

## Law Reform Notes

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*Law Reform Notes* is produced twice yearly in the Legislative Services Branch of the Department of Justice, 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 all of those who have 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 Department of Justice 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. Infirm Persons Act

In previous issues of these Notes we have discussed two proposed amendments to the Infirm Persons Act. The first would establish a "power of attorney for personal care" under which people could grant decision-making authority on personal care matters to another person. The second would revise s.39 so that it included personal care matters and made it clear that the options available under this section were more varied than simply the appointment of a committee.

Both of these amendments were made by An Act to Amend the Infirm Persons Act, c.45, 2000. The Act came into force on Royal Assent

(December 6th, 2000), and has retroactive effect in relation to powers of attorney for personal care.

Both elements of the Act are designed to give flexibility to the user. The power of attorney can be as general or specific as the person granting it wishes. It can be combined with a power of attorney for property matters in a single document, or it can be separate. Decision-making authority on different matters can be assigned to different people.

Similarly, an order under the amended s.39 can be general or limited in its effect, depending on what the applicant satisfies the court is appropriate in the circumstances.

## 2. Springing power of attorney

We discussed in issue #13 of these Notes a suggestion we had received for an amendment to the "enduring power of attorney" provisions of the Property Act. An "enduring power of attorney" remains in force despite the subsequent mental incompetence of the person granting the power. The suggestion was that the Act should also clearly authorize a "springing" power – one that would only come into effect if and when the person granting it became mentally incompetent.

We have reviewed the correspondence received on this subject, and have recommended that such an amendment should be made.

Whether to grant a "springing" power of attorney or an "enduring" one would be a choice for the individual to make. Each approach would have its advantages and its drawbacks. The advantage of the "springing" power would be that the attorney would have no authority to act until the power "sprang." The disadvantage, however, is that in some cases there might be uncertainty about whether the power had "sprung" or not. An "enduring" power of attorney avoids the latter difficulty, but with the drawback that it gives the attorney power to act even before mental incompetence arises, which the person granting the power may not want.

The effect of the amendment, therefore, would be to give the individual the choice as to which set of advantages and disadvantages he or she preferred.

## 3. Electronic Transactions Legislation

In December 2000 the Minister of Justice released a consultation paper on electronic transactions legislation for New Brunswick. The government is proposing to introduce legislation on this subject in the spring, and the consultation is intended to assist in finalizing the details of the legislation.

The consultation paper is available on the Internet (<http://inter.gov.nb.ca/justice/index.htm>), together with an electronic response form that people may use if they wish. Paper copies are available from Legislative Services Branch.

The paper is substantially an analysis of the Uniform Law Conference of Canada's Uniform Electronic Commerce Act, with recommendations as to how much of it New Brunswick should adopt, and with what adjustments. The key points of the Uniform Act are these:

- It is enabling legislation; it will permit, but not require, people to engage in electronic transactions.
- It applies to all kinds of transactions, not just commercial ones.
- It sets out two key principles: (i) that electronic transactions should have the same legal effect as transactions conducted by other means, but (ii) that nobody is required to conduct transactions electronically unless they wish to.
- It provides means of overcoming a number of identified legal obstacles to electronic transactions. Specifically, it allows electronic documents to be used (with consent) even though existing laws require documents to be "in writing," or "signed," or in a "prescribed form," or in "original form," or to be "provided" or "retained," or to be in multiple copies.
- It contains provisions relating to electronic contracts, to carriage of goods, and to the time and place of sending and delivery of electronic documents.
- It contains some special provisions relating to "Government."

The paper recommends the adoption of much of the Uniform Act. There are, though, a number of subjects that are specifically raised for discussion. The main ones are these:

- What exceptions, if any, should be made to the Act. (The Uniform Act suggests a few.)
- Whether the two key principles of the Act (see the 3rd bullet in the list above) require clarification.
- Whether the electronic signatures provision could be made more user-friendly.
- Whether the provisions on electronic contracts, carriage of goods, and time and

place of sending and delivery actually serve any useful purpose.

- Whether the special provisions for Government are required.
- Whether new provisions should be added, dealing with (i) certified copies, (ii) sending by mail and registered mail, (iii) consumer issues, (iv) regulation-making powers and (v) coming into force.

The paper also enables respondents to raise other subjects that they think New Brunswick's Electronic Transactions Act should deal with.

The paper asks for responses no later than February 14th, 2001. If we receive responses after that date, we will still consider them if time permits, but please respond sooner rather than later if you want your comments to receive proper attention.

#### 4. Tort of Invasion of Privacy

This subject was last mentioned in issues #9 and #10 of the *Law Reform Notes*. We noted there that the creation of a tort of invasion of privacy was one of several possible privacy law initiatives examined in *Privacy: Discussion Paper #2*, a paper that had recently been released at that time.

The other initiatives referred to in that discussion paper have been overtaken by events, primarily in the form of the federal *Personal Information Protection and Electronic Documents Act*. However, the Branch has continued its work on the tort of invasion of privacy, and in December 2000 the Minister of Justice introduced Bill 23, a proposed Privacy Act, in the Legislative Assembly. The Bill has been referred to the Law Amendments Committee for review before final decisions in relation to its enactment are taken.

The proposed Privacy Act is short. Most of it is concerned with establishing the legal test that the courts would apply in determining whether an invasion of privacy had occurred. The remedies would be the ordinary remedies that apply to torts in general, adjusted slightly by the provisions of the Act.

The Legislative Services Branch has prepared a "Commentary on the *Privacy Act*" which is designed to assist the public and the Law Amendments Committee in their review of the Bill. This, too, was tabled in the Legislative Assembly in December. The Commentary, which includes the full text of the Bill as well as relevant extracts from the earlier discussion paper, is available from the Legislative Assembly via the Internet (<http://inter.gov.nb.ca/legis/index-e.htm>) or in paper form.

Information about the Law Amendments Committee's proceedings can be obtained by contacting the Legislative Assembly at (506) 453-2506. At the time these *Notes* were prepared, no timetable had been set for the Committee's review of the Bill.

#### 5. Protection of Personal Information Act

The Protection of Personal Information Act is expected to be proclaimed in the near future. The Act applies to the provincial public sector. It sets standards that provincial "public bodies" must follow when they handle information about identifiable individuals.

The standards are based on the Canadian Standards Association's *Model Code for the Protection of Personal Information*. The *CSA Model Code* is also the foundation for the protection of personal information provisions of the federal government's *Personal Information Protection and Electronic Documents Act*, which applies to the private sector, and which began its three-step commencement process on January 1st, 2001.

#### 6. An Act to Amend the Wills Act

We have recently recommended to the Department that An Act to Amend the Wills Act (c.7, 1997) should be proclaimed effective April 1st, 2001.

This amendment was last referred to in issue #8 of these *Notes*. It does two things. First, it permits the court to admit a document to probate even though the document does not comply with the formal requirements of the Wills Act, if the court is satisfied that the document expresses the

## B. NEW ITEMS

testamentary intentions of the deceased. Second, the amendment alters the conflict of laws rules in Part II of the Act. It expands slightly the criteria for recognition of an out-of-province will, and it removes the existing distinction between the treatment of "land" and "movables."

The first of these amendments, dealing with non-formal wills, is to be accompanied by a small revision to the Probate Rules. The general effect of the revision is that the informal document will be treated in the same way as a will for the purposes of the Rules. The second amendment, dealing with conflict of laws, includes a consequential amendment to s.73 of the Probate Court Act, which deals with the resealing of wills.

There are no new items that we wish to present for discussion at this time. There is still work to be done on several of the projects described above. In addition, regulations need to be developed so that both the Canadian Judgments Act (c.C-0.1, 2000) and An Act to Amend the Quieting of Titles Act (c.11, 2000) can be proclaimed. We hope to be able to begin work on those regulations shortly.

*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 April 1st 2001, if possible.*

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