What is a Certificate of Title?

A discussion of certificates of title is found in the excellent article entitled opinion Submitted to the Real Property Section, The Canadian Bar Association: Solicitors' Responsibilities in Real Estate Transactions prepared by Messrs. John Swan and Barry J. Reiter of the Faculty of Law, University of Toronto and published in 8 R.P.R. 155. I attach hereto that portion of this article which deals with certificates of title under the heading "The Content of the Reporting Letter Sent to the Client".

This article reads in part as follows (at p. 211)

"However, it is assumed that such problems are likely to be extremely rare and that the more realistic concern is if there is any significance to a statement that the solicitor "certifies" that the client has a good and marketable title as compared to a statement that "in the (solicitor's) opinion" the client has a good and marketable title.

It is our opinion that the form of words used in the reporting letter makes no difference to the liability of the solicitor, It equally makes no difference if the solicitor's letter uses neither of those forms of words. It has already been argued that the source of the solicitor's obligation is not the reporting letter but the undertaking to perform those services that are customarily performed. It follows that the terms used in the letter cannot (subject to one qualification) make any difference to the obligation: they come too late to be part of the obligation. (See also, supra, p. 201.) The qualification that has to be made refers to the fact that the letter may be evidence of the obligation."

Although the form of words used in the reporting letter may make no difference to the liability of the solicitor, I believe that it is important to bear in mind what a solicitor is giving to a client in a reporting letter, with respect to title.

In my opinion, the solicitor is giving an "opinion" arrived at in a fashion similar to any opinion which that solicitor gives. For instance, instead of going to a law library to review and research the law from text and case books, the solicitor initially goes to the appropriate Registry Office to search from index and record books. As well, because of matters which may arise in the course of a search, that solicitor may also have to consult the publications found in a law library. In addition, the solicitor may have to check the status of unregistered statutory liens which may affect title. Once the process is complete, then the solicitor is in a position to offer his "opinion" on title.

Because of the very nature of a Registry Act system, the solicitor's report on title can be no more than an opinion and that opinion will be based in large part on the standards practiced by solicitors in the locale where the solicitor practices.

For instance, the practice in New Brunswick varys with respect to how far back in time a title is searched. In some areas, solicitors generally go back sixty years while in other areas, solicitors generally go back only forty years. Under either approach, however, the solicitor may be a victim so to speak of the perils and pitfalls of the Registry Act system.

A classic example is the situation of a leasehold title which may have been created sometime in the 1800s and has evolved as a spearate chain of title to the present time. Both the solicitor who searched back sixty years and the solicitor who searched back forty years would have no notice of this separate leasehold title in the normal course of a title search assuming that there is no reference to it in the instruments conveying the freehold title.

If a solicitor were giving anything more than an opinion based upon an acceptable standard of practice, then both solicitors would be liable to their clients for damages flowing from their failure to discover the separate leasehold title.

Standard of Practice

As to the general standard to be practised, the following judicial pronouncements found in recent cases dealing with certification of title are noteworthy:

1.Grant J. in Brenner v. Gregory, 30 D.L.R. (3d) 672 at p. 677:

"The obligation of a solicitor to exercise due care in protecting the interests of a client who is a purchaser in a real estate transaction will have been discharged if he has acted in accordance with the general and approved practice followed by solicitors unless such practise is inconsistent with prudent precautions against a known risk, as where particular instructions are given which the solicitor fails to carry out."

2. Hallett, J. in Maple Leaf Enterprises Limited v. MacKay, White, Stroud, Langley and Sutherland, 42 N.S.R. (2d) 60 at p. 65:

"As to the law, it is well established that among the duties a lawyer owes to his client is the duty to exercise reasonable care in the performance of the duties he has assumed for the client, he must bring a degree of expertise and care to his work equivalent to the standard exercised by reasonably competent solicitors in the province."

3. Hallett, J. in Canada Permanent TrustCompany v. MacLeod, MacLeod and Bambury and Walsh, 39 N.S.R. (2d) 636 at p. 645:

"I am satisfied that she acted in the performance of her duties in accordance with an accepted standard of the Bar of this province in connection with the certification of title."

4. Anderson, J. in Charette et al v.Provenzano et al, 90 D.L.R. (3d) 289 at p. 290:

"The defendants failed to ascertain and report that the lot was subject to an easement. The defendants did not exercise the standard of skill required of reasonably competent solicitors."

As well, the following judicial pronouncements dealing specifically with the solicitor's duty when searching in the Registry Office are comforting and noteworthy:

1. Baxter, C. J. in Carson v. MacMahon
[1940] 4 D.L.R. 249, at p. 254:

"Both of these cases turn on the use of the means of the Registry Act for tracing titles. Until superior authority compels me to do so, I cannot extend their application to instruments which by no conceivable possibility, except that of pure accident, could be found by a person searching a title. There is not even the circumstance that the searcher might be put upon inquiry by the occupation of the land. In this case it was wild land with no visible occupant.

The Registry Act provides for the keeping of indexes and I think if a person searching a title uses all the means provided by the Act it would be an unreasonable construction of the section relating to notice to hold that if there were any adventitious entry on the registry he must be held to have notice of it. All that was intended by the section was that if a document was on the registry, which he might have seen in the course of a proper search, he would be fixed with notice of it, whether he actually looked at it or not."

2. Hallett, J. in Maple Leaf Enterprises Limited v. _MacKay, White, Stroud, Langley and Sutherland, supra, at p. 73:

"A lawyer is entitled, in the absence of evidence to the contrary, to search a title in a chronological sequence in accordance with the indexes at the Registry of Deeds and has no liability with respect to documents which cannot be disclosed by normal searching procedures".

The difficulty when applying the "Standard of practice" test to certification of title, is that the practice may vary within a Province and indeed, may vary from law firm to law firm. For instance, as stated previously, the practice in New Brunswick appears to vary as to how far back in time a title is searched. As well, recent legislation dealing with marital or matrimonial property has given most solicitors fits as to the use and form of

affidavits to be attached to instruments affecting the disposition of real property. Although the times when these affidavits can be relied upon appears restricted by the legislation i.e. on dispositions by one person, many solicitors are developing various practices of requiring an affidavit on any disposition whether it be by one or more persons or by a corporation, and are further requiring statements in them as to age and residence under the Income Tax Act of Canada.

Perhaps the time may have come when Barristers Societies will have to seriously consider adopting and stating a standard of practice with respect to the certification of title. This is not a novel idea, since it already exists in such jurisdictions as the State of Maine. I am advised by an attorney practising in Calais, Maine that the standards adopted by the Maine State Bar Association are very detailed and comprehensive and deal with such varied subjects as the acceptable length of time for searching back a title (which I believe is forty years) and who is qualified to execute a discharge of mortgage in an estate situation. These adopted standards are apparently constantly reviewed and up-dated.

One advantage of adopted standards of practice, of course, is that everyone including solicitors and judges are aware of what they are and can govern themselves and act accordingly.

Perhaps another advantage stems from the fact that in some cases there may not be a common understanding between the client and the solicitor as to what the solicitor is certifying. In this regard, it is interesting to note the following comment by the previously referred to Mr. John Swan found in his annotation to Kienzle v. Stringer, 14 R.P.R. 29 at p. 31:

> "The test that should be adopted to determine the extent of a solicitor's liability is what the reasonable client expects. A client typically expects more than a simple promise to do only a careful search. There is the expectation that the lawyer is in some sense guaranteeing a marketable title."

With an adopted standard of practice, it may be easier for solicitors to explain to clients the meaning and effect of a certificate of title.

Qualifications and Limitations to Certificates of Title

The following statements by Messrs. Swan and Reiter regarding qualifications and limitations to certificates of title, found in their article referred to previously, are noteworthy:

"A solicitor who seeks to limit his obligation to his client will have to convince the Court that the client's consent to the change in the normal obligation of the solicitor was obtained with the client's knowledge of the consequences of the change" (at p. 194 of 8 R.P.R.)

"If a solicitor should agree to act for a purchaser and does not at that time ensure that the scope of his duties is expressly determined, a subsequent attempt to reduce the scope may be ineffective." (at p. 199 of 8 R.P.R.)

"It may, of course, be the case that a solicitor acting for a purchaser discovers some defect in the vendor's title or some other matter affecting the property. If the solicitor discloses the existence of this defect or problem to the client he has discharged his obligation. Should he be instructed to proceed to close despite this defect, the client may have no cause for complaint if he subsequently suffers loss. However, in this case, before the risk of loss may be effectively transferred to the client it is our opinion that the solicitor has to meet an obligation to inform the client precisely of the risks he is running by going ahead with the deal." (at p. 200 of 8 R.P.R.)

"It has already been stated that a solicitor can only limit his obligation to his client by a clear agreement that sets out his obligations at the time that the solicitor agrees to act. Any purported limitation in the reporting letter would, therefore, be ineffective" (at p. 210 of 8 R.P.R.)

In an attempt to discharge the obligation to advise the client of the scope of the solicitor's duties, some solicitors forward a letter to the client - purchaser at the commencement of their involvement in a transaction, giving a detailed explanation of the services to be rendered and those matters which are not covered by the solicitor. A letter of one firm in New Brunswick for instance, includes the following statements:

(a) that title will be examined for a minimum of forty years;

(b) that zoning will not be verified unless specifically requested;

(c) that positioning of building on the land will not be certified and that this can only be done by a surveyor at a cost ranging from $75 to $125;

(d) that the contents of the building and the quality of its construction will not be verified; and

(e) that the existence of any valid leases with tenants, roomers or boarders, if applicable, will not be verified.

With respect to the obligation of a solicitor to advise a client regarding a survey, the following statement by Coffin, J.A. in Marwood v. Charter Credit Corporation, 2 N.S.R. (2d) 743 at p. 746 is very relevant:

"it may well be that purchasers do not always wish to go to the expense of making a survey, but as a matter of practice it is my view that solicitors should always advise them in advance on this matter and make it clear that the certificate of title which will be issued is at all times subject to a survey. If this is done ahead of time and a purchaser still insists on going forward without retaining a surveyor, then the responsibilities are obvious. In the present case, the evidence is that the purchasers did not even see the report on the title until the transaction had been completed."

It would appear that the practice in Nova Scotia regarding limitations to certificates of title differs in the following two significant ways from that in New Brunswick:

(1) many certificates in Nova Scotia attempt to limit liability by stating in the certificate that in the event of an error, the firm's liability is limited to a certain stated dollar amount; and

(2) many certificates in Nova Scotia indicate that the certificate is valid only so long as the purchaser owns the property.

Apparently some solicitors take the view that they are unable to certify to an unlimited dollar amount, since they would never be sure what amount of liability insurance coverage they should have. This view appears questionable since solicitors give opinions in other matters without putting a dollar amount limit on their liability with respect to those opinions. As well, there seems to be a notion that what they are doing is "insuring" title themselves and therefore, they are requiring payment of an adequate "premium" often based on a tariff of fees recommended by a Barristers' Society. However, it is submitted that a recommended tariff of fees does not represent the premiums paid in title insurance but rather is meant to be a guide for the setting of fees in part based upon the ability of the consumer of legal services to pay for such services. As well, it is interesting to note the following statement by Messrs. Swan and Reiter in their article referred to previously:

> "It has been argued that if a solicitor should undertake to guarantee title in the sense that he was offering title insurance he faces two problems. He may be in violation of S. 21 of The Insurance Act and he may lose any insurance coverage under the Law Society's Insurance plan for professional liability." (p. 212 of 8 R.P.R.)

It is difficult to understand acceptance by a client of a limitation as to

duration of ownership, especially in Nova Scotia where apparently the typical mode of conveyance is by way of warranty deed and any warranty subsequently given by the client would in part be based upon the certificate of title obtained from their solicitor at the time of their acquisition of the property.