

Right to Mortgage Prepayment Clarified

The right of a borrower under a mortgage in Nova Scotia to prepay his mortgage is governed by the terms of the mortgage agreement, s.21A of the *Mortgage Brokers and Lenders Registration Act* and s.10 of the *Interest Act*.

The Supreme Court of Canada has recently reversed the decision of the Manitoba Court of Appeal in *Potash vs. Royal Trust Company*, (1984) 8 D.L.R. (4th), 459. In so doing, the Supreme Court inquired into and has established the effect of s.10 of the *Canada Interest Act* with respect to renewal agreements.

In the facts in the *Potash* case the borrower had a 5 year mortgage which was about to expire. Its interest rate was 11¼ per cent. He signed an extension agreement which carried it for a further year with interest of 12¾ per cent. He then signed a further agreement extending the term for a further 5 year period at 18¼ per cent. In this agreement he waived the right to prepayment except with respect to 10 per cent of the principal per year. After 2 years the borrower tendered the principal balance plus 3 months' interest and demanded a release. The mortgage company rejected this tender.

The Trial Division found in favour of Royal Trust, and Potash appealed to the Court of Appeal. The Manitoba Court of Appeal found in favour of the borrower, holding that s.10 of the *Canada Interest Act* referred to a term of 5 years, after which a borrower was entitled to repay his mortgage in full and obtain a release. The court held that the 5 year period commenced on the date of the signing of the mortgage and that the renewal agreement did not constitute a "mortgage." It held that s.10 was consumer protection legislation and that it would be contrary to the policy of the legislation for a mortgagor to waive his rights under it, thus striking out Potash's waiver of prepayment rights.

s.10(1) Interpreted

This decision was appealed to the Supreme Court of Canada which has finally settled the matter. Madam Justice Bertha Wilson wrote the decision concurred in by the other judges. She stated that she had no difficulty in interpreting s.10(1) as saying, "Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage (as amended), payable

until a time more than five years after the date of mortgage (as amended), then, if at any time . . ."

This interpretation entitles the borrower to pay the mortgage in full only at the end of each 5 year renewal period, and avoids the injustices that would occur if the borrower were to be permitted to pay out a mortgage shortly after executing a renewal agreement, notwithstanding its terms. "I find it difficult to conclude that when a mortgage presented by a mortgagee with an option to pay off mortgage at the end of a five-year period or to renew another five-year period and opts for the latter that he is thereby contracted out of his right to repay. It seems to me that what he has done is decide not to exercise it."

Transactions Affected

There are numerous combinations of documents relating to mortgage lending to which this ruling now applies. Many transactions between borrowers and mortgage companies have been held in suspense awaiting the resolution of this point.

It now appears that an agreement renewing a mortgage has the same status as the original mortgage insofar as s.10 of the *Interest Act* is concerned and borrowers will be restricted to the rights set forth in the renewal document.

The question remains as to the effect of s.21A(2) of the *Mortgage Brokers and Lenders Registration Act*, enacted by Chapter 21 of the Statutes of Nova Scotia, 1985. That provision states that a mortgage executed after June 30, 1985, and silent with respect to prepayment, can be prepaid with penalty at any time.

The Supreme Court of Canada has equated a renewal agreement to the mortgage for the purposes of s.10 of the *Canada Interest Act*. If the same interpretation is given to the term mortgage in the Nova Scotia legislation it will follow that if a renewal agreement were silent with respect to prepayment then the mortgage could be paid out at any time.

Solicitors should carefully study the text of the *Potash vs. Royal Trust* decision and the *Mortgage Borrowers and Lenders Registration Act* in order to determine the adequacy of mortgage documentation.

— C.W. MacIntyre