



#42: July 2019

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## 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](mailto: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.*

*Responses to the items below should be sent to the address above or to [lawreform-reformedudroit@gnb.ca](mailto:lawreform-reformedudroit@gnb.ca). We would like to receive replies no later than **September 1, 2019**, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

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### **1. Enforcement of Money Judgments Act and Debtor Transactions Act**

Earlier this year we submitted proposals for amendments to the *Enforcement of Money Judgments Act* relating to the seizure of retirement funds. The proposals were approved, and an amending Act was introduced in May. It received Royal Assent in June.

The effect of the amendments is that retirement funds (registered retirement savings plans, registered retirement income funds and deferred profit sharing plans) will be exempt from seizure. Previously, the Act provided that retirement funds are partially exempt from realization, which meant that a sheriff would be able to seize a retirement fund and collect a portion of its value. The amendments create a complete exemption: a new section provides that property in a retirement fund is exempt from seizure (s. 84.1). The exemption does not extend to payments out of a retirement fund, which are considered to be part of the judgment debtor's income (which is partially exempt from realization). The new section is based on

provisions in other jurisdictions and on model legislation developed by the Uniform Law Conference of Canada.

The basis for this change to a complete exemption is fairness. Pensions are completely exempt from seizure under pensions legislation. It would be unfair if those who have pensions were to enjoy greater protection than those who rely on retirement funds to save for retirement.

Now that these amendments have been made, we will be recommending proclamation of the *Enforcement of Money Judgments Act*, with a coming-into-force date before the end of this year. At some point between now and then, draft regulations will be posted for public review on the Executive Council Office webpage.

As noted in previous issues of the *Law Reform Notes*, we will recommend that the *Debtor Transactions Act* be proclaimed into force on the same date as the *Enforcement of Money Judgments Act*.

## **2. Official Notices Publication Act**

We also recently proposed changes to the legislation governing *The Royal Gazette*. Our proposals led to the creation of a new Act, the *Official Notices Publication Act*, which also received Royal Assent in June. On September 1, 2019, the Act will come into force and the current provisions relating to the *Gazette*, which are found in the *Queen's Printer Act*, will be repealed. The schedule of fees for publication in the *Gazette* will be moved from a regulation under the *Queen's Printer Act* to a regulation under the new Act. (The fees themselves will not change.)

The new Act will result in one change that may be of interest: it will remove the requirement that regulations be published in the *Gazette* (*Regulations Act*, s. 4(1)). The purpose of this change is to eliminate duplication. Currently, new regulations are published in two different places on the Office of the Attorney General website: in the *Gazette* and in the [Annual Volumes of Regulations](#) on the Acts and Regulations page. Going forward, they will be published only in the Annual Volumes. As at present, they will be published soon after they are made.

## **3. Powers of attorney legislation**

The third set of proposals we submitted this year was for new powers of attorney legislation. We had hoped that a new Act would be introduced during the spring sitting of the Legislative Assembly, but an issue arose that requires further analysis. We intend to submit proposals again in the coming months, and we hope to see the introduction of a new Act in the near future.

## **4. Mechanics' Lien Act**

We continue to work on reform of the *Mechanics' Lien Act*. As discussed in issues #40 and #41 of the *Law Reform Notes*, we are planning to both modernize the current Act and introduce a prompt payment scheme, which would be accompanied by an adjudication process (i.e., a mechanism for the expedited resolution of disputes). We are recommending that the new legislation be done in two phases. The first phase would be the modernization of the current Act, in the form of a new Act (likely called the *Construction Act*). Some time later, the second phase would introduce schemes for prompt payment and adjudication.

The feedback we have received on this project has been very helpful, and we welcome further comments. We are particularly interested to hear suggestions about what kind of adjudication process might work in New Brunswick.

In this issue, we summarize the feedback we have received regarding prompt payment and adjudication, provide an update on other jurisdictions, and discuss our plan for a two-phase approach to the new legislation.

## Feedback

In issue #41, we provided an explanation of Ontario's approach to prompt payment and adjudication. We expressed the view that a prompt payment scheme similar to Ontario's should be adopted here and that it should be accompanied by an adjudication process. We questioned, however, whether Ontario's approach to adjudication would be feasible in a small jurisdiction such as New Brunswick.

We received four submissions on this topic. All were in favour of adopting a legislated prompt payment scheme and adjudication process. The comments on adjudication in the four submissions can be summarized as follows:

- The Ontario model may not be the best option for New Brunswick, given our size, but there should be a process that is independent and expeditious. More research should be undertaken.
- There are not many people in New Brunswick who would be qualified to act as adjudicators, and the province likely does not have the resources to screen or train adjudicators. We should wait to see how the Ontario model works.
- While the Ontario model is well thought out and appears to be workable, New Brunswick may wish to adopt a simpler model that makes use of existing organizations and is less prescriptive. The volume and nature of disputes here do not call for the establishment of a New Brunswick version of Ontario's authorized nominating authority. Regardless of the approach taken, the adjudication process should (a) be binding on all parties on an interim basis, (b) include fast-track timelines that reflect the practical reality of a monthly payment cycle, (c) accommodate contractual terms that create shorter timelines, and (d) make an adjudicator's determination as enforceable as a court order.
- The Ontario model requires a large number of qualified specialists with no connection to the project. In New Brunswick, there are a limited number of qualified specialists and they are more likely to be conflicted out of acting as an adjudicator. It is unlikely that the province has the resources to fund its own nominating authority, and without such an authority it is likely that many adjudicators would be poorly qualified or incompetent. The implementation of an adjudication process should be delayed until we can learn from the experience in Ontario, and the possibility of a national or Atlantic-based nominating authority should be explored.

## Other jurisdictions

### *Ontario*

The amendments to Ontario's [Construction Act](#) that establish prompt payment and adjudication schemes will come into force on October 1, 2019. The amendments that modernized the other portions of the Act came into force on July 1, 2018.

### *Saskatchewan*

In May 2019, Saskatchewan passed [legislation](#) that adds to their *Builders' Lien Act* prompt payment and adjudication schemes similar to those in Ontario. The legislation will come into force by proclamation.

### *Nova Scotia*

Likewise, in April 2019 Nova Scotia passed [legislation](#) that adds prompt payment and adjudication to their *Builders' Lien Act* (which is to be renamed the *Builders' Lien and Prompt Payment Act*). As in Saskatchewan, the legislation will come into force by proclamation. Unlike in Ontario and Saskatchewan, the details of Nova Scotia's adjudication scheme will be established almost entirely by regulation.

## Manitoba

In April 2018, a private member's bill on prompt payment was introduced in Manitoba. The bill passed second reading but died on the order paper. It would have established a prompt payment scheme that is separate from Manitoba's *Builders' Liens Act*.

In November 2018, the Manitoba Law Reform Commission published its [final report](#) on reform of the *Builders' Liens Act*. (The Commission's February 2018 [consultation paper](#) was discussed in issue #41.)

## Canada

In August 2018, a [report](#) on prompt payment prepared for the federal government by Bruce Reynolds and Sharon Vogel was released. (Reynolds and Vogel also led the review of Ontario's *Construction Act*, which is discussed in issues #40 and #41.)

In June 2019, federal prompt payment legislation was passed. The [Federal Prompt Payment for Construction Work Act](#), which was enacted as part of the *Budget Implementation Act, 2019, No. 1*, creates a regime similar to Ontario's and applies to construction work on federal property. The Act will come into force by order of the Governor in Council.

## Plan for New Brunswick

As mentioned above, we are recommending a two-phase approach to the new legislation: first modernization, and then prompt payment and adjudication. We are taking this approach because it is not yet clear what the adjudication process should look like in New Brunswick. While the Ontario model appears to provide a good starting point, we do not yet know whether it will work in practice. Moreover, the Ontario model requires a reasonable number of qualified, conflict-free adjudicators – something that we are not confident exists here. Moving prompt payment and adjudication to a second phase of the project will allow us to evaluate the Ontario model and explore the possibility of cooperation with other jurisdictions.

Interjurisdictional cooperation was recommended by Bruce Reynolds and Sharon Vogel in their report for the federal government. They noted that in order for parties in smaller jurisdictions to find conflict-free adjudicators it would be necessary to create a national pool of adjudicators, and that physical proximity of adjudicators may not be necessary as many adjudications can take place in writing, by telephone or by video conference. They recommended that the federal government explore the idea of working toward an inter-governmental agreement on prompt payment and adjudication legislation.

The Manitoba Law Reform Commission has also recommended cooperation. In its November 2018 final report, the Commission concluded that the Ontario model for adjudication is the most suitable option for Manitoba (despite the doubts expressed in its February 2018 consultation paper), but that "creative solutions" would be required to customize that model for Manitoba, given the small number of qualified individuals and the likelihood of conflicts of interest. The Commission recommended that the Manitoba government pursue agreements with other governments regarding the creation of adjudicator pools.

It seems to us that it would be worth exploring the possibility of cooperation with other jurisdictions. We welcome readers' comments on this.

Along with prompt payment and adjudication, the second phase of legislation may also include a procedure for small claims. As discussed in issues #40 and #41, we are considering whether to recommend a system in which claims under \$20,000 could be referred to the Small Claims Court. We have received some feedback on this topic but continue to welcome comments on whether a small claims referral system would be feasible and, if so, how it should work in practice.

## **5. Notice of mortgage sale**

The New Brunswick Branch of the Canadian Bar Association has asked our department to consider recommending an amendment to paragraph 45(1)(c) of the *Property Act*, which sets out the notice requirements for mortgage sales. The proposed amendment is that the required number of newspaper advertisements be reduced from four to two.

We considered this matter in the past and concluded that two newspaper advertisements would be sufficient. We continue to hold this view, and we therefore plan to recommend the proposed amendment.

We also plan to recommend that the requirement to post a notice at the registry office be removed, now that the registry offices have been consolidated into a single office in St. Stephen.

We invite comments on these proposed changes and on the following related issues:

- Should the requirement to post a notice at the court house be removed? What about the requirement to post a notice at a public place? Do these posting requirements continue to serve a purpose? If so, how many weeks should the notices be posted for?
- Is it helpful to have notices published (online) in *The Royal Gazette*? If so, should we consider making this mandatory or should it continue to be optional? Should the possibility of an online posting system be explored?