

Law Reform Notes

Legislative Services Branch, Office of the Attorney General
Chancery Place, P.O. Box 6000, Fredericton, N.B., Canada E3B 5H1
Tel.: (506) 453-2855 E-mail: lawreform-reformedudroit@gnb.ca

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. Trustees Act

The new *Trustees Act* and *An Act Respecting the Trustees Act* (which contains related consequential amendments) came into force on June 1, 2016. As we have noted in previous issues of the *Law Reform Notes*, the new Act is substantially modelled on the Uniform Law Conference of Canada's *Uniform Trustee Act* (2012).

In November, the lawyer responsible for this file presented a paper on the new Act at a Canadian Bar Association continuing legal education session in Fredericton. A slightly adjusted version of the paper is available on the Law Reform webpage of the Office of the Attorney General website, under the heading "Other Law Reform Documents". It includes some general comments on the Act and brief summaries of the main provisions.

Because of the close connection between the New Brunswick Act and the Uniform Act, a useful resource for understanding the New Brunswick Act is the section-by-section commentary that is included in the text of the Uniform Act, which is available on the ULCC website (www.ulcc.ca). The commentary must be used carefully, since there are some differences of substance between the two Acts, as well as many differences of wording. Nonetheless, most sections are similar enough that the ULCC commentary will be helpful.

The paper on our website includes a table of concordance that will assist in matching the ULCC commentary with the relevant provision of the New Brunswick Act.

2. Enforcement of Money Judgments Act

We continue to work toward proclamation of the *Enforcement of Money Judgments Act*. The draft regulations were posted on the Executive Council Office webpage for four weeks in August and September. We received a small number of comments, which are under consideration, as are some issues arising out of discussions with Sheriff Services about the operational details of the new system.

When these issues have been finalized we will recommend proclamation of the Act, probably with two to three months of lead time between the issuing of the proclamation and the coming-into-force date.

3. Debtor Transactions Act

As mentioned in previous issues of these *Notes*, we plan to recommend that the *Debtor Transactions Act* be proclaimed into force on the same date as the *Enforcement of Money Judgments Act*.

4. Inquiries Act

In *Law Reform Notes #36* we explained that our proposals for a new *Inquiries Act* had not been considered in the spring 2014 sitting of the Legislative Assembly as we had hoped, and that we were preparing to present our recommendations to the (then) new government. We did so, and in March 2016 two Bills received a first reading: a new *Inquiries Act* and *An Act Respecting the Inquiries Act*, which contains related amendments.

The Bills were referred to the Standing Committee on Law Amendments and did not receive a second reading. They died on the order paper when the Legislative Assembly was prorogued in November 2016.

The Bills are available on the website of the Legislative Assembly (Bill #26 and Bill #27 of the Second Session of the 58th Legislature).

5. Powers of attorney and the Advance Health Care Directives Act

In *Law Reform Notes #38*, we mentioned that developing new powers of attorney legislation is a project we are considering, and we invited comments. We repeat that invitation now. What are the strengths and weaknesses of the existing law in this area? What should be considered as we develop proposals for reform?

Recent legislation developed by the Department of Health will have some bearing on this project. The *Advance Health Care Directives Act*, which came into force in December 2016, allows a person to create a “health care directive” that sets out the person’s health care decisions in advance and/or appoints a

“proxy” to make health care decisions when the person loses capacity. Some of the main features of the Act, which is similar to legislation in other provinces, are:

- A health care directive can include decisions as well as general statements of the person’s values, beliefs and wishes (s.5). It must be in writing and witnessed, but there is no requirement that it be made under seal (s.6).
- Unless the health care directive provides otherwise, if a spouse is appointed as the proxy and the couple divorces or separates, the appointment is revoked (s.12(4)).
- A health care directive comes into effect when the person (a) ceases to have the capacity to make a decision respecting a proposed treatment, in the opinion of two health care professionals (medical practitioners or nurse practitioners), or (b) is unable to communicate a decision. It remains in effect during the incapacity or inability to communicate (s.8).
- A proxy is required to act in accordance with the decisions expressed in the directive. If none are expressed, the proxy is required to act in accordance with the wishes expressed by the person before the loss of capacity or, if these are not known, in the best interests of the person (s.11).
- A health care professional can revoke the appointment of a proxy if the proxy unreasonably delays a decision (s.12(2)).

The arrival of the health care directive in New Brunswick means that there are now three types of document that a person can use to appoint someone to make decisions on his or her behalf in the event of incapacity: a power of attorney for property matters under the *Property Act*, a power of attorney for personal care under the *Infirm Persons Act* (which may be combined with a power of attorney for property matters), and a health care directive under the *Advance Health Care Directives Act*.

This creates some overlap: a decision respecting health care can be made by an attorney appointed in a power of attorney for personal care *or* by a proxy appointed in a health care directive, and either type of document can include an advance health care decision. (For discussion of powers of attorney for personal care, including their ability to include an advance health care decision, see *Law Reform Notes #9, #11, and #12.*)

The *Advance Health Care Directives Act* contains provisions that clarify the relationship between powers of attorney for personal care and health care directives:

- Section 13 provides that in the event of a conflict between the provisions of a power of attorney for personal care and the provisions of a health care directive, the provisions of the more recent document prevail. In other words, if a person has both a power of attorney for personal care and a health care directive, both documents are operative except where the provisions are at odds, in which case the provisions of the more recent document are the operative ones.
- Section 3 provides that a power of attorney for personal care “is not a health care directive”. This means that powers of attorney for personal care continue to be governed by the *Infirm Persons Act*. The *Advance Health Care Directives Act* does not apply to a power of attorney for personal care, even if it contains advance health care decisions or allows the attorney to make health care decisions.

In developing our proposals for power of attorney legislation, we will aim to come up with a scheme that works in harmony with this new Act.

B. NEW ITEMS

6. Limitation of actions – debts due to the Crown

Part 5 of *An Act to Implement Strategic Program Review Initiatives* (c.28, 2016) has extended for another 5 years the transitional provision under s.27.1 of the *Limitation of Actions Act*. The section now reads as follows:

Transition – debts due to the Crown

27.1 Despite anything else in this Act, if the limitation period that applies to a claim by the Crown for the recovery of money owing to it would, if not for this section, expire after the commencement of this section but before July 1, 2021, that limitation period expires on July 1, 2021.

The commencement date of s.27.1 was December 21, 2011, when *An Act Respecting the Recovery of Debts Owed to the Crown* (c.52, 2011) received Royal Assent. The section then referred to May 1, 2016.

The effect of the recent amendment is that the limitation period for any claim that falls within the scope of s.27.1 will not expire before July 1, 2021. Included are (a) pre-existing claims that were not yet statute-barred by December 21, 2011, and (b) claims arising after December 21, 2011, that would otherwise become statute-barred before July 1, 2021. To identify what was statute-barred by December 21, 2011, one must turn to the previous version of s.27.1, which is described in item 5 of *Law Reform Notes #30*.

7. Farewell to Tim Rattenbury

As some of you may know, Tim Rattenbury retired at the end of March. Tim's retirement leaves a void in the law reform community, and it is only fitting that we use the *Law Reform Notes* to acknowledge his immense contribution to law reform in New Brunswick.

Tim began his career with the Legislative Services Branch (formerly the Law Reform Branch) of the Office of the Attorney General (OAG) in 1984. In his 33 years with the OAG, Tim contributed to so many law reform projects there are too many to mention, but we thought we would highlight a few. In Tim's opinion it's not always the large scale projects that are the most meaningful, so we've chosen to mention a mix of projects both large and small. Over his career, Tim worked on important files including Acts related to Charter compliance, the *Entry Warrants Act*, the *Provincial Offences Procedure Act*, the *Law Reform Act* and the *Succession Law Amendment Act*. Tim also worked to repeal several OAG Acts. More recently, Tim was the architect of the *Limitation of Actions Act* and the new *Trustees Act*, and he worked tirelessly over the last few years on the *Enforcement of Money Judgments Act* and corresponding regulations.

Tim has also made a strong contribution to the Uniform Law Conference of Canada, as well as having written several articles for the *Solicitor's Journal*, provided continuing legal education training sessions and served as a mentor to many.

Tim's law reform legacy will live on through the *Law Reform Notes* which serves as a hallmark of his time with the OAG. Tim was the driving force behind the 38 issues of the *Law Reform Notes* published since 1992. We look forward to carrying on the tradition long into the future and to thinking of Tim each time an issue is published.

On behalf of those who have worked with Tim in one way or another over the past 30+ years and those who have been avid readers of the *Law Reform Notes*, we send our best wishes to Tim as he embarks on the next phase of his life!

Responses to any of the above should be sent to the address at the head of these Notes or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than July 1, 2017, if possible.

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