

Law Reform Notes

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Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Department of Justice. (This issue, however, is likely to be the only one for this year, having been delayed by the late closing of the legislative session.) The Notes are distributed to the legal profession in New Brunswick and the law reform community elsewhere. Their purpose is to provide brief information on some of the law reform projects currently under way in the Branch, and to ask for responses to, or information about, items that are still in their formative stages.

The Branch is grateful to all of those who have commented on items in earlier issues of *Law Reform Notes*; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in *Law Reform Notes*, they should let those groups know what the Branch is considering and suggest that they give us their comments. We are unable to distribute *Law Reform Notes* to everybody who might have an interest in its contents, for these are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.

We emphasize that any opinions expressed in these Notes merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Department of Justice or the provincial government. Where the Department or the government has taken a position on a particular item, this will be apparent from the text.

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. Provision for Dependants Act

On February 1, 2000, the 1997 Act to Amend the Provision for Dependants Act came into force. The amendment revises s.2 of the Act, adding a new element to the test that is applied before the court makes an order under the Act.

Previously, case-law had focused on whether the deceased had a "moral obligation" to leave the applicant more than the will or intestacy provided. The amendment adds a requirement for the applicant to show that his or her resources are "not sufficient to provide [for him or her] adequately." Only if this requirement is met will issues of "moral obligation" arise. The

amendment is intended to make the operation of the Act more predictable, particularly in relation to applications by the grown-up children of the deceased.

The amendment applies in relation to deaths occurring on or after February 1, 2000.

2. Trustees Act

An Act to Amend the Trustees Act (c.29, 2000) enacts the revisions to s.2 of the Trustees Act discussed in previous issues of these Notes. The amendment allows trustees to obtain and rely on investment advice and to delegate

investment authority when it would be prudent to do so. The trustee must act prudently in selecting a delegate, establishing the terms of the delegation and monitoring the delegate. This amendment is retroactive; it includes all prudent delegations of investment authority made in the past.

3. Interprovincial Subpoena Act

The suggestion in *Law Reform Notes #11* was that the Act should be amended to include subpoenas issued by administrative bodies (e.g., tribunals, commissions, and inquiries) in other provinces through amending the definition of "court" in the Act. An Act to Amend the Interprovincial Subpoena Act (c.30, 2000) made this amendment, which came into force on royal assent.

4. Canadian Judgments Act

The Canadian Judgments Act, discussed in several past issues of these *Notes*, was finally enacted in June (c.C-0.1, 2000). It establishes a new process which aims to make money judgments from other Canadian provinces registrable and enforceable in New Brunswick with as few complications as possible. The Act spells out what kinds of default judgments will be registrable (a wider range than at present), and it includes new protections for New Brunswick residents in relation to judgments arising out of consumer contracts and employment contracts.

The Act is subject to proclamation, and regulations will be needed before proclamation occurs. The main item to be dealt with by regulation is a description of the material to be submitted to the clerk of the court in support of an application for registration.

5. An Act to Amend the Reciprocal Enforcement of Judgments Act

The Reciprocal Enforcement of Judgments Act was also amended this year, in direct consequence of the Canadian Judgments Act. The amendments convert the Reciprocal Enforcement of Judgments Act from being a vehicle for enforcing *Canadian* money judgments (that function being taken over by the Canadian Judgments Act), to being a vehicle for reciprocal arrangements with foreign countries.

This amendment, too, is subject to proclamation, and is intended to be proclaimed at the same time as the Canadian Judgments Act. Until then, the Reciprocal Enforcement of Judgments Act will continue to be available for the enforcement of Canadian money judgments.

6. Infirm Persons Act

A proposed Act to Amend the Infirm Persons Act received second reading this year, but died on the Order Paper when the House prorogued in June. The amendment combined two projects that have been discussed in earlier issues of these *Notes*: (a) the power of attorney for personal care, and (b) a revised s.39 that includes personal care matters and makes clear that the options available under the section are more varied than simply the appointment of a committee.

We expect to recommend that the Bill be reintroduced in the coming session. We would be happy to receive comments on it in the meantime. It is available electronically on the Legislative Assembly's website (<http://inter.gov.nb.ca/legis/bills/54-2/055e.htm>).

Suggestions that we have already received are (a) that perhaps the Bill should clarify what it means by personal care matters, and (b) that the Bill should state expressly that a power of attorney for personal care does not lapse if the grantor becomes mentally incompetent. We will be considering both of these suggestions. We also mention below (item 9) a suggestion relating to "springing" powers of attorney that the proposed Act to Amend the Infirm Persons Act prompted.

B. NEW ITEMS

7. Quieting of Titles Act

This is a new item to these *Notes*, though an old one to the Branch. Several years ago, the New Brunswick Association of Land Surveyors made some recommendations to the Department about boundary issues. One recommendation was that a survey plan should always be required in applications for a certificate of title under the Quieting of Titles Act.

The Department discussed this with representatives of the Bar, the Bench and others.

What emerged was a consensus that applications under the Quieting of Titles Act can serve different purposes. In some cases (e.g., adverse possession), the applicant really does want an official determination that he or she owns a parcel of land, and a full investigation of the title, including a plan showing where the land is, is required. In other cases, though, the real purpose of the application is to deal with one or more specific weak links in the chain of title. In these cases an investigation of the entire title is excessive, and a plan would not be needed unless the particular issue in question relates to boundaries. The conclusion, therefore, was that the current application process should be split into two: the existing process but, with a requirement of a plan, for what might be called a "full" quieting of title, and a more focused process, seldom involving a plan, for dealing with one or more specific problems with title.

Several years later, those amendments are now being put in place. An Act to Amend the Quieting of Titles Act (c.11, 2000) makes a survey plan a standard feature of an application for a "certificate of title," but it also creates a new process under which an applicant can obtain a "declaration," binding on third parties, in relation to any fact or matter affecting title to land.

The amendment is subject to proclamation. Minor adjustments to the Rules of Court and the forms are expected to be required before proclamation occurs.

8. Uniform Electronic Commerce Act

We have recently begun to give serious attention to the Uniform Law Conference of Canada's Electronic Commerce Act, with a view to its possible adoption in New Brunswick. We expect to be consulting on this in the fall. Legislation based on the Uniform Act has been enacted in Saskatchewan, and introduced in Manitoba, B.C. and Ontario.

The purpose of the Act is to overcome some specific legal problems that arise in relation to electronic transactions. The Act deals with subjects such as how or when an electronic document can satisfy a legal requirement for

information to be "in writing" or for a document to be "signed."

Our belief at present is that much of the Uniform Act may be worth enactment. However, we are also aware from our involvement in the Uniform Law Conference's work on the Act that there may be other points of view. A general criticism that may be made is that the issues that the Act addresses are not really problems, or if they are problems, that the Act does not solve them. More specific criticisms have also been directed at the exact wording of particular provisions.

Anyone who wants to get a head start on this subject can check the Uniform Act, with related materials, on the Uniform Law Conference's web site (<http://www.law.ualberta.ca/alri/>). We do not expect our consultation to stray far from the path outlined in the Uniform Act.

9. Springing Power of Attorney

As was noted above, one comment that we received in reaction to the proposed Act to Amend the Infirm Persons Act was that the "enduring power of attorney" provisions of the Property Act should be amended so that the power of attorney could "spring," rather than simply "endure," when the donor becomes mentally incompetent.

We had reviewed this issue when working on the Infirm Persons Act amendment, but had let the matter rest. We were not dealing with property management issues at the time, and we thought that the language of s.58.1 etc. of the Property Act could accommodate "springing" powers as well as "enduring" ones, though admittedly its wording was not perfect for the purpose.

We are told, however, that normal practice is to prepare "enduring" powers, and that clients are often uncomfortable with this, since they do not like the idea that the power appears to give the attorney immediate authority to act, even though in fact it is only intended to be exercised if the donor becomes incompetent.

We would welcome comment on whether amending s.58.1 etc. to make it clear that a power can "spring" would resolve a matter

that is regularly of concern to clients and practitioners. If so, we see no difficulty in principle with an amendment.

10. Suggestions in response to Law Reform Notes #12

In *Law Reform Notes #12* we issued a general invitation for people to suggest possible subjects for reform. We received several replies.

- Establishing a registry of wills.
- Reforming or abolishing the rule against perpetuities.
- Reviewing New Brunswick legislation in light of the Supreme Court's decision in *M v H*.
- Expanding the availability of the civil jury.
- Expanding to other situations the current legislation on advance payment of special damages in auto accident cases.

We remain open to other suggestions. Of the items mentioned above, the *M v H* review is already in progress, and the future of the civil jury is something we reviewed in *Law Reform Notes #1-3*, concluding then that the civil jury should be abolished (though we have not put that recommendation forward to the government, so the issue is still open). Decisions about other items to be added to our program have not yet been taken.

Responses to any of the above should be sent to the address at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than October 1st 2000, if possible.

We also welcome suggestions for additional items which merit study with a view to reform.