



**SECOND REPORT
OF THE
STANDING COMMITTEE ON LAW AMENDMENTS**

**Third Session
Fifty-sixth Legislative Assembly
of the
Province of New Brunswick**

May 12, 2009

MEMBERS OF THE COMMITTEE

Hon. Mr. Burke, Q.C., Chair
Mr. Kennedy, Vice-Chair
Ms. Lavoie
Mr. McGinley, Q.C.
Mr. Fraser

Mrs. MacAlpine-Stiles
Mr. C. Landry
Mr. MacDonald
Mr. Urquhart

May 12, 2009

To The Honourable
The Legislative Assembly of
The Province of New Brunswick

Mr. Speaker:

I have the pleasure to present herewith the Second Report of the Standing Committee on Law Amendments for the session.

The report is the result of your Committee's deliberations on Bill 28, *Limitation of Actions Act*, and the discussion paper entitled *Health Care Directives Legislation*, which were referred to your Committee for consideration.

On behalf of the Committee, I wish to thank those individuals and groups who appeared before the Committee or submitted written briefs. In addition, I would like to express my appreciation to the members of the Committee for their contribution in carrying out our mandate.

Your Committee begs leave to make a further report.

I move, seconded by the Member for Victoria-Tobique, that the report be concurred in by the House.

Respectfully submitted,

Hon. Thomas J. Burke, M.L.A.
Chair

May 12, 2009

To The Honourable
The Legislative Assembly of
The Province of New Brunswick

Mr. Speaker:

Your Standing Committee on Law Amendments begs leave to submit their Second Report of the session.

On September 29, 2008, a discussion paper entitled *Health Care Directives Legislation* was filed with the Office of the Clerk of the Legislative Assembly. Pursuant to Motion 85, adopted June 3, 2008, the discussion paper was deemed referred to the Standing Committee on Law Amendments. The purpose of the discussion paper is to present the basis for new legislation in the province giving legal force to health care directives (sometimes called living wills), and describing the circumstances in which they can take effect. A health care directive is a document in which individuals describe their health care wishes, or appoint someone to make health care decisions on their behalf.

On December 16, 2008, Bill 28, *Limitation of Actions Act*, was introduced in the Legislative Assembly by the Minister of Justice and Consumer Affairs, Hon. Thomas J. Burke, Q.C. The proposed legislation is intended to improve and modernize the existing limitation of actions legislation in the province. The Bill establishes time limits within which civil proceedings must be commenced, and it provides a defense if a claim is brought too late. Generally, the Bill provides two limitation periods: a discovery period of two years beginning on the day the claim is discovered; and an ultimate period of fifteen years beginning on the day the act on which the claim is based occurred. On December 17, 2008, by resolution of the House, consideration of Bill 28 was referred to the Standing Committee on Law Amendments.

On January 20, 2009, the Office of the Attorney General filed a *Commentary on Bill 28: Limitation of Actions Act* with the Office of the Clerk of the Legislative Assembly. Pursuant to Motion 34, adopted December 18, 2008, the commentary paper was deemed referred to the Standing Committee on Law Amendments. The purpose of the commentary paper is to assist New Brunswickers in understanding the provisions of the Bill.

On January 21, 2009, your Committee met and determined that members of the public should be invited to provide input and advice to the Committee with respect to the issues raised by Bill 28 and the discussion paper. A public hearing was held on February 24, 2009, at the Legislative Assembly and a total of 14 written submissions were received by your Committee. Your Committee held further deliberations on the Bill and discussion paper, including a meeting with representatives from the Department of Health.

Your Committee expresses appreciation to the presenters who appeared at the public hearing and to those individuals and organizations who submitted written briefs.

I. BILL 28, *LIMITATION OF ACTIONS ACT*

SUMMARY OF FINDINGS

Respondents were generally of the view that the intent of Bill 28 to improve and modernize the province's existing limitation of actions legislation is a sound initiative. Those in support of the Bill were pleased to see that it draws on the Acts adopted by Alberta, Ontario, Saskatchewan and the Uniform Law Conference of Canada. Some respondents, however, did not support the Bill, in its current form, as it contains, in certain circumstances, a shorter limitation period compared to the existing legislation. Other respondents, while supportive of many of the provisions in the Bill, recommended certain revisions.

Your Committee reviewed the provisions of the *Limitation of Actions Act* and considered the written submissions received and the presentations made at the public hearing. While many issues were raised during the public consultation process, your Committee determined that the following matters should be addressed with respect to Bill 28: Application of the Act; Definition of Claim; Notice to Crown; Limitation Periods; Cases of Sexual Assault or Abuse; Test for Discoverability; Private Acts; Continuous Act or Omission; Claim for Contribution and Claims added to Proceedings; Willful Concealment; Stipulation in Writing; and Agreements to Extend or Shorten a Limitation Period.

Application of the Act

Respondents noted that it is not the intention of the Bill to address the limitation periods for recovering possession of land, or the limitation periods created by the *Insurance Act* for bringing legal proceedings under various types of insurance policies. While it was acknowledged that these two issues are currently under review, respondents were hopeful that legislation would be introduced in the near future, especially in relation to the standardization of insurance limitation periods.

Definition of Claim

Respondents observed that the Bill uses and defines the term "claim" while other provincial statutes use the term "cause of action." For clarity and consistency purposes, it was suggested that the definition of the term "claim" in the Bill be revised to include a "cause of action."

Notice to Crown

Respondents noted that the *Proceedings Against the Crown Act* requires two months' advance notice prior to commencing a proceeding against the Crown. Respondents questioned the necessity of such a provision, and suggested that the Bill should address this issue and eliminate the notice requirement for proceeding against the Crown.

Limitation Periods

The Bill provides two limitation periods: a discovery period of two years beginning on the day the claim is discovered; and an ultimate period of fifteen years beginning on the day the act on which the claim is based occurred. Opinions on the two year limitation period varied. Some respondents supported the limitation period, although it was suggested that a period of three years may be more appropriate. Other respondents submitted that the limitation period is unnecessarily restrictive and should be substantially longer, especially in cases involving motor vehicle accidents. With respect to the limitation period of fifteen years, some respondents supported the initiative; others, however, submitted that a period in excess of fifteen years may be more appropriate. One respondent suggested a period of ten years in the context of medical malpractice actions.

Cases of Sexual Assault or Abuse

Respondents were disappointed the Bill does not specifically address a limitation period for civil actions brought in cases of sexual assault or abuse. Respondents suggested these cases should be given special consideration, given how difficult it often is for victims of sexual abuse to come forward and make claims in a timely manner. Respondents noted that several jurisdictions in Canada have legislated no limitation periods for claims based on conduct of a sexual nature. It was recommended that New Brunswick should follow this course of action.

Test for Discoverability

The Bill provides that the two year limitation period begins on the day the claim is discovered. A claim is discovered on the day the claimant knew, or ought reasonably to have known, that the injury or damage had occurred and was caused by an act or omission of the defendant. Some respondents submitted the test for discoverability may be too onerous on a defendant who wishes to prove the limitation period has elapsed, specifically in the context of medical malpractice actions.

Private Acts

The Bill provides that if there is a conflict between a limitation period in the Bill and one established by a private Act, the limitation period that expires the latest prevails. It was submitted that this provision should be revised to stipulate that a limitation period in a private Act cannot exceed fifteen years.

Continuous Act or Omission

The Bill states that if a claim is based on a continuous act or omission, the act or omission is deemed to be a separate one on each day it continues. Respondents suggested the term “continuous” should be replaced with the term “continual” or “recurrent” to better reflect the intent of the provision.

Claim for Contribution and Claims added to Proceedings

Respondents suggested the Bill does not address the situation where a claim for contribution arises in the course of an on-going legal proceeding when one party seeks to add a new party. Some respondents submitted the Bill should retain the wording found in the current *Limitation of Actions Act* and state that the limitation periods are no bar to a counterclaim or third party proceedings. In the alternative, it was suggested that the Bill should contain a provision which specifically prohibits

a party from being added to a proceeding, if the limitation period in respect of the claim against that party has expired.

Willful Concealment

The Bill allows for an additional amount of time in which a claim can be made if a defendant “willfully conceals” the existence of the claim. Respondents suggested this provision is vague and should be refined to clearly state what it means to “willfully conceal” and identify the type of conduct that would come under this provision.

Stipulation in Writing

The Bill provides that if a defendant makes a part payment of a monetary obligation, the limitation period begins again at the time of the part payment. This provision, however, does not apply in certain circumstances. It was submitted that each of these circumstances should contain a stipulation in writing requirement.

Agreements to Extend or Shorten a Limitation Period

The Bill allows for persons to enter into agreements to extend or shorten the limitation periods contained in the Bill. Respondents supported allowing agreements that would extend limitation periods, but strongly opposed allowing any agreements that would shorten the limitation periods contained in the Bill. Respondents questioned the advisability of such a provision, in that it could undermine the effectiveness of the legislation, and urged that the Bill be revised to specifically prohibit the shortening of limitation periods by agreement.

RECOMMENDATION

Your Committee supports the intent of Bill 28 to improve and modernize the existing limitation of actions legislation in the province. Your Committee also recognizes the concerns raised by New Brunswickers and outlined in this report. Accordingly, your Committee wishes to make the following recommendation:

That the Legislative Assembly consider the issues and concerns outlined in this report during its consideration of Bill 28, *Limitation of Actions Act*.

II. DISCUSSION PAPER ON HEALTH CARE DIRECTIVES LEGISLATION

SUMMARY OF FINDINGS

The purpose of the discussion paper is to present the basis for new legislation in the province to give legal force to health care directives, and to describe the circumstances in which they can take effect. Respondents supported the ideas and general provisions outlined in the paper and were pleased to see that the province is developing health care directives legislation, which was viewed as a means to provide greater certainty and efficiency with respect to the delegation of health care decisions. Respondents also supported the mixed model approach, meaning the proposed legislation would allow individuals to formally record their wishes for medical treatment and, if they wish, to designate a specific proxy. If an individual has not named a proxy, the legislation would provide for the appointment of certain family members as proxies.

Your Committee reviewed the discussion paper and considered the written submissions. While many issues were raised during the public consultation process, your Committee determined that the following matters should be addressed with respect to the discussion paper: Elements of Directive; Application of Directive; Proxies; Notification of Directive; Duties on Health Care Providers; Penalties; Other Jurisdictions; and Educating the Public.

Elements of Directive

The proposed legislation would require that a health care directive be in writing and witnessed. Respondents submitted that two witnesses, neither of whom is a proxy, should be required in order to protect the individual making the directive from undue influence.

Application of Directive

Respondents submitted that the proposed legislation should clearly state the type of instructions permitted in a health care directive. Respondents suggested that consideration should be given to whether health care encompasses the broader area of personal care or whether it is limited to the area of medical care. It was submitted that the legislation should address all aspects of care which are ancillary to an individual's health.

Respondents submitted that the legislation should clearly state that an individual's directive only takes effect when the individual is unable to make, or communicate, health care decisions. Respondents also suggested the legislation should require two or more health care professionals to determine when an individual is unable to make those decisions, and, if a proxy is named, it was suggested that the proxy should be able to request a second opinion.

Proxies

The proposed legislation would allow individuals to name a proxy to make health care decisions on their behalf. It was submitted that if a health care directive names a proxy, that person should be required to sign the directive to give it legal effect, although some respondents noted this may be difficult if the proxy lives in another jurisdiction.

Respondents submitted that the legislation should clearly state that a proxy must act in accordance with the instructions contained in an individual's health care directive when the individual is incapable of making health care decisions. If the instructions are not clear, and the proxy does not have knowledge of the wishes of the individual, the legislation should require the proxy to act in the best interests of the individual. To facilitate the decision-making process, it was submitted that a proxy should have access to all available health care information of the individual, and the health care provider should be required to provide all relevant information to the proxy.

Respondents agreed the legislation should protect proxies from liability if they comply with a directive and act in good faith. It was suggested, however, that this protection should be limited if it is determined that a proxy intentionally did not act in the best interests of the individual.

Respondents submitted that proxies should not be compelled to make any particular decision and should be free to cease acting as a proxy at any time. When a proxy refuses to act, or unreasonably delays a decision, it was suggested that the person should be removed as proxy and the next person listed, if applicable, should be allowed to assume the role.

Respondents advised that multiple proxies should be prioritized, with only one decision-making proxy at a time, to avoid the possibility of conflicting instructions. In addition, the legislation would offer a list of proxies to be followed when an individual has not named one in a health care directive. Respondents supported this initiative provided that individuals are entitled to expressly exempt themselves from application of the list. It was also submitted that the categories in the list regarding an individual's children and siblings be further clarified to avoid conflicting instructions when there is more than one child or sibling involved.

Notification of Directive

Respondents advised that other Canadian jurisdictions have explored the idea of registering health care directives, to ensure they are readily available to health care professionals. This idea, however, has not been implemented due to cost and privacy issues. It was suggested that individuals should be urged to provide a copy of their health care directive to their health care providers, including the names of any individuals nominated to serve as their proxies.

Duties on Health Care Providers

The proposed legislation would obligate a health care provider to ask whether an individual has a health care directive. In emergency situations, the health care provider would not be required to locate the directive or obtain a proxy's consent. Providers acting in good faith would be protected from legal action. Respondents supported these obligations and protections to be placed on health care providers, and suggested providers should also be protected against liability when they determine, in good faith, whether or not a person is competent to make a health care decision.

Penalties

The legislation would specify certain offences under the Act and provide for penalties in the \$240 - \$2,620 range. Respondents believed these monetary fines to be low and not a meaningful deterrent.

Other Jurisdictions

Respondents proposed that the legislation should confirm that health care directives and proxies from other Canadian jurisdictions will be legally recognized in New Brunswick.

Educating the Public

Respondents suggested that the implementation of health care directives legislation should be accompanied by an education campaign to advise people of their options and to encourage them to seek advice before preparing a directive. In addition, people should be encouraged to review and renew existing directives or proxy nominations every five years. Respondents requested that a general health care directive form be made available for those individuals who are unable to pay for the services of a lawyer to draft a directive.

RECOMMENDATION

Your Committee supports the components of the proposed legislation contained in the discussion paper and looks forward to the introduction of health care directives legislation in the province. Your Committee wishes to make the following recommendation:

That the government consider the issues and concerns outlined in this report before any health care directives legislation is introduced in the Legislative Assembly.