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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 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 ***June 15, 2020****, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

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1. Notice of mortgage sale

Our proposal to amend the *Property Act* led to the fall introduction of *An Act to Amend the Property Act*, which received Royal Assent and came into force on December 20, 2019. It amends paragraph 45(1)(c) of the *Property Act* (mortgage sale notice requirements) by reducing the required number of newspaper advertisements from four to two and removing the requirements to post a notice at the registry office, a courthouse and a public place.

2. *Official Notices Publication Act*

On January 1, 2020, responsibility for the administration of the *Official Notices Publication Act*, including *The Royal Gazette*, was transferred to Service New Brunswick.

The contact information for *The Royal Gazette* is:

The Royal Gazette
Service New Brunswick
Brookside Place
435 Brookside Drive, Suite 30
P.O. Box 6000
Fredericton, NB E3B 5H1
Tel: 506-453-3864
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3. *Enforcement of Money Judgments Act*

The *Enforcement of Money Judgments Act* (EMJA) came into force on December 1, 2019. Two pieces of related legislation also came into force: *An Act Respecting the Enforcement of Money Judgments Act*, which made consequential amendments and repealed a number of old Acts (including the *Absconding Debtors Act*, the *Arrest and Examinations Act*, the *Creditors Relief Act*, the *Garnishee Act* and the *Memorials and Executions Act*), and the *General Regulation – Enforcement of Money Judgments Act* (EMJA Regulation), which deals with procedures and forms.

This legislation establishes a new system for the enforcement of money judgments – i.e., judgments that require the payment of a fixed sum of money. The following are some of the main features of the new system:

Preservation orders

- A party who has commenced, or intends to commence, a proceeding may apply to the court for a preservation order (EMJA, ss. 11, 12). The court may make the order if the other party is concealing or removing property or is likely to do so (EMJA, s. 13). This procedure replaces the procedure under Rule 40.03 for injunctions to preserve assets (Mareva injunctions).

Registration of judgments

- A judgment creditor may register a judgment in the Personal Property Registry. This is done by registering a notice of judgment in accordance with the *Personal Property Security Act* (EMJA, s. 21(1)). The minimum registration period is one year, and the maximum is now 15 years (from the date of the judgment) rather than 20 (EMJA, s. 22(1)). A registration can be renewed for one or more years, up to the 15-year maximum (EMJA, s. 22(2)). A registration made before December 1, 2019, continues to be in effect until the registration period expires or the 15-year period expires, whichever occurs first (EMJA, s. 102). If the registration period expires before the 15-year period expires, the registration may be renewed.

- A judgment creditor may also register a judgment in the Land Registry, under the *Land Titles Act* and/or the *Registry Act* (EMJA, ss. 21(2), (3)). Registration in the Land Registry is effective for 15 years from the date of the judgment (EMJA, s. 22(3)). It is no longer necessary to renew the registration after five years. A registration made before December 1, 2019, continues to be in effect for the remainder of the five-year period provided for in the *Memorials and Executions Act*, and can be renewed (EMJA, s. 103). A renewed registration will be effective until the 15-year period expires.

- If a judgment creditor is seeking to register a judgment in the Land Registry and the judgment includes provisions that do not affect land or require the payment of money, the judgment creditor may be required to register an abbreviated judgment – a version of the judgment that omits those provisions (*General Regulation – Land Titles Act*, s. 19.4; *Registry Act*, s. 50(3.1); Rules of Court, R. 60.04.1).

- Registration of the judgment in the Personal Property Registry is a prerequisite for enforcement. Until this is done, the judgment creditor cannot request enforcement by the sheriffs or apply for an examination of the judgment debtor (EMJA, ss. 33(1), 42). Registration in the Land Registry is not a prerequisite for enforcement.

Enforcement by sheriffs

- A judgment creditor requests enforcement by the sheriffs by giving them an enforcement instruction (Form 9) along with certain documents and a $120 enforcement fee (EMJA, s. 42; EMJA Regulation, s. 11(1); *Sheriff's Fees Regulation – Sheriffs Act*, s. 2(1)(l)). (Orders for seizure and sale are no longer used.) An enforcement instruction cannot be given to the sheriffs after six years have passed since the date of the judgment, unless the court grants leave (EMJA Regulation, s. 5(1)). A judgment creditor who has given an enforcement instruction to the sheriffs is referred to as an "instructing creditor" (EMJA, s. 1).

- After receiving an enforcement instruction, the sheriffs will ordinarily give the judgment debtor a written demand for payment (EMJA, s. 51). The document explains that if the judgment debtor does not either pay the amount owing or make a payment arrangement with the instructing creditor within a certain period (typically two weeks), the sheriffs may proceed with seizure.

- If the sheriffs' demand for payment does not result in the payment of the judgment or in a payment arrangement, the sheriffs will decide whether to attempt to seize property and, if so, how its value will be realized (i.e., how the property will be sold or how money will be collected). The following aspects of the legislation are relevant at this stage:

    - Subject to certain exemptions, the sheriffs can seize any property of the judgment debtor, and "property" is defined broadly – it includes land, tangible personal property, and intangible personal property such as bank accounts and income (EMJA, ss. 1, 57).

    - Judgment debtors who are individuals are protected by two types of exemption. First, retirement funds (registered retirement savings plans, registered retirement income funds and deferred profit sharing plans) are exempt from seizure (EMJA, s. 84.1). Second, certain types of property – including household goods, tools and equipment used for work, and income – are partially exempt from realization. They are exempt from realization to the extent that they are necessary to meet the reasonable needs of the judgment debtor and the judgment debtor's dependants (EMJA, s. 85). In other words, the sheriffs can sell or collect only the portion that the judgment debtor does not need.

    - The seizure of income is restricted in two respects. First, since income is partially exempt from realization, the sheriffs can collect only the portion that the judgment debtor does not need (EMJA, s. 81(2), 85). In some cases, the judgment debtor will need all of the income, and the sheriffs will not be able to collect anything. (When determining the amount of income that can be collected, the sheriffs may rely on the directives of the Superintendent of Bankruptcy relating to surplus income (EMJA, s. 86(4)).) Second, a seizure of income cannot continue for more than four years without leave of the court (EMJA Regulation, s. 5(2)).

    - Even in cases where the judgment debtor has income or other property that is not exempt, the sheriffs are not required to seize it. They are entitled to decline to exercise their authority to seize property (EMJA s. 68(1)).

    - There are no requirements with respect to how the sheriffs realize the value of seized property. They are not required to advertise sales or hold auctions. They can use real estate agents and they can sell items on consignment.

- If the sheriffs decide to attempt a seizure, the instructing creditor will be required to pay a $300 seizure fee and to provide funds to cover the sheriffs' anticipated expenses (*Sheriff's Fees Regulation – Sheriffs Act*, s. 2(1)(m); EMJA, s. 69).

- There are three methods by which the sheriffs can seize property: serving a notice of seizure (Form 10) on the judgment debtor or the person in possession or control of the property, posting a notice of seizure on the property, or taking physical possession of the property (EMJA, s. 58(1)). When a notice of seizure is served, it may be accompanied by a document that gives directions (EMJA, ss. 60(1), 81(4)). For instance, when income is being seized from an employer, the sheriffs will serve a notice of seizure and a payment order (Form 12) that contains directions regarding the payments to be made to the sheriffs.

- After property is seized, the sheriffs will realize its value and then pay the money they receive (the "enforcement proceeds") to the instructing creditor. If the value is realized through a single process such as a sale, the enforcement proceeds will be paid out all at once; if it realized through an ongoing process such as the collection of income, the enforcement proceeds will be paid out over time. Either way, the sheriffs will deduct 10% of the enforcement proceeds as an additional seizure fee and then pay the instructing creditor – to reimburse the instructing creditor for the seizure expenses and for certain fees, and to satisfy the judgment (or a portion of it) (*Sheriff's Fees Regulation – Sheriffs Act*, s. 2(1)(m); EMJA, s. 91(1)). The instructing creditor will be reimbursed only for the following fees:
    - the $44 fee for the registration of the judgment in the Personal Property Registry for one year (even if additional fees were paid to register the judgment for additional years);
    - the $10 fee for a search of the Personal Property Registry;
    - the $85 fee for the registration of the judgment under the *Land Titles Act* (if the sheriffs seized the land);
    - the $85 fee for the registration of the judgment under the *Registry Act* (if the sheriffs seized the land);
    - the $120 enforcement fee;
    - the $300 seizure fee; and
    - the $50 fee for an application for an order to attend an examination (EMJA, ss. 1 ("amount recoverable"), 91(1); EMJA Regulation, s. 3).

- The sheriffs bring an end to their enforcement of a judgment by sending the instructing creditor a notice of termination of enforcement instruction (Form 13). The sheriffs may terminate the enforcement instruction if they have determined that no property will be seized (because the judgment has been paid, a payment arrangement has been made, or there is nothing to seize) or if they have finished seizing property (EMJA, s. 46(1)). After the enforcement instruction is terminated, the sheriffs cannot seize further property but can continue to realize the value of seized property. For example, they can continue to collect a portion of the judgment debtor's income.

- The termination of the enforcement instruction is the cutting-off point for additional instructing creditors seeking to enforce judgments against the same judgment debtor. If a second instructing creditor gives an enforcement instruction to the sheriffs *before* the enforcement instruction of the first instructing creditor has been terminated, the judgments are enforced together and the second instructing creditor is entitled to a pro-rata share of the enforcement proceeds. If a second instructing creditor gives an enforcement instruction to the sheriffs *after* that point, the second instructing creditor is not entitled to a pro-rata share (but may receive a payment if there are amounts remaining after the first instructing creditor is paid) (EMJA, ss. 47, 91(3), 92).

Examination of judgment debtor

- A judgment creditor may apply to the clerk for an examination of the judgment debtor. This can be done before or after the judgment creditor has given an enforcement instruction to the sheriffs (EMJA, s. 33).

- A judgment creditor applies for an examination by providing to the clerk an application for an order to attend (Form 1) along with certain documents and a $50 fee (EMJA Regulation ss. 6(1), (2)). An order to attend (Form 4) issued by the clerk must be served on the judgment debtor at least 15 days before the examination (EMJA Regulation, s. 8(2)). The judgment creditor may, at least 10 days before the examination, request that it be recorded by a stenographer (EMJA Regulation, s. 7).

- At the examination, the clerk determines the procedure and the judgment creditor examines the judgment debtor (EMJA, s. 35). Following the examination, the clerk may issue an order for payment (Form 6) (EMJA, s. 38(1)). If the judgment debtor fails to attend the examination or fails to provide complete and honest answers, the judgment creditor may bring proceedings for contempt and may apply for another person to be examined (EMJA, s. 37(1)).

- This examination procedure replaces the procedures under both the *Arrest and Examinations Act* and Rule 61.14.

4. *Debtor Transactions Act*

The *Debtor Transactions Act* also came into force on December 1, 2019. The Act replaces the existing legislation on fraudulent conveyances and fraudulent preferences – the *Assignments and Preferences Act* and *Statute of Elizabeth*. An overview of the Act can be found in issue #37 of the *Law Reform Notes*.

The Act is modelled on the Uniform Law Conference of Canada's *Uniform Reviewable Transactions Act*, which includes commentary with explanations and examples. Though there are some differences between the two Acts, the commentary is a useful resource.

5. *Enduring Powers of Attorney Act*

Our proposals for new legislation on enduring powers of attorney led to the introduction in the fall of the *Enduring Powers of Attorney Act*, which received Royal Assent in December and will come into force on July 1, 2020.

The Act governs both enduring powers of attorney and health care directives. It replaces sections 58.1 to 58.7 of the *Property Act* (which provide for powers of attorney for property), sections 40 to 44 of the *Infirm Persons Act* (which provide for powers of attorney for personal care) and the *Advance Health Care Directives Act* (which provides for health care directives). The Act applies only to powers of attorney that are "enduring" – i.e., those under which the attorney's authority may be exercised when the grantor lacks capacity. General (non-enduring) powers of attorney continue to be governed by the common law and provisions of the *Property Act*.

The following is a summary of some of the key provisions of the Act:

- An enduring power of attorney is a power of attorney in which the grantor appoints an attorney for property (an attorney with authority in relation to property and financial affairs) and/or an attorney for personal care (an attorney with authority in relation to personal care, including health care) to act on the grantor's behalf when the grantor lacks capacity (s. 3). A health care directive is a document in which a person gives instructions regarding health care decisions to be made on the person's behalf when the person lacks capacity (s. 19). Unlike under the *Advance Health Care Directives Act*, a health care directive cannot include the appointment of a "proxy" (a decision-maker for health care). Instead, an attorney for personal care can be appointed.

- A grantor has a number of options with respect to the appointment of attorneys. A grantor can appoint one or more attorneys for property and/or one or more attorneys for personal care. The same person(s) can be appointed as both types of attorney or different persons can be appointed. Alternate attorneys can be appointed. Appointments of the two types of attorney can be made in a single enduring power of attorney or in separate ones (s. 3).

- A grantor also has options with respect to the authority given to an attorney. It can be general or specific, and it can be subject to conditions, restrictions and instructions (s. 7(1)). In the case of an attorney for property, a grantor can choose *when* the attorney will be able to exercise authority – as soon as the enduring power of attorney is executed, as of a certain date, when the grantor no longer has capacity with respect to property and financial affairs, or when other circumstances exist (s. 8(2)). (An attorney for personal care can exercise authority only when the grantor no longer has capacity with respect to the matter at issue (s. 9(1)).)

- The execution requirements vary depending on the type of attorney being appointed. If an attorney for property is being appointed or an attorney for property and an attorney for personal care are being appointed, the enduring power of attorney must be witnessed by a lawyer and must include a declaration by the lawyer. If only an attorney for personal care is being appointed, the enduring power of attorney can be witnessed by two non-lawyers instead (s. 4(1)).

- "Capacity" is the ability to make decisions – to understand the information that is relevant to decisions and to appreciate the reasonably foreseeable consequences of decisions – with respect to a particular act or matter (s. 2). This means, for example, that a grantor has capacity with respect to the act of making an enduring power of attorney if the grantor is able to make the decisions involved in doing so (such as whom to appoint). Likewise, a grantor has capacity with respect to property and financial affairs if the grantor is able to make decisions about those matters.

- The nature of a capacity assessment varies depending on the circumstances. When a person is assessing a grantor's capacity with respect to property and financial affairs for the purposes of determining whether the attorney for property can exercise authority, the question is whether the grantor is, in general, able make decisions about property and financial affairs (s. 8(2)(b)(i)). When a person is assessing a grantor's capacity with respect to personal care for the purposes of determining whether the attorney for personal care can exercise authority, the question is *which* personal care matters the grantor is able to make decisions about (s. 9(1)). When a health care provider is assessing a grantor's capacity for the purposes of determining whether the attorney for personal care can make a health care decision on behalf of the grantor, the question is whether the grantor is able to make the particular decision at issue (s. 9(4)).

- A grantor's capacity can vary over time. A determination that a grantor lacks capacity with respect to a matter may be followed by a subsequent determination that the grantor has regained that capacity (ss. 8(5), 9(5)).

- When making a decision on behalf of a grantor, an attorney is required to follow any relevant instructions given by the grantor when the grantor had capacity. This includes instructions given in the enduring power of attorney or in a health care directive and also instructions given orally or in another manner. If two sets of instructions are inconsistent, the more recent ones must be followed. When there are no relevant instructions, the attorney is required to follow a decision-making process that takes into account the grantor's current wishes and values and beliefs (ss. 1 ("instructions"), 12).

- When a health care decision is to be made on behalf of a person who lacks capacity, the health care provider is required (a) to make a reasonable effort to find out whether the person has an attorney for personal care or a health care directive and (b) if so, to follow the decision of the attorney or the instructions in the directive, except in certain circumstances (s. 20).

- A number of provisions establish protections for grantors, including provisions relating to prohibited attorneys (s. 6), gifts (s. 7(4)(b)), the duties of attorneys (s. 12), notice to be given by attorneys (s. 13), the appointment of monitors (s. 16), records to be kept by attorneys (s. 17), and the steps that financial institutions may take when an enduring power of attorney is being misused (s. 18).

- Powers of attorney and health care directives made under the current legislation will continue to be valid. Powers of attorney for property made under section 58.2 of the *Property Act* and powers of attorney for personal care made under the *Infirm Persons Act* are deemed to be enduring powers of attorney under the new Act. Health care directives made under the *Advance Health Care Directives Act* are deemed to be enduring powers of attorney under the new Act if they appoint a proxy and are deemed to be health care directives if they do not (s. 29).

We hope to have a regulation in place by the July 1 commencement date. The regulation will likely do two things: set out the details of the record-keeping requirements for attorneys and expand the definition of "financial institution" so that it includes "insurer" as defined in the *Insurance Act* and "registered adviser" as defined in the *Securities Act*.

We are working with the Public Legal Education and Information Service of New Brunswick on educational materials, which may include optional standard forms. We plan to have these available by July.

6. *Construction Remedies Act*

Following issues #40, #41 and #42 of the *Law Reform Notes*, we have submitted proposals to repeal and replace the *Mechanics' Lien Act* with a new *Construction Remedies Act*, which we hope will be introduced in the next regular sitting of the Legislative Assembly. Time will be given for industry to plan for implementation of the new Act and to adapt its procedures, and to allow for the necessary regulations to be prepared.

As discussed in issue #42 of the of the *Law Reform Notes*, we are proposing a two-phase approach to the new legislation: first modernization, and then exploring prompt payment and adjudication. The key points of Phase I modernization are as follows:

- *Structure and language*: The key elements of the current *Mechanics' Lien Act* (liens and holdbacks, construction trusts, enforcement) will carry over to the new Act but will be updated to improve their function and address specific concerns raised by stakeholders. The language and style of the new Act will reflect modern drafting conventions.

- *Application*: The current Act does not apply to the Crown. The new Act will apply to the Crown, including Crown agencies and corporations. There will be some targeted exceptions and procedural modifications where a Crown interest is involved. For example, though it will be possible to claim a lien against a Crown interest in land, the lien will attach to the holdback funds, not the land, and it will not be possible to obtain an order of sale in respect of the land. Liens against Crown interests will be given, rather than registered. This is a more modern approach to Crown immunity and is consistent with the practice in most other provinces.

- *Highways*: The current Act does not apply in respect of highways (as broadly defined), including work carried out on a highway by or on behalf of local governments. The new Act will apply to highways but, as with Crown interests, a lien in respect of a highway will attach to the holdback funds, not the land, and it will not be possible to obtain an order of sale. Again, liens against highway improvements for local governments will be given, rather than registered.

- *Alternative financing and procurement arrangements*: The new Act will specifically address alternative financing and procurement arrangements, in which the Crown partners with the private sector (e.g. public private partnerships). The private partner (often referred to as a "special

purpose entity") will be designated as the "owner" for certain provisions of the Act, such as the requirement to maintain the holdback.

- *Construction trusts*: The current trust provisions will be clarified and expanded. For example, the new Act will more clearly indicate how a trustee may use trust funds without it being considered a breach of trust. The trust will also apply to owners (other than the Crown).

- *Substantial performance of contract*: The new Act will include a formula-based definition of substantial performance and will allow for the use of certificates of substantial performance for contracts and certificates of completion for subcontracts. This should better allow for "early" release of holdback funds. Provisions will be added dealing with giving notice of the issuance of certificates to project participants and posting notice on the job site and, possibly, online.

- *Holdbacks*: Owners will be required to retain a single 10% holdback, which is more consistent with other provinces. In certain circumstances, where surety bonds are in place, the Crown will only be required to maintain a 5% holdback. The new Act will also provide for a separate "finishing holdback" (i.e. for services and materials supplied after the date of substantial performance of the contract).

- *Annual and phased release of holdback*: The new Act will allow holdback funds to be released on an annual basis on multi-year projects, and on a phased basis in multi-phase projects, provided certain conditions are met.

- *Holdback trust accounts*: Owners will be required to establish a trust account, into which all holdback funds must be deposited. Crown and local government owners and certain projects/improvements set out by regulation will be exempt.

- *Alternate forms of holdback*: The new Act will, in certain circumstances, permit owners to retain the required holdback in the form of a letter of credit or holdback repayment/release bond (or other manner prescribed by regulation).

- *Time for registering a claim for lien*: The deadlines for registering claims for lien will be harmonized at 60 days. The current Act includes different timelines which makes it confusing and it is often difficult to determine which timeline is applicable.

- *Notice to owner*: To protect unsuspecting owners from having to pay more than the agreed upon contract price (if liens are registered and no holdback maintained), on certain residential construction projects, contractors will be required to provide the project owner with a notice listing the suppliers of services and materials who will contribute to the improvement and advising of the owner's rights and obligations under the Act.

- *Examination on a claim for lien*: The new Act will allow the examination of a person who has verified a claim for lien. This procedure will be similar to an examination for discovery (Rule 32 of the Rules of Court) but will allow certain parties associated with the lien claim to question the claimant under oath, regardless of whether an action has been commenced.

- *Vacating and discharging liens*: The new Act will more clearly set out the circumstances in which a lien may be vacated or discharged and the procedure for doing so, including the ability to apply *ex parte*. It will specifically address liens that are frivolous, vexatious, an abuse of process or exaggerated. The process for vacating liens by paying money into, or posting security with, the court will be revised.

- *Alternate forms of security*: The new Act will provide that a Release of Lien Bond (as prescribed) will be an acceptable form of security to be used for paying into court.

- *Right to information*: The existing rights to information will be expanded and there will be a 21-day deadline for responding to such requests. Trust beneficiaries and mortgagees will be included.

- *Enforcement*: Enforcement procedures in the new Act will be generally the same as in the current Act. There will be a continued emphasis on resolving disputes in a summary manner, and the Rules of Court will apply unless otherwise indicated.

- *Surety bonds*: The new Act will require that all contractors who enter into a contract (over a prescribed amount) with a Crown or local government owner provide a labour and material payment bond and a performance bond (in prescribed forms).

- *Arbitration*: It will be made clear that a stay of proceedings pursuant to the *Arbitration Act* will not prevent a lien claimant from taking steps necessary under the new Act relating to the preservation of a lien.

- *Crown Construction Contracts Act*: Given that we are recommending that the new Act apply to both public and private sector construction projects, modifications to the *Crown Construction Contracts Act* will be required to remove overlap and duplication. We are proposing that the security of payment provisions currently found in the *CCCA* and its *General Regulation* (relating to the claims process and certain requirements respecting surety bonds) be repealed and replaced with provisions in the new *Construction Remedies Act*. The provisions of the *CCCA* and *General Regulation* dealing with procurement/tendering would remain, for the most part, unaffected.

Request for Assistance

One of the modernization reforms we are proposing above involves the increased use of certificates, such as certificates of substantial performance of the contract and certificates of completion of subcontracts. The intention is that with the increased use of certificates, project participants will be better informed of the status of the project so that they can make better decisions about exercising their rights. It is also hoped that this will result in project funds flowing more efficiently down the construction pyramid. Our view is that the posting of such certificates on a publicly accessible website would greatly improve the functioning of the notice provisions in the new Act. As mentioned in issue #41 of the *Law Reform Notes*, we are open to expressions of interest from private sector organizations (industry groups or otherwise) that may be willing to create and manage such a website. We would then, if acceptable, include it in the new legislative/regulatory regime. We hope that someone will come forward so that a notice website can be put in place prior to the new Act coming into force. Below are links to sites created in other jurisdictions for this purpose:

Ontario - https://canada.constructconnect.com/dcn/certificates-and-notices

Nova Scotia - http://www.substantialperformance.com/

Winnipeg - https://winnipegconstruction.ca/technical-bulletins/spcs.html

7. Part VI of the *Family Services Act*

Part VI of the *Family Services Act* (Parentage of Children) is in need of modernization. A review of this area of the law will include a review of both the current legislation and topics not legislated, for example, assisted reproduction and surrogacy. As we move towards more comprehensive legislation, what should be considered as the legislation is developed?