



#32: December 2012

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## 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. "Cause of action arises"**

This project is a spin-off from the 2009 *Limitation of Actions Act*. Its background is the change, over time, in judicial interpretations of when a "cause of action arises" for purposes of calculating limitation periods. The *Limitation of Actions Act* abandoned that expression, and the purpose of the present project was to identify and amend other legislative provisions that also depend upon establishing the time when a cause of action arises, since their meanings were uncertain in light of the case-law on limitation of actions.

The first part of the project was implemented by the *Law Reform (Miscellaneous Amendments) Act, 2012* (2012, c.10), which came into force on Royal Assent, June 13th, 2012. The Act amended the *Condominium Property Act*, the *Private Investigators and Security Services Act* and, notably, the pre-judgment interest provisions in ss.45 and 46 of the *Judicature Act*. The amendments are summarized in *Law Reform Notes #31*.

The second part of the project addresses the same problem of terminology in Rules 8.04 and 61.14 of the *Rules of Court*, which deal respectively with proceedings against partnerships and with examination of judgment debtors. The substance of the proposed amendments is described in *Law Reform Notes #29*.

Draft amendments to the Rules have been prepared and are to be reviewed by the Rules Committee in January. If they are approved, we anticipate that the amendments will be made in February or March 2013.

## 2. Privity of contract and the *Law Reform Act*

In *Law Reform Notes #30* and *#31* we suggested that s.4 of the *Law Reform Act*, which deals with the enforcement of contracts by third parties, should be amended so that it extends to third parties whom the contract identifies either conditionally or generically. Conditionally-identified third parties are those who would come within the scope of a contract *if* they did something that the contract contemplated *might* be done, though it also might not be. Generically-identified third parties are those who fall within a group described in terms such as "employees" or "subcontractors" but are not specifically identified.

This change was suggested in response to the New Brunswick Court of Appeal's ruling on s.4 in *Manderville v Goodfellow's Trucking Ltd*, [1999] NBJ No.75, read in light of the case-law relating to the so-called "principled exception" to privity of contract that the Supreme Court of Canada subsequently established in *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd*, [1999] SCJ No.48.

We have recently made recommendations for these amendments to be made, and we are hoping that this will be done in the 2012-13 session of the Legislative Assembly.

## 3. The definition of "parent" in the *Guardianship of Children Act*

Likewise, we recently submitted our recommendation that the definition of "parent" in s.1 of the *Guardianship of Children Act* should be amended to remove the following exclusion: "'parent' does not include the father of a child whose father and mother are not married to one another". *Law Reform Notes #30* and *#31* describe the background.

This amendment is now contained in Bill 21, *An Act to Amend the Guardianship of Children Act*, which received first reading on December 11th, 2012. If enacted in its present form, the amendment will come into force on Royal Assent.

## 4. Enforcement of money judgments

Also moving forward is our proposal for a new *Enforcement of Money Judgments Act*. This Act would overhaul the law on enforcement of money judgments, replacing legislation such as the *Absconding Debtors Act*, *Arrest and Examinations Act*, *Creditors Relief Act*, *Garnishee Act* and *Memorials and Executions Act*, as well as Rules of Court such as R.61 (Enforcement of Orders and Judgments). As currently conceived, the legislation would be drawn from a number of sources, including New Brunswick's existing law, four major reports that have been prepared in the province in the past 35 years, the Uniform Law Conference of Canada's *Uniform Civil Enforcement of Money Judgments Act* (2004), and the recent Saskatchewan legislation based on the *Uniform Act*. There would also be some new elements.

The Act will be sizeable, containing many changes from existing law, and there will be many consequential amendments. We are hopeful that this Act, too, will reach the Legislative Assembly during the 2012-13 session. We anticipate, though, that if it is passed then, it will probably not be proclaimed for a period of six to twelve months. This will give time for people to familiarize themselves with the Act, and possibly for amendments to be made, if needed, before the Act is brought into force.

## 5. Quieting of Titles Act

Our project to repeal the *Quieting of Titles Act* and replace it with a new procedure under the *Rules of Court* has been mentioned in several issues of these *Notes*, most recently in #30. *An Act to Repeal the Quieting of Title Act* was passed in 2007 (c.52) but has not yet been proclaimed. The accompanying Rule of Court has been in development since.

The draft Rule was reviewed by the Rules Committee in May 2012, and a revised draft, incorporating the changes the Committee suggested, will be considered by the Committee in January. If the draft is approved, we anticipate that the Rule will be made, and the repealing Act proclaimed, in February or March 2013, with a coming into force date several months after that.

If that is the way events unfold, we will describe the content of the Rule in the next issue of these *Notes*, which will be released before the changes take effect. The content of the Rule remains largely as outlined in *Law Reform Notes #22*. Its main features are that a provision for public notice is grafted onto the ordinary procedures for applications or actions under the *Rules of Court*, and the court's final order binds all persons, not just the parties to the proceedings.

## 6 Advance payment of special damages

*Law Reform Notes #31* contained a lengthy item suggesting that New Brunswick should enact a much-expanded version of s.265.6 of the *Insurance Act*. That section, which applies to auto accidents only, allows an advance payment of special damages to be ordered, even before liability has been officially established, if the judge is satisfied that liability *will be* established. R.47.03 of the *Rules of Court* also provides for advance payments of special damages, but only *after* liability has been established. It applies to all causes of action.

The discussion below, like the previous one, will refer to advance payments ordered before liability is established as "pre-liability advance payments" and those ordered afterwards as "post-liability advance payments". Both terms, however, deserve a brief comment to prevent misunderstanding. "Pre-liability" does not mean before liability arises; what it describes is a scenario in which, although liability has not been formally established, the motions judge is confident that it exists. "Post-liability", though it is restricted to the time after liability is established, begins as soon as this occurs, and the passage to post-liability can be swift. For example, in a series of interconnected motions at a single hearing, a pre-trial determination of a point of law under R.23 can lead directly to a summary judgment under R.22 (see *Girouard v Druet*, 2012 NBCA 40) and then to an advance payment of special damages under R.47.03 (see *Brunswick News Inc v Sears*, 2012 NBCA 32).

*Law Reform Notes #31* proposed that the expanded provision on pre-liability advance payments would have the following features:

- It would apply to all causes of action, to all plaintiffs and to all defendants.
- It would focus primarily on special damages (i.e., pecuniary loss in the pre-trial period), but in limited circumstances it would permit advance payments of general damages and of disbursements.
- It would include a restriction on lawyers' ability to deduct their fees from the advance payments awarded to their clients.
- It would probably be combined with the provision for post-liability advance payments under R.47.03, with the resulting blended provision being enacted as a new section in the *Judicature Act*.

We received a number of responses to this. Several individual lawyers wrote offering a brief comment in support of expansion, but primarily to explain why they thought the suggestion on fees was misguided. The Law Society also criticized the suggestion on fees, as did CBA-NB, who also mentioned some complexities the Department should bear in mind if it moved forward with legislation that extended to disbursements. (CBA-NB also suggested that the Department might consider expanding the provision for suit money that is now in R.72, Divorce Proceedings, to other family law matters. We are looking into this, and plan to discuss it in the next issue of these *Notes*.)

On issues other than fees, the only written criticism of our proposal came in a lengthy submission from the Canadian Medical Protective Association, who disagreed both with the general idea of an expanded pre-liability provision and with most of the specifics in the *Notes*. Two individual lawyers, in conversation, also said there should be no advance payments before liability had been established.

There are two additional factors, not mentioned in *Law Reform Notes #31*, that we have borne in mind when considering all of this.

The first, triggered by the comment that pre-liability advance payments are wrong in principle, is that the criteria for summary judgment under R.22 are not carved in stone, and that if they were made less stringent the most deserving of the cases that now fall into the pre-liability category might become post-liability cases instead. Ontario has recently relaxed its criteria for summary judgments somewhat (see *Combined Air Mechanical Services Inc v Flesch* [2011] OJ No. 5431), though an article by Joseph Griffiths in the *Lawyers Weekly* (August 31st 2012, p.10) questions whether the change has achieved its objective of resolving litigation expeditiously and with less cost.

The second additional factor is the theme of 'speedy justice when the case allows' that underlies recent Court of Appeal decisions such as *AMEC Americas Limited v MacWilliams*, 2012 NBCA 46, and *Brunswick News Inc v Sears*, 2012 NBCA 32. Both are wrongful dismissal cases. In *AMEC* Drapeau CJ commented: ". . . one discerns a greater awareness by the litigation bar of the benefits accruing from a skillful use of Rule 22 and a growing judicial openness toward summary judgment and advance payments of special damages in favour of deserving claimants. These are indisputably welcome developments in the pursuit of timely access to justice" (para.1). In *Brunswick News* Larlee JA added, when reversing a motions judge's decision not to award an advance payment under R.47.03, that "Once liability was found, an advance payment of damages should have followed, unless good cause was shown to the contrary".

After reconsidering our original proposals in light of the comments received and the additional factors just mentioned, we have revised our suggestions somewhat. We are still strongly inclined to recommend a much-expanded provision on pre-liability advance payments. However, we believe we should modify some of its details.

First, we have abandoned the idea that there should be a legislated restriction on the deduction of legal fees from advance payments. The correspondence persuaded us that this was undesirable.

Second, we are no longer considering advance payments of disbursements. Though there is attraction in the idea, it does raise different considerations than advance payments of damages, and at this point in the development of an expanded advance payments provision, confining the focus to damages alone makes the initiative less complex.

With those two issues off the table, the central issues raised in *Law Reform Notes #31* remain. Should a provision for pre-liability advance payments of damages be expanded beyond its current auto accident context? If it should be, how far should the expansion go?

On the general question of whether an expanded pre-liability provision is desirable, we continue to believe it is. Experience with s.265.6 in relation to auto accidents has shown its value, and although summary judgments (and therefore post-liability advance payments) could be made more readily available by adjusting R.22, the criteria for a summary judgment will always be stringent, since they produce a formal determination of liability, and their application is often technically-based. In a pre-liability motion under s.265.6, by contrast, the motions judge has more latitude; the decision can be more factually-based, with the judge ordering an advance payment if the probable outcome of the case is clear enough to warrant one.

Admittedly, pre-liability payments present the theoretical possibility that they might be ordered in a case where the defendant is ultimately found not liable. But in the 11 years since *Smith v Agnew* clarified the parameters of pre-liability motions under s.265.6, we have not yet noticed any reported cases in which this has happened. More frequent are cases in which summary judgments or trial judgments are reversed, both of which raise the same possibility that an advance or ordinary payment of damages may have been ordered against a defendant who is ultimately found not liable.

At present, therefore, we feel that the risk that a defendant may lose a motion for an advance payment, then win at trial and be left attempting (probably unsuccessfully) to recover the advance payment, is probably no greater for pre-liability payments than for post-liability ones.

Turning next to the scope of an expanded pre-liability provision, *Law Reform Notes #31* considered whether it should be restricted by reference to the cause of action, the characteristics of the plaintiff or the characteristics of the defendant, and in all three cases suggested not. We are still of that view, for the reasons set out in the *Notes*: that there is no such restriction at present in the post-liability situation under R.47.03; that restrictions would be likely to exclude some plaintiffs who should not be excluded; and that if there was a concern that a broad provision might expose disadvantaged defendants to the increased disadvantage of a pre-liability award against them, the best safeguard would be that the judge has a discretion not to make an award. Further comment on this would still be welcome, however, since this is the central issue in the design of an expanded provision. At present we have received only one direct comment on these significant details of an expanded pre-liability provision.

If there is to be a judicial discretion to decline to award a pre-liability advance payment, how should it be expressed? This question must now be addressed in the light of the Court of Appeal's decision in *Brunswick News Inc v Sears* that, in the post-liability scenario under R.47.03, once liability has been established an advance payment should be granted unless good cause is shown to the contrary. The Court did not elaborate on what a good cause might be.

Here we think a distinction should probably be drawn between the pre-liability and post-liability situations. Pre-liability, the rationale for having an advance payment provision is bound up with the financial circumstances of the parties as they go through disputed litigation, and an advance payment might well not be ordered if it was going to cause hardship to the defendant but little benefit to the plaintiff. Post-liability, the concern shifts; once it has been formally determined that the defendant must at least pay the plaintiff something, the primary concern is that the defendant should not be ordered to pay too much too soon.

Assuming this difference exists, how should it be expressed legislatively? It would be possible, perhaps, to leave it to the *Brunswick News Inc* criterion of "unless good cause [is] shown to the contrary", and make the reasonable assumption that the courts will apply the "good cause" test in a way that differentiates the pre-liability and post-liability situations appropriately. Alternatively, one could spell out an explicit test for the pre-liability phase to make sure that awards of pre-liability advance payments do not create or aggravate a situation of relative disadvantage for the defendant. We are inclined to follow the latter approach, though we do not have, at present, a specific form of words to put forward for consideration.

Another area where we now suggest that the pre-liability and post-liability situations should be treated slightly differently relates to the categories of damages which the advance payments can include. In the pre-liability phase, contrary to the recommendation in *Law Reform Notes #31* for an extension to general damages in some cases, we now believe that the *status quo* under s.265.6 should be maintained. This would mean that advance payments would apply to special damages only (i.e., past and future pecuniary losses in the period leading up to the trial), but that the judge, when deciding how much can safely be awarded, can take into account the fact that general damages will eventually be payable.

In the post-liability period, by contrast, some changes can be made. The scenario here is that there has been either a summary judgment or a split trial, and in either case liability has been decided, but damages have not. One thing we suggest is that it should be made clear that future pecuniary loss in the period after the decision on liability but before the assessment of damages is "special damages" for the purpose of the section. A second change would be to make post-liability advance payments of general damages available in the limited circumstances outlined in *Law Reform Notes #31*, namely, when the defendant has created a need for a special expenditure by the plaintiff, the plaintiff cannot afford that expenditure out of the special damages or otherwise, and the amount awarded will not be an overpayment in light of the unresolved dispute between the parties on the quantum of damages.

Overall, therefore, the modified suggestion we are now making on advance payments of damages would have the following features:

- It would deal with both pre-liability advance payments and post-liability advance payments, replacing both s.265.6 of the *Insurance Act* and R.47.03. It would probably be located in the *Judicature Act*, but possibly with some supplementary provisions in the *Rules of Court*.
- It would apply to all causes of action, to all plaintiffs and to all defendants.
- An advance payment ordered in the pre-liability phase of proceedings would be limited to special damages.
- An advance payment ordered in the post-liability phase would focus primarily on special damages, including future pecuniary loss in the period before trial of damages, but it could also award advance payments of general damages in limited circumstances based on the plaintiff's special need.
- The nature of the judicial discretion to award an advance payment should be clarified, with the judge having greater latitude in the pre-liability phase to consider whether awarding an advance payment would cause greater disadvantage to the defendant than the benefit it would bring to the plaintiff.

We welcome further comments. We hope to finalize our recommendations on this subject shortly after the close of the consultation period mentioned at the end of these *Notes* – February 15th, 2013.

## **B. NEW ITEMS**

### **7. The Revised Statutes of New Brunswick, 2012**

In 2003, the *Statute Revision Act* was enacted as the first step in completing a revision of the Acts of New Brunswick, the first such revision and consolidation of the Statutes of New Brunswick since 1973. In accordance with section 5 of the *Statute Revision Act*, the Attorney General deposited with the Clerk of the Legislative Assembly the *Revised Statutes, 2011*, on May 13, 2011. The Attorney General, on December 13, 2012, deposited with the Clerk the second instalment of the revised statutes, which will be cited as the *Revised Statutes, 2012*. In accordance with subsection 4(2) of the *Statute Revision Act* no changes have been made in the course of the revision that would have the effect of altering the substance or intent of a provision of an Act or that are of a law reform nature. Nevertheless, these *Notes* are a convenient vehicle for providing some general information on the revision.

The *Revised Statutes, 2012*, includes 18 Acts. They will come into force on a date to be fixed by proclamation of the Lieutenant-Governor in Council. As indicated previously, it is the intention of the Office of the Attorney General to continue to publish a number of revised Acts on a yearly basis.

The *Revised Statutes, 2012*, can be found on the Government of New Brunswick's website, at the Queen's Printer's homepage in the Annual Volume for 2012. On proclamation into force, they will also be found in the Alphabetical List of Acts.

### **8. Statute of Frauds**

In *Law Reform Notes #16* we mentioned that we intended to review the *Statute of Frauds* and expressed an initial view that the entire Act should be repealed. In recent months we have reviewed the Act in greater detail and have come to the same conclusion.

Our *Statute of Frauds* is closely based on two English Acts: the *Statute of Frauds (1677)* and the *Statute of Frauds Amendment Act, 1828*. These Acts establish writing requirements for certain kinds of agreements and other matters. Commentators have explained that the purpose of the original Act was to prevent fraud achieved through perjured testimony about oral agreements, and that such fraud was a problem in 1677 because, among other reasons, the parties to an agreement were not permitted to testify.

The laws of evidence and contract have changed since then, and, as a result, law reform agencies in Canada and elsewhere have called for the partial or complete repeal of either the English Acts (in the jurisdictions where they are in force as received law) or the local legislation based on the English Acts. The most recent Canadian law reform report was prepared in 1991 for the Newfoundland Law Reform Commission by Justice Joseph Robertson, now of our Court of Appeal but at the time a law professor at the University of New Brunswick. Justice Robertson recommended that both English Acts be repealed and that only a few provisions be retained through replacement legislation. Notably, he recommended that the writing requirements for land contracts not be retained. A subsequent report by New Zealand's Law Commission recommended that their Act be repealed in its entirety and not replaced.

A number of legislatures in Canada and other jurisdictions have done away with portions of their legislation. For instance, British Columbia repealed its *Statute of Frauds* but added to another Act provisions regarding writing requirements for land contracts and guarantees. Manitoba went further. It repealed the English Acts and did not enact replacement legislation. We believe that New Brunswick should follow Manitoba's example.

The *Statute of Frauds* provides that the following kinds of agreements are not enforceable unless the agreement, or a note or memorandum of the agreement, is in writing and is signed by the person to be charged (i.e., the defendant):

- promises by executors and administrators to pay damages out of their own estate (s.1(a));
- guarantees (s.1(b), supplemented by ss.2 and 3);
- agreements made upon consideration of marriage (s.1(c));
- contracts relating to an interest in land (s.1(d));
- agreements that are not to be performed within one year (s.1(e)); and
- agreements concerning commissions on real property transactions (s.6).

The Act also imposes writing requirements for:

- representations as to credit worthiness (s.4);
- ratification of minors' contracts (s.5);
- conveyances of interests in land (ss. 7-8);
- the creation of trusts of interests in land (s.9); and
- grants and assignments of trusts (s.10).

One provision of the Act, s.12, does not relate to writing requirements. It deals with the liability of executors and heirs for judgment debts of the deceased.

The repeal of most of these provisions is broadly supported by the law reform literature, on the basis that they are obsolete, redundant or ineffective. For example:

- The requirements relating to promises by executors and administrators to pay damages out of their own estate date from a time when executors felt a moral obligation to make such promises because they took the residuary estate beneficially if the deceased made no residuary gift, which is no longer the case.
- The requirements relating to conveyances and commissions on real property transactions have been displaced by the *Property Act*, the *Land Titles Act* and the *Real Estate Agents Act*.
- The requirements relating to the creation and granting of trusts have little or no effect as the courts have long enforced oral declarations and dispositions of trusts through the equitable doctrine of fraud and other doctrines.

On two of the Act's provisions – writing requirements for land contracts (s.1(b)) and guarantees (s.1(d)) – opinions are divided. Proponents of repeal make several arguments. First, the writing requirements promote more fraud and injustice than they prevent, since they allow a party to renege on an oral agreement which both parties understood to be binding. Second, the courts' creativity in circumventing the writing requirements has led to complexity and uncertainty in the law, which has generated a significant amount of litigation. Third, the writing requirements are inconsistent: an agreement for the purchase of a modest property requires writing, but an agreement for the purchase of goods or securities worth millions of dollars does not.

Those in favour of retaining these two writing requirements argue that they are important because written agreements provide a clear indication that the parties intended to enter into a binding agreement. Without

written agreements parties and courts alike would find it difficult to know whether a binding agreement had been made. As a result, parties could be held to oral agreements that they did not intend to be bound by.

Proponents of repeal point out in response that since the writing requirements can be satisfied by an incomplete, informal note they do not provide a clear indication of a binding agreement.

A recent case from our Court of Appeal, *Girouard v. Druet*, 2012 NBCA 40, illustrates this point. Two individuals negotiated, through a quick exchange of e-mails, the purchase of a condominium unit that had been advertised on Kijiji. The court found that the e-mails satisfied the requirement for a written "memorandum" of the agreement, and assumed (without deciding) that the *Statute of Frauds*' signature requirement was met. But the Court went on find that the circumstances – including the purchaser's stated intention to have a written contract prepared – indicated that the parties did not intend to enter into a binding agreement.

Proponents of repeal also make the point that the repeal of the writing requirements would not prevent formal written agreements from functioning, in most cases, as an indication of the parties' intention to enter into a binding agreement. Formal written agreements would continue to be used for land contracts and guarantees (as a result of custom, prudence, and the need to record numerous and complex terms), and thus the absence of a formal written agreement could suggest that the parties did not intend to be bound.

This point is illustrated by *Megill-Stephenson Co. v. Woo*, [1989] M.J. No. 271 (C.A.), a Manitoba case decided six years after the writing requirements were repealed in that province. The purchaser of a commercial property argued that the parties had made a binding oral agreement. The Court held that the oral agreement was not binding because the vendor expected that he would not be bound until he had signed the contract. The court observed: "In spite of the repeal of *The Statute of Frauds*, the practice in dealing with the purchase and sale of land is to have the contracts in written form, and that was the obvious expectation between the parties in this dispute."

Taken together, *Girouard* and *Megill-Stephenson* suggest that regardless of whether there are writing requirements, the courts will consider whether the parties intended to be bound and will look at the presence or absence of a formal written agreement when deciding that issue. Thus, repeal of the writing requirements would not result in parties being held to oral agreements they did not intend to be bound by. Rather, it would result in parties being held to oral agreements they did intend to be bound by.

We find the arguments for repeal of the writing requirements persuasive. It appears to us that although formal written agreements can be helpful in resolving the issue of contractual intent, requirements that agreements *must* be writing are not. And though the *Statute of Frauds* was intended to prevent fraud, it instead opens the door to unfairness. We therefore believe the Act should be repealed in its entirety.

*Responses to any of the above should be sent 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](mailto:lawreform-reformedudroit@gnb.ca). We would like to receive replies no later than February 15th 2013, if possible.*

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