
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. Statute of Frauds

An Act to Repeal the Statute of Frauds (c.47, 2014) received Royal Assent in May. This Act repeals the Statute of Frauds in its entirety and thereby removes the writing requirements that the Statute of Frauds imposes on various kinds of agreements (including guarantees and contracts relating to interests in land) and other matters.

The reasons for repealing the Statute of Frauds are described in *Law Reform Notes* #32 and #33.

The repeal will come into force on October 1, 2014. The Statute of Frauds will continue to apply after that date in proceedings commenced before that date.

2. International Interests in Mobile Equipment Act

The International Interests in Mobile Equipment Act also received Royal Assent in May. The Act implements 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 in New Brunswick. As explained in *Law Reform Notes* #33, these two documents establish an international PPSA-type system for the registration and enforcement of security agreements, title reservation

agreements, leasing agreements and contracts of sale relating to large and medium-sized airframes, aircraft engines and helicopters.

The full texts of the Convention and the Protocol are in Schedules A and B of the Act. S.5 of the Act gives them the force of law in New Brunswick.

The *International Interests in Mobile Equipment Act* is not subject to proclamation. Technically, it came into force on Royal Assent. However, s.5 states that the Convention and Protocol only have the force of law "From the day determined under Article 49 of the Convention and Article XXVIII of the Aircraft Protocol". That day is at least three months after the federal government, at the provincial government's request, ratifies the Convention and Protocol on behalf of New Brunswick. There is therefore an automatic time-lag built into the Act. We will provide further information in due course about the day when the Convention and Protocol actually begin to have the force of law in New Brunswick.

3. Quieting of Titles

The proposed new Rule of Court to replace the *Quieting of Titles Act*, which has been mentioned in several issues of these Notes, was posted on the government's website for public comment in April. No comments were received by the deadline of May 26th. We are therefore recommending the formal adoption of the Rule and, with it, the proclamation of *An Act to Repeal the Quieting of Titles Act* (c.52, 2007). The proposed coming into force date is November 1, 2014.

The new Rule is headed "Title Certifications", and replaces the existing Rule 70 ("Proceedings under Quieting of Titles Act"). The new Rule is similar in purpose to the *Quieting of Titles Act* in that it allows an applicant to obtain a declaration about title that binds everyone, even persons unknown. An applicant does not have to proceed under this Rule if all he or she needs is a declaration that binds identified parties.

Like the *Quieting of Titles Act*, the Rule provides for two kinds of orders, though it uses different terminology. There can be a "full title declaration" certifying that a person is the owner of an identified parcel of land (this is equivalent to a certificate of title under the *Quieting of Titles Act*); and there can be a "limited title declaration" certifying any lesser interest, encumbrance, fact or matter (this is equivalent to a declaration under s.26 of *Quieting of Titles Act*). Either form of "title declaration" is obtained through an ordinary action or application, but with some special provisions tacked on by the new Rule.

The most important of them deals with public notice. The content of this is similar to the *Quieting of Titles Act*, but a procedural difference is that notice will be given *before* proceedings are commenced. The response, or lack of it, will enable the prospective applicant to decide whether the proceedings go ahead (a) as an uncontested application, (b) as a contested action or application (depending on the nature of the dispute), or (c) not at all (the prospective applicant may decide to back out after receiving objections). If the proceedings do go ahead, people who received the preliminary notice but did not object are not made parties, but the applicant must notify them of the proceedings. This gives them a second opportunity to raise an objection.

Several provisions of the new Rule draw heavily on the *Quieting of Titles Act*, such as the requirements as to the documents to be provided to obtain a "title declaration". Others will be less familiar. The Rule makes several references to the *Land Titles Act* and the *Registry Act*, with the aim of ensuring that "title

declarations" obtained under this Rule can be easily integrated into the two land registry systems, and that the Registrar General is kept informed and is able to become involved if he needs to.

4. "Cause of action arises"

Also posted on the government website in April was the draft amendment to the Rules of Court rewording Rule 8 (disclosure of partners) and Rule 61 (examination of judgment debtors) to remove references to the time when a "cause of action arises". The background is explained in *Law Reform Notes #29*.

No comment was received, and we have recommended the adoption of this amendment, with a coming into force date of September 1, 2014.

5. Enforcement of money judgments

Preparations are continuing for the proclamation of the *Enforcement of Money Judgments Act* (c.23, 2013) and *An Act Respecting the Enforcement of Money Judgments Act* (c.32, 2013). These Acts establish a new system for the enforcement of money judgments in New Brunswick and repeal a number of existing Acts such as the *Memorials and Executions Act*, the *Creditors Relief Act* and the *Garnishee Act*.

During the spring sitting of the Legislative Assembly some minor amendments were made to the new legislation. See *An Act to Amend the Enforcement of Money Judgments Act* (c.56, 2014) and *An Act to Amend an Act Respecting the Enforcement of Money Judgments Act* (c.57, 2014). The amendments fine-tune what was enacted last year; they include some corrections and rewordings and make adjustments to the operational details of several provisions.

We are currently focusing on the regulations, forms and procedures that will be required under the legislation. There is still much work to be done, but we hope to be in a position to recommend proclamation before the end of the year.

6. A new Trustees Act

As soon as our work on the *Enforcement of Money Judgements Act* allows, attention will turn to the proposed new *Trustees Act* that was mentioned in *Law Reform Notes #28, #33 and #34*. This is to be based on the Uniform Law Conference of Canada's *Uniform Trustee Act* (2012). *Law Reform Notes #28*, in particular, provides information about the content of the Uniform Act and adds comments on some of its provisions. We would still welcome feedback.

This Note, however, relates to the many other Acts that interconnect with the existing *Trustees Act* and will need consideration if a new Act replaces it. The range of subject matter is broad. If readers are familiar with the interaction between any of these provisions and the *Trustees Act*, we would welcome their input on issues to be borne in mind as this project proceeds.

We have so far identified the following.

a. Acts relating to trusts

These Acts deal with various features of the law of trusts, though only the *Public Trustee Act* mentions the *Trustees Act* (see c, below).

Conflict of Laws Rules for Trusts Act.

International Trusts Act,

Loan and Trust Companies Act.

Property Act (specific provisions such as ss.3, 20 and 21).

Public Trustee Act.

Note also that the definition of "trust" in the *Trustees Act* includes "the duties incident to the office of personal representative of a deceased person".

b. Broad cross-references to the Trustees Act

S.6 of the *Presumption of Death Act* deems the holder of a returning absentee's property to be a trustee. S.4.1 of the *Family Services Act* and s.8 of its *General Administration Regulation* give the Minister of Social Development the powers and duties of a trustee.

c. Specific cross-references – investment powers

Provisions adopting the investment powers of a trustee are the largest group of cross-references. Some are worded in ways that seem better suited to the old-style 'legal list' of authorized trustee investments that existed before 1971 than to the current 'prudent investor' rule.

Adult Education and Training Act, s.6.

Arts Development Trust Fund Act, s.1.

Environmental Trust Fund Act, s.1.

Firefighters' Compensation Act - General Regulation s.8.

Infirm Persons Act, s.2.

Interpretation Act, s.38.

Municipal Debentures Act, s.23.

Municipalities Act – Reserve Fund Regulation, s.8

New Brunswick Investment Management Corporation Act, s.17.

New Brunswick Housing Act, s.14.

Private Occupational Training Act, s.6.

Public Trustee Act, s.10.

Regional Service Delivery Act – General Regulation, s.19.

Sport Development Trust Fund Act, s.2.

Workers' Compensation Act – Pension Fund Regulation, s.3.

Workplace Health, Safety and Compensation Commission Act, s.24.

d. Other specific cross-references

R.3.08 of the *Probate Rules* provides for executors and administrators to be compensated in accordance with the *Trustees Act*. R.11.01(d) of the *Rules of Court* relates to approvals of variations of trusts. S.72(1) of the *Workers' Compensation Act* refers to the *Trustees Act* in connection with the priority of unpaid assessments.

e. Analogous provisions

There are also provisions such as the estate management sections of the *Devolution of Estates Act* and the *Infirm Persons Act* that relate to trustee-type responsibilities and are badly dated. They could potentially be modernized in light of a new *Trustees Act*.

Are there any observations on the interaction between any of the provisions above and either the existing *Trustees Act* or a new one?

B. NEW ITEMS

7. Uniform Reviewable Transactions Act

We are considering whether to recommend that the *Uniform Reviewable Transactions Act* be implemented in New Brunswick. The Act was adopted by the Uniform Law Conference of Canada in 2012. The text of the Act with extensive commentary is available on the ULCC website, under the heading “Uniform Acts”.

The Act is intended to replace the existing legislation and common law on fraudulent preferences and fraudulent conveyances. If New Brunswick were to adopt the Act, it would likely replace both the *Assignments and Preferences Act*, which was originally enacted in 1895 (the provisions on assignments were repealed in 2005), and the *Fraudulent Conveyances Act, 1571* (also known as the *Statute of Elizabeth*), an English Act that remains in force in New Brunswick as received law.

The Uniform Act is divided into five Parts.

Part I contains definitions and general provisions.

Part II relates to fraudulent conveyances (or, in the terminology of the Act, “transactions at undervalue and fraudulent transactions”) and is intended to protect a creditor’s ability to recover a claim through judgment enforcement legislation. Under this Part, the court may grant relief to a creditor when a debtor transfers property to, or otherwise confers value on, a transferee in the following circumstances:

- (a) the debtor is insolvent and the transferee provides no consideration or consideration worth “conspicuously less” than the value conferred by the debtor;
- (b) the debtor’s “primary intention” is to hinder the creditor’s right to recover the claim, the creditor’s ability to recover the claim is “materially hindered”, and the transferee provides no consideration or consideration worth “conspicuously less” than the value conferred by the debtor;
or
- (c) the debtor’s “primary intention” is to hinder the creditor’s right to recover the claim, the creditor’s ability to recover the claim is “materially hindered”, and the transferee intended to assist the debtor (s.7(1)).

Part III relates to fraudulent preferences (“preferential creditor transactions”) and is intended to protect a creditor’s right, under judgment enforcement legislation, to a pro rata share of the debtor’s property. Under this Part, the court may grant relief to a creditor if an insolvent debtor makes a payment to another creditor who is not “dealing at arm’s length” with the debtor (s.13). The concept of “arm’s length” dealings ties in with provisions of the federal *Bankruptcy and Insolvency Act* and the case law under that Act.

Part IV provides for remedies and other matters, including limitation periods.

Part V repeals the *Statute of Elizabeth* and the relevant fraudulent preferences legislation.

We will be reviewing the Uniform Act closely over the coming months. We welcome comments on the Act, and we are especially hoping for comments on the grounds for relief under Part II (s.7(1)) and Part III (s.13), which are summarized above. These are central features of the Act. Other provisions that may warrant comment include those that deal with secured creditors (s.3,4), spousal transactions (ss.8(2)(a), 10(2), 14), and the connection to judgment enforcement legislation (i.e., the *Enforcement of Money Judgments Act*) (s.18(3)).

By mentioning these provisions, we do not mean to limit readers' responses. We welcome comments on any aspect of the Act and on any issue related to reform of the law of fraudulent preferences and fraudulent conveyances.

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 15th, 2014, if possible.

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