

Reviewing Title and Making Title Objections for Land Registered Parcels

- Brenda Rice-Thomson

The purpose of this paper is to provide a practical guide for reviewing title and making title objections for land registered parcels under the *Land Registration Act*. It will show on a step by step basis how to review a parcel register and related documents available on property online and why, as well as how to deal with title issues which may be found. It is designed to address new issues and circumstances arising from our dealings in the land registration system and does not purport to re-state information found in traditional articles on title searching under the registry system, or on different classifications of title objections. The scope of this paper is limited to a discussion of searching documents available on property online, and does not address other aspects of a lawyer's role in a purchase transaction, including issues relating to survey evidence or necessary off title searches.

When reviewing title and making objections, it is important to always keep in mind the lawyer's duty to comply with the *Land Registration Act*, the *Land Registration Administration Regulations*, and the Professional Standards for Real Property Transactions in Nova Scotia.

Provisions in the Agreement of Purchase and Sale Relating to Title Investigation

When acting for a buyer in a real estate transaction, the lawyer has a duty to investigate the title of the property being purchased, to explain any title qualifications to the buyer (and document such advice in writing), and to make title objections, if any, in writing to the seller's lawyer. The fact that the property has been migrated into a land titles system does not derogate from that duty, however what is required to be reviewed in connection with this title investigation is different from a title review under our prior registry system.

The clauses in the agreement of purchase and sale pertaining to the title investigation have several components, including what the seller (via his or her lawyer) is obliged to do or provide and the time limit for same, a time period for the buyer's title investigation and submission of title objections (via his or her lawyer), and the consequences if the seller is unable or unwilling to deal with same and the buyer will not waive same. There are usually separate clauses for the title review, depending on whether the property has or has not yet been migrated. The current version of the clauses found in the Nova Scotia Association of Realtors Agreement of Purchase and Sale (the "Realtors' Association Agreement"), Part II - Residential Schedule, Section 4, is set forth as follows:

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4.1 Property Not Converted to Land Registration System at Date of Agreement.

Within ten (10) days of acceptance of this Offer the Seller shall provide, to the Buyer, the applicable PID for the property, the Seller's deed and any survey or location certificate that is in the Seller's possession. The Seller, at the expense of the Seller, agrees to convert the property title to the Land Registration System at least seven (7) days prior to the closing. The Seller shall notify the Buyer, as soon as practical, that the property has been converted to the Land Registration System. After notification, the Buyer is allowed five (5) business days to investigate the title to the property, which the Buyer shall do at the Buyer's expense. If within that time frame any valid objection to title is made, in writing, to the Seller and which the Seller is unable or unwilling to remove and which the Buyer will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Buyer, and without liability by the Seller for any expenses incurred or damages sustained by the Buyer. At the time of notifying the Buyer that the property has been converted to the Land Registration System, the Seller shall provide to the Buyer:

- a) the applicable PID(s) for the property after the date of conversion;*
- b) a copy of any applicable restrictive covenants;*
- c) that portion of any approved plan applicable to the property.*

4.2 Property Converted to the Land Registration System at Date of Agreement

Within ten (10) days of acceptance of this Offer the Seller shall provide, to the Buyer, the applicable PID(s) for the property after receipt whereof the Buyer is allowed seven (7) business days to investigate title to the property, which the Buyer shall do at the Buyer's expense. If within that time frame any valid objection to title is made in writing to the Seller, which the Seller is unable or unwilling to remove and which the Buyer will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Buyer, and without liability by the Seller for any expenses incurred or damages sustained by the Buyer.

It is important for both the seller's lawyer and the buyer's lawyer to diarize and meet the deadlines set out in the agreement. Should the seller's lawyer fail to complete the migration of the property into the Land Registration system within the time limits specified in the agreement, the agreement has been breached, which may allow a buyer looking for an escape from the transaction to terminate the agreement. Beyond that, it does a disservice to both parties to have properties migrated at the last minute. If a seller's lawyer does not complete the migration of the property until the day before or the day of closing, this will hardly allow the buyer's lawyer sufficient time to conduct a proper title review, and if there are title issues, there may not be sufficient time prior to closing to properly deal with them. If a buyer's lawyer does not submit title objections until after the time period specified in the agreement has elapsed, in certain circumstances depending on the nature of the objection, the seller's lawyer could refuse to deal with it as being 'out of time'.¹ If the title objections are only made on the day before or day of closing, even if the seller's lawyer is prepared to cooperate, it may not be possible to deal with said objections properly, especially if third parties are involved.

As a buyer's lawyer, if the property has been migrated, it would be prudent to conduct the title investigation and submit title objections as soon as the other buyer conditions have been satisfied. It is usually not cost effective to the client to have the lawyer complete this work (and incur the costs of same) before the client has been able to satisfy the other conditions, as the client will not likely want to pay the lawyer for this work if their inspection or financing fails. In situations where the time limits are very tight, such as if the condition date is only a day or two prior to the closing date, however, it may be prudent to discuss with the client the benefits and

¹ See Requisitions on Conveyance [4.2] and Requisitions on Title [4.3] in Charles W. MacIntosh, *Nova Scotia Real Property Practice Manual*, (Butterworths, 1988).

costs of completing this work even prior to the other conditions being satisfied, rather than leaving it to just before the closing.

In the Realtors' Association Agreement, where the property has already been migrated prior to the execution of the agreement, the seller is required to provide the buyer with the applicable PIDs for the property within ten days of acceptance of the offer, and the buyer is allowed seven business days to investigate the title and provide any objections in writing to the seller. The lawyer must always be cognizant of whether the time periods in the agreement are stated as 'days' or 'business days'. If the time limit does not specify business days, the time period will include weekends and holidays. As indicated above, it is recommended that this work be completed as soon as the other conditions are satisfied.

Where the property has not yet been migrated, the time periods as set out in the Realtors' Association Agreement are slightly different, in that the seller is required to complete the migration at least seven days prior to closing and the buyer has five business days from notification of the registration to investigate the title and make any objections.

On a private sale or other instance where the Realtor's Association Agreement is not used, the deadlines may differ, and the lawyer should make particular note of the time periods.

It is recommended that a buyer's lawyer check the status of the parcel regularly where a transaction is imminent and the migration has not yet been completed, in order to complete the title investigation as soon as possible. If there is a concern about having sufficient time prior to the closing and after migration to complete the title investigation or to satisfactorily deal with any particular objections, the buyer's lawyer may wish to conduct a preliminary title review and make preliminary objections even prior to migration. This investigation may include review of the property details screen and property mapping, a review of the seller's current deed, a review (with the buyer) of any benefits or burdens, a judgment search, a review of abutting parcels, and any other searches that appear necessary in the circumstances.

Preliminary Review of Parcel Register as Part of Lawyer Review Clause

When reviewing the Agreement of Purchase and Sale pursuant to the lawyer review clause, it is recommended that certain aspects of the title review be checked on a preliminary basis.

Judgments

If there are any potential judgments against either the seller or the buyer, it is essential to have this information as early as possible in the process in order to ensure that it does not interfere with the closing. In some instances, parties may not be aware that a judgment creditor has filed a judgment against them, or if aware, may not realize the consequences of same. If the

buyer has a judgment against him or her, the lawyer would be required to bring this judgment onto the parcel register when filing the Form 24 for the Revision, and such judgment would attach to the property immediately upon the deed being recorded and would rank ahead of the mortgage. The buyer would have to ensure that he or she was in a position to payout the judgment on or before closing and have a release obtained. If that extra cost has not been calculated in the buyer's costs of closing and if the buyer cannot afford to pay out the judgment when purchasing the property, it is much preferable to know this as early as possible and deal with it at that time, rather than the day before closing.

Similarly, if there are judgments against the seller, there must be a calculation made of whether the seller will have sufficient funds from the sale proceeds to pay off all encumbrances. If this will not be the case, and the seller does not have other funds from which to pay these judgments, again it is preferable to have this information early rather than just before closing, in order that arrangements can be made, or the deal terminated.

Name of Seller

The name(s) and signatures of the seller(s) as shown on the Agreement of Purchase and Sale should be compared with the name(s) of the registered owner(s) as shown on the parcel register to ensure there is a match. As long as the lawyer can reasonably ascertain that the registered owner and the seller are the same party, even if a middle name is missing, there is not a discrepancy, as there is no requirement that the agreement contain the full legal name of the seller as shown on the parcel register. However a discrepancy may exist if the registered owner's name is completely different from the seller's name, if one of the owners' names is missing, or if the last name is different. The concern is as to whether the party signing the agreement has the legal authority to sell the property. All registered owners must sign the sale agreement, either personally or through a power of attorney, in order for the agreement to be enforceable.

There are many reasons for there being a difference in name between the seller and the owner, such as: if a party has changed his or her name, such as on marriage; if one party is deceased, and the surviving joint tenant is selling the property; if the owner is deceased and his or her executor is selling the property; if the agreement is signed pursuant to a power of attorney (without that notation being shown on the agreement); if the seller has an agreement to buy the property from the registered owner. In all these situations, the lawyer should request further information or clarification, to be able to satisfy him or herself that there is a legal and binding agreement.

PID Number

It is not uncommon in an agreement of purchase and sale to see either an incorrect PID number or a missing number. The parcel register should be checked to ensure that the agreement contains the correct PID number. The lawyer should also check to make sure that all applicable PID numbers are included, so as to avoid any dispute at a later date about what property was or

was not to be included in the purchase. A property being sold could be comprised of several parcels, each with its own PID. In some instances, all of the parcels are being sold together, and in other instances that was not the intention of the parties. It is helpful to refer back to the listing cut to see what was intended to be included, as well as reviewing the adjoining parcels of land, to ensure that the buyer is buying all of the property that he or she was shown. In the case of a condominium, if the parking unit is a deeded unit, instead of an exclusive use part of the common elements, there will be a separate PID for the parking unit which must be included. While the MLS number is supposed to be the same as the PID number, there are instances where this information is incorrect. The lawyer should not rely on the agent drawing up the agreement to have ascertained the correct PID, as the agent may rely on the MLS information without a review of the information available on Property Online.

Benefits and Burdens

There is often an additional schedule added to the agreement whereby the seller is obliged to provide to the buyer certain information and documentation and the buyer has a very short period of time to review and be satisfied with this documentation. The list of documentation usually includes easements or restrictive covenants affecting the property. The lawyer should check the parcel register to see if such documents are included as benefits or burdens or referenced in a textual qualification, to inquire if the buyer has received same, and if the buyer has not received same, to print them from the parcel register and send them to the client for review immediately. If the buyer finds something objectionable in the restrictive covenants, for instance, and wishes to terminate the transaction, it should be done within the time frame allowed in the agreement, and again, as early as possible in the transaction, to avoid either party incurring additional costs.

Reviewing Title

A) Review of Parcel Register

Pursuant to section 20 of the *Land Registration Act (the "LRA")*:

s. 20 A parcel register is a complete statement of all interests affecting the parcel, as are required to be shown in the qualified lawyer's opinion of title pursuant to Section 37, subject to any subsequent qualifications, revisions of registrations, recordings or cancellation of recordings in accordance with this Act.

The contents of a parcel register are spelled out in section 23(1) of the *Land Registration Administration Regulations ("LRAR")*:

s. 23 (1) A parcel register must contain all of the following:

(a) the PID assigned to the parcel;

- (b) a legal description for the parcel that complies with subsection 7(10);*
- (c) the name and mailing address, if known, of each registered owner of the registered interest in the parcel described in clauses 17(1)(a), (b) and (c) of the Act;*
- (d) the names and mailing addresses, if known, of all holders of a recorded interest in the parcel;*
- (e) the submission particulars or full text of every document by which the title to the parcel is affected, as registered or recorded under the Act or the Registry Act;*
- (f) a reference to the instrument type assigned to any registered or recorded interest, which information is provided for convenience only and is not part of the registered or recorded interest;*
- (g) a reference to the interest type assigned to any registered or recorded interest;*
- (h) a reference to any judgment recorded within the registration district which is, or may be, a charge upon the registered interests of the registered owner and any predecessor in title at the time of registration or revision of the registered ownership of the parcel;*
- (i) a reference to any statement made under Section 38 of the Act as to whether any of the owners of the interest is a non-resident;*
- (j) the manner of tenure for the registered interest in the parcel;*
- (k) any textual qualification added under Section 11.*

The lawyer's review should encompass not only the information shown on the parcel register but must also examine the documentation referenced in the parcel register as enabling the interests shown.

i) Land Registration View

The first step in the title investigation is to review the "Land Registration View". The following are the most significant areas for review:

(a) Access

The requirements as set out in Standard 2.3 on Access, are as follows:

A lawyer who prepares an opinion of title must confirm the nature of the access, if any, to the parcel and whether the access is public or private.

If the lawyer determines the access to be private, the lawyer must determine whether the access has been granted.

If the lawyer determines the access to be private and granted, the lawyer must ensure that there is marketable title for the grant of easement to the parcel. If access is referenced for the whole of the marketable title time frame, the grant may be presumed.

If the lawyer determines the access to be private and not granted, the lawyer must be satisfied that there is authority for its continued use in conjunction with the parcel. Authority for continued use must be based on a factual foundation as documented on record.

A lawyer should consider the implications of the legal description of a servient parcel that does not reference a private access to which it is subject.

A lawyer should examine plans arising from the search and survey information affecting the parcel to ascertain whether the access granted and the actual travelled way correlate, and advise the client with regard to any material discrepancies.

A lawyer must explain to the client any limitation associated with a private right of way access and confirm the client's instructions prior to closing.

If, upon a review of the parcel register, the area in which the Parcel Access is to be shown is blank, it most commonly means that there has been a subdivision of the parcel, that the registrar has removed the access previously shown, pursuant to section 9(1) of the *LRAR*, and that a Form 45 to add the access back in has not yet been filed. Section 9(3) of the *LRAR* requires that the Form 45 be filed prior to any revision. Therefore if the access is blank, the lawyer's first objection would be to require the seller's lawyer to file a Form 45. Once that is done, the lawyer can continue the review of the access category.

There are 12 possible categories or types of access. The most common ones encountered on a parcel register would be "Public" and some variation of "Private" [Private (by grant), Private (by prescription), Private (openly used and enjoyed)].

(i) Public

If the access is shown as "Public", the next step would be to check the mapping graphics to see if the parcel abuts an area shaded gray. If so, the area in gray should be selected to see if the parcel type is shown as "road parcel" and if it is owned by the municipality or province. If the parcel does not abut any gray area, further investigation is required to determine whether "public" is the correct access type. A useful resource in Halifax Regional Municipality is the HRM Street Maintenance Directory, available on the HRM website. It indicates whether the road

is owned by the municipality or is private, and whether there is winter service/maintenance.

Other issues which may arise in rural areas relating to access shown as “public”, might include the parcel abutting a controlled access highway, or abutting a roadway requiring a driveway permit.

(ii) Private

If the access is shown as “Private” the lawyer must keep in mind the requirements under the Standard as set out above. The mapping graphics should be checked to ensure that the parcel does not abut an area shaded in gray. If it does, further investigation is required to determine if the correct access type has been selected, as above.

If the access is shown as “Private (by grant)”, the Benefits section in the parcel register and the parcel description should be reviewed to see if there is an easement benefit or benefits which provides access extending all the way to a public road. As part of this search, the enabling document listed in the benefit should be reviewed to ensure that it does in fact enable the access easement for this parcel and does in fact contain the full text of the easement as required pursuant to *LRAR* section 7(10)(b)&(c) and does extend to the public road and does not contain any limitations or restrictions. Any survey evidence must be also examined and reviewed with the client to determine the actual location and extent of the access road, and whether the registered benefit as described in the enabling document is in the same location as shown on the survey evidence.

The parcel register is now required to show either the servient tenement PID(s) or “Various PIDs”. If the servient tenement PID(s) are listed on the parcel register, each of those flip-side PIDs must be reviewed to ensure that there is a match. For any of the servient tenement PIDs which are LR PIDs, there should be a corresponding burden showing the subject parcel as the dominant tenement PID, and the enabling instrument should enable the same easement. If the servient tenement PID does not show the subject parcel as the dominant tenement PID but shows “Various PIDs”, the enabling document referenced should be checked to ensure that it refers to the same burden and therefore constitutes a match. A match may also be achieved in some circumstances if the servient tenement PID references an applicable textual qualification. In addition, the parcel description for the servient tenement PID should show the burden in the legal description. For the non-LR servient tenement PIDs, there should be a Form 8A recorded to provide notice of this burden, as required pursuant to *LRAR* s. 14(3). It is important to remember when making objections relating to these matters that the Regulations have changed various times since the *LRA* came into force, meaning that, depending on the date of migration of the parcel, some of these current rules may not have been in place at that time. For instance, the requirement for filing a Form 8A when migrating where there are corresponding benefits or burdens on non-LR parcels was enacted in the *LRAR* effective May 4, 2009. Therefore when reviewing a parcel migrated prior to that date, and the non-LR servient tenement parcel does not contain a Form 8A, the migrating lawyer did not commit an error.

The mapping graphics for each of these servient tenement PIDs should be reviewed to make sure that there are no gaps. However, section 21(2) of the *LRA* provides that:

s. 21(2) Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel.

Survey evidence will always be a more reliable indicator of the actual location of the access road, and should therefore be relied on in place of the mapping graphics wherever possible.

If the access is shown as “Private (by prescription)”, the recorded documentation to support this assertion must be reviewed carefully to ensure that it meets the requirements to establish prescription as set out in Standard 3.3 on Prescriptive Rights. It is essential that the burden of this prescriptive easement be properly reflected on the servient tenement PID. The lawyer is doing a disservice to his or her client if the lawyer does not investigate this and make appropriate objections as necessary. Section 74(2) of the *LRA* and the issue of whether it is possible to assert a prescriptive easement against an already migrated parcel which does not include such easement, must also be considered.

There is considerable difficulty with the category of access “Private (openly used and enjoyed)”, in terms of what documentation is available to be satisfied as to the authority for its continued use. In many instances, it is incorrectly used interchangeable with “Private (by prescription)”.

For an excellent and comprehensive discussion of access issues, see Garth Gordon’s paper entitled “Access - Red Flag Issues Under LRA”, referenced in the Resources section at the end of this paper.

(b) Manner of Tenure

There are five categories for ‘manner of tenure’: Joint tenants, tenants in common, a mixture, not applicable (used for a sole owner), and not specified (none of the other categories). The type of tenure shown on the parcel register should be verified against the enabling deed to ensure the correct manner of tenure was chosen when the deed was registered. If the deed is silent and there is more than one owner owning property in their own right, section 5(1) of the *Real Property Act* provides that they are deemed to have taken title as tenants in common.

(c) Registered Interests

(i) Interest Holder Name

The names of the interest holders shown on the parcel register should be compared to the names and signatures of the sellers in the agreement of purchase and sale to ensure that there are no discrepancies. If there are discrepancies, depending on the nature of the discrepancy, it may

be appropriate to require as a title objection that a Form 21 be filed. A Form 21 is used to change or correct the name of a registered owner or to provide evidence of the death of a joint tenant.

If a name of one of the registered owners is missing from the agreement of purchase and sale, inquiry should be made as to what has happened to that owner. If one of the owners is deceased, the enabling deed must be reviewed to determine the manner of tenure. If the parties held title as joint tenants, the survivor would inherit by right of survivorship, and the only title objection would be to record proof of death of the deceased owner, if same has not been done. If the parties held title as tenants in common, or if the deed did not specify the manner of tenure, the interest of the deceased owner would vest in that owner's personal representatives pursuant to section 46 of the Probate Act [except where the will was dated prior to October 1, 2001 or an intestate person died before October 1, 2001, in which instance the old Probate rules would apply]. Either a Grant of Probate or a Grant of Administration would have to be obtained from the Probate Court and registered on title prior to sale. The proper party to sign the agreement of purchase and sale on behalf of the deceased owner would be the personal representatives, once the grant has been issued by the Probate Court. The Probate Court would have to register the Grant on the parcel register under registered interests, and the interest holder on the parcel register should then show the name(s) of the personal representatives, with the qualifier "trustees", and the enabling interest for the deceased owner's interest should show the Will/Grant of Probate.

If the interest holder name is not an individual, further inquiry should be made. If the name is a company, the company should be checked on the Registry of Joint Stock Companies website to ensure the company is in existence and has not been struck off the record (in which instance the property of the company may have escheated to the Crown). If the interest holder name is shown as a business or partnership name, the registration is incorrect as the title should have been registered in the name of the partners or in the name of the proprietor who is carrying on business under the business name. The enabling deed should be reviewed to determine if there has been a conveyancing error, which will likely require a confirmatory or correcting deed, or merely an error in instructions to the Registrar when registering the document, in which case a Form 6A should be filed to correct the submission. Any applicable issues as outlined here would be the subject of a title objection. See also Standard 3.13 Corporations and Other Entities, and Standard 3.14 Partnerships.

(ii) Interest Holder Type

The interest holder type will usually show 'fee simple' however pursuant to section 17(1) of the *LRA*:

s. 17 (1) The following interests may be registered:

- (a) a fee simple estate;*
- (b) a life estate and the remainder interests; and*

(c) an interest of Her Majesty.

In the event the interest holder type showed 'life interest' and/or 'remainder interest', it is essential to ensure that all interested parties execute the agreement of purchase and sale and the deed and that all interests have been or will be released. It is unlikely that a the buyer would be prepared to accept title subject to a life interest or estate in favour of another person.

(iii) Instrument Type

The instrument type enabling the registered interest will most commonly be a deed, however other instruments will also enable the interest, such as a will/grant of probate. If 'statutory declaration' is used as the enabling instrument for the registered owner, it usually means that the property was migrated on the basis of adverse possession. The statutory declarations and the parcel description contained therein should be reviewed carefully ensure that they are effective to enable the whole of the interest claimed by adverse possession and that they meet the standards required for migrating a possessory title as set out in Standard 3.2.

(iv) Document Number - Enabling Instrument

When reviewing the parcel register, it is important to review the document or document referenced as the enabling instrument, to make sure that the information shown on the parcel register is accurate and complete, and that the enabling document enables the whole interest. In some instances, a party may have obtained a ½ interest in one deed, and the remaining ½ interest in a second deed (commonly where two parties acquire title and later one quit claims his or her interest to the other). To show only the quit claim deed as the enabling instrument is incorrect as it only enables ½ of the owner's interest.

(d) Benefits and Burdens

All of the documents listed as enabling instruments in the benefits and burdens sections of the parcel register must be reviewed to ensure that they enable the benefit or burden indicated. The client must be advised as to the restrictions and qualifications on title and be provided with copies of any easements and covenants to ensure that as a buyer he or she is able to ascertain whether there is anything which would materially affect his or her enjoyment of the property. Clause 5 of Part I of the Realtor's Association Agreement provides that:

The said property is to be conveyed free from encumbrances, except as to any easements, registered restrictions or covenants that affect the property and do not materially affect the enjoyment of the property, except as specifically set out in paragraph 12 of this Agreement.

The restrictive covenants should be reviewed to determine if there is an expiry date for same. Sometimes this is noted under the textual qualifications. If the covenants have expired, an objection should be made to have them removed from the parcel register. It is important to review the restrictive covenants with the buyer as he or she may have actual knowledge from

viewing the property to determine whether it appears that any of the covenants have been breached. See in particular the Standard 3.6 on Restrictive Covenants. If particular breaches are found, the covenants should be examined to determine whether the grantor has the ability to waive or modify the covenants, and if so, an objection should be made requiring written confirmation that the breached covenant has been waived in this instance.

In addition to the review of the enabling documents as above, for any benefits or burdens which contain flip side burdens or benefits, the flip side dominant or servient tenement parcels shown must also be reviewed to ensure that there are matches. See in particular *LRAR* section 10(14) and sections 14 - 18, and the Registrar General's Directive on Necessary Changes dated August 31, 2009, referenced in the Resources section at the end of this paper. As noted previously, care must be taken to determine from the date of migration which version of the *LRAR* were in effect and therefore which rules applied. If a title objection is made on the basis that there is no match with the servient tenement parcel and both parcels were migrated in 2006, the response to the objection is likely to be "it was not required at that time". The requirement to match corresponding benefits and burdens on migration was enacted in the *LRAR* effective May 4, 2009 with the introduction of section 10(14).

Finally, any applicable recorded plans should be reviewed to ensure that all easements or other restrictions noted on said plans have been incorporated into the parcel register and parcel description. Note that the plan cannot be used as an enabling instrument.

(e) Textual Qualifications

Section 11 of the *LRAR* on textual qualifications provides as follows:

- s. 11 (1) An authorized lawyer submitting an opinion on title in an AFR or a certificate of legal effect may include a textual qualification if the lawyer is of the opinion that the textual qualification is the only means to provide a complete statement of all the interests affecting the parcel.*
- (2) A textual qualification must meet all of the following criteria:*
- (a) it must include a clear statement of the certifying lawyer's opinion about its effect;*
 - (b) it must form part of the authorized lawyer's certificate of legal effect or opinion of title;*
 - (c) it must not limit, contradict or make ambiguous any other information in the parcel register, including the legal description.*

Any textual qualifications should be reviewed, firstly, to determine if they are still appropriate or can be removed, and secondly, if still appropriate, to ensure that the qualifications can be understood and meet the requirements of the regulations, and most importantly, that the buyer understands and accepts them.

(f) Recorded Interests

Most recorded interests found on a parcel register will be encumbrances to be removed on closing, such as mortgages, liens or judgments against the parcel owner. Title objections should be made to have all of these encumbrances removed. How the title objections should be framed will be discussed in the section on Making Title Objections.

Some interests, such as development or land use agreements with a municipality, have been shown on the parcel register as recorded interests instead of burdens. The Land Registry guidelines allow for registration of development agreements either as burdens or as recorded interests, in the discretion of the lawyer, based on a review of the document.

The documents must be reviewed to ensure that there are no other embedded interests. For example, a lease should be reviewed to ensure that there is no option to purchase included within the document. If so, the lawyer should ensure that the option was not exercised or has otherwise expired or been extinguished.

Agreements such as those pertaining to private roads, should be reviewed as to cost provisions and any arrangements relating to home owners' associations and any termination of rights for failure to pay upkeep. An objection may be necessary to request proof of up to date payment to ensure no rights have been forfeited.

(g) Parcel Description

Section 21(1) of the *LRA* provides that:

21 (1) The legal description of a parcel in a register is not conclusive as to the location, boundaries or extent of the parcel.

When reviewing title, however, and notwithstanding this limitation, the parcel description should be checked against the enabling deed, or enabling statutory declarations, as appropriate, the mapping graphics, any subdivision or other plans, and any other survey fabric, for consistency and to ensure that the description purports to describe the whole of the parcel being purchased. See Standard 2.1 on Legal Descriptions.

The benefits and burdens shown in the parcel description should be checked against those in the parcel register for consistency. When comparing the benefits and burdens in the parcel register to those found in the parcel description, section 23(4) of the *LRAR* provides as follows:

s. 23(4) A reference to an enabling instrument in a parcel register can be used to enable all benefits and burdens referred to in that instrument, which are between the same parties.

The historic PDCA information should also be reviewed for comparison purposes, and to track any changes to the parcel description.

When reviewing a short form description, the plan referenced in the description should be checked against prior long form descriptions.

The MGA statement should be checked to ensure it is appropriate. Any plans referenced in the MGA statement, if not already referenced and reviewed, should be reviewed.

(h) Non-Enabling Documents

Documents such as a Defacto Consolidation declaration may be found under the heading of Non-Enabling Documents. If such document is found in the parcel register, it should be reviewed to ensure that it complies with all the requirements of section 268A of the *Municipal Government Act*, including the requirement to provide facts to support the statements of common ownership and usage prior to April 16, 1987. The Registry staff do not review the content of these documents to ensure compliance with the statutory requirements and therefore the fact of registration on the parcel register does not signify that the section 268A requirements have been met.

(i) Non-Enabling Plans

Subdivision or retracement plans may be found here or in the property details screen. They should be reviewed and compared with the parcel description and with registered benefits and burdens. If there are benefits and burdens shown on the plan which are not on the parcel register, further inquiry should be made.

ii) Parcel Archive View

The Parcel Archive view references documents which were brought into the parcel register either on migration or subsequent thereto, which have now been removed from the parcel register. All the prior owners from migration forward, any benefits or burdens which have been removed since migration (usually with a Form 45), any recorded interests which have been removed since migration, and the removal documents, are found on this screen. Correcting documents such as a Form 6A may also be found in the parcel archive. In order to review the original parcel description in the original enabling deed at the time of migration where the property has changed ownership since migration, the original enabling deed would be referenced on this screen.

The documents found in this view are useful as a resource, if looking for something in particular, however do not generally need to be analyzed in the same level of detail as the land registration view. Note section 23(3) of the *LRAR* which provides as follows:

s. 23 (3) An archive register is not part of a parcel register.

iii) Property Details View

The Property Details screen contains some of the historical information on the parcel prior to migration. If there are subdivision plans which are not referenced on the land registration view, they may sometimes be found here. Otherwise a search in the Plans Index would be required. The name of the migrating lawyer may also be found here (except where the parcel has since been subdivided, in which case it may be necessary to search back into the parent parcel register to find this information). Additional statutory declarations evidencing possession may also be found here.

iv) Property Online Map - Mapping Graphics

Section 21(2) of the *LRA* provides that:

s. 21(2) Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel.

The Property Online Map contains similar words of limitation. The mapping is not and does not replace a survey prepared by a land surveyor, and the client must also be made aware of this limitation. Having said that, a review of the mapping graphics is an important step in reviewing title. The graphics should be reviewed as well with the LR Parcel Shading, the topographical, and the monument information shown. The topographical feature may reveal other issues, such as possible roads over the parcel, which are not otherwise accounted for, and should be investigated and discussed with the client. A review of the mapping graphics is relevant when reviewing the parcel description, benefits and burdens, and access.

v) Other Searches Under Registration Index

In order to ensure a complete and up to date title search prior to making title objections, the other searches under the Registration Index should be completed, including Registration Index (GGI - for judgments or powers of attorney), Plans Index (for any other plans affecting the parcel), Plans in Process (plans up to the current date), By Name for non-Land Registration Documents (for judgments up to the current date), and By PID for Documents in Process on Land Registration Parcels (for documents being registered or recorded up to date on the parcel register). If the Land Registration View shows the following in red: 'Parcel Register Changes in Process', the document being reviewed for possible acceptance will be found under the last named index, although there will be a few days' delay before it will be viewable. A word of warning: contrary to what the generally understood meaning of 'accepted for registration' might mean, when the document in the index entitled "By PID for Documents in Process on Land Registration Parcels" shows 'accepted for registration', it only means that it has been inputted by the 'front counter' and does not signify that it has been approved for registration by the 'back counter', and therefore this document could still be rejected.

B) Condominiums

When conducting a title investigation of a condominium unit, there are several differences from other land parcels which must be taken into account which impact the title search.

The parcel description for a condominium unit must comply with the requirements in section 7(11) of the *LRAR*:

- s. 7(11) When the legal description submitted for PDCA approval relates to a unit as defined in the Condominium Act, the description must be accurate and complete but must contain only*
- (a) the name of the County where the condominium corporation is situate, together with the condominium corporation number as assigned by the Registrar of Condominiums;*
 - (b) the description for the unit as detailed in the condominium description on file with the Registrar of Condominiums;*
 - (c) a benefit, using the following wording: "together with the common interest appurtenant thereto"; and*
 - (d) a burden, using the following wording: "subject to the Declaration and By-Laws (remove reference to By-Laws if none have been registered) of (insert condominium corporation name and number)".*

The description of the unit is usually found in Schedule C of the Declaration. The approved parcel description must be compared with the description in the Declaration, and with the description in the enabling deed. There are occasionally instances where a correcting or confirmatory deed is required if the description in the conveyance does not match the description in the Declaration. In some instances an Amended Declaration has been filed to clarify the descriptions in Schedule C, and if so, that amended Schedule C must also be reviewed. Any amended Declarations or amended Bylaws will be found in the Condominium Common View. Easements and other benefits and burdens (other than the condominium benefit and burden specified above) are not permitted in the parcel description.

When reviewing the benefits and burdens in the parcel register for a condominium unit, section 12(1) (c) of the *LRAR* provides as follows:

- s. 12(1) An AFR for a unit as defined in the Condominium Act must include ...*
- (c) all other benefits and burdens that are not declarations, by-laws or amendments to declarations or by-laws, but are interests in the unit or the common interest appurtenant thereto, including those detailed in the condo declaration;*

All benefits and burdens affecting the land must be included in each parcel register for each unit. Benefits and burdens affecting the land may be found by a review of Schedule A of the Declaration (which contains the legal description of the land parcel and should also reference all benefits and burdens existing at the time the condominium was created), by a review of the underlying retired land parcel, and by searching out of the condominium corporation from the time the condominium was created (to find any benefits or burdens that have been created since the condominium corporation was created). It may also be helpful to review other migrated units in the same condominium corporation to see what benefits and burdens have been registered on other units in the same condominium corporation, although there can be significant inconsistencies in the manner in which various units have been migrated over the years.

The requirement to include other benefits and burdens in the parcel register for condominium units is a change from the manner in which condominium units were originally migrated. Until May 16, 2005 when this new regulation was implemented, no other benefits and burdens other than those enabled by the condominium declaration and also contained in the condominium parcel description were supposed to be included in the parcel register. When reviewing a condominium unit which contains no other benefits and burdens, a title objection to require missing benefits and burdens to be added, may be resisted by the migrating lawyer if the property was migrated prior to May 16, 2005 on the basis that the migrating lawyer followed the rules in existence at that time. A subsequent lawyer (who did not have the original title search of the migrating lawyer) would have to be cautious about making such amendments to the parcel register depending on whether he or she felt sufficiently comfortable with the available documentation to make such changes.

A further complication with easement benefits and burdens on condominiums relates to the requirement for matching corresponding burdens and benefits, given the impracticability of matching with large numbers of condominium units. See section 4 of the Registrar General's Directive on Necessary Changes, referenced in Resources at the end of this paper, relating to exemptions for the use of "Various PIDs" in some scenarios.

When reviewing a condominium parcel register, the condominium common view should also be reviewed. The PID number for this view will be found at the bottom of the parcel register for the unit, or it can be found by searching by condominium corporation number in the Property Query screen. The condominium common view will contain the Bylaws, any amendments to the Declaration and Bylaws, the Condominium Plans, the mapping graphics for the land parcel, and a reference to the underlying retired land parcel.

C) Review of Judgment Roll

The sections in the *LRA* pertaining to judgments and the judgment roll are sections 65 to 69.

Section 23(2) of the *LRAR* provides as follows:

s. 23 (2) A parcel register is deemed to be a complete statement of all judgments recorded in the registration district which are, or may be, a charge upon the registered interests of the registered owner and any predecessor in title at the time of registration or, if subsequently revised, at the time of the last revision of the registered ownership of the parcel.

When searching title, the names of both the sellers and the buyers must be searched for any judgments found in the judgment roll, as the judgment roll remains names based.

Standard 3.5 on Judgments sets out the requirements for searching Land Registration parcels:

A lawyer who searches for judgments on parcels that are registered under the Land Registration Act must conduct the search against the names of:

- 1. the purchaser for a period of 20 years prior to the date of search; and,*
- 2. the registered owner of the parcel at the time of search from the date of the last revision of the registered ownership.*

A lawyer who searches for judgments and identifies a judgment that is recorded against a debtor whose name is not materially different than the name of the owner or the purchaser must determine if the judgment affects the title being examined.

Section 66A of the *LRA* sets out the rules for determining whether there is a material difference in names. A useful chart to assist in this process prepared by Frank DeMont is referenced in the Resources section at the end of this paper.

When searching judgments, it is preferable to use only the last name, or the last name and initial, in order to cast the net as widely as possible to ensure all potential judgments are found. If the last name is not common, there should not be very many possible judgments to review. However if either party's last name is more common, the search may have to be somewhat more specific, using initials for given names. Both first and middle names should also be searched, as well as name variations, and reference may be made to the party's identification to ensure all possible names are checked. When inputting the search information, if the start date is not inputted, but 'judgment search' only is chosen, the system will automatically search back for the last 20 years. It is a simpler search to do and avoids issues with the incorrect inputting of the start date for the search. Any possible judgments outside the applicable search period may then be eliminated. If a Form 21 has been filed, the lawyer should also conduct a judgment search against any prior names, in case this was not done at the time the Form 21 is filed.

If the response to a title objection in respect of a judgment in the judgment roll is that it is not against the seller, one should always insist on recorded proof of same. The Form 28B enclosing a statutory declaration on similar name judgments does not attract a fee.

A response with respect to outstanding judgments against either the seller or the buyer

that the party is a discharged bankrupt, must also be dealt with carefully to ensure that the discharge has the effect of extinguishing the judgment, that there is proper documentation to establish same, and that the judgments are not of the type that would survive bankruptcy.

D) Review of Abutting Parcels

Where there are dominant and servient tenement parcels, those parcels should already have been reviewed as required to search for matching burdens and benefits for flip side easements, or Form 8As for non-LR parcels, as mentioned previously, and appropriate title objections should be made to reflect issues arising therefrom.

However, all other abutting parcels should also be checked to ensure that there are no benefits or burdens mentioned on those parcels which have not been reflected on the subject parcel. It would be beneficial to a client and may avoid future difficulties if a potential problem can be discovered and either dealt with or at least disclosed to the client for instructions prior to purchasing a property. Such issues might arise where a benefit or burden is reflected in one chain of title and not the other. A search within the marketable title time period may not reflect the encumbrance if the time at which it was created is prior to the marketable title period and was not carried forward in the legal description of the parcels. Prior to May 4, 2009, migrating lawyers were not required to ensure matches. Although it was common and required (see Standard 2.3 re Access) to search servient parcels for access benefits, other searches of abutting parcels were not commonly done.

When searching abutting parcels for such benefits or burdens, if the abutter is a LR parcel, the land registration view and legal description should be reviewed, and if the abutter is a non-LR parcel, the property details screen and current deed and legal description should be reviewed.

It may also be of assistance in a subdivision to look at other abutting parcels for the purpose of determining if there may have been restrictive covenants or other easements missed by the migrating lawyer. Again, the client would likely prefer to know about restrictive covenants for the subdivision prior to closing, rather than be faced with a request to consent to a Form 6A at some later date to add a burden or benefit missed on migration.

Making Title Objections

Title objections should be made to the seller's lawyer in writing within the time frame for making objections specified in the agreement of purchase and sale.

There is no prescribed format for making a title objection, however it should encompass both a description of the problem, including recording particulars, as applicable, in order for the lawyer to understand the issue, and a description of what is requested to be done about it and

when (ie. before closing, or with an undertaking after closing).

When objecting to a mortgage recorded upon the parcel, most lawyers use a fairly standard format and make reference to the mortgage protocol under Regulation 8 of the *Legal Profession Act*. A standard wording for such objection may be found in the Appendix under Sample Objections.

Other title objections may be peculiar to the individual circumstances. The Appendix includes some sample objections for particular situations, as examples of how such objections may be structured.

One of the problems that may be encountered in reviewing title is that there may have been several lawyers involved in the parcel register over the course of time. One lawyer has migrated the parcel and there may have been several other lawyers involved in successive ownership transfers or in recording a benefit or burden or a recorded interest. When submitting objections, the buyer's lawyer should submit the objections to the seller's lawyer, even if some of the issues found may relate to work done by prior lawyers. It will then be the obligation of the seller's lawyer to contact the migrating or other lawyer as necessary to determine who is the best person to deal with the objection.

It is important to keep in mind two points: (a) that once a lawyer is notified of an error or omission, he or she is obligated to take steps to correct the error or omission; and (b) that regardless of which lawyer corrects the error, the filing of a Form 6A to rectify the parcel requires certain consents. See *LRAR* section 22(2) and (3):

s. 22(2) An authorized lawyer who is aware that there is an error or omission in a registration or recording or other information in a parcel register certified by a certificate of legal effect that the authorized lawyer previously submitted as required under these regulations must, without delay, request a correction of the particulars certified by the certificate of legal effect in Form 6A and do one of the following:

(a) notify and obtain the consent, in writing, of the registered owner of the affected parcel and any other interest holder shown in the parcel register, who may be affected by the error or omission; or

(b) obtain the prior written approval of the Registrar General, who may withhold approval or impose any notice or other requirements the Registrar General considers appropriate in the circumstances.

(3) An authorized lawyer who is acting on behalf of a registered owner of an affected parcel or any other interest holder affected by an error or omission may submit a correction of the error or omission in a registration or recording or other information in a parcel register certified by a certificate of legal effect previously submitted by another authorized lawyer, if the lawyer complies with the requirements in subsection (2) and has one of the

following:

(a) the agreement, in writing, of the authorized lawyer who previously submitted the certificate of legal effect;

(b) the written approval of the Registrar General, who may withhold approval or impose any notice or other requirements the Registrar General considers appropriate in the circumstances.

If the seller's lawyer intends to complete a rectification of the parcel to correct an error of a migrating lawyer, or to update the parcel register, the seller's lawyer must be satisfied that he or she has the foundation to do so.

In some instances, the seller's lawyer may not be able to obtain the cooperation of a migrating lawyer to rectify on the basis that the migrating lawyer did not make an error or omission. If the migrating lawyer migrated the parcel under a different set of regulations than that which currently exist (for example, when the name of a parcel owner instead of its PID was used for an easement benefit or burden), or if other circumstances have changed (for example, if the servient or dominant tenement parcel was the subject of a PID assignment and now has a different PID, or has been subdivided or consolidated and now has a different PID), it may be possible to update the parcel register without requiring a Form 6A. In certain circumstances a Form 24 may be filed to update information using a code 451. No fee is required for such filing. This is another option in terms of addressing certain title objections.

The Registrar General's Directive on Necessary Changes, referenced in the Resources section at the end of this paper, also references certain steps which should be taken in trying to resolve mismatches, which may be of relevance when dealing with title objections relating to mismatches.

Finally, as a matter of both courtesy and good practice, lawyers should always attempt, wherever possible, to make objections, on the one part, and to respond to objections, on the other part, in as timely a manner as possible. No one will appreciate either receiving an objection on the day of closing, or, if having made objections, receiving no response to an objection to and including the day of closing. To have to deal with such things on closing day, when it could easily have been dealt with prior to closing, can lead to mistakes and frustration and does a disservice to the client.

Once title objections are made, the buyer's lawyer should ensure that he or she is satisfied that the steps proposed by or taken by the seller's lawyer will satisfactorily address the issue, and should ensure that such steps are actually completed. If the seller's lawyer is not able to complete the rectification prior to closing, an appropriate undertaking should be obtained. If the seller's lawyer has agreed to file a Form 6A but has not yet done so by the closing day, he or she will now need the written consent of the buyer as registered owner of the property at the time of the filing of the Form 6A.

As a reminder, the searches must be updated to the day of closing and time of submission of documents. Copies of all searches and subsearches conducted throughout the transaction must be printed off and kept in the file to verify that the lawyer has complied with his or her obligations.

Appendix - Sample Title Objections

Mortgage

There is a Mortgage in favor of Bank which was recorded on Date as Document Number. On closing, I will require your undertaking to payout the mortgage and provide me with a copy of the recorded Release of Mortgage. In addition, on closing I will require the following documentation relating to the outstanding mortgage:

- a. A copy of the payout statement as received from the lender and
- b. Confirmation of the transmittal of payout proceeds to the lender.

In accordance with Regulation 8 made pursuant to the *Legal Profession Act*, I will also require your undertaking to do the following no later than 180 days from the closing date:

- a. Record the release of the security interest in the parcel register; or
- b. If it is apparent the security interest will not be released withing that time, complete all prescribed steps in accordance with Section 60 of the *Land Registration Act*, and the *Land Registration Administration Regulations*, to require the Registrar to cancel the security interest.

Judgment

The judgment roll indicates that there is an outstanding judgment against Name recorded in Book Number at Page Number. On closing I shall require either a recorded Certificate of Satisfaction or your undertaking to obtain and record same, together with a copy of a letter indicating the balance owing on the judgment and your transmittal letter paying same; or, in the alternative, if the judgment debtor is not the same party as the seller, I shall require that you obtain and record a Statutory Declaration on or before closing confirming this information.

Issues with Benefits and Burdens; Mismatches

The parcel register shows a burden in favour of Name pursuant to an Easement Agreement recorded in Book Number at Page Number. A review of that document indicates that:

- (A) there was an exchange of rights of way between the two properties. The parcel register should therefore show a benefit as well as a burden arising from that Agreement. I ask that you contact the migrating solicitor to have this correction made. This will then complete a match with the adjacent PID Number.
- (B) the burden should be shown to be in favour of PID Number and not Name. I ask that the parcel register be updated to show the PID and not the name as the Interest Holder.

The parcel register shows an easement benefit over PID Number. There is no matching burden registered on PID Number showing PID Number as a Dominant Tenement PID. I ask that you ensure that this burden is added to PID Number.

The parcel register and description indicate that the property is subject to an easement burden measuring 9 feet by 72 feet six inches in favour of various owners pursuant to the deed in Book Number at Page Number. A review of the various deeds in the chain of title indicate that this easement burden affects the lands municipally known as Street address, and not the subject property on Street address, and was created in Book Number at Page Number, and not in Book Number at Page Number. I shall require that the parcel register be rectified by removing this easement burden from the parcel register and from the legal description.

Inconsistency Between Parcel Register and Parcel Description

The parcel description does not reflect any of the current burdens shown on the parcel register and must be amended to accord with the parcel register.

The legal description in the Condominium Declaration references a right of way burden in favour of the neighbouring property (PID Number). This burden has not been included in the parcel register and I will require that the parcel register be amended to show this burden and a Form 8A be filed on the neighbouring non-LR PID.

Breach of Restrictive Covenant

The parcel register indicates the property is subject to restrictive covenants found in the deed in Book Number at Page Number. The covenants prohibit a fence on the property without the approval of the grantor. I shall require written confirmation on closing from the grantor in the aforesaid deed that the fence shown on the location certificate was approved by the grantor.

Resources

Attached is a short list of relevant resources. All Articles referenced are available on the LIANS website, under the Real Estate Resources section.

DeMont, Frank, *How to Determine Material Difference in Names*, (April 2010)

Gordon, Garth, *Access - Red Flag Issues Under LRA*, (revised March 2, 2007)

MacGrath, Mary Ann, *Title Searching - One Page Reference*, (November 2006)

MacIntosh, Charles W., *Nova Scotia Real Property Practice Manual*, (Butterworths, 1988)

MacLean, Ian, *Checklist When Revising the Parcel Register or Recording an Interest*, (May 2011)

MacLean, Ian, *Title Searching Land Registered Parcels*, (May 2011)

Nova Scotia Barristers Society, *Mortgage Payout Protocol Regulation 8, Legal Profession Act*, (September 2007)

Registrar General, *Registrar General's Directive Pursuant to Subsection 10(14) of the Land Registration Administration Regulations "Necessary Changes"*, (August 31, 2009) Available on POL Home Page

Walker, Catherine, *Adverse Possession and Prescriptive Rights, Old Doctrines in a New Environment*, (February 2003)

Walker, Catherine, *Certifying Title and Qualifying Title Under the Land Registration Act*, (February 2005)