

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. Bulk Sales Act

Bill 36, *An Act to Repeal the Bulk Sales Act*, received royal assent on June 30, 2004. It repeals the *Bulk Sales Act*, effective August 1, 2004. Transitional issues (e.g. cases in which litigation is already under way on August 1) will be dealt with under the *Interpretation Act*; Bill 36 contains no specific transitional provision.

2. Class Proceedings

We have received a few short letters in reply to the discussion of class proceedings legislation in Law Reform Notes 19, and we are expecting to receive a submission from the civil litigation section of ABC-NB-CBA in the near future. We

will be formulating our recommendations on the subject after we have heard from them.

In the meantime, we encourage anyone who still wishes to comment to do so, either to us or to the civil litigation section. We are not expecting that there will be much further consultation on this subject beyond the discussion in Law Reform Notes 19, where we focused on the issues of (a) opting in and opting out, and (b) costs, and we invited people to raise other issues if they wished. As we noted then, we see the Uniform Law Conference's *Uniform Class Proceedings Act* as a well-established model on which legislation in New Brunswick should be based, though we will recommend adjustments

to the to the *Uniform Act* if these are required. Anyone who wishes to review the text of the *Uniform Act* will find it on the Conference's website (<http://www.ulcc.ca/en/poam2/>) under "Proceedings of Annual Meetings," 1996.

3. *Quieting of Titles Act*

In Law Reform Notes 19 we raised the question of whether, now that the *Land Titles Act* is in force throughout the province, the *Quieting of Titles Act* could 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*. Registration under the latter Act guarantees the registered owner's title in much the same way that a certificate of title under the *Quieting of Titles Act* does.

We received several responses to this suggestion, all of them urging caution. The specific concerns that were mentioned related to situations in which the identities of the potential respondents were unknown and/or title was based on adverse possession. A more general comment was that the *Quieting of Titles Act*, though cumbersome, had the virtue of being specifically designed to deal with its subject-matter, which the general *Rules of Court* (leaving aside *Rule 70*) were not.

Having reviewed these comments, we now think that some features of the *Quieting of Titles Act* have more value than we had originally thought, and that they would not easily be accommodated under the *Rules of Court* as they now stand. Nonetheless, we believe that the general approach we have been considering is worth further exploration. It would simplify and modernize New Brunswick's law in the new legal context created by the *Land Titles Act*, and it could be done, we believe, in a way that retains the current benefits of the *Quieting of Titles Act*.

As we have investigated the details of this, we have also come to suspect that an even simpler approach may be available in some cases. If the applicant's claim of ownership is uncontested, we believe that it might be possible to avoid court proceedings entirely and to rely instead on a special form of application for first registration of title under the *Land Titles Act*. We have not yet had the opportunity to discuss this in detail with the Registrar General of Land Titles, so our

outline of this possibility will be tentative. Nevertheless, section (a) of the material that follows will present our preliminary thoughts on the possible use of the *Land Titles Act* for uncontested matters. Section (b) will then discuss how contested cases might be dealt with under the *Rules of Court* rather than under the *Quieting of Titles Act*, and section (c) will consider how uncontested cases might be dealt with under the *Rules of Court* if a process for dealing with uncontested matters under the *Land Titles Act* is *not* put in place. Finally, section (d) deals with public notice, a topic that recurs throughout this Note.

(a) *Land Titles Act*

The key to obtaining first registration of title at present is that a lawyer must certify title in accordance with the Law Society's *Standards for the Practice of Real Property Law*. The *Standards* require a good chain of title based on an acceptable root that is at least 40 years old. If the solicitor certifies title, the Registrar General may (and does) register title in reliance upon that certificate.

Against that background, we believe that the main gap that the *Quieting of Titles Act* fills occurs in cases in which the documentary title is deficient but the defect is overcome by possession. If this is the case a court can issue a certificate under the *Act*, even though a solicitor would not be able to certify title in accordance with the *Standards*. If, though, the defect is not overcome by possession, neither the solicitor nor the court will issue a certificate.

We understand that a number of applications under the *Quieting of Titles Act* are uncontested, and are decided on the basis that the applicant's documentary evidence supports his or her claim of title, and that the public notices have not prompted any adverse claims. These are the cases, we suggest, that could be dealt with under the *Land Titles Act* without the need for a court application. The Act would need amending, of course, to put this new procedure in place.

The main elements of the procedure would be these.

- There would be a request for registration, backed up with a certificate of title (qualified) and affidavits making

full and fair disclosure of the relevant facts. The property description would need to meet the requirements for issue of a PID. There would be a requirement to give public notice; this would be an important safeguard in establishing that the application was, indeed, uncontested.

- If no objections were received, the Registrar General would investigate the title. If satisfied that the title was good despite the flaw in the documentary chain, the Registrar General would register it. If there were objections, or if the Registrar General were not satisfied that the title was good, the title would be rejected, and the applicant could apply to the court under section 79 of the *Land Titles Act* as "a person who is dissatisfied with a decision of the Registrar General."
- Registration would generate the normal guarantee of title under s.16, subject to possible rectification later under ss.68-73.

If this approach seems attractive, we will discuss it further with the Registrar General. We assume that a procedure of this sort would probably involve a higher application fee than an ordinary application for first registration, reflecting the additional work involved, and perhaps the additional risk. However, we would have thought that even with an increased fee this process might have attractions over one that involves, first, an application to the court under the *Quieting of Titles Act* or the *Rules of Court*, and then an application for first registration afterwards. We would welcome comments on this.

(b) Contested cases

Under the approach outlined above, one form of contested case would be an application under s.79 of the *Land Titles Act* following the Registrar General's rejection of a request for registration. These cases, we think, should not need any special attention from the procedural point of view. The material before the court would include the affidavits originally submitted in support of the request for first registration of title, as well as the Registrar General's reasons for rejecting the request. The process of public

notice and objection involved in that request should have identified the substantive parties to the dispute under s.79. The court should therefore be well placed to proceed.

Cases that need more thought, though, are those in which the person claiming title to the land knew from the outset that there was a dispute. How would these be dealt with if the *Quieting of Titles Act* were repealed?

If all the parties are known, we believe that ordinary proceedings under the *Rules of Court* should be entirely adequate as a means of obtaining a declaration of title to land which would serve as a basis for subsequent registration under the *Land Titles Act*. If the proceedings involved a substantial dispute of fact, they would be by way of action. If not, they would be by way of application. This differs in form from the *Quieting of Titles Act*, under which proceedings are commenced by Notice of Application (s.1(4)), but is probably less of a difference in substance, especially bearing in mind the Court of Appeal's recent statement that "Pleadings should be ordered in any case where an Adverse Claim is filed under the *Quieting of Titles Act*" (*Merrithew v Dunphy's Poultry Farm Ltd.* [2003] NBJ 441, para.4). If the applicant knows at the outset that the proceedings involve a substantial dispute of fact, it seems simpler to treat them as an action from the outset rather than to begin them as an application and then convert them into an action later.

Would an action or application between known parties need to incorporate any of the major special features of the *Quieting of Titles Act*? We see these as being its provisions on the content of affidavits (ss.1-3), public notice (ss.7, 9 and 11), the preservation of certain interests (s.18), the binding effect of the certificate of title (s.22) and subsequent reinvestigations of title (s.29).

We currently think that no special provisions of this kind should be needed when all of the parties are known. Affidavits and other evidence, we would think, could be dealt with on the normal basis that the applicant/plaintiff must present whatever evidence is necessary to prove his or her entitlement to the order sought, in the face of opposition by the respondent/defendant. If there are gaps in the evidence or if it is unconvincing, the order will not be granted.

Giving public notice also seems unnecessary if all of the parties are known. Under the *Rules of Court* the applicant must join as parties "everyone whose presence is necessary to enable the court to adjudicate effectively and completely the matter before it." If these people are all joined, there seems no need to give notice to anyone else.

As for the remaining special features of the *Quieting of Titles Act* – the binding effect of the certificate of title, the preservation of certain interests and the possibility of reinvestigation of title – we consider that these are covered by the *Land Titles Act*. When the successful applicant subsequently registers title under the *Land Titles Act*, title will be guaranteed (s.16), but will be subject to specified "overriding incidents" (s.17 – these are similar to the exceptions in s.18 of the *Quieting of Titles Act*), and will be capable of being rectified later in cases of error (ss.68-73).

What about cases in which there is a known dispute, but this only involves one of several potential deficiencies that could now be resolved by the issue of a certificate of title under the *Quieting of Titles Act*? For example, there might be a known dispute with a neighbour over boundaries, but also a potential issue relating to a missing heir. Could all of these issues be dealt with in an application or action under the *Rules of Court*, and if so, what special provisions would be needed?

The answer would depend on whether the other potential adverse interest holders were identifiable and could be served. If they were, it should be possible to proceed in accordance with the ordinary *Rules of Court* without difficulty. Parties would be served; the applicant/plaintiff would have to prove his or her case; the orders issued would bind the parties; and success in the proceedings should put the applicant/plaintiff in a position in which his or her lawyer could, with confidence, certify title as part of a normal application for first registration under the *Land Titles Act*.

If, on the other hand, some of the potential adverse claimants could not be identified, or could not be located sufficiently to permit even substituted service, we think that a procedure for giving public notice of the proceedings would be required. This would give unidentified parties the same opportunity to contest the proceedings as

they currently have under the *Quieting of Titles Act*.

In a case involving unidentified parties as well as identified parties, would it also be necessary to require the applicant to provide affidavits and a certificate of title as now described in the *Quieting of Titles Act*? We think not. Here, too, we believe, we can rely on the fact that the applicant has to prove his or her entitlement to the order sought, and if he or she is successful against one party (the neighbour, say, in the example above) but fails to provide adequate evidence to support a broader claim, the order granted should be more limited than the order originally sought.

Would the same reasoning apply in cases in which, under the recently amended ss.26 and 27 of the *Quieting of Titles Act*, an applicant seeks a binding declaration of a "fact or matter respecting the title to land" rather than a certificate of title? We believe it would.

The reason for seeking a declaration under ss.26 and 27 of the *Quieting of Titles Act* is that one or more identified problems with title have to be resolved, but that once this is done, the known deficiencies with the title will have been cured. Putting this into the context of first registration of title under the *Land Titles Act*, once the declaration has been granted, the successful applicant's solicitor should be able to certify title in the normal way. The solicitor relies on the declaration to mend the known weak links in the chain of title, and relies on professional judgment to say that, once those links are mended, the title is marketable.

A procedure under the *Rules of Court* for a declaration limited to a particular "fact or matter" should operate in much the same way. The applicant/plaintiff can bring an application or action against the parties whose interests are known to be affected by the fact or matter in question. If some of them are known but others cannot be identified, public notice should be given. If, at the end of the process, the applicant/plaintiff obtains the declaration requested, he or she can apply for first registration of title on the strength of the normal certificate of title provided by the solicitor.

Overall, therefore, our current view in relation to contested cases is this. If the *Quieting of Titles*

Act is repealed, and actions or applications under the *Rules of Court* become the standard means of dealing with contested cases concerning title to land, the only real adjustment required in the *Rules* would be to make sure that public notice of the proceedings is given in cases in which the interests of unidentified parties will be affected by the order sought.

Are we right in believing this, or is there more that would need to be done?

(c) Uncontested applications – judicial process

Next, let us consider the approach to be taken if, contrary to suggestion (a) above, no procedure is established under the *Land Titles Act* for first registration of uncontested possessory title, and a judicial process is retained instead. Would it still be possible to repeal the *Quieting of Titles Act* and rely on proceedings under the *Rules of Court*?

We believe that the answer is yes, if the *Rules of Court* are amended slightly, and we think that the previous discussion allows us to deal with this scenario briefly.

As noted earlier, the five key elements of the *Quieting of Titles Act* are its provisions on the content of affidavits (ss.1-3), public notice (ss.7, 9 and 11), the preservation of certain interests (s.18), the binding effect of the certificate of title (s.22) and subsequent reinvestigations of title (s.29). Of these five elements, the second – public notice – would be essential in all proceedings involving unidentified parties, while the third, fourth and fifth, which all relate to the effect of the court order, are superfluous in the light of the provincial guarantee of title under the *Land Titles Act*. Of the five key elements of the *Quieting of Titles Act*, therefore, only the first one – affidavits – needs further discussion here.

In theory, we believe, it would be possible to take the same position in uncontested cases as was outlined earlier in relation to contested cases. This is that there is no need for a revised *Rule* to say anything about affidavits and supporting documents, since it is up to the applicant to prove his or her case, presenting whatever evidence he or she chooses, and if the evidence is insufficient the order that is being sought will not be issued. In practice, though, there is probably much to be said for retaining much of the detail currently required by the *Quieting of*

Titles Act. An abstract of title with supporting documents, a certificate of title and an affidavit by the applicant all seem useful material to put before the judge. Similar documents are required to support an application for first registration of title under s.11 of the *Land Titles Act*. The surveyor's affidavit may also be useful as providing evidence of the facts on the ground, though we are less convinced that a plan should be required as a matter of course. Unless confirmation of the plan is a key element of the application, it should normally suffice if there is an existing property description that meets the requirements for the issue of a PID.

Once one has dealt with the issues of public notice and (probably) the content of the documents submitted in support of the application, the rest of the process seems to fall into place under the *Rules of Court* without the need for further adjustment. If somebody responds to the notice, the proceedings will develop into an ordinary contested application or action, depending on the nature of the dispute. If nobody responds, the applicant can proceed to a hearing and demonstrate to the judge, on the basis of the material provided, that the declaration that has been requested should be granted. In some cases, of course, it might not be. The applicant has the burden of proving his or her case, and if the evidence provided is insufficient, the declaration should not be given.

Our conclusion here, therefore, is that even if the *Land Titles Act* were not amended as described under suggestion (a) to deal with uncontested applications involving possessory title, it should still be possible to deal with these cases satisfactorily by way of application under the *Rules of Court*. The adjustments relating to public notice and (probably) the details of the necessary affidavit evidence seem to be minor. It should not be hard to integrate them satisfactorily into a process based on *Rules 38* and *39*.

(d) Public notice

In each of the previous three sections we have referred to "public notice." We should explain what we have in mind, and how it relates to the notices currently mentioned in the *Quieting of Titles Act*.

Under the *Quieting of Titles Act* the judge must order notice of an application to be given to the

neighbours and to be published in the *Royal Gazette*, and may order publication in newspapers, posting on the land, and any other necessary notice.

In proceedings under the *Rules of Court*, we suggest, public notice would not be needed at all in cases in which all affected parties were identified and could be served. In other cases, however, all four of the elements listed in the *Quieting of Titles Act* – notice to the neighbours, in the *Royal Gazette*, in a newspaper and by posting – should be required as a matter of course. Each is a useful element in a *bona fide* attempt to bring the proceedings to the attention of the unknown parties who may wish to contest them.

In addition, both the Registrar General (if suggestion (a) is adopted) and the court should have the power to require additional notices if appropriate. Clearly there might be cases in which the standard list of notifications needed supplementation.

Should there also be a dispensing power, to be used in cases in which one or more of the four standard notices would obviously accomplish nothing? In principle we see no objection to this, but in practice we doubt that such a power would often be exercised. It seems unlikely that any of the four standard notices would be self-evidently useless, and the process of obtaining a dispensation seems likely to be at least as onerous as giving the notice itself.

Overall, therefore, we think that a dispensing power is probably superfluous, and that the list of public notices to be given in cases involving unidentified parties, whether under the *Land Titles Act* or the slightly revised *Rules of Court*, should be the four standard items mentioned above, as well as whatever additional items the Registrar General or the court might require.

4. Mortgagee's power of sale

Another subject that we discussed in Law Reform Notes 19 was the possibility of repealing ss.44-48 of the *Property Act*, the mortgagee's power of sale, and replacing them with new provisions substantially modelled on the secured creditor's remedy of "disposal" under *PPSA*. We listed what we thought the key elements of the new provisions would be, and asked for

comments on the details.

The responses that we received, however, all took a different tack. In their various ways they expressed doubts that a *PPSA*-based approach was desirable. One lawyer wrote that there was really nothing wrong with the existing sections. Others suggested that the most that needed doing was to remove some of the minor irritants (e.g. the requirement for posting and the excessive number of newspaper advertisements) and to provide clear direction on the problem of determining the sale price and the amount of the deficiency. More generally, there appeared to be a feeling that the current system gave everybody something solid to work with, and that neither mortgagors nor mortgagees would be well served by the more open-ended system that we had proposed, under which mortgagees would have a wide-ranging power of disposal, though subject to an equally wide-ranging duty to act "in good faith and in a commercially reasonable manner" (s.65(2), *PPSA*).

Two other points came out of this discussion and have influenced our reaction. One was the suggestion that the assessed value of property is normally (though not always) a fairly reliable guide to a reasonable price at a mortgage sale; two lawyers mentioned that they used a percentage of the assessed value as the basis of their bidding practices. The other was a suggestion that the mortgagee's deficiency action is normally a waste of everybody's time: that there is normally nothing to enforce the judgment against, and that mortgagees normally only obtain deficiency judgments because CMHC requires this as a condition of reimbursement.

After considering all of these comments we went back to the drawing board and have developed a revised proposal for consideration. It retains an auction sale procedure, with some revisions of the details. It adds an alternative of listing a property with a real estate agent directly, without going through the motions of an auction sale first, and it aims to provide direction as to the price that mortgagees can accept or pay at a mortgage sale and as to the calculation of the deficiency.

Here, then, is the substance of our current proposal for a revised power of sale to replace the existing ss.44-48.

- Like the existing s.44(1)(a), the new power of sale would only apply in cases of non-payment.
- It would be a power to sell by public auction or by listing the property with a real estate agent. If any of our readers think that additional methods of sale would be useful, please let us know.
- The mortgagee would give the mortgagor 30 days notice of intent to exercise the power of sale. During that period the mortgagor could reinstate. After it, the mortgagee could place the property with the auctioneer or real estate agent, though the mortgagor would still have the right to redeem until the sale occurred.
- In the case of a sale by public auction, two public advertisements of the sale would be required in a newspaper. In the case of a sale through a real estate agent, the listing process should provide the necessary publicity, but should include at least two advertisements in a newspaper.
- The mortgagee would be allowed to buy in at a sale by public auction. Buying in might in fact be unavoidable if the mortgagee attempted to bid the price up but ended up becoming the highest bidder.
- The mortgagee would also be able to buy from the real estate agent, though only after the property had been exposed to the market for a reasonable time – perhaps three months. This delay would give time for better offers than the mortgagee's to emerge. Buying in would sometimes be necessary, though. For example, the mortgagee might sometimes need to take title in order to obtain vacant possession of the property.
- Subsequent issues relating to deficiencies and/or sale at undervalue would be determined by reference to the "reasonable value" of the property, as described in the following paragraphs. They would not depend on "duties of care" (or similar expressions), since

what matters most in a mortgage sale is the price obtained, rather than the care applied, and the effect that the price has on the outstanding balance of the debt.

- If the sale was to a third party, either at a public auction or through a real estate agent, there would be a rebuttable presumption that the price paid was the "reasonable value" of the property. Different adjectives in the legislation might make this presumption easier or harder to rebut, but our present view is that it should be hard to rebut. At a sale to a third party, therefore, the mortgagee could accept whatever price it could get, and if the mortgagor considered this unreasonably low, he or she could argue the point in a subsequent deficiency action, but would only be successful in a clear case.
- If the sale was to the mortgagee, there would be a different presumption. This would be that the "reasonable value" of the property was a set percentage of the assessed value – perhaps 75%. If the sale were through a real estate agent and the property had not sold after being on the market for three months, this 75% figure would reduce by monthly instalments until it reached 50%.
- The mortgagee would not, however, have a direct obligation to pay the "reasonable value" described in the previous paragraph; being subject to such an obligation could complicate the mortgagee's efforts to sell the property, especially if it wished to bid less than this "reasonable value" at an auction sale while trying to get an increased bid from another bidder. Instead, in a subsequent deficiency action after the mortgagee had purchased the property, the mortgagee would be obliged to credit the mortgagor with the "reasonable value" determined by the statutory formula – unless, of course, the mortgagee brought evidence to rebut the presumption that this amount was in fact "reasonable." Again, we assume that the wording of the legislation would make the presumption hard to rebut, so the attempt might often not be worth making.

- If the mortgagee did buy in and subsequently resold the property, the resale price would normally be irrelevant. It would be, at most, evidence that one or other of the parties might use in trying to rebut the presumption of "reasonable value" described in the previous two paragraphs, but it would have no specific part to play in the calculation of the deficiency. Moreover, unless the mortgagee brought a deficiency action, the issue of the "reasonable value" would rarely arise at all. Whatever price the mortgagee realizes on a resale, if it is less than the mortgage debt and the mortgagee does not bring a deficiency action, the mortgagor still ends up ahead.
- Finally, we suggest that a limitation period should be a part of the new system. Under the system we have described, issues relating to value, undervalue and deficiencies should all be obvious at the date of the sale. In the interests of finality, we suggest that actions relating to these issues should be brought within six months of the sale. However, the court should be allowed to grant an extension of time to a mortgagee who does not discover the relevant facts in time to bring an action within the six month period.

We would welcome all comments on the above. Our objective, of course, has to been to develop a system that resolves the existing problems surrounding ss.44-48, and that is functional and fair to all parties (though "functional" and "fair" sometimes pull in opposite directions). We will be interested to discover whether our present effort finds more favour than our previous one.

B. NEW ITEMS

5. Marital Property Act

Lawyers preparing the new revision of the New Brunswick statutes have recommended to us that the reference to a "decree *nisi* of divorce" in s.3(1)(a) of the *Marital Property Act* should be brought up to date. Clearly they are right; under

the *Divorce Act* of 1986, decrees *nisi* are no longer granted.

It seems to us that the appropriate amendment is simply to repeal s.3(1)(a) and replace it with the words "a judgment granting a divorce has been rendered." Before recommending this, though, we thought we should check to confirm that there are no reasons for taking an alternative approach: retaining the old wording while adding the new.

The reason for retaining the old wording would be to ensure that the legislation still covered those cases, if any exist, in which a decree *nisi* had been given before the *Divorce Act* of 1986 came into force but had not been made absolute in the subsequent 20 years. We doubt that many such cases exist, but even if they do, we do not see that removing the reference to decrees *nisi* should cause any problem. S.8(2)(d) of the *Interpretation Act* should preserve the potential applicant's right to apply under s.3(1)(a) of the *Marital Property Act*, and s.3(1)(c) and (d) of the *Marital Property Act* provide alternative bases for an application if spouses "are living separate and apart" or if "a marriage has broken down." One way or another, therefore, if there are still any decrees *nisi* outstanding, the parties involved should be able to bring an application under s.3 whether or not the reference to a "decree *nisi*" is still there.

Our conclusion is that the appropriate amendment is to remove completely the reference in s.3(1)(a) to decrees *nisi* and to replace it with a reference to a judgment granting a divorce being rendered. However, if there is something we have overlooked, we would like to know.

6. Assignments for the general benefit of creditors

The Uniform Law Conference of Canada is considering whether to begin a project on fraudulent conveyances and preferences. The project would be designed to modernize the law that, in New Brunswick, is currently reflected ss.1-3 of the *Assignments and Preferences Act* and in the *Statute of Elizabeth*. We will be following the progress of this project with interest.

In the meantime, however, the discussion of this project has led us to take another look at ss.4 to 34 of the *Assignments and Preferences Act*, which deal with assignments for the general benefit of creditors, and to consider whether these sections should be repealed.

The sections date from 1895, towards the middle of the 40 year period when Canada had no federal bankruptcy legislation. Nowadays, however, they seem to serve little purpose. Bankruptcy legislation has been in place again since 1919, and under s.42(2) of the *Bankruptcy and Insolvency Act* an assignment for the general benefit of creditors is void if it is made by an insolvent debtor and is not made under the *Bankruptcy and Insolvency Act*. An insolvent debtor is one who is unable to pay debts of \$1,000 or more.

The result, in theory, appears to be that the provincial legislation would now only apply to assignments by people who are unable to pay debts of less than \$1,000. In practice, though, there seems to be little point in providing for this scenario. Debts of less than \$1,000 seem unlikely to lead anyone to invoke the *Assignments and Preferences Act*, and even if the financial threshold for insolvency under the *Bankruptcy and Insolvency Act* were raised at some point in the future, there would still seem to be little need for a provincial regime of assignments for the general benefit of creditors.

We do not at present believe that there is any need to conduct a detailed study of ss.4-34 of the *Assignments and Preferences Act*. We believe they can be repealed without replacement. Before we make this recommendation, though, we would welcome comments on whether they do in fact serve some purpose, either in theory or in practice, that we are not aware of.

7. Marine Insurance Act

Another Act that we think can probably be repealed without replacement is the *Marine Insurance Act*. Again, we would welcome comment on whether there are technical or practical issues that we are overlooking, but it appears to us that the combined effect of Supreme Court of Canada decisions and recent federal legislation is that the *Marine Insurance Act* serves no purpose.

The Act dates from 1943, and is modelled on the English *Marine Insurance Act 1906*. In 1983, however, the Supreme Court of Canada decided that marine insurance fell within the federal legislative jurisdiction over "navigation and shipping" (*Triglav v Terrasses Jewellers Inc.* [1983] 1 SCR 283), and the federal Parliament subsequently enacted its own *Marine Insurance Act* in 1993. This Act is also substantially a reworking of the English Act of 1906, with some modernization of terminology. Other Supreme Court case law has confirmed that the federal power over navigation and shipping includes navigation on internal waters and can extend to activities on dry land when these are sufficiently closely connected to navigation (*International Terminal Operators v Miida Electronics* [1988] 1 SCR 752; *Whitbread v Walley* [1990] 3 SCR 1273).

Against this constitutional and legislative background, we find it hard to believe that New Brunswick's *Marine Insurance Act* can serve much purpose. The "maritime perils" that it applies to are "the perils consequent on or incidental to the navigation of the sea" (s.1), while the federal Act applies to "the perils consequent on or incidental to navigation" (s.2(1)), without restricting this to "the sea." If there are issues that fall within the provincial legislation but not the federal, we would be pleased to have them drawn to our attention. On the whole, though, we are inclined to think that the continued existence of the provincial legislation at this stage is more likely to create legal problems than to solve them, and that repealing the provincial Act would be beneficial.

We note that although Nova Scotia has provisions equivalent to the *Marine Insurance Act* in Part IX of its *Insurance Act*, Newfoundland and PEI do not. We take this as an indication that life without a *Marine Insurance Act* should not be unduly problematic.

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 September 1st 2004, if possible.

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