#33: June 2013

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 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"

The Rules Committee approved in January the draft amendments to the Rules of Court described in *Law Reform Notes #29* and *#31*. The amendments reword two Rules that currently involve identifying the time when a cause of action arises, an issue on which the case-law has evolved since the Rules were enacted, making their current wording unsatisfactory.

Enactment of the amendments was delayed during the legislative session, but we hope it will take place during the summer.

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

An Act to Amend the Law Reform Act, Bill 38 of the current legislative session, was awaiting Committee of the Whole at the time these Notes were prepared. The Bill clarifies that s.4 of the *Law Reform Act*, under which third parties can enforce contractual provisions that are intended for their benefit, extends to third parties who are intended to benefit only if certain circumstances occur, and to those who are not named by the contract but come within a class of persons the contract is intended to benefit.

The background to this amendment is explained in *Law Reform Notes #30*. The amendment comes into force on August 1, 2013, and will apply to breaches of contract occurring on or after that date.

3. Enforcement of money judgments

The *Enforcement of Money Judgments Act* (Bill 56) and *An Act Respecting the Enforcement of Money Judgments Act* (Bill 65) were introduced in the Legislative Assembly in May and were also awaiting debate in Committee of the Whole at the time these Notes were prepared. Bill 56 is the primary Act; Bill 65 repeals or amends more than 40 related Acts. Together they represent a complete overhaul and modernization of the law relating to the enforcement of money judgments.

The Acts are subject to proclamation, and because of the volume of the changes they contain, it will be some time before they are brought into force. People will therefore have plenty of time to familiarize themselves with the new legislation. It is also possible that the legislation may be fine-tuned in some respects before it is brought into force. With major legislative initiatives such as this, adjustments of this kind are not unusual.

The *Enforcement of Money Judgments Act* applies to New Brunswick judgments for the payment of a fixed sum of money such as damages or costs, and to other judgments and orders that New Brunswick law allows to be enforced as though they were money judgments of the Court of Queen's Bench. It does not apply to fine enforcement or the enforcement of support orders, which are dealt with by other legislation.

The Act brings all of the judgment debtor's assets within the scope of enforcement action by the sheriff, including assets that can currently only be seized by garnishment. It contains exemptions designed to ensure that judgment debtors who are individuals are always left with the basic necessities for supporting themselves. Interested parties who disagree with the sheriff's actions or decisions will be able to challenge them in the courts.

The main steps in the enforcement procedures are these.

- Even before a judgment has been obtained, a plaintiff will be able to apply to the court for a "preservation order" to prevent a defendant from hiding or disposing of assets to hinder the future enforcement of a judgment.

- When the judgment is obtained, the judgment creditor can register it under the *Personal Property Security Act.* Registration binds the judgment debtor's personal property. An additional registration under the *Registry Act* or the *Land Titles Act* is necessary to bind the judgment debtor's land.

- Once the judgment is registered under the *Personal Property Security Act* the judgment creditor can give an enforcement instruction to the sheriff, and can require the judgment debtor to attend an examination by the clerk of the court and disclose information about his or her assets.

- When property of the judgment debtor has been identified, the sheriff can seize it either physically or by serving a notice of seizure. The sheriff has the power to enter land to carry out a seizure, using reasonable force if necessary. Seizure bars the judgment debtor from disposing of the property without the sheriff's consent. The sheriff has the power to deal with seized property in any way that the judgment debtor could for the purpose of preserving it or maintaining it or realizing its value. There are special provisions clarifying procedures and alternatives in relation to particular kinds of

property, such as co-owned property, bank accounts and wages. If the judgment debtor is an individual, some kinds of property, such as necessary furniture, medical supplies and a vehicle, will be exempt from sale by the sheriff.

- The money that the sheriff realizes through the enforcement process will be used to pay off the sheriff's enforcement expenses first and the judgment debt after that. If multiple judgments are enforced at the same time and the enforcement proceeds are insufficient to pay them all, the money recovered will be shared out in proportion to the size of the judgment debts.

- As an additional or alternative means of judgment enforcement, the court will be able to appoint a receiver of some or all of a judgment debtor's property.

- The Lieutenant-Governor in Council will have regulation-making powers, relating to forms, fees, procedures and so on.

The amendments in the *Act Respecting the Enforcement of Money Judgments Act* fall into three broad groups.

- One group consists of the repeal of five very old Acts relating to the enforcement of money judgments: the *Absconding Debtors Act*, *Arrest and Examinations Act*, *Creditors Relief Act*, *Garnishee Act* and *Memorials and Executions Act.* The *Enforcement of Money Judgments Act* is replacing them.

- Another group amends legislation that interrelates with the *Enforcement of Money Judgments Act*, such as the *Personal Property Security Act*, *Land Titles Act*, *Registry Act, Landlord and Tenant Act, Partnership Act* and *Sale of Lands Publication Act,* as well as the *Rules of Court*. This is the group where the amendments will have some effect on an ongoing basis.

- Finally, there are a number of small amendments to make the terminology of other Acts consistent with the *Enforcement of Money Judgments Act*. The amendments remove words such as "garnishment" and "memorial of judgment", which will no longer be used.

These amendments will all be brought into force at the same time as the *Enforcement of Money Judgments Act*.

4. *Quieting of Titles Act*

The proposed new Rule of Court that will, in effect, replace the *Quieting of Titles Act*, was reviewed and approved by the Rules Committee in January. However, like the amendments relating to the expression "cause of action arises", the enactment of the Rule has been delayed by the legislative session. We now hope this will occur during the summer.

We are still intending to allow several months after that before the Rule comes into force. Its main features are summarized in *Law Reform Notes* #32. A fuller description will be provided in the next issue of these Notes.

5. Advance payment of special damages

Law Reform Notes #32, which presented our revised suggestions on advance payment of special damages, generated three additional responses. The first, from a practitioner, urged us to ensure that if R.47.03 is replaced, its replacement should retain the idea that an advance payment can be ordered in a split trial even if the finding of liability in the first phase of the trial is appealed (see *Stamper v CNR* [1988] 1 SCR 396). The second, also from a practitioner, supported the expansion of advance payments, urged that the expansion should at least include occupier's liability cases, and suggested that on a motion for an advance payment the judge should be informed of whether the defendant was insured. The third response was a further submission from the Canadian Medical Protective Association, reiterating the general opposition to pre-liability advance payments it had previously presented, but also suggesting some narrowings of the scope of our proposal if it did go ahead.

On the basis of everything we have seen so far, we have decided to recommend an expanded advance payments provision along the lines suggested in *Law Reform Notes #32.* Its main elements would be the following.

- 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 damages are decided, but it could also include elements of general damages in limited circumstances.

Items that we decided needed further clarification in response to the comments received were (a) the circumstances in which general damages could form part of, or be relevant to, an advance payment, and (b) the test to be applied by the judge in deciding whether or not to order an advance payment in the pre-liability phase of the proceedings.

As for general damages (by which we mean both non-pecuniary loss and post-trial pecuniary loss), we believe that the new provision should reflect, in relation to all advance payments, the point made by Drapeau JA in *Smith v Agnew,* 2001 NBCA 83, that an advance payment of special damages "might justifiably be more generous if the likely award for general damages is such that it causes any risk of overcompensation to atrophy" (para.48). This is not, though, an advance payment of general damages. It is simply a recognition that the judge can bear in mind the prospective award of general damages when deciding how much can safely be awarded as an advance payment of special damages.

In relation to true advance payments of general damages, we are recommending that these should only be available in the post-liability phase, should only relate to pecuniary loss, and should only be ordered if the plaintiff can demonstrate the need for a special expenditure, sooner rather than later, of a kind that the judge is satisfied will eventually form part of the award of pecuniary damages.

Turning to the test to be applied by the judge when deciding whether to order an advance payment, we believe that for post-liability awards the approach outlined by Larlee JA in *Brunswick News Inc v Sears*,

2012 NBCA 32, should be maintained: "Once liability was found, an advance payment of damages should have followed, unless good cause was shown to the contrary".

In relation to pre-liability awards, however, we feel that more allowance should be made for the defendant's possible inability to pay the award. Though we accept, in general, the statement in *Smith v Agnew* that "neither the plaintiff's needs and resources nor the defendant's means drive the application of s.265.6" of the *Insurance Act*, and believe that the plaintiff should not normally be required to prove need, we do consider that a pre-liability advance payment should not be ordered if it will cause hardship to the defendant but little benefit to the plaintiff.

Turning, finally, to the points made by the practitioners, we agree that the new provision should ensure that advance payments can be ordered even though the decision on liability in a split trial is being appealed. We also agree that the motions judge should be able to know whether the defendant is insured, since this may affect, in particular, the determination of whether an advance payment would cause hardship to the defendant.

6. Civil jury

In *Law Reform Notes #29* we mentioned that we were proposing to recommend the abolition of the civil jury procedure. It is very little used in New Brunswick, and this seems to have been the case for many years.

We received no comment from practitioners, but in subsequent discussion in the Rules Committee it was suggested that a better option at this time might be to retain a procedure for civil jury trials, but with some amendments.

The existing procedure in Rule 46 of the Rules of Court has two elements. R.46.01(1) says that a judge, on motion by a party, may order a jury trial "if the questions in issue in an action are more fit for trial by a jury than by a judge". R.46.01(2) then singles out six causes of action – libel, slander, breach of promise of marriage, malicious arrest, malicious prosecution and false imprisonment – that "shall be tried by jury" if any party serves a jury notice.

The amendments suggested at the Rules Committee were:

- Restrict civil jury trials to the causes of action listed in R.46.01(2).
- Remove breach of promise of marriage from the list.
- Make jury trials discretionary, rather than automatic, if a jury notice is served, with the judge deciding whether a jury trial is just and convenient.
- Spell out that the judge's power under R.1.08 to "impose such terms and give such directions as are just" applies and that it includes the power to determine liability for and recoverability of the costs of the jury as a disbursement.

After reflection, we have decided to proceed as suggested at the Rules Committee. We are therefore developing amendments to Rule 46 as described above.

7. *Statute of Frauds*

In *Law Reform Notes #32* we proposed that the *Statute of Frauds* should be repealed. The only response we received was a brief suggestion, in conversation, that we should think again about the writing requirements relating to land contracts and the ratification of minors' contracts. After re-examining those provisions, we still believe they should be repealed along with the rest of the *Statute of Frauds*, and we plan to make that recommendation.

The discussion of land contracts in *Law Reform Notes #32* outlined the different positions that law reform agencies and legislatures elsewhere have taken, and explained our reasons for thinking that having a legal *requirement* of writing and signature for land contracts was, on balance, more problematic than beneficial. Having reconsidered this issue, that is still our view.

Ratification of minors' contracts (s.5 of the *Statute of Frauds*) was not discussed specifically in *Law Reform Notes #32*. Law reform agencies elsewhere have taken various approaches to their equivalents of s.5, which is based on English legislation that was enacted in 1828 and repealed in 1874.

Considering this again, we note that at the time when the ratification occurs, the person ratifying the contract is an adult, not a minor. To say at this stage, when protection of minors is not an issue, that a ratification must be in writing and signed in order to be effective seems to us to be subject to the same objection as the other provisions of the *Statute of Frauds*. It gives too much weight to the formality of writing rather than the substance of the transaction, and is more likely to cause injustice than to prevent it. We therefore consider that s.5 should not be retained.

8. A new *Trustee Act*

In *Law Reform Notes #28* we mentioned that the Uniform Law Conference of Canada was developing a *Uniform Trustee Act* which we hoped could serve as the basis for a new *Trustees Act* in New Brunswick. The Conference adopted its Act in 2012, and we are now beginning to consider it for possible enactment. The *Uniform Trustee Act* and the final report of the Conference's working group are available at www.ulcc.ca as civil section documents for the 2012 annual meeting.

Readers are encouraged to review the ULCC materials and give us their comments. Our own position at present is as described in *Law Reform Notes #28.* In general, we are inclined to recommend adoption of the Uniform Act. We do, however, have reservations about its provisions relating to the prudent investor rule (we are not sure that existing New Brunswick law needs changing), to non-charitable purpose trusts (we are uncertain how far to move in this direction, if at all), and to the rule against perpetuities (which obviously needs reform, but we are not sure that outright repeal is wise).

Apart from this, there are also questions about how a new *Trustees Act* would interconnect with other Acts, some of which expressly cross-reference the existing *Trustees Act*, while others would also be affected if, as recommended by the ULCC, the new Act applies to all trusts created by legislation. The interplay between trustee legislation and estate administration also needs study, since New Brunswick's existing *Trustees Act* extends to personal representatives but the *Uniform Trustee Act* does not. There is therefore a danger that some things might fall through the cracks if we simply follow the ULCC's approach.

All in all, the adoption of a new *Trustees Act* is a major exercise that has the potential to lead in various directions – possibly even to the overhaul of trust-type statutes that badly need updating, such as the *Infirm Persons Act* and Part I of the *Devolution of Estates Act*. We have begun considering these issues, but for now the primary focus is on the *Trustees Act* itself.

B. NEW ITEMS

9. International interests in mobile equipment

For the past few years, federal officials have been encouraging the provinces and territories to adopt the *Convention on International Interests in Mobile Equipment* and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*. Between them, these two documents establish an international PPSA-type system for the registration and enforcement of interests associated with the financing and purchase of aircraft.

Federal officials inform us that New Brunswick is now the only Canadian jurisdiction that has not passed legislation to adopt the convention (though not all of these Acts are in force yet). We are now considering doing so.

The convention applies to three kinds of property -- airframes, aircraft engines and helicopters – and to four kinds of interests in them, namely security agreements, title reservation agreements, leasing agreements and contracts of sale. The convention sets formal requirements for the creation of these interests, and provides for registration, assignment, priorities and default.

As usual for international conventions, this is an all or nothing package. Adopting jurisdictions cannot alter its content, though the convention does permit them to deposit declarations that could enable specified non-consensual interests (such as tax liens) to be registered, or could give unregistered non-consensual interests priority over registered consensual ones. They can also make declarations relating to purely internal transactions and some other matters. We will be examining these options over the coming months, as well as the question of whether consequential amendments to other New Brunswick legislation such as the *Personal Property Security Act* will be required if the convention is adopted.

In the meantime, we welcome comments. Full information on the convention and its adoption in other countries can be found on the Unidroit website at www.unidroit.org. A model Act for implementing the convention was adopted by the Uniform Law Conference of Canada in 2001, and is available at www.ulcc.ca, listed as a civil section document for the 2002 annual meeting. An informative report on the convention is also available there.

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. We would like to receive replies no later than July 31st 2013, if possible.

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