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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 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. Limitation of Actions Act – possession of land

An Act to Amend the Limitation of Actions Act (c.17, 2011) was passed in the spring sitting of the Legislative Assembly. It repealed the *Real Property Limitations Act* and replaced it with a new s.8.1 of the *Limitation of Actions Act*, establishing the limitation period for a claim to recover the possession of land.

The amending Act was briefly summarized in *Law Reform Notes 29* while still in Bill form. A fuller explanation is provided in an article which has been submitted to the *Solicitor's Journal*, and is expected to be published soon.

In the meantime the most important point to note about the amendment is that, for consistency with other provisions of the *Limitation of Actions Act*, the normal limitation period for claims to recover land is now 15 years rather than the historically familiar 20 years. There is no discoverability rule of the kind that the *Limitation of Actions Act* applies to most claims.

The amendment came into force on Royal Assent (June 10, 2011), but under s.4(2) of the amending Act there is a transitional provision: "On or before April 30, 2012, a claim may be brought after the new limitation period has expired if the former limitation period has not expired." The concept and wording are very similar to s.27(3) of the *Limitation of Actions Act*, but some of the surrounding provisions in the amending Act differ. Anyone who is involved in a dispute which may be affected by the amendment or the transitional provision should review ss.4 to 7 of the amending Act to verify what limitation period applies.

2. Habeas Corpus Act

Our plan to repeal the *Habeas Corpus Act* and enact a new Rule of Court to govern *habeas corpus* proceedings has not been mentioned in these Notes for some time. (See previously issues 19 and 24.) However, we have continued working on it, and have consulted with the Rules

Committee about the proposed new Rule. As a result of this, *An Act to Repeal the Habeas Corpus Act* (c.53, 2011) has now been passed, subject to proclamation, and the Rule that is to be put in place should be finalized soon. *Law Reform Notes 19* explains how little substance the *Habeas Corpus Act* contained.

The Rule is likely to be short. As currently envisaged, it will simply establish that *habeas corpus* orders can be applied for by notice of motion or notice of preliminary motion, and that a document called a *habeas corpus* summons can be issued if the judge considers it important that the respondent or the person whose custody is in question be present at the hearing.

The proclamation of the repealing Act will be coordinated with the making of the Rule. Assuming that this occurs in the next few months, an explanation of the Rule will be provided in the next issue of these Notes.

3. Quieting of Titles

Progress has also been made on the proposed new Rule of Court which is intended to replace the *Quieting of Titles Act* and permit the proclamation of *An Act to Repeal the Quieting of Titles Act* (c.52, 2007). Several past issues of these Notes have dealt with this subject. If the new Rule is finalized by the time the next issue is released, we will summarize it then.

4. Enforcement of money judgments

In issue #29 of these Notes we mentioned that we were taking up again a subject that has been in need of reform for many years: the enforcement of money judgments. Shortly afterwards, we were contacted by Professor Micheline Gleixner, of the Université de Moncton. She explained that she had been developing a research project on this topic that would build on the existing studies in New Brunswick and elsewhere, and would present updated recommendations for reform. She wondered, however, whether parts of the project she had been planning should be reconsidered if the Branch was already moving forward on this subject.

We confirmed that we would welcome input, and after discussion of both the scope and the timing of our respective activities, Professor Gleixner adjusted and finalized her plans and successfully applied to Law Foundation for funding. A project team was then set up and has been at work since. Professor Gleixner hopes to release the project's report in February, and to make it available to the public as well as the Bar.

We have also continued our own work on this file, but will await the project's report before making specific legislative recommendations to the government. In the meantime, if anyone wishes to offer any comments on the issues that a new *Enforcement of Money Judgments Act* should or should not address, or on the details of what it should or should not say, we will be happy to receive them.

There may still be time for further comments to be added after Professor Gleixner releases her report, but we encourage anyone who would like to provide input on this subject to do so now if they can.

B: NEW ITEMS

5 Limitation of actions – debts due to the Crown

S.2 of *An Act Respecting the Recovery of Debts Owed to the Crown* (c.52, 2011) has repealed and replaced s.27.1 of the *Limitation of Actions Act*, the transitional provision relating to debts due to the Crown. C.52 also amends the *Financial Administration Act*. The amendments to both Acts came into force on Royal Assent (December 21, 2011), and are designed to support the efforts the government will be making in coming years to improve its collection of amounts it is owed. The focus of this note, however, is on the changes to the *Limitation of Actions Act*.

The original s.27.1 was as follows:

> **Transition – debts due to the Crown**
> **27.1** During the first 6 years after the effective date, the limitations law of New Brunswick, as that law existed immediately before the effective date, applies to a claim brought by the Crown to recover money owing to it.

The new s.27.1 replaces it:

> **Transition – debts due to the Crown**
> **27.1** Despite anything else in this Act, if the limitation period that applies to a claim by the Crown for the recovery of

> money owing to it would, if not for this section, expire after the commencement of this section but before May 1, 2016, that limitation period expires on May 1, 2016.

The end date of both provisions is the same, since May 1, 2016, is the end of the period that the original s.27.1 describes as "the first six years after the effective date". What changes, however, is the operation of limitations law in the meantime.

Under the original s.27.1, limitation periods for debts due to the Crown could expire during the transitional period, but whether or when they did so would depend on the limitations law of New Brunswick as it existed on April 30, 2010. In many cases that would mean that their duration would be six years under the former *Limitation of Actions Act* rather than two years under the new one.

Under the new s.27.1 the old limitations law of New Brunswick ceases to matter, except for the purpose of deciding whether a limitation period had already expired before the section came into force. If it had not, s.27.1 will now extend it until the transitional period ends. S.27.1 will also apply to limitation periods that begin to run in accordance with the *Limitation of Actions Act* during the transitional period. They, too, cannot expire before May 1, 2016.

As of May 1, 2016, when the new s.27.1 will have run its course, there will be no special treatment in the *Limitation of Actions Act* for claims by the Crown to recover money owing to it.

6. The definition of "parent" in the *Guardianship of Children Act*:

The lawyers responsible for the revision of the New Brunswick Acts have suggested that the definition of "parent" in the *Guardianship of Children Act* should be considered for amendment. The revision itself, of course, does not make changes of substance.

The *Guardianship of Children Act* deals with the status of parents as guardians of their children and enables them to appoint others as guardians. It starts with two definitions:

> "child" means a child domiciled or resident in the Province, whether born before or after this Act comes into force, and includes a child whose father and mother are not married to one another.
>
> "parent" does not include the father of a child whose father and mother are not married to one another.

These interconnecting definitions exclude the unmarried father from the scope of the Act, the main provisions of which are these:

- S.2 says that the parents of a child are its joint guardians, and that they can jointly appoint guardians. Either one of them can revoke this joint appointment.

- S.3(1) creates an exception. "A parent has no status as a guardian under this Act and no power to appoint a guardian if he or she is living separate and apart from the other parent by reason of divorce or otherwise and has by his or her conduct displayed an intention to abandon the child."

- S.3(2) permits an individual parent to appoint a guardian if he or she has custody of the child in fact or by court order and the other parent is dead or is disqualified under s.3(1).

- S.4 permits a parent who is entitled to appoint a guardian under s.2 or s.3 to do so in his or her will.

- S.5 says that guardians established or appointed under the Act have (a) the right to custody of the child and to control its education and upbringing, and (b) the duty to exercise care and management of the child's property.

- SS.6 and 7 deal with the removal of guardians.

There has apparently been no judicial interpretation of this Act. Taking the definition of "parent" at face value, therefore, the result seems to be that the unmarried father does not have the rights and duties of a guardian in s.5 and does not have any of the appointment powers in the Act, not even if he is the person with actual custody of a child whom the mother has abandoned. The unmarried mother has the

rights and duties of a guardian in s.5, but probably cannot appoint a guardian under s.2 (since this is a joint appointment, and the unmarried father cannot make one), and possibly cannot appoint one individually under s.3 (since it is uncertain how this section operates when the father is not dead or disqualified but is simply not a "parent").

Constitutional questions can obviously be asked about any legislation that creates distinctions like these, based on sex or marital status. Leaving those issues aside, however, we consider that the position of unmarried fathers under the Act should probably be altered for the simple reason that it does not reflect current social expectations. Unmarried couples with children are not uncommon, and most people nowadays would surely expect that if an unmarried couple has a child each of the parents would have the same status as its guardian, and that they should be able to jointly appoint someone else as guardian if they chose. Likewise, most people would assume that if the mother had died or had abandoned the child in the father's care, the father would still be its parent and should have the ability to appoint a guardian.

They might hesitate more at the idea that father would have the status of a parent under the Act if his paternity was purely factual, and there had never been a family relationship of any kind with the mother. But the position of the mother in a case like this would still be protected by the exception in s.3(1): the father would have "no status as a guardian under this Act and no power to appoint a guardian" if he was living separate and apart from the mother by reason of divorce or otherwise and had by his conduct displayed an intention to abandon the child.

All in all, therefore, we do not consider that the definition of "parent" in the Act should exclude the unmarried father. Less straightforward, however, is deciding how the definition should be amended, since any attempt to define "parenthood" nowadays raises multiple legal complexities.

One possibility would be to build on paragraph (e) of the definition of "parent" in s.1 of the *Family Services Act*:

> "'parent' means a mother or father . . . but does not include . . . *(e)* the natural father of the child who is not married to the mother of the child unless he has signed the birth registration form under section 9 of the *Vital Statistics Act* or he has filed, with the mother, a statutory declaration under section 105, or he has been named the father of the child in a declaratory order made under Part VI or he is a parent within the meaning of paragraph (b)".

This definition would extend the *Guardianship of Children Act* to unmarried fathers who had been formally recognized as such, but not to others.

An alternative might be to simply repeal the definition of "parent" in the *Guardianship of Children Act*, and probably also the definition of "child", since the two definitions go together as a package. The Act would therefore be silent about what it means by "parent". Note, however, that it is largely silent already, since the existing definition does not say who *is* a parent; it just identifies one person who is *not* one.

Silence in the *Guardianship of Children Act*, however, would not simply leave the word "parent" as an undefined word which could be interpreted according to its ordinary meaning (whatever that might be). Instead it presumably leads to ss.96 and 97 of the *Family Services Act*, which contain the following rules for determining who a "parent" and a "child" are.

> **96**(1) Subject to subsection (2), for all purposes of the law of the Province a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.
>
> **96**(4) Any distinction between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined in accordance with this section.
>
> **97**(1) For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to

> refer to or include a person who comes within the relationship of parent and child as determined under section 96.

The apparent clarity of this, however, must be combined with the lengthy definitions of "child" and "parent" in s.1 of the *Family Services Act*, then qualified again by the fact that those definitions cannot apply literally in ss.96 and 97 and the surrounding sections, and then further qualified by the fact that none of those provisions was written with an eye to issues such as same-sex marriage or modern reproductive technologies. So leaving the *Guardianship of Children Act* silent as to who a "parent" is, and relying on the general underlying law instead, is not necessarily a simple solution.

A third option, therefore, might be to provide definitions of "parent" and "child" in the *Guardianship of Children Act* that were tailor-made to the specific provisions of that Act. We have not considered exactly what this would involve, but based on all the complexities surrounding the legal concept of parenthood nowadays, it could certainly not be a simple definition.

At present, despite its drawbacks, we favour the second approach – simply repealing the definitions of "child" and "parent" in s.1 of the *Guardianship of Children Act*, and leaving it at that. The first approach, though it would provide a clear rule, would also exclude fathers who should probably not be excluded. The third approach would require the creation of new definitions of "parent" and/or "child" that would be somewhat different from existing ones, though it is not obvious what those differences should be.

The second approach, though admittedly it leaves some uncertainties, merely reflects the unspoken *status quo* in the Act. The Act, after all, does not say who a child's parents are; all it says is that the unmarried father does not count as one. Repealing the definition would mean that he did.

We would welcome comments on whether this is the best approach to the current exclusion of unmarried fathers from the *Guardianship of Children Act*, and whether there are better options that we have overlooked.

7 "Shall" and "may" in the *Interpretation Act*

It has been suggested to us that the definitions of "shall" and "may", and "doit" and "peut", in s.38 of the *Interpretation Act* should be reconsidered in the light of current Canadian drafting practice. The existing provisions are:

- "shall" is to be construed as imperative, and "may" as permissive and empowering;
- « doit » exprime une obligation, et « peut » une faculté et un pouvoir.

The background to the suggestion is that in bilingual legislation nowadays the counterpart of "shall" in English is normally not "doit" in French, but the present tense of the operative verb. Other jurisdictions with bilingual statutes have amended their *Interpretation Acts* to reflect this. They differ in minor ways, but Manitoba provides a good illustration of the usual approach and content:

> **Imperative and permissive language**
> 15 In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering. In the French version, obligation may be expressed by using the present indicative form of the relevant verb, or by other verbs or expressions that convey that meaning; the conferring of a power, right, authorization or permission may be expressed by using the verb "pouvoir", or by other expressions that convey those meanings.

Ontario, however, recently repealed its equivalent of Manitoba's s.15. Part VI of Ontario's *Legislation Act*, which is the successor to its *Interpretation Act*, says nothing about "shall" and "may" in English or the use of the present indicative or "pouvoir" in French.

We are inclined to think that the Ontario approach is the better. The definitions of "shall" and "may" in English do not appear to serve much practical purpose (see, for example, the analysis in *Sullivan on the Construction of Statutes*, 5th ed., 2008, pp.68-74). In French, likewise, it is hard to see that there is any real substance to a provision stating that obligations or powers are expressed in specified ways or by

the open-ended alternative of "other . . . expressions that convey that meaning".

Before we make any recommendation, however, we are open to other views on whether, either in English or in French, a provision like Manitoba's s.15 has advantages over simply following the Ontario example of removing "shall" and "may" from the *Interpretation Act*.

8. Privity of contract and the Law Reform Act

In 1993 New Brunswick became the first common law province to enact general legislation enabling third parties to enforce contractual provisions by which the contracting parties confer benefits on them – s.4 of the *Law Reform Act*. A few years later, in *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.* (1999 SCJ No.48), the Supreme Court of Canada took a notable step in the same direction, creating what it called a "principled exception" to the law of privity of contract. Iacobucci J explained, at para.32, that the determination of whether the principled exception would enable a third party to enforce a contract would depend in general terms upon two factors:

> (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? And (b) Are the activities performed by the third party . . . the very activities contemplated as coming within the scope of the contract in general, or the provision in particular . . . ?

We have periodically reviewed the case law under s.4 and under *Fraser River* to see whether it gives cause to amend s.4. There have been few cases under that section, but we believe that one of them, *Mandervillle v Goodfellow's Trucking, Ltd.* (1999 NBJ No.75), does identify an issue that should be addressed: how high a threshold of "intent" does s.4 set for the purpose of determining whether a third party is, in the words of the section, "identified by or under the contract as being intended to receive some performance or forbearance under it"?

The cases citing *Fraser River* are more numerous, and although they reinforce the idea that the amendment mentioned above is warranted, they do not provide any reason to consider other amendments. A full description of the cases would be out of place in this Note, but a very brief overview is this:

- Most of the cases under *Fraser River* – and almost all of the ones in which third parties have been successful – relate to waivers, releases and the like, as did *Fraser River* itself.
- Most of the cases considering *Fraser River* in relation to other kinds of contracts, including the cases on the important question of whether the principled exception can operate as a 'sword' rather than just a 'shield', are rulings on motions, and lead to findings about what is or is not arguable rather than to actual decisions about what the law is.
- Only a small handful of these non-waiver cases have produced final judgments in favour of third parties, and nothing in those judgments points to a need to consider amending s.4.

We are aware, of course, that many issues may arise in relation to s.4 in practice without showing up in the case law. We will be happy to consider anything that is brought to our attention. In the meantime, though, the issue arising out of *Manderville* is the one to be examined here.

The litigation in *Manderville* arose out of a roadbuilding contract and several subcontracts to haul gravel and other material. The head contract was a standard form contract under the *Crown Construction Contracts Act*, and included a term that if the contractor used subcontractors, their haulage rate was to be $1.24 per tonne. The contractor had not originally intended to subcontract, but the plaintiffs asked it to do so, and agreed a rate of $0.95 per tonne. They later claimed that s.4 of the *Law Reform Act* entitled them to the higher rates under the head contract.

The Court of Queen's Bench agreed that s.4 applied, and held that the contractor could not rely on the subcontract rate for reasons related to estoppel, misrepresentation and *non est factum*. The Court of Appeal allowed the contractor's appeal. It held the subcontracts enforceable, but also held that s.4 did not apply. There had been, the court said, no requirement on the contractor to subcontract, and if the

contract could be performed without there being any subcontractors, the subcontractors could not meet the test in s.4 of having been "intended to receive some performance or forbearance" under the contract. The court also raised, but did not address, a second question: whether a generic definition of the beneficiaries under a contract was capable of satisfying s.4.

We suggest that this sets too stringent a test of intent under s.4. Though it is true that the contract in *Manderville* did not express an absolute intent to provide benefits to the subcontractors, it did stipulate what sub-contractors should be paid if they were used, as they were. We believe that this should be sufficient to trigger s.4, and that the section should be amended to clarify that if the intent to provide a benefit to a third party is conditional, and the condition is satisfied, the third party can take advantage of the contractual benefit. The *Fraser River* case law on waivers contains several examples of beneficiaries who were unknowable at the time of the contract, and who need not have become involved in its performance, but who nevertheless obtained the benefit of the waiver. We believe the same should apply under s.4, and that there is no difference for this purpose between the 'shield' and the 'sword' (or "forbearance" and "performance") elements of the section.

If s.4 is to be amended to protect the position of conditional beneficiaries like the ones in *Manderville*, we would also probably take the opportunity to clarify that generic definitions of third party beneficiaries are sufficient. Of this, too, the case law under *Fraser River* contains many examples, and it is undesirable that s.4 should be different.

We note, in closing, that the amendment described above would not automatically mean that the truckers in a case like *Manderville* would be successful. The result, instead, would be that the truckers would have direct rights under their own contracts as well as indirect rights as third parties under the head contract, and we anticipate that their own contract would prevail unless they had some legal ground for avoiding it. The Court of Queen's Bench found they did; the Court of Appeal found they did not. The feature of *Manderville* that would change, however, if the amendment proposed above is adopted, is the Court of Appeal's finding that s.4 of the *Law Reform Act* cannot apply to conditional beneficiaries such as the truckers.

9. Wills Act

This is a very brief note, just to say that the Uniform Law Conference of Canada is preparing a new (or renewed) *Uniform Wills Act*. We are participating in this project, and expect to use its end product to modernize New Brunswick's *Wills Act*.

If anyone has any suggestions for issues that should be addressed in a new *Wills Act*, please let us know. The Uniform Law Conference's website contains a short workbook of background materials on the issues considered at this year's meeting, which were:

- Testamentary capacity of minors
- Statutory wills for persons without testamentary capacity
- Oral wills
- Electronic wills
- Exempt wills
- Holograph wills
- Printed wills forms
- Will formalities
- Publication of wills
- Witnesses to a will
- Changes that alter or revoke a will
- Revocation by law
- Failed gifts – beneficiary issues
- Ademption by conversion
- Admission of extrinsic evidence

The workbook can be found on the website under the headings "Proceedings of Annual Meetings 2011 / Civil Section Documents".

Responses to any of the above should be sent to 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 15th 2012, if possible.

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