

dangerousness as the criterion for detention of those held after a finding of not guilty by reason of insanity.

*(e) Protection of the Public by Gradual Loosened Control of N.G.R.I. Acquitees*

The Court seems to assume that any new system of protecting the public from dangerous N.G.R.I. Acquitees will often involve gradual lessening of dangerousness as the result of treatment. At one point Lamer, C.J.C. for the majority states as follows:

"Parliament may surely balance individual rights against the interests of protection of society and provide for some system of review. As the individual becomes less of a threat to society, the criminal law progressively loses authority and the coercive aspects of the Warrant are loosened until a point is reached at which the individual is free from any supervision provided under the *Criminal Code*."

*(f) New Federal Legislation*

Comprehensive legislation to amend the provisions of the *Criminal Code* dealing with mental disorder was tabled in Parliament in June of 1986 by the then Minister of Justice, John Crosby. This proposed legislation has been the subject of in-depth consultation involving provincial governments, interested private groups and individuals, and the legal community. The Supreme Court of Canada, in giving the Federal Government a limited six month lead time for a transition period, acknowledged it was aware of the existence of this proposed legislation. While it refrained from examining in detail the constitutional aspects of sections of the *Criminal Code* other than s.614(2), it did hint that other sections of the *Code* appeared to be "constitutionally suspect". For this reason, it is likely that the Federal Government will bring in something resembling its previous comprehensive legislative proposals. This legislation would provide significant changes to the law at the pre-trial, trial and post-trial dispositional stages where mental disorder is in issue.

---

## Is GST Payable On Foreclosure Sales?

by  
Gerald R.P. Moir\*

### Introduction

The Attorney General has advised the sheriffs to collect the Goods and Services Tax on property sold through foreclosure and sale. The sheriffs have been told that GST is payable on all sales of real property unless the sale falls within a specific exemption. The sheriffs have also been told, wisely, that it is not for them to decide whether GST is payable and they must either collect

GST or acquire from the plaintiff an affidavit or statement that GST is not payable on the particular foreclosure sale. The analysis which follows suggests that plaintiffs can give such a statement for all sales under an order for foreclosure and sale.

The legislation implementing the GST is rather complex. In the view of the writer, the legislation is needlessly complex. The following is an attempt to unravel the complexity of provisions in order to answer the question "Is GST ever payable on foreclosure and sale?" The answer to that question will have practical significance only where the purchaser does not obtain an equal input tax credit and where the sale does not fall within a

---

\*Gerald Moir is a partner in the firm of Burchell MacDougall & Gruchy. He practices in the areas of Insolvency Law and Commercial Litigation.

specific exception such as the exemption for used residential properties.

### Nature of the Remedy

It appears that foreclosure and sale has been with us since the mid-eighteenth century when Chief Justice Belcher borrowed the Irish Chancery rules to set up the first court of equity in Nova Scotia. The remedy seems now to be peculiar to Nova Scotia, although it is similar to judicial sale which is employed in many other jurisdictions.

Not much need be said about the remedy for the purposes of this analysis. A suit is commenced by a mortgagee. Upon default of defence and proof of certain facts, the court orders a sheriff to conduct a public auction. When the sheriff knocks the property down to the highest bidder the equity of the mortgagor and that of any subsequent encumbrancer are foreclosed. Title is transferred to the highest bidder. The proceeds satisfy certain municipal taxes, the expenses of sale and some or all of the mortgaged debt. Any surplus is held by the court for those who can prove their interests in the foreclosed title.

### Applicable GST Legislation: General Provisions

Section 165(1) of the *Excise Tax Act*, R.S.C. 1985, c.E-13 as amended by S.C. 1990, c.62 is the basic provision implementing GST. It provides that:

Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada a tax in respect of the supply equal to 7% of the value of the consideration for the supply.

Much of the substantive law concerning GST is found in definitions. The ones that are relevant to this discussion are set out in s.123(1). The definition of "taxable supply" is "a supply that is made in the course of a commercial activity" excepting an exempt supply. A "supply" is defined as "the provision of property ... in any manner, including sale...". "Sale" is defined to include any transfer of ownership of property and any transfer of possession under an agreement for later transfer of ownership.

The definition of commercial activity is extensive. It means (a) "any business carried on by a person" and (b)

"any adventure or concern of a person in the nature of trade" and (c) "any activity engaged in by a person that involves the supply of real property....". The word "person", which is used in all three of these paragraphs, is defined to mean

an individual, partnership, corporation, trust or estate, or a body that is a society, union, club, association, commission or other organization of any kind.

The definition of commercial activity goes on to exclude three categories of activity. The first, paragraph (d), concerns exempt sales and is not of interest for this discussion. Commercial activity does not include (e) "any activity engaged in by an individual without a reasonable expectation of profit" or (f) "the performance of any duty or activity in relation to an office or employment". Unlike the *Income Tax Act*, the *Excise Tax Act* does not define "office" but it does define "officer" to include corporate officers, elected officials and "a judicial officer or a member of a judicial ... body". (The meaning of commercial activity is further extended by s.141 but its provisions are not relevant to this discussion.)

### Analysis: General Provisions

For the purpose of this discussion, the propositions following from s.165(1) and the complex of definitions surrounding it may be stated as follows:

- (1) The purchaser of property provided in the course of a commercial activity must pay GST.
- (2) Property is provided in the course of a commercial activity only if it is provided in the course of
  - (a) a business,
  - (b) an adventure in the nature of trade, or
  - (c) any activity engaged in by a person that involves the supply of real property.
- (3) Property is not provided in the course of a commercial activity if it is provided in the course of
  - (d) exempt supplies,

- (e) any activity engaged in by a natural person without a reasonable expectation of profit, or
- (f) the performance of any duty or activity in relation to an office.

(4) "Person" has the definition stated above.

#### **Analysis: Application of General Provisions to Foreclosure and Sale**

Foreclosure and sale is an activity engaged in by the court through its order and through the consequential action of its officer, the sheriff. It involves the supply of real property to the purchaser. Therefore, foreclosure and sale is within paragraph (c) of the definition of commercial activity if it is the activity of a "person". The sheriff is a person as that word is defined by s.123(1). The court is not within the definition. It is not an "individual, partnership, corporation, trust or estate" and it is not an "other organization of any kind" where that phrase is read in the context of "society, union, club, association, commission". Viewed as an activity of the court, foreclosure and sale does not fall within the definition of commercial activity.

Viewed as an activity of the sheriff, foreclosure and sale does not fall within the definition of commercial activity. The inclusive part of the definition would apply to the sheriff because the sheriff's sale would be an activity "engaged in by a person that involves the supply of real property". However, the exclusive part of the definition also applies to sheriffs acting under orders for foreclosure and sale because the sale is an "activity engaged in by a natural person without a reasonable expectation of profit."

Moreover, foreclosure and sale, whether it is viewed as an activity of the court or of the sheriff, is also excluded from the meaning of commercial activity by paragraph (f) of the definition. The sale involves "the performance of any duty or activity in relation to an office". Some writers suggest that this phrase was intended only to avoid GST on services compensated in wages and the like. However, there are two points that must be observed and that lead inescapably to the conclusion that paragraph (f) does not have such a narrow operation.

Firstly, the exclusion relates to the provision of goods as well as the provision of services. The charging provision concerns any supply that is made in the course of

commercial activity. Supply is defined as "the provision of property or a service". Therefore, the conveyance of property in the performance of a duty is, by paragraph (f), excluded from the charging provision as much as is the provision of a service in the performance of a duty.

Secondly, the language chosen by Parliament does not allow for any such limitation. The word "office" is not defined. The word "officer" is not limited to corporate officers or quasi-employees and, in any event, it is given only an inclusive definition. Feeding the definitions into the charging provision, we read:

Every recipient of a provision of property or a service that is made in the course of [a business, a venture or activity involving real property] but not in the course of the performance of a duty or activity in relation to an office, shall pay to Her Majesty a tax....

This language expressly excludes a sale of property in the course of the performance of a duty in relation to an office. A sale of real property by the court through the sheriff under foreclosure and sale is a sale in the course of the performance of a duty (for the court, the duty to exercise its discretion and, for the sheriff, the duty to obey court orders) in relation to an office (the office of the court or a judge and the office of sheriff).

Based solely on an analysis of the general provisions, no GST is payable by a purchaser at a sheriff's sale held under an order for foreclosure and sale.

#### **GST Legislation: Specific Provisions**

The *Excise Tax Act* deals specifically with mortgaging of property, reconveyance of property by release of mortgage, repossessions and seizure under court order. However, it does not provide explicitly for foreclosure or foreclosure and sale. Nevertheless these specific provisions must be examined for the affect they may have on one's reading of the general provisions.

According to s.134 when read with the definition of "supply", a transfer of property by way of mortgage and a retransfer of property by way of release of mortgage do not attract GST. Section 183(1) provides that where property is seized or repossessed under a mortgage or similar right, no GST is payable (the consideration being deemed to be nothing). However, s.183(2) provides for GST when the seized property is later sold to another.

Section 183(4) concerns seizures by the court. It provides:

For the purposes of this Part, where under an order of the court an officer of the court seizes property and the court subsequently makes a supply of the property, the supply of the property by the court shall be deemed to be a supply made otherwise than in the course of a commercial activity.

**Analysis: Application of Specific Provisions to Foreclosure and Sale**

Foreclosure and sale involves a supply of property by the court. However, it does not involve a seizure. Therefore, s.183(4) does not apply to remove foreclosure and sale from commercial activity if it is included in commercial activity in the first place.

**Analysis: The General Provisions Revisited**

The existence of s.183(4) raises an implication that a court ordered seizure and sale would be within the meaning of "commercial activity" but for s.183(4). Our earlier analysis of the general provisions applies as much to court ordered seizure and sale as it does to a sale by the court without a seizure. This implication of s.183(4) therefore calls into question our earlier analysis of the general provisions: if our analysis is correct, why did Parliament choose to expressly exempt court ordered seizure and sale from commercial activity?

One unsatisfactory answer to this question is that the section is merely declaratory. Parliament only wanted to make it clear that seizure and sale by the court is not commercial activity and, therefore, does not attract GST. The answer is unsatisfactory because it only gives rise to another question: why did Parliament not also expressly exempt court ordered sale without seizure?

No underlying policy emerges from these specific provisions to guide the reader. A policy of requiring GST where property is seized and sold privately cannot be reconciled, in such a way as would shed light on the question of court ordered sales without seizure, with a policy of not charging GST where property is seized and sold publicly. There is no discernable reason to distinguish between sale of property under execution, where seizure is involved and GST is not payable, and sale of property under a foreclosure order, where no

seizure is involved. However, there is likewise no discernable reason to distinguish between private foreclosure by seizure and sale under a power, where GST is payable, and public foreclosure by court order.

An underlying policy cannot satisfactorily be discerned. There is nothing left to guide us except the principle of strict construction of taxing provisions. This favours our earlier analysis of the general provisions and the view that s.183(4) is merely declaratory of what would otherwise be the result of the general provisions where applied in the narrow field of court ordered seizure and sale.

**Conclusion**

A purchaser of property under foreclosure and sale is not obliged to pay GST on the purchase.

**NOVA SCOTIA LAW NEWS**

**Director of Publications**

Ruth Epstein

**Law News Committee**

Estelle Theriault, Chair

Carole Beaton

Duncan Beveridge

Michele Cleary

Mary Helleiner

Hugh Kindred

Nancy Murray

Nova Scotia Law News is published 6 times a year by the Nova Scotia Barristers' Society, 1475 Hollis Street, Halifax, Nova Scotia B3J 3M4. The opinions expressed do not necessarily reflect the official views of the Nova Scotia Barristers' Society.

The publication of the Nova Scotia Law News is assisted by a grant from the Law Foundation of Nova Scotia.

**SUBSCRIPTIONS**

The subscription price for Nova Scotia Law News is \$60.00 per year. A special rate of \$30.00 per year is available for students. Nova Scotia Law News is sent free to members of the Nova Scotia judiciary, to practising members of the Nova Scotia Bar, to members of the faculty of Dalhousie Law School, and, on request, to non-practising members of the Nova Scotia Barristers' Society. Please direct any inquiries to the Barristers' Society Offices. Tel: (902)422-1491, Fax: (902)429-4869.