

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

In Law Reform Notes 16, we briefly discussed the question of whether New Brunswick should enact class proceedings legislation. This issue had been raised with us from time to time over the years, but it was given added impetus by the decision of the Supreme Court of Canada in *Western Canadian Shopping Centres v Dutton* (2001 SCC 46). The *Dutton* case dealt with the availability of class actions in Alberta under Alberta's Rule 42, which is very similar to New Brunswick's Rule 14. The Court held that Alberta's Rule 42 provided the foundation for a comprehensive class proceedings structure, and that the many issues that the Rule did not directly address would simply have to be dealt with by the courts as they arose in cases before

them. This was a broader interpretation of Rule 42 than the New Brunswick courts had previously given to Rule 14. We are not aware of any subsequent interpretations of the New Brunswick Rule.

Since *Dutton*, several Canadian provinces, including Alberta, have enacted class proceedings legislation. In all cases it has been modelled on the Uniform Law Conference of Canada's *Class Proceedings Act* (1996). The *Uniform Act* was itself based on earlier legislation in Quebec, Ontario and (especially) British Columbia. The annotated text of the *Uniform Act* is available on the Conference's website at <http://www.ulcc.ca/en/poam2/> (see

Proceedings of Annual Meetings, 1995 and 1996). Detailed reviews of the Act have been prepared by the Manitoba Law Reform Commission (1999: <http://www.gov.mb.ca/justice/mlrc>) and the Alberta Law Reform Institute (2000: <http://www.law.ualberta.ca/alri>).

The main issues covered by the *Uniform Act* relate to the certification of class proceedings (which includes defining the class members, identifying the common issues and appointing the representative plaintiff), opting into and out of the proceedings, discovery, the calculation and distribution of monetary awards, costs and limitation periods.

We are inclined to think that New Brunswick, too, should enact class proceedings legislation. There are benefits to having procedures in place for the handling of multi-party litigation, and the *Dutton* decision suggests that the courts are likely to develop them, based on Rule 14, if the legislature does not. We understand that the Law Society's Rules of Court Revision Committee has considered whether revisions to the *Rules of Court* could, by themselves, satisfactorily deal with all the necessary elements of a class proceedings procedure, and believes that they cannot. The courts, too, are likely to run into obstacles when their ability to establish procedural rules is blocked by issues of substantive law. Legislation therefore seems the appropriate approach.

We believe that the starting point for legislation in New Brunswick should be the *Uniform Act*. There are, though, two substantial issues on which we would welcome comment at this early stage. These relate to (a) opting into and/or out of class proceedings, and (b) costs. Existing Canadian legislation takes different positions on these issues. It also contains variations of detail on less significant matters.

(a) Opting in and opting out.

The question here is whether, once the court has certified that there are multiple potential claims that will be best resolved through a class proceeding, and public notice to potential class members has been given, the class members should have to actively "opt in" in order to be part of the proceeding or whether they will be automatically included unless they "opt out." The *Uniform Act* draws a distinction on this point between residents and non-residents of the province enacting the legislation. Residents will be included in the proceedings, and bound by

the result, unless they "opt out;" non-residents will only be included, and bound, if they "opt in."

B.C., Alberta, Saskatchewan and Newfoundland have followed this approach, and we believe that Quebec's provisions produce a similar result. Ontario and Manitoba, however, have enacted that all class members, whether or not they are residents of the province, will be bound unless they opt out. A court in Manitoba or Ontario may, however, when certifying a class proceeding, restrict the class so that it does not include residents of other provinces.

An alternative approach is to have an "opt in" rule for all class members. Canadian law reform agencies that have prepared reports on class proceedings have considered but rejected this approach (Ontario 1982, Manitoba 1999, Alberta 2000), though it has found favour elsewhere (e.g. Scottish Law Commission, 1996). A possible variant is to allow the court to decide, when certifying the class proceedings, whether class members should have to "opt in," or whether they will be included unless they "opt out." The subsequent notification to potential class members would make it clear which path was being followed.

Were it not for fact that all existing Canadian Acts adopt an "opt out" rule of some sort, notably in relation to the residents of the province, we would have been strongly inclined to recommend "opt in" as the basic rule for both residents and non-residents. An "opt in" rule would mean that, once the proceedings had been certified and the class notified, the representative plaintiff would only carry the proceedings forward on behalf of the people who expressed an interest in being involved. This approach, we would have thought, provides a perfectly adequate mechanism for allowing people with a common grievance to pursue their claims collectively: once public notice of the class proceeding is given, class members can "opt in" if they wish.

Under an "opt out" approach, by contrast, once the class proceeding is certified all potential claims falling within its scope are automatically aggregated and put forward at the same time. Certification turns a claim by one plaintiff into a claim by every potential plaintiff, except to the extent that individual class members subsequently "opt out."

We have doubts at present as to whether an "opt out" rule is appropriate, except perhaps in special cases such as where it is necessary to

finally resolve all issues of liability arising out of a particular occurrence. Nevertheless, depending on what we hear in response to this discussion, we are currently inclined to recommend that New Brunswick follow the *Uniform Act* in applying an "opt out" rule to residents and an "opt in" approach to non-residents. Legislatively it is the easiest approach, since we will not have to build new elements into the *Uniform Act*. In terms of policy it has the support of some law reform entities and most legislatures in Canada, and the others have been even more favourable to the "opting out" approach. In terms of practice, it would mean that we were placing ourselves within the range of the existing Canadian standard.

We would be interested to know, however, whether our readers think (a) we should be embracing the model of the *Uniform Act* with greater enthusiasm, or (b) we should be recommending something different.

If anyone would like a more detailed discussion of the pros and cons of "opting in" and "opting out," we suggest they look at pages 92 to 99 of the Alberta Law Reform Institute's report, which comes down in favour of the *Uniform Act*, but gives fair coverage to the arguments for "opting in."

(b) Costs

The *Uniform Act* offers two alternatives in relation to costs. One is, essentially, to follow the normal rules in civil proceedings; the other is to provide that there will be no awards of costs in actions that are certified as class proceedings.

The latter rule has been followed by most of the class proceedings Acts in other provinces. It is generally thought of as being favourable to plaintiffs and to their ability to bring their claims to court. Ontario and Alberta, however, have followed the conventional rule, though in Ontario a class proceedings fund has also been established out of which some costs may sometimes be paid.

Our strong inclination in relation to costs is that the rule in class proceedings should be the same as the rule in other proceedings. That rule is, of course, criticized at times, both in terms of its fairness and in relation to the impact of costs as an incentive or a disincentive to litigation. For better or worse, though, the general rule on costs is as it is, and it does include the flexibility for the courts to make unusual awards in special

cases, which might include some class proceedings. We see no strong reason at present for creating a different rule in relation to class proceedings.

(c) Other issues

Though we have identified "opting in" and "opting out" and costs as the main items for consideration at this point, we would welcome comment on any aspect of class proceedings legislation.

2. Habeas Corpus Act

Moving forward to *Law Reform Notes 17*, we mentioned there that we were wondering whether the *Habeas Corpus Act* continued to serve any useful purpose. We were not questioning the importance of *habeas corpus* proceedings, which are after all a constitutional right. Our only question was whether the Act itself contributed anything useful to the law on the subject. If not, we surmised, the Act should be repealed.

Since then we have reviewed the Act more closely. It is old, mostly pre-Confederation, and it contains very little substance. It does not confer or confirm any right to apply for *habeas corpus*; it simply deals with some specific issues which have presumably seemed problematic at different times over the past 150 years. SS.2 to 4 deal with procedural issues. SS.5 to 11 provide, as an alternative to ordinary *habeas corpus* procedures (whatever these might be – the Act does not say), a procedure by way of prescribed form documents that can be used when the applicant is in jail. S.12 provides for relief against actions for false imprisonment. S.13 relates to the custody and control of minors.

Looking at these provisions in reverse order, we believe that s.13, dealing with the custody and control of minors, has now been overtaken by the *Family Services Act*. S.12, on false imprisonment, seems superfluous in the light of (a) the general law of false imprisonment, and (b) s.31 of the *Corrections Act*. SS. 5 to 11, establishing a largely documentary *habeas corpus* procedure when the applicant is in jail, is desirable in its end result, but if the Act were repealed and applications for *habeas corpus* were simply conducted under the *Rules of Court* the end result would be much the same: there would be a hearing on affidavit evidence unless there were a substantial dispute of fact.

SS.2 to 4, however, which deal with some technicalities of the *habeas corpus* procedure, give us more pause for thought – especially s.3. If we were confident that, if these sections were repealed, *habeas corpus* procedures would fit comfortably into the existing *Rules of Court*, we would recommend their repeal. However, we are less confident of this than we would like to be, since (a) there is at present no specific Rule on *habeas corpus* proceedings, (b) the historical "writ" procedure as we understand it includes some unusual features, and (c) we think there is a possibility that by repealing ss.2 to 4 we might re-create some old problems under a "writ" procedure rather than simply allow people to rely on perfectly adequate alternative methods under the *Rules of Court*.

Added to this, we suspect from the work that we have done that many lawyers nowadays might have difficulty working out how to apply for a writ of *habeas corpus* if called upon to do so.

Our present view, then, is that perhaps the best course of action is to prepare a new Rule of Court on *habeas corpus* proceedings, and to repeal the Act when the Rule comes into force. The Rule would rely on existing provisions of the *Rules of Court* as far as possible. If, though, practitioners advise us that the existing *Rules* are already fully adequate to deal with *habeas corpus*, we would probably revert to our initial idea that the Act serves no legal purpose, and can be repealed without anything else being added at the same time.

3. Mortgagee's power of sale

Another topic discussed in *Law Reform Notes 17* was the mortgagee's power of sale under s.44 of the *Property Act*. The background to the discussion was the continuing series of cases, not always easy to reconcile, about what obligation a mortgagee owes a mortgagor under s.44 in relation to the price obtained at the sale and any deficiency that may result. We suggested that a possible "quick fix" to the gap that the cases had identified in s.44 might be to impose on the mortgagee a duty of care comparable to s.428(10) of the *Bank Act*. Our main suggestion, though, was that perhaps s.44 should be replaced by a new power of sale based on the procedures in s.59 of the *Personal Property Security Act* and on the secured party's duty under s.65 of that Act to act in good faith and in a commercially reasonable manner.

We listed the following as the possible key elements of a new statutory power of sale:

- 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 received several comments on this suggestion, and we have now had the opportunity to consider them carefully.

The first and most important conclusion that we

have reached is that s.44 should be repealed and replaced. Uncertainties surround many aspects of the section, and we think the best thing is to repeal it and start with a clean slate.

What, then, should be written on that slate? The two main alternatives arising out of our consultation so far are (a) a revised s.44 that still revolves around a public auction at which the mortgagee can buy in, and (b) the *PPSA*-based approach outlined above. If the public auction approach is retained, we have received suggestions that the notice requirements should be reduced. More importantly, in relation to the sale price and the likely deficiency, the comments that we have received either argue or imply that the mortgagee should be able to bid low at the auction but should have to account to the mortgagor for the proceeds of the resale less the carrying costs. This, it is suggested, is the best way of determining the mortgagee's actual loss on the transaction.

At present we favour the *PPSA*-based approach over the revised auction sale procedure. The key features of any power of sale procedure, it has been suggested to us, are (1) that it must provide a clear means by which the mortgagee can foreclose the equity of redemption and other subordinate interests, and (2) that its requirements in relation to the sale price and to deficiencies should be realistic. On both of these counts we think the *PPSA*-based approach is satisfactory. One of its main attractions, though, is simply that it does not require the holding of an auction sale. From what we have heard over the years, auction sales are not normally an effective way of realizing the value of a mortgaged property. The mortgagee normally ends up buying in, so the whole process of the auction sale becomes merely an expensive ritual through which the mortgagee must pass before being in a position to get on with the real business of selling the property on the market. The *PPSA*-based approach avoids the expensive preliminaries and cuts to the chase.

We have considered, on the other hand, whether the *PPSA*-based approach might be considered *too* user-friendly from the point of view of the mortgagee, and thus insufficiently protective of the mortgagor. We do not think so. Though a sale under such a procedure might well proceed more quickly and with less formality than an auction sale, we do not see that the mortgagor derives any real protection from the auction sale procedure. Greater protection, we think, would

come from the imposing on the mortgagee the duty to permit reinstatement, to act in good faith and in a commercially reasonable manner, and to pay, if selling to itself, "a price that bears a reasonable relationship to the market value."

We would welcome further comments on this subject. We are now at the stage where we think the most useful comments would be detailed criticisms of the *PPSA*-based approach as we have outlined it. However, we are still open to persuasion on the general question of whether that is the right approach to follow.

B. NEW ITEMS

4. Quieting of Titles Act

We have recently been considering whether, now that the *Land Titles Act* is in force throughout the province, the *Quieting of Titles Act* can be repealed, with its functions being taken over by the combined effect of (a) an application or action under the *Rules of Court*, and (b) subsequent registration of the title under the *Land Titles Act*.

As we see things, the province-wide proclamation of the *Land Titles Act* reduces the usefulness of the *Quieting of Titles Act* considerably. Once title to land has been registered the title is, so to speak, "quieted" by virtue of the guarantee of title that arises under the *Land Titles Act*. If there are to be changes to that registered title, these would take place under the provisions of the *Land Titles Act* (which may sometimes involve an application to the courts) rather than through the *Quieting of Titles Act*. The key to obtaining first registration, moreover, and thus to obtaining the statutory guarantee of title, is simply a certificate of title provided by a solicitor. In some cases, the solicitor may obtain a second opinion from an adjudicator before certifying title. In other cases, presumably, the solicitor may only become willing to certify title once a specific objection has been ruled invalid under Rule 66. Whatever the background, though, once the solicitor certifies title and the title is registered, the statutory guarantee becomes operative and the *Quieting of Titles Act* becomes irrelevant.

It seems, therefore, that the situations in which the *Quieting of Titles Act* still has value are those in which good title exists (a bad title will not be

"quieted") but the solicitor investigating the title cannot safely certify it. Examples might include cases in which there is an active disagreement as to title or boundaries and cases in which title depends in whole or in part upon adverse possession. A decision to repeal the *Quieting of Titles Act* in favour of an application or action under the *Rules of Court* should only be taken if situations of those kinds can be adequately dealt with by these other proceedings.

The *Quieting of Titles Act* could, of course, continue to exist even if a completely satisfactory alternative existed under the *Rules of Court*; an Act can be superfluous without being positively undesirable. We think, though, that unless the *Quieting of Titles Act* provides real added value it would be better to dispense with it. Sooner or later it will require an overhaul in any event, and if a satisfactory alternative already exists, repeal seems a simpler and more attractive option.

We have reviewed a large number of decided cases under the *Quieting of Titles Act* to see whether the procedures under that Act accomplish anything that could not have been accomplished by an ordinary application or action. For the most part, we think not. The cases seem to be perfectly ordinary disputes between well identified parties about issues such as boundaries, chains of title and adverse possession. Admittedly, an order made in an application or action would only bind the parties, whereas a certificate of title or a declaration under the *Quieting of Titles Act* binds everybody, but parties are broadly defined under Rule 5, and provisions such as Rule 38.05 deal with service on persons who are not parties to an application but may be affected by the order sought. We believe that a declaration issued in proceedings under the *Rules of Court* should be a satisfactory basis on which to register title, and thus to attract the guarantee of title under the *Land Titles Act*.

There are, though, also a small number of cases in which the parties are not well identified, at least not initially. An example might be a case in which there is an intestacy followed by a lengthy gap in the documentary title, and it is unclear who owns what. In cases like these the notice provisions of the *Quieting of Titles Act* serve the purpose of at least attempting to bring the application to the attention of the people who may be affected by it. Do cases of this sort militate strongly in favour of retaining the *Quieting of Titles Act*?

We would be interested to receive comment on

this. Our impression at present is that there may be a few small elements of the *Quieting of Titles Act* that, if the Act were repealed, might be worth carrying forward into a new Rule of Court dealing with declarations of title to land. Provisions relating to substituted service when interest-holders are unknown would probably be at the top of our list. Provisions for the content of solicitors' and/or surveyors' affidavits might also be useful, especially in cases in which there was really only one party before the court.

On the other hand, some people may feel that the existing *Rules of Court* already contain all that is needed in order to deal with such cases. The *Rules*, they might suggest, may not specifically deal with declarations of title to land but are nevertheless capable of handling the problems that will occasionally arise.

We would welcome any views on this. We would also be interested to receive information about a subsidiary issue, namely any practical experience people may have had in the operation of Rule 70.05. This states that

(1) Every question concerning title to land that might 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.

If people have made use of Rule 70.05, does their experience reveal anything about the viability of using applications and actions as a replacement for the *Quieting of Titles Act* in the way that is suggested in this note?

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 15th 2004, if possible.

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