



BILL 28: *LIMITATION OF ACTIONS ACT*
SUBMISSION OF THE CANADIAN BAR ASSOCIATION
NEW BRUNSWICK BRANCH
TO THE STANDING COMMITTEE ON LAW AMENDMENTS

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On Behalf Of

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February 24, 2009

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"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."

~ "Utopia", 1516, by Sir Thomas More: Lord Chancellor of England and Patron Saint of Lawyers

PREFACE

Bill 28 represents the culmination of a process of law reform in New Brunswick which began with adoption of a new *Uniform Limitations Act* by the Uniform Law Conference of Canada in 2005¹. In December of 2005, the Office of the Attorney-General advised the legal profession that it felt it was time to consider reform of limitations law in New Brunswick, and that it would be considering the *Uniform Limitations Act* as the basis for revision of this law. As a result of this expression of interest in law reform by the Government of New Brunswick, the Canadian Bar Association, New Brunswick Branch (CBA-NB), provided a written submission in November of 2006 ("*Reforming Limitations In New Brunswick: A Submission To the Government of the Province Of New Brunswick*").

In our November 2006 submission, we assessed the various specific provisions of the 2005 model statute, and their suitability for New Brunswick. Our written submission went further, however, by suggesting that a wider revision of limitations law in New Brunswick was needed. We advocated that the law in this Province should move toward a greater harmonization of limitations provisions in public statutes **other than the present *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8**. We also advocated the standardization and harmonization of the limitations found in the various **private statutes** which govern self-regulating professional associations in New Brunswick.

CBA-NB is very gratified to see that some of the suggestions made in our 2006 Submission appear to have found favour in the drafting of Bill 28. This present submission is an attempt to

¹ The Uniform Law Conference of Canada (ULCC) was founded in 1918 to harmonize the laws of the various provinces and territories of Canada, as well as federal law.

address Bill 28 as it is framed following First Reading. We have sought not to simply repeat all the arguments made in our 2006 submission. This Submission does, however, reiterate a few of the comments from our earlier written submission regarding those points we feel quite strongly about.

CBA-NB does wish to commend the Office of the Attorney-General and especially the Legislative Services Branch for the detailed consultation process which has been followed in the evolution of this Bill. This is the way important law reform should be approached. CBA-NB also wishes to thank the members of the Standing Committee on Law Amendments for agreeing to hear us on this important Bill.

Some of the provisions to be found in Bill 28 are new provisions which derive neither from the ULCC model statute, nor from our own earlier Submission. The limited time between First Reading of this Bill and the consideration of it by this Standing Committee did not permit as wide a consultation within CBA-NB as we would have liked. I would, however, like to thank those of our legal colleagues who did take the time to look at this Bill and offer their thoughts regarding this Submission. I would especially like to thank Richard Scott, Q.C., Nadia MacPhee, and Frank Hughes for their suggestions and advice.

Respectfully



David G. O'Brien
February 2009

WHAT IS IN THE BILL, WHAT IS NOT, AND WHAT SHOULD BE

In its "*Commentary on Bill 28: Limitation of Actions Act*" (January 2009), the Office of the Attorney-General states in the "Introduction" that the present Bill deliberately does not deal with the limitation periods for recovery of possession of land, or the limitation periods created by the *Insurance Act* for bringing legal proceedings under various types of insurance policies.

(A) Recovery of Possession of Land

We are quite content with the decision to postpone revision of these limitations. In view of the fundamental nature of property rights which may be affected, any such changes in this law necessarily require a careful and comprehensive review of the existing legal framework and applicable statutes. In addition, some of the periods referred to under this rubric (e.g.: sections 1 and 2 of the *Easements Act*, R.S.N.B. 1973, c.E-1), constitute not so much "limitation periods", as rather periods of time over which property rights accrue (as opposed to the limitation period in which a right to sue for recognition of such property rights may be exercised.) **Frankly, this is not an area of the law in which there has been any great vocalization by members of the Bar of any need for change.**

(B) Insurance Claims

Regarding the various *insurance limitation periods*, the *Commentary on Bill 28* states that these are currently under review by the Superintendent of Insurance. While the **Commentary**

correctly notes that similar reviews are under way in other provinces, the Government of Alberta has actually already proceeded ahead in reform of this area. By virtue of the Alberta Bill 11 - *Insurance Amendment Act*, 2008 (Royal Assent November 4, 2008), Alberta created a "general" limitation of actions on insurance policies which is as follows:

"Limitation of Actions

526(1) An action or proceeding against an insurer under a contract must be commenced

- (a) in the case of loss or damage to insured property, not later than two years after the date the insured knew or ought to have known that the loss or damage occurred, and
- (b) in any other case not later than two years after the date that the cause of action against the insurer arose.

526(2) This section does not apply to contracts of automobile insurance and hail insurance.

Application of Limitations Act

527 Section 5 of the *Limitations Act* applies to a limitation period established in this Act in respect of an action or proceeding on a contract as if the period were established under the *Limitations Act*."

Section 5 of the Alberta *Limitations Act*, R.S.A. 2000, c.L-12 suspends the operation of normal limitation periods for persons under disability. It may also be noted that the "two-year period" referred to in the Alberta *Insurance Act* is consistent with the "basic" limitation in the Alberta *Limitations Act*, which is likewise two years after the date on which the Claimant first knew or ought to have know of his claim: Section 3.

In **British Columbia**, the Ministry of Finance has published an "*Insurance Act Review Discussion Paper*" (March 2007). This report (which is understood to be under present consideration by the Government of British Columbia), has proposed, amongst other things, that the limitation period in the British Columbia *Insurance Act* be extended to **two years**, with a single, general provision to be adopted for the Act, based on a "trigger date" being the date the cause of action arises against the insurer (see pages 16-17 of report).

As was noted in our 2006 CBA-NB submission, Chief Justice McLachlin of the Supreme Court of Canada has been openly critical of the confusion in limitations law as applied to all-risks and multi-peril policies (which are more generally known as "home-owner's" or residential "fire" policies). Madam Justice McLachlin has stated that it would be "highly salutary" for legislatures to revisit and reform this law: see *K.P. Pacific Holdings v. Guardian Insurance*, [2003] 1 S.C.R. 433.

There are many disparities in the limitation periods presently set out in the New Brunswick *Insurance Act*, R.S.N.B. 1973, c. I-12. These were discussed in detail in our 2006 report (see pages 10-14). **While we recognize the need for great care, insurance claims are frequently litigated, so this is an area of limitations law which affects many individuals. In view of the level of confusion here (as recognized by the Chief Justice of Canada simply with reference to homeowner's policies), it is important that standardization of insurance limitation periods in New Brunswick be kept on the "front burner". We hope to see further legislation addressing insurance issues in the near future.**

(C) Repeal of Notice Requirement for Proceedings Against the Crown

Section 15 of the *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, stipulates that no action shall be brought against the Crown unless two months' previous notice in writing thereof has been served on the Attorney-General (or a Crown corporation). The extent of such notice is simply the name and residence of the proposed Plaintiff, the cause of action, and the court in which it is to be brought. In our 2006 Submission, we suggested that two months' advance notice of a lawsuit does not likely make any significant difference as to how the Province of New Brunswick will defend the lawsuit. Nor, is there any significant reason why the Crown should enjoy the benefits of such a notice procedure over any other potential Defendant in a lawsuit. We made a similar argument regarding the "notice requirement" presently found in the *Defamation Act*, R.S.N.B. 1973, c. D-5.

While Bill 28 has adopted our recommendation regarding reform of the *Defamation Act* in this regard (see Section 30 of the Bill), Bill 28 does not deal with the equally archaic notice requirement for proceedings against the Crown.

We submit that in matters of civil litigation, there is no justification for the Crown to give itself the benefit of a mandatory "notice requirement", particularly where failure to give such notice can be fatal to a lawsuit, even though the limitation for it has not expired.

Most other jurisdictions in Canada already recognize this. The Federal *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 contains no "notice requirement" for actions in tort against servants of the Crown, and while it does maintain a "notice requirement" in respect of actions

pertaining to the ownership, occupation, possession or control of Federal Crown property, this Federal Statute also contains a remedial provision by virtue of which any failure to give such notice can essentially be ignored by the Court (see Section 3 and Section 12 of the Federal Statute). It may also be noted that the Federal Crown gives itself a slightly longer period in which to plead a Defence, when it has been sued: see S.5 of the *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604.

Apart from New Brunswick, our research indicates that only three of the other provinces still require statutory advance notice prior to commencing a proceeding against the Crown: Nova Scotia, Prince Edward Island, and Ontario. Even in Ontario, however, the sixty days' general notice requirement which is contained at Section 7(1) of the Ontario Statute is subject to the immediately following remedial provision at Section 7(2):

"Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period."

Even the addition of such a "grace provision" in the New Brunswick *Proceedings Against the Crown Act*, like the Ontario law, would be an improvement. **We still feel that by far the better course would be for New Brunswick to follow the Federal Government and the majority of**

other provinces by amending Bill 28 to add a provision which would eliminate this "notice requirement" from New Brunswick law.²

BILL 28 - PROVISIONS WITH COMMENTARY

Our comments on the specific provisions of the Bill have been arranged to follow the same format as the *Commentary* of the Office of the Attorney-General. The text of the Bill is therefore set out in bold below, with our own comments following the relevant sections:

BILL 28

Limitation of Actions Act

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

PART 1

PRELIMINARY MATTERS

Definitions and interpretation

1(1) The following definitions apply in this Act.

“claim” means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission. (*réclamation*)

“claimant” means a person who has a claim, whether or not the claim has been brought. (*réclamant*)

“defendant” means a person against whom a claimant has a claim, whether or not the claim has been brought. (*défendeur*)

1(2) For the purposes of this Act, a claim is brought

(a) when a proceeding in respect of the claim is commenced, or

² See also our related comments on this subject following Section 3 of this Bill.

(b) if the claim is added to an existing proceeding by a new or an amended pleading that is not an originating process, when that pleading is filed.

1(3) Any reference in this Act to a limitation period established by this Act does not include a reference to the period described in section 22.

Comment: In their own "*Commentary*" on the *Uniform Limitations Act*, the ULCC drafters noted that their use of the term "*claim*" marks a departure from the traditional limitations regime, which historically used the phrase "*cause of action*" as the basis for determining the applicable limitation period and for the commencement of such periods. The drafters of Bill 28 have chosen to introduce this new term into New Brunswick law (as other reforming Provinces have likewise done). However, it is to be noted that this new Act will have some application or interaction with other statutes of New Brunswick in which the traditional terminology "*cause of action*" is preserved. For the sake of clarity, as well as consistency with other New Brunswick statutes, we think the definition of "*claim*" probably ought to be amended to specifically confirm that it includes "*a cause of action*". This would seem to be the intent, and would hopefully, facilitate interaction of this statute with other statutes which maintain the traditional terminology.

Application

2(1) Subject to subsection (2), this Act applies to any claim brought after the commencement of this Act, including a claim that is added to a proceeding commenced before the commencement of this Act.

2(2) This Act does not apply to any claim to which the *Real Property Limitations Act* applies.

This Act binds the Crown

3 This Act binds the Crown.

Comment: The *Commentary* of the Office of the Attorney-General notes that this is a standard form provision, which insures that the same limitation periods apply to the Crown as to everyone else. We agree, and believe that this should be taken to its logical conclusion by repealing the requirement that the Crown be given special "notice" two months in advance of the commencement of a lawsuit against the Crown. There is no significant reason why the Crown should enjoy the benefit of any such notice provision over any other potential Defendant in a lawsuit.

Conflict

4(1) If there is a conflict between this Act and any other public Act of New Brunswick, that other Act prevails.

4(2) If there is a conflict between a limitation period established by this Act and one established by a private Act of New Brunswick, the limitation period that expires the latest prevails.

Comment: Considering the multitude and variety of limitation provisions in other public statutes and private statutes, we acknowledge the difficulty of a "clean sweep" in any reforming legislation such as the present Bill. We understand the rationale for the approach which has been taken in Section 4 and agree that it is both pragmatic and sensible in the circumstances.

PART 2

GENERAL LIMITATION PERIODS

General limitation periods

5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of

- (a) two years from the day on which the claim is discovered, and**
- (b) fifteen years from the day on which the act or omission on which the claim is based occurred.**

5(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

- (a) that the injury, loss or damage had occurred,**
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission, and**
- (c) that the act or omission was that of the defendant.**

Comment: In our 2006 Submission, we suggested a basic limitation period of *3 years* be considered, with an ultimate limitation period of something *in excess of 15 years*. Despite the fact that both the proposed basic and ultimate limitation periods are therefore shorter than we had suggested, this provision as drafted will create consistency with the law in Ontario. As the "basic" limitation will be quite short, however, this leads us to advocate more strenuously that there be no further permissible shortening of limitations by "consent": see our comments at Section 26 below.

Continuous act or omission

6 If a claim is based on a continuous act or omission, the act or omission is deemed for the purposes of calculating the limitation periods in section 5 to be a separate act or omission on each day it continues.

Comment: This proposed provision is commendable in that it provides clear guidance in a situation which is left unclear in the model statute and Ontario statutes. There is also some basis for this approach in the existing common law caselaw which countenances a "rolling" limitation period in respect of acts or omissions or accrual of rights to sue which continue over a period of time: see, e.g., *Holme Estate v. Unum Life Insurance Co.* (2000), 194 D.L.R. (4th) 139 (B.C.C.A.). Our concern with this section is limited to the choice of the word "*continuous*". The example given in the Office of the Attorney-General's *Commentary* is that this provision might be useful "for continuous claims such as nuisance". We agree, but the problem we see arising is that actionable "nuisance" (as the term is understood at common law), may arise for acts or omissions which are not so much "continuous", as "continual". The concise Oxford Dictionary defines "continuous" as "unbroken, uninterrupted, connected throughout in space or time". The adjective "continual" is defined as "constantly or frequently recurring; always happening". The distinction at first blush may appear to be over-subtle, but if the matter comes to an argument over whether a limitation of action applies, such arguments will be raised. For example, it might be argued that nuisance consisting of a discharge of sewer water onto an adjacent property is not "continuous", if there were three days in the course of one month when the discharge did not occur. Such a discharge, with short intermittent disruptions, might more properly be described as "continual" or "recurrent". While we endorse and support the concept of this provision, we suggest it might be improved by deletion of the word "continuous", and substitution of a term such as "continual" or "recurrent". Such would be more in keeping with the sort of factual situations which this provision seems to be intended to capture.

PART 3

SPECIAL LIMITATION PERIODS

Application of Part 2

7 Unless this Part provides otherwise, Part 2 does not apply to the claims referred to in this Part.

Judgments

8 No claim based on a judgment for the payment of money shall be brought after 15 years from the day of the judgment.

Comment: At the present time the limitation period for suing on a judgment is 20 years. This provision would reduce the limitation period to 15 years, but this will be consistent with the "ultimate" limitation created by this Bill.

Recovery of personal property

9(1) No claim to recover possession of personal property that has been converted shall be brought

- (a) if the defendant is a purchaser of the personal property for value acting in good faith, after 2 years from the day the purchaser purchased the personal property, and**
- (b) in any other case, after the earlier of**
 - (i) two years from the day on which the claimant first knew or ought reasonably to have known the identity of the person who has possession of the personal property, and**
 - (ii) fifteen years from the day on which a conversion of the personal property first occurred.**

9(2) On the expiry of a limitation period under this section, the claimant's title to the personal property is extinguished.

Conversion

10(1) Subject to subsection (2), Part 2 applies to a claim for damages for conversion.

10(2) If there have been 2 or more conversions of the same personal property, a claim for damages for conversion shall not be brought against a defendant if, under section 9, a claim to recover the possession of the personal property from that defendant cannot be brought, or could not be brought if that defendant were still in possession of the property.

Demand loans

11 No claim that is based on a failure to repay a demand loan shall be brought after the earlier of

- (a) two years from the day default in repayment occurs after the demand for repayment is made, and**
- (b) fifteen years from the day on which the lender is first entitled to make a demand for repayment of the loan.**

Secured debt

12(1) Subject to subsection (2), Part 2 applies to a claim for payment of a debt secured on real or personal property.

12(2) No claim to recover the principal of a debt secured on real or personal property shall be brought after 15 years from the day the security is taken.

12(3) A payment made in relation to a debt is a part payment for the purposes of section 20, and is presumed, in the absence of evidence to the contrary, to be a payment of both principal and interest.

12(4) If a creditor takes possession of the property on which the debt is secured, the debtor shall not bring a claim to redeem the property after 15 years from the day the creditor takes possession of the property.

Statutory liens

13 If a lien or charge is created by an Act in relation to an amount due under that Act, no claim shall be brought to recover the amount due after 15 years from the day on which the lien or charge arises.

Contribution

14 No claim for contribution in respect of a payment that a claimant has made, or a liability that a claimant has incurred by virtue of a settlement or judgment, shall be brought against a person after the expiry of the earlier of

- (a) the period of 2 years that begins on the day the claimant first knew or ought reasonably to have known that the person was liable to make the contribution, and**
- (b) whichever of the following periods expires last:**
 - (i) fifteen years from the day the act or omission that gave rise to the payment, settlement or judgment occurred, and**
 - (ii) five years from the day of the payment, settlement or judgment.**

Comment: We see this provision as being likely troublesome. The difficulty is that there are two different ways in which a "claim for contribution" may arise. **First**, a claim for contribution may arise in the course of an ongoing legal proceeding when one party seeks to add a new party (by "third party" or subsequent such proceedings under the Rules of Court). (This Section 14, drafted to be triggered by "payment", "settlement", or "judgment" does not seem to deal with this situation at all. It may be caught in the proposed Section 21 below, but depending on how Section 21 comes to be judicially interpreted, this is uncertain.) As the defendant in the existing lawsuit may only have been sued at the very end of the limitation against him, and as he may then only in the course of discovery of information in that legal proceeding, later become aware of another party who might be liable for contribution of which he had no prior knowledge - products liability cases would be the prime

example of this type of situation - the law should create the latitude for the "third party" to be added. We suggested in our 2006 Submission that Section 5(2) of the presently existing *Limitation of Actions Act* should be preserved and extended in this regard, such that "... the lapse of time herein limited is no bar to the counter-claim or third party proceedings". An additional party could then be added as long as the lawsuit continues. The second way in which a claim for contribution or indemnity can arise is by virtue of a "contribution action" that arises as a result of a settlement or judgment. As a "settlement" or "judgment" or "payment" can be tracked to a specific point in time, that type of situation might be appropriate for a limitation such as that proposed by Section 14(b) of the Bill, so that the liability of the potentially contributing party is extinguished 15 years from the date of the act or omission or 5 years from the date of the payment, settlement or judgment, whichever period expires last.

PART 4

OPERATION OF LIMITATION PERIODS

Knowledge

15(1) If, in respect of a claim brought by a principal, an agent has actual knowledge of the matters referred to in subsection 5(2), subparagraph 9(1)(b)(i), paragraph 14(a), subparagraph 16(b)(i) or section 22 and has a duty to communicate that knowledge to the principal, the principal shall be deemed to have knowledge of the matters on the earlier of

- (a) the day on which the agent first knew those matters, and**
- (b) the day on which the principal first knew or ought reasonably to have known those matters.**

15(2) In respect of a claim brought by a claimant who is, in relation to the property to which the claim relates, a successor in right, title or interest to another person, the claimant shall be deemed to have knowledge of the matters referred to in subsection 5(2) or subparagraph 9(1)(b)(i) or 16(b)(i) on the earlier of

- (a) the day on which the predecessor first knew or ought reasonably to have known those matters, if that day occurred before the predecessor transferred the property, and**
- (b) the day on which the claimant first knew or ought reasonably to have known those matters.**

Willful concealment

16 If a defendant willfully conceals from a claimant the existence of a claim, the following rules apply:

- (a) the defendant cannot rely on the expiry of a limitation period referred to in paragraph 5(1)(b), subparagraph 9(1)(b)(ii) or paragraph 11(b) or 14(b) as a defence to the claim, and**
- (b) in the case of a claim referred to in section 8, subsection 12(2) or (4) or section 13, the claim shall not be brought after the later of**
 - (i) two years from the day the claimant first knows or ought reasonably to know that the claim exists, and**
 - (ii) the period described in section 8, subsection 12(2) or (4) or section 13, as the case may be.**

Comment: While we agree with the principle of creating an additional amount of time in which a claim can be made where there has been some "willful concealment", the difficulty with this provision as presently drafted is that it does not clearly state what it means to "*willfully conceal[] from a claimant the existence of a claim*". On a "literal reading", this provision would only apply when the defendant has somehow concealed from a claimant the fact that he or she has a claim which "exists". We do not think that is what is actually intended here. The ULCC model statute is much more precise as to the conduct which is intended to be caught in this type of provision. Section 6(3) of the model statute (dealing with the ultimate limitation period), is as follows:

"6(3) The limitation period established by subsection (2) does not run during anytime in which the person against whom the claim is made,

- (a) Willfully conceals from the person with the claim *the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or*
- (b) Willfully misleads the person with the claim *as to whether the injury, loss or damage is sufficiently serious to warrant a proceeding.*"
[Emphasis added]

The general approach of Section 16 of the Bill is salutary, and the drafting may be sufficient, but we suggest that the wording be refined to make it clearer precisely what sort of conduct would trigger this provision.

Minors

17 The operation of any limitation period established by this Act is suspended while the claimant is a minor.

Incapacity

18(1) The operation of the limitation period in paragraph 5(1)(a), subparagraph 9(1)(b)(i) or paragraph 11(a) or 14(a) is suspended during any period in which the claimant is incapable of bringing the claim because of his or her physical, mental or psychological condition.

18(2) If the limitation period has less than one year to run when the suspension ends, the period is extended to the day that is one year after the day on which the suspension ends.

Comment: We note that this section expands the traditional definition of "*incapacity*" by virtue of the use of the wording "physical, mental or psychological condition". While this may result in some caselaw, we feel the wording does give the Court the flexibility to reach reasonable interpretations of this in borderline factual situations.

Acknowledgment

19(1) If, before the expiry of the relevant limitation period established by this Act, a defendant gives an acknowledgment of the right, title, liability or obligation to which the claim relates, the operation of the limitation period begins again at the time of the acknowledgment.

19 (2) An acknowledgment

(a) must be in writing, and

(b) must be made by the defendant or the defendant's agent to the claimant, the claimant's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada).

19(3) An admission or statement made in correspondence relating to the resolution of a claim is not an acknowledgment for the purposes of this section if

(a) the correspondence indicates that the admission or statement is made without prejudice, or

(b) the correspondence reserves the defendant's right to rely on the expiry of a limitation period as a defence to the claim.

Comment: For the sake of consistency with paragraph 19(3)(a), the opening wording of paragraph 19(3)(b) should be reworded as follows:

"(b) the correspondence indicates that the defendant intends to maintain the right to rely on the expiry of a limitation period as a defence to the claim."

Part payments

20(1) If a defendant makes a part payment of a liquidated or unliquidated monetary obligation before the expiry of the relevant limitation period established by this Act, the operation of the limitation period begins again at the time of the part payment.

20(2) A part payment must be made by the defendant or the defendant's agent to the claimant, the claimant's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada).

20(3) Subsection (1) does not apply if

- (a) the payment is made as full payment, settlement or discharge of the monetary obligation of the defendant,**
- (b) the payment is made without prejudice or on the basis that the defendant does not accept liability for any amount beyond the amount paid, or**
- (c) the defendant reserves the right to rely on the expiry of a limitation period as a defence to the claim.**

Comment: In order that subsection 20(3) be consistent with the provisions of subsections 19(2) and 19(3), it is suggested that each of the paragraphs of subsection 20(3) be amended to contain a requirement of stipulation in writing of the conditions set out therein. In other words, it is suggested that the opening words of each paragraph be as follows:

- "(a) the payment is stipulated in writing as being made as full payment, ...,
- (b) the payment is stipulated in writing as being made without prejudice ...,
- (c) the defendant reserves in writing the right to rely"

PART 5

CLAIMS BROUGHT AFTER EXPIRY OF LIMITATION PERIOD

Claims added to proceedings

21 Despite the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or an amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and the conditions set out in one of the following paragraphs are satisfied:

- (a)** the added claim is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
- (b)** the added claim adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within 6 months after the expiry of the limitation period, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits;
- (c)** the added claim adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within 6 months after the expiry of the limitation period, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

Delay caused by defendant

22 If the relevant limitation period established by this Act has expired, but the actions taken or assurances given by the defendant or the defendant's agent in relation to the resolution of the claim before the expiry of the limitation period caused the claimant to reasonably believe that the claim would be resolved by agreement and therefore to delay bringing the claim, the claimant may bring the claim within 6 months after the day on which the claimant first knows or ought reasonably to know that the belief was unfounded.

Comment: The office of the Attorney-General, in its *Commentary* on Bill 28, notes that this provision is a response to the suggestions for some form of "equitable tolling" or "estoppel" provision. The *Commentary* acknowledges fairly that, "expressions like these mean different things to different people, and the particular focus of Section 22 on cases where the defendant's conduct causes the claimant to believe that litigation will not be necessary, and the claimant therefore has not sued by the time the limitation period expires." Prior to our earlier 2006 Submission, some of our members expressed serious reservations about any such change, due to the potential for uncertainty and lack of predictability which might result. They expressed a concern that any equitable tolling

mechanism which is included should not be such as to assist plaintiffs who have "slept on their rights". We suggested in our written Submission that there be some form of tolling in cases of fraudulent concealment and willful misleading (which are dealt with elsewhere in Bill 28). We also suggested that should the Government decide to include a more general tolling provision, that it be 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. The time available has not permitted any fair sampling of members' opinions on this proposed provision. In view of previous comments, we make no specific recommendation for or against it. Some of our members will feel that it is good law, and other members will disagree. At the end of the day, however, by creating an objective test which requires the claimant to show that he or she "*reasonably believe[d] that the claim would be resolved by agreement*" the Court will at least have a yardstick to apply, as well as a defined period "*... 6 months after the day on which the claimant first knows or ought reasonably to know that the belief was unfounded ...*", in which to exercise it.

PART 6

GENERAL

Non-judicial remedies

23(1) In this section, "non-judicial remedy" means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings.

23(2) If a claimant is prevented from bringing a claim as a result of the expiry of a limitation period established by this Act, the claimant is not entitled to enforce against the defendant any non-judicial remedy that the claimant would otherwise be entitled to enforce in relation to the claim.

Conflict of laws

24(1) Subject to subsection (2), this Act applies to any claim brought in New Brunswick, despite the fact that, in accordance with conflict of laws rules, the claim is to be adjudicated pursuant to the substantive law of another jurisdiction.

24(2) If the limitations law of that other jurisdiction would prevent the claim from being brought in that jurisdiction, the claim shall not be brought in New Brunswick.

Comment: This is a "choice of law" provision by virtue of which claims that would be barred in another jurisdiction are barred in New Brunswick, even though the New Brunswick limitation has not yet expired. The net result is that New Brunswickers who have claims which might be litigated in jurisdictions other than New Brunswick must be mindful of the applicable limitation in that "other

jurisdiction" wherever that may be. This appears to be generally in accordance with the prevailing common law rule by which limitations in foreign jurisdictions are generally regarded as "*substantive law*", and thus binding for the case in the "*forum*" jurisdiction: see *Tolofson v. Jensen*, 1994 Can LII 44 (S.C.C.), and *Clark v. Naqvi*, 1989 Can LII 161 (N.B.C.A.) , per Stratton, CJNB.

Rules of equity

25 Nothing in this Act derogates from any rule of equity under which a court may refuse to grant relief to a claimant in respect of a claim.

Agreements

26 Nothing in this Act precludes any person from entering into an agreement that has the effect of extending or shortening a limitation period established by this Act.

Comment: CBA-NB has no objection to the wording in this provision which permits the "extending" of a limitation period. **However, CBA-NB objects in the strongest possible terms to permitting the "shortening" of limitation periods by agreement.** While the "*Commentary*" of the Office of the Attorney-General states that this proposed section reflects existing law, we are not so sure. While it does seem fairly clear that limitation periods can be *extended* by agreement, it is not as clear that they can be *shortened* by agreement: see comments of the Alberta Court of Appeal in *Fenrich v. Wawanesa*, 2005 A.B.C.A. 199, at para. 25.

Our research has turned up no definitive caselaw on the point. The drafters of the ULCC model statute appear to be of the view that limitation periods *can* (at common law) be shortened by agreement, but they do not think that is a good idea. Section 14 of the ULCC model statute is as follows:

"Agreements

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

(2) Subsection (1) does not affect an agreement made before the day this Act comes into force." [Emphasis added].

Section 21 of the Saskatchewan *Limitations Act*, S.S. 2004, c. L-16.1 provides that parties may agree to *extend* a limitation period. According to our research, it would appear the only province which allows, by its limitations legislation, any shortening of limitation periods is Section 22 of the Ontario *Limitations Act*, 2002, S.O. 2002, c. 24, SCH. B. It has, however, obviously been found to be troublesome as it was amended further in 2006 (2006, c. 21, SCHED. D, S.2), the "bottom-line effect" now being that in Ontario, the only limitation periods which can be "varied" or "excluded" by

agreement, are limitation periods which are "business agreements". "Business agreements" are defined as agreements made by parties, "none of whom is a consumer".

As noted above, the drafters of the ULCC model statute recommended that the law expressly *prohibit* shortening of limitation periods which are created by the *Limitations Act*. There is a very sound public policy reason for this. 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 over the weaker party, who is frequently a consumer of product or services, or an employee. (See generally, comments to this effect in the judgment of Justice L'Heureux-Dubé for the Supreme Court of Canada in *Garcia Transport v. Royal Trust*, [1992] 2 S.C.R. 499).

It is not an overstatement to say that the recognition of an ability to shorten limitation periods by agreement would in fact "cut the legs" completely out of the minimum basic limitation law created in a new *Limitation of Actions Act*. In our modern society, many transactions come with forms containing printed conditions which the consumer is in no real position to challenge. Invoices, work orders, purchase orders, bills of lading, retention letters from providers of professional services such as accountants, agreements of purchase and sale, lease agreements, employment contracts - all such agreements come with "terms and conditions" which are not in reality negotiable by the consumer of such goods and services, or by the prospective employee. It is not uncommon at the present time for merchants, suppliers, or employers to insist on compulsory arbitration clauses in contracts with their consumers or employees.

While Section 4 of this proposed Bill 28 seeks to redress a problem by providing that limitation periods in this Bill would prevail over limitation periods established by *private statute*, the force of Section 4 as a remedial provision would be swept away where the limitation in *this Act* prevails. The professional could then take advantage of Section 26 to devise a "retention letter" providing that the limitation period against that professional will be (for example), "6 months from the date of completion of professional services rendered". This kind of provision would shorten the applicable limitation period, not simply by reducing the time for bringing the suit, but by completely sweeping away any potential applicability of the "*discoverability*" doctrine, which is such an important overall part of both this reform legislation, and the common law as it presently exists. The effect of having this statute recognize the shortening of limitation periods would have the *opposite effect* of creating the greater harmonization which we see as one of the basic goals of limitations law reform process. It would also tend toward producing, eventually, litigation which desperate plaintiffs would pursue to test the "unconscionability" of substantially reduced contractual limitation periods. It should also be borne in mind that this provision may be utilized in respect of disability insurance, which is not at present governed by any limitation in the *Insurance Act* (that is to say, where a policy of disability insurance is issued without an accompanying life policy).

It is not an exaggeration to say that the effect of this statutory provision as drafted may well be regarded as both "anti-consumer" and "anti-labour" in effect. As this legislation, in any event, will

create a "basic" limitation period of 2 years (by Section 5(1)), there is no public policy reason to advocate that parties should be permitted to shorten it even further. **CBA-NB strongly urges the Legislative Assembly to change this provision by revising it as follows:**

"26. A limitation period under this Act or any other Act may be extended, but not shortened, by agreement."

The validity (or otherwise) of any pre-existing agreements to shorten limitation periods may be left for the Court to determine in accordance with common law.

PART 7

TRANSITION

Transition

27(1) The following definitions apply in this section.

"effective date" means the day on which this Act comes into force. (*date d'entrée en vigueur*)

"former limitation period", with respect to a claim, means the limitation period that applied to the claim before the effective date. (*ancien délai de prescription*)

"new limitation period", with respect to a claim, means the limitation period established by this Act that applies to the claim. (*nouveau délai de prescription*)

27(2) This section applies to claims that are based on acts or omissions

(a) that took place before the effective date, and

(b) with respect to which no claim has been brought before the effective date.

27(3) During the first 2 years after the effective date, a claim may be brought after the new limitation period has expired if the former limitation period has not expired.

27(4) Nothing in this Act permits a claim to be brought if the former limitation period has expired before the effective date.

PART 8

CONSEQUENTIAL AMENDMENTS AND COMMENCEMENT

Arbitration Act

28 *Section 52 of the Arbitration Act, chapter A-10.1 of the Acts of New Brunswick, 1992, is amended*

- (a) in subsection (1) by striking out “as if the arbitration were an action and a claim made in the arbitration were a cause of action” and substituting “as if the arbitration were a court proceeding”;*
- (b) in subsection (2) by striking out “within which an action may be brought on a cause of action that was a claim in the arbitration” and substituting “within which a court proceeding may be brought in respect of a claim that was presented in the arbitration”.*

Business Corporations Act

29 *Subsection 83(6) of the Business Corporations Act, chapter B-9.1 of the Acts of New Brunswick, 1981, is repealed and the following is substituted:*

83(6) **No action shall be brought under subsection (5) after 2 years from the day on which the plaintiff first knew or ought reasonably to have known that the conduct giving rise to the action took place.**

Defamation Act

30(1) *Section 12 of the Defamation Act, chapter D-5 of the Revised Statutes, 1973, is amended by striking out “Sections 13 to 18” and substituting “Sections 15 to 18”.*

30(2) *Section 13 of the Act is repealed.*

30(3) *Section 14 of the Act is repealed.*

30(4) *Section 18 of the Act is amended*

- (a) in subsection (1) by striking out “sections 13, 14 and 17” and substituting “section 17”;*
- (b) in subsection (3) by striking out “sections 13, 14 and 17” and substituting “section 17”.*

Comment: We are very happy to see these proposed changes to the *Defamation Act*.

Electricity Act

31 *Section 31 of the Electricity Act, chapter E-4.6 of the Acts of New Brunswick, 2003, is amended*

(a) in subsection (1) by striking out “notwithstanding the Limitation of Actions Act or any other Act” and substituting “notwithstanding any other Act”;

(b) in subsection (2) by striking out “notwithstanding the Limitation of Actions Act or any other Act” and substituting “notwithstanding any other Act”.

Executors and Trustees Act

32(1) *The heading “LIMITATION” preceding section 17 of the Executors and Trustees Act, chapter E-13 of the Revised Statutes, 1973, is repealed.*

32(2) *Section 17 of the Act is repealed.*

Comment Section 17 of the *Executors and Trustees Act*, as this presently exists, gives the legal personal representative of any person dying intestate, 20 years to sue for recovery of any share of the personal estate of the intestate, with further qualification when there has been an "acknowledgement" of such rights. The proposed amendment would significantly reduce the time available to the ordinary periods as set out in this Bill. However, this will produce more certainty in property rights.

Fatal Accidents Act

33(1) *Subsection 2(2) of the Fatal Accidents Act, chapter F-7 of the Revised Statutes, 1973, is amended by striking out “Subject to subsection (5)” and substituting “Subject to subsections (5) and 8(3.1)”.*

33(2) *Subsection 5(4) of the Act is repealed and the following is substituted:*

5(4) **No application shall be made under subsection (1) by a person barred from bringing an action under this Act because of the expiration of a period set out in paragraph 8(4)(a) or (b), but where such an application is made not earlier than 3 months before the expiration of that period, the judge may, if he or she thinks it just to do so, extend for a period not exceeding one month the time within which an action may be brought as provided in subsection 8(4).**

33(3) Section 8 of the Act is amended

(a) in subsection (3) by striking out “lapse of time or”;

(b) by adding after subsection (3) the following:

8(3.1) If the deceased, at the time of his or her death, could not have brought an action against the tortfeasor by reason of lapse of time, a person who, if not for this subsection, would be entitled to bring an action under this Act is barred from doing so.

(c) by repealing subsection (4) and substituting the following:

8(4) Except where it is expressly declared in another Act that it operates notwithstanding this Act and subject to subsection 5(4), an action, including an action to which subsection 2(5) or (6) applies, shall not be brought under this Act after the earlier of

(a) two years from the day on which the person bringing the action first knew or ought reasonably to have known that the wrongful act, neglect or default of the tortfeasor caused the death or contributed to the cause of death of the deceased, and

(b) five years from the day of the death of the deceased.

Comment: This Section and Section 39 are designed to bring the limitation periods for claims under the *Fatal Accidents Act* and the *Survival of Actions Act* into accordance with each other with a basic 2 year Discovery period and a 5 years "ultimate limitation" period. This would remedy a potential disparity between the statutes and we see this as a beneficial law reform provision.

Limitation of Actions Act

34(1) The title of the *Limitation of Actions Act*, chapter L-8 of the *Revised Statutes, 1973*, is repealed and the following is substituted:

Real Property Limitations Act

34(2) Section 1 of the Act is amended

(a) by repealing the definition “beyond seas”;

(b) by repealing the definitions “mortgage”, “mortgagor” and “mortgagee”;

(c) *in the definition “proceedings” by striking out “entry, taking of possession, distress and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute;” and substituting “entry and taking of possession.”;*

(d) *by repealing the definition “rent”;*

(e) *by repealing the definition “rent charge”.*

34(3) *Parts I and II of the Act are repealed.*

34(4) *Subsection 33(2) of the Act is repealed.*

34(5) *Parts IV, V and VI of the Act are repealed.*

34(6) *Section 55 of the Act is repealed and the following is substituted:*

Definition of “trustee”

55 *In this Part, “trustee” includes an executor and a joint trustee.*

34(7) *Section 56 of the Act is repealed.*

34(8) *Section 57 of the Act is repealed.*

34(9) *Section 58 of the Act is amended*

(a) *by repealing subsection (2);*

(b) *by repealing subsection (3).*

34(10) *Section 60 of the Act is amended by striking out “any land, rent charge, or money charged on land, the right and title of such person to the land or rent charge or the recovery of the money out of the land shall be extinguished” and substituting “any land, the right and title of such person to the land shall be extinguished”.*

34(11) *Section 61 of the Act is repealed.*

34(12) *Section 62 of the Act is amended by striking out “Parts II, III and IV” and substituting “Part III”.*

34(13) *Subsection 63(1) of the Act is amended by striking out “Parts II, III and IV” and substituting “Part III”.*

34(14) *The heading “APPLICATION OF ACT” preceding section 64 of the Act is repealed.*

34(15) *Section 64 of the Act is repealed.*

34(16) *The heading “ACQUIESCENCE” preceding section 65 of the Act is repealed.*

34(17) *Section 65 of the Act is repealed.*

Mental Health Act

35 *Subsection 66(2) of the Mental Health Act, chapter M-10 of the Revised Statutes, 1973, is amended by striking out “All actions and prosecutions” and substituting “All prosecutions”.*

Comment: The effect of this change would be to leave a period of 6 months for prosecutions under the *Mental Health Act*, whereas actions against persons for anything done or omitted to be done under that Act would no longer be subject to a 6 month limitation, but would be subject to the general provisions in this Bill. This is a salutary change.

Midwifery Act

36(1) *The heading “Limitation of actions” preceding section 96 of the Midwifery Act, chapter M-11.5 of the Acts of New Brunswick, 2008, is repealed.*

36(2) *Section 96 of the Act is repealed.*

Probate Court Act

37 *Subsection 68(2) of the Probate Court Act, chapter P-17.1 of the Acts of New Brunswick, 1982, is repealed.*

Regional Health Authorities Act

38(1) *The heading “Limitations” preceding section 61 of the Regional Health Authorities Act, chapter R-5.05 of the Acts of New Brunswick, 2002, is repealed.*

38(2) *Section 61 of the Act is repealed.*

Survival of Actions Act

39 *Section 9 of the Survival of Actions Act, chapter S-18 of the Revised Statutes, 1973, is amended*

(a) *in subsection (1) by striking out “Notwithstanding the Limitation of Actions Act or any other Act” and substituting “Notwithstanding any Act”;*

(b) *by repealing subsection (2) and substituting the following:*

9(2) Subject to subsection (2.1), proceedings on a cause of action that survives under section 2 shall not be brought after 2 years from,

(a) **if the cause of action is discovered by the person in whom the cause of action was vested before death, the day of the death of the person, and**

(b) **if the cause of action is discovered after the death of the person in whom the cause of action was vested before death, the day the cause of action is discovered by the person bringing the action.**

(c) *by adding after subsection (2) the following:*

9(2.1) Proceedings on a cause of action that survives under section 2 shall not be brought after 5 years from the day of the death of the person in whom the cause of action was vested before death.

(d) *by repealing subsection (3) and substituting the following:*

9(3) Subject to subsection (3.1), proceedings on a cause of action that survives under section 3 or 4 shall not be brought after 2 years from the later of

(a) **the day of the death of the person against whom the cause of action subsisted or was deemed to have been subsisting before death, and**

(b) **the day the cause of action is discovered by the person who has the cause of action.**

(e) *by adding after subsection (3) the following:*

9(3.1) Proceedings on a cause of action that survives under section 3 or 4 shall not be brought after 5 years from the day of the death of the person against whom the cause of action subsisted or was deemed to have been subsisting before death.

9(3.2) For the purposes of subsections (2) and (3), a cause of action is discovered by a person on the day on which that person first knew or ought reasonably to have known that the cause of action existed.

Commencement

40 This Act comes into force on a day to be fixed by proclamation.