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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 ***August 15, 2024****, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

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1. *Supported Decision-Making and Representation Act*

As noted in issue #47 of the *Law Reform Notes*, our proposals for new legislation to replace the *Infirm Persons Act* and establish a scheme for supported decision-making led to the enactment of the *Supported Decision-Making and Representation Act* (SDMRA). The SDMRA came into force on January 1, 2024, as did the *General Regulation – Supported Decision-Making and Representation Act* and Rule 71.1 (Proceedings under the *Supported Decision-Making and Representation Act*).

The SDMRA modernizes the law in two ways. First, it updates the law regarding court-appointed *substitute* decision-makers (which were known as "committees" under the *Infirm Persons Act* and are now known as "representatives"). Second, it introduces two options for *supported* decision-making. The first option is the appointment of a "decision-making assistant". This appointment is made by the person who requires assistance (with the help of a lawyer) through a prescribed form called a "decision-making

assistance authorization". The second option is the appointment of a "decision-making supporter". This appointment is made by the court.

As a result, there are three types of appointees under the SDMRA: decision-making assistants, decision-making supporters and representatives. The main difference between them (other than the method of appointment) is their role in decision-making:

- A decision-making assistant provides *assistance* to the person in making decisions (e.g., by explaining the relevant information and the reasonably foreseeable consequences of the available options) (ss. 10(5), 2).
- A decision making-supporter and the person make decisions *together* through a "supported decision-making process" (s. 27(1)).
- A representative makes decisions *on behalf of* the person (on the basis of the person's wishes and preferences where possible) (s. 44).

As indicated above, the legislative package consists of three parts:

- the SDMRA, which deals with the three types of appointees and with related matters, including capacity assessments and the status of committees appointed under the *Infirm Persons Act*;
- the *General Regulation*, which sets out various details (such as record-keeping requirements for appointees) and includes three prescribed forms: decision-making assistance authorization, financial summary, and capacity assessment report;
- Rule 71.1, which sets out the procedure for court applications under the Act – i.e., applications for an order appointing a supporter/representative (Rule 71.1.04 – 71.1.07), applications for a review of such an order, including a review of the records kept by the supporter/representative (Rule 71.1.08), applications for directions (Rule 71.1.08), and other applications (Rule 71.1.09 – 71.1.11). (There are also three new forms in the Appendix of Forms: 71.1A, 71.1B, and 71.1C.)

Inclusion NB (formerly the New Brunswick Association for Community Living) has developed a course on the SDMRA for lawyers. It is available on their training platform, Inclusive Communities Institute. Inclusion NB has been a key contributor to this legislation, and we are grateful for their leadership in providing education.

2. Apostille Convention

The Apostille Convention (also known as the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*) came into effect in Canada on January 11, 2024. The Convention facilitates cross-border circulation of public documents (documents issued by government officials) as well as notarized documents. It does so by removing the traditional requirement for legalization and introducing a streamlined authentication process through the issuance of a single Apostille certificate. The certificate allows the documents to be submitted to more than 120 countries who have signed the Convention without the additional step of legalization by a country's consulate or embassy in Canada. As is the case for many jurisdictions, Global Affairs Canada (GAC) issues the Apostille certificates for New Brunswick. Further information on the Convention and authentication services in Canada is available from GAC at: Changes to authentication services in Canada (international.gc.ca).

3. *Uniform Benevolent and Community Crowdfunding Act*

In *Law Reform Notes* #44 (February 2021), we indicated that we were considering recommending the *Uniform Benevolent and Community Crowdfunding Act* (UBCCA) for implementation in New Brunswick and asked for your views on whether such legislation would be useful.

As set out issue #44, the UBBCA creates a framework to deal with legal issues that can arise when informal fundraising appeals are made to the public; for example, when there is a surplus of funds or when fundraisers fail to adequately document their efforts.

By way of update, in December 2023, the Uniform Law Conference of Canada made amendments to the UBCCA to harmonize its provisions with the recently adopted civil law counterpart statute, called the *Uniform Gratuitous Crowdfunding Act*. These amendments allow for: (1) one of several beneficiaries who objects to a public appeal to be excluded from the campaign, and (2) certain interested persons to apply to the court for an order terminating a public appeal on the grounds of illegality.

Additionally, in April 2024, Prince Edward Island enacted the *Benevolent and Community Crowdfunding Act* (RSPEI 1988, c. B-2.01) based on the most recent version of the UBCCA.

We continue to see the benefits of legislation based on the UBCCA and would welcome any comments on its suitability for implementation in New Brunswick.

4. Rule Against Perpetuities

In addition to being fodder for law school exam questions and first assignments for unsuspecting articled clerks, the so-called rule against perpetuities (the "Rule") has been a topic of law reform discussions for many years. In *Law Reform Notes* #5 (November 1995), our Branch outlined issues with perpetuities law and put forward several potential options for reform. As set out in *Law Reform Notes* #6 (June 1996), little response was received as to (a) whether the current rule against perpetuities caused significant trouble for practitioners, and (b) if it did, which approach to reform seemed the most promising. As a result, reform of the Rule was not pursued further at that time.

In response to our recent discussions on wills and estates legislation, feedback was received indicating that this rule of law continues to cause problems in New Brunswick and should be abolished. We intend to explore this topic again and welcome your comments.

Reform of the Rule has been discussed in two relatively recent reports, which we recommend to readers, and which have informed our comments below:

- Alberta Law Reform Institute, *Abolition of Perpetuities Law*, Final Report 110 (March 2017)
- Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (December 2010)

The common law rule against perpetuities limits the duration of certain restrictions on the use and transfer of property. In its traditional form, the Rule provides that no legal interest in property is valid unless it is certain, at the time when the disposition takes effect, that the interest will vest within a life or lives in being plus twenty-one years (the "perpetuity period"). In other words, property may not be tied up in trust, subject to restricted use, or otherwise held subject to any contingency, for longer than twenty-one years after the death of a person who is alive at the time of the disposition and whose life is relevant to the validity of the disposition.

Generally speaking, the purpose of the Rule is to balance the rights of property owners to impose conditions on the use and exchange of their property against the importance of having property under the control of living persons, so that it may be put to its best contemporary use. The Rule was originally conceived to prevent landowners from using future or contingent interests to tie up property for generations, thereby preventing it from being used for commerce or development (to prevent "the grasp of the dead hand to be kept on the hand of the living"). Over time, the common law Rule expanded to cover most future or contingent interests.

Today, this arises most commonly in connection with trusts; however, the Rule applies to many types of property interests such as options to purchase, conditional easements, remainder estates, profits-à-

prendre, rent charges and covenants or contracts to grant leases. See *City of Moncton* v. *Canada* (1987), 84 N.B.R. (2d) 6 (Q.B.), for example.

While it may be easy to explain the Rule in general or theoretical terms, it becomes much more difficult to apply or understand how it applies in any given situation. The Rule is seen as being too complex and abstract, resulting in a substantial risk that beneficiaries or grantees will be deprived of their interests through inadvertent errors in drafting. For example, in the estate planning context, vesting conditions may offend the Rule, most often unintentionally, and often only hypothetically. When this happens, the intended gift or transfer will generally be entirely invalid. As a result, the Rule has been described as "arcane in origin, difficult to understand and apply, unintuitive, and seemingly random in its effect."

The difficulty arises largely from the Rule's preoccupation with remote hypotheticals (such as "fertile octogenarians," "precocious toddlers" and "magic gravel pits"), coupled with the requirement that it must be certain, at the time of disposition, that all future or contingent interests will vest within the perpetuity period. The result being that the mere possibility that a contingent interest might vest beyond the perpetuity period means that the disposition is invalid at the outset (void *ab initio*).

Additional problems arise because of the difficulty in identifying a "life or lives in being", and the not always clear distinction between vested and contingent interests. The Rule is also subject to several exceptions that depend, in many cases, on subtle distinctions in language, such as the distinction between conditions subsequent (bound by the Rule) and determinable fees (not bound).

This complexity leads to a series of traps for unwary drafters of postponed, restricted, or conditional property transfers. Only with a complete grasp of the Rule, including all its exceptions and partial exceptions, and a thorough canvasing of all remote and unlikely possibilities of lifespan and life events of all possible "lives in being" and their offspring, can a drafter have confidence that perpetuities problems have been avoided.

At minimum, the Rule causes uncertainty and confusion and creates a risk that legitimate dispositions may be invalidated.

Reform of the Rule

In Canada, the most widely adopted response to deal with the harshness of the Rule has been to legislate a "wait and see" approach. This allows for the determination of whether a contingent interest will vest during the perpetuity period to take place when the period expires, rather than at the outset. The intention is to essentially eliminate the hypothetical questions about what might happen and only make the determination of validity or invalidity based on what actually did happen. Only interests which are proven, in time, to actually vest outside the perpetuity period will be invalid.

This approach is in place in Alberta, Ontario, British Columbia, Northwest Territories, Nunavut and Yukon.

Additionally, some jurisdictions have also adopted a fixed perpetuity period (rather than the concept of lives in being plus 21 years) in certain circumstances. For example, British Columbia allows for the choice of a perpetuity period of up to 80 years, Ontario allows for a perpetuity period of 40 years for easements, profits-à-prendre and similar interests, and Alberta sets an 80-year perpetuity period for commercial transactions.

The reform legislation in these jurisdictions also tends to provide other presumptions and interpretation guidelines designed to override other aspects of the common law Rule, for example by providing rebuttable presumptions that a woman over 55 years and a male or female under 12 years are incapable of having a child.

Prince Edward Island, while not implementing the wait and see approach, has legislated a longer perpetuity period of a life in being plus 60 years.

Abolition of the Rule

Manitoba (in 1982), Saskatchewan (in 2008) and Nova Scotia (in 2016) have enacted legislation that abolishes the Rule entirely.

In adopting its *Uniform Trustee Act* in 2012, the Uniform Law Conference of Canada recommended all jurisdictions abolish the Rule. The stated justification being that the social and economic conditions that gave rise to the Rule no longer exist. It is no longer a significant concern that a settlor would seek to control transgenerational dispositions in perpetuity. It is more likely to be the case that a bequest might fail due to inadvertence because of the application of the Rule. A potential instance, however unlikely, of someone attempting to exercise such perpetual control is better addressed by means of modern legislative provisions respecting variation of trusts, rather than by reliance on the application of a complicated rule and technical body of case law.

Additionally, the Alberta Law Reform Institute in its 2017 Final Report recommended that the Rule be abolished in that province.

Current situation in New Brunswick

New Brunswick, like Newfoundland and Labrador, has the unreformed common law version of the Rule in effect.

New Brunswick has exempted employee benefit plans from the effects of the Rule (see section 3 of the *Property Act*) and has included in the new *Trustees Act* (in force since June 2016) provisions allowing for trusts to be varied or terminated in certain situations (see sections 57 to 61), thereby providing a mechanism for perpetuity problems to be dealt with in that context.

Potential plan for New Brunswick

Our current thinking is that the Rule should be abolished. However, our view is that problems can arise (either intentionally or accidentally) when property is tied up indefinitely and, therefore, some safeguards should be established which would allow the court, on application, to vary or terminate "perpetual" interests when appropriate.

In this respect, we find the scheme implemented in Nova Scotia (see the *Perpetuities Act*, SNS 2011, c. 42, and sections 29 to 32 of the *Real Property Act*, RSNS 1989, c. 385), and the recommendations of the ALRI, attractive. We are therefore considering the following:

- Abolish the Rule (including the so-called rule in *Whitby v. Mitchell* which prohibits the disposition, after a life interest to an unborn person, of an interest in property to the unborn child or other issue of an unborn person).
- For trusts/estate planning:
    - Let the *Income Tax Act* (Canada) deemed disposition rule and the variation of trusts provisions found in the *Trustees Act* ameliorate the effect of abolition and serve the purposes the Rule was designed to fulfill.
- For non-trust long-term unvested property dispositions (such as long-term options, conditional easements, rights of re-entry following a condition subsequent, or successive remainder interests):
    - Implement new provisions, either in a standalone Act or by amendment to existing legislation (e.g., *Property Act*), which give the court the ability to order a variation (including advanced or postponed vesting) or termination of any unvested property interest, other than one subject to the variation provisions of the *Trustees Act*.
        - Notice would be required to the holder(s) of the interest, and others that may be affected by the potential order. The court would have discretion to direct that efforts be made to ascertain, locate and/or give notice to such holders.

        - The power would be exercisable upon it being shown that the reasonable use of the property will be impeded, without practical benefit to others, if the interest is not varied or terminated.
        - The court would be required to consider (a) the length of time that the interest has remained or could be expected to remain unvested, (b) the intention of the parties to the transaction (or in the case of a gift, the donor), if ascertainable, and (c) the positions of the interested parties attending the hearing.
        - The court would have discretion to order such further terms as the court considered just in the circumstances, including immediate or deferred compensation for any loss, injury, interference, or damage suffered by any person arising from the variation or termination of the interest.
        - The legislation would allow the possibility to exclude certain types of property interests in certain circumstances (e.g., options and conditional easements) or to include others but subject to certain conditions (e.g., the possibility of reverter following a determinable fee).
- The new scheme would apply retrospectively to all interests created before or after abolition of the Rule except where:
    - there was a court decision that invalidated the interest prior to the new provisions coming into effect, or
    - the interest was invalid prior to the effective date and that invalidity was relied upon.

With court variation legislation available to address potential perpetuities issues involving both trusts (the *Trustees Act*) and non-trust interests (the new legislation), our view is that the common law Rule could be safely abolished as set out above.

We welcome your comments as to whether the Rule is causing problems in New Brunswick such that it should be abolished and whether the potential solution outlined above seems appropriate and workable.

5. *Tortfeasors Act* and *Contributory Negligence Act*

As part of our ongoing review of legislation under the responsibility of the Attorney General, we would like to know if you have encountered issues with the *Tortfeasors Act* and *Contributory Negligence Act* that should be addressed. We would like your comments on whether the existing legal framework adequately addresses the rights and obligations of concurrent wrongdoers (as between themselves and in relation to the injured person) and meets the needs of plaintiffs and defendants involved in multiparty litigation, and, if not, what improvements could potentially be made.

For those interested in this topic, we refer you to the following:

- British Columbia Law Reform Institute, *Report on Contribution After Settlement Under the Negligence Act*, Report 74 (December 2013)
- Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act*, Report 128 (September 2013)
- Uniform Law Conference of Canada, *Uniform Contributory Fault Act* (1984)