
Law Reform Notes

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

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

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. Limitation of Actions Act

The new *Limitation of Actions Act* was passed in June 2009 and came into force on May 1, 2010. The Act is based on the same general foundations as the Acts enacted in Alberta, Saskatchewan and Ontario recently, and recommended by the Uniform Law Conference of Canada, though it includes many variations of detail. The central rule is that a claim cannot be brought if either (a) two years have passed since the claim became discoverable, or (b) fifteen years have passed since the act or omission on which the claim is based occurred. Other provisions adjust this general rule for particular scenarios (such as the infancy of the claimant) or for particular kinds of claim (including cases where the limitation period is contained in another public Act).

There is a transitional period during which the previous *Limitation of Actions Act* will remain applicable to some cases. The previous Act,

though no longer available on the Queen's Printer's website, can now be found under the heading "Legislative Development: Other Documents" on the Office of the Attorney General's home page. It is also on CanLII as a past version of the *Real Property Limitations Act* – an Act that we hope will be repealed soon (see item 5 below), but which currently consists of the very ancient provisions of the former *Limitation of Actions Act* on the recovery of possession of land.

The "Legislative Development: Other Documents" heading also contains the Commentary that the Office of the Attorney General submitted to the Legislative Assembly to accompany the First Reading version of the Bill. (The Commentary is also on the Legislative Assembly's website.) Note, however, that some sections of the Bill were amended subsequently. Presentations on the final text of the Act were provided at CLE sessions in February and May 2010. A CLE on insurance law in October 2010

also included a paper about limitation periods in insurance contracts, some of which are governed by the new Act though many are still determined by special provisions of the *Insurance Act*. These papers are available from ABC-NB-CBA. The Summer 2010 issue of the New Brunswick *Solicitor's Journal* also contains an overview of the Act.

2. Franchises Act

The *Franchises Act* was passed 2007. Consultation on the regulations followed, and the Act has now been proclaimed, to come into force on February 1, 2011.

The Act injects five new elements into the franchisor/franchisee relationship: the duty of fair dealing (s.3), the franchisees' right to form an association (s.4), the franchisor's duty of precontractual disclosure with its related remedies (ss.5, 6 and 7)), the mediation procedure (s.8), and the overriding of contractual provisions requiring litigation to be conducted outside New Brunswick (s.11). The two regulations under the Act are the *Disclosure Document Regulation*, which establishes the details of the extensive disclosure document that franchisors must provide to franchisees before a franchise agreement is signed, and the *Mediation Regulation*, which creates the framework for the mediation process.

3. Quieting of Titles Act

In 2007, the Legislative Assembly passed *An Act to Repeal the Quieting of Titles Act*. The repeal has not yet been proclaimed, however, because it depends on the creation of a new Rule of Court to replace the *Quieting of Titles Act*, and the new Rule was put on hold while items 1 and 2 above, as well as the *Securities Transfer Act* (enacted in December 2008 and proclaimed in February 2010), were being dealt with. The main elements of the new Rule were outlined in Law Reform Notes #22, and were subsequently discussed with the Rules Committee.

We are now returning to this project, and hope to make recommendations to the new government shortly. The general approach is that the new Rule will rely on the procedures for applications or actions as far as possible (depending on whether or not there is a substantial dispute of fact), but will add to them

provisions that, like the key elements of the *Quieting of Titles Act*, require public notice and full disclosure if an applicant wants the court's eventual ruling to apply to persons unknown, and bind the world at large, rather than just the parties.

4. Intestate succession and the Land Titles Act

We have recently resumed our discussion with the Registrar General of Land Titles about simplifying the process for transmitting title under the *Land Titles Act* in cases of intestacy. (See *Law Reform Notes* #22 and #23.) As things stand, the effect of s.53 is that formal administration of the intestate's estate is necessary in order for the family to deal with registered land. The concern that has been expressed is that in many cases this process is complex and costly, especially when dealing with small estates.

For the calendar year 2009, the Registrar General reports that there were 93 Applications for Registration of Transmission (Form 41) under the *Land Titles Act*. Form 41 applies to both probated and unprobated wills as well as to intestacies, and the Registrar General estimates that approximately 10% of these 93 forms relate to intestacies.

Three main options are under consideration.

The first is to develop a streamlined process under the *Probate Court Act* for obtaining letters of administration for registered land without assuming responsibility for the administration of the whole estate. The successful applicant would then be the "personal representative" for the purpose of s.53 of the *Land Titles Act* (only), and the existing procedures for transmission of title under s.53 would remain unchanged.

The second would amend the *Land Titles Act* rather than the *Probate Court Act*, and would create a two-step administrative process somewhat similar to the existing s.53, but would not involve a court. First the deceased owner's next of kin would register as such. Second, they could then transfer the title, either to one or more of themselves or to a third party. The initial registration as next of kin would not convert the applicants into registered owners; it would be more like registering a power of attorney, giving them authority to deal with the property but no actual interest in it.

The third option is simply for the Registrar General to accept a transfer by the next of kin as being effective to transfer title in cases of intestacy. This would be similar to the acceptance that deeds by beneficiaries have received under the *Registry Act* in the past. Again, there would be no change to the *Probate Court Act*, and no need for the next of kin to apply for any form of letters of administration.

Each of these options has advantages and disadvantages. We would welcome comments on which seems the most promising, and on possible solutions to the different issues each one presents.

The attraction of the first option – obtaining formal letters of administration, but limited to the registered land – is that it stays close to familiar estate administration rules, and ensures that a court will determine who the personal representatives are. The disadvantage, though, is that it still involves a court process, which, in its present form, would run all the way from initial application to passing of accounts. This does not seem to present major savings of time and expense compared to an application for the whole estate unless further streamlining of the Probate Court process took place, and we would welcome suggestions on what other parts of the process might be streamlined in order to accommodate registered land.

There would also be some technical issues to be considered in any process in which the registered land was formally administered and the rest of the estate was not. For example, would the legislation need to clarify which parts of the funeral expenses and estate debts the personal representatives had to pay as part of their administration of the land? We invite comment on whether issues like these seem problematic, and on possible solutions. The courts, of course, have long had the theoretical ability to make a limited grant of letters to part of an estate, but there is little experience of how such a process might work, since the courts have held that limited grants should only be issued in exceptional circumstances. (See *Re Sadler Estate* [1991] NBJ No.135.)

The second option – enabling the next of kin to register as such and then transfer the property – avoids a court process and avoids splitting the estate between formal administration of the registered land and informal administration of

everything else. This option is unusual in giving statutory recognition to the next of kin's capacity to deal with the land without a grant of administration, but, as is always the case with informal estate administration, the next of kin are the people with the most direct interest in the property, and whatever they do is done at their own risk.

A potential difficulty with this option is the risk of error or abuse, given that the courts would not be involved and that the land registry system is not equipped to determine who the next of kin are. The Registrar General has some initial concerns that in circumstances such as a missing heir coming forward too late or a creditor of the estate not being paid, the aggrieved party will look to the Registrar General to resolve the matter or pay indemnification.

To reduce these risks, it seems likely that this approach would be limited to straightforward cases, thus excluding, for example, partial intestacies and cases involving minors, infirm persons or remote next of kin. The applicants would also need to provide interconnecting affidavits confirming they were the next of kin, and a solicitor's certificate would likely also be required, saying that the solicitor had explained the relevant provisions of the *Devolution of Estates Act*, and that as far as he or she knew, the applicants were the right people. In all cases the Registrar General would have discretion as to whether to register or not.

As well, discussion has taken place on whether the nature or the value of the property involved should be limited. Much of the impetus for this initiative was to deal with family homes of modest value. Some discussion has now taken place about (a) whether or not there should a split between residential and non-residential property, and (b) what an appropriate financial limit would be: \$100,000, \$200,000 or \$500,000 for example. Feedback on these issues would be welcomed.

If limited in ways like these, the administrative approach under the *Land Titles Act* would leave cases that were not straightforward to be dealt with under the *Probate Court Act*. Would an administrative process like this include a wide enough range of scenarios to be a useful step forward from the *status quo*, given the Registrar

General's estimate that there are approximately 10 transmissions on intestacy a year at present?

The third option – permitting a direct transfer by the next of kin – is more familiar in that it resembles past practice under the *Registry Act*, but it has the same difficulties as the second in terms of error and abuse. Like the second, therefore, it would probably be limited to straightforward intestacies, with the same package of supporting documentation being required. So the second and third options both raise the same question of whether an administrative process limited to 'straightforward' cases would be broad enough to be useful.

A difference between them is that the third option achieves in one step what the second achieves in two. However, we are not sure whether this is an advantage. At first glance, having only one step seems simpler. On the other hand, the two-step approach would mean that the question of who has the ability to deal with the property was dealt with *before* an actual transfer was submitted for registration, which could be beneficial. For example, a purchaser from the next of kin might feel more comfortable signing an agreement for purchase and sale if the next of kin's ability to sell had already been recognized on the register.

We would welcome feedback on the three options we have outlined – or other suggestions if readers have them – as well as on the various intricacies and complications involved in implementing them. The latter are likely to be important here, since this is the kind of initiative in which the devil will probably be in the details.

B. NEW ITEMS

5. Limitation of Actions – Possession of Land

As mentioned under item 1, above, when the old *Limitation of Actions Act* was repealed its very ancient provisions on proceedings for recovering of possession of land were carved out and preserved as the *Real Property Limitations Act*. This was intended as a temporary measure, and we have now developed proposals for what the replacement provisions should be. We welcome comment on them. They are intended to be added to the new *Limitation of Actions Act*, with the *Real Property Limitations Act* being

repealed. They would not displace s.17 of the *Land Titles Act*, under which the law of adverse possession does not apply to registered land.

Our approach has been to try to boil the existing legislation down to its basics, then reproduce something that is similar in effect, but expressed in modern language and harmonized with the new *Limitation of Actions Act*. The end product would be intended as a new 'clean sheet', and would not attempt to cover all the intricacies the current legislation does.

On that basis, bearing in mind the 15-year ultimate limitation periods in the new *Limitation of Actions Act*, the central limitations rule would be that a claim to recover the possession of land cannot be brought after 15 years of continuous dispossession (or 60 years for the Crown, as at present). After that time, title would be extinguished. There would be no equivalent to the new 2-year discovery periods, since these would have the effect of extinguishing title far too soon.

Then comes the question of whether there are special scenarios that need to be addressed. Reading through the *Real Property Limitations Act* (with much assistance from *Anger and Honsberger* in trying to determine what on earth it means) we believe there are four. These are (a) future interests, (b) fixed term leases, (c) periodic and 'at will' tenancies, and (d) joint ownership.

(a) Future interests. We believe we should keep the existing rule that a future interest cannot be extinguished before it falls into possession. However, we are inclined to adjust the time periods, so that when one future interest follows another, only 5 years are added for the new limitation period each time rather than the standard 15 years. The purpose is to shorten the period of time over which limitation periods can accumulate when one future interest follows another.

(b) Fixed term leases. We believe we should keep the rule that the limitation period for the reversion on a fixed term lease cannot expire during the term. But as with future interests, and for the same reason, we believe that the extra protection for the reversion should be reduced to 5 years after the fixed term ends. Thus the limitation period for the reversion would be the later of the following two dates: (a) 15 years

from the start of the dispossession, and (b) 5 years after the fixed term expired.

(c) Periodic tenancies and tenancies at will. Here we suggest the basic rule should be that the period of dispossession begins when the tenant ceases to pay rent. The limitation period for recovering possession would therefore end when the tenant had stayed in possession for 15 years without either paying rent or otherwise acknowledging the owner's title.

(d) Joint ownership. We believe we must keep the rule in s.32 of the *Real Property Limitations Act* that possession by one joint owner ousts the other. This comes up at times as a significant feature under the *Quieting of Titles Act* in cases where one or more of several joint heirs is missing.

There are several other elements of the *Real Property Limitations Act* that should be retained in a modified form, but they will not need to be expressly stated if the new provisions are included in the new *Limitation of Actions Act*, since this Act includes comparable provisions already.

1. If there is wilful concealment of the owner's right to possession, the limitation period will not end until 2 years after the owner should have found out (s.16 of the *Limitation of Actions Act*).
2. If the owner is a minor, the limitation period will not start to run until he/she is an adult (s.17 of the *Limitation of Actions Act*).
3. Acknowledgments of title or payments of rent will recommence the limitation period (ss.19 and 20 of the *Limitation of Actions Act*).
4. Self-help remedies such as re-entry cannot be instituted when legal proceedings can no longer be commenced (s.23 of the *Limitation of Actions Act*).

A feature of the existing legislation we would not attempt to replicate is s.63, as it applies to adult incapacity. Under s.18 of the new *Limitation of Actions Act*, adult incapacity only affects the operation of 2-year "discovery" periods, not 15-year "ultimate" ones. It would therefore have no application to the proposed 15-year period for recovering the possession of land.

We would welcome comments on the framework outlined above, and on whether there are important details we have overlooked.

6. A new *Trustees Act*

In 2004, the British Columbia Law Institute released its report *A Modern Trustee Act for British Columbia*. The report includes the text of proposed new trustee legislation, and the Uniform Law Conference of Canada has taken this up as the basis for developing a *Uniform Trustee Act* that the Conference hopes to finalize next year. We will be participating in this project, and anticipate that the new *Uniform Trustee Act* may serve as the basis for a new *Trustees Act* in New Brunswick. This note therefore summarizes the main features of the BCLI proposal, adds comments on some of them, and invites feedback on any or all.

The introduction to the BCLI report describes British Columbia's current *Trustee Act* as "a lengthy and eclectic statute consisting largely of re-enactments of English legislation dating from the mid-nineteenth century". New Brunswick's *Trustees Act* is shorter, but otherwise the same description fits. Most of our Act dates back to the 1903 Consolidated Statutes, but in substance it is older, since the 1903 version is a compilation of several pre-existing Imperial Acts, one of them dating back to at least 1850.

Since 1903 there have been only six substantive alterations to the *Trustees Act*.

- In 1911 trustees were given the power to sell settled lands with the consent of the life tenant, with the proceeds being held on trust in place of the land (now ss.44-48).
- In 1938 trustees were authorized to delegate their responsibilities by power of attorney while absent from the province (now s.6).
- In 1944 the court was given the power to authorize transactions that were not otherwise permitted by a power in the trust instrument (now s.25).
- In 1959 the court was given the power to vary or revoke trusts of behalf of people incapable of giving consent (now s.26).

- In 1971 the long-established 'legal list' approach to trustee investment powers was replaced by the 'prudent investor' rule (now s.2; the items on the 'legal list' had been amended several times before then).
- In 2000, the 'prudent investor' rule was revised slightly (now ss.2 and 2.1).

The BCLI proposal suggests many changes to existing law. It is set against the background of British Columbia's legislation rather than New Brunswick's, but the Acts have much in common (including several provisions that are identical), and large parts of the law of trusts are non-statutory in both provinces, so the proposals seem understandable here, and easy to adopt if the Legislature so decides. The Society of Trust and Estate Practitioners has provided some comments on the BCLI proposal that the ULCC Working Group is reviewing, but at present the BCLI report is still the most suitable document to consider. It is available at <http://www.bcli.org>.

The summary below is very brief and heavily paraphrased. The section number references are to the sections of the draft Act the BCLI report contains.

Scope and application

The Act does not attempt a complete codification of trust law. It consists of specific provisions that are designed to operate with, and in some cases change, the common law (s.5). Most of its provisions are default provisions that settlors can displace if they want to (s.4).

The Act only applies to trusts created by an instrument, by an oral declaration or by an enactment (s.1, definition of "trust instrument", and s.3). Unlike existing law in both New Brunswick and BC, it will not apply to implied or constructive trusts, nor to the discharge of the functions of personal representatives.

General provisions

Trustees are given a broad power to appoint agents and delegate administrative powers to them (s.7). Trustees are required to provide the beneficiaries with annual financial reports, and with other documents or information if requested (s.9). A major change is that trustees are authorized to act by a majority rather than unanimously (s.12).

Appointment, removal, etc.

A trusteeship ceases automatically (or never arises) if a trustee dies, disclaims or resigns, or is mentally incapacitated or an undischarged bankrupt, or is convicted of an offence involving dishonesty (ss.2 and 16). Trustees are given the power to fill vacancies (s.14) and to remove co-trustees who are failing in their duties (ss.2 and 17).

Administrative powers of trustees

The basic rule is that trustees have all the powers of an ordinary property-owner in relation to the trust property (s.39). The court can also confer powers where they are lacking (s.40).

There is an extensive set of provisions on investment powers (ss.27-32), as well as several provisions that, in different ways, permit trustees to cut across some of the traditional dividing lines between the capital and the income of a trust (s.34 on the rules in *Howe v Lord Dartmouth* and *Re Chesterfield's Trusts*; s.35 on apportionment of outgoings; s.36 dealing with allocation of receipts and outgoings in "discretionary allocation trusts"; s.37 creating a framework for "total return investment"; and s.41 on allocation of insurance proceeds).

Dispositive powers of trustees

The Act broadens in several ways the powers of trustees to apply income or capital for the maintenance or advancement of beneficiaries, and sometimes their families (ss.43-48).

Powers of the court

The court is given several powers relating to the appointment, removal or reinstatement of trustees and to enforcing the performance of their duties (ss.52-54). Existing powers to vary or terminate trusts are expanded so that (a) competent beneficiaries can vary, rather than just terminate, the trust, and (b) the court can approve a variation or termination of a trust despite the opposition of a competent beneficiary (ss.55-57).

Compensation

Trustees are authorized to 'pre-take' reasonable compensation with notice to the beneficiaries, but without needing court approval unless a beneficiary applies for the court to fix the compensation (s.62).

Charities, etc.

The Act removes some restrictions on the *cy-près* doctrine (s.65). It contains new provisions relating to the distribution of surplus funds from public appeals (s.66). It permits “purpose trusts” (i.e., trusts with no beneficiaries, established for particular purposes that are socially useful but not charitable) (s.70), and gives limited recognition to other purported trusts set up with “purposes” but no beneficiaries (s.71). An exemption from exigibility for some charitable trust property is also introduced (s.72).

Rule against perpetuities

At its 2009 meeting, the Uniform Law Conference agreed to add a further item to the BCLI proposal, namely the repeal of the rule against perpetuities in relation to trusts. This will presumably lead to reworking some provisions of the BCLI proposal that presuppose the existence of the rule against perpetuities (e.g., s.70).

If readers have comments on any of the above, or suggestions for other issues that should be addressed in new trustee legislation, we would be pleased to hear them. In our own review of the Act, the issues that we are currently giving the closest attention are the following. They are mostly not the issues the BCLI report highlights – on those the report speaks for itself – but they are things that would be important in considering the enactment in New Brunswick of a new *Trustees Act* based on the BCLI model.

1. The exclusion of personal representatives from the Act. The potential concern here is that if New Brunswick’s existing *Trustees Act* applies to personal representatives but a new Act does not, personal representatives would lose any powers they currently draw from the existing Act. We will be investigating this, and would welcome any information about the usefulness (or not) of existing *Trustees Act* provisions to personal representatives.

2. Treating enactments as “trust instruments”. There are many references to trusts in New Brunswick Acts. Some of them establish trust funds that are to be administered by identified trustees. Others are merely brief statements that particular property is held in trust in some way, and are apparently designed to restrict what a person can do with property (often money) that is under his or her control. We have begun to review some of these references to see how

they might relate to a new *Trustees Act*, but our belief at present is that if a new Act said it applied to all trusts created by enactments, it would probably produce unintended effects.

3. Majority decision-making. Making majority decision-making, rather than unanimity, the default rule for trustees affects everything in the Act. The BCLI proposal contains many new flexibilities for trustees, and majority decision-making makes it easier for any of these flexibilities to be employed. Though we are inclined to favour majority decision-making, and the ULC has approved the idea, we would welcome further comment.

4. Prudent investor rule. The BCLI proposal is based on recently enacted BC legislation derived from a 1996 Uniform Law Conference Act. The latter was a fuller and more intricate version of previous prudent investor legislation that the Conference adopted in 1970 and New Brunswick enacted in 1971. In 2000 New Brunswick amended its legislation to include part of the Conference’s 1996 revision, but decided for the most part to stick with the earlier, more basic version that was already in force here. At present we are still inclined to favour that approach rather than to adopt the new provisions that are now reflected in the BCLI proposal.

5. Purpose trusts. The BCLI proposal on purpose trusts gives partial legal effect to purported trusts that have purposes but no beneficiaries, and gives them full legal effect if they are created for specified socially useful purposes. The former draws on existing BC legislation (s.24, *Perpetuity Act*); the latter would essentially allow trusts to be set up for the same purposes that non-profit corporations can be under BC’s *Society Act*. In New Brunswick we start from a different position, having no *Perpetuity Act* provision to preserve, and having in s.18 of the *Companies Act* a provision under which non-profit companies can hold their assets on trust for socially useful purposes similar to the BCLI list. Possibly, therefore, our approach to whether or how to provide for purpose trusts in a new *Trustees Act* may also be different.

6. The rule against perpetuities. The ULCC Working Group has not yet developed a specific proposal for the rule against perpetuities. The Nova Scotia Law Reform Commission recently

issued a consultation paper on this subject (available at <http://www.lawreform.ns.ca>). Following the example of Manitoba and Saskatchewan, the Commission tentatively proposes that the rule against perpetuities should be abolished, and that if problems then arise because people are able (by accident or design) to tie up property for very long periods of time, the way to address them is by providing for a court application to vary or terminate both trusts and non-trust settlements. Our initial reaction is that, to guard against perpetuities, something more may be needed than just a court process for undoing them. We would be pleased to receive views or suggestions on this;

we will take them with us into the ULCC Working Group's discussions.

Responses to any of the above should be sent to to the address at the head of these Notes, marked for the attention of Tim Rattenbury, or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than February 1st 2011, if possible.

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