

Law Reform Notes

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Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Office of the Attorney General, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its 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 everyone who has 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 Office of the Attorney General 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. Class Proceedings Act

The *Class Proceedings Act* has been proclaimed and will come into force on June 30, 2007. No new Rules of Court have been enacted to accompany it. When we reviewed the rules that had been adopted in other provinces with similar legislation, we concluded that the most important provision was already part of the New Brunswick Act (see s.3(2), which deals with the style of cause), and that the other rules adopted in some, but not all, provinces, were not essential.

One issue that is still under consideration, however, is whether Rule 14, headed "Class Actions", should be amended in some way, or perhaps repealed, now that there is a *Class Proceedings Act*. Both in name and substance

there is much overlap between the Rule and the Act, and although this should not cause problems, it may at least cause confusion.

We have considered four legislative options in relation to Rule 14. The first is to repeal it. The second is to retain it with no amendments (except, perhaps, to the title). The third is to amend it so that its application is more narrowly focused on the (few) scenarios that have been identified in other provinces as coming within the Rule but not the legislation. The fourth is to amend it in a way that draws on existing New Brunswick caselaw and creates, in effect, an alternative to a full class proceeding in uncomplicated cases. Examples of the first

three options can be found in other provinces, but we currently favour the fourth, and should explain it.

The traditional understanding of Rule 14 was that it could only be used in a narrow range of cases. The criteria mentioned in *Guarantee Co. of North America v. Caisse Populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (Q.B.), for example, were:

1. The class must be properly defined.
2. All members must have a common interest.
3. There must be a wrong common to all.
4. Damages suffered must be the same to all except in amount.
5. The relief sought must be beneficial to all.
6. None of the members of the class may have an interest antagonistic to the other members.
7. There must be created in the course of the action or as a result thereof a fund or a pool of assets which is isolated and subject to pro-rata distribution should the need arise.

These criteria singled out a small number of class actions that could be conducted satisfactorily *without* any of the special procedures subsequently introduced by class proceedings legislation. Those special procedures have now been added, which enables complex class actions to proceed, but may prove unduly burdensome in the uncomplicated cases that could previously be dealt with under Rule 14.

Our current thought on Rule 14, therefore, is that it should probably be retained but amended slightly to make it clear that the cases that could traditionally be handled under the Rule, without reliance on the new class proceedings provisions, still can be. We will be examining this possibility further during the summer months.

2. Bill 32 – Franchises Act

Bill 32, the *Franchises Act*, received first reading in February, and was referred to the Law Amendments Committee for review. At the time these Notes were prepared, the Committee had not yet reported back to the House.

The Bill is modelled on the Uniform Law Conference of Canada's *Uniform Franchises Act*, and closely resembles legislation in force in Ontario and PEI. It superimposes some statutory requirements on the contractual relationship between franchisors and franchisees under franchise agreements. The main ones are these:

- Both parties owe each other a duty of "fair dealing" in relation to their agreement (s.3).
- A franchisor cannot prohibit its franchisees from forming a franchisees' association (s.4)
- Franchisors must disclose specified information to prospective franchisees before the franchise agreement is signed (s.5). If proper disclosure is not provided, franchisees can rescind the agreement (s.6) and can claim damages if they have suffered loss (s.7).
- A framework is created for the mediation of disputes arising under the agreement (s.8).
- Franchisees cannot be obliged to litigate disputes outside New Brunswick (s.11), and any waivers of their rights under the Act are void (s.12).

If enacted in its present form, the Act will be subject to proclamation, and two regulations will be required before it is proclaimed. One lists the information that a prospective franchisor must include in its disclosure document. The other establishes the basic rules of the mediation procedure. Existing regulations in Ontario and PEI, as well as recommendations by the Uniform Law Conference, are likely to provide the basis for the disclosure regulation in New Brunswick. The mediation regulation, however, will be largely homegrown, since the franchise legislation in Ontario and PEI does not contain an equivalent to section 8 of Bill 32, and we doubt that the proposed mediation regulation prepared by the Uniform Law Conference (and available on its website) would be suitable for use here without substantial modifications.

3. Quieting of Titles

Bill 69, *An Act to Repeal the Quieting of Titles Act*, was introduced in May, and was awaiting Committee of the Whole when these Notes were prepared.

The background to the Bill is explained in Law Reform Notes #19, #20, #21, #22 and #24. The overall package involves not only repealing the Act but also developing a new *Rule of Court* that will serve a similar purpose, but in a modernized form that is better coordinated with both the *Rules of Court* and current land law, especially the *Land Titles Act*.

The Bill contains a proclamation provision and the Act, if passed in its present form, will not be proclaimed until the necessary Rule is enacted.

4. Limitation of Actions

Our work on a new *Limitation of Actions Act* continues. We have not yet formulated specific recommendations, but we hope to do so by the fall.

In January we received a substantial submission from ABC-NB-CBA, which was subsequently endorsed by the Law Society. The full text is on the CBA website. The submission supports the development of new legislation and offers comments on most of the issues highlighted in Law Reform Notes #23 and #24. It also raises some new issues. One is a recommendation that the two months' notice requirement in the *Proceedings against the Crown Act* should be considered for abolition. Another is that the idea that limitation periods can be extended by "acknowledgment" should be expanded to apply to claims for unliquidated sums as well as for liquidated ones – in effect, to admissions of liability.

We will be reviewing all of these issues in the coming months, and expect to remain in contact with the designated representatives of ABC-NB-CBA and the Law Society as we do so. If there are other issues that people wish to mention, now is the time.

5. Infirm Persons Act

In the previous issue of these Notes we discussed four suggestions we had received for amendments to the *Infirm Persons Act*, and

noted three others to be dealt with later. The first four were: (a) Should "incapacitated by infirmity" in section 39 be defined? (b) Should the will-making provisions be amended in response to *Re MacDavid*? (c) Should the Act specify the amount of the committee's bond? (d) Should the court be given the power to waive or reduce the bond?

We have received several responses, and would welcome others. Anyone who still wishes to comment should look at the discussion in Law Reform Notes #25, and send us their views. At present we still favour, in each case, the provisional conclusions described there.

This brings us to the next three items for discussion: (a) Should the committee be required to report annually to the court? (b) Should the requirement that notice be given to the next of kin be changed, since the next of kin may also be mentally incompetent? (c) Should the Act be amended to give some kind of recognition to the role of informal caregivers?

(a) Should the committee be required to report annually to the court?

This suggestion stems from the concern that committees may mismanage the estate, in many cases unintentionally, but that by the time this comes to light it may be too late. Comparable concerns may arise in relation to the personal care of the infirm person, and in both instances regular reporting might reduce the risk. The court does have the power under Rule 71.04 to require the passing of accounts at any time, but we are told this power is seldom used. The court presumably also has the general authority under the Act to direct the committee to report on anything at any time, but again we understand that courts normally do not do so. If anyone has other information, please let us know.

Generally speaking, we think that periodic reporting by the committee to the court makes sense. It is currently required in at least Saskatchewan and PEI, and we are told that in Saskatchewan, where it is fairly recently introduced, it has worked well. We have no information yet about how it has worked in PEI. The reporting requirement is not intended to be onerous. Saskatchewan's Form 1 under its *Adult Guardianship Act* may offer a suitable model for property reporting, and as for personal care, the first part of a form we have been shown

from the Superior Court of New Jersey ("Annual Report of Guardian" – available on the court's website) looks like a good model. We invite readers to look at these forms and tell us what they think.

Subject to whatever comments we receive, we are inclined to recommend that the *Infirm Persons Act* should be amended to require the committee to report to the court "annually or at such other times as the court directs" and "in the prescribed form or such other form as the court requires".

(b) Should the requirement that notice be given to the next of kin be changed, since the next of kin may also be mentally incompetent?

This question is prompted by Rule 71.03(1), which requires an applicant under the *Infirm Persons Act* to serve the notice of application on "the alleged infirm person, unless the court dispenses with service" and on "the spouse, next of kin, committee, if any, and attorney . . . if any . . . who have not consented to the granting of the relief requested . . .". Rule 71.03(2) sets the criteria for dispensing with service on the infirm person. Nothing in the Rule, however, provides for dispensing with service on anybody else.

We agree with the correspondent that this should be changed. Technically, perhaps, this may be unnecessary, since s.5(4) of the Act only says that the court shall make "such order as may seem expedient" for notice to be served on the spouse, next of kin, etc., and the court is presumably free to decide that service on a spouse or next of kin who is incompetent is not "expedient". This, though, is not immediately apparent from the Rule, and we think it would be better if the Rule were clarified.

In making the amendment one must also take into account Rule 18.02(1)(j), which provides for process to be served on mental incompetents by serving other identified people. It would only be if service in accordance with Rule 18 would serve no purpose that the dispensing power would apply.

(c) Should the Act be amended to give some kind of recognition to the role of informal caregivers?

This is the most wide ranging of the questions addressed here. It is something we have long

wondered about, but it came to the fore recently when we read about s.5 of the English *Mental Capacity Act 2005*, which provides legal protection for "Acts in connection with care and treatment". This was a substantially revised version of the "general authority to act reasonably" recommended by the English Law Commission in its 1995 report *Mental Incapacity*. The South African Law Reform Commission's 2004 discussion paper *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* recommended something similar: a statutory version of their non-statutory concept of *negotiorum gestio*.

The starting point for the English Law Commission (we paraphrase heavily) was its belief that most care and property management, for most infirm persons, most of the time, was done informally by family members, and that there was nothing wrong with that. The Commission considered, however, that the family members' legal authority to do the things they were doing was extremely unclear. Legal specialists, the Commission thought, could perhaps piece together legal doctrines like agency of necessity, contracts for necessities, and the principle of necessity in *Re F* [1990] 2 AC 1, and construct a legal framework which covered many of the required bases, but most practitioners would not be able to do so, and most caregivers or other people dealing with them would have even less idea of where they stood.

The Commission therefore formulated two main recommendations. The first was that there should be specific legislation confirming that it was lawful to do, for the personal welfare or health care of an infirm person, whatever was reasonable and in his or her best interests. The Commission thought this provision had to be expressed broadly so that it could include not only the direct caregivers but also people such as the friend who called in to help with meals and the neighbour who helped with repairs.

The Commission also dealt with property matters, and recommended, notably, a "release of payments" provision under which institutions which held the infirm person's money could release funds to pay for things such as the contracts which, under the common law doctrine of necessities, third parties dealing with the infirm person were entitled to enforce.

These recommendations evolved during the course of government consultations and the parliamentary process. During the consultations the government abandoned the release of payments provision, explaining that although it thought that something of this sort was highly desirable, other means of achieving the objective were better. Then, during the parliamentary process, the commission's "general authority to act reasonably" was revised, becoming instead an immunity from liability in relation to "acts in connection with care and treatment" that were both reasonable and in the infirm person's best interests. Here, apparently, the concern was that the wording of the "general authority" was much too general. The government considered that the immunity from liability would achieve the desired objective but in statutory wording that was less open to abuse and misinterpretation.

The debates in England highlight several possible approaches to the law relating to informal caregivers, but the threshold question is whether legislation on this subject should be developed at all. We are inclined to think that it should be, and that the challenge is not in identifying the value of the legislation but in finding the right words to express it. Before we go any further down this path, we would welcome feedback on whether, in principle, legislation clarifying the position of informal caregivers in relation to the care and property of the infirm person is as desirable as we suspect.

Readers who believe that legislation would be useful may also wish to offer comments on its substance. Our preliminary reaction to the English material above is that an "immunity from liability" provision may well be sufficient for many of the people who have dealings with the infirm person, but that the primary caregivers might well need some sort of general authority to act reasonably in the infirm person's best interests. We also suspect that a "release of payments" provision of some sort would be highly desirable, but that perhaps the primary caregivers should be the only people to whom the "payments" could be "released". There may well be other possibilities that people will raise for consideration.

B. NEW ITEMS

6. ICSID Convention

On December 15, 2006, Canada signed the

International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) Convention. The Convention provides a mechanism for the conciliation and arbitration of disputes between member countries and foreign direct investors in those countries. Canada's signature has no legal effect, however, until all of the provinces and the federal government enact implementing legislation, and the federal government has asked us to consider doing so.

For the ICSID Convention to apply to a dispute there are three requirements. (1) The dispute must be between a Contracting State (or a "constituent subdivision" – e.g. a province) and a national of another contracting state. (2) The dispute must be a legal dispute arising directly out of an "investment" (which includes things like running a business or building an infrastructure project). (3) Both parties must voluntarily consent to using the ICSID system. Another key element of the Convention is that the decision is binding on the parties and is not subject to any appeal or other remedy except those found within the Convention.

Over 140 countries are party to the Convention, including most economically developed countries. If Canada joins them, Canadians investing in other Convention countries, and nationals of those countries investing in Canada, may have access to the Convention if their investment is adversely affected by government action.

The Uniform Law Conference of Canada has developed uniform implementing legislation for the ICSID Convention. The *Uniform Settlement of International Investment Disputes Act* is available at the Conference's web site (<http://www.ulcc.ca/>) under the heading "Uniform Acts".

The Uniform Act has been used as the model by the provinces and territories that have already adopted implementing legislation, namely, Ontario, Saskatchewan, British Columbia, Newfoundland and Labrador, and Nunavut. Several other provinces are considering the legislation. The federal government has recently introduced a bill to implement the Convention federally. We are considering the possibility of enacting the legislation in New Brunswick and would welcome any comments.

7. Canadian judgments

The *Canadian Judgments Act* was enacted in 2000, and came into force in 2003. It establishes a simplified procedure for the enforcement in New Brunswick of money judgments from other Canadian provinces and territories. The judgment is registered in the Court of Queen's Bench; a New Brunswick judgment based on it is then issued; and the New Brunswick judgment is enforceable in the ordinary way.

The Act is a modified version of the Uniform Law Conference of Canada's *Uniform Enforcement of Canadian Judgments Act (UECJA)*. The Conference subsequently expanded its Act to include non-money judgments ("decrees"), renaming it the *Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA)*. We are considering making a similar change to the *Canadian Judgments Act*, and would be pleased to receive information on both the operation of the *Canadian Judgments Act* so far and the desirability and implications of expanding it to include decrees.

"Decrees" under the *UECJDA* are of two kinds: they may be purely declaratory or they may order somebody to do or not do something. They may also be either interim or final, unlike money judgments, which must be final in order to be enforceable. The general approach of the *UECJDA* is that a decree issued in one province can be registered in another, with no questions asked about its merits, nor the procedure by which it was obtained nor the jurisdiction of the originating court. Once registered, a decree can be enforced in the registering province in the same way as a decree originally issued there. A court of the registering province can adapt the decree so as to make it enforceable in accordance with local law and practice, and has a limited ability to decline enforcement on "public policy" grounds, but for the most part the court simply takes the order as it finds it and is only concerned with enforcement issues.

Generally, the *UECJDA* seems straightforward and appropriate. There seems to be every reason to facilitate the enforcement of non-money judgments just as much as money judgments, and the common law, as we understand it, is currently unclear on how extra-provincial decrees are to be enforced, even in

cases in which it is accepted that they should be recognized.

There are, however, two substantial issues that have cropped up so far in our review of this project. We would welcome suggestions on how they should be dealt with.

The first is that the *Canadian Judgments Act*, unlike the *UECJA* or the *UECJDA*, establishes criteria for the registration of default judgments (see s.5). Those criteria, similar in effect to the common law of "real and substantial connection", but with special protection for employees and consumers, were designed to protect defendants from being forced to litigate in places that plaintiffs found convenient but that had no connection to the subject-matter of the case. We expect this to be less of a concern in relation to decrees, since decrees are typically issued by judges, who will presumably be alert to issues such as forum and jurisdiction, whereas default judgments are often purely administrative. Nonetheless, there may still be a place for a provision like s.5.

The second is that the *UECJDA* is not explicit about the relationship between the New Brunswick court and the court of origin when it comes to the actual enforcement of the out-of-province decree. Enforcement of mandatory orders, in particular, may well involve contempt proceedings or discretionary measures, and we can foresee difficulties of various kinds arising if, as *UECJDA* appears to intend, the local court is fully responsible for the enforcement of the decree but has little if any control over the substantive requirements it is being asked to enforce.

We invite comment on both of these issues, as well as on any others arising under the *Canadian Judgments Act* as it now exists or if it is expanded to include decrees.

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 August 1st 2007, if possible.

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