

Commentary on Bill 28:

*Limitation of Actions Act*

Office of the Attorney General

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## Introduction

On December 16th 2008 the Attorney General introduced Bill 28, a proposed new *Limitation of Actions Act*, in the Legislative Assembly. The Bill was referred to the Law Amendments Committee for review. This paper presents a section by section commentary on the Bill, and is designed to assist readers in understanding the Bill from a purely legal point of view.

The general approach of the Bill will be familiar to anyone who has followed the emerging pattern of limitations law reform in Canada. The Bill draws on the Acts adopted by Alberta, Ontario, Saskatchewan and the Uniform Law Conference of Canada (ULCC) in recent years, and uses a combination of a short limitation period based on the claimant's discovery of his or her claim, and a long limitation period based on when the defendant did whatever is complained about, to determine the time within which a claimant must bring a claim. If either period has expired, the claim cannot be brought. These four Acts will be referred to in this paper as the "recent Acts". They are not identical, but have many common features.

In many places, however, the New Brunswick Bill adjusts the models on which it is based, and a major purpose of this paper is to explain these adjustments, and place them in their legal context. Some of them address problems that have either emerged already in the operation of the recent Acts elsewhere or seem likely to do so. Others take different approaches to particular topics because existing New Brunswick law differs from the law that was reformed in other provinces. In some cases, new law is being deliberately created.

Two issues that the Bill does not address should also be mentioned. First, it does not apply to the limitation periods for recovering possession of land. Though these are long overdue for reform, the Department has decided to review them further before presenting legislation. For the time being, therefore, the parts of the existing *Limitation of Actions Act* that contain them will be retained and renamed the *Real Property Limitations Act*. Second, the Bill does not alter the limitation periods created by the *Insurance Act* for bringing legal proceedings under different kinds of insurance policies. These, too, are in need of reform, but they are currently under review by the Superintendent of Insurance, and similar reviews are under way in other provinces. It would be premature to amend them in this Bill.

The Law Amendments Committee will decide what process it will follow in relation to the Bill. For further information on this, please contact:

Mr. Shayne Davies  
Clerk Assistant and Committee Clerk  
Legislative Building, Centre Block  
P. O. Box 6000  
Fredericton, NB  
E3B 5H1

Tel: (506) 453-2506. Fax: (506) 453-7154. Email: [shayne.davies@gnb.ca](mailto:shayne.davies@gnb.ca)

The text of the Bill is in bold below, with a comment following each section.

## **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**
- (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:** This section defines the basic terms “claim”, “claimant” and “defendant”, and identifies the time at which a claim is “brought”. The definition of “claim”, which follows the Ontario Saskatchewan and ULCC models, is central to the Act, since it defines the scope of the civil proceedings to which the Act applies.

The reference to s.22 in s.1(3) ensures that the six month period in s.22 is not affected by the provisions in Part 3 that vary the operation of limitation periods in specified circumstances.

## 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.**

**Comment:** The new limitation periods will apply as soon as the Act comes into force, and will apply to past events, and to new claims added to existing proceedings, as well as to the future. S.27, however, creates a two-year transitional phase during which the expiry of the new limitation period will not bar a claim if the former limitation period has not expired. The comment to s.27 explains this further.

The *Real Property Limitations Act*, referred to in s.2(2), is the name that will be given to what will remain of the existing *Limitation of Actions Act* after the amendments in s.34 of the Bill take effect. The remnant will be the provisions relating to the recovery of possession of land. Other property-related provisions of the existing Act, which deal with subjects like rents, mortgages and enforcement proceedings under the *Personal Property Security Act*, are being repealed. Their subject-matter will therefore now fall under the new limitation periods in this Bill.

## This Act binds the Crown

**3 This Act binds the Crown.**

**Comment:** This is a standard form provision, which ensures that the same limitation periods apply to the Crown as to everyone else.

## 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:** Many public Acts create self-contained rights with self-contained remedies that must be applied for within a particular period. This Act will not affect them. A few public Acts, however, such as the *Regional Health Authorities Act*, create special limitation periods for perfectly ordinary claims in tort. These are being eliminated by the consequential amendments in Part 8.

There are also a number of private Acts that create special limitation periods, often for claims in tort or contract against the members of a particular association. Under s.4(2), private Acts cannot provide a shorter period than the *Limitation of Actions Act*, but can provide a longer one. Associations that have special limitation periods in their Acts may well decide they should propose amendments to their Acts as a result of this Bill. When s.4(2) is in force, the only effect of those special limitation periods will be to extend, rather than limit, the liability of the associations' members.

## 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:** This section is the most important provision in the Bill. It provides the general limitation periods that will be applicable to the vast majority of claims in most ordinary circumstances. There is a two year period based on discovery and a fifteen year period based on the time at which the action complained about occurred. The periods operate in parallel; if either one has expired, the claim cannot be brought. In practice, however, the two year period will ordinarily be the operative one, with the fifteen year period only becoming relevant in cases where a long time passes before a claim is discovered.

The figures of two years and fifteen years have been selected for consistency with the Ontario, Saskatchewan and ULCC Acts. In Alberta the figures are two years and ten years. For convenience, the two year period will be referred to below as the “discovery period” and the 15 year period as the “ultimate period”. These terms are not used in the Act, however.

The three elements of discovery in s.5(2) are drawn from the Ontario, Saskatchewan and ULCC Acts. Alberta's formulation is very similar. Those Acts also contain another element, however,

that s.5(2) omits, on the basis that the first three elements are self-sufficient. It is along the lines that, in order for the discovery period to begin, the claimant must know that the injury, loss or damage is “sufficiently serious to warrant a proceeding” (ULCC, s.5(a)(iv)), or that “having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it” (Ontario, s.5(a)(iv)).

The ULCC’s annotation to its s.5(a)(iv) explains that this provision recognizes that the first sign of damage should not always be the time for the commencement of the discovery period. A standard example is that the discovery period for a defective foundation should not necessarily begin just because some superficial defects in a building have become apparent. This desirable result, however, is also implicit in s.5(2) of the Bill, especially para.(a), which refers to the claimant being able to discover “*the* injury, loss or damage” – that is to say, the injury, loss or damage to which the claim relates – not just *some* injury, loss or damage. In the case of the defective foundation, this is the defective foundation, not the minor defects; that the claimant has discovered the latter will be relevant to, but not determinative of, whether he or she should have discovered the former. Under paras.(b) and (c), likewise, there will be cases in which a claimant may reasonably be unaware of how the loss was caused, or of the defendant’s role in it, even though some of the relevant facts are known.

S.5’s omission of the fourth element, therefore, should not be read as meaning that the Bill does not provide for issues of delayed or incomplete discovery. Rather, it leaves them to be addressed through the familiar concepts of loss, causation and identification, without adding the unfamiliar and potentially complex overlay of whether a claimant should recognize a legal proceeding as being “appropriate” or “warranted”.

### **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 section follows the established day-by-day approach to calculating the limitation periods for continuous claims such as nuisance. Alberta, Ontario and ULCC follow a different approach that (a) does not indicate how the discovery period operates when a continuous act or omission is discovered, and (b) delays the beginning of the ultimate period until the act or omission ceases, the effect apparently being that as long as the act or omission continues there is no ultimate period governing how far back in time a claim can reach. The Saskatchewan Act is silent about continuous acts and omissions.

Rather than follow either of these models, the Bill spells out that the day-by-day approach is to be applied to both the discovery period and the ultimate period. The effect, since these operate in parallel, is that if the claimant brings the claim within the first two years of discovery, the claim can relate back fifteen years from the date the claim is brought. If, though, he or she delays beyond the two years, the claim can still be brought, but can only relate back for the past two years. In either event, the claimant can seek declaratory or injunctive relief if the act or omission is still continuing, and in many cases this will be the most important of the claimant’s objectives.

## 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.**

**Comment:** Part 3 consists of free-standing provisions which, for different reasons, cannot operate under the Part 2 pattern of interconnecting discovery and ultimate periods. Special limitation periods are therefore created. Some follow a two year and fifteen year pattern. Others have fifteen years alone. A few involve other periods. For convenience once more, the two year periods in Part 3 that depend on the claimant's knowledge will also be referred to in this paper as "discovery" periods, and the fifteen year periods that date from the act, omission or event complained about and do not depend on knowledge will also be referred to as "ultimate" periods.

#### 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:** This is similar to the existing law. It clarifies the date from which the fifteen years run and ensures that a discovery period, which would be inappropriate to the recovery of judgment debts, does not apply.

#### 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.**

**Comment:** This section and s.10, which should be read together, create new limitation periods for the recovery of personal property and conversion. The subject is complicated because, under the law of conversion, when property passes from person to person different claims can arise against different people at different times. In addition New Brunswick's current limitation periods for conversion are different from the law that has recently been reformed in other provinces. S.61 of the *Limitation of Actions Act* says that claims can only be brought for six years after property is first converted, and after that, the original owner's title is extinguished. Extinguishment of title is the lynchpin of this section. Unless title is extinguished, the claimant's ability to bring claims against subsequent transferees and owners can continue indefinitely, even if they have paid for the property and had no reason to believe that anybody else might claim the property was his or hers.

SS.9 and 10 of the Bill produce a similar effect to the existing law, but within a two year and fifteen year framework. They also add protection for a purchaser in good faith. S.9 deals with recovering possession of personal property and s.10 with claims for damages.

S.9(1)(a), which is adapted from Saskatchewan and Ontario, provides a two year period for claims to recover possession of personal property from a purchaser in good faith. S.9(1)(b) applies in other cases, and establishes a discovery period and an ultimate period for the specific case of a claim to recover personal property. When possession can no longer be recovered from the person in possession, s.9(2) extinguishes title. This shelters all subsequent owners from actions by a person who claims to have previously owned the property.

## **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.**

**Comment:** This section complements s.9, linking the period to recover damages for conversion to the time to recover possession. Until the time for recovering possession has passed, the claimant can sue anyone in the chain of conversions leading up to that point, relying on the general limitation periods in s.5. But when possession cannot be recovered from a defendant, nor can damages.

S.10(2) also indicates that damages can be recovered from a person even after he or she no longer has possession of the property, and that the limitation period for each potential defendant will depend on what the period would have been if he or she were still in possession. An example in which different periods would apply to different defendants would be that of a bailee who wilfully conceals the conversion from the claimant and then sells the property to a purchaser in good faith. Under s.16, below, the bailee's wilful concealment could suspend the operation of the limitation period against him or her for many years, but as for the purchaser in good faith, s.9(1)(a) would provide protection two years after the purchase. After those two years, therefore,

the claimant's remedies would be restricted to a claim for damages against the bailee. The claimant would have no remedy against the purchaser in good faith or subsequent owners.

### **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.**

**Comment:** All of the recent Acts have amended the law on demand obligations, since the underlying law – that limitation periods begin on the day the loan is advanced – does not work well with a two year discovery period. However, the approach they adopted focused on the ultimate period only, and the Ontario Court of Appeal held in *Hare v Hare* 83 O.R. (3d) 766 (2006), interpreting a discovery provision very similar to s.5 of this Bill, that this did not change the existing law in relation to the discovery period, which begins when the loan is advanced. Ontario has very recently added a discovery period to its Act.

S.11 also covers both periods, though differently from Ontario, saying in s.11(a) that the two year period begins when the demand for repayment is made, and that the fifteen year period begins when the demand could first be made. This will be the day the loan is advanced unless another date is established.

### **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.**

**Comment:** This section departs from other recent Acts by establishing an extended limitation period for recovering the principal of a secured debt. Without this, secured debt, like other payment obligations, would fall under the ordinary two year discovery period and fifteen year

ultimate period, and the two year discovery period would usually be the operative one, since creditors will normally know when debts have not been paid. However, a two year limitation period seems short in relation to secured transactions (even though the two years would automatically restart if an acknowledgment is given or a part payment made – see ss.19 and 20), and it would be a major change from existing law under Parts II and V of the *Limitation of Actions Act*. S.12(2) of the Bill, therefore, eliminates the discovery period in relation to the principal of a secured debt, and creates a pure ultimate period instead.

The distinction between principal and interest, with interest having a shorter limitation period than principal, is modelled on the mortgage provisions in ss.25 and 27 of the existing Act, both of which are repealed by s.34 of the Bill. The limitation period begins when the security is taken, but it is carried forward each time an acknowledgment or part payment is received. So is the shorter period for interest, but the longer period for principal means that even if the creditor delays bringing the claim for more than two years the principal can still be recovered even after parts of the interest cannot.

Also relevant to secured debt is s.23, which bars non-judicial remedies such as a mortgagee's power of sale, or enforcement proceedings under Part V of the *Personal Property Security Act*, when a claim can no longer be brought. S.12(4) of the Bill, modelled on s.46(1) of the existing *Limitation of Actions Act*, allows the debtor fifteen years to recover property after the secured creditor has taken possession of it.

### **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.**

**Comment:** In similar vein to the treatment of secured debt in s.12, s.13 establishes a 15 year limitation period for payment obligations that are both created by statute and reinforced by a statutory lien or charge. In the *Municipalities Act*, for example, there are statutory liens for drain connections (s.120), special frontage assessments (s.141), water and sewer charges (s.189) and costs incurred in relation to dangerous or unsightly premises (s.190.06).

### **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:** This section provides a more complete statement of the limitation periods for contribution than other recent Acts. Ontario and Saskatchewan link both the discovery period and the ultimate period to the time when process is served, though process will not be served in all contribution cases. Alberta and ULCC add settlement as an additional trigger, but only address the ultimate period. Alberta cases such as *Condominium Plan 9512180 v. Prairie Land Corp.* [2008] A.J. No. 492 have now suggested that the discovery period begins when the defendant knows or ought to know that it has a claim for contribution against the third party.

S.14 of the Bill establishes a discovery period based on the claimant's discovery of the contributor's potential liability and an ultimate period that takes into account both the date of the act or omission that gave rise to the original claim and the date of the payment, settlement or judgment the claim produces. The figure of five years rather than fifteen for the last of these is designed to reduce the period over which people are, in theory, exposed to claims for contribution even after they can no longer be sued directly in relation to the conduct that is the basis of the claim.

These provisions must be read in conjunction with two other provisions that will also operate in the kinds of multi-party litigation that any mention of contribution tends to bring to mind, and that may allow a defendant to bring claims against other parties considerably later than the claim against him or her begins. The first is the general discovery rule in s.5. In a case where the initial defendant brings in a third party, the initial defendant (who is the "claimant" in relation to the third party claim) must discover the things listed in s.5 before his or her discovery period begins, and this will sometimes only occur late in the initial proceedings. The second is the provision in s.21 under which, in some circumstances, a claim can be added to existing proceedings even after its limitation period has expired. This will be discussed below.

## **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.**

**Comment:** These two subsections are drawn from the other recent Acts, with some changes of wording.

S.15(1) deals with principals and agents. It applies to all of the provisions of the Act that revolve around knowledge or discovery, and says that if an agent actually knows the relevant facts and has a duty to communicate that knowledge to the principal the principal is deemed to know them.

S.15(2) applies to cases in which property to which a claim relates passes from one person to another. Its effect is that if a predecessor knows of a claim before the property is transferred, the successor is treated as knowing what the predecessor did. If this were not so, every transfer would be capable of generating a new claim each time the new owner discovered what the previous owner already knew, and this could occur even though the limitation period applying to the previous owner had already expired. If, of course, the previous owner knows of a problem but conceals it, the successor will be likely to have a claim against the predecessor.

### **Wilful concealment**

**16 If a defendant wilfully 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:** “Wilful concealment” is a term drawn from the Saskatchewan, Ontario and ULCC Acts. It is the deliberate prevention of discovery. Its effect under the Bill depends on whether the particular claim that has been wilfully concealed is subject to both a discovery period and an ultimate period or simply to a free-standing fifteen year period.

If the claim is subject to both a discovery period and an ultimate period, s.14(a) eliminates the ultimate period. The result is that the claimant has two years after discovery to bring the claim, whenever discovery occurs. If it happens in year five, the claimant may sue until year seven. If, though, it does not happen until year twenty-one, the claimant can sue until year twenty-three.

If the claim is subject to a free-standing fifteen year rule, s.14(b) applies. In this case, a two year discovery period is created, and will apply if, but only if, it extends the fifteen year period. If, therefore, the claimant discovers the concealment in year five, there is no requirement that he or she sue before year seven; the full fifteen years is still available. If the claim is discovered in year twenty-one, the claimant can sue until year twenty-three.

## **Minors**

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

**Comment:** This section is copied from the other recent Acts. Its effect is that if a claimant is a minor, limitation periods do not start to run until he or she reaches 19. At that stage, the two year discovery period will begin if the minor knows of the claim. If not, the fifteen year ultimate period will begin.

## **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:** Like the Ontario and ULCC Acts, this section expands the definition of incapacity, and refers to the claimant being incapable of bringing a claim because of his or her “physical, mental or psychological condition”. Like all of the recent Acts, it suspends in s.18(1) the operation of the various two year periods based on discovery. It also allows the claimant at least one year to bring the claim after he or she becomes capable of doing so again. Unlike the other Acts, however, it does not suspend any ultimate periods. In relation to these periods a person who lacks capacity is no worse situated than a person who has full capacity but is unable to sue because he or she has not discovered the claim. Furthermore, the approach taken elsewhere of suspending the operation of the ultimate periods “during any period in which” the claimant lacks capacity appears to invite any claimant who discovers a claim late to look back over the past

fifteen years and to try piece together enough “periods in which” the ultimate period was suspended to demonstrate that the full fifteen years has not yet run. On a traditional definition of incapacity this might not be a problem. Under the expanded one in the Bill, however, it could be.

## **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:** This section expands the current law of acknowledgments along the lines recommended by the Law Commission of England and Wales (*Limitation of Actions* (2001), pp.83-87), and as apparently exemplified in Canada by s.5 of B.C.’s *Limitation Act* and s.18 of Newfoundland and Labrador’s *Limitations Act*. At present, a written and signed acknowledgment of a debt or a judgment or certain property-related rights will trigger a new limitation period. Under the amendment, (a) the same principle will apply to written acknowledgments of any right, title, liability or obligation, and (b) the requirement for a signature is removed. Thus a written statement that “I know this is your car” will trigger a new limitation period for recovering possession of the car.

The stated effect of an acknowledgment is that “the operation of the limitation period begins again”. In theory this means both the discovery period and the ultimate period, but in practice it will almost always be the discovery rule that applies. It is hard to imagine that a claimant can receive an acknowledgment without having “discovered” the claim.

S.19(3) carves out an exception for admissions or statements made without prejudice in the course of settlement negotiations. Though this will narrow the scope of the section, it is included

because without it, defendants and their insurers might be unwilling to make admissions, for fear of restarting a limitation period.

See also s.22, which provides claimants with a measure of protection in relation to conduct by the defendant that is not a written acknowledgment.

### **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 similar vein to s.19, s.20 expands the existing law of part payments. At present, part payment of a debt or a judgment or certain property-related obligations will trigger a new limitation period. S.20, however, applies to part payments of all liquidated or unliquidated monetary obligations.

Like s.19, there is an exemption for payments that are made as final payments or without prejudice. Again, the reason is to avoid discouraging such payments by exposing the payor to a renewed limitation period each time a payment is made.

## **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.**

**Comment:** This section is drawn from the Alberta and ULCC Acts, and is explained on pp.81-89 of the Alberta Law Reform Institute's report on *Limitations* (1989) and in subsequent Alberta case-law. It creates a framework within which, once a claim has been brought in time, some new claims can be added to the proceedings even though the limitation periods applicable to those claims have expired.

In all cases the added claim must relate to the subject-matter of the original proceedings; thus the claims that have been brought in time define the range of the claims that can be added later under this section. In addition, if the claim adds a new defendant, the defendant must have had sufficient knowledge of the claim within the time frame that the combination of the limitation period and six months for service would allow. If the claim is by a new claimant, not only must the defendant have that knowledge, but the involvement of the new claimant must also be necessary or desirable from the point of view of the original proceedings.

### **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:** This section is not drawn from an existing statutory source. The Department has developed it in response to suggestions it received in consultation that the new legislation should contain some form of 'equitable tolling' or 'estoppel' provision. Expressions like these mean different things to different people, and the particular focus of s.22 is 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. The section allows the claimant six months to bring the claim once it emerges that the defendant is not in fact going to do what he or she had indicated.

Examples might include a case where a debtor repeatedly promises to repay a family debt, if only given more time, or where an insurance adjuster negotiates at length with an unrepresented claimant who has every reason to believe that a reasonable settlement will soon be reached, and in either case the claimant only discovers too late that the passage of time can bar the claim. However, the section is less likely to assist a claimant who is legally well-informed or legally represented. Claimants like these should find it difficult to persuade a court that the actions or assurances of the defendant caused them to delay bringing a claim when they know the legal consequences of delay and have formal alternatives available such as seeking an agreement suspending a limitation period (s.26).

## 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.**

**Comment:** In relation to certain claims, claimants can not only sue but also have alternative remedies that they can exercise without legal proceedings. Examples include a non-residential landlord’s right to distrain for rent and a secured creditor’s right to take enforcement proceedings under Part V of the *Personal Property Security Act*. This section ensures that if a limitation period has expired, and a claimant therefore cannot sue, he or she cannot exercise these non-judicial remedies to achieve a result that can no longer be obtained by legal proceedings.

#### 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:** The recent Acts have taken different approaches to the question of how the limitations laws of other jurisdictions should be applied when a court of one province applies the

substantive law of another jurisdiction in deciding a claim. S.24 follows the Alberta approach. The basic rule is that the New Brunswick limitation periods apply to all claims brought in New Brunswick. The subsidiary rule is that claims that would be barred in the other jurisdiction are barred here too. The net effect is that if either the New Brunswick limitation period or the other limitation period has expired, the claim cannot be brought here.

### **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.**

**Comment:** This section is derived from s.65 of the existing *Limitation of Actions Act*. In context, its effect is that if a claimant claims a remedy that a court can refuse on grounds of delay, the fact that the claim has been brought before the limitation period expires does not, of itself, prevent the court from refusing the remedy.

### **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:** This section reflects existing 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.**

**Comment:** Under s.2 of the Bill the new limitation periods apply to all claims brought after the Act comes into force. In many cases, though not all, this will shorten existing limitation periods, and in some situations it could even mean there is no time remaining in the new limitation period when the new Act comes into force. For example, a claim arising out of an accident discovered in 2004 could be brought until 2010 under an existing six year limitation period, but the new two year limitation period would require it to have been brought by 2006. To avoid this result, s.27 provides a two year transitional period in which the former limitation period prevails over the new one if the new one expires earlier. In this particular example, therefore, the former limitation period will continue to apply. But if the former limitation period still had four years to run when the Act comes into force, the claim would have to be brought within two years, after which the priority given to the former limitation period ceases.

S.27(4) clarifies, however, that the Act does not revive claims for which the limitation period had expired before the new Act comes into force. For example, if the existing 6 year period for a claim in conversion expired in 2004, it will remain expired, even though, under the new 15 year rule in s.9, it would not expire until 2013.

## **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”.**

**Comment:** Minor revision of terminology.

### *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.

**Comment:** This is the limitation period for a civil claim for insider trading. The existing period builds on the terminology of existing *Limitation of Actions Act*. It is being replaced with a new period based on the new Bill.

### *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:** This section removes a special six month limitation period that applies to defamation actions against newspapers and broadcasters, as well as a requirement to give a notice of intent to bring the action.

### *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”.*

**Comment:** Cross-references to the *Limitation of Actions Act* are removed, but with no change of legal effect.

*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:** This section deals with actions to recover the personal estate of an intestate from his or her legal representative. The ordinary periods in the Bill will apply.

*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 bring the limitation periods for claims under the *Fatal Accidents Act* and the *Survival of Actions Act* (as amended below) into line with each other. There is a two year discovery period and a five year ultimate period, but if the deceased's own claim was barred under the *Limitation of Actions Act* before he or she died, the dependants' claim under the *Fatal Accidents Act* is also barred.

### ***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:*

**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.*

**Comment:** This section repeals all of the existing *Limitation of Actions Act* except the provisions relating to the recovery of possession of land. For further information, see the introduction to this paper and the comment on s.2(2).

### ***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:** This removes a six month limitation period relating to acts or omissions in pursuance of this Act.

### ***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.*

**Comment:** This removes a special two year period for actions against registered midwives.

*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.*

**Comment:** The repealed subsection creates a short extension to a limitation period, and is no longer required.

*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.*

**Comment:** This removes a special limitation period applicable to regional health authorities and their employees.

*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.**

**Comment:** This section creates new limitation periods for claims that, when a person dies, survive as claims by or against his or her estate. There is a two year discovery period and a five year ultimate period. If discovery had actually occurred before the person died, the two years run from the date of death; otherwise they begin whenever discovery occurs. The five years run from the date of death in all cases.

These periods displace the periods under the *Limitation of Actions Act* as long as the latter have not already expired when the person dies. They will ordinarily allow more time than discovery periods that are already running when the deceased dies, and will allow either more or less time than the unexpired portion of an ultimate period, depending on whether that unexpired portion is less than, or more than, five years.

#### **Commencement**

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

**Comment:** The Act will be brought into force by proclamation. No specific date for proclamation has yet been considered.