

## 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. Electronic Transactions Act

The Electronic Transactions Act has been proclaimed, and came into force on March 31, 2002. We provided a summary of the Act in the last issue of these Notes.

The only regulation that has been made under the Act is a short Exclusion Regulation by which a small number of Acts (e.g., the Family Income Security Act) are excluded from the application of the Electronic Transactions Act. In Law Reform Notes #15 we discussed the similar question of whether certain kinds of legal documents needed to be excluded from the Act, and argued against doing so for much the same reasons that we had given in a Discussion Paper

in December 2000. The responses that we received agreed that the exclusions discussed in the Notes should not be made. We received no suggestions for others.

#### 2. An Act to Amend the Mechanics' Lien Act, c. 84, 1992

We have recently recommended that this Act, too, should be proclaimed, with a coming into force date of June 1, 2002. The amendment brings procedures under the Mechanics' Lien Act more into line with the ordinary procedures under the Rules of Court.

Responses to the last issue of these Notes supported the proclamation of the Act. One question was raised, though, about whether the amendment led to some duplication in relation to the service of a "notice of trial." Both s.40 of the Mechanics' Lien Act and R.47.04 of the Rules of Court provide for a "notice of trial," though these are different documents. After comparing them, however, we concluded that although there was an area of overlap between them, it was only partial, and it did not seem to cause practical problems (as opposed to possible procedural inconvenience) where it existed. We therefore decided that this particular issue should not stand in the way of proceeding with the proclamation.

### 3. Canadian Judgments Act and An Act to Amend the Reciprocal Enforcement of Judgments Act

We have recently submitted our recommendations for the drafting of the regulations that will permit the Canadian Judgments Act, as well as the companion amendments to the Reciprocal Enforcement of Judgments Act, to be proclaimed. If all goes well, we hope to be in a position to announce the proclamation of these Acts in the next issue of these Notes, which should be released in the fall. We do not propose to recommend that the Acts come into force before then.

### 4. An Act to Amend the Quieting of Titles Act

Here, too, we have put forward our recommendations for some regulations, in this case amendments to R.70 of the Rules of Court. Once the Rules are amended, the Act can be proclaimed. The main purpose of the Act is to introduce a new procedure under which specific title problems can be finally resolved without the need for a full application for a certificate of title. The amended Rule will accommodate this procedure. The second function of the Act is to ensure that in those cases in which an application for a certificate of title is still made, a survey plan will normally be required.

Again, it currently seems unlikely that proclamation will occur before the fall. However, if the regulations were ready before then, we would be inclined to proceed to proclamation, without necessarily waiting to make sure that we

gave advance notice through the next issue of these Notes.

## B. NEW ITEMS

### 5. Class Proceedings

Over the past few years we have received requests to develop a Class Proceedings Act. Other commitments have always made it impossible to take this on. More recently, though, the legal background to this issue changed when the Supreme Court of Canada decided in *Western Canadian Shopping Centres Inc. v Dutton* (2001 SCC 46) that class proceedings in the modern sense of the word were possible in Alberta under a combination of the Rules of Court and the inherent jurisdiction of the court. The Alberta rule was very similar to New Brunswick's Rule 14.

We think that the best approach to this subject now is to work in conjunction with the Law Society committee that is reviewing the Rules of Court. Various possibilities seem to be open. One of them is to develop a Class Proceedings Act in the complete form that exists in places like Ontario, Quebec or British Columbia. Another, in theory, might be to do nothing, and allow the law relating to class proceedings to evolve on the substantially common-law track on which the Supreme Court of Canada has now placed them. A third option may be to develop revised Rules of Court building on *Dutton* and other cases, which might not need to be as comprehensive as a Class Proceedings Act.

We hope to be reviewing this with the Rules of Court Revision Committee in the near future.

### 6. Legislative Reform Initiative

Finally we reach the item which explains why this issue of these Notes is longer than most.

Readers may be aware that the Office of the Attorney General has recently begun work on a new Revision of the Acts of New Brunswick. The work is being carried out within the

Legislative Services Branch, though not by the Law Reform Unit. As with previous Revisions, the purpose is essentially to tidy up the New Brunswick statutes in matters of form and, to some extent, expression, but without making changes of substance.

As a parallel process, the Law Reform Unit has recommended to the Department that we should make an attempt (as far as our very limited resources will permit) to modernize the substance of the legislation that falls within what may be considered a "law reform" mandate. We have identified 75 of the Acts administered by the Office of the Attorney General as coming within this range, and we have conducted a very cursory review of them to see whether they are (a) in need of substantive reform or (b) substantially acceptable as is. We have then subdivided the former group into four categories, depending on what kind of reform we think the Acts need. We end up, therefore, with five categories, which we will describe below.

At this very early stage of our work, what would be most helpful would be to receive comments on the categories themselves and on whether our initial allocation of Acts among them seems appropriate. We would also welcome comments on priority items from any part of the list. We will definitely not be able to work on everything that we mention here, so there are some, probably many, Acts on this list that will simply be "revised" with no changes of substance. The discussion in these Notes is designed to help us in deciding which ones will, and which ones will not, receive attention from a "law reform" point of view.

We must emphasize, by the way, that we have not yet discussed the items on the list with potentially interested parties, either within or outside government. The list is very much a matter of first impressions, and these may change in the light of either internal or external reactions.

The five categories we have identified are these.

**Repeal (carefully).** These are Acts that we think should probably be repealed rather than brought forward into a new Revision of the Acts of New Brunswick. We will explain our reasons later in these Notes. In several cases we will suggest that though the Act as a whole should

be repealed, there is some part of it that should be retained in another form. It is because of these points of detail that the heading of this category notes that any repeal must proceed "carefully."

Bulk Sales Act  
Controverted Elections Act  
Corrupt Practices Inquiries Act  
Habeas Corpus Act  
Married Woman's Property Act  
Notaries Public Act  
Nova Scotia Grants Act  
Statute of Frauds  
Surety Bonds Act  
Unconscionable Transactions Relief Act

**Consequential Repeal.** We are currently involved in two Uniform Law Conference projects that, if enacted in New Brunswick, would lead to the consequential repeal of a number of existing Acts. One of the projects deals with enforcement of judgments; new legislation on this subject would probably replace the following:

Absconding Debtors Act  
Arrest and Examinations Act  
Assignments and Preferences Act  
Creditors Relief Act  
Garnishee Act  
Memorials and Executions Act

The other deals with commercial liens; new legislation on this subject would probably replace the following:

Innkeepers Act  
Liens on Goods and Chattels Act  
Warehouseman's Lien Act  
Woodsmen's Lien Act

**Revise and reform.** These are Acts that we feel need some changes of substance, in addition to whatever changes of form and expression the Revision process might bring. In some cases the changes of substance would be so substantial that a new Act would probably be needed. The list that follows is long, though, and we will need to be selective in deciding what to work on. We have therefore marked with asterisks the items that we currently think we are most likely to attempt to deal with, based largely on the fact that we have worked on them or on related subjects in the past. If people have any views on whether these or other things should be our priorities, please let us know.

Crown Debts Act  
 Defamation Act  
 \* Devolution of Estates Act \*  
 Evidence Act  
 \* Executors and Trustees Act \*  
 Foreign Judgments Act  
 \* Infirm Persons Act \*  
 Inquiries Act  
 Interprovincial Subpoena Act  
 Landlord and Tenant Act  
 \* Limitation of Actions Act \*  
 Marine Insurance Act  
 \* Mechanics' Lien Act \*  
 Proceedings Against the Crown Act  
 Property Act  
 Quieting of Titles Act  
 Sale of Goods Act  
 Tortfeasors Act  
 \* Trustees Act \*  
 Wage-Earners Protection Act  
 Warehouse Receipts Act

**Rewrite.** In these Acts we are not at present aware of a need for significant changes of substance. Their wording, however, is dated; ideally it would be modernized. The best way of doing this is probably to rewrite the Acts completely. In this way it would be possible to deal not only with issues of wording but also with the incidental issues of substance that are certain to arise if the wording is modernized.

Age of Majority Act  
 Demise of the Crown Act  
 Easements Act  
 Escheats and Forfeitures Act  
 Factors and Agents Act  
 Frustrated Contracts Act  
 Great Seal Act  
 Protection of Persons Acting Under Statute Act  
 Public Records Act  
 Queen's Counsel and Precedence Act  
 Reciprocal Enforcement of Judgments Act  
 Sale of Lands Publication Act  
 Wills Act

**Acceptable as is.** These Acts appear to us to be ready for Revision in their current form. Some of them, no doubt, raise issues that may require legislative attention at some point. The Contributory Negligence Act, the Fatal Accidents Act, the Survival of Actions Act and the privity of contract provisions of the Law Reform Act are

examples. Nonetheless, as we attempt to establish the law reform program that will best complement the Revision project, we are inclined to think that the Acts on the list that follows should be "revised" first, and "reformed" later (if at all).

Arbitration Act  
 Canadian Judgments Act  
 Conflict of Laws Rules for Trusts Act  
 Contributory Negligence Act  
 Family Services Act (Part VII)  
 Fatal Accidents Act  
 Guardianship of Children Act  
 International Child Abduction Act  
 International Commercial Arbitration Act  
 International Sale of Goods Act  
 International Trusts Act  
 International Wills Act  
 Law Reform Act  
 Marital Property Act  
 Postal Services Interruption Act  
 Presumption of Death Act  
 Provision for Dependants Act  
 Reciprocal Enforcement of Maintenance Orders Act  
 Reciprocal Recognition and Enforcement of Judgments Act (Canada/U.K. Convention)  
 Survival of Actions Act  
 Survivorship Act

Next comes the question of how many of the Acts listed above we can realistically expect to be able to deal with. This is where readers' comments on priorities would be especially welcome.

Our current impression is that it should probably not be difficult to deal with the Acts listed as "Repeal (carefully)," provided that, on closer examination, repeal still seems to be the right thing to do. We also hope to be able to deal with the ten Acts listed under the heading "Consequential repeal," though we have provisionally assigned a higher priority to the enforcement of judgments project than to the commercial liens project.

Under the heading "Revise and reform," the Acts that we have marked as our provisional priorities are three that we have devoted time to in the past (the Limitation of Actions Act, the Mechanics' Lien Act and the Devolution of Estates Act) along with three others that we think our work on the Devolution of Estates Act would

probably lead us into (the Executors and Trustees Act, the Trustees Act and the property management provisions of the Infirm Persons Act). Since none of these projects will be quick or easy, we think it unlikely that we would touch anything else in this list.

We see the Acts on the "Rewrite" list as having lower priority than the items in the previous three groups, though they may nevertheless receive attention if the opportunity arises. The Acts listed as "Acceptable as is," of course, we would not expect to touch at all. If other people see items in these two groups that they would regard as priorities for reform, they should let us know.

Having outlined our five groups of Acts, we now return to the first of them, "Repeal (carefully)," to explain briefly why we think the ten Acts listed here can probably be disposed of. This may well be the only opportunity that readers of these Notes will have to comment on these Acts, so please let us have your reactions, whether favourable or unfavourable, to what we suggest.

#### a. Bulk Sales Act

In Law Reform Notes #2 (March 1994) we discussed very briefly the idea of repealing the Bulk Sales Act as being an Act that caused complications that were greater than any benefits it brought. We mentioned Alberta and British Columbia as provinces that had repealed their Bulk Sales Acts. Saskatchewan and Manitoba had done so too.

All of the comments we received in 1994 agreed with repealing the Act, but we were not able to proceed with it then. Subsequently we have heard some comments in support of the Act. Not surprisingly, these are based on considering the position of the unsecured creditors and the protection that the Act is supposed to provide them.

Despite the natural sympathy one has for unsecured creditors, we continue to believe that any benefits the Bulk Sales Act brings are more than outweighed by the complications. We therefore mention it once again as an Act that we think should be repealed. Since 1994, Nova Scotia and PEI have joined the list of provinces repealing their Bulk Sales Acts.

#### b. Controverted Elections Act

The Controverted Elections Act establishes a procedure under which the election of an MLA can be set aside because of procedural or substantive irregularities, the latter including the so-called "corrupt practices" of "bribery" and "treating." In proceedings under the Act, the candidate whose election is being challenged may also bring allegations of "bribery" or "treating" against an unsuccessful candidate.

A report commissioned by the Office of the Attorney General after the Court of Appeal decision in *Inman v Kennedy* ((1997) 189 NBR (2d) 1) pointed out that both the procedures and the language of the Act were outdated, and recommended that the Act should be replaced by a revised and simplified process under the Elections Act.

We believe that this is probably the path that should be taken.

#### c. Corrupt Practices Inquiries Act

The Corrupt Practices Inquiries Act is also concerned with the "corrupt practices" of "bribery" and "treating." Under this Act, 25 electors may petition the Chief Justice of New Brunswick to appoint two judges to inquire into the petitioners' allegations that corrupt practices have extensively prevailed in the election of an MLA.

We do not immediately see that this Act serves any purpose, given the availability of remedies under the Controverted Elections Act (or its replacement). Presumably the *raison d'être* of the Corrupt Practices Inquiries Act is to permit electors to take the initiative in promoting a public inquiry into alleged electoral malpractices, whereas the ordinary process under the Inquiries Act would give this authority to the Lieutenant-Governor in Council. We would have thought, though, that any allegations of "corrupt practices" would be fully dealt with in proceedings under the Controverted Elections Act or its replacement, and that if the judge who held such proceedings felt that there were broader issues that required a public inquiry, the simplest approach would be to let him or her say so in the report coming out of the proceedings under the other Act.

Our current belief, therefore, is that the Corrupt Practices Inquiries Act can simply be repealed without replacement.

d. Habeas Corpus Act

Our preliminary assessment of the Habeas Corpus Act places it on the borderline between the "repeal (carefully)" and the "rewrite" categories. The Act contains some short provisions on procedure and on the custody of children. More substantially, it contains provisions under which the keeper of a jail or prison can explain the detention of a person by responding to an order in the form prescribed by regulation rather than to a writ of *habeas corpus*.

We believe that whether the Act should be repealed or rewritten is likely to depend on whether this alternative process involving a prescribed form is still needed, or whether it can be abandoned in favour of other mechanisms. We will be reviewing this issue.

e. Married Woman's Property Act

Our provisional view that the Married Woman's Property Act should be repealed is based on the idea that the Act has achieved its intended purpose, and that there is no need to re-enact its provisions in either the forthcoming Revision to the Acts of New Brunswick or any future ones. Obviously, though, before recommending repeal we would want to review the technical implications closely, in order to make sure that the repeal would not have the effect of changing the law from the state in which it now is.

We note that s.9 of the Act provides for "protection orders" relating to the earnings of minor children, and includes a brief reference to domicile. These provisions are a little different from much of the Act, in that they were not designed to produce a one-time change in the law but to have continuing application. Nonetheless, we doubt that s.9 continues to serve a useful purpose.

f. Notaries Public Act

The Notaries Public Act provides for notaries public to be appointed by the Lieutenant-Governor in Council. It also confirms that all members in good standing of the Law Society of New Brunswick are notaries public.

We are informed by the Executive Council Office that no appointments under this Act have been made since at least 1984. We doubt that there is any point in retaining it. If it is repealed, though, we think it would be wise to retain the idea that nobody except a member of the Law Society should represent himself or herself as being a notary public. Probably the Law Society Act would be the natural place to put this prohibition. Presumably some sort of grandfathering provision should also be considered in relation to existing appointees.

g. Nova Scotia Grants

S.1 of this Act confirms the legal effect of Nova Scotia Crown grants that were issued and registered before January 3, 1786, and makes those that were unregistered at that time "null and void." S.2 deals with the determination of boundary lines in pre-1786 Nova Scotia grants in Charlotte County.

Though we must do some more work on the technicalities here, we feel that the time must have come to repeal these provisions.

h. Statute of Frauds

The Statute of Frauds has been repealed in Manitoba, and substantially repealed in BC. Law reform agencies that have examined their local versions of this Act have agreed that most of it should be repealed. There are, however, different views about what the fate should be of the provisions that require writing in relation to guarantees (s.1(b)), land contracts (s.1(d)) and conveyances (s.7). In a 1991 discussion paper for the Newfoundland Law Reform Commission, Professor J.T. Robertson (then of UNB), suggested that a writing requirement for consumer guarantees (only) might still be useful, that writing requirements for land contracts should be repealed, and that in relation to conveyances the writing requirement in the Statute of Frauds was, technically and practically, redundant, but that it might nonetheless be worth re-stating in some form to ensure consistency with the objectives of the registry system. He also pointed out that the issue of what to do with 3-year leases of land would require careful attention.

Our initial view is that the Act should be repealed without replacement – though we do agree that we must give more thought to the 3-

year lease issue. As for the guarantees, we do not see that a writing requirement by itself gives any real protection to consumers. As for any new provision about conveyances of land, we think that this is unnecessary in light of s.11 of the Property Act and, more importantly, the Province-wide proclamation of the Land Titles Act, which contains its own rules about what kinds of documents are needed in order to register and transfer title.

#### i. Surety Bonds Act

This Act appears to apply to (a) situations in which municipal, Crown or court officials are required by law to provide sureties for the discharge of their responsibilities, and (b) other situations in which courts require bonds. In both cases (more clearly the former than the latter), the application of the Act appears to depend upon designations by the Lieutenant-Governor in Council of incorporated companies whose bonds are acceptable. The most recent designation was apparently in 1977, when 70 insurance companies were listed.

We very much doubt that the Surety Bonds Act serves any purpose. All it seems to do is create an additional technicality in relation to what we suspect are a small number of bonds. However, we propose to investigate this more closely, especially in relation to the courts, before recommending the Act's repeal. Input from municipal solicitors would be helpful in relation to bonding requirements for municipal officials.

#### j. Unconscionable Transactions Relief Act

Under this Act, the courts can grant relief when money is lent but "the cost of the loan is excessive and . . . the transaction is harsh and unconscionable" (s.2). We accept that the courts should have this power, but we believe that the general law on unconscionability of contracts has now evolved to the state where it would be preferable to rely on the common law of unconscionability (see e.g. *Shanks v Cornford* (2001), 235 NBR (2d) 136) for all transactions rather than having a statute applying to loans but common law rules applying to everything else.

The simplest approach appears to be to repeal the Act, though in a way that makes it clear that the repeal is not intended to permit unconscionable loan transactions. If it is felt useful to ensure that there is, somewhere in the statutes of New Brunswick, at least some form of reference to the courts' authority in relation to unconscionability, our first thought is that a small amendment to s.26(3) of the Judicature Act, under which the courts can relieve against penalties and forfeitures, might be worth considering.

*Responses to any of the above should be sent to the address at the at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than June 1<sup>st</sup> 2002, if possible.*

*We also welcome suggestions for additional items which merit study with a view to reform.*