legislative intervention from the Chief Justice of Canada would, we think, be unanimously supported by insurance lawyers, whether acting for claimants or insurance companies. Continuing uncertainty in such matters is in nobody's interest.

15. We conclude this topic by observing, first, that there is no obvious reason for the disparity in years between these various insurance limitations. Second, we suggest that in relation to multi-peril policies, the question of which limitation applies should not depend upon a retrospective interpretation of whether fire is an "incidental peril" when other perils are covered in a policy. Movement toward one basic limitation in all these types of insurance claims would avoid much confusion.

V. The special limitation periods in the *Insurance Act* should be reviewed in consultation with the Superintendent of Insurance to make them consistent with the principle of the basic limitation to be established in any new uniform *Limitations Act*.

16. Special attention must be devoted to the question of limitations provisions in *disability policies*. At present, there may be considerable uncertainty in confirming the applicable limitation of actions on disability policies. The term "*disability insurance*" is defined in Section 1 of our *Insurance Act* as follows:

" 'Disability Insurance' means insurance undertaken by an insurer *as part of a contract of life insurance* whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease;" [Emphasis added]

(The definition of "*life insurance*" in Section 1 **includes** "*disability insurance*".) Where disability insurance is *part of a contract of life insurance*, it is at least arguable that the limitation period is the statutory one set out at Section 168 under "Part V-Life Insurance" of the *Insurance Act*,

although this provision seems more likely to have been devised for "*life insurance*" actions (see, generally, comments of Richard Hayles in **Disability Insurance: Canadian Law and Business Practice**, Carswell, 1998, at pp.255-257). Moreover, many private disability policies do **not** include life coverage as a constituent element. Many such private disability policies purport to create their own limitation period within the policy wording. (Whether such "private limitations" can take priority over the general provisions of the *Limitation of Actions Act* is itself a difficult question: see the cautionary comments of Drapeau J.A. in this regard at para. 26 of *Norris v. Lloyd's, supra.*) It then becomes necessary to obtain a copy of the appropriate policy wording from the private disability insurer, in order to verify the supposed private limitation which the disability insurer has stipulated in its policy. The willingness of private disability insurers to promptly provide accurate and complete copies of their private disability policy wording (whether "single coverage" or "group coverage" policies are involved) is not always readily forthcoming.

VI. A clear and single limitation of actions period should be established for actions on disability policies, regardless of whether the disability coverage is part of a life insurance policy, an individual disability policy, or a group disability policy. This reform should be undertaken in conjunction with the creation of a more appropriate and comprehensive definition of "disability insurance" in the *Insurance Act*.

(B) Public Statutes With "Notice" Or "Filing" Requirements

17. Over the course of time, some limitation periods have been created which are directly tied to "**filing**" or "**notice**" provisions, where compliance is intended to be a "condition precedent" to the filing of a lawsuit. The requirement that an action be filed within ninety days from the filing of a claim for lien, pursuant to Section 27 of the *Mechanics' Lien Act*, R.S.N.B. 1973, c.M-6, is the most obvious example. By Section 13 of the *Defamation Act*, R.S.N.B. 1973, c.D-5, no action shall lie against the proprietor or publisher of a newspaper or the owner or operator of a broadcasting station, or their officers, servants or employees, unless the Plaintiff has, within three months after the publication of the defamatory matter has come to his notice or knowledge, given to the Defendant, in the case of a daily newspaper, seven, and in the case of other newspaper or where the defamatory matter was broadcast, 14 days notice in writing of his intention to bring an action.

18. One of the most common "notice" provisions solicitors routinely encounter is Section 15 of the *Proceedings Against The Crown Act*, R.S.N.B. 1973, c.P-18. This stipulates that no action shall be brought against the Crown unless 2 months' previous notice in writing thereof has been served on the Attorney-General or on the corporation in the case of an action to be brought against a Crown corporation. It is worth noting in passing that the extent of such notice is to include simply:

" . . . the name and residence of the proposed plaintiff, cause of action, and the court in which it is to be brought "

While this provision may have had some clear utility for the Crown in an earlier time (possibly before the unified court system was introduced in this Province), we suggest that **two months' advance notice of a lawsuit does not make any significant difference as to how the Province of New Brunswick will defend a lawsuit. Nor is there any significant reason why the Crown should enjoy the benefit of such a notice procedure over any other potential Defendant in a lawsuit.** We respectfully suggest that such a provision today is little more than another "trap for the unwary", and that consideration be given to its abolition.

19. The nature and placement of limitations provisions in other public statutes varies greatly, and may be tied to filing or notice provisions for which there may be very good reasons (*Mechanics' Lien Act*), or notice provisions of dubious continued justification (the *Defamation Act*). Clearly, reviewing such limitation provisions in public statutes other than the *Limitation of Actions Act* will require a great deal of effort over a substantial period of time, but the effort should be undertaken.

VII. It should be a long-term goal of revision of limitation of actions law in New Brunswick to bring specific limitations in public statutes other than the *Limitation of Actions Act* into general harmony with the basic limitation of actions scheme in a revised *Uniform Limitations Act*.

VIII. The "notice" requirement in the *Proceedings Against The Crown Act* should be considered for abolition. Similar provisions creating "notice" requirements as conditions precedent to the filing of lawsuits should be considered for abolition, where there is no compelling policy rationale for maintaining same.

(C) Real Property/ Easements Act/ Executors And Trustees Act/ Regional HealthAuthorities Act

20. The drafters of the model uniform statute consciously decided not to address the above issues in the model statute. The office of the Attorney-General advised (Law Reform Notes No.23 - December 2005), that many *property* limitation periods might be satisfactorily dealt with under the regime of "basic" and "ultimate" limitation periods, with the main exception being actions relating to recovery of land or other property. This may be the case, but a comprehensive review of the applicable statutes should be undertaken before any specific changes are considered. CBANB would appreciate having the further opportunity to address any such specific proposals.

21. Regarding the *Easements Act*, R.S.N.B. 1973, c.E-1, it was suggested in Law Reform Notes #24 that a general limitation period for actions for possession of land might become 15 years as against private parties, while staying at 60 years as against the Crown, in contrast to the various periods of 20, 30, 40, and 60 years which are referred to for different purposes in the present *Easements Act*. We would point out, however, that the time periods referred to in sections 1 and 2 of the *Easements Act* are, in fact, periods of time over which a **right accrues** (as opposed to the period in which a **right to sue may be exercised**). The distinction is made clear at Section 3 of the *Easements Act*:

"3. Each of the periods of years mentioned in Sections 1 and 2 shall be taken to be the period next before some suit or action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those two sections, unless the same

has been submitted to, or acquiesced in, for one year after the party interrupted has had notice thereof and of the person making or authorizing the same to be made."

We suggest that very careful consideration be given to the existing legislation and to non-interference with vested rights before any changes are made in this regime.

22. Regarding the *Executors and Trustees Act*, R.S.N.B. 1973, c.E-13, it was suggested in Law Reform Notes #24 that the 20 year limitation period referred to in Section 17 of this Statute for recovery of Estate property might be brought into line with other provisions relating to the recovery of property from Third Parties, and that ". . . if a special rule is needed at all, it should therefore be based on a 15 year period". We see no reason in principle why the limitation period in this case should not be brought into line with the general limitations principles to be established in a new uniform Act, but we once again stress that this is a case for careful consideration before any changes are made.

IX. CBANB urges extreme caution before any changes to limitations rules affecting real property rights, the time periods set out in the *Easements Act*, or the limitation in the *Executors and Trustees Act*. We would appreciate having the opportunity to provide further comment, should specific proposals for change of these laws be forthcoming.

23. Regarding the *Regional Health Authorities Act*, S.N.B. 2002, c.R-5.05, it was noted in Law Reform Notes #24 that Section 61 of this Statute creates a special limitation period for negligence claims against a regional health authority or its directors or staff. This provision is similar to those in some of the private Statutes which relate to health care professions. We reiterate our comments above as stated regarding "private statutes", and suggest that the limitation under the *Regional Health Authorities Act* should be treated similarly (see Recommendation III above).

(D) Fatal Accidents Act/Survival Of Actions Act

24. In Law Reform Notes No.24 (June 2006), the Office of the Attorney-General suggested that it might be appropriate to harmonize the limitations under the *Fatal Accidents Act* R.S.N.B. 1973, c.F-7, and the *Survival of Actions Act*, R.S.N.B. 1973. This makes sense.

25. A more difficult question is whether the present "time-limited" limitation within the *Fatal Accidents Act* (i.e., ". . . within two years after the death of the deceased . . .") should be adjusted for "discoverability". It was suggested in the same Law Reform Notes that the "time-limited" limitation provision under the *Fatal Accidents Act* should remain "time-limited", rather than allow for "discoverability" by a deceased's dependents, where the claim had not been "discovered" during the time-limited limitation period. The rationale in the Law Reform Notes was as follows:

"This gives people a reasonable opportunity to bring claims that only arose or had not yet expired when the deceased died. To allow full range to a "time otherwise limited" rule would allow actions to be brought either by or against the Estate or by the dependents long after the main protagonist, whether as alleged wrongdoer or as alleged victim, is out of the picture. The more time passes after the death of the main protagonist, the more artificial it becomes to see these later actions as having much to do with passing compensation, either to or from the deceased in relation to the harm that he or she has either caused or suffered".

We understand the suggested rationale. On the other hand, however, as it is possible to implement a "discoverability" rule in such a case, and as the "discoverability principle" is available generally to the main body of limitations law in New Brunswick, and this would continue under the model statute, we suggest for consistency that the discoverability principle should be allowed to operate here. (See generally caselaw discussed below in relation to Section 5 of the model statute.)

THE MODEL *UNIFORM LIMITATIONS ACT* AND NEW BRUNSWICK

26. As noted above, the Office of the Attorney-General has sought comments for proposed law reform assuming the *Uniform Limitations Act* as a foundation text. The following comments apply by reference to the specific sections of the *Uniform Limitations Act*, attached hereto as Appendix B.

Section 1: Definition

27. The model statute includes a new definition of the term "claim". For the sake of clarity, as well as consistency with other N.B. statutes, the definition of "claim" probably ought to be amended to specifically include reference to the traditional legal term "cause of action" as follows:

" 'Claim' means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission, *and includes a cause of action.*"

Section 4: Basic limitation period

28. The "basic limitation period" which is proposed in the model statute is the "**second anniversary** of the day on which the claim was discovered".

29. The authors of the model statute acknowledge that the "2-year" period is essentially an arbitrary determination (see "Comment" following Section 4, Appendix B). The vast majority of limitation provisions which solicitors now deal with on a daily basis in New Brunswick vary between periods of 1 year, 2 years, and 6 years.

30. We respectfully suggest that a basic limitation of 2 years may well be too short for all.

- X. CBANB suggests a basic limitation period of three years be considered.

Section 5: Discovery and "discoverability" of claims

31. Section 5 of the model statute seeks to codify the recent Canadian caselaw on the "discoverability" of causes of action. (A succinct summary of the "Discoverability Principle" was given by Larlee J. A. on behalf of the New Brunswick Court in *Dupuis v. City of Moncton* (2005), 284 N.B.R. (2d) 97 (C.A.) at paragraphs 29-34.)

32. This section in the model statute is an attempt to codify the present state of Canadian law as it is already applied by the Courts. Section 5(a) attempts to elaborate fully on what constitutes discoverability, and seeks to provide some balancing of each side's interests by making the date of discoverability "the earlier of" the dates which then follow.

33. It might be worthwhile to consider whether it is desirable to extend the "discoverability" principle to those special limitations outside the model statute which, by definition, will otherwise exclude the application of the discoverability principle. In *Peixeiro v. Haperman*, [1997] 3 S.C.R. 549, Justice Major said as follows:

"In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T.(2d) 200 (Man.C.A.), at page 206, that the discoverability rule is an interpretive tool for the construing of limitations statute which ought to be considered each time a limitations provision is in issue:

In my opinion, the Judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to

be commenced within a specified time for the happening of a specific event, the statutory language must be construed. When time runs from 'the accrual of the cause of action' or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the Judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the Judge-made discoverability rule may not extend the period the legislature has prescribed.'

It is interesting in this respect to make reference to the Ontario Court of Appeal's decision in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370. In that case, the Court considered Ontario's *Trustee Act* which provided any action brought pursuant to that Act must be brought within 2 years of the death of the deceased person. Relying on Justice Major's decision in *Peixeiro*, the Court found that as a matter of statutory interpretation, the discoverability principle did not apply to the *Trustee Act*, and accordingly, there could be no extension under the common law doctrine of discoverability. *Waschkowski* demonstrates that the discoverability principle does not apply universally; rather, its application depends on the specific statutory context.

34. The decision as to whether the *Uniform Limitations Act* should be drafted so as to give the discoverability principle paramountcy over other such time-specific limitations as may exist in New Brunswick is an important policy decision to be determined in the drafting of a new Act for this Province. As discoverability will be, in effect, "the general rule", **we suggest there should be a specific policy rationale whenever "discoverability" is to be excluded.**

Section 6: Ultimate limitation period

35. This provision in the model statute would create an "ultimate" limitation period of the "**15th anniversary** of the date on which the act or omission on which the claim is based took place". In the "Comment" to Section 6 (see Appendix B), the U.L.C.C. notes that this period is again, essentially arbitrary. The figure of "15 years" was first recommended by the Alberta Law Reform Institute as being an appropriate period. In fact, Alberta adopted a form of "ultimate" limitation by which a claimant must seek a "remedial order" within "**10 years** after the claim arose": Section 3(1), *Limitations Act*, R.S.A. 2000, c.L-12.

36. The Province of Ontario has adopted an "ultimate limitation period" of **15 years**: see Section 15(2), *Limitations Act*, 2002, S.O. 2002, c.24, S.C.H. B. The Province of British Columbia, at Section 8 of the *Limitation Act*, R.S.B.C. 1996, c.266, has adopted an "ultimate limitation" of **30 years**, which is subject to specific qualifications and exceptions.

37. **It is worth pointing out that the adoption of any specific "ultimate limitation" will have the effect of attenuating the applicability of the "discoverability principle", since the judicial enunciation of the principle thus far does not preclude its application beyond any specific period of years.**

38. In the recent Ontario decision of *York Condominium Corporation No.382 v. Jay-M Holdings Ltd.*, 2006 CanLII 1459 (On.S.C.), Justice Ground considered that Province's statute and said at paragraph 12:

". . . In my view the structure and purpose of the legislation incorporates the balancing referred to by the City between the discovery principle and the need for some cut-off date beyond which proceedings cannot be brought."

39. In *Maull v. Rodnunsky*, 2001 A.B.Q.B. 309 (CanLII), the Court discussed the objects of an ultimate limitation period at paragraph 23 in the following terms:

"The defendant's brief outlines the objectives of the ultimate . . . limitation period, which include: bringing potential liability to an end after a reasonable period of time, thereby allowing people to properly order their affairs; keeping insurance premiums down; and, preventing old claims from going to trial where the evidence may be stale and the memories faded. I agree that these are the objectives of the ultimate . . . limitation period".

40. At the end of the day, an arbitrary decision must be made. **As the matter is one of ultimate termination of the right of an individual to seek redress to the Courts, 15 years does not appear to be sufficient.** In the course of preparing this submission, a fatal accident occurred in the City of Boston when a portion of the "Big Dig" road tunnel system collapsed, killing a woman. Media reports stated that work began on this project in 1991, almost exactly 15 years before the tragic accident in July 2006. While there may be other remedies against other parties available in such a situation, should it be the policy of the law to exclude liability for provision of engineering services which may have been completed just over 15 years prior to the accident? There may be some difficulty in proving applicable professional standards as of the time of provision of services, but that is an evidential issue: proof of negligence in such a situation may be difficult, but the existence of an ultimate limitation period would preclude any attempt on the point. We do not think 15 years is a sufficient period for an "ultimate" termination point.

XI. CBANB recommends that an ultimate limitation period in excess of 15 years be considered as appropriate for this Province.

41. Should it be suggested that ultimate limitation periods in the range of 20-30 years be too long, it is noted that the drafters of the model statute propose that there be **no limitation period** for certain proceedings: those relating to **trespass to the person and assault or battery, if such claims were based on sexual misconduct or interfering elements of intimate relationship or dependency** (Section 9, Appendix B). An ultimate limitation period of 20-30 years is not too long, in the context of a model statute that recognizes some causes of action as subject to **no** limitation.

Section 6(3): Ultimate limitation period: postponement of limitation for concealment or misleading/"tolling"

42. Section 6(3) of the model statute would postpone the ultimate limitation period due to wilful concealment by the Defendant or acts of the Defendant misleading the Plaintiff pertaining to the claim. It recognizes the concept of "**tolling**" of the **limitation period** as that principle has evolved judicially.

43. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the Supreme Court stated at page 390 as follows:

"It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the Plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. A fraudulent concealment necessary to **toll** or **suspend**

the operation of the statute need not amount to deceit or common-law fraud."
[Emphasis added]

44. See also *Giroux (Estate) v. Trillium Health Centre*, 2005 Can LII 1488, where the Ontario Court of Appeal noted that a judge of first instance had correctly applied the common-law doctrine of fraudulent concealment to "toll" (i.e., suspend) the limitation period under consideration.

45. While Section 6(3) of the model statute constitutes a recognition of "tolling" of the limitation for fraudulent or other intentionally misleading conduct, it is suggested that **consideration ought to be given to vesting the Court with a broader jurisdiction to "toll" limitations based on more general principles of equity. However, we also wish to emphasize that some of our members have serious reservations about such a change, due to the potential for uncertainty and lack of predictability which might result, depending upon what sort of provision is adopted. The embrace of an equitable tolling mechanism should not be such as to assist plaintiffs who have "slept on their rights". CBANB sees this as the most difficult issue to be dealt with in this law reform initiative.**

46. The neighboring Province of Nova Scotia has adopted, at Section 3 of their *Limitation Of Actions Act*, R.S.N.S. 1989, c.258, a statutory mechanism which vests the Court with discretion to disallow a defence based on time limitation. The test is somewhat cumbersome, but essentially recognizes a discretion which is to be exercised when it is equitable to do so, taking into account the degree to which the time limitation prejudiced the Plaintiff, and the degree to which the

disallowance of the defence would prejudice the Defendant. (See detailed discussion of the operation of this mechanism by Cromwell, J.A. for the Court in *Butler v. Southam Inc.*, 2001 N.S.C.A. 121.)

47. **CBANB suggests an "equitable tolling" provision may constitute a desirable component of limitation law reform in New Brunswick, but we are very concerned regarding the potential uncertainty if the factors "triggering" such a provision are left too vague or unclear.**

XII. CBANB recommends that the Government of New Brunswick consider the possibility of including a mechanism by which the Court may exercise a discretion to either disallow a defence based on a time limitation, or to "toll" the limitation, based on general equitable principles, as well as in those cases where there has been fraudulent concealment or wilful misleading. Should the Government decide to include such a general provision in a revised limitations statute, it is essential that the basis on which the equitable jurisdiction of the Court is to be exercised should be defined as clearly, and simply, as possible.

Section 6(5): Ultimate limitation period: claims for contribution and indemnity

48. Section 6(5) of the model statute is as follows:

"(5) For the purposes of this section, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer is served with the claim in respect of which contribution and

indemnity is sought, or incurs a liability through the settlement of that claim, shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place."

Subsection (6) goes on to provide that the above provision applies, whether the right to contribution and indemnity arises in respect of a tort (or otherwise). This provision is problematic in several respects.

49. First, the provision speaks of being "served with the claim", although the term "claim" is defined in Section 1 of the model statute to have a meaning much broader than solely an "originating process". Nevertheless, the wording "*served with the claim*", might be argued as an intended reference to being served with an "originating process" as defined in Rule 16 of the **Rules Of Court**. Being "served with the claim" might alternatively be argued to include having been served with a "demand letter" for contribution, before a lawsuit was commenced. There is a serious question as to what exactly was contemplated by the drafters here. Clarification is required.

50. Second, there is some confusion between the disjunctive wording of paragraph (5), which "starts the clock" from either the day on which a wrongdoer is "served with the claim", **or** the day on which a wrongdoer "incurs a liability through the settlement of that claim" (we note that the term "settlement" itself, which is undefined in the statute, can be uncertain of meaning, and may or may not include the final disposition of a claim by the Court, through a formal "judgment"). The terminology in use in this provision should be clarified.

51. Third, we note that the provision applies "*for the purposes of this section*": that is, for the purpose of **Section 6**. It is unclear whether this limitation on claims for contribution and indemnity applies only to claims which are proceeding by virtue of the "ultimate limitation period", or whether it applies to claims which have been brought within the "basic limitation period" (established in **Section 4**). It is possible the drafters intended that there should be no limitation on claims for contribution and indemnity where the main claim was brought within the "basic limitation period", although again, the point is arguable.

52. With the exception of the procedural time limits established in respect of claims for contribution and indemnity under the New Brunswick **Rules Of Court**, the only provision in the present New Brunswick *Limitation of Actions Act* dealing with limitation of Third Party claims appears to be that contained in Section 5(2). It provides that when an action for damages arising out of the operation, care or control of the motor vehicle is brought within the time limited (i.e., 2 years after the cause of action arose), and a counter-claim is made or Third Party proceedings are instituted by a Defendant in respect of damages arising out of the same accident, ". . . *the lapse of time herein limited is no bar to the counter-claim or third party proceedings*". Section 5(2) of our presently existing *Limitation of Actions Act* has the virtue of clarity and simplicity, and we respectfully suggest that it might be considered for broad application in any new *Limitation of Actions Act*.

XIII. CBANB has concerns regarding the effect of Section 6(5) of the model *Uniform Limitations Act*, pertaining to a limitation in claims for contribution and indemnity. It is suggested rather that

the form of wording contained in Section 5(2) of the existing N.B. Statute be considered for broad application in any new Statute on this point.

Section 10: Successors, principals and agents

53. This provision of the model statute would "deem" knowledge of claims to successors in right, title or interest. The subheading of the section refers to "successors, principals and agents" but does not refer explicitly to "assignees". While this category of persons might be included by inference, this is unclear and should be clarified.

Section 11: Acknowledgments

54. The authors of the model statute state in their Comment that Section 11 was intended to codify existing rules by which acknowledgment and part payment has the effect of restarting a limitation period. First, we point out that the present *Limitations of Actions Act*, at ss. 10-12, does in fact deal with some of the scenarios considered in the proposed s.11. Second, we note that section 11(1) of the model statute would operate where a person acknowledges liability in respect of a claim for, *inter alia*, ". . . a liquidated sum": **we suggest consideration be given to extending this provision to also include claims for *unliquidated* sums.**

Section 12: Other Acts, etc.

55. See our comments above regarding "private statutes" and "other public statutes".

Section 13: Amending pleadings

56. This provision seeks to clarify the situation where pleadings are amended after expiration of the limitation period. If it is intended to enact this provision in New Brunswick law, the provision should be revised so as to confirm that it would apply with all necessary changes to Counter-Claims, Cross-Claims, and Third Party Claims.

Section 14: Agreements

57. Section 14(1) of the model statute provides as follows:

"14(1) A limitation period under this Act may be extended, but not shortened, by agreement."

Subsection (2) stipulates that agreements made before the coming into force of the statute are not affected.

58. **We strongly support inclusion of such a provision in a revised New Brunswick Statute.**

59. The assumption of equal bargaining power in the law of contract is now unrealistic in view of modern-day contracts of adhesion. Increasingly complex standardized contracts present an opportunity for the stronger party to exploit its economic or social superiority on the weaker party, who is frequently the consumer. (See generally, comments to this effect in the judgment of L'Heureux-Dubé J. for the Court in *Garcia Transport v. Royal Trust*, [1992] 2 S.C.R. 499.)

60. Should the Government feel differently, and wish to permit the shortening of limitations by agreement, then we strongly suggest this be modified by a further provision to the effect that:

" . . . Such agreement shall be ineffective to the extent that it is shown that it would not be fair or reasonable to allow reliance on such agreement".

This wording is taken from Section 25(1) of the *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, which limits the ability of parties to contract out of remedies provided by the Act.

XIV. CBANB strongly supports a provision in a revised *Limitation of Actions Act* to prohibit parties from agreeing to limitation periods shorter than those set out in the statute, while allowing parties to extend them. Should the Government wish to permit the shortening of limitations, it is recommended such agreements be subject to judicial review for fairness and reasonableness.

Section 15: Conflict of laws

61. Section 15 of the model statute would recognize New Brunswick's limitation period, as well as that in any other jurisdiction involved, as constituting *substantive* law. This approach appears to be desirable and in accordance with Canadian caselaw following *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. It would also have the additional policy consideration of tending to prevent "forum shopping". The Supreme Court of Canada in the decision of *Castillo v. Castillo*, [2005] 3 S.C.R. 870 commented on the equivalent provision in Alberta's legislation as follows:

"The Alberta Legislature can, in relation to the administration of justice in the Province, determine the time limits within which the Alberta Courts can entertain actions, including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction. In *Tolofson*, as stated, this Court concluded that limitations law, which in the past had frequently been classified as procedural . . . was, in fact substantive in nature and must be treated as such."

Section 16: Transitional provisions

62. The model statute has a transitional provision which applies it to actions for which the underlying cause has occurred but no action yet started as of the date the new legislation is enacted. Ontario's governing statute had a similar transitional section which attempted to clarify the impact of the new law but has led to some complications (see for example, *York Condominium Corporation No.382 v. J-M Holdings Limited (supra)*). Some of the problematic provisions from the Ontario statute have not been included in the model statute, which seems to present a more straightforward approach. The basic principle advocated in the model statute for transition would seem to make sense, modified to take into account the "new" New Brunswick "basic limitation".

CONCLUSION

63. CBANB wishes to thank and compliment the Office of the Attorney-General for its law reform activities generally, and for its present initiative in this specific area of the law. To describe the overall present landscape of limitations law as "confusing" would perhaps be charitable. This area of the law is badly in need of substantial revision. We appreciate the opportunity to express our views on behalf of CBANB, and we hope that by highlighting the foregoing issues we may at least provoke further discussion which will result in better law for the Province of New Brunswick.

SUMMARY OF PRIMARY RECOMMENDATIONS

- I. A substantial revision of the law governing limitations of actions is appropriate and desirable at this time in New Brunswick. This revision should encompass not only limitations in the present *Limitation of Actions Act*, and other public statutes, but also limitations provisions in private statutes.
- II. Limitations provisions presently contained in private statutes should be more readily discoverable and ascertainable than is presently the case. Improved indexing of private statutes would be of short-term assistance in correcting this situation, but a better long-term solution is desirable, and should include one of the following recommendations (III or IV).
- III. "Specific" limitations should be eliminated from private statutes. As the vast majority of such limitations pertain to the provision of professional services, the limitations law applicable to self-governing groups governed by private statute should be identical. Furthermore, the limitations of actions for professionals should not be any different from the limitations law applicable generally by virtue of a public *Uniform Limitations Act*. (*This is the Preferred Option of CBANB*).
- IV. Alternatively, should it be the preference of the Government to continue to permit the ongoing existence and continued enactment of "specific" limitation periods in private statutes, as such private statutes are created or amended over time, all such limitations should be harmonized as much as possible with one "model" limitation. All existing "specific" limitation periods in private statutes should be subordinated to the remedial and saving provisions of the *Uniform Limitations Act*. In the event of any conflict between the two statutes, the Plaintiff should always having the benefit of the more favourable provision.
- V. The special limitation periods in the *Insurance Act* should be reviewed in consultation with the Superintendent of Insurance to make them consistent with the principle of the basic limitation to be established in any new uniform *Limitations Act*.
- VI. A clear and single limitation of actions period should be established for actions on disability policies, regardless of whether the disability coverage is part of a life insurance policy, an individual disability policy, or a group disability policy. This reform should be undertaken in conjunction with the creation of a more appropriate and comprehensive definition of "disability insurance" in the *Insurance Act*.

- VII. It should be a long-term goal of revision of limitation of actions law in New Brunswick to bring specific limitations in public statutes other than the *Limitation of Actions Act* into general harmony with the basic limitation of actions scheme in a revised *Uniform Limitations Act*.
- VIII. The "notice" requirement in the *Proceedings Against The Crown Act* should be considered for abolition. Similar provisions creating "notice" requirements as conditions precedent to the filing of lawsuits should be considered for abolition, where there is no compelling policy rationale for maintaining same.
- IX. CBANB urges extreme caution before any changes to limitations rules affecting real property rights, the time periods set out in the *Easements Act*, or the limitation in the *Executors and Trustees Act*. We would appreciate having the opportunity to provide further comment, should specific proposals for change of these laws be forthcoming.
- X. CBANB suggests a basic limitation period of perhaps three years be considered.
- XI. CBANB recommends that an ultimate limitation period in excess of 15 years be considered as appropriate for this Province.
- XII. CBANB recommends that the Government of New Brunswick consider the possibility of including a mechanism by which the Court may exercise a discretion to either disallow a defence based on a time limitation, or to "toll" the limitation, based on general equitable principles, as well as in those cases where there has been fraudulent concealment or wilful misleading. Should the Government decide to include such a general provision in a revised limitations statute, it is essential that the basis on which the equitable jurisdiction of the Court is to be exercised should be defined as clearly, and simply, as possible.
- XIII. CBANB has concerns regarding the effect of Section 6(5) of the model *Uniform Limitations Act*, pertaining to a limitation in claims for contribution and indemnity. It is suggested rather that the form of wording contained in Section 5(2) of the existing N.B. Statute be considered for broad application in any new Statute on this point.
- XIV. CBANB strongly supports a provision in a revised *Limitation of Actions Act* to prohibit parties from agreeing to limitation periods shorter than those set out in the statute, while allowing parties to extend them. Should the Government wish to permit the shortening of limitations, it is recommended such agreements be subject to judicial review for fairness and reasonableness.

APPENDICES

Appendix A - Uniform Law Conference of Canada Briefing Note - Uniform Limitations Act

Appendix B - Uniform Limitations Act