

Law Reform Notes

Department of Justice
Room 111, Centennial Building
P.O. Box 6000, Fredericton, N.B., Canada E3B 5H1
Tel.: (506) 453-2569; Fax: (506) 457-6982
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 Quieting of Titles Act (c.11, 2000)

Work continues on the regulations that are required before this Act can be proclaimed. The main purpose of the Act is to introduce a new procedure under which specific title problems can be finally resolved without the need for a full application for a certificate of title. A second purpose is to ensure that in those cases in which an application for a certificate of title is still made, a survey plan will normally be required.

We hope that the proclamation will occur in March 2003.

2. Canadian Judgments Act (c.C-0.1, 2000), and An Act to Amend the Reciprocal Enforcement of Judgments Act (c.32, 2000)

These two Acts together introduce a new system for the enforcement of money judgments issued by the courts of other Canadian provinces and territories. We are currently working on a regulation detailing the material that is to be provided when a Canadian judgment is submitted for registration under the Act. Our provisional target date for bringing the legislation into force is March 1, 2003.

3. Legislative Reform Initiative

In *Law Reform Notes 16*, we set out some suggestions for an extensive project that would complement the proposed new Revision of the Statutes of New Brunswick by repealing or reforming a number of old Acts. We received specific comments on some of the Acts that we mentioned, but no reactions to the general thrust of the project or to the priorities that we identified. We will therefore be proceeding along the lines we described.

Other priorities may, of course, emerge from time to time, so there may well be departures from the agenda we have outlined. For example, an item which was not previously high on our list, but which has recently been suggested to us as needing urgent attention, is the statutory power of sale under s.44 of the Property Act. We deal with this under item 8, below.

4. Bulk Sales Act

One of the Acts that we suggested could simply be repealed as part of the legislative reform initiative was the *Bulk Sales Act*. In an earlier version of *Law Reform Notes* we had made the same suggestion, which had been generally welcomed. Through the spring and summer of 2002 we received no contrary views, and in the fall we began preparing our recommendations for the repeal.

At the last minute, however, we received one strong plea for us to reconsider. (It has recently been modified somewhat.) Shortly afterwards the Business Law Section of ABC-NB-CBA conducted a brief e-mail survey of its members. Some of them suggested in general terms that they might have concerns about repeal.

In reaction to this, we have delayed making any recommendation about this Act. Instead we will set out here, more fully than on previous occasions, the two sides of the debate as we understand them, and explain why we still consider the repeal of the *Bulk Sales Act* appropriate.

Bulk Sales Acts were enacted throughout most of Canada and the U.S.A. in the late 19th and early 20th centuries. In the past 20 years, most American States and almost all Canadian

provinces and territories have repealed them. Thorough discussions of the reasons for repeal are available in Law Reform Commission reports from B.C., Alberta, Saskatchewan and Manitoba. In P.E.I. and Nova Scotia repeal occurred as a consequential amendment to the enactment of *PPSAs*. In Quebec, comparable provisions of the *Civil Code* were repealed this year.

The main reasons that Law Reform Commissions have given for the repeal can be summarized as follows.

- The practical requirements of the Acts are unworkable. (In New Brunswick this view is reflected in the Bar Admission Course materials on Bankruptcy: "As most practitioners know, it is frequently impossible for a *bona fide* vendor and a *bona fide* purchaser to satisfactorily comply with all of the provisions of the Bulk Sales Act (New Brunswick) without spending an inordinate amount of time, money and effort or, for that matter, destroying the goodwill of the business being purchased. However the penalty for non-compliance with the Act can be unduly severe.")
- There is no logic to the range of businesses that the Act covers (e.g., why manufacturers and retailers but not wholesalers?), nor to the range of transactions affected (e.g. why protect creditors from sales of "stock," but not from sales of real property, sales of intangibles, securitization agreements, etc.?)
- The Acts are a trap for the unwary, especially in relation to those "sales in bulk" – e.g. sales of major items of equipment – that occur without a sale of the business.
- Bulk sales are an ordinary part of the business cycle. They are not inherently prejudicial to creditors, especially when, as in most cases, the business is solvent. There is simply no reason to subject all bulk sales to restrictive rules.

Commissions elsewhere have considered whether alternative protection should be provided for creditors if the Act is repealed. The conclusion, after serious attempts to devise

alternative protection in some cases, has always been "no." The key reasons are (a) there is nothing wrong with bulk sales as such, so why regulate them? and (b) the time when creditors do need protection is when a business is insolvent and is proposing to deal with creditors, or some of them, unfairly, but this is exactly the problem that the preference provisions of the *Assignments and Preferences Act* and/or the *Statute of Elizabeth* already address.

What has recently been put to us on the other side of the argument (as it had been to Law Reform Commissions elsewhere) is that (a) the Act provides useful protection to creditors, and (b) it is not in fact hard to comply with – all the vendor has to do is pay the creditors off out of the proceeds of sale, or, if the proceeds will not satisfy the debts, send letters requesting "waivers," and apply to the court if enough waivers are not forthcoming

Point (a) above seems to us the stronger one – except that when we have asked what it is that creditors need protecting from, the answer seems to be "from insolvent vendors who are proposing to treat them unfairly." This, though, is substantially what the *Assignments and Preferences Act* protects against.

Point (b), on the other hand, appears to involve "reading down" the *Bulk Sales Act* in a way that its wording does not permit. For example:

- Paying off creditors out of the proceeds of sale is inconsistent with s.5(1)(a), which says that creditors must be paid *before* the completion of the sale.
- When people speak of obtaining "waivers" from 60% of the creditors they seem to be thinking of suppliers, and perhaps other trade creditors. The Act, however, applies to all creditors – secured or unsecured; trade, non-trade or purely personal. Dealing with the trade creditors alone is not sufficient.
- The "compliance" that has been described to us has always been in the context of a sale of a business. A "sale in bulk" as defined in the Act, however, can occur in many other contexts than a sale of a business.

In one of the brief comments made to the

Business Law Section the writer mentioned the importance of ensuring compliance with the spirit of the *Bulk Sales Act*. The problem is, though, that compliance with the spirit of the Act is not enough. It produces the same legal results as not complying with the Act at all.

Having considered the points that have recently been made to us, we continue to feel that the arguments for repeal of the Act heavily outweigh the arguments for retention. We have considered, like other Law Reform Commissions, whether the Act should be replaced with something else, but we think not. One possible replacement, for example, might be a new Act that applied to all sales of all businesses, not just to sales of "stock" by certain kinds of businesses. This approach, which would make the Act less random in its application, was essentially the approach that Quebec took when it revised its *Civil Code*, only to repeal the new provisions ten years later. Alternatively the Act could be narrowed, so as to protect, for example, only the unsecured trade creditors of the listed businesses. This would presumably bring the law more into line with current practice, but (a) would lessen any potential for creditor protection that the Act may have, and (b) would continue to complicate business transactions that are not ordinarily prejudicial to creditors.

If there were to be any additional protections introduced when the *Bulk Sales Act* were repealed, we would be inclined see the preference provisions of the *Assignments and Preferences Act* as providing the base that should be developed. We are not sure, however, what form that development would profitably take. We would be happy to receive suggestions, though we note that no such amendments have been introduced in the seven other Provinces that have repealed their Bulk Sales Acts. The Acts have simply been repealed as undesirable, and the repeals do not seem to have been experienced as causing any harm to creditors. Our strong inclination at present, therefore, is to recommend repeal without attempting to create replacement protections in other legislation.

5. *Corrupt Practices Inquiries Act* and *Controverted Elections Act*

As suggested in *Law Reform Notes 16*, we have started developing proposals for (a) the repeal of

the *Corrupt Practices Inquiries Act* and (b) the replacement of the *Controverted Elections Act* with a new procedure under the *Elections Act* for the setting aside of an election. This is another item from our legislative reform initiative.

B. NEW ITEMS

6. Uniform Law Conference of Canada

The Uniform Law Conference of Canada met in Yellowknife in August. The agenda of the Civil Section dealt with the following subjects:

- Unclaimed intangible property legislation.
- Security interests in intellectual property.
- Jurisdiction and choice of law rules for consumer contracts.
- Harmonization and/or fine tuning of PPSAs.
- *Bank Act* security.
- Transfer of investment securities.
- Franchise legislation.
- Civil enforcement of judgments.
- Public inquiries legislation.
- Various issues under *Vital Statistics Acts*.
- Civil aspects of the criminal rate of interest under the *Criminal Code*.
- Electronic documents under the substantial compliance provisions of the *Wills Act*.
- Extra-territorial police powers of investigation.

In addition, the Conference's wide-ranging Commercial Law Strategy continues.

Further information about any of these items can be obtained from this office or from the

Conference's Web site at www.ulcc.ca. Of the items listed above, the ones that we are following most closely are franchise legislation and civil enforcement of judgments. In addition, we would welcome some feedback on the criminal rate of interest, which we deal with in the following item.

7. Criminal rate of interest

S.347 of the *Criminal Code* makes it an offence to charge interest exceeding 60% per annum. Prosecutions can only be brought with the consent of the Attorney General, and have been few.

S.347 has, however, recently started having an impact in civil contexts, where litigants have argued that contractually agreed payment terms were unenforceable because they violated s.347. In *Garland v Consumers' Gas Co.* [1998] 3 SCR 112 the Supreme Court of Canada held that the late payment charges levied by Consumers' Gas, as approved by the Ontario Energy Board, violated s.347. Commercial arrangements involving, for example, royalty payments have also fallen foul of s.347. (See e.g. *Boyd v International Utility Structures Inc* (2002) 216 DLR 4th 139.) The paper delivered at the Uniform Law Conference in August mentioned that a mailroom lender charging a \$2 fee for a \$20 loan for one week would be charging interest at several thousand per cent under the formula adopted by the courts for the purposes of s.347.

We would welcome comments on any difficulties people are running into with s.347 in civil and commercial contexts. Our impression from listening to the discussion in Yellowknife in August was that s.347 would be capable of causing real complications for a variety of perfectly reasonable transactions. In the criminal context this is not a problem. The fact that a prosecution can only be brought with the consent of the Attorney General means that reasonable transactions can be screened out. On the civil side, however, whether or not the Attorney General consents to a prosecution does not alter the fact that interest exceeding 60% is criminal.

If there is a problem, one answer, obviously, would be to amend the *Criminal Code*. We understand that this is a possibility that is under

review. Other options, however, might include provincial legislation, especially since it is in civil contexts, through the law relating to illegality of contracts, that s.347 is apparently causing difficulties. One way or another, assuming s.347 is not itself amended, provincial legislation would presumably involve making some contracts – perhaps those that were not otherwise "unconscionable" – enforceable despite s.347.

We would be pleased to receive any information or suggestions that people think might be helpful as the Uniform Law Conference's examination of this subject continues.

8. S.44, Property Act

It has recently been suggested to us that s. 44 of the Property Act requires urgent attention in the light of the Court of Appeal's decision in *Gambit Holdings and Development Ltd. v Bayview Credit Union* 2002 NBCA 49.

Gambit Holdings is the most recent of several important rulings by the New Brunswick Court of Appeal on s.44. These began with *Banque Nationale du Canada v Desrosiers* (1996) 167 NBR (2d) 241, which appeared at the time to set out a general principle that a mortgagee exercising the power of sale under s.44 owed a duty of care to the mortgagor obtain a reasonable price. In *Bérubé v Lévesque* (1999) 219 NBR (2d) 8, however, the Court of Appeal held that *Desrosiers* was being interpreted too broadly and too loosely. *Gambit Holdings* reiterates and expands the message in *Bérubé v Lévesque*.

We would be interested to receive comments on whether the law as stated in *Bérubé* and *Gambit Holdings* is satisfactory. In *Bérubé* the Court of Appeal seemed to suggest that it thought not (para.20), but that it was simply applying the law as the Legislative Assembly had enacted it.

Bérubé and *Gambit Holdings* together, we believe, establish the following propositions.

- A mortgagee selling under a contractual power of sale (i.e. not s.44) may well have a duty of care to the mortgagor and be liable for improper exercise of the power. This will depend on the terms of the contract.

- A bank selling under the power of sale in s.44 of the *Property Act* is under the duty set out in section 428(10) of the *Bank Act*, and must therefore "act honestly and in good faith and shall deal with the property in a timely and appropriate manner having regard to the nature of the property and the interests of the person by whom the security was given. . ."
- However a mortgagee who sells under s.44 alone, and is not under any further statutory duty, owes no such duty of care. Under s.44, the mortgagee's only obligation is to follow the procedure set out in the Act, and a mortgagee who does so has the protection of s.47(6), and is therefore "not answerable for any involuntary loss happening in or about the exercise or execution of the power of sale."
- A loss will only be considered "voluntary" if the mortgagee deliberately causes it. "Indeed, when a mortgagee has fully complied with the *Property Act*, it is difficult to fathom circumstances that would justify a finding that the mortgagor's consequential loss of equity was other than involuntary." (*Bérubé*, para.26, repeated in *Gambit Holdings*, para.9.)

The Court did not expressly deal with the question of whether a sale at a purely nominal price might be considered to cause a voluntary loss. Such a sale might, perhaps, be characterized as a "gift" (or a "taking" if the mortgagee buys in) rather than a "sale." However, the general tenor of the judgment is that all that is required of the mortgagee is to follow the procedure in the *Property Act*. The Court in *Gambit Holdings* did, however, deal with another important point – the date at which the mortgagee's deficiency claim is to be assessed. Dismissing arguments by both the mortgagee and the mortgagor in relation to expenses incurred after the mortgagee bought the property in, the court said that "the legally correct approach would compute the deficiency under the mortgage as of [the date of the mortgage sale]. What Bayview did with its properties . . . ceased to be of interest to the appellants after the mortgage sale" (para.12). In context, the court was only referring to expenses. In logic,

however, its comments would appear to suggest that a mortgagee who buys in is not accountable in any way for the profit, if any, realized on a subsequent resale.

Our impression from *Gambit Holdings* is that the court might, if the point arose, find that accepting a nominal price caused "voluntary loss" to the mortgagor, but that it is less likely to hold that the proceeds of a subsequent resale were relevant in any way to a deficiency action. Unless, though, the court finds in the mortgagor's favour on one or other of these two interrelated points, the position of the mortgagor in a sale under s.44 is poor; he or she would be exposed to a sale at a nominal price but have no claim on the proceeds of the subsequent resale by the mortgagee. In *Bérubé* the court pointed out that if the mortgagor wanted to avoid the consequences of a sale under s.44, he or she could do so by selling the property himself/herself.

Our first question to our readers is whether we are interpreting the recent Court of Appeal decisions correctly. The second question, whether or not our understanding of those cases is accurate, is whether the current law is satisfactory.

If the current law is not satisfactory, all that we think we could contemplate developing at present would be a short self-contained amendment that dealt with the problems relating to the power of sale but did not involve a more complete review of the law of mortgagees' remedies. Possibly the simplest approach would be to add to s.44 something like s.428(10) of the *Bank Act*. That way, the seller under s.44 would have a statutory duty of care, and his/her protection under s.47(6) would be restricted accordingly.

Bearing in mind, though, that other aspects of s.44 have also been criticized over the years, we wonder whether a complete reformulation of the mortgagee's power of sale might be viable as a stand-alone amendment. We have looked to the secured creditor's remedy of "disposal" under PPSA as a possible model, and we have benefited from a comprehensive paper on real property security that Professors Norman Siebrasse and Catherine Walsh prepared for Service New Brunswick in 1996. Their proposals were similar, though not identical, to the suggestions that follow.

Our suggestions are these.

- The statutory power of sale should only apply to cases of non-payment (as under s.44(1)(a), *Property Act*).
- It should be a power to sell by any means.
- The mortgagee should be obliged to exercise the power in good faith and in a commercially reasonable manner. (See s.65(2), *PPSA*.)
- The mortgagee should give the mortgagor and subsequent interest-holders 30 days' notice of intent to sell.
- The content of the notice should be modelled on s.59(9) *PPSA*. This would include a statement that the mortgagor has a right to reinstate by paying the arrears (s.59(9)(k)), but it would not include a notice to subordinate interest-holders that they have a right to redeem (s.59(9)(f)).
- No public notice of the intended sale would be required.
- The mortgagee should be entitled to sell to itself, but only "for a price that bears a reasonable relationship to the market value" of the property. (See s.59(14) *PPSA*.)
- If the mortgagee proposes to sell to itself, it must give the mortgagor notice of the intended sale price.
- Any surplus or deficiency will be established as at the date of the sale. If the mortgagee, acting in good faith and in a commercially reasonable manner, buys in at a reasonable price and subsequently makes a profit on the resale, the mortgagee can keep it. If, conversely, the mortgagee makes a loss on the resale, it cannot add that loss to the mortgagor's deficiency.

We are aware that more complete legislative packages could be developed about (a) mortgagees' remedies in general, or (b) the power of sale in particular. However, the object of the exercise as we see it is to develop an

amendment that can fit neatly into the existing space occupied by s.44, without the need to rethink things like the cross-references to s.44 in the *Standard Forms of Conveyances Act*. We also note that building onto the general principles in the *PPSA* may have an advantage in cases to which s.55(4) of *PPSA* applies. Under that subsection, if the same obligation is secured by both land and personal property, both can be disposed of in accordance with the procedure that applies to the land.

Questions:

1. Is legislation needed at all?
2. If so, which of the two possible legislative approaches discussed above is preferable? These were (a) expanding the principle of s.428(10) of the *Bank Act*, and (b) developing a *PPSA*-like sale process.

3. Can a *PPSA*-like sale process function as a stand-alone power of sale in the *Property Act*, or can it only work as part of a more complete package like that of *PPSA* itself?

4. Is there a better approach that will respond to the specific legislative need but without raising broader issues about mortgagees' remedies?

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 February 1st 2003, if possible.

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