NEW BRUNSWICK'S NEW *LIMITATION OF ACTIONS ACT* – THE 1ST 1,993 DAYS

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WEBINAR

NB References have been hyperlinked to original sources where available.

NB For ease of reference, the current Act, the *Limitation of Actions Act*, SNB 2009, c. L-8.5, is referred to as the "*LOAA"* or the "current Act", while the former Act, the *Limitation of Actions Act*, RSNB 1973, c L-8, is referred to as the "*LOAA 1973*" or the "former Act".

NB H*ansard*, the daily transcription of the debates in the Legislative Assembly, including the Committee of the Whole, are not published on the Legislative Assembly's website but can be accessed through the Legislative Library which can be contacted by email at library.biblio-info@gnb.ca. You will need the date of the daily sitting in question.

Legislative History:

- Legislative Proceedings:

Bill 28: Limitation of Actions Act: Status of Legislation: includes amendments made to the Bill during consideration in the Committee of the Whole.

56th Legislature: 3rd Session (2008-2009): Bill 28:

1st Reading:	December 16, 2008
2nd Reading:	May 22, 2009
Committee of the Whole:	June 17, 2009

3rd Reading: June 18, 2009

Royal Assent: June 19, 2009

Commentary on Bill 28: Limitation of Actions Act (Office of the Attorney General, January 2009).

2nd Report of the Standing Committee on Law Amendments (May 2009)

- As Enacted:

Limitation of Actions Act, SNB 2009, c L-8.5, effective May 1, 2010.

- As Amended:

An Act to Amend the Limitation of Actions Act, SNB 2011, c 17, effective June 10, 2011: adds section 8.1 with respect to recovery of land and makes consequential amendments. **NB** Includes specific transition provisions applicable with respect to the repeal of the *Real Property Limitations Act*.

57th Legislature: 1st Session (2010-2011): Bill 29:

1st Reading: May 13, 2011

2nd Reading: May 25, 2011

Committee of the Whole: May 31, 2011

3rd Reading: June 1, 2011

Royal Assent: June 10, 2011

An Act Respecting the Recovery of Debts Owed to the Crown, SNB 2011, c 52, effective December 21, 2011: amends section 27.1 with respect to Transition – debts due to the Crown.

57th Legislature: 2nd Session (2011-2012): Bill 13:

1st Reading:	December 8, 2011
2nd Reading:	December 9, 2011
Committee of the Whole:	December 16 and December 20, 2011
3rd Reading:	December 21, 2011
Royal Assent:	December 21, 2011

- As Consolidated to Date:

Limitation of Actions Act, SNB 2009, c. L-8.5 [*LOAA*]

General:

- Calculation of Time

Interpretation Act, RSNB 1973, c I-13:

> 22 In an Act or regulation
>
> > (k) where a period of time dating from a specified day, act, or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of such day or of the day of such act or event.

In calculating when a limitation period expires, the date of the triggering event is excluded from the calculation and the limitation period expires on the relevant anniversary of that date at midnight. See *Ferris v The City of Fredericton*, 2010 NBCA 55 at paras 27-33 (CanLII), *per* Richard JA *per curiam* (a decision under the former Act).

- Rule of Interpretation

"Whenever a limitation provision is open to multiple reasonable interpretations, the one least inimical to the plaintiff must be favoured: para. 173 *Kermont Management Inc. v. Saint John Port Authority et. al.* (2002) 2002 NBCA 11 (CanLII), 248 N.B.R. (2d) 1 (C.A.) … (*Dupuis v. Moncton (City)* (2005) NBCA 47 at para. 20; See also: *Godin v. Star-Key Enterprises Ltd.* 2006 NBCA 91 (CanLII) at para. 21)": *Algo Enterprises Ltd v Upm-kymmene Miramichi Inc*, 2014 NBQB 265 at para 12 (CanLII), *per* Walsh J (a decision under the former Act).

Applicable to Litigation, Arbitration and Beyond:

Arbitration Act, RSNB 2014, c 100 (as consolidated to date):

> **Limitation periods**
>
> 52(1) The law with respect to limitation periods applies to an arbitration as if the arbitration were a court proceeding.
>
> 52(2) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order shall be excluded from the computation of the time within which a court proceeding may be brought in respect of a claim that was presented in the arbitration.
>
> 52(3) An application for enforcement of an award may not be made more than two years after the day on which the applicant receives the award.

A party unsuccessfully seeking to arbitrate may, pursuant to section 52(2), have the period from the commencement of the arbitration to the date of the court order ending the arbitration excluded from the calculation of the limitation period in which litigation must be commenced. There is no equivalent provision applicable where a party unsuccessfully seeks to litigate.

See *LOAA*, section 23 regarding Non-judicial remedies.

***LOAA*, Part 1, section 2(1): Application:**

> **Application**
>
> 2(1) 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.

In the case of a decision from the Court of Queen's Bench, to determine the applicable Act, check the court file number which is usually shown towards the top of the first page.

If it indicates that legal proceedings were brought in 2009 or an earlier year, the former Act is applicable. If it indicates that legal proceedings were brought in 2011 or a subsequent year, the current Act is applicable. If it indicates that legal proceedings were brought in 2010, further information will be required to determine if it was brought before May, 1, 2010, in which case the former Act is applicable, or on or after May 1, 2010, in which case the current Act is applicable.

If the current Act is not applicable to ongoing litigation, reference will have to be made to the former Act, the *Limitation of Actions Act*, RSNB 1973, c L-8, as interpreted and applied by the courts of New Brunswick.

In the case of a claim added to a proceeding on or after May 1, 2010, the current Act applies regardless of when the legal proceedings themselves were brought.

"Such an order [*i.e.* to join a new defendant and to add new claims] should not issue where, as here, the defendant confirms his or her definite intention to plead the limitation-setting provision and nothing in the record disentitles that defendant to plead and rely upon the statutory time bar.": *Lévesque and BMG Farming Ltd v Province of New Brunswick and New Brunswick Crop Insurance Commission*, 2011 NBCA 48 at para 38 (CanLII), *per* Drapeau CJNB *per curiam* (a decision under the former Act). Under the current Act, section 21 may be applicable to permit the party or claim to be added notwithstanding the expiry of the relevant limitation period.

At the start of trial on March 30, 2011, the defendant amended the Statement of Defence to plead the former Act and the current Act, claiming the plaintiffs had notice of the patent defect of the retaining wall in June 2002 and that consequently their claim was barred by the time limits set out in section 9 of the former Act and section 27 of the current Act. Legal proceedings had been brought in 2009. The trial judge held the current act did not apply because it did not come into force until May 2010.: *Forbes v Lund*, 2011 NBQB 289 at para 17 (CanLII), *per* Clendening J.

In *Desjardins-King v Castonguay*, 2013 NBQB 140 (CanLII), *per* McLellan J, legal proceedings had been commenced in 2008 with respect to allegedly defamatory statements made by the defendant of which the plaintiff had knowledge by 2003 at the latest. The defendant's pre-trial motion to strike the claim was heard in early 2013. Among other relief, the defendant requested the court to decide a number of questions of law in advance of trial in the basis that they might dispose of the action and, in particular: "Is the Plaintiffs' action statute barred by virtue of s. 4 of the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8 and s. 27.2 of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5?" As the action had been brought before May 1, 2010, the current Act had no application. The motion judge held the action was prescribed under the former Act and struck out the action.

***LOAA*, Part 1, section 3: This Act binds the Crown:**

This Act binds the Crown

3 This Act binds the Crown.

See section 27.1 with respect to the transition provision applicable to debts due to the Crown.

***LOAA*, Part 1, section 4: Conflict**

> **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 this Act and any private Act of New Brunswick, this Act prevails.

- Section 4(1)

If the claimant or the defendant or both are dead before legal proceedings are brought, reference must be made to the *Fatal Accidents Act*, RSNB 2012, c 104, or the *Survival of Actions Act*, RSNB 2011, c 227, or both, as the case may be.

"Under section 156 of the *Securities Act*, a purchaser of a security can bring an action two years after the date of the transaction that gave rise to the cause of action or three years after the date of the transaction in the case of an action for damages. I accept the position of the defendants that pursuant to section 4(1) of the *Limitation of Actions Act*, the limitation periods prescribed in the *Securities Act* prevail.": *Blanchard v Caisse Populaire de Shippagan ltée*, 2013 NBQB 180 at para 52, 405 NBR (2d) 336, *per* DeWare J.

- Section 4(2)

A private Act is one enacted on petition or application of one or more persons relating to private or local matters or for the particular interest or benefit of any person, corporation or municipality, while a public Act relates to matters of public policy and is introduced directly by a Member of the Legislative Assembly.[1]

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[1] Standing Rules of the Legislative Assembly of New Brunswick (Adopted June 17, 1986. Consolidated to March 10, 2015), r 1 regarding definitions, Part XIII: Private Bills.

For example, the preamble of the *Engineering and Geoscience Professions Act*, SNB 2015, c 9, states:

> WHEREAS the Association of Professional Engineers and Geoscientists of New Brunswick prays that it be enacted as hereinafter set forth;
>
> AND WHEREAS it is desirable, in the interest of the public to continue the Association of Professional Engineers and Geoscientists of New Brunswick as a body corporate for the purpose of advancing and maintaining the standard of professional engineering and geoscience carried on in New Brunswick, for governing and regulating members offering services as professional engineers and geoscientists and providing for the interests of the public and the professions;
>
> [emphasis added]

Private Acts are published in the Annual Volumes of Acts published by or with the permission of the Queen's Printer. They are separately indexed. For example, from the 2014 Annual Volume:

PRIVATE ACTS

ALPHABETICAL INDEX

2014

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Private Acts are not otherwise found on the Queen's Printer's website.

The Canadian Bar Association – New Brunswick Branch has posted an *Index to the Private Acts of the Province of New Brunswick, 1929-2012* on its website. It is a good place to start in seeking to find a private Act but should be used AYOR [at your own risk].

***LOAA*, Part 2, section 5: 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.

Pursuant to a separation agreement entered into in December 1996, the parties agreed that they would continue to have joint ownership of two GICs totalling $20,000. Approximately two years after the execution of the separation agreement the respondent negotiated both GICs and withdrew the funds. He did this without the knowledge or consent of the applicant. The applicant became aware that the respondent had collapsed the GICs at the time that the present application seeking an order that the respondent pay to her share of the GICs was brought, approximately September 2010. The respondent argued her claim was prescribed. Applying section 5, the application judge held that, as the clam had only been discovered in August or September 2010, the two-year limitation period had only begun to run then.: *McKinley v McKinley* 2011 NBQB 260 at paras 13-16, 378 NBR (2d) 293, *per* Morrison J. As the claim was brought after May 1, 2010, the current Act was applicable. The two-year discovery-based limitation period prescribed by section 5(1)(a) would not have expired until sometime in 2012 and the 15 year ultimate limitation period prescribed by section 5(1)(b) would not have expired until sometime in 2013.

A provision of an agreement for the sale of corporate shares providing for the right of the purchaser to be indemnified by the vendor "to a maximum of $500,000 for any and all claims arising directly or indirectly out of or in connection with any breach of warranty or representation by the vendors" was in issue. The purchaser was sued by a third party. The action was dismissed at trial on June 22, 2010. The third party appealed. The appeal was dismissed on July 14, 2011. Legal proceedings by way of notice of application by the vendor to challenge the right to indemnification were instituted sometime in 2012, more than two years after the date of the trial decision. It appears that an action by the purchaser against the vendor was subsequently instituted in 2012. The vendor alleged that the limitation period had expired on June 22, 2012. The application judge held that the circumstances before him involved some nuances of fact that could be better fleshed out through the trial process than through a summary application and dismissed the application. The application judge did accept that the purchaser had acted reasonably by awaiting the decision of the Court of Appeal and that it was arguable that it was a reasonable interpretation that the limitation period began to run when the Court of Appeal filed its decision: *Turner v Northern Harvest Sea Farms Inc*, 2012 NBQB 360 (CanLII), *per* McLellan J. Further proceedings between the parties do not appear to be reported.

- Does the claimant need a legal opinion or other expert's opinion in order to discover a claim?

"The respondents contend the limitation period under Rule 69.03 only begins to run when someone finds a reason to challenge the validity of a decision. The law does not support any such assertion. ... One of the reasons for the existence of limitation periods is to permit aggrieved parties the opportunity to investigate, make enquiries and seek advice (legal or otherwise) in order to determine whether judicial intervention is warranted.": *Province of New Brunswick v. LeBlanc*, 2013 NBCA 9 at paras 13-15 (CanLII), *per* Bell JA *per curiam* [emphasis added] (a decision under Rule 69 of the *Rules of Court of New Brunswick*).

Guidance on this issue may be obtained from case law in other Canadian jurisdictions.

Master Jodi L. Mason stated in *Sztuczka v. Knebel*, *2012 ABQB 72* (CanLII) (Master's Chambers), a medical malpractice case

> [11] Counsel for Dr. Knebel [the defendant, a dentist, who moved for summary judgment based on Alberta's limitations legislation,] submitted numerous cases addressing discoverability of claims. Counsel for Ms. Sztuczka [the plaintiff, seeking damages for professional negligence] did not take issue with the principles contained in these cases, paraphrased as follows:
>
> > 1. Discoverability means knowledge of the facts (acts or omissions), that may give rise to a claim against a tortfeasor: *Dickieson v. Dickieson*, 2010 ABQB 227 (CanLII), 2010 ABQB 227, 28 Alta. L.R. (5th) 310 at paragraph 21, citing *Burtch v. Barnes Estate* 2006 CanLII 12955 (ON CA), (2006), 80 O.R. (3d) 365 (Ont. C.A.) at paragraph 24. It does not require a legal opinion as to the validity of the claim: *Dickieson v. Dickieson* at paragraph 21, citing *Hill v. Alberta (South Alberta Land Registration District)* 1993 ABCA 75 (CanLII), (1993), 100 D.L.R. (4th) 331 (Alta. C.A.)
> >
> > 2. It is a question of fact as to when the plaintiff acquired sufficient knowledge of the material facts to trigger the running of the limitation period: *Kydd v. Abolarin*, 2011 ABQB 690 (CanLII), 2011 ABQB 690 at paragraph 39;
> >
> > 3. The knowledge required to start the limitation running is more than suspicion and less than perfect knowledge: *Kydd v. Abolarin* at paragraphs 35-39, citing *Nasrin Karim Professional Corp. v. Bank of Nova Scotia*, 2007 ABCA 10 (CanLII), 2007 ABCA 10, 404 A.R. 303; ...
> >
> > 4. In some cases, the plaintiff will require an expert medical opinion in order to determine whether to commence an action. In other cases, the plaintiff will have knowledge of material facts and the expert medical opinion will only be required as evidence to support the claim: *Kydd v. Abolarin* at paragraphs 36-39. Injuries that manifest immediately are more likely not to require an expert opinion, for causation can easily be inferred. Cases where the injury does not manifest itself until much later and has more than one potential cause, will likely require an expert opinion to trigger the running of the limitation period: *Guay v. Wong*, 2008 ABQB 638 (CanLII), 2008 ABQB 638 at paragraph 81;

> 5. A plaintiff need not know precisely what went wrong during treatment before the limitation commences; section 3(1)(a)(ii) speaks merely to the "injury being attributable to the conduct of the defendant": *Carreno v. Park*, 2010 ABQB 36 (CanLII), 2010 ABQB 36 at paragraphs 28-34;
>
> 6. The subjective test and the objective test in the *Limitations Act* are alternatives; time starts to run as soon as one of them is met: *Gayton v. Lacasse*, 2010 ABCA 123 (CanLII), 2010 ABCA 123, 482 A.R. 179 at paragraph 61; *Gratton v. Shaw*, 2011 ABCA 340 (CanLII), 2011 ABCA 340, 505 A.R. 340. Once the plaintiff subjectively knows that she has a claim, it is irrelevant whether a reasonable person "ought to have known"; and
>
> 7. Error, ignorance or uncertainty of the law, which may require a potential claimant to diligently obtain legal or other expertise to interpret the facts, does not postpone any limitation period: *Dickieson v. Dickieson* at paragraph 21, citing *Waap v. Alberta*, 2008 ABQB 544 (CanLII), 2008 ABQB 544 at paragraph 126.

While the requirements of the Alberta legislation are in many ways equivalent to those of the New Brunswick legislation, it remains to be seen whether the Alberta analysis based on section 3(1)(a)(ii) of the Alberta *Limitations Act* requiring knowledge that "the injury was attributable to conduct of the defendant" posits a lower standard of knowledge than that required by section 5(2)(b) of the New Brunswick *Limitation of Actions Act*, *i.e.* that the injury, loss or damage was "caused by or contributed to" by an act or omission.

Due diligence in this context was recently addressed by the Ontario Court of Appeal in *Longo v. MacLaren Art Centre*, 2014 ONCA 526 (CanLII). Delivering the judgment of the court, Hourigan JA stated:

> [41] The items listed in s. 5(1)(a) [of the *Limitations Act, 2002*] are conjunctive. The limitation period does not begin to run until the putative plaintiff is actually aware of all of those matters or until a reasonable person, with the abilities and in the circumstances of the plaintiff, first ought to have known of all of those matters.
>
> [42] A plaintiff is required to act with due diligence in determining if he has a claim. A limitation period will not be tolled while a plaintiff sits idle and

takes no steps to investigate the matters referred to in s. 5(1)(a). While some action must be taken, the nature and extent of the required action will depend on all of the circumstances of the case, as this court noted in *Soper v. Southcott* (1998), 1998 CanLII 5359 (ON CA), 111 O.A.C. 339, at p. 345 (C.A.):

> Limitation periods are not enacted to be ignored. The plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts upon which a negligence or malpractice claim can be based. This includes acting with diligence in requesting and receiving a medical opinion, if required, so as not to delay the commencement of the limitation period. In some cases, a medical opinion will be necessary to know whether to institute an action. In other cases, it will be possible to know material facts without a medical opinion, and the medical opinion itself will simply be required as evidence in the litigation. In the latter instances, the time of receipt of the medical opinion is immaterial to the commencement of the running of the limitation period.

[43] The *Soper* case, which was cited by the motion judge, was decided under the previous legislation but is entirely consistent with the current legislation. The plaintiff must act reasonably in investigating and determining whether he or she has a claim. A consideration of whether the plaintiff has acted reasonably will include an analysis of not only the nature of the potential claim, but also the particular circumstances of the plaintiff.

[44] Certainty of a potential defendant's responsibility for an act or omission that caused or contributed to the loss is not a requirement. All that is required is that the plaintiff has prima facie grounds to infer that the acts or omissions were caused by the identified parties. The establishment of prima facie grounds may or may not necessitate obtaining an expert report: *Kowal v. Shyiak*, 2012 ONCA 512 (CanLII).

[emphasis added]

- Can an action be dismissed on a pre-trial motion due to expiry of the applicable limitation period?

"If *Aguonie* [an earlier decision of the Ontario Court of Appeal] stands for the proposition that the issue of discoverability is one that cannot be decided on a summary judgment motion, but must go to trial, then that is not the state of the law in New Brunswick. The issue of discoverability can be resolved under Rule 22 if there is no genuine issue as to

the material facts.": *Dupuis v. City of Moncton*, 2005 NBCA 47 at para 31 (CanLII), *per* Larlee JA *per curiam* (a decision under the former Act.

"The question of when the limitation period begins to run under the *Limitation of Actions Act* is a question of fact. Given the very different interpretations of these facts by the parties, it is a question which must be settled during a trial. In a motion for summary judgment, it is not possible to determine the date on which the cause of action 'arose' when there is a dispute between the parties as to the dates.": *Blanchard v Caisse Populaire de Shippagan ltée*, 2013 NBQB 180 at para 45, 405 NBR (2d) 336, *per* DeWare J. Legal proceedings had been brought in 2012 and section 27.2 of the current Act was in question.

"[Rule 23(2)] goes on to provide that 'evidence shall not be admitted'. As I read the submission and listening to the argument, this is a conflict of fact associated with this issue. It is suggested by Mr. Worton and Keltic that I should accept their facts and strike the pleading requested in their motion, while other affidavits suggest a completely different factual situation. The issue essentially becomes an application of evidence presently not before the court to sections 5(1) and 5(2) of the *Limitations of Actions Act*. Once the Court determines certain facts these facts can be applied to the Act. For the present, what is being requested is not available under the Rules. ... With respect to the *Limitation of Actions Act* and paragraph 18 and sub-paragraph 21(a), I am of the view that Rule 23 is not appropriate because the evidence is not clear and there are disputes in the evidence. Thus, there is no clear point of law to be determined based on undisputed facts. This, as well, precludes a summary judgment motion because I am not certain as to the judgment of the Court should this matter proceed to trial because there are evidentiary disputes.": *Focus Logistics Ltd v Worton*, 2014 NBQB 179 at paras 20, 24, [2014] NBR (2d) Uned 71, *per* Rideout J.

Where the limitation period in question, *Fatal Accidents Act*, RSNB 1973, c F-7, s 8(4) ran from a discrete date: "within two years after the death of the deceased" and did not incorporate questions of discoverability, summary judgment was granted dismissing the

action as statute barred.: *Trenholm Estate v Canada (Attorney General)*, 2015 NBQB 153, 438 NBR (2d) 353, *per* Rideout J.

LOAA, Part 2, section 6: Continuous act or omission:

> **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.

A breach of contract claim, for example, will not be within the ambit of this provision unless the right in question is properly characterized as a "continuing right".: *Province of New Brunswick, as represented by the Minister of Human Resources v. Quinton*, 2011 NBCA 35 at para 19 (CanLII), *per* Robertson JA *per curiam* (a decision under the former Act).

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.

***LOAA*, Part 2: section 8: Judgments**:

> **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.

In *Bell v. Morey*, 2013 NBQB 382 (Court file number M/M/0164/2013, November 26, 2013), Dionne J stated:

> [13] The Court also finds that the expression: "*liquidated or unliquidated monetary obligations*", as found in Section 20 (1) of the new Act shall include any monetary obligations that was converted into a judgment, thus making section 8 of said new Act subject to the application of section 20 (1) of same.
>
> [14] The Court is as well of the opinion that the legislators, in adopting section 8 of the new Act and in not excluding it from the application of section 20 (1) of the new Act, were favoring the interpretation proposed by the Applicant.

The application judge also held that the Registrar General under the *Land Titles Act* had improperly removed the Memorials of Judgment registered against title without notice to the judgment creditor merely because the judgment in question was dated more than 15 years earlier.

***LOAA*, Part 2, s 8.1: Recovery of land:**

The Transition provisions as enacted by SNB 2011, c 17 state:

> **Transitional provisions**
>
> 4(1) The following definitions apply in this section and in section 5 of this amending Act.
>
> > "claim" means a claim to which the former Act applied immediately before the commencement of this amending Act. (*réclamation*)
> >
> > "former Act" means the *Real Property Limitations Act*, chapter R-1.5 of the Revised Statutes, 1973, as it existed immediately before the commencement of this amending Act. (*loi antérieure*)
> >
> > "former limitation period" means the limitation period that applied to the claim immediately before the commencement of this amending Act. (*ancien délai de prescription*)
> >
> > "new limitation period" means the limitation period that applies to the claim after the commencement of this amending Act. (*nouveau délai de prescription*)
>
> 4(2) On or before April 30, 2012, a claim may be brought after the new limitation period has expired if the former limitation period has not expired.
>
> **Expiry of former limitation period**
>
> 5 Nothing in this amending Act permits a claim to be brought if the former limitation period has expired before the commencement of this amending Act.
>
> **Application**
>
> 6 No proceeding commenced before the commencement of this amending Act is affected by this amending Act.

***LOAA*, Part 3, section 11: Demand loans:**

> **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.

Care must be taken in reviewing decisions from Ontario as the Ontario legislation refers to “demand obligations”, not merely “demand loans”.

The common law in New Brunswick distinguishes between two major categories of demand obligations: demand promissory notes and demand mortgages, on the one hand, and demand guarantees and demand collateral mortgages, on the other.

Stratton CJNB, delivering the judgment of the Court of Appeal in *Bank of Montreal v. Stephen* (1990), 111 NBR (2d) 330 (CA), stated:

> [20] There is longstanding judicial support for the proposition that a demand promissory note is due as soon as it is made. As long ago as 1837 in *Norton v. Ellam*, 150 E.R. 839, it was decided that a promissory note, payable on demand, is a present debt. The reasoning in *Norton v. Ellam* was adopted and applied by the Ontario Court of Appeal in *Royal Bank of Canada v. Hogg*, [1930] 2 D.L.R. 488. In *Royal Bank of Canada v. Dwigans*, [1933] 3 D.L.R. 178, McGillivary, J.A., said at p. 182:
>
> > In my opinion it must be taken as settled that a promissory note payable on demand is payable immediately.
>
> [21] In *Falconbridge on Banking and Bills of Exchange* (7th Ed. 1969), at p. 790, the rule is stated that for the purpose of an action against the maker and consequently, for the purpose of a Statute of Limitations, time begins to run on a demand promissory note "from the date of the instrument, or from the date of delivery, if that be delayed, and not from the time of demand".

> [22] On the other hand, the rule is different in respect of a guarantee. As stated in *Rowlatt on The Law of Principal and Surety* (4th Ed. 1982), at p. 192, "Where a surety is only liable to pay after demand, time does not begin to run till after it has been made". In citing this rule, I should note that in American Law, a distinction is drawn between the concepts of guarantee and suretyship; there are points of difference between a 'surety' and a 'guarantor'. Such does not appear to be the case in Canada. According to Dr. Kevin Patrick McGuiness in his text, *The Law of Guarantee* (1986), at p. 25: "Under our law, suretyship is not considered to be a form of undertaking distinguishable from a guarantee. The term 'surety' is commonly used as a synonym for 'guarantor' ..." It should also be noted that under the terms of the guarantee document here in issue, Mr. Stephen guaranteed payment of "all present and future debts and liabilities ... due or owing" to the bank by the company "from [the] date of demand for payment of the same".

For further discussion of this distinction, see Perrell J in *Skuy v Greennough Harbour Corporation*, 2012 ONSC 6998 (CanLII), at ¶¶ 33*ff*.

Stratton CJNB continued:

> [23] In view of the authorities to which I have referred, it is clear and, in fact, not seriously disputed, that on April 12, 1985, the date on which the bank demanded payment from Mr. Stephen under his guarantee, any action by the bank against the company on the promissory note was statute barred. It is equally clear that on July 19, 1985, the date on which the bank commenced its action against Mr. Stephen on his guarantee, only 13 weeks had passed since the demand was made for payment. Thus, the action against Mr. Stephen under the guarantee was begun well within the statutory period allowed.

Based on Stratton CJNB's characterization, the limitation period for a demand promissory note and a demand mortgage would be determined under section 8, while the limitation period for a demand guarantee or demand collateral security would appear to be determined under section 5.

Under section 5(2), a claim cannot be discovered unless "injury, loss or damage has occurred". In the case of a demand guarantee or demand collateral security, there cannot have been a loss until after a demand has been made and not honoured:

arguably the day after the demand was made, adopting the position of the Ontario Court of Appeal in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218 (CanLII).

The case before the Ontario Court of Appeal in *Markel Insurance* concerned a loss transfer claim under Ontario insurance legislation between the first party insurer who had paid certain statutory accident benefits to its insured and who then made requests for loss transfer from a second party insurer. The Court had to determine under Ontario's modern limitation of actions legislation when the applicable limitation period had started to run and, in particular, when the first party insurer had sustained a loss. The Ontario Court of Appeal held that a loss had been sustained the day after the demand had been made.

LOAA, Part 2, section 14.1: Trespass to the person, assault or battery:

> **Trespass to the person, assault or battery**
>
> 14.1 There is no limitation period in respect of a claim for damages for trespass to the person, assault or battery if the act complained of is of a sexual nature.

As there is no applicable limitation period for such claims brought under the current Act as determined by section 2(1), section 27.2 is of particular importance if it can be shown that the claim in question was prescribed under the former applicable limitation period before May 1, 2010.

See, for example, *Laplante v Michaud*, 2013 NBQB 58, 2012 CanLII 98332 (NBQB), *per* Léger J. Legal proceedings were instituted in 2012 with respect to alleged acts that occurred in 1977 through 1979. Applying the former Act and the principle that, in addition to the tolling of the limitation period during the plaintiff's minority, in cases of sexual abuse the limitation period can extend to the time when the plaintiff in his adult life reasonably became aware of the harm resulting from the sexual abuse, the trial judge held that the limitation period had expired before May 1, 2010, and section 27.2 was applicable to bar the claim.

In *FH v Moncton Youth Residences*, 2013 NBQB 336, 411 NBR (2d) 279, *per* Rideout J, the motion judge declined to consider the application of section 27.2 on a motion to add a third party as a defendant where the facts were in dispute as to the application of the discoverability principles applicable under the former Act in the context of sexual assault.

***LOAA*, Part 4, section 18: Incapacity:**

Incapacity

18(1) The operation of the limitation period in paragraph 5(1)(a), subparagraph 9(1)(b)(i) or paragraph 11(a), 14(1)(a) or 14(2)(a) [all of which are discovery-based limitation periods] 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.

With respect to section 18, Rideout J stated in *Eastland Auto Inc v Stiles Auto and Mechanics*, 2015 NBQB 12 (CanLII):

[23] I am satisfied that Mr. Dugas suffers from the mental disability of hoarding which may affect his ability to make decisions. But we also have evidence that he was functioning as a corrections officer until his retirement. That he manages apartments and deals with all that is involved with maintaining and leasing apartments. He placed a stop payment on a cheque which was to pay the Defendant's account, details to be outlined subsequently.

[24.] Section 18(1) of the *Limitation of Actions Act* requires that Mr. Dugas, as sole owner of the Plaintiff, must be "incapable of bringing the claim because of his […] physical, mental or psychological condition." I have reference the *Infirmed Persons Act* which defines a mentally incompetent person as follows:

> "mentally incompetent person" means a person (*incapable mental*)
>
> a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
>
> b) who is suffering from such a disorder of the mind
>
> that he requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property;

[25] I do not believe the *Limitation of Actions Act* requires the person to be a “mentally incompetent person” but some affect must be put to the words “incapable of bringing the claim”. Mr. Dugas is functioning in society, maintaining employment for over twenty years and is capable of managing his apartment building and generally to carry on commerce.

[26] Mr. Pereira’s reports relate to his condition in 2013 and 2014. Mr. Dugas has been a patient of Mr. Pereira [a psychologist] since 2002. I understand that Mr. Dugas has made progress. That being said is his hoarding disorder such that, as contemplated in section 18, he is incapable of bringing an action. The evidence that he eventually took back this backhoe and stored it at two other locations for a lengthy period of time, suggests he was able to make decisions in that regard. He had possession of the backhoe from 2006 and made decisions with respect to the backhoe. He continues to manage his apartment. He acted decisively when he paid a $200.00 cheque to get release of the backhoe and then placed a “stop payment” on the cheque. In my view, these activities do not indicate an incapacity to make decisions including that of bringing an action as contemplated in section 18.

***LOAA*, Part 4, section 20: Part payments:**

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.

In *Bell v. Morey*, 2013 NBQB 382 (Court file number M/M/0164/2013, November 26, 2013), Dionne J stated:

[13] The Court also finds that the expression: "*liquidated or unliquidated monetary obligations*", as found in Section 20 (1) of the new Act shall include any monetary obligations that was converted into a judgment, thus making section 8 of said new Act subject to the application of section 20 (1) of same.

[14] The Court is as well of the opinion that the legislators, in adopting section 8 of the new Act and in not excluding it from the application of section 20 (1) of the new Act, were favoring the interpretation proposed by the Applicant.

[15] The Court therefore prefers the interpretation proposed by the Applicant (paragraph 10 to this Decision) and declares that the combined effects of the above noted Sections 8 and 20 (1) of the Limitation of Actions Act, is that any partial payment on a judgment by a judgment

> debtor, except in circumstances covered under paragraph 20 (3) of the Act, has the effect of resetting the limitation period to time zero, hence giving the judgment creditor another 15 years to initiate whatever other claims on that judgment.

FINAL DISPOSITION

[16] The Court declares and orders as follows:

> a) Because of the partial payments made by the judgment debtor, Michael Alexander Morey, on the judgment of July 7, 1998, to wit and by formal admission of the parties, the most recent one made June 13th, 2013, the judgment creditor Carole Bell, has until June 12th, 2028 to initiate any further claims on said judgment; ...

The judgment in question was dated July 7, 1998. As set out at para 10 of the decision, the Applicant had stated, in part:

> 17. The Respondent has made 119 part payments, the most recent having been made on May 15, 2012. All of these payments were made on account of the Judgment as a whole. All of these part payments were made before the expiry of the relevant limitation period and none of the circumstances set out in section 20(3) of the Limitation of Actions Act, supra, apply. The effect of these part payments is that the operation of the limitation period with respect of the Judgment begins again at the time of the last part payment.

The application judge also held that the Registrar General under the *Land Titles Act* had improperly removed the Memorials of Judgment registered against title without notice to the judgment creditor merely because the judgment in question was dated more than 15 years earlier.

LOAA, Part 5, section 21: Claims added to proceedings:

> **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 [*i.e.* a person against whom a claimant has a claim, whether or not the claim has been brought and regardless of how the person may be characterized for procedural purposes, *e.g.* as plaintiff, defendant, third party, etc.] 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.

"Of course, the limitation statute currently in effect, the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, is far more flexible than the version at issue here [the former Act]. Thus, the new statute provides a process to accommodate the addition of claims after the expiry of a limitation period. Section 21 ("Claims added to proceedings") is on point ...": *Lévesque and BMG Farming Ltd v Province of New Brunswick and New Brunswick Crop Insurance Commission*, 2011 NBCA 48 at para 80 (CanLII), *per* Drapeau CJNB *per curiam* (a decision was under the former Act).

Motion to add a new defendant allowed without discussion of section 21 and all issues under the current Act left to be addressed in the Statement of Defence. Defendant to be added alleged that claim had been discovered in 1998 and was prescribed, while the plaintiffs alleged that the claim had not been discovered until receipt of report in July 2012 ("while they had suspicions, they did not know for a certainty that the property was contaminated until they received their expert`s report"). Within days of receipt of the report by the plaintiffs, they commenced the motions to add.: *Eastpre Feeds Ltd v Irving Oil Company Limited and Irving Oil Limited*, 2012 NBQB 254 (CanLII), *per* Rideout J.

In *Murray v City of Fredericton*, 2012 NBQB 169 (CanLII), *per* Clendening J, a self-represented plaintiff unsuccessfully applied to add a number of defendants after the applicable limitation periods had expired citing section 21(a) in support. The motion judge did not specifically address the application of section 21(a) in the context of the facts before her.

"Section 21(a) of the *Limitation of Actions Act* ... speaks of 'the capacity in which either party sues or is sued'. In my view, since the term 'capacity' in this section is used in reference to a party to a legal proceeding there is no distinction between it and the term 'legal capacity', the definition of which is set out in the *Morgentaler* case ... In other words it refers, not to the role of a party in the proceeding but to the party's personal characteristics such as age, mental capacity etc. As I read sub-section 21(a) it is not available to a person who wishes to amend their pleadings by introducing either themselves or another party to the proceedings in a representative capacity. Similarly, if they were initially a party in a representative capacity, they cannot use this section to become a party in their personal capacity. What the sub-section does not permit, in my opinion, is the introduction of new parties with different personal characteristics after the expiry of the limitation period; it does not, however, prevent existing parties from being given additional roles in the litigation.": *Fowler v Croteau*, 2012 NBQB 239 at paras 21, 22 (CanLII), *per* Grant J [emphasis added]. The plaintiff successfully argued that his

motion to add two third parties as defendants was within the application of section 21(a). If section 21(a) was not applicable, the motion judge held section 21(b) applied and that they would not be “prejudiced in defending against the added claim on the merits”. The motion judge held that “in essence the phrase ‘on the merits’ refers to the issue of liability and does not include damages.”

“The new Limitation Act of New Brunswick is patterned after Alberta Legislation. It appears clear from the Alberta Court that the new claim must be related to the conduct, transaction or events described in the original pleading. See *Bow Valley Insurance Servers* (1992) v. Shah 2005 ABCA 304 (CanLII) at paragraph 14: ‘The first requirement is that the new claim be "related to the conduct, transaction or events described in the original pleading". The phrase "related to" has a very broad meaning: *Slattery v. Slattery*, 1993 CanLII 73 (SCC), [1993] 3 S.C.R. 430, at 445-46. For reasons given above when describing the statement of claim here, and chain contracts, the new claim is plainly "related to the conduct, transaction or events" pleaded in the statement of claim.’”: *Caisse Populaire Beauséjour Ltée v Wry*, 2012 NBQB 335 at para 19 (CanLII), *per* Rideout J. This paragraph apparently summarized the submissions of the plaintiff and may not reflect the opinion of the motion judge. The motion was decided without any further reference to section 21.

***LOAA*, Part 5, section 22: Delay caused by defendant:**

> **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.

Allegations of "some negotiations and discussions that occurred between the principal of Northern Harvest and the beneficiary of the trust that may have created some misunderstanding that a settlement might be worked out" not sufficient to satisfy requirements of section 22.: T*urner v Northern Harvest Sea Farms Inc*, 2012 NBQB 360 at paras 16, 17 (CanLII), *per* McLellan J.

Section 22 was discussed as follows in *Gildart v Minhas*, 2012 NBQB 300 (CanLII), *per* McNally J:

> [14] To successfully invoke the exception available under section 22 of the *Act* to extend the two year limitation period within which she was required to commence her action, the plaintiff must establish on the balance of probabilities that due to the actions or assurances of the defendant or his agent, she reasonably believed that the claim would be resolved by agreement and that this reasonable belief caused her to delay bringing the claim.
>
> [15] In paragraph 19 of his affidavit, [plaintiff's counsel] asserts that "*There is no question that the actions taken by Gisele Robichaud on behalf of the Defendant's insurer caused me to reasonably believe that the claim would be resolved by agreement without the necessity of having to commence an action*". Respectfully, close examination of the correspondence exchanged between the parties, as well as [plaintiff's counsel's] own statements in his affidavit, do not support this assertion. I am not satisfied that prior to July 7, 2011, [plaintiff's counsel], acting on behalf of the plaintiff, believed that the claim would be resolved by agreement or that if he did have such belief that it was a reasonable belief.

[16] Firstly, the parties respective assessment of the claim and settlement proposals (the defendant's insurer at $2,500.00 maximum and [plaintiff's counsel] at in excess of $82,000.00), would clearly not be indicative of even a likely resolution of the claim and certainly could not be construed as an assurance to [plaintiff's counsel] or any lawyer of any experience that the claim would be resolved by agreement.

[17] For his part, with such a significant discrepancy in the parties respective positions, I cannot imagine [plaintiff's counsel] consciously proceeding without commencing an action within two years to protect his client's interest on a perceived assurance that the claim would be resolved by agreement. Nor can I imagine or accept that [plaintiff's counsel] would proceed in such a manner without first obtaining a written confirmation from the defendant's insurer that the claim would indeed be resolved by agreement and what the settlement figure would be, or at least the range within which it would be settled, if the actual settlement figure could not be agreed upon at that time.

[18] Secondly, as I understand the evidence, all communication between [plaintiff's counsel] and representatives of the defendant's insurer occurred through the exchange of written correspondence, either letter or email, and there was no verbal communication between them. In my view, a review of the correspondence exchanged discloses no facts, assertions or any evidence that could be interpreted as an assurance on the part of either the insurer, or [plaintiff's counsel] on behalf of the plaintiff for that matter, that the parties would resolve the claim by agreement.

[19] In paragraph 3 of her supplemental affidavit dated June 20, 2012, Gisele Robichaud swears that at no time did she give "*assurances or act in any way that would indicate to the Plaintiff that this claim would be resolved by agreement and that litigation would be avoided*". This evidence has not been contradicted nor challenged by any evidence of the plaintiff or his counsel. There was also no evidence presented to suggest that the plaintiff or plaintiff's counsel had any discussions with Ms. Gallant where any assurance was given that the claim would be resolved by agreement without the necessity of litigation or that there was any waiver of any defences or limitation periods.

[20] There is nothing in the correspondence that could be seen or interpreted to constitute an admission of liability on the part of the insurer or a waiver of any defence or limitation period. In fact the evidence is to the contrary, where Ms. Gallant at the end of her correspondence repeatedly indicated that nothing in her correspondence "*is or shall be construed as either an admission of liability or a waiver or extension of any applicable notice, claim or limitation*". Additionally, a "without prejudice" request for further information by Ms. Robichaud on March 22, 2011 could

not, in my view, be construed by [plaintiff's counsel] as constituting an assurance that the claim would be resolved by agreement.

[21] In short, the correspondence exchanged is nothing more than the usual and normal exchanges between counsel and insurer that occur when processing a personal injury claim for the purpose of gathering the necessary information to assess the claim and attempt to resolve it, if possible. I cannot see how any of it could be realistically construed as an assurance that the claim would be resolved by agreement without the necessity of litigation from either the perspective of [plaintiff's counsel] personally or to any reasonable lawyer of even minimal experience or expertise.

[22] Thirdly, [plaintiff's counsel's] own evidence does not support his assertion that the representatives of the defendant's insurers assured him or the plaintiff that the claim would be resolved by agreement. In paragraph 18 of his affidavit [plaintiff's counsel] states that approximately three weeks prior to the two year anniversary of the plaintiff's accident he forwarded to Gisele Robichaud copies of the plaintiff's tax returns that she had requested and that "*[T]here was never any indication from Ms. Robichaud that she would insist on having an action filed prior to the two year anniversary of the accident in order to pursue settlement discussions. I had been of the clear understanding from the first time I heard from Ms. Robichaud that our mutual intention was to have this matter resolved*". In paragraph 19 [plaintiff's counsel] refers to his letter to Ms. Robichaud in response to her request for a copy of the plaintiff's Notice of Action With Statement of Claim Attached and says that "*I responded the same day by email confirming to her that we had been in the process of trying to resolve the claim in furtherance of the earlier settlement proposal ... and ... again confirmed in this email that I had always understood she wished to settle and referred her to Section 22 of the Limitations of Actions Act.*"

[23] There is a clear and obviously important distinction between the parties to an action having an apparent intention or desire to attempt to resolve a claim without the necessity of litigation and the defendant through actions or statements causing a claimant to reasonably believe that the claim would be resolved by agreement. In my view, even extending the most generous interpretation possible to the plaintiff's position and interpretation of the evidence, the plaintiff has established no more than an intention and desire by the representatives of the defendant's insurer to attempt to settle the claim and has not established a reasonable belief on her part or [plaintiff's counsel's] that the claim would be resolved by agreement without the necessity of litigation.

[24] In the circumstances of this case as presented on this motion, I have not been convinced on the balance of probabilities that [plaintiff's counsel],

> despite his statement to the contrary, believed that he or his client received any assurance from any of the representatives of the defendant's insurer by their statements or actions, that the claim would be resolved by agreement or that there was any waiver of any defence or time limitations under the *Act*. Further, even if [plaintiff's counsel] personally believed that he received such an assurance from the defendant's insurer, in my opinion it would not have been reasonable in the circumstances for him to believe that was the case.
>
> [25] Finally, no evidence was presented by the plaintiff to establish the second requirement under section 22 of the *Act* which is that the delay in bringing the claim was due to the claimant's belief that the claim would be resolved by agreement. Neither [plaintiff's counsel] nor the plaintiff provided any direct evidence on this issue, absent which I am not prepared to make any inference or finding in this regard based on the record before me. The plaintiff has also failed to establish this second requirement under section 22 of the *Act*.
>
> [emphasis added]

"The plaintiffs state that the message of the General Manager of the Caisse de Shippagan, Gilles Lanteigne, described as the "General Manager message" [sic] and found on the website of the Caisse de Shippagan, confirms their belief that a resolution by agreement was possible. Mr. Lanteigne's letter described the financial performance of the Caisse de Shippagan during the year 2010. Among other things, Mr. Lanteigne explains that he is still working on the PIS issue and states [Translation] "[w]e hope this matter will be settled by the end of 2011". Apart from Mr. Lanteigne's message, which was placed on the Internet for the information of all Caisse de Shippagan shareholders and the members of the public, there is no evidence the plaintiffs were advised that their claim would be settled prior to 2011. There exists no letter between the plaintiffs and the defendants nor is there any evidence that there were meetings or discussions between the parties concerning a possible settlement before the end of 2011. There is no evidence indicating that either the Caisse de Shippagan or the other defendants were aware that the plaintiffs wanted to bring an action in 2011. ... In this case, I do not accept the plaintiffs' arguments that Mr. Lanteigne's message on the Internet in 2011 constituted "actions taken" or "assurances given" for the purposes of section 22 of the *Limitation of Actions Act*. The plaintiffs had to establish that there had been clear

communications between them and the defendants, that they intended to bring a claim, and that they had received clear assurances from the defendants that the object of their claim would be resolved by agreement before the end of 2011. The plaintiffs presented no evidence that the parties intended to resolve the claim by agreement. There is no evidence to confirm that the defendants were aware of the fact that the plaintiffs were planning to file a claim in 2011.": *Blanchard v Caisse Populaire de Shippagan ltée*, 2013 NBQB 180 at paras 48, 51, 405 NBR (2d) 336, *per* DeWare J (citing *Gildart v Minhas, supra,* with approval).

LOAA, Part 6, section 23: Non-judicial remedies:

> **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.

A "a non-judicial remedy" has been interpreted to include the self-help remedy of set-off.

In *20116291 (Re)*, 2012 CanLII 7256 (NBWHSCC), for example, the Appeals Tribunal wrote with respect to this issue:

> The workers' advocate in this matter, appearing at the Appeals Panel hearing, argued three basic premises:
>
> > 2. Any effort by the Commission to recoup the overpayment from the appellant by way of civil action was barred by the applicable *Limitation of Actions Act* (*LOA*) and if a civil action was barred, then the Commission should not be permitted by the Appeals Tribunal to avoid the *LOA* by simply exercising a non-judicial remedy and deducting the appellant's overpayment from ongoing benefits; ...
>
> As for the second argument (*LOA* and its avoidance), the advocate insisted that the overpayment was reasonably discoverable between September 1998 and September 2004 when the limitations period would have expired if due diligence had been exercised on the Commission's part (citing the case of *Higgins v. Lawlor et al*, 2004 NBQB 67 (CanLII), 2004 NBQB, 67 as one example of this principle in support). The Commission, he said, was the custodian of the appellant's claims data, reviewed his entitlement annually, if not more frequently, and should have discovered a 'double payment' made in 1998 well before 2010 with any reasonable effort. The Commission, he said, should not be permitted to resort to a non-judicial remedy such as "set-off" and collect from the appellant an overpayment, if it could not bring a civil action in the very same circumstances.
>
> . . .

> This appeal is accepted.
>
> . . .
>
> Any overpayment ought to have been discovered by the exercise of reasonable diligence on the Commission's part well before December 2010. If a civil action for recovery of the overpayment had been launched, the six-year limitation period for recovery would have elapsed and the action barred. Nor can a non-judicial remedy be applied, in all fairness, as noted on page 507 of the Appeal Record within the confines of Appeal decision 20074648 and its resort to principles from the law of restitution and estoppel:
>
> > If such payments are subsequently determined to have been paid in error, and if the worker had no reason to know of the error and had not contributed to the mistake, then, absent special evidence negating the presumption of prejudice, the courts, applying the general principles of the law of restitution, would refuse to order the recovery of such payments. They would refuse to do so on the basis that it would be inequitable to do so.
>
> Commission policy 21-290 cited previously, allows for the Commission to "write-off" or waive claim-related overpayments [page 556 of the Appeal Record]. Such a waiver the Appeals Panel would have ordered had it not been convinced that there was little proof of an overpayment in the first instance and any possible collection of a proven overpayment would have been inequitable at this late date.
>
> The Commission is to restore to the appellant the amounts deducted to satisfy the alleged overpayment.

The Commission had attempted in December 2010 to set-off an overpayment allegedly made in 1998 and allegedly not discovered until 2010 from the benefits then payable to the worker. Before the Appeals Tribunal, the workers' advocate had argued on behalf of the worker that the current Act was applicable and therefore a two-year limitation period was applicable. The Commission had submitted that "the limitation periods set forth in Section 5 of the [current] Act [did] not immediately apply to WorkSafeNB and its treatment of overpayments due to the transition Section 27.1. The applicable limitation period continues to be the six-year period, which was set out in section 9 of the [former Act]." The specific application of either section 27.1 or 27.2 was not addressed by the Appeals Tribunal.

LOAA, Part 7, section 27: Transition:

> **Transition**
>
> 27(1) The following definitions apply in this section and sections 27.1 and 27.2.
>
> > "effective date" means the day on which this Act comes into force [*i.e.* May 1, 2010]. (*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 that took place 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.

"Effective May 1, 2012, after the expiry of a transitional period, the limitation period for an action to enforce that sort of contractual commitment was reduced to two years.": *Turner v Northern Harvest Sea Farms Inc*, 2012 NBQB 360 at para 10 (CanLII), *per* McLellan J (*obiter dicta*).

"This claim arises out of injuries allegedly sustained on December 15, 2009. Until the new *Limitation of Actions Act* became fully effective this past spring [?] it could have been filed within six years. Now the new two year limitation period has expired. The plaintiff filed this action on the 15th of June 2010 under the Rule 79 procedure.": *Doucette v Wal-Mart Canada*, 2012 NBQB 311 at paras 7, 8 (CanLII), *per* McLellan J (*obiter dicta*). The plaintiff's motion to transfer the action from Rule 79 to the ordinary rules was allowed.

“I am also convinced by the plaintiffs that section 27(3) of the *Limitation of Actions Act* allows a claim to be brought after the expiry of the new limitation period if the former limitation period has not expired. If the plaintiffs discovered the facts to support their cause of action between May 24, 2006, and May 1, 2012, they can rely on section 27(3) to extend the limitation period to six years.”: *Blanchard v Caisse Populaire de Shippagan ltée*, 2013 NBQB 180 at para 46, 405 NBR (2d) 336, *per* DeWare J (*obiter dicta*).

***LOAA*, Part 7, section 27.1: Transition – debts due to the Crown:**

> **Transition – debts due to the Crown**
>
> 27.1 Despite anything else in this Act, if the limitation period that applies to a claim by the Crown for the recovery of money owing to it would, if not for this section, expire after the commencement of this section but before May 1, 2016, that limitation period expires on May 1, 2016.
>
> 2011, c.52, s.2

Proceedings Against the Crown Act, RSNB 1973, c P-18:

> 1 In this Act
>
> > "Crown corporation" includes, but is not limited to ... the Workplace Health, Safety and Compensation Commission ...

In *20116291 (Re)*, 2012 CanLII 7256 (NBWHSCC), the Commission had attempted in 2010 to set-off an overpayment allegedly made in 1998 and allegedly not discovered until 2010 from the benefits then payable to the worker. The workers' advocate argued the current Act was applicable and therefore a two-year limitation period under section 5(1)(a) was applicable. The Commission submitted that "the limitation periods set forth in Section 5 of the [current] Act [did] not immediately apply to WorkSafeNB [this appears to be a business name adopted by the Workplace Health, Safety and Compensation Commission] and its treatment of overpayments due to the transition Section 27.1. The applicable limitation period continues to be the six-year period, which was set out in section 9 of the former [Act]."

Without specifically addressing section 27.1 or 27.2, the Appeals Tribunal held:

> Any overpayment ought to have been discovered by the exercise of reasonable diligence on the Commission's part well before December 2010. If a civil action for recovery of the overpayment had been launched, the six-year limitation period for recovery would have elapsed and the action barred. ...

LOAA, Part 7, section 27.2: Expiry of former limitation period:

> **Expiry of former limitation period**
>
> 27.2 Nothing in this Act permits a claim to be brought if the former limitation period has expired before the effective date.

In *Bires v Canada (Attorney General)*, 2012 NBQB 161 (CanLII), *per* McLellan J, legal proceedings were brought in August 2011 with respect to claims for false arrest, imprisonment, battery, defamation, trespass and conversion that occurred in 2007 and May 2008. The motion judge applied the former Act where the applicable limitation period was two years and struck out the claims for false arrest, imprisonment, battery, defamation. He permitted the claims for trespass and conversion to continue as the applicable limitation periods had not expired as of August 2011. Section 27.2 was not discussed by the motion judge.

In *Laplante v Michaud*, 2012 CanLII 98332 (NBQB), *per* Léger J, legal proceedings were brought in 2012 with respect to alleged acts of sexual abuse that occurred in 1977 through 1979. Applying the former Act and the principle that, in addition to the tolling of the limitation period during the plaintiff's minority, in cases of sexual abuse the limitation period can extend to the time when the plaintiff in his adult life reasonably became aware of the harm resulting from the sexual abuse, the trial judge held that the limitation period had expired before May 1, 2010, and section 27.2 was applicable to bar the claim.

In *FH v Moncton Youth Residences*, 2013 NBQB 336, 411 NBR (2d) 279, *per* Rideout J, legal proceedings were brought in 2010 with respect to alleged acts of sexual abuse that occurred in 1986. One of the named defendants, the Province of New Brunswick third partied Securitas Canada. A motion by the plaintiff to add Securitas Canada as a defendant was heard in October 2013. Securitas Canada argued that it should not be added as a defendant as the limitation period applicable to any claim against it had expired before May 1, 2010, citing section 27.2. The motion judge granted the relief

requested by the plaintiff, noting that he could and should not consider on the motion the factual issues arising from the application of the discoverability principles applicable under the former Act in the context of sexual assault.