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CANADA

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Law Reform Notes

Office of the Attorney General
Room 416, Centennial Building
P.O. Box 6000, Fredericton, N.B., Canada E3B 5H1
Tel.: (506) 453-6542; Fax: (506) 457-7342
E-mail: Tim.Rattenbury@gnb.ca

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. *An Act to Amend the Marital Property Act*

This Act removes the reference to a "decree nisi of divorce" from s.3(1) of the *Marital Property Act*, replacing it with a reference to a "judgment granting a divorce." At time of writing, this amendment had reached the Committee stage in the Legislative Assembly. If passed in its present form, it will come into force on Royal Assent.

2. *An Act to Repeal the Marine Insurance Act*

This Act repeals New Brunswick's *Marine Insurance Act*, which, for the reasons described in *Law Reform Notes 20*, no longer serves any useful purpose. This Act, too, was only a Bill at the Committee stage in the Legislative Assembly at the time these Notes were prepared. If the Bill is passed, the repeal will take effect on 1st September, 2005.

3. *An Act to Amend the Assignments and Preferences Act*

This Bill, too, was still before the Legislative Assembly at time of writing, and will come into force on 1st September 2005 if it is passed in its present form. The Bill removes from the *Assignments and Preferences Act* all of the sections dealing with assignments for the general benefit of creditors. As discussed in *Law Reform Notes* 20, these serve no purpose in the light of current federal bankruptcy

legislation. The three sections of the *Assignments and Preferences Act* that then remain are the ones that relate to unjust preferences.

The amendment includes consequential amendments to other Acts such as the *Absconding Debtors Act* and the *Arrest and Examinations Act*. In all cases the intention is to remove provisions that interconnect with the repealed sections of the *Assignments and Preferences Act*. Note, though, that even after these consequential amendments take effect, some New Brunswick Acts will still contain references to assignments for the general benefit of creditors. This is because the federal *Bankruptcy and Insolvency Act* uses that expression, and in some of the contexts in which the expression appears in the New Brunswick Acts, it is not necessarily a reference to the repealed provisions of the *Assignments and Preferences Act*.

4. *Quieting of Titles Act*

In several previous issues we have discussed the possibility of repealing the *Quieting of Titles Act*, with its functions being taken over by the combined effect of (a) ordinary proceedings by way of application or action under the *Rules of Court*, and (b) subsequent registration of the title under the *Land Titles Act*. This approach is designed to modernize the legislative framework for finally resolving title problems, integrating it as much as possible with ordinary procedures under the *Rules* and the *Land Titles Act*, while retaining the ability to deal with the practical problems that are currently addressed under the *Quieting of Titles Act*.

Initially (*Law Reform Notes 19*) we had suggested that the existing *Rules of Court*, read in conjunction with the guarantee of title provided by s.16 of the *Land Titles Act*, might already provide all that was needed in order for this blend of the *Rules of Court* and the *Land Titles Act* to produce the desired effect. However, several readers expressed concerns about this, especially in cases in which title depends in whole or in part on adverse possession and/or some or all of the adverse claims or claimants are unknown. Subsequently (*Law Reform Notes 20)* we acknowledged that adjustments to the *Rules of Court* would be required. We suggested that provisions for giving notice of the proceedings would probably be essential, and that provisions describing the content of the affidavit evidence that would be required in an uncontested application would probably be desirable.

We received one further comment on this revised suggestion. It expressed cautious support for the approach that we had outlined and highlighted some specific issues that should be taken into account in proceeding in that direction.

Based on the discussion so far, we have reached the tentative conclusion that we should recommend the repeal of the *Quieting of Titles Act* and the enactment of an accompanying amendment to the *Rules of Court*. However, before finalizing that recommendation, we wish to revisit its procedural aspects. In a case like this, where repeal of the Act is contingent upon suitable revisions to the *Rules of Court* being put in place, it is important to ensure at the outset that suitable revised *Rules* can indeed be devised. In due course we anticipate that we will develop a detailed proposal for consideration by the Rules Committee. In the meantime, though, we would welcome any input that could help in the design of that proposal.

Our approach in formulating a possible new *Rule of Court* starts with the idea that some title problems can be resolved satisfactorily in ordinary legal proceedings without an application under the *Quieting of Titles Act* being necessary. It is up to counsel to decide whether, given the nature of the legal problem they are confronting, the added value of a certificate of title or a declaration under the *Quieting of Titles Act* is required. This would still be the case under the approach we are now considering. The new Rule would only apply when counsel saw fit to invoke it. They would probably not do so in cases in which an ordinary declaration *inter partes* would be all that they needed in order to certify title in an application for first registration under the *Land Titles Act*.

The second point we note is that the *Rules of Court* already contemplate a procedure in which a certificate or declaration under the *Quieting of Titles Act* can be tacked onto an ordinary application or action under the *Rules of Court*. R.70, which deals with proceedings under the *Quieting of Titles Act*, provides in R.70.05 for

what is called an "Alternative Proceeding by Notice of Action or Notice of Application":

> (1) Every question concerning title to land which could be determined in a proceeding under the *Quieting of Titles Act* may also be determined in any proceeding commenced under these rules.
>
> (2) The Notice of Action or Notice of Application in such a proceeding shall be served on everyone to whom notice would be given under the *Quieting of Titles Act*, and the court has the same power as it would have under that Act to determine and finally dispose of a question concerning title to land.

We would welcome information about how this combined procedure works in practice. We asked about this once before, but did not receive any specific replies, and we would still very much like to do so. In the absence of further information, however, we take R.70.05 to be a clear indication that an application or action can be a suitable procedural framework for obtaining an order under the *Quieting of Titles Act*, and that the essential element in combining the two procedures is giving notice of the proceedings.

Finally, we come to the heart of the matter. Assuming, hypothetically, that the *Quieting of Titles Act* were repealed, what would the *Rules of Court* need to say in order to ensure that a viable procedure still remained for dealing with the problems the Act now addresses? For simplicity's sake, we will use the expressions "certificate of title" and "declaration," both drawn from the *Quieting of Titles Act*, to describe the kinds of orders that counsel may still need to obtain under what we will call a "new *Rule 70*." We will discuss the certificate of title first, then the declaration.

a. Certificates of title

The certificate of title is easier to deal with than the declaration because the nature of the order sought is the same in all cases: it is a certificate stating that a person is the owner of an identified parcel of land. That land, furthermore, will be unregistered land. On this basis:

- The most important requirement in a new *Rule 70* would be that the applicant must give notice of the proceedings. Notice would be given to the neighbours and to everyone else the applicant believed might have an interest in the land. It would also be published in the press and in the *Royal Gazette*, and posted on the land.

- Preferably, the notice would be given before proceedings were commenced, and it would require a response from anyone who disputed the claim. That way the claimant would know from the outset whether or not the claim was contested.

- If the claim was contested, the claimant would begin either an action or an application, depending on whether a "substantial dispute of fact" (R.16.04) was involved. People who had not responded to the notice would not need to be joined (unless the judge decided otherwise). As under R.70.05, if the claimant proved that he or she was the owner of the land, the certificate issued would bind not only the defendant or respondent, but also non-participants in the proceedings.

- If, alternatively, the claim was not contested, the matter would proceed as an application, since the applicant would have no reason to anticipate a "substantial dispute of fact."

- In an uncontested application, the "style of proceeding" (R.16.06) would need to be revised, since there would be no identifiable respondent. Probably the "style" would identify the property involved instead.

- Similarly, service would not be required if the application was uncontested, since the applicant would be unaware of anyone who should be served. However, the applicant should have to provide an affidavit describing the notices given and the absence of response to them. The judge could always require further notice or service under R.38.05.

- The evidence in support of the application would be substantially the same as under the *Quieting of Titles Act* – namely, an abstract of title with supporting documents and affidavits. The property description would have to meet the standards under the *Land Titles Act* for issue of a PID. The rules

on affidavit evidence and on admissibility might need to be relaxed along the lines of s.4 of the *Quieting of Titles Act*, so that the judge could receive any evidence that had probative value.

- A certificate of title would only be issued if the judge was fully satisfied that the applicant was entitled to it. The certificate would be subject to the "overriding incidents" listed in s.17(4) of the *Land Titles Act*, unless the court ordered otherwise. An applicant who intended to displace those overriding incidents would need to show that the parties affected had received notice of the applicant's intent.

- There would be no need to say that the certificate was binding against all persons (see s.22 of the *Quieting of Titles Act*), since this would be achieved by subsequent registration under the *Land Titles Act*; however, there would be no harm in doing so.

- There would be no need to say that the certificate could be set aside on application by an interested party (see s.29 of the *Quieting of Titles Act*). In most cases, title would be registered under the *Land Titles Act* before any attempt was made to set it aside, and any subsequent challenge would be under that Act. If that were not the case, though, Rule 38.07 would govern any future application to set the certificate aside.

b. Declarations

A discussion of declarations is inevitably less specific than one of certificates of title. A declaration under s.26 of the *Quieting of Titles Act* can be limited to any interest, encumbrance, fact or matter relating to land. The content of declarations can therefore vary widely, as will the notices and affidavits required in support of the application. The same would be so under a possible new *Rule 70*.

Comparing the procedure for declarations under a new *Rule 70* to the procedure suggested above for certificates of title, we suggest:

- One major difference would relate to the notice provisions. Requiring the applicant to give all of the notices previously mentioned would be excessive in the case of a declaration, since many of the people notified might have no interest in the specific issue at stake. The decision about what notice should be given is therefore likely to be made by the court.

- The court's directions could perhaps be obtained by preliminary motion. Alternatively, the applicant might be *required* to give notice to the people he or she believed were likely to be affected by the order, and *authorized* to give whatever additional publicity was appropriate in the circumstances, and the court would subsequently decide whether the notice given by the applicant was sufficient, and order additional notice if it saw fit.

- Another major difference would relate to the affidavit evidence and supporting materials. A fully documented abstract of title would not be needed, since the applicant is not making a claim for a certificate of title; the applicant's affidavits should simply be whatever is needed to prove his or her claim. The one thing that a new *Rule 70* should probably add, especially in uncontested cases, is a requirement that the applicant provide an affidavit that describes the notices given and makes full disclosure of the facts and issues that are relevant to the order that is sought. (Compare s.27(3) of the *Quieting of Titles Act*.)

- It would probably be desirable to say that a declaration issued under the new *Rule 70* binds non-participants in the proceedings. This is because, unlike the certificate of title, there might well be cases in which the declaration was not intended as a preliminary to an application for first registration under the *Land Titles Act*. For example, the declaration might simply resolve a dispute about a right of way over unregistered land.

- As in the case of the certificate of title, the Rules relating to the style of proceedings and to service might require some adjustment in order to accommodate uncontested applications, but most of the Rules on actions and applications should apply to proceedings under the new *Rule 70* without modification.

Readers who have followed our discussion of the *Quieting of Titles Act* from the beginning will probably notice that there has been a steady shift in emphasis. We started with the idea that the Act could be repealed, and that the *Rules of Court*, combined with the *Land Titles Act*, might be able to pick up the slack with virtually no amendments. Now we are talking in terms of a new *Rule 70* that provides for certificates of title and declarations of interests, encumbrances, facts or matters.

At the end of the day, though, this possible new *Rule 70* seems to be short, and we still see the package of repealing the *Quieting of Titles Act*, revising the *Rules of Court,* and placing increased reliance on the *Land Titles Act*, as a desirable step forward in simplifying and modernizing New Brunswick's land law. We will be interested to receive comments on the viability of the *Rules*-based approach outlined in this Note, as well as any suggestions for improvements to it.

B. NEW ITEMS

5. *Uniform Securities Transfer Act*

In August 2004 the Uniform Law Conference of Canada officially adopted a *Uniform Securities Transfer Act*. We have begun to consider the possibility of enacting it in New Brunswick, and would welcome any comments.

The *Uniform Act* is designed to modernize one specific part of the law relating to trades in securities – namely the transfer of property that occurs as part of the transaction. It also covers the pledging of securities and the enforcement of judgments against securities. It is not concerned with securities regulation, nor with the payments that occur, along with the transfer of property, during the settlement of a trade.

A concise explanation of the Act is provided in the "Summary Background" that was presented at the Conference's meeting in 2003. This document is available on the Conference's web site (http://www.ulcc.ca/) under "Proceedings of Annual Meetings"; "2003"; "Commercial Law Documents." The document explains that securities holding and settlement systems have evolved beyond the point where our existing law adequately supports them. Traditionally, securities were held and transferred in a "direct holding system," where owners would either be registered on the issuer's register or would be in physical possession of negotiable securities certificates, and transactions were settled by the actual delivery of such certificates. This is the system reflected in existing securities transfer law. Nowadays, however, most securities are held in the "indirect holding system." In this system, investors' interests in securities are recorded on the books of an intermediary. The intermediary, in turn, has its interests reported on the books of another intermediary, and so on up the chain until some intermediary is either recorded on the issuer's register or is in physical possession of negotiable security certificates. This indirect holding system is the one that the *Uniform Act* is designed to accommodate. The Act is designed to harmonize as far as possible with Revised Article 8 of the *Uniform Commercial Code* in the United States.

The Act itself (which is not an easy read) can also be found on the Uniform Law Conference's web site (http://www.ulcc.ca/) under the heading "Uniform Statutes." It establishes who does what, and with what legal effect, when "financial assets" belonging to "entitlement holders" are held in "securities accounts" operated by "securities intermediaries." It also includes provisions on the traditional "direct holding system," and deals with incidental matters such as conflicts of laws, service of documents and the duty of good faith. Consequential amendments to the *Business Corporations Act*, to the *Personal Property Security Act* and to judgment enforcement legislation also form part of the package.

The working group preparing *Uniform Act* have consistently urged that it should be adopted by all provinces, and ideally word for word, in order to provide a harmonized set of rules for a market that knows no provincial boundaries. In our own reading of the Act we have identified a small number of drafting issues that may need to be addressed, but at this stage we are inclined to follow the approach that corrections, if any, should be kept to the absolute minimum. We see the *Uniform Securities Transfer Act*, therefore, as a "take it or leave it " package, and we would welcome input on whether it should be "taken" or "left."

We would also welcome information on any features of the existing legislation in New

Brunswick that may be different from its counterparts elsewhere and may complicate efforts at word for word enactment. One thing that has been mentioned to us, for example, is that New Brunswick's *Business Corporations Act* adopts a "personal property" approach to share transactions, as distinct from the "negotiable instrument" approach that applies elsewhere. We have not yet investigated what difference this may make in relation to the *Uniform Securities Transfer Act*, but if it inspires any of our readers to think of other unusual features of New Brunswick's current legislation, please let us know.

6. *Uniform Enforcement of Money Judgments Act*

This is another Act that the Uniform Law Conference of Canada has recently adopted. The text was approved at the 2004 conference, and the formal adoption process was completed in April 2005. The Act is available on the Conference's Web site (http://www.ulcc.ca/) under the heading "Uniform Statutes."

There has long been a need to bring New Brunswick's law on enforcement of judgments up to date. Major reports were produced for the Department in 1976, 1985 and 1994, but none of them led to the ultimate objective of legislative reform. We therefore welcomed the opportunity to try once again when the Uniform Law Conference took up its project in 1998. The Conference recognized from the outset that this was not a subject on which uniformity among the provinces was, in itself, particularly necessary. Instead, the Conference saw the project as a cooperative law reform effort which could be beneficial to many provinces, since most of them were in the same boat in terms of the need for legislative reform.

The *Uniform Act* is long. Its objective is to bring all forms of valuable assets owned by a judgment debtor within a single legislative framework, and to give the enforcement officer ("sheriff," in New Brunswick terms) the means of realizing against any of them. Court directions would also be available, and would be needed in some cases. If the *Uniform Act* were enacted in New Brunswick it would lead to the repeal of the *Absconding Debtors Act*, the *Arrest and Examinations Act*, the *Creditors Relief Act*, the *Garnishee Act*, the *Memorials and Executions Act*, and maybe more.

The Act is in 16 Parts, as follows:

Parts 1 and 2 deal with interpretation and with general matters such as waivers, service of documents and court supervision.

Part 3 contains general provisions on the powers of enforcement officers. The most important one is the idea that once property has been seized, the enforcement officer can do anything that the judgment debtor could have done in order to realize the value of the property.

Part 4 provides for prejudgment "preservation orders." These would perform a similar function to *Mareva* (or similar) injunctions under *Rule 40* of the *Rules of Court*.

Parts 5 and 6 require a notice of judgment to be registered under (in effect) the *Personal Property Security Act* as a precondition to enforcement. This is similar to existing requirements in New Brunswick under ss.2.2 to 2.6 of the *Creditors Relief Act*. Part 5 deals with the registration process, and Part 6 deals with the priority of the "enforcement charge" that registration creates, integrating it into the *PPSA* scheme with a few necessary adjustments.

Part 7 describes the first step of the actual enforcement process: the judgment creditor delivers an "enforcement instruction" to the sheriff. The enforcement instruction will identify the action that the enforcement officer is requested to take. Preferably this instruction would be clear and specific, but the *Uniform Act* does not prevent an enforcement instruction from being general.

Part 8 permits a judgment creditor to obtain disclosure of the judgment debtor's assets. Possibilities include a questionnaire, examination before the enforcement officer, or an examination before a person appointed by the Court.

Part 9 deals with seizure and sale of personal property. The enforcement officer may seize property either by taking physical possession of the property or by serving a notice of seizure – the latter being especially important in relation to intangible property. Sale (or other realization) may be done by whatever means gives the best

opportunity to maximize the proceeds. Division 1 of this Part applies to personal property in general. Divisions 2 to 6 contain specific provisions on the following: Division 2 - fixtures and crops; Division 3 - interests under a lease, contract of sale or security agreement; Division 4 - accounts owing and/or obligations due, including future accounts and wages; Division 5 - securities and security entitlements (as defined in the *Uniform Securities Transfer Act*, above); Division 6 - intellectual property.

Part 10 deals with land. It provides alternative approaches to binding land by registration of the judgment and establishes special rules for the sale of land.

Part 11 applies to co-owned or partnership property. Subject to some restrictions, the general approach is to permit the enforcement officer to seize and sell the co-owned property itself, not just the judgment debtor's interest in it, but to give the other co-owners (a) a prior right to buy out the judgment debtor's share, or (b) if they do not exercise that right, their proportionate share of the proceeds.

Part 12 provides a list of personal exemptions from enforcement. This is similar to existing law in that it is designed to preserve the basic living requirements of judgment debtors who are individuals, but it is modernized in its details.

Part 13 provides for court-appointed receivers. The Act does not specifically define or limit when a receiver would be appointed, but the situations contemplated are presumably those that are too complex to be handled by the enforcement officer.

Part 14 establishes the rules on distribution of the funds realized through enforcement proceedings. It lists the sums (such as the costs of enforcement) that must be paid off before the judgment creditor is paid, and it says that if more than one judgment creditor has given enforcement instructions at the same time, the proceeds of enforcement must be distributed *pro rata*. This is a more limited form of sharing than under the *Creditors Relief Act* at present, since under the *Uniform Act* only judgment creditors who had given enforcement instructions would be able to share.

Part 15 provides for third person claims to be presented through interpleader proceedings.

Part 16 relates to forms, fees and regulations, and to transitional issues.

We are intending to use the *Uniform Act* as our starting point in implementing the reforms that have proved elusive for many years. We anticipate, though, that there are parts of the Act that will need reworking, and now is the time for people to let us know if there are particular issues that we should make sure we consider as part of that process. The Act covers a huge variety of subject-matter, and we doubt that people will want to comment on every part of it. However, even brief comments on specific items would be helpful. These might relate to problems in the existing law rather than to the contents of the *Uniform Act*.

Without wishing to limit the issues that people may raise with us, the following are questions on which we would welcome feedback.

- Do the existing provisions for registration of judgments under the *Personal Property Security Act* work satisfactorily?
- Are there particular kinds of personal property, either tangible or intangible, that should receive special attention?
- What special difficulties, if any, arise at present in relation to land?
- Are there gaps or problems with the existing prejudgment remedies under *Rule 40* of the *Rules of Court*? If not, we would be inclined to omit Part 5 of the *Uniform Act* entirely.
- Similarly, are there gaps or problems with the existing provisions on court appointed receivers in *Rule 41* of the *Rules of Court*? If not, we would be inclined to omit Part 13 of the *Uniform Act* entirely.

We expect to be working on this project during the summer. How quickly it proceeds will depend in part on the responses we receive to this Note.

7. *Inquiries Act*

Another Act that the Uniform Law Conference of Canada adopted in 2004 was its *Uniform Public Inquiries Act*. The Act with commentary is available on their website (http://www.ulcc.ca) under the heading "Uniform Statutes". We are now considering the possibility of adopting the *Uniform Act* as our provincial Act. New Brunswick's Act is old (1886 with minor revisions), as are many of its counterparts in other provinces. The *Uniform Act* was intended as a way to bring them up to date.

There are three main themes to the changes introduced by the *Uniform Act*. First, it incorporates the recent case law to ensure the Act reflects the evolution of the common law. Second, it differentiates two types of commission of inquiry: one is formal (under Part I of the Act) and has all the compulsory powers of traditional public inquiries; the other one is less formal (under Part II of the Act) and may or may not have compulsory powers. This way the commission's powers can be tailored to fit its needs and goals. Third, the Act tries to control the cost and timing of the inquiry process and to limit the availability of judicial review.

We have done a preliminary comparison of the New Brunswick's *Inquiries Act* and the *Uniform Act*. The following provisions are common to both:

- Power to establish a commission of inquiry
- Jurisdiction of the commission
- Budget/ funding
- Compelling testimony and evidence
- Contempt powers
- Participants' funding and costs
- Protection of commissioners

The *Uniform Act*, however, also contains provisions on the following:

- Reporting dates
- Replacement of commissioners
- Appointment of staff and delegation of functions to them.
- Power to search (with warrant)
- Power to inspect
- Evidentiary privileges for disclosure of information / records
- Notice of allegation of misconduct and right to be heard
- Right to counsel
- Limited review of commission's action / decision
- Request for directions from the court
- Joint inquiries
- Preservation of commission's records

At this time, we are in the process of evaluating options and deciding whether to recommend the adoption of the *Uniform Public Inquiries Act* as our provincial Act. We are inclined to do so, but we encourage comments on this. These might relate either to the *Uniform Act* in general or to any particular provision it contains.

Finally, we would mention that a number of other provincial Acts contain cross-references to the *Inquiries Act*, and confer on bodies acting under those Acts the powers of a commissioner under the *Inquiries Act*. If we proceed with the adoption of the *Uniform Act* we will pay close attention to these cross-referencing provisions, in order to ensure that they are amended appropriately.

8. Intestate succession and the *Land Titles Act*

We have been in discussion with the Registrar General of Land Titles about intestate succession under the *Land Titles Act*. This issue arises because s.53 of the *Land Titles Act*, which deals with transmission on death, does not specifically contemplate intestacy. When the owner of registered land dies, s.53 permits the title to the land to be registered "in the name of

his personal representative as such," but s.3 defines "personal representative" as meaning "an administrator duly appointed by The Probate Court of New Brunswick or an executor." Technically, therefore, it seems that in cases of intestacy there can be no transmission of registered land unless and until letters of administration have been taken out.

We believe that this may present an unnecessary complication to the administration of intestate estates. Although letters of administration are a central element in the formal administration process, we understand that most such estates are administered informally, without grant of letters, and we see no harm in that. We think it would be an unfortunate side effect of the *Land Titles Act* if it routinely meant that formal administration through the Probate Court system was required for no other reason than that the estate happened to include registered land.

We have therefore begun discussions with the Registrar General about amending the *Land Titles Act* to accommodate intestacies. Our current suggestion is that it should be possible to treat the beneficiaries of intestate estates in much the same way as the executor of an unprobated will. That is to say, if it is clearly established who the beneficiaries are (this would presumably be done by affidavit) it should be possible to register them as being the representatives of the estate, thereby giving them the same power to transfer title as the "personal representative" currently has. If the beneficiaries sold the property the proceeds of sale would form part of the estate and be subject to the claims of estate creditors, but a purchaser for value would have the protection provided by s.53(6).

In considering this approach, we would be interested to know of any experiences people have had so far when dealing with intestate succession under the *Land Titles Act*. Presumably there will not have been many cases of this as yet (except perhaps in Albert County), but there will be more in the future. How much difficulty have these caused so far?

We would also be interested to know whether, in the normal course of events, there is often much difficulty or disagreement involved in establishing who the beneficiaries of an intestate estate are. Under the approach that we are currently envisaging for the *Land Titles Act*, proof of who the beneficiaries are would probably be by affidavit submitted to the Registrar General. The Registrar General would not be obliged to accept the affidavits, but in practice he or she might often have no obvious reason to reject them. We would have thought that affidavit evidence should normally be a sufficiently reliable method of establishing who the beneficiaries are – especially when the beneficiaries are close relatives such as the spouse, issue or parents. Might remoter next-of-kin be more problematic?

Another problem that may arise is that the beneficiaries, or some of them, may be minors or incompetent. We doubt, at present, whether the system we have outlined would apply in cases like these, but we suggest that even if it only operated if the beneficiaries were competent adults, adopting it would still be a step in the right direction.

9. *Married Woman's Property Act*

In *Law Reform Notes 16* we identified the *Married Woman's Property Act* as an Act that could probably now be repealed. The Act, we suggested, had achieved its legislative purpose many years ago, and there was no need to keep it on the statute book any more. We added, however, that the Act would need to be reviewed carefully before a firm decision was taken, in order to make sure that repealing it would neither revive the problems that the Act had previously solved nor create new ones. That review has now been done, and we believe that the Act can be repealed, as long as care is taken to ensure that the repeal does not produce unintended effects.

The current form of the *Married Woman's Property Act* dates from 1951, but it embodies 100 years of small enactments which, in various ways, eliminated inequalities in the legal status of married women. The major provision of the Act is s.2, which ensures that marrying does not affect the independent legal status of women in relation to torts, contracts, property ownership and other listed matters. This is reinforced by s.3 (property ownership), s.4 (torts and contracts) and s.6 (right to protect property through legal proceedings, including proceedings between husband and wife). Several other provisions are ancillary to these major

provisions, and s.9 contains a free-standing provision for obtaining an order known as a "protection order."

The effect of the major provisions of the Act, must be maintained, of course, but we do not believe that it is necessary for this purpose to preserve the text of the *Married Woman's Property Act* for all time. Nowadays it should go without saying that the legal capacities of men and women, married and unmarried, are the same, and we see no danger, in a post-*Charter* world, that repealing the *Married Woman's Property Act* would recreate the inequalites the Act was designed to suppress. For the avoidance of doubt, perhaps, it might be desirable that the repealing Act explicitly state that it does not revive the pre-existing law. This, though, would only be an express repetition of s.8(1)(a) of the *Interpretation Act*.

We have also considered the more intricate details of the Act such as its provisions dealing with restrictions on alienation or anticipation (s.3) and with tenancy by curtesy (s.8). These relate to changes that took place long ago (1951 and 1916 respectively), and we see no need to retain references to them. Other provisions of the Act appear to have been transitional in nature when first enacted (e.g. s.3(1)(a)) or to be intended as declaratory of the intended effect of the Act (e.g., s.5). These would cease to have any meaning if the major provisions of the Act were gone.

We also believe that the "protection orders" provided for by s.9 can be dispensed with. A "protection order" entitles a married woman whose husband is not supporting her or has abandoned her "to have and to enjoy all the earnings of her minor children." We would be surprised if any such order were sought nowadays.

Our conclusion, therefore, is that the *Married Woman's Property Act* can be repealed, as long as care is taken to ensure that the old problems it resolved are not accidentally revived. If, though, we have overlooked or misunderstood something in the Act that it is important to retain, please let us know.

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 August 1st 2005, if possible.

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