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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.

Responses to the items below should be sent to the address above or to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than ***April 1, 2021****, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

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1. *Construction Remedies Act*

The *Construction Remedies Act* was introduced in the Legislature on November 18, 2020, as Bill 12 and received Royal Assent on December 18, 2020. The new *Construction Remedies Act* (c. 29, 2020) repeals the *Mechanics' Lien Act* and makes related amendments to the *Crown Construction Contracts Act*. A few provisions relating to sections of the *Crown Construction Contracts Act* and its *General Regulation* dealing with standard Crown construction contract forms came into force on Royal Assent. The remainder of the new Act will come into force on proclamation to give industry and public sector owners time to plan for the changes and to allow the necessary regulations to be prepared. We anticipate this will happen this year.

Many of the key points of the new Act were highlighted in issue #43 of the of the *Law Reform Notes*. We remain open to expressions of interest from private sector organizations (industry groups or otherwise)

that may be willing to create and manage a publicly accessible website where certificates of substantial performance, etc. could be posted. We would then, if acceptable, include this in the new legislative/ regulatory regime. We continue to hope that someone will come forward so that a notice website can be put in place prior to the new Act coming into force.

As mentioned previously, we continue to monitor developments in other jurisdictions dealing with prompt payment and adjudication regimes.

2. Remote witnessing of wills and enduring powers of attorney

The Covid-19 pandemic has made it difficult for lawyers to meet with clients wanting to make or update wills and enduring powers of attorney. After consulting with both the Law Society and the CBA-NB, we proposed amendments to the *Enduring Powers of Attorney Act* and the *Wills Act* to allow for the use of electronic means of communication as an acceptable alternative to meeting with clients and witnesses in person. Our proposal led to *An Act Respecting the Enduring Powers of Attorney Act and the Wills Act* (c. 31, 2020), which came into force on December 18, 2020.

In brief, the amendments (1) permit the use of electronic means of communication; (2) require a lawyer when an electronic means of communication will be used; (3) permit the use of counterparts; and (4) require a statement that an electronic means of communication has been used. The amendments will remain in force until the end of 2022 to ensure they cover the duration of the pandemic and to allow us time to evaluate their use and effectiveness.

The Law Society has produced directives for lawyers to follow when using electronic means of communication for wills and enduring powers of attorney. The directives are available on the Law Society's website.

3. Revocation of Queen's Counsel appointments

At the suggestion of the Law Society, the *Queen's Counsel and Precedence Act* was reviewed and amended to add a revocation provision. *An Act to Amend the Queen's Counsel and Precedence Act* (c. 28, 2020) came into force on December 18, 2020. The amendments provide for the automatic revocation of Queen's Counsel appointments upon disbarment and revoke the appointments of those previously disbarred.

4. Legal parentage

As mentioned in issue #43 of the *Law Reform Notes*, we plan to undertake a review of the existing legislation regarding the legal parentage of children (currently Part VI of the *Family Services Act*). We anticipate both modernizing the existing legislation and expanding it to include issues not currently covered, for example, surrogacy. We received feedback agreeing with the need for enhanced legislation in this area of the law. As we move towards more comprehensive legislation, we look forward to hearing from readers about concerns that should be addressed in the legislation.

5. *Infirm Persons Act*

We are in the early stages of a review of the *Infirm Persons Act*, which was enacted in 1943. We anticipate that this review will lead to proposals for a new, comprehensive Act that would modernize this area of law, particularly with respect to the rights and interests of persons with disabilities.

As we develop our proposals for a new Act, we will be considering the following questions, among others:

- What aspects of the *Infirm Persons Act* should be carried forward into the new Act? Are there provisions that no longer serve any purpose?

- Should the concept of "mental incompetency" in the *Infirm Persons Act* be replaced with a "functional" approach to legal capacity, in which capacity is assessed in relation to a particular decision or type of decision? Or should the new Act reflect the concept – expressed in Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* – that everyone has legal capacity and persons with disabilities may require support to exercise their legal capacity?

- Should the legislation provide for both substitute decision-making (i.e., where one person makes a decision on behalf of another person) and supported decision-making (i.e., where one person helps another person to make a decision). If so, which type of decision-making should be used in which circumstances?

- Should the new Act include an appointment process that does not require a court order – perhaps something along the lines of the representative agreement under British Columbia's *Representation Agreement Act* or the supported decision-making authorization under Alberta's *Adult Guardianship and Trusteeship Act*?

- Who should be eligible to act as a substitute decision-maker (or supporter)? What powers and duties should they have? In what circumstances should their appointments be reviewed or terminated?

We welcome comments on these questions or any other aspect of the *Infirm Persons Act* or the law in this area.

6. Wills and estates legislation

We are considering a new project to modernize estates law (both testate and intestate). Our initial focus will be on potential changes to the following statutes: *Wills Act, Devolution of Estates Act, Probate Court Act* and Rules and *Executors and Trustees Act*.

We would be interested in hearing about issues with the current legislative scheme dealing with estates law and any proposals for reform that you may have.

7. *Uniform Non-Consensual Disclosure of Intimate Images Act*

We are reviewing the *Uniform Non-Consensual Disclosure of Intimate Images Act* ("UNCDIIA"), which was adopted by the Uniform Law Conference of Canada ("ULCC") in January 2021. For a copy of the UNCDIIA, please email the ULCC at KCunningham@ulcc-chlc.ca.

The primary objective of the UNCDIIA is to provide civil remedies to people who have had intimate images shared without their consent (so-called "revenge porn"). The Uniform Act accomplishes this by providing that a person who distributes or threatens to distribute an intimate image commits a tort that is actionable without proof of damage. An intimate image is defined broadly under the UNCDIIA to include visual recordings in which a person is or is depicted as nude or engaging in a sexual act and the person had a reasonable expectation of privacy at the time of the recording or distribution. It also includes altered images (e.g. "deepfakes"), images of unidentifiable individuals (e.g. "upskirting") and nearly nude images.

The UNCDIIA provides two distinct, and in some cases cumulative, proceedings to obtain relief.

The first proceeding is by way of application (under section 4 of the UNCDIIA) for declaratory and injunctive relief, the primary objective of which is to obtain, on an expedited basis, an order which provides for the takedown of the intimate images and prevents further distribution. To this end, the court may:

- declare that the distribution (or threatened distribution) of the intimate image was unlawful;
- order the respondent to make every reasonable effort to make the intimate image unavailable to others by destroying all copies of the intimate image in the respondent's possession or control,

having the intimate image removed from any internet intermediary to which the respondent provided the intimate image, and having the URL page of the intimate image de-indexed from any search engine;

- enjoin the respondent from distributing the intimate image;
- order an internet intermediary or other person or organization (even though not a party to the application) to make every reasonable effort to remove or de-index the intimate image;
- order the respondent to pay nominal damages to the applicant; and
- make any other order the court considers just and reasonable in the circumstances.

The applicant need only satisfy the court that: (a) the image is an intimate image of the applicant, and (b) the respondent distributed (or threatened to distribute) the intimate image. Only actual consent functions as a defence. The goal is to give victims what they most want: the destruction, removal or de-indexing of the intimate image as cheaply and quickly as possible.

The second proceeding available is a claim for relief from the court (under section 5 of the UNCDIIA) which is designed to be the traditional type of tort claim. In the context of this proceeding, the court can provide much of the same declaratory and injunctive relief as in the application process, but the court can also award a much larger array of damages including general, special, aggravated and punitive damages. In this proceeding, fault is squarely in issue; therefore, defences include an honest and reasonable belief in consent, a lack of intent to distribute and that the distribution was made in the public interest. This proceeding may take longer to litigate and require the assistance of counsel but could result in significant damages awards.

We would like to hear your views on the UNCDIIA. We are particularly interested in any comments you might have on the procedural or substantive aspects of the two-proceeding approach established by the Act given that it is intended that a person be able to make an application under section 4 as well as a claim under section 5.

8. *Uniform Benevolent and Community Crowdfunding Act*

We are considering whether to recommend that the *Uniform Benevolent and Community Crowdfunding Act* ("UBCCA") be implemented in New Brunswick. The UBCCA was adopted by the ULCC in August 2020. This is a revision of the *Uniform Informal Public Appeals Act* ("UIPAA"), which was adopted by the ULCC in 2011.

The primary function of the UBCCA is to deal with unintended legal consequences that arise when informal appeals are made to the public to raise funds to help people or groups that have encountered financial, health or other difficulties or events. Such informal appeals can be made in many ways including requests for donations, sales, raffles, services, and concerts or other events. More recently, the proliferation of online crowdfunding platforms has meant that fundraisers can conduct mass funding appeals in a way that was not previously possible. Many fundraising efforts for what formerly were locally-based appeals are now conducted through such platforms.

Despite their best intentions, people who initiate such fundraising appeals often do not obtain legal advice and have little understanding of the legal implications of what they are doing. This typically raises two problems. First, it is often unclear what can be done when there is a surplus of funds. Second, fundraisers often fail to document their efforts. The UBCCA creates a framework to deal with these issues.

Surpluses are not usually a problem if the purposes are charitable. Fundraisers cannot return the excess funds to the donors, because they are typically given outright for charity. However, the court can approve a scheme under its *cy-près* power to apply the surplus to other, similar charitable purposes.

Unfortunately, that solution does not work for non-charitable objects, which include many of the objects of informal public appeals such as those mentioned above. If the fundraisers address the matter and provide

in their published materials that any surplus would be devoted to other specified purposes, the surplus could be dealt with in that way. If they fail to make such other arrangements, the money will have to be given back to the donors. The law requires this by raising a resulting trust. That is, the law imposes a trust on the fundraisers to refund the surplus to the donors, who are the owners of the funds. This will not present a problem when the donors are known, for example, where they made their donations by subscription. However, problems are created if the identity of the donor is not known because they gave anonymously or without providing sufficient contact information. In such situations, the doctrine of resulting trust still applies, which can lead to a less than ideal outcome.

The value of the UBCCA was demonstrated in the aftermath the Humboldt Broncos junior hockey team tragedy in 2018. An appeal with general objects was launched locally on GoFundMe and it raised approximately $15 million. Questions were raised about how the moneys should be distributed. The UIPAA (the predecessor of the UBCCA) had been enacted in Saskatchewan so the organizers and the court had the tools needed to craft a distribution scheme that gained wide support among the victims and their families. Had the Act not been in place, or had the accident occurred in another Canadian jurisdiction, there may have been considerable added delay and expense in bringing the matter to an acceptable conclusion.

The UBCCA addresses these issues by:

- confirming that money raised through a public appeal is held in trust for the object of the appeal;
- providing a mechanism for the disposition of surpluses (or if too little is raised to be of use) and for the court to direct the application of surplus funds if necessary;
- indicating that the scheme is default in nature and can be replaced by more specific documents and rules for different appeals;
- including a model trust document that provides a default governance structure for the trust created by the appeal.

It seems to us that scenarios like those described above demonstrate the benefits of legislation such as the UBCCA. Fundraising for benevolent objects is desirable and should be encouraged and crowdfunding has become a regular feature in our society. To solve problems that arise without legislation such as the UBCCA can be difficult, can cost a lot in terms of court time and legal and other expenses, can delay distribution of the funds raised and can result in strife among the parties involved. It seems that with such legislation in place, many of those problems can be avoided.

We would like to have your views on whether legislation modelled on the UBCCA would be useful in New Brunswick.