
Law Reform Notes

Legislative Services Branch, Office of the Attorney General
Room 416, Centennial Building
P.O. Box 6000, Fredericton, N.B., Canada E3B 5H1
Tel.: (506) 453-6542; Fax: (506) 457-7342
E-mail: lawreform-reformedudroit@gnb.ca

Law Reform Notes is produced in the Legislative Services Branch of the Office of the Attorney General. It is distributed to the legal profession in New Brunswick and the law reform community elsewhere, and is now available on the Office of the Attorney General's website. The Notes provide brief information on some of the law reform projects currently under way within the Office, and ask for responses to, or information about, items that are still in their formative stages. We welcome comments from any source.

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 Office 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. Previous issues now on website

All previous issues of *Law Reform Notes* are now available on the "Law Reform Notes" page of the Office of the Attorney General's website. They date back to 1992, and include information on most of the legislation generated by the Department's law reform program since then. They often provide useful background to the legislation subsequently introduced. In some cases documents such as consultation papers were also prepared. We hope to add several of these to the "Other Documents" page of the website in the coming months.

Note that the law reform program is not responsible for all of the legislation promoted by the Office of the Attorney General, and that the Department of Justice and Consumer Affairs is a separate department, though the same Minister is normally responsible for both departments. Legislation developed outside the law reform program is not included in the law reform webpages.

2. Limitation of actions – possession of land

Bill 29, *An Act to Amend the Limitation of Actions Act*, was introduced in the Legislative Assembly on May 13th, and was awaiting second reading at the time these Notes were finalized. The Act repeals the *Real Property Limitations Act* and replaces it by adding a section 8.1 to the new *Limitation of Actions Act* and making some consequential amendments.

The main features of the Bill are as suggested in *Law Reform Notes* #28. Recapitulating briefly:

- The new provisions are similar in effect to the old ones, but much less intricate, and expressed in terms that integrate with the new Act.
- The main change of substance is that the ordinary limitation period for recovering possession of land will become fifteen years rather than twenty. For the Crown, however, the existing special period of sixty years will remain.

- There are specific sub-rules that apply to future interests and to some landlord and tenant scenarios.
- The limitation periods can be extended in cases of willful concealment, infancy, part payment or acknowledgment, but this flows from other provisions in the *Limitation of Actions Act*, and is not specifically spelled out in the new section.
- By virtue of s.17 of the *Land Titles Act*, the legislation has very limited effect in relation to titles registered under that Act.

If enacted in its present form, the Bill will come into force on Royal Assent, but there is a transitional provision that, until 30th April, 2012, allows claimants to rely on the former limitation period under the *Real Property Limitations Act* even after the new limitation period under the *Limitation of Actions Act* has expired. This provision is modelled on s.27 of the *Limitation of Actions Act* and is timed so that the transitional periods under both that Act and the new amendment will end on the same day. As from 1st May, 2012, therefore, the new limitation of actions régime will be fully in place.

Before that date, we plan to provide additional explanation of the amendment in Bill 29. Compared to the *Real Property Limitations Act*, the new s.8.1 is very short, only six subsections. It may therefore be helpful if we explain how we see these subsections relating to each other, to the rest of the *Limitation of Actions Act*, and to the existing case-law. During the transitional period the text of the repealed *Real Property Limitations Act* will be available on the Law Reform/Other Documents page of the Office of the Attorney General's website.

B. NEW ITEMS

3. The Revised Statutes of New Brunswick, 2011

In 2003, the *Statute Revision Act* was enacted as the first step in completing a revision of the Acts of New Brunswick, the first such revision and consolidation of the Statutes of New Brunswick since 1973. In accordance with section 5 of the *Statute Revision Act*, the Attorney General deposited with the Clerk of the Legislative Assembly the first portion of the revised statutes, to be known as the *Revised Statutes, 2011*, on May 13th, 2011. In

accordance with subsection 4(2) of the *Statute Revision Act* no changes have been made in the course of the revision that would have the effect of altering the substance or intent of a provision of an Act or that are of a law reform nature. Nevertheless, the *Law Reform Notes* are a convenient vehicle for providing some general information on the revision.

The *Revised Statutes, 2011*, includes 137 Acts. It is the intention of the Office of the Attorney General to continue to publish a number of revised Acts on a yearly basis.

Amongst other things, the *Revised Statutes, 2011*, will begin the process of replacing the existing alpha-numeric chapter numbering system with a numerical system which is more suitable to New Brunswick's bilingual legislation. Each year the chapter numbers from 100 on will be used for that year's revised statutes. This year, for example, the revised *Absconding Debtors Act* will be chapter 100 of the Revised Statutes, 2011, the *Adult Education and Training Act* will be chapter 101 of the Revised Statutes, 2011, and so on. Next year's revisions will start at chapter 100 of the Revised Statutes, 2012.

The purpose of the statute revision process is to provide the people of New Brunswick with the best legislative product available. This is accomplished under the authority of section 4 of the *Statute Revision Act* by, among other things, consolidating amendments, modernizing and improving language, standardizing formats, removing gender-specific terminology, reconciling apparent inconsistencies and correcting clerical and grammatical errors. An important aspect of the current statute revision project has been the adoption of standardized French common law terminology and significant improvements to the text of the French versions of the Acts of New Brunswick.

The *Revised Statutes, 2011*, will come into force on a date to be fixed by proclamation of the Lieutenant-Governor in Council. This proclamation will coincide with the proclaiming into force of *An Act to Amend the Interpretation Act* (Bill 31) and *An Act Respecting the Revised Statutes, 2011* (Bill 32), Acts which make amendments consequential to the coming into force of the *Revised Statutes, 2011*.

The *Revised Statutes, 2011*, can be found on the Government of New Brunswick's website, at

the Queen's Printer's homepage. On proclamation into force, they will also be found in the Alphabetical List of Acts.

4. Enforcement of Money Judgments

Although this topic has appeared in these *Notes* before, we refer to it as a "new item" because it has not been mentioned for some time. We have recently returned to it.

It has been recognized for a long time that New Brunswick's judgment enforcement laws need modernizing. Major reports on this were prepared in 1976, 1985 and 1994, the last of these being a detailed legislative proposal prepared by Professor John Williamson of UNB. Subsequently the Uniform Law Conference of Canada prepared its *Uniform Civil Enforcement of Money Judgments Act (2004)*, and Saskatchewan enacted legislation based on the Uniform Act in 2010. Our starting points as we take up this project again are the Williamson report and the ULCC and Saskatchewan Acts.

They are similar in their outlines and in many of their details. They provide for judgments to bind land and personal property by registration in the appropriate registries. They centralize enforcement mechanisms under the sheriff, and provide means by which all valuable assets of the judgment debtor can be realized. They establish personal exemptions and (rather different) schemes for distribution of the proceeds of enforcement proceedings when there are multiple judgment creditors. For further information, readers may wish to look at the consultation document that this Department prepared on the Williamson report in 1994 (now on the "Law Reform / Other Documents" webpage) and at *Law Reform Notes #22*, which contains a summary of the ULCC Act.

The consultation document and *Notes* both identify some issues that we expect to consider as this project proceeds. But we would welcome comments of all kinds on issues or problems that readers think a reform of judgment enforcement legislation should address.

5. Abolition of the civil jury

This is another item that is "old" but "new" again. Early issues of these *Notes* considered, at the suggestion of the Rules Committee, the

provisions of Rule 46, which explains when a civil jury is available. Our conclusion was that the civil jury should be abolished. However, no recommendation was presented to the government at the time. A recent review of the law reform files has identified this as an item of unfinished business that could and should be dealt with.

Our initial review was in 1994, and we have examined subsequent material to see if our original conclusion still holds good. We believe that it does. The existing law, under which the availability of civil juries in most cases depends on persuading a judge that the case is "more fit" to be tried by a jury than a judge (Rule 46.01(1)) seems to serve little purpose, and as between (a) making civil juries more readily available, and (b) eliminating them, eliminating them seems the better option. We anticipate making this recommendation to the government in the coming months.

A corollary of this is, of course, that it will be possible to permit actions for libel, slander, breach of promise of marriage, malicious arrest, malicious prosecution or false imprisonment to be brought under R.80, Simplified Proceedings, for claims of up to \$30,000. These six causes of action are expressly excluded from R.80 because of the availability of the civil jury. As for R.79, the Simplified Procedure for claims up to \$75,000, these causes of action are not expressly mentioned, and we are not sure how R.79 would interrelate with R.46. Repealing R.46, however, would clearly ensure that R.79 was available.

6. "Cause of action arises"

This item is a tidying-up exercise arising out of the new *Limitation of Actions Act*. Unlike its predecessor, the new Act does not rely on the time when "the cause of action arises" as the starting point for limitation periods. Some other Acts, however, do use this expression. We have reviewed them to see whether they need amendment in the light of (a) the new wordings in the *Limitation of Actions Act*, or (b) the shifting case-law under the former Act about when a cause of action arises.

Although many Acts refer to causes of action, we have found only four Acts and two Rules of Court in which substantive provisions revolve around identifying *the time when* a cause of

action arises. One of them is the *Insurance Act*, where this concept governs several limitation periods, but it will be up to the Superintendent of Insurance to determine what changes, if any, are appropriate. That leaves five other places where we believe amendments are required. We would welcome comments on whether the changes we suggest are the right ones.

a. *Condominium Property Act*.

S.24(1) of this Act says that “A judgment for the payment of money against a corporation is also a judgment against each owner at the time the cause of action arose for a portion of the judgment determined by the proportions specified in the declaration for sharing the common expenses.” It is not clear what time the underlined words refer to – the time of the act or omission, the damage, the discovery or something else – nor why, if ownership has changed since that time, it should be the former owner rather than the current one who is proportionately liable for the judgment against the corporation.

After discussion with the Director of Condominiums, we are suggesting that s.24 should be amended to refer to “each owner at the time of the judgment”. This is the same change as was made in Ontario some time ago, though several other provinces, such as Nova Scotia and Manitoba, still refer to the time when the cause of action arose.

b. *Private Investigators and Security Services Act*

S.22 of this Act is as follows: “No person who operates an agency shall bring or maintain an action in any court for the recovery of any fee or other compensation for any act done or expenditure incurred by him in the course of his business unless he alleges and proves that he was at the time the cause of action arose the holder of a licence authorizing him to perform the act or make the expenditure that is the subject matter of the action.”

Here, too, it is not clear what time the underlined words refer to, and it is possible that a cause of action for non-payment might not arise until some time after the service was rendered. After discussion with the Department of Public Safety, we are suggesting that time when it is essential that the person must be licensed is the time when “the act is done or the expenditure is incurred”.

c. *Judicature Act*

This is the only one of these proposed amendments that we expect may attract comment. SS.45 and 46, dealing with pre-judgment interest, are both involved, but the central provision is s.45(1): “In any proceedings for the recovery of any debt or damages, the Court may order that there shall be included in the sum for which judgment is given interest on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment.”

There are quite a few cases on this. They emphasize that s.45 is discretionary and they indicate that the judge can select different start dates for pre-judgment interest for different heads of damages. Even so, the reference to the date when “the cause of action arose” as one of the two boundaries of the pre-judgment interest period seems to be a source of potential confusion.

Our inclination at present is to replace it with wording based on judicial interpretations of the rationale for s.45. Based on cases like *Jean v. Pêcheries Roger L. Ltée*, 2010 NBCA 10 (approving *Cyr v. Roman Catholic Bishop of Edmundston* (1982), 39 N.B.R. (2d) 361 (C.A.), [1982] N.B.J. No. 159 (QL)), it seems that s.45 would better reflect the case-law if it referred to the time when the judgment debtor should have paid the amount that is subsequently awarded as damages, rather than to the time when “the cause of action arose”. That seems to be the general rubric within which the courts have operated so far, though there may well be other approaches to removing the “cause of action arises” expression while preserving the substance of the *status quo*.

We have invited the Rules Committee to comment on this, but we would also welcome comments from others.

d. *Rule 8.04 – Partnerships*

This item and the following one are also being raised with the Rules Committee.

R.8.04(1) of the *Rules of Court* permits a party in a proceeding involving a partnership to find out who the partners are. “Where a proceeding is commenced by or against a partnership in the firm name, any other party may, at any time, serve a notice requiring the partnership to

disclose forthwith in writing the names of all of the partners constituting the partnership at the time the cause of action arose and their present places of residence.”

We are not aware of any specific rulings on the meaning of the underlined words. Presumably they tie in with ss.10-13 of the *Partnership Act*, which make every partner individually liable for the debts, obligations and liabilities that the firm incurs while he or she is a partner. If so, the aim of the Rule is presumably to make sure that, in litigation involving a partnership, the partners who are individually liable can be individually identified.

If that is the objective, though, does the reference in R.8.04 to disclosing the partners “at the time the cause of action arose” achieve it? Given the uncertainties that surround that expression, and the risk that it might nowadays be linked to the time when a claim was “discovered”, we suggest it would be better if the Rule used the language of the *Partnership Act*, and required disclosure of the partners at the time the debt, obligation or liability was incurred.

e. Rule 61.14 – Examination in Aid of Enforcement

Paragraphs (1) to (4) of R.61.14 include several references to examining the judgment debtor or

others about the judgment debtor’s assets and income “when the cause of action arose” and to disposals “since the cause of action arose”. The question, once more, is whether these are suitable expressions.

Again, we are not aware of any specific rulings on the meaning of these words; their purpose is presumably to highlight any asset disposals a person makes in anticipation of losing a lawsuit. However, if that is the purpose, the reference to the time when “the cause of action arose” seems unsuitable. A better reference point (drawing on the wording of the new *Limitation of Actions Act*) would be “the time of the act or omission on which the judgment creditor’s claim was based”.

Responses to any of the above should be sent to to the address at the head of these Notes, marked for the attention of Tim Rattenbury, or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than July 15th 2011, if possible.

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