

Law Reform Notes

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Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Office of the Attorney General, 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 Office of the Attorney General 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. Class Proceedings Act and Rule 14

The previous issue of these Notes included a discussion of what should be done with Rule 14 of the Rules of Court now that the *Class Proceedings Act* is in force. The Rule and the Act overlap in many respects but the Rule also covers some scenarios that fall outside the Act. Our suggestion at that time was that Rule 14 should be retained but amended to make it clear that the kinds of simple, small-scale class actions that could traditionally be conducted under Rule 14 still can be. *Guarantee Co. of North America v Caisse Populaire de Shippagan Ltée* (1988) 86 NBR (2d) 342 sets out criteria for the traditional application of the Rule; other cases, including several in other provinces, have applied them.

This approach was discussed with the Rules Committee, and we have recently recommended it to the government. If it is adopted, counsel who are considering bringing class proceedings should continue to bear Rule 14 in mind. The Rule and the Act have some differences of scope, and even in the area where they overlap there may be cases in which Rule 14 will provide, in the terms of s.6(1)(d) of the *Class Proceedings Act*, a "preferable procedure" to a full-blown class proceeding under the Act.

2. Franchises Act

The *Franchises Act*, which was still a Bill at the time when we last wrote, was passed in June 2007, with one small amendment coming out of

the Law Amendments Committee's discussions. The Act is subject to proclamation, and two regulations must be put in place before proclamation occurs. One deals with the information that franchisors are required to disclose to franchisees before the franchise agreement is entered into. The other establishes the basic elements of the mediation procedure referred to in s.8 of the Act.

We are currently working on the regulations, and anticipate that there will be some form of consultation on them in the early part of 2008. A proclamation date will not be decided until the regulations are finalized.

3. Quieting of Titles

Another Bill that was still before the Legislative Assembly when we last wrote was the proposed *Act to Repeal the Quieting of Titles Act*. The repeal was to be the first part of a two step process, the second one being the development of a new Rule of Court that would serve a similar purpose to the Act, but in a modernized form that is better coordinated with both the other Rules of Court and existing land law, including the *Land Titles Act*.

The Act was passed, subject to proclamation, and the new Rule of Court is under development. Proclamation is unlikely to occur in the near future, however, since several other files are taking priority.

4. Limitation of Actions

We mention this because it is an important subject that we expect to be of interest to our readers, though there is little we can say about it at present. We have prepared our recommendations for a new *Limitation of Actions Act*. What happens next will be decided by Ministers.

B. NEW ITEMS

5. Divorce Court Act

We have recently reviewed the *Divorce Court Act* as part of our continuing effort to prune out legislative deadwood in advance of the new revision of the statutes of New Brunswick. The Act is a treasure trove for legal historians,

preserving references to the matrimonial jurisdiction of the Court of Governor in Council (s. 2), to the grounds for divorce being, as in 1860, frigidity or impotence, adultery and consanguinity (s. 38), and to the prohibited grounds of consanguinity being those established by "an Act of Parliament made in the thirty-second year of the reign of King Henry the Eighth, intituled *An Act for Marriages to stand, notwithstanding pre-contracts*" (s.38).

Much of this has now been overtaken by those comparative legislative upstarts the federal *Divorce Act* and *Marriage (Prohibited Degrees) Act*, though it seems that the provincial Act, and the Court of Divorce and Matrimonial Causes it preserves, probably continue to have some theoretical application to issues such as separation and nullity of marriage. On these issues there are several cross-references, probably circular, between the *Divorce Court Act* and the jurisdiction of the Family Division of the Court of Queen's Bench under s.11 and Schedules A and B of the *Judicature Act*.

With slightly heavy heart, since the *Divorce Court Act* appears to contain the only reference to King Henry VIII in the New Brunswick statutes, we have concluded that the *Divorce Court Act* should be repealed. In order to avoid any risk that doing so might deprive the Family Division of jurisdictions that it currently derives from section 2 of the *Divorce Court Act*, we expect to recommend a minor revision to schedule B of the *Judicature Act*. If any of our readers are aware of any problems that this approach might cause, please let us know.

6. Surety Bonds Act

The *Surety Bonds Act* also seems to be ripe for repeal. Enacted in 1892, expanded in 1898 and 1899, and little altered since then, the Act provides for the Lieutenant Governor in Council to approve companies whose bonds or guarantees may be used in a variety of contexts that the Act describes. These relate to the faithful performance of the duties of municipal, Crown or court officials (ss.1, 2 and 3) and to the giving of security required by a court or by law (s. 4). A few other Acts make reference to the *Surety Bonds Act*, notably the *Probate Rules*, which require sureties who are not approved under the *Surety Bonds Act* to "justify to an amount or amounts which shall equal the amount of the bond" (r.2.09(4)).

As far as we can tell, however, the Act has little practical effect. The most recent list of approved companies was issued more than thirty years ago (O-i-C 77-247), and has not been updated. When the Act does apply, it seems that the use of companies on the list is permitted rather than mandatory, though this is not entirely clear in all cases. But whether the use of a listed company is, technically, permissive or mandatory, our enquiries so far about practice under the *Surety Bonds Act* and the other legislation that refers to it suggest that the list is not in fact used, and without it the Act is useless.

All in all, we think the best thing to do with the *Surety Bonds Act* is to repeal it. If any of our readers know of reasons for doing otherwise, please tell us.

7. Tort-related statutes

We have recently begun a project examining several tort-related provisions in New Brunswick's statutes. The project was prompted by a comment that these provisions were sprinkled through the statute book in places where people might not always think to look (e.g., *Tortfeasors Act*, *Contributory Negligence Act*, *Law Reform Act*, *Insurance Act*); that it was not always obvious why one rule applied to some kinds of accidents (e.g. auto) but not to others; and that if, for whatever reason, the legislature chose to apply different rules in different situations, it should at least define clearly where the dividing line lay. The case of *LeBlanc v Boisvert*, 2005 NBCA 115 (CANLII) exemplifies the last of those comments. The accident there was between a car and a horse, with both parties claiming the other was negligent. The Court of

Appeal discussed, but did not decide, the question of whether or in what way the \$2,500 cap on general damages was engaged in such circumstances. Drapeau CJNB commented: "In the reasons that follow, I discuss the interpretative options that emerge from the debate in this Court without settling the controversy and without expressing any settled views" (para.7).

The overall project is a little amorphous at present. We have begun by looking at two issues: (a) the definition of "accident" in s.265.1 of the *Insurance Act*, which establishes the dividing line between auto accident and other claims for purposes of damages awards, and (b) the question of whether the advanced payment of special damages provision in s.265.6 of the same Act should be extended to non-auto claims, and possibly to general damages too. We expect to write about both of these in the next issue of these Notes, and to consider other *Insurance Act* issues (except the cap on general damages) later.

In the meantime, we would welcome suggestions for further issues that a "tort-related statutes" project, loosely defined at present, should consider.

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 March 1st 2008, if possible.

We also welcome suggestions for additional items which should be studied with a view to reform.

