New Nouveau Brunswick

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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 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. Privacy

In *Law Reform Notes* #9 we mentioned that *Privacy: Discussion Paper* #2 had been tabled in the Legislative Assembly and referred to the Law Amendments Committee. The Committee has not yet held discussions or public hearings into the Paper. The Legislative Assembly's priority in recent months has been the Natural Gas hearings.

In the meantime, the Federal Government has introduced Bill C-54, the Personal Information Protection and Electronic Documents Act, Part 1 of which has important implications for the issues examined in Part I of the Discussion Paper. Part 1 of the Bill applies to "every organization in respect of personal information that . . . the organization collects, uses or discloses in the course of commercial activities . . . ." An "'organization' includes an association, a partnership, a person and a trade union," and "'personal information' means information about an identifiable individual that is recorded in any form."

The Bill requires all organizations to follow a slightly modified form of the Canadian Standards Association's *Model Code for the Protection of Personal Information* (which is set out in a Schedule to the Bill); it gives the Federal Privacy Commissioner enforcement powers in relation to the Schedule (though not the power to make binding orders); and it makes certain key provisions of the Schedule enforceable by action in the Federal Court.

Bill C-54 presents a number of difficulties for the consultations in New Brunswick on Part I of *Privacy: Discussion Paper #2*. The Bill covers many of the private sector activities which, for constitutional reasons, the Discussion Paper had assumed would be covered by provincial legislation, if at all. It was, and remains, a surprise that Bill C-54 purports to cover so broad a range.

In doing so, the Bill pre-empts discussion of the major policy items raised in Part I of the Discussion Paper, namely "Is there a need for private sector data protection legislation?" and "If so, what should it say?" If Bill C-54 is enacted in its current form, there *will be* private sector data protection legislation in New Brunswick, and what it says will be what Bill C-54 says – at least initially.

Those last three words must be added because Bill C-54 contains provisions under which the Federal Government could withdraw from the field if the Province enacted "substantially similar" provincial legislation. However, if the Province and the Federal Government pursued this course, the end result would apparently be, as Bill C-54 is currently drafted, to leave some activities of many organizations under Bill C-54 while other activities of the same organizations would be subject to the Provincial Act. It is unlikely that this would be a desirable end result.

Discussions are under way within the Department as to how to proceed with *Privacy: Discussion Paper #2* in the light of Bill C-54.

2. Out-of-Province Judgments

Two Bills dealing with the enforcement of out-of-Province judgments in New Brunswick were introduced in the 1997-98 session. These were Bill 44, the Canadian Judgments Act and Bill 45, An Act to Amend the Reciprocal Enforcement of Judgments Act. Both Bills died on the Order Paper when the old session ended on November 24th, and a new one began.

We are proposing to recommend to the Department that the Bills should be reintroduced. We should comment, though, on some points which were made on the proposed Canadian Judgments Act during debate in the House and in subsequent comments from readers of these Notes.

The main issue raised has been whether the proposed Canadian Judgments Act would give sufficient protection to New Brunswick residents. The concern is based on s.9 of the Bill, which permits New Brunswick courts to stay temporarily the enforcement of a judgment obtained in another province, but indicates that substantial challenges to the judgment should be brought in the court that issued it. This seems uncontroversial in relation to judgments given in contested proceedings, but may be more debatable in relation to default judgments, particularly if there is concern that, despite the rules on court jurisdiction that apply in other provinces, proceedings might be commenced in a province that had no sufficient connection with the substance of the dispute.

Bill 44 contemplated that these issues could be addressed by regulations under the Act, if necessary. *Law Reform Notes #9* added that there would be further consultation on this issue if the Bill were enacted as drafted. Under para.11(c) of the Bill, regulations can restrict the classes of Canadian judgments that can be registered and enforced. A prime candidate for exclusion under this provision would be default judgments obtained in proceedings which did not have an identified connection with the province in which the proceedings were commenced.

Whether such an exclusion was required, however, would be a matter for future consideration. The Uniform Law Conference of Canada's Uniform Enforcement of Canadian Judgments Act, which was the major source for Bill 44, does not contain a similar exclusions provision. Nor does legislation in Prince Edward Island, Saskatchewan and British Columbia based on the Uniform Act. (The last two of these Acts are not yet proclaimed.) Bill 44, however, left the door open for a different approach if consultations determined that exclusions were required.

3. S.43.3, Evidence Act

In Issue #9 of these *Notes* we mentioned that representatives of the hospital and medical communities had suggested that s.43.3 of the Evidence Act should be amended to protect the opinions expressed to hospital authorities when they are investigating incidents that have occurred in their hospitals. The suggestion was made in response to the Court of Appeal's decision in Doyle v Green 182 N.B.R. (2d) 341 on the subject

of discovery of hospital documents. The concern was that this decision undermined the quality assurance process that s.43.3 aims to protect.

We received some negative reaction to the suggestion for any amendment. One comment was that s.43.3 already gave the medical community a privilege that other litigants did not enjoy, and that this should not be expanded. Another was that any amendment relating to opinions and incident investigations should very clearly *not* extend to anything beyond opinions.

Our review of this issue has continued, and we are looking at two possible amendments to s.43.3 that we currently feel might be recommended to the government. Both are designed to achieve what we believe to be the existing policy of s.43.3, and to provide a reasonable balance between the public interest in maintaining an effective quality assurance process and the interest of individual litigants in having access to the facts of their particular cases.

The first of these amendments would deal specifically with opinions expressed during investigations. It would be to the effect that when a hospital or its quality assurance committee investigates an occurrence in the hospital, any written or oral opinion that it receives as to the standard of medical or hospital care or practice that was provided in the situation is privileged. This approach seems to balance the quality assurance process's need for health care professionals to be uninhibited in their criticism of each other's performance with the ability of injured parties to be able to discover the facts.

The second (which was not mentioned in *Law Reform Notes #9*) is to change slightly the existing wording of para.43.3(2)(b). The paragraph currently provides privilege to "any document made by a hospital or by a committee established by the hospital prepared exclusively for the purpose of being used in the course of, or arising out of, any study, research or program, the dominant purpose of which is medical education or improvement in medical or hospital care or practice."

We feel that the expression "made by" a hospital or a committee should probably be expanded to "made by or for" the hospital or committee. The existing wording might perhaps be read as suggesting that the privileged documents must be in some sense the formal documents of the hospital or the committee itself, to the exclusion of the documents that employees or consultants may develop for the hospital or committee as it performs its functions under the section. It would be odd if the effect of para.(b) were to protect the final document but none of the preparatory material on which it was based. Adding something like the words "or for" to the paragraph should make this a less plausible interpretation. In the light of Doyle v Green, of course, the amended para.(b) would continue to have little application to incident investigations.

We would appreciate comments on these two potential amendments.

4. Attorney for Personal Care

General agreement was expressed to the idea outlined in Issue #9 that the Province might establish "attorney for personal care" provisions somewhat similar to the enduring power of attorney for property matters under the Property Act. We propose to develop a specific proposal on this to put to the government.

5. Uniform Law Conference

The Uniform Law Conference of Canada met in Halifax in August. Representatives of the Department of Justice participated, as did a representative of the CBA New Brunswick Branch.

The items for discussion were listed in *Law Reform Notes #9*, and an article by the CBA's representative at the conference, reporting on the proceedings, appeared in the Fall 1998 issue of the *Solicitor's Journal*.

The article in the *Solicitor's Journal* invites CBA members to contact the CBA representative on any items of interest in the Conference's current agenda. We encourage them to do so. The Conference is eager to receive input from practitioners; this is exactly what CBA representation is designed to achieve.

The Legislative Services Branch is itself also keen, of course, to hear suggestions for, or comments on, the activities of the Conference.

B. NEW ITEMS

6. S.39, Infirm Persons Act

A lawyer who replied to us in relation to the "attorney for personal care" also suggested that s.39 of the Infirm Persons Act might deserve attention. The section provides a means by which the court may authorize a person to perform some or all estate management functions on behalf of a person who, though not "declared to be mentally incompetent," is nonetheless "through mental or physical infirmity . . . incapable of managing his affairs, or providing for their management." The comment that we received was that this provision was apparently limited to property matters, and that it would be useful if a similar power could be added enabling specific personal care decisions to be taken, even without a declaration of mental incompetence.

The lawyer added that, in his experience, judges tended to find ways of making the necessary decisions on behalf of people who could not look after themselves, so the fact that s.39 appeared to be limited to property management perhaps caused fewer problems than it might. He suggested, nonetheless, that adding a provision in relation to personal care that paralleled s.39 could fill a technical gap in the Act and could lessen the temptation to stretch declarations of "mental incompetence" beyond their proper place.

We would appreciate other comments on this suggestion. On the face of things, it seems sensible. On the other hand, we would not want to act too hastily in adding new provisions to the Act if existing provisions actually do the job satisfactorily.

Particularly useful in this context would be examples of cases which fall into the gap that the present Act seems to contain. These would be cases where the decision to be taken falls outside s.39, because it does not relate to the administration of the estate, but where a full declaration of mental incompetence does not seem to be appropriate.

7. Legislative Improvements for Vulnerable Persons

The Throne Speech for the 1998-99 Legislative Session included the statement that "the government is exploring legislative improvements for the management of the affairs of vulnerable persons, including the concept of a Public Trustee." The items in these *Notes* on the "attorney for personal care" and s.39 of the Infirm Persons Act fall within this general category, as might many other legislative options, up to and including the possiblity of establishing a Public Trustee for the Province.

To assist the Department in determining what kinds of "legislative improvements" are most appropriate, it would be helpful if readers of these *Notes* would advise us of situations in which existing laws are not adequate to meet the needs of vulnerable persons. The government is aware of some of the issues that arise in places such as hospitals and nursing homes, or in cases in which social workers are involved. It has less information, though, about situations in which social agencies are not involved. Our readers may well encounter such situations in their practices. We believe we could learn from their experiences.

With the benefit of more complete information about the strengths and weaknesses of current legal rules it should be possible to get a better focus on what the appropriate "legislative improvements" should be.

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 January 15th 1999, if possible.

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