

Law Reform Notes

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Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Office of the Attorney General, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the law reform projects currently under way in the Branch, and to ask for responses to, or information about, items that are still in their formative stages.

The Branch is grateful to everyone who has commented on items in earlier issues of *Law Reform Notes*; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in *Law Reform Notes*, they should let those groups know what the Branch is considering and suggest that they give us their comments. We are unable to distribute *Law Reform Notes* to everybody who might have an interest in its contents, for these are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.

We emphasize that any 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 Department 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. Class Proceedings Act

The *Class Proceedings Act* was enacted in June 2006, but has not yet been proclaimed. We are currently considering whether amendments to the *Rules of Court* are required before the proclamation occurs, and we have recently asked the Rules Committee for its views. Other provinces with similar legislation have enacted few Rules; the only one that they all thought necessary was a requirement that intended class proceedings must be clearly identified as such. This, though, is already covered in New Brunswick by s.3(2) of the Act.

If no new Rules are required, we would hope that the Act can be brought into force in February

2007. If Rules are required, the proclamation date will depend on how extensive the Rules are.

2. Transfer of Securities Act

We mentioned in Law Reform Notes 22 and 23 that most provinces are considering enacting legislation based on the Uniform Law Conference of Canada's *Uniform Securities Transfer Act*. We also provided a short summary of the legislation.

Ontario and Alberta have now enacted their Acts, which are in close to identical terms. Other provinces are expected to join them in 2007. We have recommended that New Brunswick should do the same.

3. Limitation of Actions

Another major project we have been working on is a new *Limitation of Actions Act*. We asked for comments on some of the major elements in issues 23 and 24 of these Notes.

We have not yet finalized our recommendations on this subject, but we expect to do so soon. If anyone still wishes to comment, please do so as soon as possible. We will probably not be able to consider comments received after the first week of January 2007.

B. NEW ITEMS

4. Infirm Persons Act – Various issues

We have received several suggestions for amendments to the *Infirm Persons Act*. Some of them, unfortunately, we are unable to deal with because they would involve a more substantial reworking of the Act than we can undertake at present. For example, one suggestion was that the Act should provide greater guidance about how medical decisions should be taken. We acknowledge that the Act gives no guidance on this, but it says virtually nothing about other aspects of personal care either, and we think it would be difficult to address the one without the other. Another suggestion was that the enduring power of attorney provisions in ss.58.1 to 58.7 of the *Property Act* should be combined with the attorney for personal care provisions in ss.40 to 44 of the *Infirm Persons Act*. Again, we understand the suggestion, but given the mix of common law and statute which currently governs powers of attorney in New Brunswick, with only some parts of the legislation having anything to do with mental incompetence, we do not see the realignment of the legislation as being a straightforward exercise.

What we are left with, then, are a number of other suggestions that can be readily addressed within the existing framework of the *Infirm Persons Act*. We will deal with four of them here, and the others, we hope, in the near future. The first four are: (a) Should "incapacitated by infirmity" in s.39 be defined? (b) Should the will-making provisions be amended in response to *Re MacDavid*? (c) Should the Act specify the amount of the committee's bond? (d) Should the

court be given the power to waive or reduce the bond?

The remaining suggestions, to be dealt with later, are: (a) Should the committee be required to report annually to the court? (b) Should the requirement that notice be given to the next of kin be changed, since the next of kin may also be mentally incompetent? (c) Should the Act be amended to give some kind of recognition to the role of informal caregivers?

If there are other issues that readers think we should address, please let us know.

(a) *Should "incapacitated by infirmity" in s.39 be defined?*

Although this was expressed as a question about a definition, we have responded to it rather differently. As a matter of pure definition, we believe that s.39 provides as clear a description of "incapacitated by infirmity" as s.1 does of "mental incompetency". The difficulty is, though, that the descriptions overlap, leaving it unclear where the boundary between s.39 and s.3 (the primary section on mental incompetency) lies. This difficulty is not new, but its extent grew when s.39 was expanded in 2000.

However, we do not think at present that legislation is the answer to this, since we believe that the overlap is not as much of a problem as it may initially seem. In explaining why, we think it is useful to summarize the legislative history of s.39.

The *Infirm Persons Act* was first enacted in 1943. At that time it was called the *Mental Incompetency Act* (c.41, 1943); the name was changed by *An Act to Amend the Mental Incompetency Act* (c.61, 1961-62).

The 1943 Act combined at least four sources. These were:

(a) the *parens patriae* jurisdiction of the court;

(b) the court's powers under the old Order 56 Rules 43 to 55 in relation to the estates of "lunatics";

(c) the court's powers under the old Order 56 Rules 83 to 109 in relation to the estates of "habitual drunkards";

(d) several provisions of the *Trustee Act* relating to "lunatics" and "persons of unsound mind".

The Act that emerged was very much like today's. It contained 38 sections dealing with "mental incompetency", and one additional section, s.39, under which the court's property management powers under ss.1 to 38 could be adapted to a person who was "incapacitated by mental infirmity" – that is to say, "every person ... with regard to whom it is proved ... that he is, through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs."

Since 1943 there have been three significant amendments to section 39. In 1951 (c.185), "mental infirmity" was expanded to become "mental or physical infirmity", as it still is today. In 1995, when will-making provisions were added to the Act, they were applied to both the "mental incompetency" and the "incapacitated by infirmity" provisions. (This is the effect of s.39(5)). Most important for present purposes was the amendment in 2000, made at the same time as the provisions on powers of attorney for personal care. The 2000 amendments:

- (a) added personal care decisions to s.39;
- (b) made it clear that s.39 applied if the individual was only incapable of dealing with "some" property or personal care matters;
- (c) made it clear that the court could either appoint persons to perform specified acts or could give them general authority as committee of the estate and/or person;
- (d) removed a possible confusion as to whether "mentally incompetent" and "incapacitated by infirmity" were mutually exclusive concepts; henceforth, they are not.

Adding personal care to s.39 was new. (See *Re West* (1978) DLR (3d) 182 for the pre-2000 interpretation.) The other changes are best

viewed as removing some possible ambiguities and uncertainties.

The 2000 amendments make s.39 a broad and flexible section. On the face of things, virtually anything can be done under s.39, including some things that would not be possible under s.3. However, the powers in s.39 are all discretionary, and they must be exercised judicially having regard to the other provisions of the Act. There may be, in other words, some things that a court *could theoretically* do under s.39, but this does not mean that it *will actually* do them.

Based on this approach, and in the absence of any case-law interpreting the post-2000 version of s.39, we offer our view on the relationship between s.3 and s.39 in the form of some rules of thumb about which section we think an applicant should use in different situations. The expression "full order" in the passage below means an order appointing the applicant as committee of the estate or of the person or both. "Limited order" means anything less than this, though in practice we expect that most "limited orders" will be specific in nature – for example "run the business", "manage the investments", "sell the house", "make a will".

- If you want a full order and the individual is mentally incompetent, use s.3, even though the individual will undoubtedly also have a mental infirmity within the meaning of s.39.
- If you want a full order and the individual's infirmity is physical, not mental, use s.39. There is no alternative.
- If you want a full order and the individual's infirmity is mental but does not amount to mental incompetency, use s.39, but expect to have a very tough job persuading the judge to grant the order.
- If you want a limited order of any kind, use s.39, even if the individual is mentally incompetent. However, (i) have a good explanation of why this particular order is all that is being requested, and (ii) be prepared to explain why a full order is not being sought if, on the facts, it could be.

One final thing we noticed (to our surprise) when looking at s.39 again is that it does not explicitly give the court the power to make decisions or take actions. S.39(3) only mentions the court appointing other people to do so. We think that the court's own power to act is implicit in s.39(1), but that it would be better to spell it out explicitly. This, therefore, is the one amendment to s.39 that we currently think we should recommend.

(b) *Should the will-making provisions be amended in response to Re MacDavid?*

In *Re MacDavid* (2003 NBJ No. 405) the applicant successfully applied to have Mrs. MacDavid declared mentally incompetent, but failed to persuade the court to make a will on her behalf. The court held that the Act expressly gave the committee of the estate the right to apply for a will to be made, and that the applicant, who held an enduring power of attorney but had not applied to be appointed as the committee, therefore could not apply.

We believe that this is a misapplication of the will-making provisions of the Act. Under s.3(1) the court has "full jurisdiction and authority" in relation to mentally incompetent persons, and under s.3(4) this includes the power to make, amend or revoke a will. Whether or not a committee is appointed is up to the court, and if, as is normal, a committee is appointed, it is up to the court to decide whether the committee will have the power to make a will. If the court does give it this power, the court must still approve any exercise of the power (s.15.1). The absence of a committee, therefore, should not be a barrier to the making of a will. The power is the court's, not the committee's. If the matter stopped there, we would think that an amendment reversing the result in *Re MacDavid* would be desirable.

However, there is also s.39 to be considered. S.39(5) explicitly incorporates the will-making power in s.11.1, and in our view s.39 would be available in the circumstances of *Re MacDavid*, where all that the applicant apparently wanted was get a will made. Based on the analysis of s.39 presented in relation to the previous topic, therefore, we do not believe that *Re MacDavid* opens up a substantial gap in the Act. If there is to be a committee of the estate, will-making power can be obtained under ss.3 and 11.1. If not, it can be obtained under s.39.

A final point worth mentioning in connection with wills concerns the relationship between "testamentary capacity" and the *Infirm Persons Act*. We consider that a person who lacks testamentary capacity will inevitably come within s.39, since there is some part of his or her affairs that he or she cannot provide for – namely, making a will. However, the relationship between testamentary capacity and mental incompetency is potentially more complex. A person could, conceivably, be mentally incompetent within the meaning of the *Infirm Persons Act*, yet have, at the specific time the will is made, enough of a "sound disposing mind" to make a will. This might be a so-called "lucid interval". Or it might possibly be because the estate is so straightforward and the will so simple that the person making the will genuinely understands what he or she is doing. Such a scenario may not arise frequently, but it is theoretically possible. Note, therefore, that one of the effects of section 11.1(2) of the Act, which states that a will made under the Act "is for all purposes, including subsequent revocation or amendment, the will of the person in whose name and on whose behalf the will . . . is made" is that the mentally incompetent person can, at any time that he or she has testamentary capacity, revoke or amend the will made or approved by the court.

(c) *Should the Act specify the amount of the committee's bond?*

SS.1(3) and 10(4) and (5) require the committee of the estate to be bonded, but they do not state the amount of the bond. We have received the suggestion that they should. No specific figure was recommended, since the writer's main concern was that the legislation should establish a standard of some sort rather than that the standard be set at a particular level. However, we have heard suggestions from a couple of sources that the amount should be set at the value of the estate or the value of the estate plus an increment – perhaps one year's income. A figure in this range seems appropriate having regard to s.10(4) of the Act. S.10(4) requires the committee to give security in the amount fixed by the court "for duly accounting for the property that shall come into the hands of the committee from time to time . . .", etc.

We understand that most other provinces, but not all, require bonding. We are only aware of two, however, which have said anything about

the amount. In Manitoba, s.77 of the *Mental Health Act* requires the security to be twice the value of the estate. In Saskatchewan, s.55(2) of the *Adult Guardianship And Co-Decision-Making Act* creates a presumption that the bond will equal or exceed the value of the estate "unless otherwise directed by the court".

For purposes of discussion, we suggest that fixing the amount of the bond at the value of the estate plus one year's income seems reasonable. We would welcome comments on this. We also invite anybody who does comment to say whether his or her opinion would differ depending on whether or not the court has the discretion to waive or reduce the bond, as discussed in the following item.

(d) *Should the court have the power to waive or reduce the bond?*

We understand that nine of the common law provinces and territories expressly require bonding, and that six of them permit the court to waive the bond. The three provinces where bonding is required but waiver is not permitted are New Brunswick, Nova Scotia, and Prince Edward Island. According to Gerald Robertson's *Mental Disability and the Law in Canada* (1994, p.28), however, where the power to waive exists it is not often used.

Should a power to waive or reduce the bond be introduced in New Brunswick? Several people have suggested to us that it should, their general view being that in the majority of cases (though not all) obtaining, maintaining and ultimately discharging the bond presents greater complications than the benefit that bonding brings. The other side of the argument, of course, is that bonds do provide protection to the incompetent person if the unexpected happens.

At present we think that the courts should probably be given the power to waive the bond. They should probably also have the power to reduce the amount of the bond, though this may be a less useful power, since a reduced bond will probably be just as inconvenient to obtain, maintain and discharge as an unreduced one.

If a power to waive bonds is created, should the Act also establish the criteria on which it is to be exercised? Other provinces do not seem to have done this, and we are aware of only one decided case on the subject: *Macht v British*

Columbia (Public Trustee) (1991) 78 DLR (4th) 438. Here the British Columbia Court of Appeal listed five factors for a court to consider when deciding whether to waive the bond, and decided that the bond should not be waived for a committee who was the brother and executor of the incompetent, but had offered little evidence of experience in administering other people's finances or of understanding what it involved.

We think that if a discretion is established it would be preferable if the legislation identified the criteria for its exercise. We have not yet given much thought to what those criteria might be, but, for purposes of discussion, we suggest something like this: "The court may waive the committee's bond if it is satisfied that there is no substantial possibility that the estate will be used otherwise than in accordance with this Act." Factors such as demonstrated financial competence and the absence of a conflict of interest would be indicators of whether there was a "substantial possibility" that the estate would be misapplied.

5. Interpretation Act

Our colleagues in the legislative drafting section of the Legislative Services Branch are hoping to begin a review of the *Interpretation Act* in the near future. They are aware of several issues that need to be addressed, but would be grateful to learn of others. If any of our readers are aware of problems arising from things that the *Interpretation Act* either does or does not say, please let us know, and we will ensure that your comments receive attention.

Responses to any of the above should be sent to the address at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than February 1st 2007, if possible.

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