
Law Reform Notes

Department of Justice
Room 115, Centennial Building
P.O. 6000, Fredericton, N.B., Canada E3B 5H1
Tel.: (506) 453-2854 Fax: (506) 457-7899
E-mail: TimR@gov.nb.ca

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 PREVIOUS ISSUES

1. Automobile accident compensation

The amendments discussed in previous issues of these *Notes* (relating to calculation of damages and advance payment of damages) have now been proclaimed. They will apply to accidents occurring on or after January 1st, 1997. The Superintendent of Insurance is in the process of gazetting the increased Section B benefits described in issue #6 of these *Notes*. They, too, are to apply to accidents occurring on or after January 1st 1997.

2. Privacy

Law Reform Notes #6 mentioned that the Branch was preparing a discussion paper on privacy legislation; the legislation would be designed to protect the confidentiality of personal information in the possession of the government

of New Brunswick. The paper was submitted to the Legislative Assembly in July, and was referred to the Law Amendments Committee. The Committee held public hearings on the proposal in October and November. It is expected that the Committee will report back to the House in the present session with its comments and recommendations.

3. 1996-97 Legislative Session

A new session of the Legislative Assembly began on November 26th with a new Speech from the Throne. The Speech included references to several items which have been discussed in previous issues of these *Notes*; amendments to the Wills Act, the Probate Court Act and the Property Act are among the items that are expected to be introduced during the Session.

B. NEW ITEMS

4. Uniform Law Conference

New Brunswick sent delegates again this year to the annual meeting of the Uniform Law Conference of Canada, which took place in August. As usual, the Conference had an agenda of criminal law items and an agenda of civil law items. Information on the criminal law agenda can be obtained from the Public Prosecutions Branch of the Department of Justice. The civil law items are listed below.

We are singling out two items on the list for special attention at present (items (a) and (b)), but we would be happy to receive comment on other items, or to provide further information about them. The Conference always welcomes input on its work in progress, and it is helpful for us to be able to offer this input as the work proceeds rather than after it is concluded.

(a) **Matrimonial property and choice of law.** This project arises out of the fact that the various provinces have not only different marital property regimes but also different conflicts rules dealing with cases with an interprovincial element. The project aims to produce a standard conflicts rule which will determine which law applies to the division of property.

In order to contribute fully to this project, it would be useful for us to receive information on the kinds of difficulties that arise when there is an inter-provincial element involved in property division cases. We would also appreciate preliminary comments on what the conflicts rule should be.

The model suggested at the Conference in August revolved around four main elements:

- court jurisdiction in matrimonial property cases should be based on residence, submission, agreement or real and substantial connection, and should incorporate the idea of *forum non conveniens*;
- the conflicts rule should identify the substantive law of a single province as being the law that will govern the division of *all* of the property;

- if the spouses have made a contract governing the distribution of their property on marriage breakdown, the contract should prevail;
- if the spouses have not made such a contract, the substantive law to be applied should be:
 - (i) if the spouses married under a community of property regime, that regime;
 - (ii) if they did not, the law of the territory most closely associated with the marriage.

Under paragraph (ii) above, the territory most closely associated with the marriage would be presumed to be the territory of the last common habitual residence of the spouses, but the presumption would be rebuttable. If, for example, the spouses had resided together in New Brunswick for one year but had resided together for the previous twenty years of the marriage in Alberta, Alberta might well be held to be the territory most closely connected with the marriage, in which event Alberta law would govern the division of the property.

We would appreciate comments on this approach. We have not yet investigated the issues, but on first reading of the proposal elements 2 and 3 above seem appropriate objectives. Elements 1 and 4, however, seem to leave more scope for argument in individual cases than, say, the present s.44 of New Brunswick's Marital Property Act does. Is the more flexible approach that the Uniform Law Conference is considering preferable to the more rigid reliance on the "last common habitual residence" that is found in New Brunswick's existing law?

(b) **Uniform Prudent Investor Act.** This proposed Act would deal with the investment powers of trustees. It has three main elements. The first is to refine the 'prudent investor' approach to trustee investments that the Conference adopted in 1970. (New Brunswick enacted this in 1971 as s.2 of the Trustees Act; most other provinces apparently retain the 'legal list of approved investments' approach.) The second element is to clarify that the 'prudence' of

investments is to be assessed on a portfolio basis, rather than on an individual investment basis, and that investment in mutual funds is permitted. The third element is to give trustees the power to delegate their investment authority to suitable people.

A Uniform Act is currently being finalized, based on decisions reached at the conference. The question for New Brunswick will be whether to move from its existing 'prudent investor' approach to the more refined version that the Conference is developing. It would be helpful to have comments on any difficulties that have been encountered under the present provision. Our current view is that, having adopted the major principle of the 'prudent investor' approach many years ago, a move now to the 'new and improved' version would probably depend on whether the refinements that the Conference is considering will respond effectively to actual problems that are arising under the current régime.

(c) **Uniform Liens Act.** This Act aims to consolidate the rules relating to liens for services to goods (e.g. repairer's lien, warehouseman's lien) and to establish a PPSA-based registration scheme which would, among other things, make it possible for the lien-holder to release the goods but retain a security interest. The Conference concluded its discussions of the Act this year; the final text is expected to be available by the end of the year.

Though we do not expect to be in a position to proceed with this proposal in the near future, it would be helpful to know how troublesome the current state of the law is under the Liens for Goods and Services Act, the Warehouseman's Lien Act and the Innkeepers Act, as well as under the common law relating to the carrier's lien. These are the principal statutory and common law liens that the Uniform Liens Act has in view.

(d) **Uniform Cost of Credit Disclosure Act.** The Conference has substantially completed its work on this Act too. Future developments are largely in the hands of consumer affairs officials of the federal and provincial governments, who have been working with the Conference as it developed its Uniform Act, and who have conducted

consultations on revised and harmonized cost of credit disclosure legislation.

(e) **Uniform Class Proceedings Act.** Here, too, the Conference has completed its work. The final version of the Uniform Act should be available by the end of the year.

(f) **Personal Information and Protection of Privacy.** This project is being promoted by the federal government. Its aim is to develop data protection legislation for the private sector based on the same principles that apply now in the public sector in much of Canada, and that are reflected in our recent Discussion Paper on privacy legislation. At present Quebec is the only Canadian province with legislation that applies in the private sector as well as the public sector.

The Conference will be developing a draft Act for discussion at next year's meeting.

(g) **Financial Exploitation of Crime.** This project considers what the legal response should be when criminals seek to make money by writing books, giving interviews etc. about their crimes. The Conference considered alternative approaches to legislation on this subject, but took no final decisions.

(h) **Computer-Generated Evidence.** The Conference agreed to prepare a draft Act on computer-generated evidence for consideration next year. In New Brunswick, recently proclaimed amendments to the Evidence Act already deal with this subject.

(i) **Creditor Access to Future Income Security Plans and Insurance Contracts.** The Conference agreed to prepare, for discussion next year, a suggested uniform approach to the question of the exigibility of RRSPs, insurance proceeds and the like.

(j) **Builder's Liens and Arbitration.** The CBA is developing a proposal to accommodate arbitration clauses within builder's lien legislation. The expectation is that they will have a specific proposal for discussion at the Conference next year.

(k) **Documents of Title.** This project aims to rationalize and harmonize the law relating to

commercial documents such as bills of lading and warehouse receipts. A draft Uniform Act has been prepared, which is to be revised for presentation next year.

(l) **Interprovincial Enforcement of Non-Money Judgments.** The Conference will prepare draft legislation for discussion next year on enforcement of non-money judgments from other Canadian provinces and territories. The Conference has already dealt with money judgments in its Uniform Enforcement of Canadian Judgments Act. The non-money judgments project is an extension of this work.

(m) **Enforcement of Foreign Judgments.** This is a further expansion of the Conference's earlier work on enforcement of judgments, this time dealing with judgments from outside Canada. Again the intention is to have a specific proposal available for discussion next year.

(n) **Transfers of Investment Securities.** This project aims to modernize the law relating to transfers of investment securities. It is proceeding slowly. We are expecting a substantive document for discussion next year.

5. Mortgage remedies

The New Brunswick Geographic Information Corporation has developed a major proposal for a Land Securities Act designed to simplify and modernize both the law and the registration processes relating to land-based secured transactions. In the process it has made several suggestions to the Department of Justice for amendments relating to mortgage remedies. These suggestions overlap both with the Branch's previous interest in notice provisions for mortgage sales (see previous issues of *Law Reform Notes*) and with issues arising out of the Court of Appeal's recent decision on the mortgagee's power of sale in Banque Nationale du Canada v Desrosiers.

Stated very briefly, the main suggestions are these:

- (a) The secured party's power of sale should be a power to sell by any commercially reasonable means after serving a notice of default; reasonable notice to the interested parties would be required, but public notice would not be.
- (b) The secured party should be given a statutory right to retain the collateral in satisfaction of the debt if the creditor defaults.
- (c) A debtor who has been served with a notice of default should be given a statutory right to bring the debt up to date and thus avoid disposal by the secured party -- but no more than twice in any year.
- (d) The personal liability of a mortgagor on the covenant to pay the debt should cease if the mortgagor transfers the equity of redemption with the approval of the mortgagee.

We have not yet examined these suggestions closely, but at first sight all of them seem reasonable. We would welcome comments on both the benefits and any disadvantages of the suggestions; this information would be helpful in focusing our future studies.

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 January 15th 1997, if possible.

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