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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 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. International Interests in Mobile Equipment Act***

The *International Interests in Mobile Equipment Act*, which was passed in May 2014, implements in New Brunswick two international instruments: 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 the previous issue of the *Law Reform Notes* we explained that we had proposed an amendment to the Act relating to the date on which the Convention and the Protocol will come into effect in New Brunswick. That amendment has now been made.

In April, the Lieutenant-Governor in Council made an order-in-council authorizing the Attorney General to request the federal government to make declarations that the Convention and the Protocol are to extend to New Brunswick and in May the Attorney General made this request. The next step is for the federal government to make the declarations by depositing a document with UNIDROIT, the organization that administers the Convention and the Protocol. Six months after the federal government makes the declarations, the Convention and the Protocol will come into effect in New Brunswick.

We hope to advise readers of the date on which the Convention and the Protocol will come into effect in the next issue of the *Law Reform Notes*.

## 2. Enforcement of Money Judgments Act

Minor amendments were made to the *Enforcement of Money Judgments Act* during the spring sitting of the Legislative Assembly. The amendments clarify the regulation-making powers in the Act and make some small corrections.

We anticipate that the draft regulations under the Act will be posted to the government website for draft regulations in the summer, and we hope to be in a position to proclaim the legislation before the end of the year.

## 3. A new Trustees Act

The new *Trustees Act* that has been referred to in several previous issues of these *Notes* was also enacted in the spring sitting of the Legislative Assembly. It is substantially modelled on the Uniform Law Conference of Canada's *Uniform Trustee Act*, though with many changes of wording and some changes of substance.

A second Act called *An Act Respecting the Trustees Act* contains a number of consequential amendments. Most of them are to Acts that contain cross-references to the investment powers of trustees

The new *Trustees Act* is lengthy. Its Part and Division headings provide an overview of its contents.

- Part 1. Definitions and Application
- Part 2. Appointment and Removal of a Trustee
  - Division A. Appointment of Trustee
  - Division B. Termination of Trusteeship
- Part 3. Vesting of Property
- Part 4. Duties and Powers of Trustees
  - Division A. Duties
  - Division B. General Administrative Powers
  - Division C. Investment Powers
  - Division E. Distributive Powers
  - Division F. Delegation
  - Division G. Miscellaneous
- Part 5. Variation and Termination of Trusts
- Part 6. Trustee Compensation and Accounts
- Part 7. Charitable Trusts and Charitable Gifts
- Part 8. Additional Powers of the Court
- Part 9. General
- Part 10. Repeal and Commencement

The Act as a whole does not apply to personal representatives, though Part 6, on trustee compensation and accounts, does. With some exceptions, the Act applies to existing trusts as well as to trusts established after the Act comes into force. The provisions on the powers of trustees can be displaced by a trust instrument that provides different powers.

Both the *Trustees Act* and *An Act Respecting the Trustees Act* are subject to proclamation. Because of the scope and variety of the changes the legislation involves, we plan to allow several months for people

to become familiar with the legislation before we consider proclaiming it. If, during this period, people bring to our attention issues relating to or arising out of particular provisions, we will be happy to consider them.

#### 4. Debtor Transactions Act

Another new Act passed in the spring sitting is the *Debtor Transactions Act*. This Act is modelled on the Uniform Law Conference of Canada's *Uniform Reviewable Transactions Act*, which was discussed in the previous two issues of the *Law Reform Notes*. As with the new *Trustees Act*, this Act has many changes of wording and a few changes of substance from the Uniform Act. It replaces the *Assignments and Preferences Act* and the *Statute of Elizabeth (1571)* as the legislation governing fraudulent conveyances and fraudulent preferences.

The Act is divided into six parts:

- Part 1 – Preliminary Matters. This Part includes definitions and provisions relating to court applications.
- Part 2 – Transactions. This Part relates to transactions between debtors and non-creditor transferees. Among other things, it provides that the court may grant relief to an applicant in relation to a transaction in which
  - the debtor was insolvent and received no consideration or consideration worth conspicuously less than the property or other benefit conferred by the debtor (s.6(1)(a));
  - the debtor intended to hinder or defeat the creditor's ability to enforce the claim, the creditor's ability to enforce the claim was materially hindered, and the debtor received no consideration or consideration worth conspicuously less than the benefit (s.6(1)(b)); or
  - the debtor intended to hinder or defeat the creditor's ability to enforce the claim, the creditor's ability to enforce the claim was materially hindered, and the transferee intended to assist the debtor (s.6(1)(c)).
- Part 3 – Creditor Transactions. This Part relates to transactions between debtors and creditors. It provides that the court may grant relief in relation to a transaction in which the debtor was insolvent and the parties were not dealing "at arm's length" (s.12(2)).
- Part 4 – Orders. This Part sets out the types of orders that the court may make and the objectives of those orders. It includes provisions relating to secured creditors, exempt property and other matters.
- Part 5 – General Provisions. This Part provides for injunctions and limitation periods.
- Part 6 – Transitional Provision, Repeal and Commencement. This Part repeals the *Assignments and Preferences Act*, provides that the *Statute of Elizabeth* is no longer in force in New Brunswick, and provides that the Act will come into force on proclamation.

We plan to propose that the Act be proclaimed into force at the same time as the *Enforcement of Money Judgments Act*.

## 5. Advance Payments of Special Damages

Issues #31, #32 and #33 of these *Notes* discussed the possibility of developing an expanded version of s.265.6 of the *Insurance Act*, which permits a judge to order an advance payment of special damages "if the judge is satisfied that the plaintiff will prove that the defendant is liable for those damages". The section applies to auto accidents only. (Rule 47.03(3) of the Rules of Court is broader, but only applies after a judgment on liability.) In issue #33 we said we had decided to recommend that advance payments of the kind the *Insurance Act* permits should be made available in all claims for damages, whatever the cause of action and whoever the plaintiff or defendant.

We made that recommendation, but in subsequent discussions within the Department it was suggested that moving from where we are now, a very limited advance payments provision, to one that would be available in all claims for damages, might be going too far, too fast. As a result of this we are requesting feedback, one more time, on how far an expanded provision for advance payments of special damages should go. Should it apply to all claims for damages, to all plaintiffs and to all defendants, as we previously concluded? Or should it be more limited? If the latter, where should the line be drawn?

The previous issues of these *Notes* present the case for not creating limits. Briefly, it is that the rationale for making these advance payments available is equally valid in all kinds of claims, and experience with the auto accident provision has shown that the procedure works. By contrast, the reason for creating limits is, essentially, caution. It reflects the idea that auto accidents are a known quantity, whereas an unrestricted provision for advance payments in all claims for damages is anything but that, and may well generate unintended results in unanticipated cases.

If there is to be a limit on an expanded advance payment provision, we believe it should at least allow advance payments to be ordered in claims for personal injuries. These are, we feel, the cases that most immediately come to mind when considering what kinds of plaintiffs are most likely to be in the predicament where advance payments of special damages are most needed – individuals with a valid claim who are suffering financially in the period before they are able to obtain either a summary judgment or a judgment following trial.

Are there other kinds of claims by individuals that readers would add to the list? Might it make sense, indeed, to expand the provision to all claims for damages brought by individuals, even at the risk that this could allow some unanticipated claims to slip in?

Excluded, obviously, from both the narrower and the broader suggestions above would be most commercial claims. Is this appropriate, or are commercial plaintiffs just as likely to be in need of the speedier access to a partial remedy that advance payment provisions are intended to bring?

We welcome feedback on this. We hope to be in a position to make final recommendations in the summer.

## ***B. NEW ITEMS***

### **6. Repeal of the *Notaries Public Act***

Among several items mentioned under the heading "Legislative Reform Initiative" in *Law Reform Notes #16* (April 2002) there was a short note suggesting that the *Notaries Public Act* could probably be repealed. The Act allows the Lieutenant-Governor in Council to appoint notaries public, but apparently none have been appointed since the mid-1980s. Before then, we are told, practising lawyers normally received a separate appointment as a notary public, but in 1983 the Act was amended so that all members of the Law Society who are in good standing are automatically notaries public. A similar provision of the *Commissioners for Taking Affidavits Act* makes lawyers commissioners for taking affidavits.

The real function of the *Notaries Public Act* at present, therefore, is to ensure that all New Brunswick lawyers are notaries public. The Act is defunct as a vehicle for appointing other people as notaries.

We suggest that the Act should be repealed. Recognizing, though, that the concept of notarization is well established in New Brunswick and elsewhere, we believe it would be wise, especially in connection with scenarios involving other jurisdictions, to preserve a legislative statement that lawyers in New Brunswick do have the additional status of notaries public.

We are therefore considering the following package:

1. Repeal the *Notaries Public Act*.
2. Place in another Act the statement that lawyers in good standing are notaries public. The most natural place would probably be the *Law Society Act, 1996*.
3. Remove references to notaries public from other Acts where the expression only refers to New Brunswick lawyers and is accompanied by other words that do the same. An example would be s.16 of the *Evidence Act*, which says that that "Any Notary Public, Commissioner for taking affidavits to be read in The Court of Queen's Bench of New Brunswick or other functionary authorized by law to administer an oath" can receive a solemn declaration. An example of the opposite would be s.47.1(4), of the same Act, which deals with electronic records and refers to affidavits sworn before a notary public. There no one else is mentioned, and the notary public can apparently be from New Brunswick or elsewhere, so this provision would not change.
4. Add to the *Interpretation Act* a definition of "notary public" saying that this means, in relation to a notary public for New Brunswick, a member of the Law Society who is in good standing. This would be particularly important if the *Law Society Act, 1996*, were the Act that contained the statement that lawyers are automatically notaries public, since this is a private Act and not available on the Department's Acts and Regulations website.
5. Possibly include in the repealing Act a provision protecting the status of existing notaries public appointed by the Lieutenant-Governor in Council, in case there still are some who are not lawyers.

Are there any comments on either the repeal of the *Notaries Public Act* or the suggestions above as to the complete legislative package?

### 7. *Judicature Act*

We are planning to develop proposals to modernize the *Judicature Act*. This statute is central to the administration of justice in New Brunswick, and it is due for an update.

The *Judicature Act* was enacted in 1909, but its roots can be traced back to the earliest years of this province. Many amendments have been made over the years, some of them major. The Act reflects developments in the law and the courts both before and after 1909, which makes for a document that is historically illuminating but difficult to use and understand.

We plan to review the Act in the coming months with an eye to updating and improving its language and organization. We do not anticipate proposing major substantive changes to the Act, but we have not ruled them out.

During this review, the questions we will consider include:

- How should the Act be organized?
- Does the Act include provisions that are obsolete or otherwise unnecessary?
- Does the Act include terminology that should be updated?
- Is the Act incomplete in any respect?
- Does the Act include provisions that should be moved to another Act?

We invite initial comments on any of these questions or on any other aspect of the *Judicature Act*. There will be further opportunity for comments later. We note that our focus will be on the Act itself. The Rules of Court are beyond the scope of this project.

*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 August 1st, 2015, if possible.*

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