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## 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. Bills enacted

Several Bills arising out of items discussed in previous issues of these Notes were enacted during the 1996-97 Session of the Legislative Assembly.

##### (a) **An Act to Amend the Property Act**

This Act repeals the rule against accumulations, which was previously found in ss.1 and 2 of the Property Act. The Act came into force on Royal Assent, February 28th, 1997.

##### (b) **An Act to Amend the Probate Court Act**

The amendment alters the law on bonding for estate administrators. Under the amendment bonding will not be required unless the Court decides that a bond is needed in order to secure the proper administration of the estate. There are two exceptional situations, however, in which the current law remains in place and bonding will continue to be required unless dispensed with by

the court. These are where the administrator is (a) a creditor, or (b) a non-resident of the Province.

The amendment is subject to proclamation. The Department has recently recommended July 15th as the proclamation date.

##### (c) **An Act to Amend the Provision for Dependants Act**

This amendment revises the criteria for bringing an application under the Provision for Dependants Act. Responding in part to criticisms such as those of Clendening J. in Spinney v Spinney Estate, 165 N.B.R. (2d) 69, (that the cases are "all over the place" in relation to the position of independent adult children under the Act), the amendment builds in a requirement that an application can only succeed if the applicant's resources are not sufficient to provide adequately for him or her.

This amendment is also subject to proclamation; no proclamation date has yet been set.

(d) **An Act to Amend the Wills Act**

This Act makes two changes to the Wills Act. First, it introduces the concept sometimes referred to as 'substantial compliance', under which a court can admit a document to probate, even though the document does not comply in all respects with the formal requirements of the Wills Act, as long as the court is satisfied that the document expresses the testamentary intentions of the deceased. The amendment closely follows precedents in Saskatchewan and Manitoba. Second, the amendment alters the conflict of laws provisions of Part II of the Wills Act. It adjusts slightly the criteria for the recognition of an out-of-province will, but more importantly, it removes the requirement that an out-of-province will has to be consistent in form with the Wills Act in order to affect land in New Brunswick. Henceforth a will that is recognized in relation to personal property will also be recognized in relation to land.

This amendment, too, is subject to proclamation. We are currently reviewing the Probate Rules to determine what amendments, if any, may be required before proclamation is recommended.

(e) **International Wills Act**

This Act brings New Brunswick into line with most other provinces in Canada by adopting the Unidroit Convention Providing a Uniform Law on the Form of an International Will. The Convention establishes a form of will which the contracting states undertake to recognize as valid. There are at present twelve contracting states: Canada, France, Italy, Belgium, Portugal, Yugoslavia, Bosnia and Herzegovina, Slovenia, Cyprus, Ecuador, Libya and Niger. A standard form New Brunswick will with two witnesses is compatible with the Convention; however, a prescribed form certificate is required to accompany the will in order to ensure that it meets the criteria for recognition under the Convention.

Steps are currently under way to have the federal government ratify the convention on behalf of New Brunswick. Proclamation will follow in due course.

## 2. Privacy

*Law Reform Notes #7* reported that the Department had submitted to the Law Amendments Committee of the Legislative Assembly a discussion paper on privacy legislation -- i.e. legislation to protect the confidentiality of personal information in the possession of the government of New Brunswick. The Law Amendments Committee held public hearings into the discussion paper in October and November 1996, and issued its report in February 1997.

The report made two recommendations:

### **RECOMMENDATION 1**

That the proposed *Privacy Act* be adopted in principle, and that a bill be introduced at the appropriate time, subject to having the Ombudsman responsible for the Act, with sufficient staff and resources to carry out these duties. In the alternative, the government should consider the appointment of a full-time Privacy Commissioner under the Act.

### **RECOMMENDATION 2**

Your Committee strongly recommends that the government prepare a discussion paper forthwith, for referral to public hearings, with regard to the extension of privacy legislation to the private sector.

Future issues of *Law Reform Notes* will advise of further developments.

## 3. Uniform Law Conference

In issue #7 of these *Notes* we listed the the current agenda of the Uniform Law Conference of Canada, and identified two items in particular for comment.

### (a) **Matrimonial property and choice of law**

We outlined last time the main elements of the approach the Conference was developing on this subject, and invited comment. The one response we received voiced concern at the potential uncertainties that would arise if choice of law issues revolved around identifying the "territory most closely connected with the marriage."

Discussion of this project will take place at the Uniform Law Conference in August, and we will take the response received into account. Additional comments on this subject would still be welcome.

**(b) Uniform Prudent Investor Act**

The Conference has now adopted its Uniform Prudent Investor Act, which deals with the investment powers of trustees. The Act is a development of an earlier (1970) Uniform Act advocating that the investment powers of a trustee be based on the 'prudent investor' standard rather than a 'legal list of approved investments' approach.

New Brunswick adopted the 'prudent investor' approach in 1971 as s.2 of the Trustees Act, and responses to *Law Reform Notes #7* did not identify any problems with the existing wording of the section. They did suggest, though, that some of the related issues dealt with in the proposed new Uniform Act deserved attention. These were issues relating to delegation of trustee powers and the ability of trustees to retain and rely on professional fund managers.

We hope to be able to give these matters some attention.

**4. Mortgage remedies**

The main comment received in reply to the preliminary note on mortgage remedies in *Law Reform Notes #7* was that if the mortgagee were to be given a statutory right to retain the collateral in satisfaction of the debt, the legislation must ensure that the mortgagor was given proper credit for any equity existing in the property. We accept this point unreservedly, and will keep it in mind as work on this project proceeds.

**B. NEW ITEMS**

We have not embarked on any new projects in the six months since the last issue of these *Notes* was distributed, and we expect that for the next six months, too, we will be fully occupied in dealing with projects already under way. Nonetheless, we always welcome suggestions for further items that should be reviewed.

*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 July 15th 1997, if possible.*