

## 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 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 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. Protection of Personal Information Act

The Protection of Personal Information Act came into force on April 1st, 2001. The Act sets out a framework of principles that government departments and other listed provincial "public bodies" must follow as they collect, store, use and ultimately dispose of personal information as part of their everyday activities. The principles are substantially the same as the ones that are to apply to the private sector under Part 1 of the federal government's Personal Information Protection and Electronic Documents Act.

Readers who are familiar with the federal Act will be aware that it contemplates that

provinces may also enact their own protection of personal information legislation for the private sector, and that if the Governor in Council considers a provincial Act to be "substantially similar" to the federal Act, exemptions from the federal Act may be made (s.26(2)(b)). New Brunswick has no current plans to enact its own legislation for the private sector.

A brief information leaflet about the provincial Protection of Personal Information Act is available on the internet at <http://inter.gov.nb.ca/archives/documents/POPI.pdf>, or in paper form from the Provincial Archives at (506) 453-2122.



## 2. Tort of Invasion of Privacy

In the last issue of Law Reform Notes we mentioned that a proposed Privacy Act, which would create a tort of invasion of privacy, had been introduced in the Legislative Assembly, and had been referred to the Law Amendments Committee for review.

The Committee held public hearings on March 22nd, 2001, when it received presentations from various groups, including the media, private investigators, the Law Society and the CBA. The Committee had not reported back to the House before the legislative session prorogued on June 1st, so the Bill died on the Order paper.

No final decisions have yet been taken as to whether similar legislation will be re-introduced.

## 3. Electronic Transactions Act

The Electronic Transactions Act (c.E-5.5, 2001) received Royal Assent on June 1, 2001. The Act is subject to proclamation. We hope that proclamation will occur early in the new year.

The Act is based on the Uniform Law Conference of Canada's Uniform Electronic Commerce Act, which we reviewed in detail in a consultation paper that was released in December 2000 (<http://www.gnb.ca/justice> or in paper form from this office). The Act follows most, though not all, of the recommendations contained in the paper.

The purpose of the Act is "to facilitate the use and acceptance of electronic information by persons who wish to do so" (s.2). Its key provisions are in ss.7 to 14, which ensure that people who wish to deal with each other electronically can do so despite the existence of certain legal requirements (e.g. for writing, for signatures or for delivery by registered mail) that might, at first sight, seem hard to satisfy electronically. The Act does not limit people's ability to determine for themselves whether or when or under what conditions they will conduct transactions electronically or take advantage of the options available under ss.7 to 14. S.3 expressly states that "Nothing in this Act requires a person to use or accept electronic information." (Under the definitions in s.1, "information" includes "a document.")

Other substantive provisions of the Act are these.

- S.6 confirms the legal effect of transactions conducted electronically.
- S.15 confirms the ability of the "responsible authorities" under a provincial Act to establish "effective electronic means" of proceeding in relation to that Act.
- S.16 deals with the time of sending and receipt of electronic messages.
- S.17 confirms that contracts and other transactions may be entered into by the interaction of individuals and "electronic agents," and s.18 contains a provision dealing with material human error in such transactions.
- S.19 contains regulation-making powers, including regulation-making powers relating to consumer transactions that are entered into electronically.

In the case of conflict between the Electronic Transactions Act and any other Act that expressly authorizes, prohibits or regulates the use of electronic information, the other Act prevails (s.4(1)).

One issue that we discussed in the consultation paper and which we wish to air again before the Act is proclaimed is whether regulations should be made under s.19(1)(f) "excluding any Act, legal requirement, information, transaction or other matter from the application of this Act or of any of its provisions." If we followed the model of the Uniform Act (as the other provinces with comparable legislation have done), we would exclude the following: (a) "wills and their codicils;" (b) "trusts created by wills or by codicils to wills;" (c) "powers of attorney, to the extent that they are in respect of the financial affairs or personal care of an individual;" (d) "documents that create or transfer interests in land and that require registration to be effective against third parties;" and (e) "negotiable instruments, including negotiable documents of title," except in relation to "any action in connection with a contract of carriage of goods." (See ss.2, 24 and 25 of the Uniform Act, the full text of which is included in our consultation paper.)



In our consultation paper we suggested that even though documents like these are obviously not the kind of thing that one would expect to be prepared electronically, naming them as "exclusions" from the Act would be superfluous in some cases and undesirable in others. The technical reasons varied, and sometimes overlapped, but included the following.

- Legal requirements that documents be under seal are not affected by the Act. Documents under seal therefore do not have to be "excluded" from it by regulation.
- The form of documents requiring registration is determined by registry officials and legislation, whether they are "excluded" from the Electronic Transactions Act or not.
- Though preparing a will electronically would be unwise, if a person made a deliberate attempt to do so the resulting electronic document both would and should be capable of being admitted to probate as (at least) a document that "embodies the testamentary intentions of the deceased" (s.35.1, Wills Act). Nothing is therefore accomplished by making "wills" an exclusion from the Act.
- Whether electronic "negotiable instruments, including negotiable documents of title" are capable of being developed is primarily a matter of commercial practice, and if the Electronic Transactions Act has the effect of removing some specific obstacles, so much the better.

Further details are provided in the consultation paper's discussion of ss.2 and 25 of the Uniform Act.

Underlying the technical arguments that the consultation paper made are two general points. First, we believe that exclusions like these will cause undesirable complications about when the Act does or does not apply. (E.g., how should the exclusions of "trusts created by wills" or "powers of attorney to the extent that . . ." be interpreted? What is the combined effect of the "negotiable instruments" exclusion and its "carriage of goods" exception?) Second, and more important, is the "facilitating" nature of the Electronic Transactions Act. Even if documents of the kinds that the Uniform Act excludes remain within the scope of the Act "Nothing in this Act requires a person to use or accept" them. Given

that the Act does not force an electronic version of any of those documents on anyone, we are not sure what is really gained by "excluding" them from the Act. We note, furthermore, that excluding or not excluding a document from the Act does not in itself mean that the document either can or cannot be prepared electronically. All it means is that the particular rules set out in the Act do not apply.

Our position at present, therefore, is as it was when we released the consultation paper. We do not see the need for the exclusions listed in the Uniform Act, and we are not at present aware of other exclusions that should be made. However, we are still open to comments. We received very few in response to the consultation paper.

#### 4. Quieting of Titles Act

We have begun work on the regulations that will be necessary in order to permit the proclamation of An Act To Amend the Quieting of Titles Act (c.11, 2000).

#### 5. Canadian Judgments Act and Reciprocal Enforcement of Judgments Act

We have also begun work on the regulations that will be needed before the Canadian Judgments Act (c.C-0.1, 2000) and An Act to Amend the Reciprocal Enforcement of Judgments Act (c.32, 2000) are proclaimed.

### **B. NEW ITEMS**

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

As part of the government's initiative to either proclaim or repeal a variety of existing unproclaimed Acts, we have reviewed the 1992 Act to Amend the Mechanics' Lien Act. The amendment deals with procedural issues in mechanics' lien actions. Its purpose is to remove some outdated provisions, and to bring the mechanics' lien procedure more into line with other proceedings under the Rules of Court.

Our current view is that the amendments should be proclaimed. We have made contact

with the Construction Law and the Litigation Subsections of the CBA about this, as well as with the Rules Committee (from whom the suggestion for the amendments originally came). Unless those discussions, or any responses we receive to these Notes, identify problems with the amendments, we expect to recommend that they be brought into force.

*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 November 1<sup>st</sup> 2001, if possible.*

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