

Faculty of Law
University of New Brunswick



Commercial Law
Law 2223

Commercial Law
Professor N. Siebrasse

10 December 2004
1:00 - 4:00 p.m.

INSTRUCTIONS

1. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or electronic aids.
2. This examination is 3 hours long.
3. This examination is 6 pages long (including this page). Please check that you have all 6 pages.
4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.
5. Assume all transactions occur in New Brunswick unless otherwise specified.
6. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective (for example, if the question asks if the rule is sound as a matter of policy, or asks whether the should be implemented in some area of law) be sure and address both advantages and disadvantages of the rule and the relevant options.
7. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B- grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.
8. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

Question 1 – 15 marks/minutes (total)

The Bank of Fredericton entered into a security agreement with Kim Madshus in which it agreed to lend her \$10,000, taking all her present and after-acquired property as security. Using its direct online access to the personal property registry, the Bank correctly entered all of the information required to register a financing statement in respect of the transaction. However, at the time that the registration information was transmitted, the Personal Property Registry (“PPR”) was hit by a virus which temporarily disabled the system. As a result, the Bank’s registration was lost by the Registry. It can be proven that one of Service New Brunswick’s employee’s responsible for system maintenance had negligently failed to update the anti-virus software. It can also be proven that if the anti-virus software had been properly updated, the system would not have been disabled. The Bank then advanced the \$10,000. Kim subsequently borrowed \$20,000 from the Miramichi Trustco, secured by all of her present and after-acquired property. The Miramichi Trustco registered an appropriate financing statement, which was correctly received by the system, and advanced the \$20,000. Kim subsequently defaulted on both loans. All of her property is worth only \$24,000.

Part A – 5 marks/minutes

What are the priorities as between the Bank and the Trustco? What would the priorities have been if the Bank’s registration had been properly received and registered? Explain

Part B – 10 marks/minutes

If the Bank’s priority position is adversely affected by the system failure, does the Bank have an action for damages against Service New Brunswick? Discuss whether the rule which grants/denies the Banks action against SNB is sound as a matter of policy.

Question 2 – 16 marks/minutes

Section 3(2)(b) of the PPSA provides that the priority and registration provisions of the PPSA apply to a lease for a term of more than one year. . .that [does] not secure payment or performance of an obligation.” Explain the policy justification for this rule, considering both why a true lease for a term of more than one year is deemed to be a security interest, and why a true lease for a term of less than one year is not deemed to be a security interest, for registration and priority purposes. Part V of the Act does not apply to these transactions (see s. 55): why not?

Question 3 – 14 marks/ minutes (total)

D is a bankrupt debtor. One of D's main assets is a printing press which is collateral for a \$40,000 loan from the Bank of Fredericton.

Part A – 7 marks/minutes

The trustee believes that the printing press can be sold for \$60,000 if due care is taken in the sale. However, the trustee does not believe that the press can be sold for \$20,000 if it is sold subject to the Bank's security interest. The Bank has taken no action to realize on the security of the printing press. How would you advise the trustee to proceed? Explain.

Part B – 7 marks/minutes

The trustee believes that the press can be sold for no more than \$35,000, even if due care is taken in the sale, but the printing press can be used to complete outstanding contracts which would bring in a profit of \$10,000 if they could be fulfilled. The Bank has proposed to retain the collateral in satisfaction of the debt. The trustee is worried that when the 15 day notice period expires and the Bank obtains clear title to the press, it will remove the press and the trustee will be unable to fulfil the outstanding contracts. How would you advise the trustee to proceed? Explain.

Question 4 – 18 marks/minutes

The Bank of Fredericton has agreed to provide Debbie with a secured line of credit with a limit of \$15,000, taking all of her present and after-acquired property as collateral. Debbie and the Bank enter into a security agreement to this effect and the Bank perfects its security interest by properly registering a financing statement in the PPR. Debbie borrowed \$1,000 on the line of credit. Debbie runs a small business from her home, and she owed the Office Depot \$2,000 for office supplies which she bought on credit. The Office Depot obtained a default judgment against Debbie for that amount and registered a notice of judgment in the PPR. Debbie then borrowed a further \$3,000 on her line of credit. The Office Depot then informed the Bank of its registered notice of judgment by means of registered mail directed to the Bank's address specified in the financing statement, to the attention of the loan officer who was also specified in the financing statement. The loan officer received the notice, but did not take any steps to limit Debbie's line of credit. Debbie then borrowed a further \$5,000 on her line of credit. Debbie's business was not going well, and a dissatisfied customer, Jack Elias, sued her. Jack obtained a judgment in the amount of \$2,000 and registered a notice of judgment in the PPR accordingly. Debbie defaulted on her payments on her line of credit and the Office Depot instructed the sheriff to commence enforcement proceedings against Debbie.

If Debbie's total non-exempt assets are worth \$8,000, how much will each party receive after all parties have fully enforced (ignore costs of enforcement)? Would the result be different if Debbie were petitioned into bankruptcy?

Question 5 – 17 marks/minutes (total)

In *United Trust Co. v. Dominion Stores Ltd.* Spence J., for the majority, stated as follows:

There is no doubt that [the doctrine of actual notice] as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms.

Part A – 5 marks/minutes

Explain what is meant by the doctrine of actual notice.

Part B – 12 marks/minutes

Explain the law related to the effect of actual notice under the PPSA. Discuss whether the law under the PPSA sound in policy, comparing the advantages and disadvantages of the PPSA approach with the rule set out in *United Trust*.

Question 6 – 20 marks/minutes (total)

Part A – 4 marks/minutes

What is meant by a “right of reinstatement” under the PPSA.

Part B – 9 marks/minutes

There is no right of reinstatement in land law in New Brunswick. Should land law be reformed to provide a right of reinstatement? Explain.

Part C – 7 marks/minutes

The right of reinstatement cannot be waived prior to default, but it can be waived after default. Why? Consider both why the right cannot be waived prior to default, and why it can be waived after default.

Question 7 – 15 marks/minutes (total)

Denise borrowed \$25,000 from the Bank of Fredericton to buy a new car. The loan was secured by the car itself. Two years later, with \$12,000 still outstanding, Denise defaulted on the loan. The Bank seized the car and gave Denise notice of its intention to sell. It advertised the sale by a small print ad in the used car column of the local newspaper. Five days after seizing the car the Bank sold it to Pauline, who had responded to the ad, for a price of \$5,000. It can be proven that if the Bank had advertised more widely, or sold it at auction, or sold it directly to a used car dealer, the Bank could probably have sold the car for approximately \$9,000.

Part A – 8 marks/minutes

What remedies, if any, does Denise have (a) as against the Bank and (b) with respect to the car in Pauline's hands.

Part B – 7 marks/minutes

As a matter of policy, should Denise be able to recover the car from Pauline?

Question 8 – 55 marks/minutes

Dan was a farmer in the Fredericton area. He wanted to borrow money to expand his farm and finance his on-going operations. He approached the Bank of Fredericton with a view to negotiating a secured line of credit using his personal property as collateral. In anticipation of an opening the line of credit, the Bank registered a financing statement in the PPR describing itself as the secured party, "Daniel D. Donaldson" as the debtor and "all present and after-acquired property" as the collateral. Dan's correct name, according to the PPR regulations, was his birth certificate name, which is "Daniel David Donaldson." The financing statement was registered on 1 January 2000 for a 5 year term. Negotiations fell through and the Bank and Dan did not enter into an agreement at that time. Nonetheless, the registration of the financing statement was not discharged.

On February 1, 2000, Dan approached the Miramichi Trustco for the same purpose. The Trustco searched the PPR, using the name "Daniel David Donaldson." The search returned two registrations as inexact matches. One was the Bank of Fredericton's financing statement with the debtor name "Daniel D. Donaldson" which also showed the debtor's address as Fredericton. The other inexact match was to "D. D. Donaldson" with an address in Edmundston. The Trustco nonetheless continued negotiations with Dan. The Trustco agreed to open a line of credit in Dan's favour with a limit of \$15,000 dollars, taking certain specified farm equipment as collateral, namely a tractor, a combine, a grain auger. The tractor and the combine are motor vehicles while the grain auger is not. On February 15, the Trustco registered a financing statement showing itself as the secured party and "Daniel David Donaldson" as the debtor. The financing statement described the collateral as "all present and after-acquired personal property" and also specifically identified the tractor and the combine. The Trustco entered the serial number for the tractor and the combine in the appropriate data field for serial numbered collateral.

information. However, while it registered the tractor serial number correctly, it registered the serial number for the combine incorrectly. On February 20 Dan borrowed \$10,000 on the line of credit.

By April Dan was running short of cash. Dan didn't want to draw on the Trustco's line of credit to the maximum as he wanted to keep it as a reserve. Dan went back to the Bank of Fredericton, which agreed to lend Dan \$5,000, taking all Dan's present and after-acquired property as security. Dan and the Bank entered into a security agreement to that effect and the Bank advanced the funds.

By June Dan was again short of cash. He approached a neighbour, Sara Parker, for a loan. Sara was willing to take the combine and tractor as security as she thought she would be able to use them in her own farming operation if Dan defaulted on the loan. Sara searched the PPR for the debtor name "Daniel David Donaldson" and discovered both the Bank and the Trustco's prior registrations (the Bank's as an inexact match, and the Trustco's as an exact match). She then decided to search according to the tractor and combine serial numbers. Her searches returned the financing statement in respect of the tractor, but her search using the correct combine serial number didn't show anything. Sara examined the financing statement that she had discovered using the debtor name search and realized that the Trustco had used the wrong serial number in respect of the combine. Sara agreed to lend Dan \$8,000 taking the combine as security. They entered into an agreement to that effect and Sara registered a financing statement with herself as the secured party, "Daniel David Donaldson" as the debtor name, with the combine as collateral, entering the correct serial number in the data field for serial number information.

In August Dan was desperate. He held a Saturday morning yard sale at which he sold much of his household property. In particular, he decided he could get by without the stand-alone freezer (the size of a normal refrigerator) which he used to freeze meat and other family food, and he sold it to Ted Paulson for \$500. He also sold the family television, a one year old "high definition" television, to Patricia Peterson for \$1200.

What are the priorities of the parties (including Dan, the Bank, the Trustco, Sara, Ted and Patricia) and in what amount in respect of (1) the tractor; (2) the combine; (3) the grain auger; (4) the freezer; (5) the high-definition television; (6) all of Dan's other personal property.

You need only give the priority of each party and for what amount; you need not specify how much each party will actually receive if the goods are sold. You can assume that Dan did not make any payments on any loans, and you may ignore interest, so that the amount outstanding on any debt is the same as the amount that was actually lent. You do not need to provide a policy justification for the rules you apply.

***** THE END *****