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THE PROPOSED LAND REGISTRATION ACT
HOW IT WOULD AFFECT LAWYERS

The proposed *Land Registration Act* ("LRA") would affect the work of a property lawyer in various ways, some of which are discussed below. However, most of the skills developed by lawyers will continue to be needed and for the most part the system will "float on existing law", as noted in Garth Gordon's Review of Land Titles Legislation. Apart from changes to the manner of registering interests in land, the legislation will result in relatively few changes to substantive property law. The LRA will provide a quicker and more convenient means of searching and registering title, but it will not change much of what a lawyer does in a typical property transaction. Other presentations will review the proposed legislation generally; this paper will focus on certain aspects of the LRA which have particular relevance to lawyers.

Essentially, the LRA will consolidate all existing registry office information about a parcel of land into an individual register for each parcel. Instead of a name-based registry system requiring a review of indices and a checking of all documents indexed into and out of grantors' and grantees' names in a chain of title, the LRA will enable a searcher to find all relevant title information about a parcel in its register, with certain exceptions. The parcels would be indexed by unique identification numbers, or "PIDs". The LRA is drafted to enable the establishment of a fully electronic system, with the intention that ultimately searches and registrations/recordings may be effected electronically from a lawyer's office without the need to attend at a registry office.

Apart from the fee simple ownership interest which will be "registered" and guaranteed by government, other interests in the parcel will be "recorded" in the parcel register and their effect will still require legal interpretation by lawyers. The common law freedom of drafting which we now have will be maintained and lawyers will continue to create their own right-of-way

agreements, licences, priorities agreements, mortgages, restrictive covenants, profits à prendre, and the like. The full text of these documents will be available for review, unlike *Personal Property Security Act* registrations where only a notice is filed. The government will make no representation or warranty about the legal effect of any of these recorded interests, and clients will still need lawyers' opinions to deal with the priorities and legal implications of the recorded interests.

In addition to the parcel register, there will be two other interest registries which may have to be searched. There will be a Power of Attorney Registry, to enable persons who wish to register a power of attorney which will be relied upon in many transactions to register it in a general interest registry rather than in respect of a specific parcel. Banks, for example, will likely wish to register the powers of attorneys pursuant to which they execute releases of mortgage and other documents in the general Power of Attorney Registry. If on the other hand a power of attorney is to be used in one transaction only, it will be possible to register it in the specific parcel register to which it relates.

The other "interest" register is a general Judgment Registry. Although it will be possible to register a judgment against a specific parcel in that parcel register, it will also be possible to register a judgment in the general Judgment Registry so as to bind any land which a judgment debtor may acquire in future during the currency of the judgment.

I will now comment briefly upon certain specific provisions of the LRA.

1. New Registrations (Section 35ff)

Under Section 35, any person claiming to own a parcel that is not registered under the LRA may apply to the registrar of the district in which the land is situated to have the title to the parcel

registered. There are also certain circumstances in which an application for a registration under the LRA will be mandatory, as set out in Section 45. Any conveyance for value or mortgaging of a parcel will require the registration of the title to the parcel under the LRA. Also, it will be necessary to register title under the LRA when a plan of subdivision creating three or more parcels is approved and registered. This is intended to ensure conversion from the old *Registry Act* to the new LRA within a reasonable time period. However, there are approximately 520,000 parcels of land in Nova Scotia and, in my opinion, many of us will be retired before the last parcel has been entered into the LRA system and the old *Registry Act* can be repealed.

The application for registration must be accompanied by an opinion of title certified by a qualified solicitor setting out the ownership of the fee simple and all other interests in the parcel (such as mortgages and easements), a copy of the abstract of title on which the opinion is based, and an affidavit of verification by the solicitor confirming that the solicitor's opinion is based upon a title abstract showing the chain of ownership to the parcel to the standard required under the *Marketable Titles Act,* or to such lesser standard as the Registrar General may approve.

Only the fee simple estate, a life estate and remainder interest or interests, and the interest of the Crown may be "registered" and will be guaranteed by government. The other interests disclosed by the lawyer's title search will be "recorded" in the parcel register. Once the interest of the owner has been "registered", subject to whatever recorded interests are shown in the parcel register, a curtain is drawn across the past and it will no longer be necessary ever again to conduct an historical search of title in respect of that parcel. As the registered interest is conveyed from time to time, the parcel register will be "revised" to provide the name of the new owner. Recorded interests which expire or are paid out, such as judgments or mortgages, will be deleted from the parcel register (although deleted information will be archived), so that at any one time an examination of the parcel register will show only the registered owner and current outstanding recorded interests.

An application to register an interest will also require the filing of evidence that the subdivision provisions of the *Municipal Government Act* have been complied with or certification by the qualified solicitor that the provisions do not apply.

The solicitor who certifies title will be liable to the Registrar General with respect to "any negligent error or omission" in the title opinion, if the Registrar General is required to pay compensation under the LRA as result of the negligent error or omission within ten years after the opinion was furnished to the Registrar. During this period, the Nova Scotia Barristers' Society Liability Claims Fund will stand behind and in effect underwrite the solicitor's title opinion. After the ten year period, the government will bear the full responsibility of compensating any persons whose interests in land have been lost or damaged as the result of the registration of a parcel. However, there will be many circumstances even within the ten year period in which the Registrar General may have to pay compensation although the certifying solicitor was not negligent. A solicitor can provide an opinion that a title is marketable under the *Marketable Titles Act* based upon a chain of title commencing with a root of title forty years plus one day old. If there were a profit à prendre fifty years old which did not appear in such a chain of title, the solicitor might certify the title as marketable without making it subject to the profit à prendre, without negligence. The Registrar General would still compensate the owner of the profit à prendre which was lost, but would not have any recourse against the solicitor if the solicitor was not negligent.

The New Brunswick system, which is similar to the Nova Scotia LRA, limits the number of lawyers who will be entitled to certify titles into the new land registration system. Only solicitors who have been qualified by government to do so will be able to register interests in land. This is not the Nova Scotia approach, and all solicitors will be able to certify the title to parcels being registered under the LRA. However, the abstracts of title will be filed and available for review in the event that a claim is made in respect of a parcel and it is anticipated that there will be

some form of monitoring by the Barristers' Society and/or government in respect of titles that are registered under the LRA.

Also note that the Registrar General may approve a lesser standard than the *Marketable Titles Act* standard. It is contemplated that the Registrar General may in respect of certain well-established subdivisions, such as Clayton Park, provide that a title may be certified based only upon a chain of title forward from the deed conveying the bulk lands to the developer.

Note as well that certain "excluded interests" pursuant to Section 38 are in effect deemed to be acceptable risks and that a lawyer need not qualify his title opinion in respect of unreleased dower interests or in respect of unreleased mortgages more than forty years old which have not been amended or supplemented by an instrument registered during the preceding forty years. Presumably, deeds of trust and mortgage which were registered more than forty years ago but which are still outstanding will have amending agreements or supplemental indentures registered in respect of them, which would bring them to the attention of the title searcher. Under the *Marketable Titles Act,* since a reference to the original deed of trust and mortgage would appear in the forty year chain of title by virtue of the supplemental indenture, it would be necessary to go back up the chain and certify the title as subject to the deed of trust and mortgage even if it were registered outside of the minimum search period of forty year plus a day. Any person holding such an "excluded interest" would be entitled to compensation, if the registered title were not certified as subject to such interest.

2. Adverse Possession

Solicitors will also be assisted by Section 106, which contains consequential amendments to the *Limitation of Actions Act* and which will make it easier to certify title. Absence in the Province will no longer be considered a disability, and the period for acquiring rights by adverse

possession against a person under a disability is reduced from a maximum of forty years to twenty-five years. The time limit for acquiring adverse possession against the Crown is reduced to forty years from sixty years.

It is important to note that, unlike a Torrens System, the LRA does not abolish the concept of adverse possession and does not purport to guarantee the boundaries of parcels. Section 19 expressly provides that the description of a parcel in a register is not conclusive as to the boundaries or extent of the parcel. In order to convert to a true Torrens System, it would be necessary to require the filing of a plan of survey in respect of every parcel of land being registered under the LRA, and to check that plan of survey against surveys of adjacent parcels. The cost to the public associated with such a Torrens conversion was an obstacle, as was the concern that many plans of survey in this Province are very old and were conducted to standards which would not satisfy modern requirements and standards. In addition, because of the often confused state of boundary lines, and the inability to determine where even the boundaries of original Crown Grants are situate, possession often plays an extraordinary important role in determining ownership to land in Nova Scotia and will continue to do so. In appropriate circumstances, where it appears to the registrar that the boundaries of two registered parcels of land in some way conflict or overlap, the registrar may register a notice to that effect with respect to each parcel affected.

3. Revisions of Registrations under the LRA (Section 16ff)

Sections 16 to 18 deal with what interests may be "registered" and with the effects of registration. Beginning with Section 20, the LRA then sets out the manner in which a registration may be subsequently revised. A revision of a registration, which involves changing the name of the registered owner of a parcel, is ordinarily a straightforward process, although a registrar may refuse to revise a registration if he has reasonable and probable grounds to believe that the revision might result in a registration that is not in accordance with law. Section 20(1) provides that a

registration shall be revised when required by a transaction that binds the registered owner of the interest, and to correct the register when a revision of a registration was not authorised or is based on a transaction that has been rectified or rescinded according to law. Section 21 deals with changes of name, and provides that the registrar may revise the parcel register to change the name upon receipt of an affidavit by the person verifying the change of name and the PID numbers of all registers in which the change of name should be noted. There is also a provision in Section 21(5) for including any change of name in the judgment register if there are any judgments against names that are not materially different from the previous name of the person whose name was changed.

Section 23 deals with transfer of registered title where there is a will, and provides for a registrar of probate to forward a copy of any will for which probate or administration has been granted to the LRA registrar together with a list of the PID numbers of properties known to the registrar of probate with respect to which the deceased owned a registered or recorded interest at death. The registrar will then record the will in each parcel register that contains a registered or recorded interest owned by the deceased at death. Note that under Section 23(5) a will shall not be accepted by the registrar as a direction to revise a registration unless the will is accompanied by a certificate of a qualified solicitor verifying the interests conveyed, the parcel conveyed, and the person to whom it was conveyed. Thus a solicitor's opinion will be required to ensure that a parcel register is revised appropriately, since many wills require interpretation to determine whether title is vested in an executor, or directly in devisees, and to identify the devisees by name and the parcels intended to be devised.

Section 24 deal with intestacy in the same manner, and provides for the revision of a registration where an owner dies intestate upon receipt of proof of death and an affidavit in prescribed form of a person having knowledge of the facts setting out the heirs at law of that owner pursuant to the *Intestate Succession Act,* together with a certificate of a qualified solicitor verifying

the interest conveyed, the parcel conveyed, and (based upon the affidavit) the persons to whom it was conveyed. There is an exception under Section 24(3) in that proof of death and an affidavit as to heirs are not required when letters of administration are filed with the LRA registrar by a registrar of probate.

Under Section 25, where the registrar is provided with proof of death of a joint tenant, the registrar is to revise a registration to delete the deceased joint tenant as an owner of a parcel.

There are various other provisions dealing with the transfer of title by other instruments in Sections 26 to 30 of the Act, which deal with trusts, expropriations, bankruptcy, tax sales, court orders, and the like. Unlike transfer of title on death, none of them require a certificate from a qualified solicitor, although solicitors will likely be involved in effecting the revision of registrations pursuant to these sections.

4. Subdivision

Note that a solicitor's certificate is required setting out the name of each registered owner and holder of a security interest in respect of unregistered land affected by a subdivision when an application for subdivision is filed, as a result of Section 108 of the LRA. This is a consequential amendment to the *Municipal Government Act,* which applies on an application for approval of the subdivision of land that is not registered pursuant to the LRA. Where title to the parcel is registered under the LRA, an application for subdivision approval must be signed by each registered owner and holder of a security interest in the land affected by the subdivision, other than the owner or mortgagee of a servitude, a lessee, the owner of a profit à prendre, and the holder of a judgment. In circumstances where the title is registered under the LRA, the development officer can check himself to ensure that each registered owner and holder of a security interest in the parcel has signed the application for subdivision approval.

5. Judgments (Sections 65-74)

Under the LRA, judgments will have effect only for five years although they may be renewed for a further period of five years through a renewal process. Once the judgment has expired, it will be removed from the register. There will be no need first to abstract a judgment and then to check for its release. There are provisions requiring information so as better to identify a judgment debtor, and provisions whereby a registered owner or any person claiming an interest in the parcel against which a certificate of judgment is recorded may request the registrar to give to the judgment creditor a notice to withdraw the recording. This is to deal with circumstances in which a judgment appears to have been wrongly registered against a parcel, and the provision provides for the deletion of the certificate of judgment against the parcel upon the expiration of sixty days from the giving of the notice unless within that time the judgment creditor files with the registrar an order of the court extending the period of recording of the certificate of judgment.

6. Overriding Interests (Section 70)

The LRA will provide for certain overriding interests which shall be enforced with priority over other interests. Certain interests of the Crown (for example in minerals and watercourses), liens in favour of municipalities, leasehold interests for a term of three years or less if there is actual possession under the lease, utility interests, easements or rights of way that are being used and enjoyed, rights acquired by adverse possession or prescription, and certain interests or rights granted by or created under an enactment of Canada or Nova Scotia will prevail. However, the overall intent of the Act is to reduce the number of unregistered interests which can bind land, and in particular to require liens in favour of provincial departments and agencies to be recorded against the parcel or run the risk of losing their priority. Thus liens created under the *Workers' Compensation Act, Condominium Act, Labour Standards Code*, or *Environment Act* will need to be

recorded against a parcel if they are to be binding upon successors in title. This should greatly simplify our work as lawyers in acting on the purchase or mortgaging of land, since we will be able to check the parcel register for such liens and will no longer be required to write letters to government departments and await the not always timely responses.

7. A New Role For Lawyers

Solicitors have long had a role in ensuring that title to land in Nova Scotia is properly conveyed and registered, and this role will continue under the LRA. In addition to the requirement that title to parcels being registered under the LRA be certified by qualified solicitors, the Act provides for agreements with classes of professionals who may act as registrars authorised to effect electronic registrations and recordings. See Section 95 of the LRA, under which the Minister (subject to the approval of the Governor-in-Council) may enter into agreements prescribing the terms and conditions under which the members of a profession may perform prescribed duties of a registrar, which agreements may contain provisions respecting the standards that the members of the profession shall meet, the manner of enforcement of the standards, the liability of the members to the Registrar General, and such other matters respecting the implementation and administration of the Act as may be expedient. It is contemplated that the Nova Scotia Barristers' Society will work with the Minister to develop a protocol whereby lawyers may be authorized to effect electronic registrations and recordings from their offices, once the technology is in place to enable this. A qualified lawyer might thus be able to revise a registration to transfer title from John Doe to Robert Doe and to record a mortgage against the parcel, directly from his office. The agreement would deal with the solicitor's liability in the event of an error, and would likely provide for liability insurance coverage of the solicitor in the event of a mistake. Documents such as mortgages could be scanned into the electronic register from the lawyer's office, and payment of registration or recording fees and deed transfer tax could be effected electronically.

Summary

In conclusion, the LRA will change many ways in which lawyers do things, but will not much affect the substantive law that we as property lawyers use in conveyancing and mortgaging or much of what we do in a property transaction. We will still advise our clients in respect of the ownership of title to land, in respect of interests recorded against the owner's interest and in respect of their priorities, in respect of zoning and land use issues, in respect of restrictive covenants, and the like. We will still be drafting and recording various agreements in respect of parcels of land. But the process of gathering the information in respect of which our opinion is required should be greatly simplified, and many mechanical problems associated with conveyancing will be removed. It will no longer be necessary, for example, to drive to Shubenacadie to file a deed transfer tax affidavit and have a deed stamped, and then to drive to Windsor to have the deed recorded. Above all, the LRA should make it possible for us to provide faster and better service to our clients. The current *Registry Act* system is a dinosaur looking for a tar pit. The public of Nova Scotia deserves and needs something far better, if Nova Scotia is to compete in the globalised economy of the 21st Century.