New Nouveau Brunswick

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Law Reform Notes

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Law Reform Notes *is produced twice yearly in the Legislative Services Branch of the Office of the Attorney General, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the law reform projects currently under way in the Branch, and to ask for responses to, or information about, items that are still in their formative stages.*

The Branch is grateful to everyone who has commented on items in earlier issues of ***Law Reform Notes****; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in* ***Law Reform Notes****, they should let those groups know what the Branch is considering and suggest that they give us their comments. We are unable to distribute* ***Law Reform Notes*** *to everybody who might have an interest in its contents, for these are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.*

We emphasize that any opinions expressed in these ***Notes*** *merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Office of the Attorney General or the provincial government. Where the Department or the government has taken a position on a particular item, this will be apparent from the text.*

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. *Franchises Act*

Bill 6, the *Franchises Act*, received first reading in December 2005, and was subsequently referred to the Legislative Assembly's Standing Committee on Law Amendments. This committee reviews the subject matter of the Bills referred to it and sometimes seeks public input before reporting back to the Legislative Assembly.

Bill 6 is based on the Uniform Law Conference of Canada's *Uniform Franchises Act*. The *Uniform Act* is largely based on Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*, and is also the source of the *Franchises Act* that has recently been proclaimed in PEI.

The Bill respects the basic principle that a franchise agreement is a commercial contract, and that most of the terms will be whatever the parties agree, but it adds some provisions designed to ensure fairness in the parties' relationship. The key provisions are these:

- Both parties owe each other a duty of "fair dealing" in relation to their agreement (s.3).
- A franchisor cannot prohibit its franchisees from forming a franchisees' association (s.4)
- Franchisors must provide prospective franchisees with full disclosure of all material information before the

franchise agreement is signed (s.5). If proper disclosure is not provided, franchisees can rescind the agreement (s.6) and can claim damages if they have suffered loss (s.7).

- A framework is created for the mediation of disputes arising under the agreement (s.8).

- Franchisees cannot be obliged to litigate disputes arising under the Act outside New Brunswick (s.11), and any waivers of their rights under the Act are void (s.12).

At the time these Notes were prepared, the Law Amendments Committee had recently decided to provide the opportunity for interested parties to submit written briefs on the Bill. Further information on this can be obtained from the Committee Clerk at the Legislative Assembly of New Brunswick, P.O. Box 6000, Fredericton, N.B., E3B 5H1.

2. *Married Woman's Property Act*

Following discussions of the *Married Woman's Property Act* in issues 16 and 22 of these Notes, Bill 39, an *Act to Repeal the Married Woman's Property Act*, was introduced in February 2006. The rationale for the repeal is that the *Married Woman's Property Act*, though valuable in its time, served its purpose long ago and no longer needs to be retained on the statute book.

The Bill is short. It repeals the *Married Woman's Property Act* in its entirety, and makes consequential amendments to the *Judicature Act* and the *Devolution of Estates Act*. It also contains a provision making it clear that the repeal does not create or re-establish any of the inequalities that the Act was originally designed to suppress.

If enacted in its current form, the repeal will take effect on August 1, 2006.

3. *Class Proceedings Act*

Another Bill that is now before the Legislative Assembly is Bill 50, the *Class Proceedings Act*. The Bill establishes a legislative framework for the conduct of class proceedings in New Brunswick. It is based on the Uniform Law Conference of Canada's *Uniform Class Proceedings Act*, and is therefore very similar to the legislation that has now been enacted in all of the common law provinces except PEI and Nova Scotia. There are, though, several places where the wording of the *Uniform Act* has been reworked.

The Bill is designed to supplement the existing rules of civil procedure rather than to create a new and self-contained code. Its central provisions relate to the "certification" of a class proceeding and the binding effect of a judgment on "common issues", but it also provides special rules on subjects such as discovery, notices to class members, settlements, appeals and limitation periods. On many issues, however, the Bill is silent. These will be dealt with under the ordinary substantive and procedural law of the province, including the *Rules of Court*.

The Bill is subject to proclamation, and some minor amendments to the *Rules of Court* are likely to be required before it is proclaimed. If the Bill receives Royal Assent during the current session we anticipate that proclamation may occur towards the end of the year.

4. *Uniform Securities Transfer Act*

The past two issues of these Notes have discussed another recent project of the Uniform Law Conference of Canada, its *Uniform Securities Transfer Act*, and have mentioned that there is a concerted effort under way across the country to implement this Act with as few changes as possible. Legislation has recently been introduced in Ontario and Alberta.

We have been participating in these interprovincial efforts. We have not yet made any recommendations for legislation, but we anticipate doing so soon. If any of our readers wish to comment on this subject, now is the time.

Brief information on the legislation can be found in Law Reform Notes 22, which highlights the main new feature of the *Uniform Securities Transfer Act*, its rules for the handling of securities held indirectly through intermediaries such as brokers and dealers. Law Reform Notes 23 provides information on another major

element of the Act, its rules for the transfer of securities held directly from the issuing corporation. The latter rules are a departure from the existing provisions of the New Brunswick *Business Corporations Act* but are similar to those of the *Canada Business Corporations Act*.

5. *Quieting of Titles Act*.

In previous issues of these Notes we have gradually developed the idea that, now that the *Land Titles Act* is in place throughout the province, the *Quieting of Titles Act* could probably be repealed, and replaced with a procedure that combined a new Rule of Court with the guarantee of title that is now available under the *Land Titles Act*. This approach is designed to both simplify and modernize the procedures involved in what is now known as a quieting of title.

In January we had the opportunity to discuss this suggestion with the Rules Committee. We have not yet made recommendations for the drafting of the necessary the legislation and Rules, but we hope be in a position to do so during the summer months.

6. *Habeas Corpus Act*

We have not commented on this Act for some time, but we made the suggestion in Law Reform Notes 19 that the *Habeas Corpus Act*, which is primarily procedural, could probably be repealed. We also suggested that enacting a new Rule of Court on *habeas corpus* proceedings might be desirable; it was not a necessary concomitant of the repealing the Act, but we thought practitioners might find it helpful to have a Rule to work with rather than to have to rely on unwritten common law procedures.

This, too, is a subject we have now had the opportunity to discuss with the Rules Committee. Based both on those discussions and on the (limited) comments we have received in the past on this subject, we propose to proceed in the direction outlined above. We hope to be able to prepare the legislative recommendations during the summer.

7. Limitation of Actions

In Law Reform Notes 23 we outlined our plans to develop a new *Limitation of Actions Act* based on the *Uniform Limitations Act* and recent legislation in Ontario, Saskatchewan and Alberta. It revolves around two interconnected limitation periods: a "basic period" of two years running from the time when the claim is discoverable, and an "ultimate" period of 15 years running from the date of the wrongful act. If either one of these two periods has expired, the claim is statute barred. This framework would be applied as widely as possible, and with as few exceptions as possible.

We have received less comment on this than we expected, though we understand that a response from ABC-NB-CBA is coming soon. We would still welcome replies from others. In the meantime, we will briefly review the main comments that we have received so far, and will discuss two additional issues: secured payment obligations and limitation periods in other Public Acts.

(a) Main comments received so far.

- We have received support for the establishment of an "ultimate" limitation period of 15 years. We understand, however, that this is one of the subjects on which ABC-NB-CBA is considering its position.

- We have also received support for our suggestion that limitation periods created by Private Acts should not bar actions commenced within the period prescribed by the new *Limitation of Actions Act*.

- The suggestion has been made that the new Act should provide for "equitable tolling" and for a judicial discretion to extend the limitation period. We are favourably disposed towards "equitable tolling", under which a defendant would be unable to raise a limitations defence if his or her conduct had created a legitimate expectation that he or she would not do so. We are less attracted by the idea of a judicial discretion to extend limitation periods. The commentary that we have read about the operation of such a discretion in

jurisdictions where it exists has not been complimentary, and the case for creating one seems to be much reduced if the "basic" limitation period is based on the time when the claimant should have discovered the claim rather than the date of the defendant's allegedly wrongful act.

- It has been suggested that the legislation should provide guidance on the treatment of third party claims, particularly those that do not become apparent until litigation between the original parties is well advanced. Again, the discoverability rule provides part of the answer here, since the basic limitation period relating to the third party will not even begin to run until the claim against the third party, as distinct from the claim against the original defendant, is discoverable. Apart from that, though, the *Uniform Limitations Act* (s.13) also deals with adding claims to existing proceedings after the limitation period expires. Three scenarios are contemplated; we will summarize them briefly, and we would welcome comment. First, a late claim between the original parties can be added if it relates to the subject matter of the original proceedings. Second, a late claim that adds a new defendant must not only relate to the original proceedings but must also not prejudice the new defendant in its defence on the merits. Third, a late claim adding a new claimant is permitted if, in addition to both of the factors just mentioned, the court is satisfied that adding the claim is necessary to the effective enforcement of the claims asserted in the original proceedings.

- In response to our question in Law Reform Notes 23 about whether the Act should prohibit the shortening of limitation periods by agreement (as the *Uniform Limitations Act* proposes) we have received one reply saying that this should indeed be prohibited. We would welcome further input on this, since we remain doubtful that any such prohibition is needed. The arguments for a prohibition seem to be either of a consumer protection nature or based on the idea that, as a matter of public policy, people must be able to litigate their claims at any time within the period that the Act allows. The argument against is that the ability to establish limitation periods by agreement has existed without controversy for many years, and there are good reasons why the parties to, for example, a commercial contract might want to stipulate that claims under the contract should be brought within a particular time rather than left to the vagaries of when or whether a claim is "discovered" at any time over the next fifteen years.

- We have also received comment about the difficulties surrounding the limitation periods in the *Insurance Act*, especially in relation to multi-peril policies. We plan to discuss this with the Superintendent of Insurance.

(b) Secured payment obligations

Secured payment obligations are currently dealt with in the property limitations provisions of the *Limitation of Actions Act*. See in particular sections 25, 27, 46, 47, 47.1, 52 and 53. Both real property security and personal property security are covered, as well as other forms of payments charged upon land. The limitation periods apply not only to judicial proceedings to recover the money, but also to non-judicial remedies such as selling the collateral or taking possession of it.

Compared to this, the provisions of the *Uniform*, Ontario, Alberta and Saskatchewan Acts are sparse. There are some passing references to secured transactions (in Ontario and the *Uniform Act* these relate to personal property only), but in general, the "basic" and "ultimate" limitation periods apply in the normal way. They are reinforced by the idea that a part payment of a debt serves as an "acknowledgment" of the debt, and that a new limitation period for the debt begins to run with each acknowledgment. Thus a creditor always has at least two years to commence an action for the debt when a subsequent payment is missed.

As we consider this issue in the coming months we would be pleased to receive input from people who are familiar with the operation and

enforcement of secured payment obligations. If these transactions can be satisfactorily dealt with for limitations purposes on substantially the same basis as unsecured obligations, which seems to be the approach in the Acts just mentioned, we would not want to complicate things by adding more. We wonder, though, whether that approach may undermine the very reasons for taking security in the first place, one of which is presumably to be able to sit tight as a creditor and not have to worry about enforcing one's claims as rapidly as an unsecured creditor would. We also suspect that we may lose some valuable clarity if we do not include in a new *Limitation of Actions Act* provisions which, like our existing Act, explicitly establish the limitation periods beyond which a secured creditor cannot pursue non-judicial remedies such as sale of the collateral or taking possession of it.

(c) Limitation periods in other Public Acts

We have conducted a preliminary review of the Public Acts of New Brunswick to identify other limitation periods that might need amending when a new *Limitation of Actions Act* is introduced. We have disregarded Acts like the *Marital Property Act* and provisions like ss.35 and 76 of the *Business Corporations Act* that create self-contained remedies that must be obtained within a particular time period; we see no need to alter these. Once these are excluded there seem to be only a small number of Acts that raise classic limitation of actions issues.

The most important are probably the *Fatal Accidents Act* and the *Survival of Actions Act*, which we will discuss together. The others we have identified so far are the *Defamation Act*, the *Easements Act*, the *Executors and Trustees Act*, the *Insurance Act* and the *Regional Health Authorities Act*. If readers are aware of others that should be considered, please let us know.

i. Fatal Accidents Act and *Survival of Actions Act*.

The *Fatal Accidents Act* creates a two-year period within which the deceased's dependants can bring a claim. The two years run from the date of the deceased's death. The *Survival of Actions Act* states that causes of action both by and against a deceased survive for the benefit of and against the estate. The limitation period is the longer of "the time otherwise limited for bringing the action" and one year. A special rule applies if the defendant to the estate's action dies before the damage occurs; in this case the limitation period starts when the damage is suffered.

These provisions were drafted long before discoverability was considered to be a central element in determining when the "time otherwise limited for bringing the action" expired. The question now is how they should be revised if a new *Limitation of Actions Act* that is specifically based on discoverability is introduced.

One thing that we think should change is that the same number of years should apply in relation to both the *Fatal Accidents Act* claim and the *Survival of Actions Act* claim. Our first suggestion, therefore, is that the one year period under the *Survival of Actions Act* should become a two year period.

Then comes the question of whether this two-year period should be the only limitation period, and run from the date of the death, as is now the case under the *Fatal Accidents Act*, or whether this should merely supplement a rule based on "the time otherwise limited for bringing the action", as the *Survival of Actions Act* now provides. A stand-alone two year rule would bring finality quickly, whereas a "time otherwise limited" rule would provide scope for claims to be brought either by or against the estate, or by the deceased's dependants, even though the claims had not been discovered during the deceased's life or within two years after his or her death.

Though it is possible to allow discovery-based actions to be brought long after the death of the main protagonist, we are currently inclined to favour a stand-alone two year limitation period that runs from the date of his or her death (assuming that the deceased's own limitation period has not expired by then). This gives people a reasonable opportunity to bring claims that only arose or had not yet expired when the deceased died. To allow full range to a "time otherwise limited" rule would allow actions to be brought either by or against the estate or by the dependants long after the main protagonist, whether as alleged wrongdoer or as alleged victim, is out of the picture. The more time passes after the death of the main protagonist, the more artificial it becomes to see these later actions as having much to do with passing compensation either to or from the deceased in

relation to the harm that he or she has either caused or suffered.

ii) Defamation Act

SS.13 and 14 of the *Defamation Act* contain some unusual provisions under which the plaintiff in a defamation action against a newspaper or broadcaster must give notice of intended action within three months, and must commence action within six months, after the publication of the defamatory matter comes to his or her knowledge. This operates in conjunction with the general limitation period for defamation under s.4 of the *Limitation of Actions Act*, which is currently two years after the cause of action arose.

We will be reviewing the rationale and operation of these special provisions. Obviously they were thought to represent sound public policy at the time they were enacted, and we may well hear arguments that they should be retained or expanded. On the other hand, it is also possible that they may by now have become an anomaly that might be repealed as part of the present exercise to simplify and rationalize limitation periods as much as possible.

iii) Easements Act

The *Easements Act* contains several provisions relating to the acquisition of easements by prescription. Periods of 20, 30, 40 and 60 years are mentioned for different purposes.

No doubt there are good historical reasons why these periods were chosen; we propose to investigate this. Nevertheless our starting point is that if, as suggested in Law Reform Notes 23, the general limitation period for actions for possession of land under a new *Limitation of Actions Act* is to become 15 years as against private parties while staying at 60 years as against the Crown, we would expect the same numbers to apply in relation to easements.

iv) Executors and Trustees Act.

S.17 of the *Executors and Trustees Act* creates a 20 year limitation period for actions to recover estate property from the personal representatives of an intestate. We suggest that this, too, should be brought into line with other provisions relating to the recovery of property from third parties, and that if a special rule is needed at all it should therefore be based on a fifteen year period.

v) Insurance Act

We have already mentioned that we hope to discuss the special limitation periods in the *Insurance Act* with the Superintendent of Insurance.

vi) Regional Health Authorities Act

S.61 of the *Regional Health Authorities Act* creates a special limitation period for negligence claims against a regional health authority or its directors or staff. Any action must be brought within two years after the services provided cease or within one year after the negligence becomes discoverable, whichever is the later.

S.61 is similar to provisions in some of the Private Acts relating to health care professions. We propose to discuss it with the Department of Health.

B. NEW ITEMS

There are no new items for discussion at this time.

Responses to any of the above should be sent to the address at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than August 1st 2006, if possible.

We also welcome suggestions for additional items which should be studied with a view to reform.