

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. Class proceedings

In the Throne Speech for the 2005 to 2006 Session, the government announced its intention to enact a *Class Proceedings Act*. The Bill had not been introduced at the time these Notes were prepared.

2. Married Woman's Property Act

In Law Reform Notes 22, we suggested that the *Married Woman's Property Act* had achieved its purpose some time ago, and that it could now be repealed, as long as care was taken to ensure that repealing the Act did not revive any of the problems that the Act had previously solved.

The only comment that we received agreed that the Act should be repealed. We have made that recommendation.

3. Intestate succession and the Land Titles Act

Another suggestion that we made in Law Reform Notes 22 was that s.53 of the *Land Titles Act*, which deals with transmission of title when the registered owner dies, is unsatisfactory in cases of intestacy. It requires an administrator of the estate to be appointed by the Probate Court of New Brunswick, and may force the formal administration of estates that otherwise could be satisfactorily administered informally.

We have discussed this with the Registrar General of Land Titles and are currently developing a recommendation for an amendment that would permit the beneficiaries of the intestate to become registered in much the same way that the "personal representatives" now can be, and with the same legal effects in terms of their subsequent dealings with the property. We expect that this proposal will only apply to straightforward cases where there is no real doubt about who the beneficiaries are. There will therefore still be some cases in which formal appointment of an administrator will be necessary before registered land can be transmitted.

4. Uniform Securities Transfer Act

We also mentioned in Law Reform Notes 22 that we were looking at the *Uniform Securities Transfer Act (USTA)*, which was adopted by the Uniform Law Conference of Canada last year, and were considering whether to recommend it for enactment in New Brunswick. *USTA* is available at <http://www.ulcc.ca/>, under "Uniform Statutes".

We have not received any comments on this so far, and our review continues, in concert with several other provinces. One issue has emerged, however, that we would like to highlight for consideration, since New Brunswick's existing law seems to be different from that elsewhere, and enacting *USTA* would be a greater change for us than for others.

The *USTA* deals with the transfer of "securities". It defines securities in a way that includes all shares issued by all corporations (see s.14), whether or not these shares are traded on securities markets. The new transfer rules would replace the rules in Part VI of the New Brunswick *Business Corporations Act* and perhaps the rules in ss.74 to 80 of the *Companies Act* as well. Is this appropriate or is it not?

The relevant provisions of *USTA* are in Parts 2 to 5. They are very similar to Part 7 of the *Canada Business Corporations Act* and to *Business Corporations Acts* in provinces like Alberta and Ontario. They deal with the position of the issuer of a share as against the holder, with transfers of shares between holders, and with the right of the new holder to be registered

as the owner. They also create statutory warranties relating to share transactions and deal with subjects such as conflicts of laws and judgment enforcement. Note, however, that in *USTA* these provisions apply to shares that are not represented by share certificates as well as to shares that are.

We would like to know more about the implications of applying *USTA*'s transfer rules to shares in non-traded business corporations, which are the vast majority in New Brunswick. We have not yet given this subject serious thought, and at this point our assumption is that since provisions that are very similar to *USTA* already apply to non-traded business corporations federally and in provinces such as Alberta and Ontario they would be likely to work in New Brunswick. However, we would welcome further contributions to this discussion.

B. NEW ITEMS

5. Franchises Act

Another new Act that the government announced in the Throne Speech for the 2005-2006 Session was a *Franchises Act*. Franchise legislation now exists in Alberta and Ontario, as well as in PEI (unproclaimed) and throughout the United States. The Uniform Law Conference of Canada also finalized its *Uniform Franchises Act* this August, as well as two related uniform regulations. These replace an earlier *Uniform Act* on the same subject.

The New Brunswick Bill had not been introduced when these Notes were prepared. A Bill introduced by the Opposition in the 2004-2005 Session died when the House prorogued.

6. Limitation of Actions

New Brunswick's *Limitation of Actions Act* is long overdue for reform. Parts of it are close to 200 years old and are hard to understand. In addition, the variety of limitation periods it contains have often been criticized, and they have made particularly little sense in recent years, since the courts have held that limitation periods normally start to run when a wrong is discovered, not when it is committed.

Responding to this shift in the case law, Alberta, Ontario and Saskatchewan have recently enacted limitation of actions legislation based on the principle of discoverability. The Uniform Law Conference of Canada has now adopted a similar Act, its *Uniform Limitations Act* (see <http://www.ulcc.ca>, and use the text found under "Proceedings of Annual Meetings"; "2005"; "Civil Section Documents"). We participated in the Uniform Law Conference's project, and are now considering using the *Uniform Act* as the basis for legislation in New Brunswick.

We envisage the project unfolding as follows. First we will outline here the major elements of the *Uniform Act* and some issues on which we would welcome feedback. Then, after considering whatever comments we receive, we will prepare a further entry in these Notes, probably in May or June 2006. We will consider any further comments, and we hope that we will then be in a position to make recommendations to the government for the drafting of a new *Limitation of Actions Act*. However, we will also recommend that the Act should be subject to proclamation and that a reasonable period should be allowed before the Act is proclaimed. This will allow practitioners and other interested parties to consider the details of the legislation carefully before it comes into force, and to make further comments if they wish. If final adjustments are needed, the Act can be amended before it is proclaimed.

At present we are at the beginning of this process and our aims are (a) to outline the major elements of the *Uniform Act*, (b) to comment on some of the ancillary matters that the Act addresses, and (c) to invite our readers to identify other issues that deserve attention.

a) Major elements of the *Uniform Act*.

The Act applies to all "claims". A "claim" is defined as a "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission" (s.1). There are therefore some civil proceedings that fall beyond the scope of the Act because they do not involve "injury, loss or damage that occurred as a result of an act or omission." Other things may be expressly excluded (s.2), though we believe that the items the *Uniform Act* currently lists may require further thought.

Having defined "claims", the Act creates two interconnected limitation periods: the "basic" period and the "ultimate" period. The "basic period" is two years, running from the time when the claim is discovered or discoverable (s.4). The "ultimate" period is 15 years, running from the date of the wrongful act (s.6). If either one of these two periods has expired, the claim is statute-barred. Note in particular that under this approach a defendant will normally have a limitations defence after 15 years, even if the plaintiff has not yet discovered that a claim exists.

The Act provides for various special cases and exceptions.

- The ultimate period does not apply in cases of wilful concealment (s.6(3)).
- If the wrongful act or omission is continuous or is a series of acts or omissions, the ultimate period dates from the time when the continuous breach ceases or from the last act or omission in the series (s.6(4)).
- Both the "basic" and the "ultimate" periods are suspended while the claimant is a minor or suffers from incapacity (ss.7 and 8).
- There is no limitation period for sexual assault or for assault in the context of a relationship of dependency (s.9).
- If an obligation is acknowledged or if there is a part payment of a debt, the limitation periods begin anew, based on the date of the acknowledgment or part payment (s.11).
- If proceedings are commenced against one party within the limitation period, other parties can be added after the period ends in certain circumstances (s.13).

At this point we are inclined to accept the major elements of the *Uniform Act* set out above.

(b) Ancillary matters

We have reservations, though, about several ancillary matters. These relate to the scope of

the *Uniform Act* and to how it interacts with other Acts and laws.

(i) *Real property.* The *Uniform Act* does not contain real property limitation periods like the ones in Parts II to VII of New Brunswick's current *Limitation of Actions Act*. This is not because the Conference considered that existing laws on this subject were satisfactory, but simply because it decided not to deal with them in this particular project. In New Brunswick, however, we cannot imagine preparing a new *Limitation of Actions Act* but leaving the real property limitation periods in their current state. We believe, also, that the exercise is not as complicated as it might seem.

Our current property limitation periods apply to various things. These include actions to recover possession of land, of course, but also other property issues such as agreements of purchase and sale and payments of rent, secured debts and interest. Some provisions apply to personal property rather than to land.

We believe that many of the issues that New Brunswick's property limitation periods now address can be dealt with satisfactorily under the "basic" and the "ultimate" periods described above. They are, in substance, "contract" issues more than "property" issues.

The main exception, however, relates to actions to recover land or other property. Here the "property" element predominates, and under our present law the expiry of the limitation period not only bars actions but also extinguishes the owner's title (ss.60 and 61). We believe that the *Uniform Act's* 15 year "ultimate" period could well be suitable for that purpose, but we would not want to apply its "basic" two year period, running from discovery of the unauthorized possession, to bar the owner's right to recover. At present, therefore, we think that the new legislation should probably use the 15 year period alone as the limitation period for actions to recover possession of land, and possibly of personal property as well.

There are, of course, various details that will need close examination if we develop legislation on that basis. For example, the existing Act contains specific rules about when the limitation period begins to run in relation to joint owners, expired tenancies and future interests, and we will need to consider things like these closely in

order to make sure that the new legislation does not recreate uncertainties that current legislation has resolved for close to 200 years. However, even if we do need to restate parts of the existing law, it should be possible to do so in words that are easier to understand than the existing Act.

(ii) *Limitation periods in other Acts.* The *Uniform Act* follows Ontario in saying that the *Limitation of Actions Act* prevails over limitation periods in other Acts unless those other periods are specifically listed in a schedule to the *Limitation of Actions Act* (s.12). Alberta and Saskatchewan follow the more traditional approach under which, in effect, the *Limitation of Actions Act* states the general rules, but there is no restriction on creating special limitation periods in other legislation.

Here we prefer the traditional approach. Although we agree that, as part of this reform exercise, the limitation periods created by other Acts should be reviewed and brought into line with the new *Limitation of Actions Act* where appropriate, we see no overall gain, and some potential for confusion, in establishing a new precedence rule and a schedule along the lines that the *Uniform Act* proposes.

There is, however, one area where we do see the need for a precedence rule of sorts. This is in relation to Private Acts. Some of these do create limitation periods, which may be either shorter or longer than the periods in a new Public Act, and they would not be reviewed as part of our general review of existing legislation.

Our current view, therefore, is that if a Private Act creates a limitation period the plaintiff should have the benefit of the more favourable period under either the Public Act or the Private Act. Put another way, this would mean that the defendant would have to show that both the limitation period in the *Limitation of Actions Act* and the period in the Private Act had expired in order to succeed with a limitations defence.

(iii) *Agreements.* The *Uniform Act* permits limitation periods to be extended, but not reduced, by agreement (s.14). This falls half way between the traditional approach, under which limitation periods can be either extended or reduced by agreement, and the Ontario Act, which permits neither extensions nor reductions, though this has proved controversial in Ontario.

At present we prefer the traditional approach to either the Ontario rule or the *Uniform Act* compromise.

The ability to extend limitation periods by agreement is useful, especially if it allows parties to continue to negotiate or to attempt measures such as mediation without having to worry about being met with a limitations defence if that process is unsuccessful.

Whether there should be an ability to shorten limitation periods is more debatable. On the one hand, one must be concerned that such agreements might cause unfairness, especially to a party in a relatively weak bargaining position. On the other hand, agreements can be a sensible way of establishing the duration of one's potential exposure to liability under a contract, and their attraction may be greater if, under limitation of actions legislation, the "ultimate" period is long and the "basic" period begins at an unpredictable point in time when the plaintiff discovers or ought to discover the existence of a claim.

We would welcome comments on this. At present we are not convinced that the traditional approach needs changing, but if it does, we believe that the change should probably not go as far as the *Uniform Act*, and should only seek to prohibit agreements that unfairly shorten limitation periods.

(iv) *Conflicts of laws*. The *Uniform Act* says that the law on limitation of actions is "substantive law" for the purposes of conflicts of laws (s.15). This means that if a New Brunswick court is hearing a case which is to be determined in accordance with the law of another jurisdiction, that jurisdiction's limitations law will apply, and New Brunswick's will not.

An alternative that the Conference considered, but eventually rejected, was to apply a dual test, as Alberta now does. Under this approach all actions brought in Alberta must satisfy Alberta's *Limitation of Actions Act*, but an action in which the law of another jurisdiction is to be applied must also comply with the limitations law of that

other jurisdiction. Thus the defendant has a limitations defence if either Alberta law or the law of the other jurisdiction provides one.

We are attracted by the Alberta approach, and would welcome comments on it. Its attraction is the practical simplicity of having the New Brunswick rules apply to all proceedings brought in New Brunswick even if, in some cases, there may be an extra-provincial rule to be applied as well. It also avoids the complications for New Brunswick courts of hearing cases that are not only based on extra-provincial laws, but involve fact situations that new Brunswick law considers to be too old for litigation.

There is a case currently before the Supreme Court of Canada which involves Alberta's conflicts of laws provision (*Castillo v Castillo* 244 DLR (4th) 603). The Court has recently dismissed the appeal, with reasons to follow. We will be watching for these with interest to see what light they throw upon the conflicts of laws provisions in provincial limitations legislation.

(c) Other issues for consideration?

This is the point at which we throw the discussion open for other suggestions and ideas. Developing a new *Limitation of Actions Act* will undoubtedly raise a wide variety of issues, both practical and conceptual. Some of these we are likely to identify ourselves as we get deeper into this project and review the limitation periods in other New Brunswick Acts. Others may not occur to us unless our readers specifically draw them to our attention. We therefore encourage you to do so.

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 February 15th 2006, if possible.

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