

L I M I T A T I O N S A C T

D I S C U S S I O N P A P E R

Law Reform Branch
Office of the Attorney General
Province of New Brunswick

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INTRODUCTION

Some years ago the Law Reform Branch of the Office of the Attorney General commenced a legal research project in the area of limitation of actions. The first phase of the project was designed to identify all limitations periods which appear in the province's public and private statutes. That undertaking became merged with a similar project that had been commenced independently at the University of New Brunswick Law School. The joint project resulted in the publication of "**New Brunswick Limitations**", a looseleaf service which lists all statutory time periods contained in New Brunswick statutes.

The immediate purpose of the limitations manual is to assist legal practitioners and other interested parties in discovering relevant limitations periods. Its other purpose for the Law Reform Branch was to provide research material regarding reform of provincial limitations law.

In 1986, the Branch prepared an "**Issues Paper**" based principally on our existing legislation, recent jurisprudence and law reform studies completed in other jurisdictions, both Canadian and foreign. The paper identified the major issues to

be addressed in limitations legislation and suggested alternative approaches and solutions for consideration. It provided the principal material for use at a workshop held in January, 1987, in which a group of twenty-four interested parties participated. These parties represented a variety of experiences and perspectives in relation to limitations law.

While the workshop did not produce a consensus on all of the issues, there was a significant degree of agreement both on matters of principle and on acceptable solutions. Subsequently, a draft Limitations Act was prepared for introduction at the spring session of the Legislature. The Bill was not intended for enactment at that time. Rather, it was intended as a vehicle for making a public presentation of certain proposals for reform of our limitations law in the hope and expectation that public response to the Bill would assist in fashioning an Act for possible enactment in 1988.

The attached paper entitled "**Limitations Act: Explanatory Notes**" has been prepared to assist in the understanding of, and encourage response to, the Bill. Those

who wish to make representations in the matter are encouraged to do so no later than April 1, 1988. Written submissions should be addressed to:

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LIMITATIONS ACT: EXPLANATORY NOTES

Section 1 - Definitions

"action" means any civil proceeding in a court;

Note: The Act will apply only to civil judicial claims and not to criminal or administrative claims.

"Crown" means the Crown in right of the Province and, in so far as the legislative competency of the legislature extends, includes the Crown in all its other capacities;

Note: This definition overrides the presumption that a reference to the Crown in a provincial statute can be no more than a reference to the Crown in right of that particular Province.

"limitation period" means a limitation period referred to in section 3 or 4, unless otherwise specified, and includes any extension of the period under section 6;

Note: The proposed Act does not specifically deal with limitation periods found in other public or private Acts.

However, any limitation period which conflicts with the proposed Act will ultimately be examined and, if it cannot be justified, will either be brought into line with the proposed Act or overridden by it.

"person" includes the Crown;

Note: It is intended that the Act should apply to the Crown unless otherwise specified.

"possession" includes the right to receive all rents and profits from a property without being in physical possession of the property;

Note: In this Act the word "possession" means actual or constructive possession and, when used in conjunction with real property, includes the right to receive the rents and profits therefrom where that right exists.

"security interest" means an interest in property that secures payment or performance of an obligation and includes the interest of a vendor of property who retains title to property as security for the purchase price.

Note: Specific reference is made to the interest of an unpaid vendor who retains title to property as security, since it is not certain that it would otherwise be included.

Section 2 - Preservation of Equitable Remedies

2 Nothing in this Act affects a rule of equity that refuses relief, on the ground of laches or acquiescence, to a person whose right to bring action is not barred by section 9.

Note: As with the existing Act, the proposed Act will permit the use of the equitable defences of laches and acquiescence where the action is not statute-barred. Laches is particularly relevant where an equitable remedy is sought in aid of a legal right, as for example in the case of claims for the specific performance of a contract where delay short of the limitation period for recovery of damages, six years under the existing Act, may in some circumstances operate as a bar to granting the equitable remedy. Acquiescence, because it does not depend upon delay, is a good defence even though the limitation period has not expired. Equitable causes of actions per se will be subject to the applicable limitation period under the Act.

Section 3 - General Limitation Period

3 Subject to section 4 and section 16, the limitation period respecting the commencement of an

action expires four years after the day on which the act or omission giving rise to the cause of action occurred.

Note: The proposed Act simplifies the existing limitations system by subjecting most causes of actions to a single limitation period of four years. This provision reflects the current movement in many reform jurisdictions towards a limitations system with fewer and shorter limitation periods. This limitation period is measured from the day on which the act or omission giving rise to the cause of action occurred.

Section 4 - Limitation Period for Recovery of Possession of Land

4 The limitation period respecting the commencement of an action for recovery of possession of land expires twenty years after the day on which the act or omission giving rise to the cause of action occurred.

Note: By this provision the proposed Act preserves the concept of adverse possession which exists under the present Act. However, it should be noted that since the Crown is subject to the Act, except as provided by section 16, the limitation period for the bringing of an action by the Crown to recover possession of land is reduced from sixty (60) to twenty (20) years.

Section 5 - Application of Limitation Periods

5 The limitation periods set out in sections 3 and 4 apply to an action even though the person who has the cause of action did not know of the act or omission at the time it occurred or did not know that the act or omission gave rise to a cause of action.

Note: Recent jurisprudence on limitation of actions legislation has raised doubts as to when a cause of action arises. The intention of section 5 is to remove any doubt in this regard by clearly stipulating that the limitation period commences on the day the act or omission giving rise to the cause of action occurs whether or not the claimant possesses at this time all the facts upon which to base his action. The matter of the claimant's lack of knowledge prior to the expiration of the limitation period is addressed in section 6.

Section 6 - Extension of Limitation Period

6(1) Notwithstanding section 3, a judge may, upon application by a claimant after the expiration of the limitation period referred to in section 3, revive the operation of the limitation period and extend its

duration in accordance with subsection (3) where the claimant did not know and could not reasonably be expected to have known all of the facts on which to base an action before the limitation period expired.

6(2) An application under subsection (1) shall be made within one year after the day on which the claimant knew or ought to have known all of the facts on which to base an action.

6(3) The extension of the duration of a limitation period referred to in subsection (1) shall be great enough so as to allow the claimant such time as is reasonably necessary to commence an action, but the extension shall not exceed one year in duration, as calculated from the day on which the application referred to in subsection (1) is granted.

Note: This section allows any person who misses a limitation period, because he had no reasonable opportunity to discover that he had a cause of action until some time after the cause of action accrued, to apply to the Court within one year of acquiring such knowledge to have the limitation period revived and extended. The Court then has the discretion to grant an extension for a maximum period of one year from the time the application was made.

Section 7 - Action Based on Fraud or Deceit

7(1) Notwithstanding section 3, the beginning of the limitation period for an action based on fraud or deceit is postponed until the person who has the cause of action knows or ought to know the identity of the defendant and all of the facts upon which to base the action.

7(2) This section does not operate to the detriment of a bona fide purchaser for value.

7(3) The burden of proving that the beginning of the limitation period for an action has been postponed by reason of subsection (1) rests on the person claiming the benefit of the postponement.

Note: In an action based on fraud or deceit the commencement of the limitation period is automatically postponed until the claimant knows or ought to know certain essential facts. This is to be contrasted with the previous section where the judge has the discretion to revive and extend the limitation period if the claimant can prove he was unable to obtain necessary information.

Section 8 - Effect of Expiration of Limitation Period

8 Where the limitation period referred to in section 3 has expired, the expiration of the limitation period is a defence to any action to which the limitation period applies.

Note: By virtue of this provision, when an action is brought outside the limitation period the defendant must plead the expiration of that period as a defence to the claim and prove that the limitation period did, in fact, expire.

Section 9 - Ultimate Limitation Period

9 Notwithstanding section 6 but subject to section 16, all rights and claims arising out of any cause of action are extinguished after the expiration of twenty years from the day on which the act or omission giving rise to the cause of action occurred.

Note: The proposed Act contains provisions whereby the applicable limitation period is or may be postponed, suspended and revived and extended in certain situations. However, to ensure that claims will not exist indefinitely the Act prescribes an ultimate limitation period of twenty years within which all actions must be commenced. This period runs from the day on

which the act or omission giving rise to the cause of action occurred.

Section 10 - Legally Incapacitated Complainant

10(1) In this section

"representative" means a person who has legal authority to manage the affairs of a legally incapacitated person.

10(2) For the purposes of this section, a person is legally incapacitated if

(a) the person is a minor, or

(b) the person is incapable of managing his or her affairs because of disease or impairment of physical or mental condition.

10(3) If a person who has a cause of action is legally incapacitated at the time that the limitation period for the action would, except for this section, begin to run, the beginning of the limitation period is postponed until the earlier of

(a) the day on which the person is no longer legally incapacitated, and

(b) the day on which the representative of the person knows or ought to know all of the facts on which to base the action.

10(4) If a person who has a cause of action becomes legally incapacitated after the limitation period for the action has begun to run but before it expires, the running of the limitation period is suspended until the earlier of

(a) the day on which the person is no longer legally incapacitated, and

(b) the day on which the representative of the person knows or ought to know all of the facts on which to base the action.

10(5) The burden of proving that the running of a limitation period has been postponed or suspended under this section rests with the person claiming the benefit of the postponement or suspension.

10(6) Notwithstanding subsections (3) and (4), where a

legally incapacitated person may have a cause of action against another person, other than a representative of the legally incapacitated person, that other person may cause a notice to proceed with the action to be delivered in accordance with this section, in which case the limitation period that applies to the action begins to run against the legally incapacitated person as if the legally incapacitated person had ceased to be incapacitated on the day on which the notice to proceed was delivered.

10(7) A notice to proceed referred to in subsection (6) shall

(a) be in writing;

(b) be addressed and delivered to the representative of the legally incapacitated person;

(c) state the name of the legally incapacitated person;

(d) specify the circumstances out of which the cause of action may arise or may be claimed to

arise with such particularity as is necessary to enable a determination to be made as to whether the legally incapacitated person has or may have a cause of action;

(e) give warning that the cause of action which arises or may arise out of the circumstances stated in the notice is liable to be barred by this Act;

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person who is causing the notice to be delivered or by the solicitor of the person.

10(8) The delivery of a notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

10(9) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

Note: This provision attempts to balance the interests of the opposing parties to an action where the complainant is "legally incapacitated". This is achieved by postponing or suspending, as the case may be, the applicable limitation period until the complainant is no longer legally incapacitated or his representative knows or ought to know the facts on which the claim is based. The defendant may, however, trigger the running of the limitation period while the complainant is legally incapacitated by serving a notice to proceed upon the representative of the complainant. The limitation period will then commence or resume on the day the notice is served.

Section 11 - Confirmation of a Cause of Action

11(1) When a person against whom an action lies confirms the cause of action, then, as regards a person having the benefit of the confirmation as against the person bound by the confirmation, the limitation period for the action shall be deemed to commence on the day on which the confirmation occurs.

11(2) Notwithstanding subsection (1), a confirmation under this section does not

(a) revive a claim or right extinguished under section 9, or

(b) allow a limitation period to run beyond the twenty-year limit established in section 9.

11(3) For the purposes of this section

(a) a person confirms a cause of action only if

(i) the person acknowledges a cause of action, right or title of another, or

(ii) the person makes a payment in respect of a cause of action, right or title of another;

(b) an acknowledgement of a judgment, debt or obligation is a confirmation

(i) whether or not a promise to comply with the judgment, to pay the debt or to perform the obligation can be implied from the acknowledgement, and

(ii) whether or not the acknowledgement is accompanied by a refusal to comply with the judgment, pay the debt or perform the obligation; and

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money.

11(4) Where a secured party has a cause of action to realize on property subject to a security interest

(a) a payment to the secured party of principal or interest secured by the property, or

(b) any other payment to the secured party in respect of the party's right to realize on the property or any other performance by another person of the obligation secured

is, as against the payer or performer, a confirmation of the cause of action.

11(5) Where a secured party is in possession of property which is subject to a security interest in the party's favour

(a) the acceptance by the party of a payment of principal or interest secured by the property, or

(b) the acceptance by the party of

(i) a payment in respect of the party's
right to realize on the property, or

(ii) any other performance by another person
of the obligation secured,

is a confirmation by the secured party to the payer or
performer of the payer's or performer's cause of action
to redeem the property.

11(6) For the purposes of this section, an
acknowledgement is not binding unless it is in writing
and signed by the person giving the acknowledgement.

11(7) For the purposes of this section, a person does
not have the benefit of a confirmation unless the
confirmation is made

(a) to the person

(b) to another person through whom the person
claims, or

(c) in respect of a claim of the person

identified in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act, chapter B-3 of the Revised Statutes of Canada, 1970.

11(8) For the purposes of this section, a person is not bound by a confirmation unless

(a) the person is a maker of the confirmation,

(b) after the making of the confirmation, the person becomes, in relation to the cause of action, a successor of the maker,

(c) the maker is, at the time the confirmation is made, a trustee, and the person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee, or

(d) the person is bound under subsection (9).

11(9) Where a person who confirms a cause of action

(a) to recover property,

(b) to enforce an equitable estate or interest in property,

(c) to realize on property subject to a security interest,

(d) to redeem property subject to a security interest,

(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or of the income or profits of the property or by way of sale, lease or other disposition of the property or by way of other remedy affecting the property, or

(f) to recover trust property or property into which trust property can be traced

is, on the date of the confirmation, in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless that other person was in possession of the property on the date of the confirmation or claims

through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

11(10) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

11(11) Except as otherwise provided in this section, nothing in this Act operates to allow confirmation of an unliquidated sum or to make any right, title or cause of action capable of being confirmed that was not capable of being confirmed before this Act came into force.

Note: The proposed Act provides that for certain causes of action when the person against whom the action lies confirms the cause of action before the ultimate limitation period expires, the applicable limitation period recommences. Such a recommencement does not, however, permit the ultimate limitation period to be exceeded. The particulars relating to a confirmation are representative of those which exist within most limitation of actions legislation.

Section 12 - Negotiations

12(1) In this section

"negotiations" means verbal or written communication between the parties to a claim, or their agents or solicitors, with the object of arriving at a settlement of the claim.

12(2) Notwithstanding section 3, where a person who has a cause of action enters into negotiations with a person against whom the action lies after the limitation period for the action has begun to run but before it expires, the limitation period shall be deemed not to expire until the later of

(a) the day on which the limitation period would, but for this section expire under this Act, or

(b) six months after the termination of the negotiations.

Note: This provision is intended to permit parties to negotiate at length without fearing the expiration of the applicable limitation period. It will serve to avoid the necessity of commencing an action unless the negotiations fail.

Section 13 - Effect of Complying with Notice Periods

13(1) Where an Act of the Legislature requires a person

who has a cause of action to give notice of the commencement of an action to a person against whom the action lies before the action may be commenced, the duration of the limitation period for the action is extended by an amount of time equal to the duration of the notice period.

Note: In some cases a claimant is required by statute to give a specified period of notice to the defendant before commencing an action. If the limitation period should expire during the notice period the claimant would be unable to commence the action in time. This provision would prevent that result by extending the limitation period by the length of the notice period. Accordingly, as long as the notice is given before expiration of the limitation period the claimant would have sufficient time in which to commence the action.

13(2) Where failure to comply with a notice provision contained in an Act of the Legislature that requires a person who has a cause of action to give notice of intention to commence an action, or notice of the facts on which an action may be based, would have the effect of reducing the duration of a limitation period provided

for in this Act, failure to give or insufficiency of the notice is not a bar to the action if the judge before whom the action is tried, or if, on a preliminary application, a judge of the court in which the action is pending, is of the opinion that the defendant was not prejudiced by the lack or insufficiency of the notice.

Note: In some cases a claimant is required by statute to notify a would-be defendant of the happening of an event which could give rise to a cause of action, with such notification being required to be given within a specified period from the happening of the event. While couched in "notice giving" language, such a provision can have the effect of being a very restrictive limitation period. Failure to give the required notification in time can cause the action to be statute-barred even though the limitation period for bringing such an action has not expired. The proposed provision would avoid that result in certain cases by allowing a judge to waive compliance with the notice requirement where the defendant was not prejudiced by such failure.

Section 14 - Counterclaim, set-off

14 Where an action is commenced before the limitation period for the action expires, the expiration of the limitation period applicable to a claim does not bar the making of that claim in the original action

(a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim, or

(b) by way of set-off

if the claim is related to or connected with the original cause of action.

Note: As a result of this section, a defendant, as of right, may bring a counterclaim or a claim for a set-off which otherwise would be statute-barred, if the claim is related to or connected with the original cause of action.

Section 15 -

Amending Claims, Third Party Claims, Change of Parties

15 Where an action is commenced before the limitation period for the action expires, then, notwithstanding the expiration of the limitation period applicable to a claim, the court may, upon application, allow

(a) the making of the claim by way of third party proceedings,

(b) an amendment changing the claim,

(c) the addition or substitution of a plaintiff, or a change in the capacity in which the original plaintiff sues, so that the claim may be asserted by the new plaintiff or by the original plaintiff in the new capacity, or

(d) the addition or substitution of a defendant, or a change in the capacity in which the original defendant is sued, so that the claim may be asserted against the new defendant or against the original defendant in the new capacity

if the claim arose out of the facts set out in the original pleadings, would not cause undue prejudice to a defendant and is necessary or desirable to ensure the enforcement of the claims originally made in the action.

Note: In this section, the Court is given the discretion to allow the parties to make certain claims which otherwise would be statute-barred.

Section 16 - Actions Not Subject to a Limitation Period

16 The following proceedings are not governed by this Act and may be brought at any time:

(a) proceedings for the judicial review of the exercise of statutory powers;

(b) an action by a debtor in possession of property subject to a security interest to redeem the property;

(c) an action by a creditor in possession of property subject to a security interest to realize on the property;

(d) an action relating to the enforcement of an injunction or a restraining order;

(e) an action for a declaration as to personal status;

(f) an action for a declaration as to the title to property by a person in possession of the property;

(g) an action to enforce an easement, restrictive covenant, profit à prendre or other incorporeal hereditament except an action for damages for interference with or a breach of the easement, restrictive covenant, profit à prendre or incorporeal hereditament;

(h) a claim requesting habeas corpus;

(i) an action by the Crown to recover

(i) vacant Crown land, or

(ii) land included in a road allowance or reserved, set apart or laid out as a public highway where the freehold title to such land is vested in the Crown or in a municipal or Crown corporation.

Note: There are some actions which, because of their nature, are expressly excluded by limitation statutes from the general principle that all actions should be subject to a limitation period. The proposed Act provides a list of such actions in section 16.

Section 17 - Conflict of Laws

17 The law governing the limitation of actions of any other province or territory of Canada, or of any state or country, shall be characterized as substantive law for the purpose of the application of the rules of conflict of laws.

Note: This provision reflects the attitude that the appropriate limitation law to be applied to an action is that of the jurisdiction whose laws, in accordance with principles of private international law, apply to the action. Consequently, New Brunswick courts in dealing with "foreign" causes of action will apply the "foreign" statute of limitations.

Section 18 - Application of Act to Crown

18 This Act applies to actions by or against the Crown.

Note: Subject to specific exceptions in the case of actions for the recovery of land, the proposed Act will apply to proceedings by and against the Crown in the same way and to like extent as it applies to a private citizen.

Section 19 - Regulations

19 The Lieutenant-Governor in Council may make regulations respecting the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under section 10.

Note: This is the standard regulatory-making power provision which enables the Lieutenant-Governor in Council to prescribe regulations which facilitate compliance with the Act.

Section 20 - Commencement of Act

20 This Act or any provision of it comes into force on a day or days to be fixed by proclamation.

Note: This provision provides for the commencement of the Act by proclamation at some future date.