

COUNTRY CONVEYANCING: WATCH OUT FOR THE LEGAL COWPIES

There is a lake in southern Kings County that was obviously named by the first conveyancer to search title in the area: LAKE TORMENT. Typical of rural Nova Scotia that area is almost whimsically divided by lines that run from long vanished maple stumps and spruce trees to other similar monuments, lines described by reference to 19th century neighbours with Biblical names. The "being and intended to be" paragraphs in the descriptions generally refer to vast acreages which "more or less" make one wonder what it was our forefathers drank while walking the bounds and drafting descriptions. The purpose of this paper is to alert you to some of the more common pitfalls in country conveyancing and does not pretend to be exhaustive in its scope: in all aspects of country conveyancing, caution must be the watchword. t..

PROPERTY DESCRIPTIONS & TITLE: WATCH OUT!

I suggest the essential first step in representing the purchaser of a country property is to clearly explain the limits, if any, in your title certificate before you and the client agree to do business. You should also discuss fees. This, together with a clear explanation of the necessity for a survey of the property, should be committed to writing and sent to your client so that your terms of engagement are clearly understood by both of you. Good communications with your client throughout the transaction together with clear explanations of any title or other wrinkles is also essential. Experience indicates that a client's memory of such explanations given verbally is inversely proportional to his disappointment when he discovers that the property he just purchased is less than half the size recited in the deed description.

Errors in stated acreage in deed descriptions are notorious. Only once in seven years of practice have I heard a rumor that a purchaser received more property than was stated in the "being and intended to be" clause in his deed. By and large the law appears to be a practical application of the caveat emptor principle see, for example, Aberg v. Rafuse (1980), 36 N.S.R. (2d) 56 (N.S.S.C., Glube, J.) in which the purchaser had to settle for 58 acres although the size of the property was expressed to be 374 acres in the description. One can only imagine the client's delight at the outcome. See also Bent v. Nova Scotia Farm Loan Board, Horsnell and Horsnell (1979), 30, N.S.R. (2d) 552 (N.S.C.A.) for another recent decision fixing the purchaser with what he had been shown, not the acreage indicated to him. If you draft an Agreement of Purchase and Sale on behalf of a purchaser consider adding an appropriate minimum acreage clause which states who is responsible to arrange and pay for the survey. A sample clause is attached to this paper.

Adverse possession. You should also advise a purchaser client concerning possible third party property rights arising from adverse possession and the necessity of a survey in this regard. The possibility possessory rights is a compelling reason for your client to obtain a survey.

The best title some vendors have to offer is based on adverse possession. If your purchaser client will not be satisfied with possessory title put a clause to this effect in the Agreement of Purchase and Sale. For a helpful note on this topic see: A Possessory Title - Would You Accept It?, Floyd Horn, N.S.L.N. 6:3:54. This article also is helpful in the matter of clarification of titles under the Quieting Titles Act, the Lands Titles Clarification Act and the Vendors' and Purchasers' Act.

Apart from the usual wrinkles that one finds in searching titles generally, there are some unusual circumstances that arise from time to time in searching rural properties. Here are some hints that may be of assistance to you:

(a) Old School Properties: If you cannot find title of an old school property into a municipality you may find that title vested in it under sections 221-225 of the Municipal Act.

(b) Railways: Beware of descriptions which contain references to railway "rights of way" - you will probably find that the "right of way" is not that at all but that title to the alleged "right of way" vested in the particular railway by legislation. For example, the former North Mountain Railway line, a component of the Dominion Atlantic Railway in Kings

County vested in the D.A.R. by 10 Edw. VII, c. 136, a 1910 statute, and other legislation. Similarly for the old Cornwallis Valley Railway.

(c) Dower: Old dower interests may be preserved by the Matrimonial Property Act s.33(4); in this circumstance you may find succour in section 4 of the Dower Act which exempts unimproved land from dower interests.

(d) Boundaries: You may find assistance in title or boundary matters by referring to aerial photographs. These may be purchased from Maritime Resource Management Service, Box 310, Amherst, Nova Scotia, B4H 3Z5, telephone - (902) 667-7231. You may also find help in some municipal offices which have tax assessment maps reduced from aerial photographs. You cannot rely on the accuracy of these maps but they can be of great assistance in locating a property. Some assessment offices also have title history particulars on the assessment cards.

(e) Recitals: Section 1(a) of the Vendors and Purchasers Act can be quite helpful: it states that ,I recitals, etc., contained in documents which are more than 20 years old at the date of the contract shall be sufficient evidence of the truth of such I facts unless they are proved to be inaccurate.

(f) When all else fails: If you are really stumped in searching country properties call the neighbours; they can usually provide you with an oral history of the property - and a whole lot more. (My wife always says that you don't see much in the country, but what you hear makes up for it)

ACCESS TO THE PROPERTY

Access to the property is of equal importance to ownership.

Access may be by public highway. If it is, be aware of sections 10, 14 and 16 of The Public Highways Act which detail what constitutes a public highway, deems the width of public highways to be 66 feet and rules out title to highway lands by adverse possession. I have attached a letter from the Department of Transportation which was published by the Society in materials, for the New Home Construction and Conveyancing conference in 1980; it summarizes these provisions.

A surprising number of properties in our area are "caught" by the deemed 66 foot width of highways. Many homes and buildings in our area were built very close to the apparant limit of the highways; upon survey it is not uncommon for the "deemed" road limit of the highway to go through the front porch, the living room or other parts of the structure. This problem can also arise when the Department of Transportation straightens highways as well. This should be a matter of great concern to the lawyer and is another compelling reason for the client to obtain a survey. For an example of the effect of these sections see Ewing v. Publicover (1976), 13 N.S.R. (2d) 346 (N.S.S.C., MacIntosh, J.) in which a purchaser had an Agreement of Purchase and Sale put aside because part of I the property to be conveyed was within the statutory highway width and was not the vendor's to sell.

If access to the property is by private right of way you will want to be sure that there is good title to the right of way in the person granting it. You will also want to ask if the right of way is an exclusive one, useable for all purposes, i.e. vehicular traffic, open all year round (if that is a concern), who maintains the right of way, if the right of way requires payment of an annual fee and whether or not the fee is paid. If your client intends to develop the property or subdivide it, ensure that the right of way is of sufficient width and that your client has the right to develop it in accordance with local zoning by-laws. Some zoning by-laws call for a 66 foot right of way, not standard cow path width.

You should make every effort to obtain an express grant of right of way for your client as many i rights of way in rural parts are not expressly granted. Problems can arise if hard feelings develop between the purchaser and the neighbour over whose land the right of way passes.

In some commercial circumstances the purchaser may be able to obtain a right of way under the Private i

Ways Act and in other circumstances there may be a right of way by operation of law (for example B.O.J. Properties Ltd. v. Allen's Mobile Home Park Ltd. (1980), 36 N.S.R. (2d) 362 (N.S.C.A.) discussing rights of way of necessity).

DOMESTIC WATER

Your client will probably require an adequate supply of potable water for his or her enjoyment of the property. Again this is a matter for which provisions should be made in the Agreement of Purchase and Sale by appropriate warranties. Bacteriological analysis of the water can be made at regional laboratories of the Department of Public Health. For chemical analysis of private water supplies inquiries can be made of the Department of Pathology, Division of Clinical Chemistry, 5788 University Avenue, Halifax, Nova Scotia, B3H 1V8 or telephone 428-3466/64, Water quantity/floor checks can be made by well drillers but my experience in this regard has been dismal as most well drillers that I have talked to are not in the slightest bit interested in doing this type of test. The best practical evidence I have ever had of an adequate water supply in a country property is that of a previous owner who said she had raised twelve children on the property and had never run short of water; even the mortgage company involved accepted her letter in lieu of a Well Driller's Certificate.

In any event, you should be clear about the source of water to the property. Is it on the property to be conveyed or is the source on a neighbouring property? If it is on a neighbouring property is there an express Grant of Easement or not? If not, you should make every effort to obtain one. Your urban client moving into the country would also be well advised to inquire whether it is a natural or man made supply, whether the well is dug or drilled, and concerning the construction of the well as many old crock wells allow groundwater to seep in.

OVERRIDING INTERESTS

Be aware of the myriad overriding interests in land to which a property may be subject. Many of these are outlined in overriding Interests in Land, MacIntosh and Gavin, N.S.L.N. 2:3:1 and more fully set forth in their publication, overriding Interests to Real Property in Nova Scotia, published by the Land Registration and Information Service of the Council of Maritime Premiers, 1975.

Of particular interest to persons with waterfront property is the Angling Act. It gives residents of the Province the right to travel on the waters of any lake, river or stream, the right to cross uncultivated lands and the right to travel on foot along the banks of any river, stream or lake for the purpose of fishing. Unless the land owner obtains an exclusive fishing license he cannot prevent Nova Scotia residents from exercising their fishing privileges.

Your client may also find power line rights of way across the property which may or may not be revealed in the Registry Office. Section 22 of the Power Commission Act gives the Nova Scotia Power Corporation wide powers to construct power lines and other facilities and, as well, to flood properties without the consent of property owners. Similar powers are found in Section 5 of the Rural Electrification Act. If your client's property is on one of the lakes formed by a Power Corporation dam, you may wish to alert your client to the fact that the Corporation has the right to flood his property before he completes the transaction.

You and your client should also be aware of the Water Act which vests title to every water course including the bed and source thereof in the Crown in right of the Province. Minor water courses which cannot be used for mechanical or power services are excepted. The Act also limits the right of the land owner to divert and use water from water courses.

Your client's right to remove materials from the beach in front of his property may be limited under the Leaches Preservation and Protection Act, S.N.S. 1975, c.6. Other restrictions on the right to build wharves and protrusions into navigable waters are

contained in the Navigable Waters Protection Act, R.S.C., c.193, which indicates that no work shall be built or placed in, upon, over, under, through, across any navigable water unless approved by the Minister of Transport. Grants of beach or foreshore properties may be obtained under the Beaches and Foreshores Act. You may wish to caution your client against harvesting seaweed before checking for regulations under the Sea Plants Harvesting Act.

Use of some farm properties may be affected by the Common Fields Act, Fences and Impound of Animals Act and the Fences and Detention of Stray Livestock Act. These provide for the maintenance of fences, etc. If your client is buying dykeland, you may also wish to review the foregoing statutes as well as the Marshlands Reclamation Act and any appropriate Municipal By-Laws thereunder. You should be aware that some dykelands come within the purview of Dykeland Organizations under some of the foregoing legislation. One positive note about dykeland is that (at least in Kings County) boundary disputes are rare - perhaps only a last ditch alternative.

SUBDIVISION APPROVAL

If ever there was an important subject, this is it. You need to be certain that the property your client is purchasing has any necessary subdivision approval. The Planning Act (ss. 1, 49 and 50) is the starting point. Where subdivision approval is required any conveyance of a subdivided lot is void where approval is not obtained. Reid v. Reid (1978), 22 N.S.R. (2d) 361 (N.S.S.C., Jones, J.) and cases cited therein. Where an unsubdivided lot was conveyed on or prior to April 30, 1977, such conveyance may be valid pursuant to the Real Property Transfer Validation Act, S.N.S. 1977 c.16. There are also certain circumstances in which the Act may not apply, for example, where there are no regulations under the Planning Act in the municipal unit involved nor any subdivision by-law: Dougan v. Falkenham (1978), 24 N.S.R. (2d) 662 (N.S.S.C., Jones, J.). See also Reid v. Reid Clarified, N.S.L.N.

4:4:1; Does Reid v. Reid Still Linger?, N.S.L.N.

4:2:20; also Unfiled Plan Renders Deed Void, N.S.L.N.

2:4:16 (but note amendment to section 50(7) of the Planning Act by section 3 of the Real Property Transfer Validation Act). In any event subdivision approval is an area in which extreme caution is called for.

BUILDING PERMITS - ZONING

If your purchaser client intends to occupy the property or build on it, you should make the obtaining of a Building Permit, clearance under the Health Act and any necessary clearance from the Department of Transportation a condition of completion of the transaction. Note that some municipalities incorporate into a single Development Permit Application three distinct matters the development permit, i.e. conformance with planning and zoning legislation, the building permit, and an occupancy permit.

The Health Act and regulations thereunder, particularly the On-Site Sewage Disposal System Regulation. N.S. Reg. 73/78 (sections 8, 26, and 27) prescribe minimum lot sizes for the installation of on-site sewage disposal systems. It might require "uncanny" skill on your part to satisfactorily explain to your client why he or she has not been able to erect "facilities" on the new property if you fail to address this problem.

Your client may require a Building Permit from the local municipality. You should make appropriate inquiries or direct your client to do so.

If your client is acquiring property for a special purpose, appropriate zoning should be a condition in the Agreement of Purchase and Sale.

If the property contains a new cottage or dwelling, you may wish to check relevant municipal by-laws to determine whether or not an occupancy permit is required. Lack of such a permit may make occupancy illegal: you may wish to make production of an Occupancy Permit by the vendor a condition of the Agreement of Purchase and Sale.

CHANGE OF USE TAX

The Assessment Act, sections 25C, 40A and 40B provide for immediate payment of Change of Use Tax, 50\$ for recreation property and 20\$ for farm and forestry property upon its change of use. I have attached a copy of the decision in Robert McDade v. Municipality of the County of Pictou, R.A.A.C. (Pictou County) which was decided in late February or early March, 1979. I also refer you to N.S.L.N. 7:5:74 which summarizes Clayton Developments Limited vs. Director of Assessment, R.A.A.C. (Halifax County) Kidd, Chairman, January 27, 1981. R/6 and Dietrich Wolter v. Director of Assessment, R.A.A.C. (Annapolis-Digby), MacDonald, Chairman, January 27, 1981. R/5. Although the Act is specific as to who pays the Change of Use Tax, there seems to be room for some judgment as to when the Change of Use occurs. Accordingly, if there is any question between the Vendor and Purchaser, responsibility for payment of any Change of Use Tax should be fixed by contract between them so that the burden falls where they intend. The policy apparently being followed by the Regional Director of Assessment is that submissions to a Development Officer of a Plan of Subdivision prima facie constitutes a change of use, generally on the part of the assessed owner, and results in an assessment for the same (with a fairly short appeal period).

Property developers should be aware of the Change of Use Tax as well. I have heard one horror story of a property owner filing a subdivision plan which created a number of waterfront cottage lots; the "change of use" increased the assessment from \$5,000.00 to \$60,000.00 and substantial Change of Use Tax was payable immediately. Under similar circumstances, a developer may wish to apply for approval of such lots, one at a time as sales are arranged so as to spread the Change of Use Tax over an appropriate period of time.

NON-RESIDENTS

If the Vendor is a non-resident of Canada, remember to obtain an appropriate clearance under section 116 of the Income Tax Act. You might bear in mind that the process is much simpler when the Vendor lives outside the Country than when the vendor is in the process of leaving Canada permanently. In the later case, Revenue Canada demands a lot more information concerning the deemed disposition of the vendor's assets than in the former and the process can take much longer. One does well to chat with the appropriate Revenue Canada official to obtain both the return forms and form of recommended letter of undertaking as well as to confirm the data required concerning the adjusted cost base and the distinction which may apply between a gift and a sale under relevant tax conventions.

If the Purchaser is a non-resident of Nova Scotia, the Purchaser must register his acquisition of a property under the Land Holdings Disclosure Act. The forms are simple, straight forward, and may be signed by the solicitor. No special taxes, assessments, or c' fees are payable under the Land Holdings Disclosure Act except for non-compliance.

INSPECTION

If you represent the purchaser, make sure the Agreement of Purchase and Sale includes a clause permitting inspection of the property immediately before closing. Rural properties are subject to wear and tear from weather as well as occasional acts of vandalism. Without such a clause, your client may not be entitled to such inspection as of right.

NEGLIGENCE

Solicitor's negligence in conveyancing matters appears to be based upon local practice. It may be prudent for you to seek advice of local counsel if you are involved with title to land which is outside your normal area of practice.

GOOD LUCK

Checklist for Agreement of Purchase and Sale

Acreage

1. What size is the property, is price to be abated if the acreage is less than that represented or is the agreement to be void and deposit returned?'
2. Is the property to be surveyed? By Whom? At whose expense?

Is there Access to the Property?

1. By public highway? By private easement?
2. If by private right-of-way, who maintains it?, Is it open all year round?, Is a fee involved?, Is the fee paid up to date?
3. Is there an express easement?
4. How wide is the right-of-way?
5. How wide does it have to be for your client's purposes?

Change of Use. Zoning, Building Permits

1. Will there be a change of use created by the purchase?
2. When will the change of use occur?
3. Should you allocate responsibility for payment of the Change of Use Tax by contract?
4. Do zoning regulations permit the intended use of ,
the property by your client?
5. Is the agreement to be conditional upon the Purchaser obtaining a building permit, clearance from the Department of Transportation, or clearance under the Health Act and Regulations?
6. What is the source of domestic water for the property? Is it on the property or off? If off, is there an express easement? Will the agreement be conditional upon obtaining an express easement? Is the agreement to be subject to proof of quantity and quality of the water supply?

General

1. Does the purchase price have to be allocated between land, buildings, chattels, etc.?
2. Will there be an oil/fuel adjustment? (some people burn wood not oil)
3. Include a clause giving the purchaser the right to inspect the property immediately before closing.
4. Do you wish the conditions to be true conditions precedent or do you wish to put in a clause that the conditions in the Agreement of Purchase and Sale are for the benefit of the Purchaser who may waive them at his or her option?
5. Have you discussed fees with the client, your form of title certificate and the limitations therein, and the necessity of survey with your client before accepting the Retainer? If not, reread your professional liability insurance policy, set aside a reserve for the deductible in your bank account and buy a lucky rabbit's foot (maybe you should get a horse shoe, the rabbits foot wasn't very lucky for the rabbit).