Certifying Title and Qualifying Title under the *Land Registration Act*

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Introduction

Today's sessions have focused on easements, one of more difficult interest types to grapple with when converting clients' properties into the new land registration system. As discussed by others, the *Land Registration Act* involves a lot of "newness" for our practices. New processes and new technology.

The underlying issues and general principles inherent in certifying title under the Registry system ("old world") are in many ways the same when certifying pursuant to the requirements of the *Land Registration Act* (S.N.S., 2001, c.1). However, there are some new relationships, and a new statutory framework within which lawyers are certifying title, which necessitates an examination of how, and in what way our obligations may also have been "retooled". As a result of this "retooling", we may need to further consider the changes that may be required to both the form and content of our certificates of title.

Let us examine each of the key relationships in the statutory framework of the *Land Registration Act,* (the "Act") beginning with the newest of statutory processes- conversion- first in the context of the legal description certification process, or PDCA, and then in the context of the application for registration of the state of title, or AFR. We will then discuss the process involved in subsequent changes, or revisions, to the ownership of a parcel, and the manner in which corrections, or rectifications, to the parcel register are made. We will attempt to identify new obligations affecting certification as we proceed, and those which are the exercise of established obligations but in a new environment.

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I. The Relationship with Government when Certifying Property on Conversion

1. Setting the stage for the relationship

Before the title to a property can be converted into the new system, an individual parcel register must be created (s.11 of the Act). The content of the parcel register is set out in Administration Regulation 11 ("Admin. Reg.") and includes:

- a description of the parcel;
- reference to the instrument that most recently conveyed the fee simple interest;
- the full text of any servitude benefitting or encumbering the parcel; and
- the full text of all recorded interests.

Under the Act, interests in a parcel are divided into two categories-registered and recorded (sections 17 and 47 respectively of the Act). Only those interests which qualify for registration (fee simple, life estate and remainder, and Her Majesty the Queen) are guaranteed by the system to the holder of those interests (s.20 of the Act). Any change in a registered interest in a document filed, must be accompanied by a lawyer's certificate setting out the legal effect of the document (s.18 of the Act).

A lawyer who provides this certificate of legal effect will be liable "to the Registrar General with respect to any negligent error or omission" for 10 years from the date of the certificate if compensation is paid by the Registrar General under the Act (sections 18(7), and 37(11) of the Act) . The system does not extend its guarantee of registered interests to the extent of title (s.21 of the Act).

This is the backdrop for the discussion of the relationship of lawyers with government established by the *Land Registration Act.*

2. Certifying the legal description- the PDCA

Registration of a parcel has two stages. The first deals with an application to have the legal description for the parcel certified. Only authorized submitters (currently surveyors and lawyers who have been "authorized") can make this application. The application for registration must identify the Property Identification number ("PID") "certified by the registrar" to match the description of the parcel (s.37(4)(g) of the Act). The Administration Regulations deal with the steps inherent in this process. A lawyer, when submitting a PDCA on behalf of an owner, must:

> "...assist the parcel owner in identifying the parcel's PID and take reasonable steps to identify the parcel, including:
>
> - reviewing the legal description;
> - reviewing Provincial property mapping graphics;
> - placing a comment if errors in the parcel graphic are identified by the parcel owner; and
> - having the parcel owner confirm the apparent match of the graphics identified by the PID with the legal description" (there are a few exceptions for mortgagee foreclosing etc) (Admin. Reg. 5(5))

As can be seen, the lawyer is not responsible for matching the legal description with a PID. The lawyers' role is to assist the client in identifying the correct match. This necessitates the lawyer reviewing the provincial graphics with the client, and having the client confirm that the location of the parcel as shown, is correct, relative to adjoining lots.

There are very specific requirements with regard to how a legal description is submitted for certification, including a general requirement that the description must be "accurate and complete" (Admin. Reg. 5(7)). It must also contain:

- a description of all benefits, all burdens, all information pertinent to the use of easements;
- evidence of compliance with the requirements of Part IX of the *Municipal*

Government Act (this latter requirement being a particularly touchy subject of late for government and authorized submitters alike).

Part IX of the *Municipal Government Act* sets out the criteria for the subdivision status of the parcel for conveyancing purposes. The requirement for providing a *Municipal Government Act* compliance statement has its origins in the Act (s.37(4)(f)). Requiring it in the PDCA is simply the way the regulations deal with the requirement , in addition to the declaration required on the solicitors opinion (Form 8).

The statutory framework enables "short form descriptions" as a substitute for long form metes and bounds description when there is an approved plan of survey on record which clearly sets out the parameters of the lot (s. 19 of the Act, and Admin. Reg.5(8)(a)(ii)).

3. New obligations for lawyers in the certifying descriptions for the PDCA

Lawyers are familiar with the "old world"obligation to confirm the accuracy of legal descriptions. (Professional Standards for Real Estate Transactions in Nova Scotia- Standard 2.1), but there are new statutory process obligations with which lawyers are not as familiar.

a) Consolidated descriptions-

For example, for consolidated parcels where there is no consolidated description (ie. the description may have been laid out as the perimeter of two separately described lots), a new description is required for the consolidated parcel,(if there is enough information on the plan of consolidation to create one) unless reference can be made to an approved plan for the consolidated parcel, in which case the short form description may be used.

b)Defacto consolidations for multiple parcels in a property

Another example of a new process is a "defacto consolidation" for properties that may consist of more than one parcel. If two(or more) parcels have been both **owned** in common **and occupied**

in common since prior to April 16th, 1987, (for example a city property that consists of a house lot, and a small strip of land for the driveway acquired many years earlier) then the option set out in s. 268A of the *Municipal Government Act* (S.N.S. 1998, c.18) may be available. If electing this provision, a lawyer must first establish with the client that the requirements have been met. Once satisfied, a declaration is required to be prepared and filed in the "old world", prior to the PDCA application, confirming that the lots have been owned in common and used in common for the requisite period (see sample attached as Appendix A). The owner must understand that if this election is made any later re-subdivision must comply with the formal subdivision requirements of the *Municipal Government Act.* If the client does not wish to elect to proceed in this fashion then the lawyer must advise the client that a separate PDCA application will be required for each of the parcels that comprise the property being registered.

c) The requirement for "full text" of benefits and burdens-

One new obligation set out in the *Land Registration Act* is the requirement that the full text of the usage of easements must be included in the legal description for the parcel register (Admin. Reg. 5(7)(e)). For example, it may be that in the title history there was a driveway agreement entered into between two properties. Subsequent deeds would describe the existence of the easement, but would perhaps have referred readers to the book and page reference of the recorded agreement, rather than incorporate all of the terms of usage in subsequent instruments. Now a solicitor is required to go back to the original easement agreement and incorporate all of the terms of use set out in that agreement into the current legal description that is being certified. While this may seem cumbersome and time consuming, it should be remembered that the object of this new system is that those viewing the parcel register ought to be able to see all of the interests that attach to that parcel. The exceptions to the requirement for full text are that restrictive covenants, utility easements and development agreements may be referenced by book and page (Admin. Reg. 5(9)(b)).

d) Specific language requirements-

Lawyers are used to being able to author their own drafting language so as to convey the import

of a legal concept or principle. However, there are some circumstances in the conversion process in which the lawyer's ability to craft their own language is restricted. One particularly frustrating requirement (for all) is that lawyers must on occasion use very specific language in the conversion process, that is not always intuitive to a lawyer's "old world" practice, but which if not used, results in those annoying "rejection" notices from the Land Registration Office. Lawyers must pay attention to details, and note when specific language is required to be used. The *Municipal Government Act* compliance statement is one example of such a requirement.

4. Certifying the state of the title on conversion- (Application for Registration or AFR)

As the practice has developed, it is the seller's lawyer for the most part that is converting property on behalf of the seller in to the new system and therefore the seller's lawyer that is responsible for the title inquiries and the opinion on conversion. The lawyer may or may not have acted for the seller before, and therefore may or may not be privy to the peculiarities of the specific title under review. Let us examine the different components of the lawyer's role on conversion to more clearly understand what it is that we are certifying in the "new world".

a) Registered vs Recorded Interests-

As described earlier, the *Land Registration Act* differentiates between "registered" and "recorded" interests in land. Those interests which qualify for "registration" confer ownership and are part of what will attract the "government guarantee" (see s.20 of the Act for a description of the "guarantee"), while interests that do not qualify for registration are "recorded" .

Recorded interests confer only priority, and not any guarantee (s.47 of the Act). Note clause 18 on Form 8 which specifically confirms that the certifying lawyer "expresses no opinion as to the validity or effect of the recorded interest listed in Paragraph 11". So while there is the obligation to put all recorded interests that are found in the abstract of title in the parcel register at the time of conversion, that obligation does not extend to certification to the registrar as to the effect of those interests in the opinion given.

The registered interests that are the subject of the government guarantee, are backed by a qualified solicitor's opinion of title for ten years from the date the certificate is given. Thereafter, the risk is transferred to government. Of particular interest is section is s.37(11) of the Act:

> "s.37(11) A qualified solicitor is liable to the Registrar General with respect to any negligent error or omission in an opinion furnished pursuant to this Section if the Registrar General has, within ten years after the opinion was furnished to the Registrar General, been required to pay compensation pursuant to this Act as result of the negligent error or omission."

(See also similar language in s.18(7) of the Act)

As can be seen, the threshold for liability is familiar, but the relationship in certifying to the government is new, as is the time frame limit for liability. The form of a solicitor's opinion of title on conversion is a statutorily mandated form (Form 8). So at the time a property is first brought in to the new system either on the basis of voluntary conversion or by mandatory trigger, a full title search is conducted, and all of the interests affecting a parcel are reflected on the parcel register and are the subject of a solicitor's opinion of title to the government (s.37(4)(b) of the Act).

The Act also prescribes the foundation threshold for the solicitor's opinion (s. 37(9)):

> "S.37(9) The solicitor's opinion of title shall be based on an abstract of title certified showing the chain of ownership of the parcel
>
> (a) to the standard required to demonstrate a marketable title pursuant to the *Marketable Titles Act* or to the standard required pursuant to the *Limitation of Actions Act* or the common law;
>
> (b) to such lesser standard as the Registrar General may approve".

Again, this is not foreign to lawyers, but in the new world, all of the information must be filed with the Land Registration office, and once filed will be subject to audit. The Professional Standards for Real Estate Transactions in Nova Scotia ("the Professional Standards") set out the requirements before an opinion on title can be prepared (Professional Standard 3.1). The opinion must be based on the abstract of title, and

> "the abstract must be capable of being read and understood by a person who has not

searched the title, without reference to any documents or records external to the abstract"

It is not enough that you "know" that the mortgage shown as unreleased in the abstract has been paid out, so is no longer a "live" interest in a parcel at the time of registration. If there is an outstanding mortgage showing in the parcel register, for which a release of mortgage has not yet been registered or recorded, and it is not a mortgage which is not considered an interest under the Act (s.40 of the Act citing those mortgages over 40 years old, and see also s.24(2) of the *Limitation of Actions Act* for mortgages twenty years old if certain criteria are met), then it must be shown as a recorded interest in the parcel register. Similarly, the fact that you know your client is not the judgment debtor is not sufficient- a declaration to that effect must be filed at the Land Registration Office, and a copy must be included with your abstract.

Form 8 also requires a declaration by the solicitor that:

> "The abstract of title has been prepared in accordance with the standards for the practice of real property law, recommended by the Nova Scotia Barristers' Society"(paragraph 14 of Form 8).

The electronic AFR application is very specific with regard to the certification for each parcel registered. The electronic form ends with the requirement for the submitting solicitor to certify that:

- The information contained in this Application for Registration is a true and correct summary of the title information disclosed by the records on file in the office of the Registrar of Deeds for the County where the parcel lies.

This the familiar "old world" threshold for certifying title with which we are all familiar.

- The information contained in this application includes any necessary reference to occupancy of the parcel and residency as identified by the applicant.

This is a reference to Form 5, which will be discussed shortly. It should be remembered that this is a confirmation of the manner in which third party interests may be affected by a registration, and the importance of a lawyer's role in this process to ensure the applicant fully discloses any third party interest affected by occupation of the parcel.

- A title search with respect to the parcel described in this application has been conducted in accordance with the current Nova Scotia Barrister' Society Professional Standards: Real Property Transactions in Nova Scotia .

This is a reminder for lawyers that reference should be made to the Professional Standards found on line at **www.nsblcf.ca/realestate.htm** when exercising professional judgment in certifying title .

- There are no other registered encumbrances affecting the title to the land except those specified herein;

This statement reminds lawyers that the parcel register will constitute a guaranteed title, and so a lawyer must certify that there are no other interests other than those disclosed in the application for registration.

- I have obtained all affidavits and other documents required under section 37 of the Land Registration Act and the Land Registration Administration Regulations

Lawyers must have all documents which support their opinion **in hand** at the time an application for registration is submitted. The certification also requires the lawyer to certify that the required documents will be filed with the applicable Land Registration Office within the required time frame.

b)The "Bundle"

While certifying title is a familiar role for property lawyers (Professional Standard 1.3 and see also the resource article included as a reference in that Professional Standard- "Abstracts and the *Land Registration Act"* (at page 9)), the manner in which the opinion is required to be documented under the *Land Registration Act* is not. Rather than merely ensuring that all the information on which the opinion is founded is kept in a clients' file, there is the statutory obligation to furnish both the opinion, and all of the information on which the opinion is based to the Registrar (see s.37(4) of the Act and also specifically Admin. Reg. 9(4)). This information is commonly termed "the Bundle". Also new is the time requirement for the filing of the "Bundle"

with the Land Registration Office - 15 days from "raising" the title, or completing the Application for Registration (Admin. Reg. 9(4)). Failure to do so will attract a "processing fee" (although it may feel like a fine) of $100.00 and late filing may also give rise to an audit if circumstances warrant.

The contents of the Bundle must include:

- An abstract of title (that is legible) and copies of all subsearches, either registry or electronic (s.37(4)(c) of the Act). This should include the legal description that is being certified;
- Cover Sheet (Form 23- Admin. Reg. 9(4)(a));
- an original signed copy of the Statement of Registered and Recorded Interests in a parcel (or "SRI" which is generated electronically by the system upon registration of a parcel -Admin. Reg.9(4)(f));
- an authorization to submit the application if applicable (Form 4-Admin. Reg. 9(4)(b));
- an owner's declaration regarding use, occupancy and residency (Form 5-Admin.Reg. 9.(4)(c));
- a copy of the Form 9 Notice if there is someone declared by the owner to be occupying any portion of the property without consent (Admin Reg. 9(4)(c)); and
- an original signed opinion of title (Form 8- s.37(4)(b))
- any supporting documents relied on for the opinion that are not recorded together with any recording fee if required (Admin. Reg. 9(4)(d)). Examples of supporting documents may include a death certificate, if not already recorded, Property Details print out for reconciliation purposes that was used in any review of the parcel register, and a copy of the Confirmation of Graphics form signed by the client to confirm relative location as the basis for the registrar's match of the parcel with a PID.

As can be seen, the authority accorded to lawyers who are authorized and "qualified" to work in the new system and "raise" title when registering parcels on behalf of clients in the new system, and the new associated obligations are clearly set out in the statutory framework, and coupled with our continued obligations to exercise professional judgement operate to impose a significant responsibility to those who choose to work within this new system.

There are some specific aspects of our certification to the new system that are worthy of some further comment.

c) Access-

The *Land Registration Act* (s.37(4)(b)) requires that a solicitor certify, as part of an application for registration and part of their opinion (Form 8) the status of access to the parcel, if any, that appears on the face of the record. Again, this is not a new obligation (Professional Standard 2.1), rather a new process of having to confirm this information at the time and as part of the application for registration (AFR) this information. This is therefore part of the solicitor's opinion to the government.

d) Possessory Interests and Prescriptive rights-

The Act allows for the registration of interests based on possession and use in the same manner as traditional paper based interests. These kinds of interests do not attract any special qualification to government guarantee (unlike some other jurisdictions). As with paper based interests, it will be the solicitor's opinion of title that gives rise to the issuance of the government guarantee for the registered interests in that parcel.

The Professional Standards (3.2 -Possessory Title and 3.3- Prescriptive Rights) reflect that these kinds of interests may be certified by lawyers. These same standards also caution and remind lawyers that they **must** "document facts" evidencing these kinds of interests. If there are interests that may be lost over time as a result of the operation of the *Land Registration Act,* a lawyer **must explain** the qualifications to the client and "confirm the client's instructions prior to

closing" (Professional Standard 1.3 Certified Opinion of Title and Certificate of Legal Effect).

Section 73 of the Act deals with overriding interests. If there is an overriding interest (ie. easement 'used and enjoyed') which is not reflected in the parcel register, the Act provides that it will continue, notwithstanding the absence of its' reference in the parcel register. However, a lawyer should review with the client the nature of this kind of interest, and consider the option of documenting the existence of this kind of interest, by way of statutory declarations for example. Once filed, these declarations constitute the enabling instruments necessary to qualify for the incorporation of that interest in the parcel register as a benefit, rather than relying on the possibility that later the overriding interest either does, or worse still, does not exist.

As a general principle, when we certify paper based interests, we confirm with the client that we cannot speak to the extent of the parcel or boundary definition (see s. 21 of the Act and Form 8). The certification however, of possessory interests may involve some assessment of extent. After all, these are interests based on **possession**. If what is being occupied is the whole of a parcel described in a deed, then it is reasonable to conclude that the standard lawyer's qualification with respect to extent may still apply. It may be however, that only part of a parcel is being claimed through adverse possession. In those cases I suggest that certification can not reasonably result without a review of objective evidence as to the extent of the parcel being possessed. Evidence of extent should be sought out, and examined. Surveyors and the aerial photography at Crown lands are the obvious sources for this kind of quality evidence.

e) Form 5- Declaration of Occupancy and Residency

The Act requires that lawyers when completing an Application for Registration, secure a declaration from the owners with regard to the occupancy of a parcel (Form 5). This declaration is required to be filed with the lawyer's opinion and abstract of title in the Bundle. It requires an owner to declare whether any part of the property being registered is occupied, in whole or in part, by any person without their consent. This is not a declaration requiring a legal conclusion, rather it is a form requiring a declaration as to the facts of occupation. If there is any occupation

of any part of the property without consent of the owner, then the owner is required to speak to the particulars known of that occupation.

As lawyers, we will be required to assist our client in assessing whether the nature of the occupation is such that it gives rise to a competing interest in the parcel. If so, we must provide our opinion to that effect to our client, and in turn reflect that opinion when registering a parcel into the new system. While advice to clients with regard to these kinds of interests is not a new obligation, this declaration reviewed in preparation for conversion into the new system may affect third parties. Consideration of other provisions both within the statute (s.75 of the Act) and in other statutes (*Limitation of Actions Act* R.S.N.S. 1989 c.258) or common law may impact on the advice given for these kinds of interests. Professional Standards 1.1 and 1.2 have particular application. Familiarity with new legislation affecting title or ownership rights, and the impact of migration (conversion) on both the client and persons other than the client is inherently part of the fulfillment of the obligations associated with assisting the client in the completion of this declaration.

f) Crown or "green" layer on Property Online

On January 20th, the Provincial Crown Lands or "green" layer was put onto Property Online. This has caused some lawyers to question how their certification to the system is affected by the appearance of green cross hatches on the parcel being converted.

A common misconception is that if the abstract for the parcel reveals a clear paper chain of ownership of over 40 years, then that ought to be conclusive to extinguish any possible outstanding interest that the Crown may have. Not so. Section 9 of the *Marketable Titles Act* (S.N.S. 1995-96 c.9) confirmed that interests in Her Majesty the Queen were not bound by the provisions of that Act. While the provincial Crown is bound by the *Land Registration Act* one must be satisfied that there is evidence of 40 years plus a day of possession of such a nature as to extinguish any possible Crown interest. Interestingly while paper title will not, absent evidence of possession, be sufficient to extinguish any possible interest of the Crown, possessory title of

40 years plus a day absent any paper title, will trump any Crown interest that may be outstanding, in addition to any other paper title interest that may be outstanding. Again, it bears repeating that when certifying possessory interests, evidence of extent must be sufficient to underpin any certification made.

Is the appearance of green cross hatches a cause for alarm? Just as the Property Online disclaimers are clear as to the limitations of its fabric until conversion, so too is the Crown layer of information. The information is intended to act as a "flag" and should trigger a caution to examine the nature of occupation of a parcel, but does not mean that formal proof of possession may be required. For example, I recently acted for a client converting a parcel of land in the old part of downtown Dartmouth. There was a green cross hatch across the entire parcel, denoting a possible Crown interest. My abstract revealed that for over 40 years, the legal description had described this parcel as including "one half of a double house" and so, in the exercise of my professional judgment, this evidence was satisfactory to resolve any concern I might have had that there might be an outstanding interest in favour of the Crown.

So, consider the Crown layer to be information which is in my view helpful to have, but worthy of double checking, either at Crown lands office, or by way of objective evidence that may be available to you in your review. You should also check the documents that are indexed against the parcel in Property Online- there may be a Crown Release or Quieting Titles Certificate already filed. The Department of Natural Resources has not yet removed these ungranted parcels from the "Crown Layer" but will be doing so as time and resources permit.

g) Qualifications To Title ("TQ's)

The Professional Standard (1.3) dealing with certification of title deals directly with the issue of qualifications:

> "When a lawyer qualifies a certified opinion of title to the registrar in a migration of a parcel under the *Land Registration Act*, the lawyer must, after examining the abstract of title on which the opinion is based and considering the qualifications, document the qualifications in the opinion".

When a lawyer is converting a parcel of land into the system, that lawyer is responsible to note in the application for registration, " the ownership of the fee simple and all of the interests affecting a parcel..."(s.37(4)(b)). Any qualifications to an opinion, other than the standard qualifications listed in the Form 8 Opinion (for rights acquired through unregistered interests, overriding interests and subject to extent) must be noted in the parcel register in the form of "Textual Qualifications".

If there is an outstanding interest in a parcel, this would be noted as a Textual Qualification on the AFR, and as well noted in the Form 8 Solicitors Opinion included in the Bundle. Lawyers must be clear as to the title that is being certified. If only a partial interest is being registered, then that must be made clear. Partial interests in land do qualify for registration, as long as that partial interest can be certified. However, there must be some certifiable interest in a parcel before that parcel can be registered. This may seem obvious, but for example, you cannot register a nine tenths interest in a parcel, and enter a Textual Qualification "subject to the applicant owner not owning the parcel registered". You can however register a parcel "subject to a one tenth's interest in the heirs of John Smith arising from the intestacy of Mr. Smith in 1980".

Mark Coffin, the Registrar General of Land Registration will discuss as part of this panel presentation what sample textual qualifications have already been made on parcels that have been registered to date, and what is, and what may not be (from the government perspective), the subject of an appropriate textual qualification. I encourage readers to read his paper which discusses, very ably, the issues associated with these kinds of qualifications.

II. The Relationship with the Client Buyer

Changes of Ownership-Revision and Certificates of Legal Effect

In the "old world" when a property was sold, a buyer's lawyer searched the full historic title and opined to the buyer as to its state. Any concerns identified were raised and addressed by the

seller's lawyer, who may, or may not have previously certified the title.

Now, once a parcel is converted into the new system, the relationships and continuing obligations are somewhat different. The buyer will continue to retain a lawyer to act on their behalf for the purchase transaction, as in the past. The buyer's lawyer will, as in the past, be responsible for the work they do, but the work they do is different. The lawyer acting for the buyer is not reviewing the historic basis for title, but will be reviewing the parcel register as converted by the seller's lawyer, and the documents that relate to the interests shown in the parcel register. The lawyer will still be reviewing the approved plan, if any, and still dealing with location certificate and survey issues as in the past (Professional Standard 2.4), but the certification to the government issued by the lawyer who converted the parcel will remain in effect for its 10 year limit for those interests which are the subject of the government guarantee and which are not changed at the time of the sale.

The buyer's lawyer when filing the deed changing ownership, will certify that the deed has the effect of changing the registered ownership interest (Form 24). If the buyer's lawyer identifies any error on the face of the parcel register, he or she is obliged to raise it with the seller's lawyer and request that it be addressed. For example, if the parcel access type indicates public, and the buyer's lawyer notes on the plan and the legal description that access is private, that should be raised as a concern by the buyer's lawyer, who will ask the seller's lawyer will to make the correction on the parcel register. A buyer's lawyer cannot "blindly" rely on the face of the parcel register. There are due diligence obligations of the buyer's lawyer, and a more in depth discussion of that has been the subject of an earlier panel. It may be fair to say however that because of the more limited scope of the inquiries that the buyer's lawyer is carrying out, the exposure of that lawyer to the government on their "certificate" is more limited than that of the certifying lawyer on conversion.

The buyer's lawyer will be responsible for reviewing and opining on the recorded interests, to the buyer's lender, if any, and as well as to the buyer. The lawyer will attend to the revision of the

seller's fee simple interest in the parcel register, and the parcel register will be amended , based on that lawyer's certification provided in the form of a "certificate of legal effect" (s.18(4) of the Act). The lawyer attending to the revision of the parcel register, will be answerable for the subject matter of his or her "certificate of legal effect", and to the client's lender with regard to their opinion as to the priority of the recorded interests.

As the basis for our certification to buyers has changed, so too should our "old world" certificate of title.

III. Mistakes made in the parcel register-
Corrections, or "Rectifications"

The Act contemplates that on occasion, there will be a need to correct what has been entered on the parcel register. The process for doing so is called "rectification" (s.33 of the Act, Admin. Reg.10A) . This process can be initiated by a lawyer on behalf of the registered owner, or the registered owner, or the registrar. This is an important section for lawyers to be aware of, and will be triggered when a lawyer who has converted a parcel or made a revision, has made either an error or omission in the process of registration, which needs correcting.

Form 17 is the mandated form for effecting a rectification in the parcel register. It may be that a lawyer who is acting for a buyer, on review of the documents provided by the seller's lawyer and completion of the due diligence process, may require the seller's lawyer to complete a rectification with regard to something that is wrong on the face of the parcel register, or something that does not appear, that should. For example, if a parcel register indicates "public access" and a review of the seller's deed and plan confirm it to be private, then this would be the subject for a rectification by the seller's lawyer. Another example might be that the old parcel register on Property Online shows there to be three mortgages, but there are none showing on the parcel register. The buyer's lawyer may inquire of the seller's lawyer whether any of the mortgage details shown on the Property Online affect the parcel. If the seller's lawyer has

neglected or forgotten to show them on the parcel register, then this would be the subject matter for a rectification. This is part of a new process of "reconciliation of information", distinct from the "old world"- reconciling information shown to be relevant to the parcel register in the old world, with what is shown on the parcel register after migration.

One practice note- a correction to the parcel description, if required, is carried out by an "amending PDCA" rather than a rectification, and as such there is no cost for this correction.

IV. General Form and Content of Certificates or"Reports" on Title under the New Regime

In light of the new relationships, it may be worthwhile to review the context for the lawyer's certification to our purchaser client under this New Regime. The *Land Registration Act* determines the form and content of the lawyer's opinion of title to the government, both on the initial conversion of a parcel, and at the time ownership is transferred or "revised". However we must refer to professional standards, authorities and common law principles for guidance when considering the nature and extent of what is appropriate to certify to our purchaser clients.

As noted by the authors in "Lawyers Professional Liability" (2ed Grant, Stephen, Rothstein, Linda at page 2 and 3):

> "The first and most obvious source of a lawyer's duties is the retainer. A retainer is "a contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations"... Prudence dictates that a lawyer make careful note of the duties she has been retained to perform in order to avoid or limit later disagreement....As a general rule, a solicitor is not required to provide services outside the scope of the retainer. As well, the standard of care to be implied will be defined within the confines of the retainer. A solicitor will only be required to take the steps that a reasonably competent practitioner would take to carry out the retainer..."

There may not be very many of us who are feeling particularly comfortable with what will constitute the threshold for "a reasonably competent practitioner" in this new world, at least not yet with regard to the nuances of how the new relationships and processes affect all of our practices from the "old world". However, I would suggest that the scope of the retainer, while it

may not have changed from the buyer's perspective, has changed as a matter of fact due to the framework of certification pursuant to the conversion of parcels under the *Land Registration Act.*

Professional Standard 1.3 (Certified Opinion of Title and Certificate of Legal Effect) sets out the lawyer's obligations in certifying under the new regime. It mandates the lawyer's obligation to set out any qualifications to the opinion to the client and confirm the client's instructions prior to closing. Further, the Professional Standards set out the importance of documenting advice given to the client, (Professional Standard 1.5).

In summary, we should:

- make known to our buyer clients that the government guarantee is limited to registered interests and provide our clients with the particulars of that guarantee including any details of any title or textual qualification shown on the parcel register;
- provide an opinion to our clients with regard to the effect of all recorded interests; and
- make sure our buyer client is advised in writing before the closing takes place if there are further qualifications to your certification.

To do otherwise may be inviting a presumption on a subsequent judicial review that the qualifications to our retainer are not properly documented, and therefore do not apply.

I enclose for discussion purposes a sample of a "Report to Client" which will evolve as our understanding of our obligations to our client, and the manner in which we certify to them, matures. (Appendix B)

V. Conclusion

We can see how the new statutory framework has changed the context in which we provide our certificate of title, at least to the government. It has also however, changed the relationship with our buyer client with respect to the interests that are the subject of our retainer.

It should be made clear to the client as to what the government guarantees (a certificate of registered ownership may be requested to be issued to your client at no cost s.13(5) sample Appendix C), and what the government does not guarantee. Although the lawyer who certified at the time of conversion has primary responsibility for the historic title, any lawyer who reviews the contents of a parcel register, has the responsibility of due diligence for that review, and ought to bring forward any concern discerned with regard to the particular attributes shown on the parcel register to the seller's lawyer.

There are no absolutes except our seemingly regular feeling of unease and frustration when we falter a step or two in the new world, and our unexplained euphoria when we succeed in conquering these new challenges. As we move forward, we will move from "consciously incompetent" to "unconsciously competent", although our progress from day to day may not be as obvious nor as clear and convincing as we would like. However, as we forge ahead, I am heartened that lawyers are willing to share both their victories and defeats, and are also willing to extend a helping hand so that others who come behind us are well served- our colleagues, our clients, the public of Nova Scotia and the new *Land Registration* system.

Appendix A

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

IN THE MATTER OF:	The Canada Evidence Act
	- and -
IN THE MATTER OF:	Property of John Smith known as PID 12345678 Civic 4 Bob St., Halifax, in the County of Halifax, Province of Nova Scotia

STATUTORY DECLARATION

We, John Smith and Susan Smith, both of Halifax, in the County of Halifax, Province of Nova Scotia do solemnly declare:

1. THAT we have personal knowledge of the matters herein deposed to except where stated to be on information and belief;

2. THAT we are the joint owners of lands described in Schedule "A" attached hereto, and shown as PID 12345678 on the provincial government mapping, having acquired the property by the Last Will and Testament of Mary Castas registered in Book 3985 at Page 638 and by Trustees deed dated the 24th day of January 2003 registered in Book 7262 at Page 354 (the "Smith lands");

3. THAT the lots described in Scheduled "A" attached hereto have been in common ownership and used as one property and not as three separate lots since prior to April 1987 and have continued to be so owned and used to the present time;

4. THAT this declaration is being made pursuant to s. 268A of the *Municipal Government Act* S.N.S. 1998 as amended for the purposes of treating the lots as consolidated;

6. THAT attached as Schedule "B" is the legal description for the consolidated single lot.

AND WE MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada
Evidence Act.

DECLARED BEFORE ME at Halifax)	
in the County of Halifax, and)	
Province of Nova Scotia, this)	
20th day of December , 2004)	_____
before me:)	JOHN JOSEPH SMITH
)	
_____)	_____
A BARRISTER OF THE SUPREME)	SUSAN SANDRA SMITH
COURT OF NOVA SCOTIA)	

APPENDIX B

REPORT ON TITLE

TO: *

RE: PID No.* - Civic Address * (hereinafter referred to as the "Property")

WE, **WALKER'S LAW OFFICE INC.**, of Halifax, Nova Scotia, confirm that we have examined the Land Registration View of the Property On-Line Database of the Government of Nova Scotia, with respect to the property you are acquiring.

We confirm that there are two parts to the parcel register for the Property:

Registered Interests- this is the ownership part of your parcel, and currently you will see on the copy of the parcel register that we attach to this report that

*John Smith and Jane Doe

are shown to be the owners of the property. They are the seller(s) who have entered into the agreement to sell their property to you. **The government guarantees** that the owners shown on the parcel register, own the property and so we do not provide to you an opinion for this ownership. On closing we will be receiving a deed from the sellers and we will attend to its registration at the Land Registration Office. Upon registration, the parcel register will be revised to show you as the registered owner(s).

The parcel register shows there to be the following "benefits" attached to your Property:

* An easement/right of way which is a private road access to your property as shown on the approved plan of subdivision over Wayward Way. There is no information in the parcel register to confirm who is responsible for the maintenance of the roadway;

The parcel register shows there to be the following "burdens" attached to your Property:

* Restrictive Covenants- A copy of these was reviewed with you prior to Closing and this includes a description of certain restrictions on the use of your property. You should be aware of any limitation that is set out in these covenants for any future use you may intend.

* Utility easement- There is an easement in favour of Nova Scotia Power Corporation over the front of your property as shown on the plan of subdivision reviewed with you on the Closing.

There are/are not any qualifications noted on the parcel register that relate to the registered interests.

Recorded Interests- these are the interests that may affect your use and occupation of the property, and **these interests are not guaranteed by the government.** The recorded interests shown on the parcel register are as follows:

* Mortgage in favour of the Royal Bank of Canada- This is the seller's mortgage and we will receive an undertaking as part of the closing procedures from the seller's lawyer to payout the mortgage from the sale proceeds and ensure that a release is recorded.
* Although not yet shown on the parcel register, your mortgage with TD Canada Trust will be a recorded interest once filed at the registry office.

What we will do On Closing-

We will register your Deed at the Land Registration Office and upon registration, the Parcel Register will be revised to show you as the registered owner(s).

We will register your Mortgage in favour of * in the parcel register and this Mortgage forms a recorded interest in your parcel register and a charge against your property until the mortgage is paid out and the release of mortgage recorded.

Qualifications on our opinion and our retainer:

1. While we have reviewed the parcel register, and any benefits and burdens shown, and reported to you about them, we do not provide you with an opinion as to these interests. As noted above, these interests are the subject of the government guarantee.

2. We have provided to you our opinion as to the recorded interests in the parcel register that affect your Property.

3. There are certain interests which do not appear in the parcel register and therefore they are interests that may exist and that are preserved by the *Land Registration Act* but that we cannot provide you with an opinion on. They are called "overriding interests" and examples include the following:

   -interests which are not registered at the Registry of Deeds or the Land Registration office- this may include easements or rights of way that can be seen on the ground and are openly used, but are not documented in any way; and

   - interests that are preserved by statute such as an interest in Her Majesty in right of the the Province, or an interest in favour of a Municipality pursuant to a statute or law.

4. We are not qualified to provide any advice with regard to the way in which your land is located on the ground- this advice can only be provided by a Nova Scotia Land Surveyor.**We have strongly recommended that you secure a current location certificate or other survey product to ensure that there are no interests that affect your property that could be**

discovered on a physical inspection. You have waived/confirmed our advice in this regard;

YOUR OWNERSHIP is therefore qualified with respect to these interests noted above.

TAXES

WE CONFIRM based on certificates received from the appropriate municipality the property taxes relating to the lands have been paid in full until and including the 200* Interim Tax Bill, and there are no municipal improvements or betterment charges, capital charges for utilities or municipal charges due and owing, except as follows:*

DATED at Halifax, Nova Scotia, this * day of *, 2004.

WALKER'S LAW OFFICE INC.

Per:_____
Catherine S. Walker, Q.C.

APPENDIX "C"

NOVA SCOTIA

CERTIFICATE OF REGISTERED OWNERSHIP

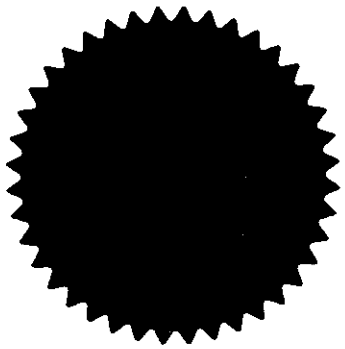
Land Registration Act, S.N.S. 2001, c.6, subsection 13(5)

This is to certify that

Her Majesty The Queen In Right Of The Province Of Nova Scotia

Is the Registered Owner of the parcel located at Woodville Road, Woodville, Block 83, in the County of Hants and shown as Parcel Identification Number 45062098.

Certified at 8:49 am on February 3, 2005.



Registrar General of Land Registration

Disclaimer – Certificates of Registered Ownership

Land Registration Administration Regulations, subsection 13(3)

This Certificate of Registered Ownership is subject to

(a) the limitations, burdens and benefits respecting the registered interest in this parcel that appear in its parcel register;

(b) the recorded interests in this parcel as shown in its parcel register; and

(c) the overriding interests set out in Section 73 of the *Land Registration Act*,

and all other provisions of the *Land Registration Act* and regulations.

Registrar General of Land Registration