
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 Office, and ask for responses to, or information about, items that are still in their formative stages. We welcome comments from any source.

Opinions expressed in these 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 International Interests in Mobile Equipment Act

During the summer it emerged that the *International Interests in Mobile Equipment Act*, which received Royal Assent in May, would need amending before it is brought into effect. The Act implements in New Brunswick the *Convention on International Interests in Mobile Equipment* and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, which establish a PPSA-type registry system for the secured financing of large and medium-sized airframes, aircraft engines and helicopters.

The Convention and Protocol are brought into effect by "declarations" that the federal government makes at the province's request and deposits with UNIDROIT, the international organization involved. During the summer we noticed that UNIDROIT, when referring to the most recent declarations it had received for Canadian jurisdictions, had cited different articles of the Convention and Protocol than the ones that those jurisdictions, and we, had referred to in our respective Acts. The declarations were being treated as "subsequent declarations" (since the Convention and Protocol were in effect elsewhere in Canada) rather than initial ones (which they were from the jurisdictions' point of view), and this affected not only the appropriate citations but also the date when the declarations would take effect – six months, rather than three months, after the date of their deposit.

To avoid possible confusion about this, we recommended that the *International Interests in Mobile Equipment Act* should be amended to make it consistent with the approach that the federal government and UNIDROIT will actually take when the province asks the federal government to declare that the Convention and Protocol extend to New Brunswick. That amendment is now contained in Bill 8, *An Act to Amend the International Interests in Mobile Equipment Act*, which has recently been introduced in the Legislative Assembly.

2 Enforcement of Money Judgments Act

We are currently finalizing our recommendations for the regulations that are needed in connection with the *Enforcement of Money Judgments Act*. They mainly relate to forms and procedures, and are not extensive. They do, however, involve several additional pieces of legislation, such as the *Rules of Court* and the regulations under the *Personal Property Security Act*, among others.

There will be a CLE session on the *Enforcement of Money Judgments Act* at the CBA's midwinter meeting in February. By then we should have a better idea of when the regulations are likely to be completed and when proclamation will occur.

3 Inquiries Act

We mentioned in Law Reform Notes #34 that we had developed and submitted recommendations for a new *Inquiries Act*. New Brunswick's current Act dates from the late 1800s, and has been changed very little since then. The new Act would update the law in light of recent initiatives such as the Uniform Law Conference of Canada's *Uniform Public Inquiries Act* (2004) and recent legislation in Newfoundland (2006), British Columbia (2007), Ontario (2009) and Saskatchewan (2013). Also affected would be approximately 50 other Acts and regulations that contain cross-references to the *Inquiries Act* and rely on it, to varying extents, to provide powers to a wide range of statutory bodies and officials.

We had hoped that the legislation might be considered during the spring sitting of the Legislative Assembly in 2014, but this was not to be. We are now preparing to present our recommendations to the new government.

4. Uniform Reviewable Transactions Act

In the previous issue of the *Law Reform Notes* we summarized the contents of the *Uniform Reviewable Transactions Act* and explained that we were considering whether to recommend that it be implemented in New Brunswick. The Uniform Act would replace the *Fraudulent Conveyances Act, 1571* (an English Act which is often referred to as the *Statute of Elizabeth*) and the *Assignments and Preferences Act*.

We have now reviewed the Uniform Act more closely and we plan to recommend legislation that is based on it. In some areas, however, we are considering modifications, which are discussed below. We would welcome feedback before final conclusions are reached.

The Uniform Act allows a creditor to apply to the court for relief when the debtor transfers property to another person. The test for determining whether relief is available depends on whether the transferee is another creditor.

When the transferee is a creditor, relief is available if (a) the debtor was insolvent, and (b) the debtor and creditor were not “dealing at arm’s length” (s.13(1)). The concept of “arm’s length” dealings ties in with provisions of the federal *Bankruptcy and Insolvency Act* and the case law under that Act.

When the transferee is not a creditor, relief is available if

- (a) the debtor is insolvent and the transferee provides no consideration or consideration worth “conspicuously less” than the value conferred by the debtor (s.7(1)(a));
- (b) the debtor’s “primary intention” is to hinder the creditor’s right to recover the claim, the creditor’s ability to recover the claim is “materially hindered”, and the transferee provides no consideration or consideration worth “conspicuously less” than the value conferred by the debtor (s.7(1)(b)); or
- (c) the debtor’s “primary intention” is to hinder the creditor’s right to recover the claim, the creditor’s ability to recover the claim is “materially hindered”, and the transferee intended to assist the debtor (s.7(1)(c)).

We are considering whether this three-pronged test should be modified. We wonder whether a less structured analysis might be preferable. For instance, the test could simply be whether the creditor’s right to recover the claim is materially hindered, and matters such as the debtor’s insolvency and the value of the consideration could be seen as factors to be considered rather than elements that must be established under particular prongs of the test. Also, we wonder about the role of the intentions of the debtor and the transferee in this test. If a transfer has the effect of hindering a creditor, should it matter whether the debtor intended that effect? If so, should it matter only when the debtor is solvent?

Another point on which we are considering a modification is the treatment of “exempt property” – i.e., property that is exempt from enforcement under judgment enforcement legislation because it is necessary to meet the debtor’s basic needs. Under the *Enforcement of Money Judgments Act*, exempt property includes food, clothing, a motor vehicle and tools used for work.

Under the Uniform Act, exempt property is treated like any other property. If a debtor transfers exempt property, the court can order that it be sold and the proceeds given to the creditor. In other words, the property loses its exempt status when it is transferred. The rationale for this approach is that a debtor who transfers exempt property has decided that he or she does not in fact need the property, and can be treated as having surrendered the exemption.

We think the legislation should perhaps do more to protect debtors who transfer exempt property. Debtors may well sell or give away exempt property because they are not aware that they are allowed to keep it (not because they have decided they do not need it) and we suggest that the Act should allow debtors to recover or replace such property.

A third potential modification relates to secured creditors. The Uniform Act is primarily aimed at unsecured creditors, as secured creditors can enforce directly against the collateral. However, the Act recognizes that relief should be available to a secured creditor when the debt exceeds the value of the collateral. Section 3(1) provides that a secured creditor “may apply for an order for relief under this Act but only with respect to the amount of the claim, if any, that exceeds the value of the property against which the security interest may be enforced”.

We agree with the premise here – that relief should be available to a secured creditor when direct enforcement against the collateral will be insufficient – but we think the approach should be more flexible.

If a secured creditor is not allowed to *apply* for relief unless the amount of the debt exceeds the value of the property, proceedings could be tied up by preliminary motions dealing with the value of the collateral and the standing of the creditor. It would be better, we think, if any secured creditor could apply for relief, and the court, when determining the remedy, would take into account the extent to which the creditor can recover the debt through direct enforcement.

Along with the above substantive points, there are a few matters of organization and terminology that we would change. For instance, the term “transaction” seems less than ideal given that the Act applies to gratuitous transfers.

We welcome comments on any of the above issues or any other issues arising in relation to the Uniform Act.

B. NEW ITEMS

5 The Revised Statutes of New Brunswick, 2014

In 2003, the *Statute Revision Act* was enacted as the first step in completing a revision of the Acts of New Brunswick, the first such revision and consolidation of the Statutes of New Brunswick since 1973. In accordance with section 5 of the *Statute Revision Act*, the Attorney General has recently deposited with the Clerk of the Legislative Assembly the *Revised Statutes, 2014*, the third such deposit. In accordance with subsection 4(2) of the *Statute Revision Act* no changes have been made in the course of the revision that would have the effect of altering the substance or intent of a provision of an Act or that are of a law reform nature. Nevertheless, these *Notes* are a convenient vehicle for providing some general information on the revision.

The *Revised Statutes, 2014*, includes the following 38 Acts.

- Arbitration Act
- Blind Workers' Compensation Act
- Business Improvement Areas Act
- Change of Name Act
- Court Security Act
- Crown Construction Contracts Act
- Electoral Boundaries and Representation Act
- Escheats and Forfeitures Act
- Fiscal Stabilization Fund Act
- Foreign Resident Corporations Act
- Forest Fires Act
- Franchises Act
- Health Services Act
- Human Tissue Gift Act
- Intoxicated Persons Detention Act
- Kings Landing Corporation Act
- Legislative Assembly Act
- Liens on Goods and Chattels Act
- Maritime Economic Cooperation Act
- Maritime Provinces Harness Racing Commission Act
- Municipal Thoroughfare Easements
- New Brunswick Day Act

New Brunswick Grain Act
New Brunswick Transportation Authority Act
Nova Scotia Grants Act
Nursing Homes Act
Plumbing Installation and Inspection Act
Reciprocal Enforcement of Judgments Act
Research and Productivity Council Act
Restricted Beverages Act
Sheep Protection Act
Sheriffs Act
Society for the Prevention of Cruelty to Animals Act
St. Croix International Waterway Commission Act
Transportation of Primary Forest Products Act
Unsightly Premises Act
Women's Institute and Institut féminin Act
Youth Assistance Act

The *Revised Statutes, 2014*, will come into force on a date to be fixed by proclamation of the Lieutenant-Governor in Council.

On deposit, the *Revised Statutes, 2014*, are found on the Government of New Brunswick's website, at the Acts and Regulations homepage under the "Revised Statutes" link. On proclamation into force, they will also be found in the alphabetical list of Acts.

Responses to any of the above should be sent to the address at the head of these Notes, marked for the attention of Tim Rattenbury, or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than February 7th, 2015, if possible.

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