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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 Branch, and ask for responses to, or information about, items that are still in their formative stages.

We welcome comments from any source. If any of our readers are involved either professionally or otherwise with groups or individuals who may be interested in items discussed in these *Notes*, we encourage them to let them know what the Branch is considering and to suggest that they offer their comments.

Opinions expressed in the *Law Reform 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. The Revised Statutes, 2011, 2012 and 2014**

From time to time we receive questions, or see passages in court decisions, that suggest that practitioners are not always identifying the recently revised statutes of 2011, 2012 or 2014 as being revised Acts rather than new ones. This typically shows up in the form of a close examination of the text of a supposedly "new" Act compared to the Act it replaced, to see what changes of substance have been made.

With revised Acts the answer ought to be "none". Though changes of wording, organization and layout are made in revised Acts, these are within the parameters set by the *Statute Revision Act*. S.4(1) of that Act lists the limited kinds of changes that can be made during a revision. S.4(2) adds that "No change may be made under subsection (1) that has the effect of changing the substance or intent of a provision of an Act". S.11 adds that "A revision does not operate as new law but has effect and shall be interpreted as a consolidation of the law contained in the Acts replaced by the revision".

The full set of Revised Statutes for any particular year can be found on the Office of the Attorney General's "Acts and Regulations" webpage under the heading "Revised Statutes". In the comprehensive list of "Current Legislation – alphabetical" the recently revised Acts are intermingled with everything else, but the following are markers of the fact that an Act with a recent date is in fact a revised one.

- The chapter numbers for the recently revised Acts are all c.100 or higher. Examples include the *Absconding Debtors Act*, 2011, c.100, the *Marital Property Act*, 2012, c.107 and the *Youth Assistance Act*, 2014, c.137.
- Clicking on the HTML version of the Act (but not the PDF version) leads to a page that gives the chapter number, which includes "R.S.N.B." and the year of the revision.
- The title page of a revised Act does not say "Assented to [date]". Instead, it says "Deposited [date]". This is because the adoption process for revised statutes involves the deposit of the official copy of the revision under s.5 of the *Statute Revision Act*, followed by a proclamation under s.6 saying when the revision comes into force. Royal Assent is not part of the process.
- The individual sections of revised Acts all identify their sources, which will start with either R.S. 1973 or a specific chapter number for a later year and will list subsequent amendments.

We hope that this information will assist practitioners in identifying which of the Acts with recent dates are genuinely new Acts and which ones are recently revised but older, potentially very much older, in substance. If the previous versions of revised Acts are ever needed they can be found under the heading "Repealed legislation (2011 onward)" on the same webpages.

## 2. International Interests in Mobile Equipment Act

In *Law Reform Notes #37*, we explained that the two international instruments implemented by the *International Interests in Mobile Equipment Act* (c.34, 2014) – 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* – will come into effect in New Brunswick six months after the federal government makes declarations that they are to extend to New Brunswick.

We have been advised that the federal government made those declarations in late December, and that the Convention and the Protocol will come into effect in New Brunswick on July 1, 2016. They are already in effect in all of the other jurisdictions in Canada and in the United States.

The Convention and the Protocol establish an international registry system for the secured financing of aircraft (i.e., airframes, aircraft engines and helicopters). It is similar to the registry system under the *Personal Property Security Act*. When the Convention and the Protocol come into effect in New Brunswick, they will take precedence over the PPSA in relation to the aircraft to which they apply.

The Convention and the Protocol apply to aircraft that meet certain size requirements. A list of aircraft that meet these requirements can be found on the website of the American Federal Aviation Administration (under Licenses & Certificates – Aircraft Certification – Aircraft Registration – Cape Town Treaty).

The Convention and the Protocol are set out in Schedules A and B of the *International Interests in Mobile Equipment Act*. Further information, including a list of the countries in which the Convention and the

Protocol are in force and the text of the declarations made by the federal government, can be found on the UNIDROIT website (under Instruments – Security Interests). The Uniform Law Conference of Canada website also has information (under Annual Meetings – Civil Section Documents 2001).

### 3. Trustees Act

The new *Trustees Act*, c.21, 2015, has now been proclaimed and will be coming into force on June 1, 2016. The consequential amendments in *An Act Respecting the Trustees Act*, c.22, 2015, will come into force at the same time.

The new *Trustees Act* contains many changes to trusts law. Reading its Table of Contents will provide a quick overview of the Act's subject-matter. Item 6 of *Law Reform Notes #28*, though written in December 2010 as a comment on a report by the British Columbia Law Institute that had become by then the basis for a project of the Uniform Law Conference of Canada, is still largely accurate as a brief summary of the main changes that are being implemented by New Brunswick's new *Trustees Act*.

At this particular time an important feature of the Act is the way it applies to trusts that were established under existing law. This is dealt with by s.2, which says:

#### **Application to existing trusts**

**2** Unless otherwise provided in this Act, this Act applies in respect of trusts created before or after this Act comes into force.

In general, therefore, the new provisions apply to existing trusts, not just new ones. There are exceptions in sections such as s.54(1) (majority decision-making by trustees) and s.80 (contribution and indemnity among trustees), which expressly create distinctions based on the time the Act comes into force.

There is also s.3, which says:

#### **Powers conferred by trust instrument**

**3(1)** A trust instrument may confer on the trustees or on a trustee powers that differ from, vary or exclude the ones provided by this Act.

**3(2)** If the trust instrument confers powers described in subsection (1), the powers provided by this Act do not apply to the trust to the extent that they are inconsistent with the powers conferred by the trust instrument.

This confirms the primacy of the trust instrument, whether old or new, in relation to the powers of trustees. This can apply to their provisions on subjects the new Act does not address as well as on subjects (such as majority decision-making, again) that the pre-existing law did not address but that the new Act does.

Also worth highlighting at this time is that Part 6 of the new *Trustees Act*, headed "Trustee Compensation and Accounts", applies to personal representatives as well to trustees. This extended application of Part 6 is an exception to the general rule that the new Act does not apply to personal representatives except when they are acting as the trustees of a testamentary trust (s.5).

#### 4. Enforcement of Money Judgments Act

Progress towards the proclamation of the *Enforcement of Money Judgments Act* has been slower than hoped. We are, however, nearing the next major step in the process, which is the posting of the draft regulations on the Executive Council Office's webpage for public review. There are several items involved. In addition to a new regulation under the *Enforcement of Money Judgments Act* there are complementary draft amendments to the *Rules of Court* and to the regulations under other several other Acts, including the *Land Titles Act*, the *Personal Property Security Act* and the *Sheriffs Act*.

Once the regulations are posted we anticipate that it will be at least six months before the Act is brought into force. The first part of this is the time taken up by the posting period, consideration of any comments received and preparation of the final text of the regulations. At that point the regulations can be enacted and the proclamation issued, but we expect to recommend that the proclamation should allow about three months lead time before the legislation actually takes effect.

At present, therefore, we are looking at the fall as the potential commencement time for the *Enforcement of Money Judgments Act*. An update will be provided in the next issue of these *Notes*.

#### 5. Debtor Transactions Act

As mentioned in *Law Reform Notes #37*, the *Debtor Transactions Act*, which replaces the *Assignments and Preferences Act* and the *Statute of Elizabeth* (1571), is scheduled to be brought into force at the same time as the *Enforcement of Money Judgment Act*.

#### 6. Advance payment of special damages

The latest instalment in our long-running discussion of this item was the request in *Law Reform Notes #37* for further input on the question of how far an expanded provision for advance payments of special damages, modelled on the auto accident provisions in s.265.6 of the *Insurance Act*, should go. Should it apply to all claims for damages, to all plaintiffs and to all defendants, as we had previously concluded? Or should it be more limited? If the latter, where should the line be drawn? We suggested that it should at least apply to all claims for personal injuries and invited comment on this or other possible cut-off points.

In response we received two letters from practitioners urging that the expansion should be broad, though they did seem to have personal injury cases mostly in mind. On the other side we heard again from the Canadian Medical Protective Association, which reiterated its previous disagreement with the proposal for an expansion, both in general and in relation to medical malpractice claims. We also heard from one insurance company that was strongly opposed to any expansion, from another that seemed more focused on the details, and from the Insurance Bureau of Canada. IBC noted that there were some different views but stated that the insurance industry generally was not supportive of the proposed reforms, and that IBC's position, and that of a number of insurers, was that the proposed expansion beyond auto accidents should not be implemented. If it was, though, IBC identified several safeguards and limits that should be seriously considered.

There seemed to be a general acceptance, even among the people who were opposed to expansion, that s.265.6 had worked well in relation to auto accidents. Those who were opposed suggested, though, that this was not a good indicator of what would happen in other scenarios where, they said, determining liability was typically less straightforward than for auto accidents.

We thank everybody for their input. The Department is currently considering the various options.

### 7. Notaries Public Act.

Item 6 of *Law Reform Notes #37* suggested that the *Notaries Public Act* no longer serves a useful purpose, and that it could be repealed as long as the formal status of practising lawyers as notaries public was preserved. The item outlined five interconnected elements for a legislative package that would achieve this effect.

The Law Society responded favourably, adding a comment about the terminology to be used in the potential amendments to the *Interpretation Act* and the *Law Society Act, 1996*, that had been mentioned in the *Notes*. We also received from a practitioner a comment supporting the suggestion in the *Notes* that the legislation should include 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.

We propose to recommend to the government the legislative package outlined in *Law Reform Notes #37*.

## **B. NEW ITEMS**

### 8. Devolution of Estates Act, Part I

As part of the work surrounding the new *Trustees Act* we have examined the estate management provisions of two other Acts that involve substantial trustee-like functions: Part I of the *Devolution of Estates Act* (this note) and ss.10 to 35 of the *Infirm Persons Act* (the next one). Both are quite old.

The initial objective was to determine (a) whether consequential amendments to these two Acts were required in light of the new *Trustees Act*, and (b) more broadly, whether the substance of the new *Trustees Act* could serve as the foundation for the modernization of their estate management provisions. The answer in both cases, because of the nature of the existing provisions and the significant differences between private trusts, personal representatives and committees of the estate, was “not really”. However, our review did indicate that a modernization of some kind is in order, and as preliminary information that will help build on our work so far we invite comment on the value of the estate management provisions of the *Devolution of Estates Act* and the *Infirm Persons Act* as they now stand. What are their problematic or useful features? What should be added or altered if they are reformed?

The *Devolution of Estates Act* contains, in Part I, what appear to be extensive estate management provisions. On closer examination, however, there is much less to them than meets the eye.

Part I dates back to 1934, and was, in its day, a significant law reform initiative. Its purpose was to bring real property into substantially the same legal framework as personal property for estate administration purposes, and to have everything flow through the “personal representatives” (the representatives as to personalty) rather than have the real property pass separately to the “real representatives” (the heirs), as was previously the law. Against this background, but only against this background, much of Part I makes sense. It is shot through with references to real property being dealt with as though it were personal property, sometimes with some adjustments, but without, typically, saying anything about how personal property is to be dealt with.

Looking at these provisions 80 years on, there are three sections that seem to have substantive continuing value.

- S.3 says that the real and personal property of a deceased vests in the personal representative as trustee for the persons entitled thereto, and subject to the payment of the deceased's debts. This establishes the basic framework for the administration of estates.
- S.18 says that registering a will under the *Registry Act* vests real estate in the person to whom it is devised. This still operates in the registry of deeds.
- S.19 says that money and securities for money to a value of \$2,500, "personal chattels" (as defined in s.1) and real property that the personal representatives have not disposed of or distributed within two years after the deceased's death vest in the person beneficially entitled to them. This is a useful provision for bringing closure to informal estate administration, though it would be more useful if its scope were expanded.

Beyond that the apparent usefulness of the provisions of Part I diminishes, and their clarity is limited by the fact that they cross-refer to unstated law about how the personal representatives are to deal with personal property. Against that uncertain background, and summarizing its provisions rather loosely, this is what the Act says about real property.

- Some or one of several joint personal representatives cannot sell or transfer real property without the authority of the Court (s.4).
- The vesting of real property in the personal representatives does not affect the rules on marshalling or administration of assets, the beneficial interests in the property, or a person's right to recover the property from a third party (s.5).
- Nor does it affect the order in which assets are applied to pay funeral or testamentary expenses or debts or legacies (s.6).
- The personal representatives are deemed to be the "heirs" for the purpose of interpreting relevant Acts or instruments (s.7).
- The court can order a sale or conveyance of real property if, one year after the grant of probate or administration, the personal representatives have failed to do so (s.8).
- The personal representative can sell real property to pay debts or for the purpose of distribution, but the beneficiaries must consent in the latter case (ss.9, 10 and 11).
- The personal representative can divide or partition real property among the beneficiaries with their consent (s.12).
- The personal representative can lease real property for one year (or longer with the approval of the Court), and can mortgage it to pay debts or property taxes (and for other purposes with the approval of the Court) (s.13).
- Purchasers of real property from the personal representative for value and in good faith take the property free of estate debts and claims, but the same does not apply if the personal representative simply conveys the land to the person beneficially entitled (s.14).
- If there are two or more personal representatives, they must all concur in a transfer of real property (s.15).
- The personal representative can apply to the Court to sell real property free of curtesy or dower (s.16).
- The personal representative's powers under this Act are in addition to those conferred by any other Act or by a will (s.17).

This is obviously a mixed bag of provisions. Overall they appear to address a number of issues that might well have needed clarifying in the 1930s, but that may not need reiterating today. Overall, moreover, noting their dated nature and their uncertain context, they lead us to believe that it may well be desirable to develop modern legislation that spells out what the responsibilities and powers of personal representatives are. Alberta's recent *Estate Administration Act* provides an illustration of what might be contained in a reasonably comprehensive Act that actually tells the personal representatives what they are supposed to do when they administer an estate.

At this point, though, and as background information to a possible broader project that might lead to a modern *Estate Administration Act*, we are simply requesting information on the current operation of Part I of the *Devolution of Estates Act* and on the strengths and weaknesses of its provisions as they now stand.

### 9. *Infirm Persons Act* – estate management provisions

The *Infirm Persons Act* dates from 1943. There have been few significant changes to its estate management provisions since then. Despite first impressions, the Act contains a variety of options for dealing with the property of infirm persons.

- S.3 permits the court to commit the custody of a mentally incompetent person's estate to a committee, who will then be responsible for managing the estate in accordance with the court's order.
- S.39 permits the court to confer on a person limited decision-making authority on behalf the infirm person, without necessarily appointing a committee.
- S.22 relates to temporary mental incompetence, and allows the court, instead of appointing a committee, to authorize the temporary use of the individual's funds for the maintenance of the individual and his or her dependants.
- SS.24 to 35, headed "Vesting Orders", enable the court to deal with a variety of scenarios in which there are legal complications because property belongs to a person who does not have the legal capacity to deal with it. For the most part, these provisions appear to operate independently of whether a committee of the estate has been appointed.

The sections that relate most directly to estate management are ss.10 to 23. They include the following key provisions.

- S.10 requires a committee to file an inventory and deposit security.
- S.11 sets out the purposes for which the estate management powers of the Act are to be used.
- S.15 says that the court can authorize the committee of the estate to do anything the mentally incompetent person would have been able to do if competent.
- Surrounding provisions relate to court authorizations to sell or charge property (s.13), to make improvements (s.14) and approve the terms of leases (s.17).
- There are also provisions protecting the position of beneficiaries, heirs and so forth if property is sold under the Act or if, for example, a transaction authorized under the Act converts a capital asset into money and thereby affects related interests (e.g., ss.16 and 18).
- In addition, Rule 71.04 of the Rules of Court provides for the passing of accounts.

Many provisions of the *Infirm Persons Act* are not easy to read or to understand. Often they are broad in scope but depend on court orders. It is not clear from the Act whether these orders are to be applied for

as need arises or whether the court might give generic permission prospectively. This could make a big difference to the discharge of the committee of the estate's responsibilities.

Not surprisingly, modern legislation such as Division 4 of Part 2 of Alberta's *Adult Guardianship and Trusteeship Act* reads very differently. The central document there is a "trusteeship order" made by the court, based on a "trusteeship plan" submitted by the would-be trustee (s.46). Unless limited by the trusteeship order, the appointed trustee may do anything in relation to the property included in the order that the "represented adult" would be capable of doing if competent (s.55), though there are restrictions on selling land. There is a statement of the trustee's general duty to make expenditures for the represented adult's support and care, with the further possibility of acting for the benefit of family members (s.56). The duty of trustees to exercise care, skill and diligence is spelled out, along with an exculpation provision for honest and reasonable actions (s.57). There is a power to invest (s.59), as well as a limited power to make gifts (s.60). There is a duty to maintain and submit accounts (s.63) as well as a right to compensation (s.67).

Parts of Alberta's legislation have equivalents or near-equivalents in the *Infirm Persons Act*, or may underlie the Act even if not spelled out there. Others seem more different. For now, though, our focus is on the substance of the *Infirm Persons Act* and on what benefits or complications its existing estate management provisions bring. What experience do our readers have of working with these provisions as they now stand? What improvements would they suggest?

#### 10. Powers of attorney legislation

Another potential project that has been suggested, and that we mention now because it is closely related to the previous item, is the development of powers of attorney legislation for persons with incapacity. At present the law in New Brunswick is a combination of several elements: common law rules about powers of attorney, ss.58.1 to 58.7 of the *Property Act* (enduring powers of attorney for property matters) and ss.40 to 44 of the *Infirm Persons Act* (powers of attorney for personal care). Issue #11 of these *Notes*, which was prepared in May 1999 while the legislation on powers of attorney for personal care was being developed, suggested that this combination could be a basic but effective legal framework and explained how it addressed a number of the key issues that some other provinces had dealt with explicitly in more detailed Acts. They were:

1. Who can appoint an attorney?
2. What form should the document take?
3. When is the attorney's authority activated?
4. What is the attorney's duty?
5. How can one challenge the attorney's discharge of his or her functions?
6. How would the power be terminated?
7. How extensive should the legislation be?
8. Should the legislation be retroactive?

The suggestion we have received is that this whole package should be dealt with by explicit new legislation rather than, as it is at present, by a few short provisions interpreted in the light of established legal principles. The new Act might involve substantive changes to the existing law on the issues our existing law addresses and might also address additional subjects that some other provinces' legislation does, such as the powers and liability of the attorney, payments to the attorney, and the recognition in New Brunswick of powers of attorney (and similar documents) from outside the province.



At this point our questions on this subject are very preliminary and are similar to the ones we have asked in relation to the *Devolution of Estates Act* and the *Infirm Persons Act*. The existing blend of legislation and common law on powers of attorney for persons with incapacity has now been in force for more than fifteen years. What has our readers' experience been of working with it? What are its strengths and weaknesses? If there is to be a move towards more comprehensive legislation, what are the things that should be considered as the legislation is developed?

*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 June 15th, 2016, if possible.*

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