



#45: September 2021

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.

*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 **November 1, 2021**, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

1. Construction Remedies Act

As previously mentioned, the new *Construction Remedies Act* (c. 29, 2020) received Royal Assent on December 18, 2020. A draft *General Regulation* (including forms) was posted for public review from June 7 to July 5, 2021. As a result of feedback received during that review, we are recommending a couple of minor amendments to the Act itself to clarify when a single holdback trust account is allowed and to provide for the option of posting certificates/declarations of substantial performance and completion electronically.

Our current recommendation is for the Act to come into force by proclamation on November 1, 2021, except for sections 37 and 38 and subparagraphs 87(1)(a)(v) and (vi), which relate to holdback trust accounts. We hope that the amendments to the Act will proceed in the fall session, and that these remaining provisions will then come into force by proclamation, hopefully in early 2022.

Likewise, the *General Regulation* will commence on November 1, 2021. Note, however, that while section 4 (Holdback Trust Accounts – Exclusions) will come into force along with the rest of the Regulation, it will not have effect until section 37 the Act (as amended) is brought into force.

2. Notaries Public Act

Last fall we submitted a proposal for amendments to the *Notaries Public Act*. This led to an amending Act (*An Act to Amend the Notaries Public Act*, c. 2, 2021), which came into force in March.

The amendments remove the provisions of the *Notaries Public Act* that allow for the appointment of a notary public. These provisions are obsolete. Since 1983, lawyers have automatically become notaries public, and as far as we are aware no one has been appointed as a notary public since the mid-1980s.

The amendments also clarify which lawyers may act as notaries public. Previously, the Act provided that “every attorney who ... becomes a member in good standing of the Law Society of New Brunswick is a notary public”. There was some uncertainty as to whether this included non-practising members (including retired members), given that the powers of a notary public overlap to some extent with the definition of “practice of law” in the *Law Society Act, 1996*, and non-practising members cannot engage in the practice of law. As a result of the amendments, the Act now provides that “[e]very member of the Law Society of New Brunswick is a notary public” *but* a member “who is not a practising member may not use or exercise any power of a notary public that involves engaging in the practice of law as defined in the *Law Society Act, 1996*” (ss. 1, 5.1). In other words, non-practising members can act as notaries public as long as they do not engage in the practice of law.

Anyone with a question about whether the exercise of a particular power involves engaging in the practice of law should contact the Law Society.

3. Provincial Offences Procedure Act

Amendments relating to fines for provincial offences have been made to the *Provincial Offences Procedure Act*. The amending Act (*An Act to Amend the Provincial Offences Procedure Act*, c. 24, 2021), received Royal Assent on June 11, 2021.

The amending Act includes two sets of amendments. The first set, which came into force on Royal Assent, relate to the waiver of fines. Previously, the Act provided that a judge may release a defendant without imposing a fine or a term of imprisonment (or other sentence) if the judge is of the opinion that imposing a fine or term of imprisonment “is not in the public interest” and “would harm the reputation of the system of justice” (s. 55). The Act now provides that a judge must also be of the opinion that “exceptional circumstances exist” (s. 55(1)). Also, the Act now provides that a judge who releases a defendant without a sentence or waives the victim surcharge must give reasons for doing so (ss. 55(2), 55.1(3)).

The second set of amendments, which have not yet come into force, relate to the payment of fines. The changes are as follows:

- A judge will be able to order that a fine be paid in instalments (except for the offences referred to in subsection 347.1(1) of the *Motor Vehicle Act*).
- A judge will be able to extend the deadline for payment of a fine to up to one year, if the judge is ordering payment in instalments or an extension is appropriate for any other reason. (The regular deadlines – 90 days for fines of less than \$1200; 180 days for fines of \$1200 or more – will not change.)
- The Act will state that a defendant may plead guilty and make submissions respecting “the fixed penalty” (i.e., both the fine and the victim surcharge). Currently, the Act states that a defendant may plead guilty and make submissions respecting “the portion of the fixed penalty representing the surcharge payable under the *Victims Services Act*” (i.e., the victim surcharge).

These amendments will come into force by proclamation, to allow time for the preparation of corresponding amendments to forms in the *Forms Regulation – Provincial Offences Procedure Act*. We do not yet know when the amendments to the Act and the forms will come into force.

4. Limitation of Actions Act

An Act to Amend the Limitation of Actions Act (c. 21, 2021) came into force on June 30, 2021. The amendments establish a six-year limitation period and fifteen-year ultimate limitation period for claims brought by the Crown for money owing to it. The amendments also establish new transitional provisions for these claims. The transitional provisions extend the expiry of two types of limitation periods to July 1, 2022: (a) a limitation period that was to have expired on July 1, 2021, under the previous transitional provisions, and (b) a limitation period that would expire between July 1, 2021, and July 1, 2022, if not for the new transitional provisions. For background information on transitional provisions regarding money owing to the Crown, refer to *Law Reform Notes* #30 and #39.

5. Legislation regarding COVID-19

Due to the COVID-19 pandemic, New Brunswick was in a state of emergency from March 19, 2020, to July 30, 2021. In anticipation of the end of both the state of emergency and the corresponding mandatory order, the legislature passed *An Act Respecting the Operation of the Order Relating to COVID-19 under the Emergency Measures Act* (c. 26, 2021), which deals with the effect of the expiry of the mandatory order. The Act received Royal Assent on June 11, 2021.

Included in the Act is a section on the calculation of limitation periods. The section carries forward the portions of the mandatory order that suspended the operation of the provisions that establish limitation periods for commencing a proceeding; however, the section only applies to limitation periods that were affected by the period of suspension (March 19, 2020 to September 18, 2020 in most instances) and expire on or before December 31, 2022.

6. Uniform Non-Consensual Disclosure of Intimate Images Act

As discussed in *Law Reform Notes* #44, we have proposed a new Act, based on the *Uniform Non-Consensual Disclosure of Intimate Images Act*, which was developed by the ULCC in early 2021. The proposed Act, which will likely be titled the *Intimate Images Unlawful Distribution Act*, would create statutory civil liability for the distribution, or threatened distribution, of intimate images without the consent of the person depicted in the image and provide remedies for the victims of such activity. We hope that this will be introduced in the fall 2021 legislative session.

7. Legal parentage

As mentioned in previous issues of the *Law Reform Notes*, we plan to undertake a review of the existing legislation regarding the legal parentage of children (i.e. Part VI of the *Family Services Act*). This project was put on hold during the COVID-19 pandemic, as resources were needed elsewhere. At this point, it is unclear when work on this file will recommence. The goal continues to be to introduce legislation to modernize and expand the existing legislation. This area of the law is continually changing, and the British Columbia Law Institute (BCLI) has undertaken a project to review Part 3 (Parentage) of the BC *Family Law Act*. We look forward to reviewing BCLI's ongoing work to help inform our path forward in modernizing our legislation.

8. Infirm Persons Act

As we explained in issue #44 of the *Law Reform Notes*, we are reviewing the *Infirm Persons Act* and plan to propose new legislation. We continue to welcome feedback on the questions set out in that issue or on any other aspect of this area of law. We would ask that comments be sent to us by November 1, 2021.

9. Wills and estates legislation

We continue to consider the modernization of estates law (both testate and intestate).

In issue #44 of the *Law Reform Notes*, we sought general input about issues our readers are having with the current legislative scheme and any proposals they may have for reform. At this time, we are considering and seeking feedback on the topics set out below; however, any other general input or reform suggestions are still welcomed and encouraged. We would also like to have your views on whether and to what extent the existing legislation in this area should be consolidated into one Act (or at least fewer Acts than are in place today).

Testate Issues (Wills Act)

- Generally speaking, are there terms or concepts that are outdated, duplicative, unnecessary or need to be clarified?
- Minimum age for making a will
- Special rules for testators under minimum age
- Remote witnessing of wills – In response to the COVID-19 pandemic, section 4.1 was added to the *Wills Act* to allow, subject to certain conditions, for the use of electronic means of communication as an acceptable alternative to meeting with clients and witnesses in person. Section 4.1 remains in force until the end of 2022. We are interested in hearing about your experience using section 4.1 and whether you think these provisions should be adopted permanently.
- Electronic wills
- Use of extrinsic evidence in interpretation of will by court
- Scheme to deal with failed gifts (lapse, ademption, forfeiture, declension)
- Death of executor – Is there currently an administration problem when the executor dies (and there is no co-executor or alternate appointed)?
- Devise of mortgaged land (section 34) – Should this provision be extended to include both real property and tangible personal property and be limited to registered (under the *Registry Act/Land Titles Act* or *Personal Property Security Act*, as may be) purchase money interests?
- Abrogation or modification of common law presumptions/doctrines
- Gifts to witnesses – Should the provisions account for other relationships? Should the court be able to validate gifts to witnesses, etc.?
- Effect of subsequent divorce (or termination of a common law relationship) on will

Intestate Issues (Devolution of Estates Act)

- Generally speaking, are there terms or concepts that are outdated, duplicative, unnecessary or need to be clarified?
- Posthumous births – children conceived and born after the death of the intestate, for example through the use of assisted human reproduction
- Spouses – inclusion of common law relationships
- Termination of eligibility for spouses/common law partners – effect of divorce, separation or other relationship termination on the ability to inherit on intestacy
- More than one surviving “spouse” eligible to inherit the spousal share on intestacy

- Adopted/pre-adoption children/ *in loco parentis* – inheritance by adopted child from adopted parent; inheritance by adopted child from genetic parent; inheritance by child adopted through customary adoption (particularly in respect of off-reserve indigenous children); inheritance by child in the process of being adopted (i.e. before adoption order has been issued); inheritance by child from a person who stands in the place of a parent (a step-parent, for example)
- Distribution of estates involving common children – We are considering modifying the basic distribution rules to provide that the surviving spouse or partner should receive the entirety of the intestate’s estate where all children of the intestate are shared with the surviving spouse or partner. It seems that this result most likely emulates what is being done by testators (particularly for smaller estates) by way of joint or mirror wills.
- Repeal or modification of doctrine of advancement
- Partial intestacy – set-off of gifts made under a will

Again, we welcome your comments on these or any other topics dealing with potential wills and estate law reforms.

10. Uniform Access to Digital Assets by Fiduciaries Act

We are considering whether to recommend that the *Uniform Access to Digital Assets by Fiduciaries Act* (“UADAF”) be implemented in New Brunswick. The UADAF was adopted by the ULCC in August 2016. Saskatchewan is the first Canadian jurisdiction to implement the UADAF: *The Fiduciaries Access to Digital Information Act*, S.S. 2020, c. 6, came into force on June 29, 2020.

Fiduciaries are appointed to distribute or manage a person’s property and affairs when the person dies or loses the capacity to do so themselves. There is concern that the law currently does not adequately deal with how fiduciaries may gain access to digital assets, nor does it make clear the duty of custodians of digital assets – like websites, banks, social media platforms, etc. – to provide access to those assets. Nearly everyone today has digital assets, which can include: electronic information about bank accounts, securities and insurance policies, email accounts, virtual currency, audio or video files, online music, e-books, gaming credits, loyalty points, blogs, social media posts and family photographs, whether stored in the cloud or on personal computers, laptops, tablets or other storage devices. A custodian’s refusal to grant access to such assets can create added expense and stress for fiduciaries when trying to fulfill their obligations. The problem will likely continue to grow as digital assets held by individuals increase in number and in value and as our population ages.

The general goal of the UADAF is to facilitate fiduciary access while respecting the privacy and intention of the account holder. The Act adheres to the traditional approach of trusts and estates law, which respects the intention of the account holder. The Act also promotes the fiduciary’s ability to administer the account holder’s property in keeping with existing fiduciary duties.

The UADAF addresses the four common types of fiduciaries: personal representatives of a deceased’s estate, guardians (committees in New Brunswick) appointed for an incapacitated account holder, attorneys acting under a power of attorney, and trustees. The UADAF confirms that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have.

The UADAF establishes how a fiduciary can request access to a digital asset from a custodian. The right of access to the digital asset is subject to any restrictions set out in the will, power of attorney or court order appointing the fiduciary. Access is also subject to any restrictions in the service agreement between the account holder and the custodian, if the restriction is put in place by the account holder by a separate action (other than simply agreeing to the terms of service agreement) after the Act comes into force. If necessary, a fiduciary may also apply to the court for directions respecting the fiduciary’s right to access a digital asset. The Act provides custodians with liability protection when they comply with the Act in good faith.

The UADFA does not apply to an employer's digital assets that are used by an employee in the ordinary course of the employer's business. Likewise, the Act does not deal with efforts of non-fiduciaries to access digital assets. Family members, friends or other interested persons may seek access, but, unless those persons are fiduciaries, their efforts will be subject to other laws and will not be covered by the UADFA.

Our view is that the adoption of the UADFA could be beneficial in ensuring certainty and predictability for account holders, fiduciaries, custodians and courts when dealing with digital assets.

We would like to know if you have encountered issues when dealing with digital assets, if you are currently making specific provision for digital assets when drafting wills, powers of attorney or trusts and whether you think legislation modelled on the UADFA would be useful in New Brunswick.