

## 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. Marital Property Act

In Law Reform Notes 20, we mentioned that s.3(1)(a) of the *Marital Property Act* still contains a reference to a decree *nisi* of divorce and should obviously be brought up to date. We wondered, however, whether there might be some existing situations which could be affected if the reference to decrees *nisi* were removed. We thought not, and nobody has written to suggest otherwise. We have therefore recommended removal of the reference to a decree *nisi*, and its replacement with a reference to a judgment granting a divorce.

#### 2. Assignments for the general benefit of creditors

Another question we raised in Law Reform Notes 20 was whether sections 4 to 33 of the *Assignments and Preferences Act*, which deal with assignments for the general benefit of creditors, should be repealed. We thought they should be, and nobody has suggested otherwise in response. We have recommended their repeal.

### 3. Marine Insurance Act

This is another Act which, we suggested in Law Reform Notes 20, should simply be repealed. Again we have heard nothing to the contrary and have recommended that the Act be repealed.

### 4. Class Proceedings

Several recent issues of these Notes have discussed the possibility of enacting class proceedings legislation in New Brunswick. Issue 19 contains the fullest discussion of the subject. There we suggested that the Uniform Law Conference of Canada's *Uniform Class Proceedings Act* would be the likely model for any such legislation, and we singled out two particular issues for comment. These were the rules on (a) opting into and opting out of class proceedings, and (b) costs.

In relation to opting in and opting out we suggested that if there were legislation in New Brunswick it should probably follow the model of the *Uniform Act*; under this approach a class proceeding certified in New Brunswick would automatically bind all class members who were residents of the province unless they opted out, but would only bind non-residents if they specifically opted in. Most of the responses we received disagreed with this, arguing that non-residents, too, should automatically be included as class members unless they opted out. One, however, argued that even class members who resided in New Brunswick should only be bound if they opted in. The latter possibility was one that we had discussed in Law Reform Notes 19.

In relation to costs, we pointed out that the *Uniform Act* contains two alternative approaches. One is that the rules on costs in class proceedings should be the ordinary rules that apply in other proceedings. The other is that there should be no awards of costs against a party to a class proceeding or to an application for certification unless the party has acted frivolously or vexatiously. We indicated that we preferred the first alternative. One respondent agreed with this. Most, however, argued for the no costs approach.

We are now in the process of formulating our final recommendations on class proceedings. No decisions have yet been reached, but on the two specific issues mentioned above our current

view continues to be the one expressed in Law Reform Notes 19 – that non-residents should have to positively opt in in order to be part of a New Brunswick class action, and that there should not be a special no costs rule.

As for opting in and opting out, the *Uniform Act*'s requirement that non-residents must opt in (which is now the rule in BC, Alberta, Saskatchewan and Newfoundland) is based on practical and constitutional considerations. Practically, the proceedings are more manageable if the class is primarily local and the court does not have to be continually alert to the interests of absent class members, wherever in Canada (or possibly the world) they may be. Constitutionally, there are concerns as to whether a judgment in a class action in one province can bind class members who are outside that province, whose claims may have no real connection to the province, and who may not even be aware that the class action is under way.

The argument on the other side is that the resident/non-resident distinction is artificial, that it undermines the objective of class proceedings legislation by creating multiple actions where there should only be one, and that it may prevent non-resident class members from obtaining the benefit of the class proceedings even though the province in which the proceedings are brought is the natural forum for the action.

There is merit on both sides of this debate. We note, however, that the Uniform Law Conference of Canada has recently launched a project designed to address the issue by establishing (if appropriate) a legislative framework for national class actions. While that project is under way, we consider that it would be premature to devise our own provisions for national (and possibly international) class actions. We believe that we should study the issues within the context of the Conference's new project, but that in the meantime we should work with the *Uniform Act* as it now stands.

As for costs, all we can say is that we have reconsidered the arguments for creating a special no costs rule for class proceedings, and we do not find them persuasive. In the absence of a no costs rule, courts can still exercise their discretion under the ordinary rule in a way that recognizes the special features of class proceedings. This is what has happened in

other provinces that have retained the ordinary rule.

If, on the other hand, a no costs rule were established, especially one that only applied to certain parts of the proceedings, this would raise the stakes as to the precise procedural mechanics by which the litigation is advanced. The opposing parties would tend to have competing incentives to steer the proceedings either towards, or away from, the shelter of the no costs rule, depending upon their own view of their own best interests at the time. We think that this is undesirable, and we do not see how it can be avoided under a legislative framework that has one rule on costs for class proceedings, or for some parts of intended class proceedings, and another rule on costs for everything else.

Overall, therefore, we have not been convinced that the ordinary rule on costs should be varied for class proceedings.

#### 5. Quieting of Titles Act

In previous issues of these Notes we made the suggestion that if some minor amendments were made to the *Rules of Court*, the *Quieting of Titles Act* could be repealed, with its functions being taken over by the combined effect of (a) ordinary proceedings for a declaration of title to land, and (b) subsequent registration of title under the *Land Titles Act*. Under this approach, we suggested, the necessary amendments to the *Rules of Court* would relate to the giving of public notice and to the affidavits to be used in the application. We also considered the possibility of avoiding court proceedings entirely in uncontested cases, and creating instead a special form of application for first registration of title under the *Land Titles Act*.

We have not been able to return to this subject since discussing it in Law Reform Notes 20, but we hope to do so in the new year. We would therefore still welcome feedback.

#### 6. Mortgagee's power of sale

Our long-running discussion of the mortgagee's power of sale is in substantially the same position as the *Quieting of Titles Act*. In Law Reform Notes 20 we explained our current tentative recommendation for a revised power of

sale, but we have not had the opportunity to return to the subject since. The revised power of sale would retain a specific procedure for auction sales, with some amendments, and would add a procedure for selling mortgaged property through a real estate agent without going through the motions of an auction sale first.

We have had some response to this suggestion, but would welcome more. We expect to be finalizing our recommendations in the new year, so if anybody else wishes to comment, we encourage them to read the material in Law Reform Notes 20 and to let us have their views.

#### B. NEW ITEMS

There are no new items that we wish to present for discussion at this time.

*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 1<sup>st</sup> 2005, if possible.*

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