The Probate Court Act

HENRY J. MARQUIS*

This article addresses the history and development of Probate Court legislation in the province of New Brunswick. In the first part of the article the author discusses British and colonial antecedents of the **Probate Court Act,** *S.N.B. 1980 c.P-17.1, and the scope of the new act. In doing so, he considers such questions as: what is the scope of jurisdiction of the court, what are the effects on common form business and contentious business, and what modifications have taken place with respect to accounting, inventory, bonds, payment of debts, ancillary letters and resealing. The author concludes by assessing perceived merits and shortcomings of the act.*

Cet article donne un aperçu de l'histoire et de l'évolution de la législation portant sur les tribunaux des successions dans la province du Nouveau-Brunswick. Dans un premier temps, l'auteur s'intéresse aux antécédents britanniques et coloniaux de la **Loi sur la Cour des successions,** *L.N.-B. 1980 c. P-17.1 et à la portée de cette nouvelle loi. Il examine l'étendue de la compétence de la Cour, les effets de la loi sur les procédures simple et contentieuse d'homologation, les modifications apportées dans le domaine de la reddition des comptes, des inventaires, des cautionnements, du paiement des dettes, de la délivrance de lettres auxiliaires et de la réapposition de sceau. En conclusion, l'auteur fait une évaluation des mérites et des points faibles de cette loi.*

HISTORY AND DEVELOPMENT

The Probate Court, as a separate Court, has existed in New Brunswick since the date of the founding of the Province in 1784. Under the provisions of *An Act Relating to Wills, Executions and Administrators and for the Settlement and Distribution of the Estates of Intestates*[1], Judges of the Probate Court were authorized to take proof of wills, grant Letters of Administration, provide for the administration of estates (including approving bonds with sureties), and to make orders in cases of insufficiency of assets.

Prior to 1784, Probate Courts, as part of the colony of Nova Scotia, were based on the law of England but without the great proliferation of jurisdictional problems which were inherent in the English system. It is estimated that when the Probate Courts Act was passed in England in 1857, Probate Courts there, which were once the domain of the ecclesiastical Courts, numbered in excess of 350.

During the period prior to 1900, the Act was subject to periodic amend-

*B.C.L. 1954 (UNB), N.B. Bar 1954, senior partner in the law firm of Marquis, Faloon.

[1] xxvi Geo III (1786) Chap. xi.

ments with the result that the Probate Court gradually acquired greater jurisdiction and powers. In 1854, for example, the Court was given power to grant Letters of Guardianship for estates and infants. As late as 1978, if a party was cited to attend and failed to do so, a Supreme Court Judge could make an order removing an Executor/Administrator from office.

With the beginning of this century, the Probate Courts Act achieved the form which has remained in effect, with minor changes, until the adoption of our present Act in 1983.

Prior to 1983, a considerable body of precedent and practice was built up, but not by way of reported decisions. As anyone who has had occasion to research probate law can attest, reported decisions in this province are relatively few. The knowledge of practice therefore tended to reside in Probate Court Judges, officers, and relatively few solicitors.

Around 1980, a decision was made to "overhaul" the Probate Court system. Enactments of other Provinces were looked at, and input was sought from members of the Bar.

Eventually, the Ontario Act, with modification, was used as the model; and on May 1, 1984, the *Probate Court Act*, S.N.B. 1980, c.P-17.1, with Rules and Regulations, came into force.

SCOPE OF NEW ACT

The present Act follows the form of modern legislation in that substantive matters, jurisdiction, and make-up of the Court are found in the Act, while procedural or form matters are in the Regulations.

One of the aims of the Legislature was to make the role of the Court more passive. For example, no longer is it necessary to bring witnesses before a Judge to prove a will in common form. The affidavit of witness is now completed beforehand and filed as part of the application.

Notwithstanding the intention of the Legislature that procedures be simpler, (if such an be imputed from the new Act), problems are arising in daily practice as a result of certain shortcomings in the new legislation. Whether such problems are real, or are only perceived, is not relevant. In either vein the problems persist.

The principal difficulty in the new Act is with the jurisdiction of the Court in that certain matters are not clearly spelled out. Take for instance Letters of Guardianship and Letters of Administration limited to the discharge of a mortgage already paid. Notwithstanding an attempt to deal with these matters in 5.3(1):

> Without derogating from the jurisdiction of the Court of Queen's Bench and subject to the Judicature Act, all jurisdiction and authority in relation to matters and causes testamentary and all matters arising out of or connected with the grant, recall or revocation of grant of probate or administration are vested in the Court; and save as may be otherwise directed by the Act or the rules, such jurisdiction and authority shall be exercised in the manner hitherto in use.

and again in s. 55,

> a person entitled to a grant of letters of administration to the property of a deceased person may, at the discretion of the Court, take out limited letters...,

some judges are taking the position that if the Act does not give such jurisdiction, in plain language, the jurisdiction does not exist.

The result of the above is that where there are infant children surviving an intestate deceased, Letters of Guardianship are no long available from the Probate Court, and one is obliged to seek a Decree from the Court of Queen's Bench of New Brunswick, Family Division, appointing a Guardian. Since most applications involving guardianship of infant children tend to arise upon the death of a parent where Letters of Administration are issued, it would be more convenient and less costly to obtain guardianship from the Probate Court.

The same observations are true in the case of Letters of Administration limited to the discharge of a mortgage already paid. Such a procedure is less time consuming and less costly than application to the Court of Queen's Bench of New Brunswick, Trial Division, under the Rules of Court.

One of the most interesting provisions in the new Act is s.38 which provides:

> Except where otherwise provided in this Act or the rules, or in any other Act of the Legislature, the Court, in granting probate or administration, shall be governed by the principles of the common law.

One finds this a most perplexing provision for the reason that the Probate Court is a creature of statute, and has been so in England for centuries. In fairness, the section may have been intended to address itself to the precedence of persons entitled to be appointed. If so, the intention of the section could have more easily been achieved by setting out, in the rules, the order of precedence.

On the question of practice, the Regulation to the new Act provides in s.4.04:

> Where any matter or procedure has not been provided for by these rules or the Act, the Rules of Court of New Brunswick shall apply.

The Act itself provides in s.8 that:

> The rules of evidence observed in and, except as herein otherwise provided and subject to the rules in contentious matters, the practice and procedure of the Court of Queen's Bench apply to the Court, and with respect to all matters within the jurisdiction of the Court, the Court and the judges and officers thereof respectively have and may exercise all the powers of the Court of Queen's Bench and of the judges and officers thereof.

COMMON FORM BUSINESS

One will find common form business, Letters Probate and Letters of Administration, greatly simplified. All that is now required is filling out an application, which includes identifying the will in an application for Letters Pro-

bate, and affidavits proving the will and including the executor/administrator oath. No longer is it necessary to have a witness attend to prove the will, or an executor/administrator attend to take the oath.

Additionally, the Court now corresponds to the eight judicial districts in the Province. For example, where a deceased resided in Kings County, application is made to the Court at the judicial district of Saint John.

Waiting periods for applications have likewise changed from the ten day period under the previous Act, to seven days for a will and fourteen days for administration.

Surety bonds are still required, but there is a new positive provision by which the Judge can order the bond cancelled.[2] Also, where the "net value" of an estate is less than fifty thousand dollars, the applicant is the surviving spouse, and an affidavit is filed state that all debts are paid, a bond is not required.[3] It should be noted, however, that "net value" is not defined.

In the definition of common form business in s.1 of the Act, it is noted that common form business includes an application to prove a will in solemn form, provided there is no contention.

CONTENTIOUS BUSINESS

By contrast, the provisions in the new act and the rules dealing with contentious business are unnecessarily complicated.[4] Under the previous Act, contentious business was brought before the Court by way of Citation, such a Citation being issued with or without an affidavit to lead the same. Upon the the return of the Citation, the Judge either disposed of the matter raised, or ordered the matter removed to Queen's Bench for trial.

By virtue of the present provision, contentious proceedings are still commenced by Citation, and an affidavit is required to lead to the issue of the same. Once issued, the caveat remains in force for six months unless renewed or a notice to contest has been filed. A notice to contest may be viewed in the same light as Notice of Intent to Defend under the Rules of Court. In addition, the applicant is now obliged to serve a warning on the person lodging the caveat by requiring a Notice of Intent to Contest within ten days. There is a further provision to the effect that if circumstances do not warrant lodging a caveat, an intervention may be filed. After the Notice of Intent to Contest has been filed, the applicant makes still another application and a hearing is scheduled.

One of the advantages of Probate practice prior to the new Act was the fact that contentious business could be handled in a less formal, less costly and summary manner. One is hard pressed to discover any justification for the procedures now in effect. They will, in the writer's view, contribute to the

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[2] *Probate Court Act*, S.N.B. 1980 c.P-17.1, s.63.

[3] *Ibid.*, s.58(2).

[4] *Ibid.*, s.32-33, see Rules 3.01-3.02.

volume of paper now before the Courts, tend to delay matters and certainly increase the cost to the parties concerned. In a sense, the Probate Court has not been overlaid with procedures more appropriate in Queen's Bench, Trial Division. It is to be hoped that exposure to the problems inherent in the present rules will lead to amendment which will restore the less formal requirements which have served the community well for the past eighty years.

ACCOUNTING

The provisions of the new Act and the rules dealing with passing of accounts represent a major improvement over the procedures set out in the old Act. The new rules outline separate accounting between capital and income (where appropriate), details of investments, assets on hand and statements of compensation claimed. Also provided is a detailed procedure for giving notice to interested parties.

Previously, an award for compensation or commission was based partly on the *Probate Courts Act* and the *Trustees Act*[5]; the latter being relied upon for care and management fees. Under the present Act, compensation allowed is entirely under the provisions of the *Trustees Act*[6].

One matter of importance is provided in s.72(1) of the new Act

> An executor or administrator shall not be required by any Court to render an account of the property of the deceased otherwise than by an inventory thereof, unless at the insistence or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compelled to account before any court.

In addition, rules 3.08(1) and (2) provide respectively:

> (1) Executors, administrators and trustees of an estate may pass their account voluntarily or they may be called upon by Citation to do so in accordance with paragraph (2).
>
> (2) A person interested in an estate may apply to the Court for a Citation ordering the executor, administrator or trustee of the estate or pass the accounts of the estate.

Prior to the new Act the Court could, on its motion, order passing of accounts. While this writer agrees with the new provisions for the reason that the Court in a given matter is not likely to know, by its own knowledge, any reason for passing accounts, nevertheless, the common law requiring an executor, administrator, or trustee to account has not changed. Perhaps it would be more accurate to say that such persons should be ready to account at all times. There is a real danger that the present rules might encourage parties to ignore requirements for accounting.

One of the most perplexing provisions of the new Act is s.71(7) which provides for giving notice upon passing of accounts to the Public Administrator where a trust has been established for any religious, educational, charitable or other purpose. Presuming that one can allocate a logical purpose to this sec-

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[5]S.N.B. 1979 c.T-15.

[6]*Ibid.*, s.38.

tion, the questions about its meanings and effect are numerous. What is meant by the words 'or other purpose'? Where a will establishes a bequest for scholarships, is notice to the Public Administrator necessary? Where the bequest is payable to a specific legatee upon trusts, does the section apply? A careful review of this section is imperative.

INVENTORY

By the provisions of the old Act, an inventory, setting out the details of the deceased's assets, had to be filed within two months of the grant. By s.56 of the new Act, an inventory now consists only of a statement of the total value of such assets, verified by oath. The forms provided allow for a division of real and personal property. There would seem to be no advantage in filing a detailed statement, unless on an application to pass accounts, the present provision is to be preferred.

BONDS

The present Act will allows for non-resident persons to act as sureties. This practice has been criticized for the obvious difficulty inherent in non-residency, specifically the problem of enforcing the bond against a surety who is resident outside of the Province. It might have been far wiser to require that a least one of the sureties be a resident.

A new provision in the Act[7] requires a non-resident executor to file a bond with sureties unless that requirement is waived by the will. Solicitors should therefore consider incorporating such a waiver, in appropriate circumstances, when drafting wills.

PAYMENT OF DEBTS

The priority of application of assets to the payment of debts remains the same, but unfortunately the new Act establishes procedures which are unnecessarily complex for the resolution of disputes. One could envisage regulations which set out straight-forward directions for trial. Admittedly, the new Act does all of this by highly complex and wordy instructions. Again the idea of carrying out Probate practice in a summary and cost saving manner seems to have been lost.

ANCILLARY LETTERS-RESEALING

The new Act and Rules still maintain a distinction between the two procedures on the issue of ancillary letters and resealing without saying precisely what the distinction is. Originally, one procedure was used for real property and the other for personal property. When one looks at the provisions of the *Registry Act*[8] respecting wills in foreign jurisdictions affecting real property in

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[7] *Supra.*, footnote 2, s.28.

[8] R.S.N.B. 1973 c.R-6.

this Province, one is hard put to justify an application to the Probate Court. It may have been simpler to remove the distinctions, which are mainly historical, and have one form. Whether the form is called Ancillary or Resealing is immaterial.

One very significant change in Probate practice results from an absence of any provision in the new Act and Rules for the filing of wills. An unprobated will, by itself, can no longer be filed with the Registrar.

This singular oversight (perhaps intentional) is causing very real problems. What were the reasons for filing an unprobated will, other than the specific requirements under the old Act? Mainly, the reasons were as follows. First, filing facilitated a permanent safekeeping. Second, in the event that additional assets might be discovered which required probating, the application could proceed, even years later. Third, once an unprobated will has been filed, it becomes a public document, subject to inspection, in particular by persons who might in other circumstances be interested parties. Fourth, and of extreme importance, is that through the inspection of a filed will, a person can be satisfied that there is no interest to be taken under the will or, conversely, that an interest does in fact exist.

At the risk of being impertinent, this writer is of the opinion that the new Act should serve the public firstly and the efficiency of the administration of the Court secondly. It is to be hoped that the Legislature will redress this serious omission, respect the filing of an unprobated will, as soon as possible.

CONCLUSION

On balance, the new Act is to be commended, with a proviso that the difficulties observed be removed by legislative amendment. In this connection one is encouraged by the new approach taken by the Law Reform division of the Office of the Attorney General and by the Barristers' Society of the province of New Brunswick in the introduction of the new Standard Forms of Conveyances Act. It is felt that the collective benefits of such an approach may prove to be valuable in the present case.