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## 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 Department 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 Department 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.*

### A: UPDATE ON ITEMS IN LAW REFORM NOTES #4

#### 1. Notice of Mortgage Sales

In previous issues of **Law Reform Notes** we raised the possibility of simplifying the notice requirements for mortgage sales, but we then put this aside in the hope that we would be able to take a broader look at mortgagees' remedies this summer. We were not able to conduct that broader study, but we did receive further correspondence suggesting that the existing notice requirements were excessive. We have therefore decided to return to the question of the notice requirements as an independent item.

What was suggested in the correspondence this summer was that s.45 of the *Property Act*, which contains the notice requirements for mortgage sales, should be amended as follows:

1. The posting of printed handbills should not be required.
2. The number of newspaper advertisements should be reduced from four to two, these being in the last two weeks before the sale.
3. A single notice in the *Royal Gazette* should be required, two weeks before the sale. (It was suggested that reinstating this requirement, which is inexpensive, would be useful because of the wide readership of the *Royal Gazette* in business and professional circles.)
4. The requirement of four weeks notice to the mortgagor would remain, thus giving him or her, in effect, a two week grace period after the notice is served but before notice of the sale is published.

Having reviewed the earlier correspondence on this subject, we believe that these would be reasonable amendments in cases in which the mortgagor is served with the original notice of sale. Unless anyone identifies a major drawback we propose to recommend them for enactment. If, though, the mortgagor did not receive the original notice, we believe that four newspaper advertisements should continue to be required, though there should be no requirement for the posting of handbills.

We are also proposing to recommend the addition of a new s.45(4) designed to make it less likely that people will feel the need to use a full property description in any advertisement of the mortgage sale. S.45(3) already states that a full property description is not necessary, but that "any description from which the premises can be readily identified is sufficient." To increase people's confidence in relying on s.45(3), we suggest that the new subsection might say something like this:

- 45(4) For the purposes of subsection (3), a notice of sale sufficiently identifies the premises to be sold if the notice
- (a) describes the property by its civic address,
  - (b) states an address at which the vendor will make a full property description available, and
  - (c) gives the P.I.D. number of the property.

We also suggest that the name of the mortgagor should not need to be published unless he or she had not received the original notice of sale.

## 2. Administration of Estates

In **Law Reform Notes #2 and #3** we put forward three suggestions designed to simplify the administration of intestate estates. These were (a) to reduce the need for bonding of administrators, (b) to reduce the need for formal appointment of administrators, and (c) to expand s. 19 of the *Devolution of Estates Act*. Based on

these suggestions and the reactions to them we have now developed specific proposals. We would welcome comment before making detailed recommendations to the government.

### (a) Bonding

New Brunswick's current bonding provisions are found in sections 57 - 63 of the *Probate Court Act*. We believe that these should be amended to read that, except where otherwise provided, persons to whom letters of administration are granted need not give a bond. Having reviewed law reform initiatives and recommendations from elsewhere, we suggest that the exceptional cases in which bonding will be required should be these:

- (i) where a person applies for letters of administration solely in his or her capacity as a creditor of the estate;
- (ii) where the administrator of the estate is a non-resident of New Brunswick;
- (iii) where the court determines, on the application of any interested person or of its own motion, that a bond is necessary in order to secure the proper administration of the estate.

In cases (i) and (ii) the court should have the power to waive the requirement of a bond. In case (iii) a power of waiver would be unnecessary, since a bond would only be called for if the court decided it was needed.

The main questions that we have in relation to this proposal are these:

1. Are there additional circumstances in which bonding should be required?
2. Should the court's discretion under ground (iii) be stated in the broad terms described above, or should the legislation attempt to give more direction on the circumstances in which the court's discretion to order bonding should be exercised? If so, what should it say?

## (b) Appointment of Administrators

The broad suggestion in **Law Reform Notes #2** was that the people who were entitled to apply for letters of administration might be given authority to deal with an intestate estate without first obtaining letters. The suggestion was set against a background in which the vast majority of estates in New Brunswick -- something like 85%, comparing Vital Statistics death records with court statistics on grants of letters probate and letters of administration -- are dealt with informally, without grants of letters. We see nothing wrong with this. In some cases, however, people find that they have to apply for letters of administration for no other reason than that, technically, in cases of intestacy, nobody has authority to act on behalf of the estate unless letters are granted. By giving that authority the proposed legislation would remove an obstacle to simple informal estate administration.

As we have worked on the details of the proposal, however, it has become apparent that different legislative formulations of the general idea outlined above could produce different results. It would be helpful to receive comments on the nature of the approach that should be adopted.

The most direct approach would be to build the new legislation onto the existing framework of s.53 of the *Probate Court Act*. That section currently provides that the administration of an estate may be committed by the court to the spouse or the next-of-kin of the deceased, and case-law establishes who are the 'kin' and which of them is 'next.' Building on this base the new section could simply provide that, subject to the overriding authority of the court to grant letters of administration to somebody else, the right to administer the property of the deceased would devolve directly to the person who would have been entitled to a grant of letters on application to the court. If, by virtue of degree of consanguinity with the deceased, more than one person would have been equally entitled to the grant, these persons may act jointly or may agree among themselves as to who shall act. The persons identified in this way would have the same powers as an executor has before the grant of letters probate. If these powers were not enough to do a particular act, an application for

letters would be needed.

What this approach would do is provide a 'statutory administrator' who could administer an estate when a deceased had not appointed an executor, much as the *Devolution of Estates Act* provides default rules for identifying beneficiaries in the absence of a will. The authority of the 'statutory administrator' could apply equally to intestacies and to cases where there are wills but no executors, just as s.53 of the *Probate Court Act* now provides the same rules for determining who has the right to administration.

A slightly different approach would focus more on the beneficiaries of the estate, and give them the authority to decide who is to be the administrator. Again, the person they decided upon would have the same powers as the executor of an unprobated will, and their decision would be subject to the overriding power of the court to appoint someone else. The focus on the beneficiaries here reflects the fact that they are the ones with the ultimate interest in the estate, so their decision as to who should administer the estate should prevail (unless an interested party can persuade a court otherwise). This approach, too, could in theory apply both to intestacies and to wills without executors, but in practice it would probably apply more easily to intestacies, since the beneficiaries are easy to identify and the beneficial interests are relatively homogeneous.

A third approach would avoid questions of who is, or who may appoint, administrators of an estate, and would couch the legislation in terms of giving legal effect to acts done by or with the consent of the specified individuals. (The legislation might select either the next-of-kin or the beneficiaries.) Again we believe that the degree of the legal effect should be 'the same legal effect as if it had been done by the executor of an unprobated will.'

This approach comes closer to the original idea from which the exercise started -- namely, that what was needed was a small provision that allowed family members to get over obstacles that they sometimes encountered in relation to specific transactions in the informal administration of estates. On the other hand, this "small provision" might end up not being that small at all. It would be hard to identify particular kinds of transaction to which it should be limited,

so the result would probably be a power which gave the family members potentially broad authority over the administration of the estate.

We believe that the end result, and the objective, of each of these approaches would be the same. Each would make it unnecessary for family members to go to court for a formal grant of letters of administration in most cases, while each would retain the overriding power of the court to displace the authority of the family members by appointing someone else as administrator. Nonetheless, the three approaches reach their objectives by different means. The first provides a default rule for identifying the administrator of an estate. The second provides a self-help remedy by which the beneficiaries can select an administrator. The third sidesteps the question of 'who is the administrator?' and focuses instead on regularizing the actions that may need to be taken in the administration of an estate.

Can people suggest strong reasons for preferring one of these approaches over the others?

### (c) Section 19 of the *Devolution of Estates Act*

Here the detail of the recommendation does not seem complicated. The current s. 19 provides that real property, personal chattels, and money and securities for money under the value of \$2500 vest in the beneficiaries after a period of two years has elapsed from the death of the deceased. The suggestion that we raised in **Law Reform Notes #2**, and which, in the light of the comments received, we are now proposing to recommend to the government, is simply this: that the section should be expanded to apply to all property.

## 3. Damages for Personal Injuries

### 3(a) Pre-judgment Interest on Non-Pecuniary Damages

In **Law Reform Notes #4** we asked for comment on the suggestion that pre-judgment interest on non-pecuniary damages might either (a) be reduced from its present 'commercial' rate to a rate that represents only the plaintiff's 'loss of

use' of the money in the period before judgment, or (b) be eliminated entirely in the absence of special circumstances.

Most of the people who responded to the **Notes** preferred the status quo to either of the alternatives suggested, though there were some who accepted the argument that 'loss of use' was the appropriate measure for pre-judgment interest on non-pecuniary loss.

The main arguments presented to us were these:

- that the present law was well understood,
- that the so-called 'commercial rate' did not in fact over-compensate plaintiffs when one took into account such things as the date from which interest ran, the fact that it was simple interest, the possibility that judges might not reflect current money values in their awards, and the ability of judges to use their discretion to avoid unfair results,
- that altering the present law would provide a windfall to insurers, since it was unlikely that they would pass any of the savings on as reduced premiums to their customers,
- above all, that pre-judgment interest was important in discouraging insurers from delay.

We believe that the observation that the current law is well understood is largely neutral as between the three options. A 0% basic rate of pre-judgment interest would be as simple to apply as the present law; so would a 'loss of use' approach as long as it took a readily identifiable figure as its measure of 'loss of use' -- probably the 2.5% discount rate set by R.54.10.

The other three arguments carry more weight. They relate, respectively, to the merits of the status quo, to the direct financial consequences of changing it, and to the incidental benefits of the current law from the point of view of plaintiffs.

Having considered all of these arguments, we believe that a reasonable case can be made for all three of the options under review. The conclusion that 'loss of use' and 0% remain reasonable options (for the reasons given in Law Reform Notes #4) is reinforced by the recent cases of *Flanagan v Levesque* (1994) 148 NBR (2d) 101, where Godin J. adopted the discount rate as the measure of pre-judgment interest, and *Horne v Armand* (1995) 159 NBR (2d) 229 where Graser J. awarded no pre-judgment interest on general damages since these had been assessed "for pain and suffering running to today's date." Other recent judgments have followed more traditional lines, but evidently there is a case to be made for the alternatives.

We propose, therefore, to submit the three options described above to the government, as well as the arguments in support of each and the concerns about 'windfalls' and 'delays.' It will be up to the government to decide which option represents the better public policy.

### 3(b) Pre-Judgment interest on Pecuniary Damages

On this topic our question last time was whether New Brunswick should follow the lead of some other Canadian jurisdictions in adopting a method of calculating pre-judgment interest on pecuniary damages that is more mathematically precise than the present one. Most of our correspondents saw no need for change. We think we should leave the matter there.

### 3(c) The Collateral Source Rule

The correspondence on this subject demonstrated clearly that the collateral source rule raises difficult issues, both of principle and of practice.

Most of the people who wrote (though not all) argued that altering the law would be wrong because it would allow tortfeasors to benefit from the plaintiff's collateral arrangements -- a perspective very different from the one presented in Law Reform Notes #4. Several mentioned the complications that changing the law would produce in the calculation of damages. As one letter put it, "There are major practical

difficulties in determining collateral benefit offsets, namely the conditions attached to future payments, which conditions may or may not be met in practice." Difficult issues also arise in relation to the subrogation rights of the providers of collateral benefits. Several lawyers said that collateral insurers were becoming increasingly active in exercising their subrogation rights. Some complained that insurers were 'drafting around' the limits of their subrogation rights at common law, and were giving themselves, by contract, excessive rights to reimburse themselves out of the damage awards that plaintiffs recovered. The suggestion was made that legislation should be introduced to prevent this practice.

These comments on subrogation lead back to the threshold question of whether the existing law allows plaintiffs to over-recover. The more collateral insurers subrogate, the less difference it makes to plaintiffs whether collateral benefits are or are not deducted from the damage award; either way, the plaintiff will not retain the money. One letter described the effect of changing the law here as being no more than "a redistribution of profits in the insurance industry at no saving to the public . . . redistribution of wealth in the guise of insurance law reform."

As we have tried to balance the various points made to us, the following package has emerged as one that might provide a reasonable realignment of the respective interests of plaintiffs, defendants, liability insurers and collateral insurers:

1. The collateral insurer pays benefits up to the time of judgment or settlement, and cannot recover them through subrogation or contractual terms.
2. The liability insurer pays the damage award in full, after deduction of collateral benefits already received.
3. The disability insurer is released from further payments until the plaintiff's loss under the relevant head of damages (probably loss of income in most instances) exceeds the damage award. At that time the disability insurer's obligations will revive if the plaintiff still qualifies for the benefits.

Point 3 of the above was based on an insurer's precedent provided to us. We had wondered if the suspension and subsequent revival of the collateral insurer's obligation might be difficult to put into practice, but the fact that this arrangement is a precedent from an actual agreement suggests that it should be workable. A simpler alternative to it might be, at stage 2, to allow the plaintiff to elect between damages and collateral benefits as the source of compensation for a particular kind of loss.

This package certainly seems to meet the concerns expressed about collateral insurers 'contracting around' their common law position and into a position that is more favourable to them. None of the payments they made under this scheme would be recoverable. The package also avoids the "major practical difficulties in determining collateral benefit offsets, namely the conditions attached to future payments . . ." Under this approach, there would be no offsets for future collateral benefits; at most there would be a calculation of when the entitlement to the collateral benefits might revive.

Obviously this approach would result in smaller payments of damages by tortfeasors, and is therefore unlikely to satisfy those who believe that tortfeasors should not benefit in any way from the existence of collateral benefits. It is, nonetheless, an approach that deserves to be presented for comment as an alternative to the straight reversal of the collateral source rule discussed in **Law Reform Notes #4**.

### 3(d) The Tax Treatment of Damage Awards

This item arose out of the complaint that plaintiffs are overcompensated if awards for loss of income are based on before-tax income rather than after-tax income. In Issue #4 we canvassed three alternatives: retain the status quo, use after-tax income as the measure for loss of past income but retain gross income for future loss, and put both past and future loss on an after-tax basis.

Replies generally favoured the status quo, even while accepting, in some cases, the criticism of it. They mentioned the complexity of trying to determine a plaintiff's after-tax situation, particularly in cases involving future loss of

income. One described how, actuarially speaking, it would probably make little difference in cases of long term loss of future income whether one preserved the present law (before-tax income basis, but without gross-up) or established a different approach (after-tax income basis, but grossed-up to compensate for the effect of tax on the investment income). Another comment was that though the before-tax basis might be advantageous to the plaintiff, it was justified because it helped to offset income-related losses that could not now be recovered as damages. Others suggested that, though there might be an anomaly here, if anything was to be done it should be done by the federal government as a matter of taxation law, and not by the province as a matter of the law of damages.

Since distributing **Law Reform Notes #4**, we have received from the B.C. Law Reform Commission its *Report on Taxation and the Assessment of Income Related Damage Awards*. The Report is brief, but is very clear in its assertion that "The effect of . . . ignoring the impact of taxation is to overcompensate plaintiffs" (p.5). Its recommendation is that after-tax income should be used as the basis for damage awards.

Clearly the key question here is whether the government accepts the argument that the current law overcompensates plaintiffs. With the benefit of the correspondence we have received, we feel we are now in a better position to present both sides of the argument. If the government does decide that the law should be changed, we think there may be advantages in a system that only applies to past loss of income, and not to future loss of income. This may be conceptually less pure than the wholesale adoption of the after-tax approach for both past and future income, but it would avoid most of the practical complications described in the correspondence. In relation to future income, moreover, actuarial analysis appears to suggest that any 'overcompensating' effect of the present law diminishes as the duration of the award increases.

### 3(e) Seatbelts/Contributory Negligence

The suggestion here was that there should be a presumption of 25% contributory negligence for failure to wear a seatbelt. One lawyer replied: "A rebuttable, 'all-or-nothing' 25%

statutory reduction for failure to wear a seatbelt would be a godsend to the profession. I endorse this option wholeheartedly for all the reasons you put forward." Most respondents, however, felt differently. The opposition was not to the level of the 25% reduction, which was what we had identified in *Law Reform Notes #4* as being the major issue, but to both the principle of applying a statutory reduction and the practical effects of reversing the onus of proof.

Some people argued that applying a statutory reduction was inappropriate as being an attempt to attach a civil penalty to breach of a provincial statute. We do not see it that way. Common law principles were reducing damages for failure to wear a seatbelt before seatbelt use was made mandatory (though the amount of the reduction would vary from case to case), and the recent judgment of Cory J. in *Galaske vs O'Donnell* [1994] SCR 670 appears to indicate that even under the existing state of the law some reduction of damages for failure to wear a seatbelt will normally be appropriate.

The arguments about onus of proof raise different issues. Several lawyers suggested that this would require plaintiffs to bring experts to prove that the plaintiff's failure to wear a seatbelt had made no difference to the injuries suffered, and that this would be much more burdensome than the present law, under which it is, in practice, defendants' insurers who have to bring the expert evidence.

These comments have led us to wonder whether it is possible to provide a modest threshold test which the defendant must cross before the burden of disproving contribution passes to the plaintiff. The threshold test could be generic in nature -- for example, that the particular accident was of a kind in which seatbelt use normally reduces injuries -- or it might be more specific -- the defendant might be required to show that the plaintiff's injuries would probably have been reduced if a seatbelt had been worn. Thereafter the presumption of a 25% contribution would apply.

How different would either of these approaches be from what needs to be shown in practice under (a) the current law or (b) the pure presumption arising out of the plaintiff's failure to

wear his or her seatbelt? Our aim in asking this is to discover whether there is a reasonable middle ground between the status quo and the proposed alternative, or if the choice revolving around the reversal of the onus of proof is indeed as stark as Issue #4 of these Notes made it appear.

### 3(f) Deductions for Contingencies

Rather to our surprise, most of our correspondents stated that the law on deductions for contingencies, at least as applied in New Brunswick, was not unduly slanted in favour of negative contingencies. The courts, they said, had become more balanced in their approach, and the case-law should be left to develop without legislative intervention.

We do not propose to take this matter any further.

### 3(g) Periodic Payment of Damages / Structured Settlements

Most of the people who commented on this subject felt that it might well be worth considering legislative provisions under which courts might sometimes order 'structured' awards rather than lump sum payment of damages. We propose to add this to our agenda of subjects for review, though without, at present, any clear idea of when it may be possible to get to it.

## **B. NEW ITEMS**

### 1. Accumulations

We have received correspondence from the Fundy Regional Council Association for Community Living requesting the repeal of sections 1 and 2 of the *Property Act*, which limit to 21 years the period of time over which a settlor can direct the "rents, issues, profits or produce" of property to accumulate.

This statutory accumulation period creates two problems. First, adults with mental handicaps may survive their parents by more than 21 years. At the expiration of 21 years

handicapped beneficiaries who do not require the full income of a trust fund during any year can no longer reap the benefit of having unused income added to the trust capital for future needs. Second, it is unclear to whom, and when, the excess income goes when the point in time is reached at which it can no longer be accumulated.

The author of the leading modern textbook on the subject, R.H. Maudsley, concurs in the view that statutory accumulation periods should be abolished. He states: "The overwhelming trend is to discard special periods of accumulation in favour of the perpetuity period." He cites Northern Ireland, Queensland, Western Australia, Victoria, Alberta, British Columbia and New Zealand as examples; since his book was published, New South Wales, Manitoba and several American states have also abolished statutory accumulation periods. He goes on to say that "the introduction of different periods for perpetuities and for accumulations produces complications which are out of all proportion to the benefits claimed or to the significance of the problem."

We are inclined to agree that separate accumulation provisions no longer serve any useful purpose, if indeed they ever did. Accordingly, we believe they should be abolished, and the duration of accumulations should be governed by the general rule against perpetuities. We have not identified any problems with this. Does anyone else see any?

## 2. Perpetuities

Although the repeal of ss. 1 & 2 of the *Property Act* could be accomplished as an independent law reform initiative, it has been done by other jurisdictions in conjunction with the reform or repeal of the general rule against perpetuities. Our research into accumulations raised the issue of whether we, too, should also deal with the perpetuities "problem". Other jurisdictions have found it necessary to legislate reform of perpetuities law because this judge-made rule has the effect of rendering void *ab initio* any contingent interest that violates it, and it is commonly agreed that it is fraught with traps for the unwary.

We have examined the law reform initiatives of several other jurisdictions, notably England, British Columbia, Ontario and Manitoba. The first three of these have enacted "wait-and-see" legislation to avoid the problem of a contingent interest being "void *ab initio*". Under a "wait-and-see" approach, the interest is not invalid merely because the contingency may not occur within the perpetuity period, but only when, as events unfold, it becomes certain that it will not occur in that period. Those three jurisdictions have also eliminated the most frequently encountered traps in the common law rule ("fertile octogenarians", "precocious toddlers", "magic gravel pits", and the all-or-nothing rule of class closing). Other jurisdictions have also enacted a statutory period of years as the perpetuity period rather than the common law's 'lives in being plus twenty-one years' test.

Attempts at drafting "wait-and-see", however, have been subject to criticism. Maudsley argues that, technically, existing legislative models have not achieved their objectives and create a range of difficulties that are no less serious than, though different from, those of the common law rule.

The fourth of the jurisdictions mentioned above, Manitoba, has abolished the rule completely, but this, too, has had its critics. The Manitoba Law Reform Commission, which recommended the repeal, argued that its consultations showed that lawyers didn't understand the rule well and thought it irrelevant to modern life. In addition, the Commission stated that, according to Manitoba's practitioners, there were no aspiring "dead hands" in Manitoba who were waiting in the wings to tie up family fortunes for generations the moment the rule was repealed. But just in case the practitioners were wrong about the "dead hands", Manitoba concurrently enacted variation of trusts legislation giving the court the discretion to bring a trust to an end when its continued existence was deemed to be too inconvenient for the beneficiaries.

The critics of the Manitoba repeal argue that the rule against perpetuities still serves a valid policy objective in preventing people from tying up property for long periods, by accident or design, and to the great inconvenience of those who come after. These critics argue that the rule should be reformed, not repealed. They point out

that the rule properly prevents persons from attaching conditions subsequent in perpetuity to deeds of real property (for an example of this where, in our view, the rule functioned appropriately see *City of Moncton v. Canada* (1987), 84 N.B.R. (2d) 6 (Q.B.)). The rule also prevents perpetuities with regards to options to purchase, easements, profits-à-prendre, rent charges and covenants or contracts to grant leases.

However, the inherent traps of the common law rule are still very much alive in New Brunswick, as illustrated by *Bérubé v. Babin* (1993), 135 N.B.R. (2d) 316 (C.A.). In this case, the plaintiff deeded an unserviced acre of land to one Joncas. He or his successors were to deed back part of the land when city services were installed, and "everyone knew" that services would be installed within a few years. Services were installed within 5 years of the conveyance. The Court of Appeal held that the reconveyance provision was void *ab initio* because it violated the rule against perpetuities (it being theoretically possible that city services could have been installed after more than 21 years).

We would like to know whether the continued existence of the common law rule in New Brunswick causes significant trouble for practitioners, and, if so, which avenue of reform seems the most promising. The major alternatives seem to be:

1. To do nothing (on the ground that the existing law causes few real problems, and 'better the devil you know than the devil you don't').
2. To leave the rule substantially intact, but eliminate specific recognized problems of the 'fertile octogenarian' type, and perhaps replace the present perpetuity period with a set number of years.
3. To adopt a "wait and see" approach.
4. To repeal the rule entirely, and adopt something comparable to Manitoba's variation of trusts approach to deal with the 'perpetual contingent interests' that people might accidentally or deliberately create.

### 3. Uniform Law Conference

New Brunswick sends delegates each year to the Uniform Law Conference of Canada. The Conference meets in two Sections, the Criminal Law Section, which makes recommendations to the Federal Government for changes to criminal law and procedure, and the Uniform Law Section, which deals with civil law subjects, and makes legislative recommendations primarily to the Provincial and Territorial Governments. The Uniform Law Section focuses on areas of law in which it believes that greater harmonization of laws between the separate legislative jurisdictions would be beneficial. In practice this means that its agenda emphasizes commercial law, conflicts of laws and other topics with an inter-jurisdictional element.

The Conference normally makes its recommendations in the form of Uniform Acts; governments may then implement the recommendations by enacting the Uniform Acts as local legislation. The new *Arbitration Act* is a recent example in New Brunswick.

The Conference welcomes input on its work in progress. For the information of any readers who may be interested, the civil law items discussed this year were these:

1. **Electronic Evidence.** The Conference is considering amendments to the Evidence Act dealing with the use of computer-based information as evidence.
2. **Cost of Credit Disclosure Act.** A proposed Uniform Act is being prepared in cooperation with consumer affairs officials within the framework of the internal free trade discussions.
3. **Commercial Liens.** The project aims to modernize and rationalize the law on the repairer's lien, the warehouseman's lien, the carrier's lien, etc., putting it all in a PPSA environment.
4. **Arbitration Act.** The Conference adopted some fine-tuning amendments to the recent Uniform Arbitration Act (which New Brunswick has enacted with modifications).

5. **Mechanics' Liens and Arbitration.** The Conference decided to examine the prospects for accommodating arbitration within the framework of mechanics' liens legislation.

6. **Jury Reform.** In a joint session of the Criminal Law Section and the Uniform Law Section, the Conference adopted a statement of principles on jury selection, which is to be submitted to Provinces for consideration.

7. **Commercial Exploitation of Crime.** The Conference is attempting to develop legislation to ensure that if convicted criminals make money from e.g. movie rights or books based on their crimes, the proceeds are dealt with in a manner that takes into account such things as the interests of victims of the crime.

8. **Class Actions.** A draft Uniform Act is in preparation.

9. **Investment Powers of Trustees.** The project aims to revisit and improve the Uniform Act that New Brunswick has adopted, but most other Provinces have not.

10. **Documents of Title.** This is another commercial law initiative. Its purpose is to rationalize and modernize the law on bills of lading and warehouse receipts.

11. **Transfer of Investment Securities.** This project aims to modernize and clarify the law on transfer of shares, etc.

12. **Court Jurisdiction and Transfer of Proceedings.** The Conference adopted some fine-tuning amendments to its recent Uniform Act on this subject.

13. **Personal Information/Privacy.** This project will examine the possibility of privacy protection legislation in the private sector, as an extension to the public sector legislation that now exists in several jurisdictions.

14. **International Conventions on (a) Financial Leasing and (b) Factoring.** The Conference adopted Uniform Acts by which Provinces can adopt these two recent international conventions.

Anybody wanting information on any of these items should contact either this office or New Brunswick's CBA representative at the Conference: René Basque, of Forbes, Roth, Basque in Moncton. Information on the proceedings of the Criminal Law Section can be obtained from Robert Murray, Director of Public Prosecutions in the Provincial Department of Justice.

#### 4. Various Personal Injuries Issues

Several of the people who responded to the items on damages for personal injuries in **Law Reform Notes #4** raised additional items for our consideration. These included:

- problems with various aspects of Section B of the standard automobile policy;
- concern about the costs of litigation and the effect this has on plaintiffs' effective levels of compensation;
- concern that plaintiffs who do not have independent legal advice may accept unreasonably low settlement offers;
- a suggestion that some means should be found of achieving speedy settlements when liability was not seriously contested;
- a suggestion that the whole field of disability insurance was inadequately dealt with in the Insurance Act.

We are not sure how many of these items we can realistically hope to take up. Judging from the number of comments we received, Section B should apparently be placed at the top of the list. Items criticised in relation to Section B included the low level of the weekly indemnity, the fact that death benefits are deductible from other life insurance proceeds, the lack of time limits for payments for medical and rehabilitation expenses, the absence of coverage for the expenses of occupational retraining, and the possibility for conflict of interest that arises when a single insurer insures both the plaintiff and the defendant. We list these items so that people can both comment on them and provide information about other problems with Section B that they think should be reviewed.

Apart from Section B, the other item that it might be possible to do something about in the short term is the need to find a way of cutting down on delay when liability is not seriously disputed. We have recently received from the Manitoba Law Reform Commission a Report on *Interim Payment of Damages*. The major recommendation, based on Scottish and English precedents, is a provision allowing a judge, if satisfied that liability will be established, to award the plaintiff part of his or her damages in advance. At the end of the day, when liability is established and damages assessed, the pre-payment would be set off against the eventual award.

If people feel that legislation of this sort would be useful, we would give serious consideration to the proposal in the Manitoba Report.

#### 5. Extra-Provincial Judgments

The *Reciprocal Enforcement of Judgments Act* and the *Foreign Judgments Act* currently govern the recognition and enforcement of extra-provincial money judgments in New Brunswick. The former provides a registration procedure for judgments from a reciprocating Canadian province. The latter codifies the old common law on the recognition and enforcement in New Brunswick of extra-provincial judgments, both Canadian and non-Canadian.

The Courts of Appeal of both New Brunswick and Saskatchewan, the only provinces with the *Foreign Judgments Act*, have ruled that this Act stands in the way of the enforcement of a Canadian judgment which is based on the "real and substantial connection" test of jurisdiction enunciated in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. [See *Bower v. Sims* (1993), 138 N.B.R. (2d) 302 (C.A.); *Cardinal Couriers Ltd. v. Noyes* (1993), 109 Sask. R. 108 (C.A.).] This is because the *Foreign Judgments Act* contains an exhaustive list of grounds on which an extra-provincial court will be accepted as having had jurisdiction to give its judgment, and some of the cases in which there will be a "real and substantial connection" fall outside the existing categories on the list.

We believe that not only is this situation inadvisable from a policy standpoint, but the

application of the *Foreign Judgments Act* in the Canadian context may also be unconstitutional in light of both *Morguard* and *Hunt v. T & N plc*, [1993] 4 S.C.R. 289. To bring the law of New Brunswick into line with these Supreme Court rulings, we believe that revisions should be made to New Brunswick's legislative package on the enforcement of extra-provincial judgments.

First, subject to any comments we may receive in response to this note, we propose to recommend that New Brunswick adopt the *Uniform Enforcement of Canadian Judgments Act*, recently drafted and approved by the Uniform Law Conference. This Act provides a registration procedure for all Canadian money judgments, subject to a few exceptions, and provides for registered non-New Brunswick judgments to be enforced here as though they were New Brunswick judgments. There is no requirement that the provinces whose judgments are registered be reciprocating. The Uniform Act is based on the philosophy of *Morguard* that we should give "full faith and credit" to the judgments of other Canadian provinces. Unlike the *Reciprocal Enforcement of Judgments Act*, the Uniform Act provides no preconditions on registration based on the jurisdiction of the originating Canadian court.

We would appreciate comment on this approach to the recognition and enforcement of Canadian judgments in New Brunswick. We can provide copies of the Uniform Act on request.

Second, we are examining whether the *Reciprocal Enforcement of Judgments Act* should be applied to reciprocating foreign states. This would necessitate a change to the current Act, as it now applies only to Canadian judgments and not to non-Canadian ones, but if the Uniform Act were adopted for Canadian judgments, legislation for reciprocal enforcement between provinces would no longer be necessary. B.C. and P.E.I., the two provinces to have adopted the Uniform Act so far, have retained their *Reciprocal Enforcement of Judgments Acts* for non-Canadian judgments. Enforcement of judgments under reciprocal arrangements is simpler than the traditional common law method of bringing an action on the judgment.

Third, we are examining whether the *Foreign Judgments Act*, should be retained, though modified to apply only to non-reciprocating foreign states. We would like opinions on whether retaining the *Foreign Judgments Act* in this form serves a useful purpose in clarifying the circumstances in which a foreign money judgment will be recognised in New Brunswick, or whether it would be better to repeal the Act and allow the common law on the recognition and enforcement of foreign judgments to develop on its own. If the Act is retained, we believe it should be amended to include "real and substantial connection" as an indication of jurisdiction but should retain "lack of jurisdiction", "contrary to public policy" and "contrary to natural justice" as reasons not to enforce a foreign judgment.

We strongly believe that the current *Reciprocal Enforcement of Judgments Act* and the *Foreign Judgments Act* should be changed. We welcome comments on whether we are suggesting the most appropriate changes, and on how these changes can best be implemented.

*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 December 15th, if possible.*