Draft Speaking Notes and Commentary
on the Registrar General's Directive respecting LRA Regulation 10(14)

Catherine S. Walker, Q.C.

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The RG has prepared a directive to address some of the issues that have been raised to date with respect to the Regulations that became effective May 4th, 2009. In particular, the directive is aimed at clarifying the application of Regulations 14-18 to the AFR process, and the 'necessary changes' referenced in Regulation 10(14).

Regulation 10: The AFR Process

Regulation 10 deals with the AFR process generally, and specifically the obligations of an authorized lawyer when migrating a property. The obligations include the requirement to comply with s.37 of the Act (basic opinion requirements), requirements if migration is based on adverse possession (notice requirements- 10(10), statutory declaration foundation requirements 10(13)), and notice requirements if there is any occupation without permission 10(9)).

The new sub regulation 10(14) effective May 4th, 2009, provides that if, on an AFR, you are adding a benefit or burden, you must comply with the general requirements for adding benefits/burdens as set out in Regulations 14, 16, 17 and 18. These regulations apply to an AFR "with necessary changes". This memo is intended to provide some practice context for the RG Directive as to how the requirements of Regulations 14,16,17 and 18 are modified for an AFR context.

Some historical context:

Since 2007, an authorized lawyer adding a new benefit or burden to a registered parcel has been required to comply with the specific requirements for any corresponding (or 'flipside') parcels impacted by the new benefit or burden. The addition of a benefit or burden usually impacts more than one lot. This introduces a process of requiring a lawyer to carry out a 'matching' assessment of parcel registers for all easements except those set out in Regulation 16 (utility easements, municipality easements and restrictive covenants). Sometimes the matching process is also referred to as a 'jigsaw puzzle' assessment as there is more than one piece, and the pieces must 'fit' or 'match'.. If your client is entitled to an easement over his adjoining neighbour's property for example, your client's parcel will have a 'benefit' and the adjoining property should have the corresponding 'burden' so that both fit together and the interests shown in the parcel registers 'match'.

The corresponding parcel(s) (sometimes more than one) affected is often called the "flipside" parcel(s) - either dominant tenement PIDs (DTP- the one that enjoys the benefit), or servient

[1] Author's Note- While I have attempted to embark on a consultative process in the preparation of these remarks, I take sole responsibility for any errors and for the views expressed, which are my own, and not necessarily reflective of government, the NSBS, or LIANS. This is a discussion document, intended to help practitioners as we work in the *Land Registration* environment. As lawyers, we must, as always, continue to use our own professional skill and judgment in certifying title, or providing any opinion.

tenement PIDs (STP- the one that 'serves', or has the burden). Regulation 14 sets out the requirements for what you have to do when adding a new benefit or burden (B/B) for registered parcels, after migration.

The regulations that came into effect May 4th,2009, obliged lawyers to follow the requirements for the addition of benefits and burdens in Regulations 14, 16,17 and 18 for AFRs. The AFR process, involving the documentation of existing benefits/burdens is different from that contemplated by Regulation 14 for the addition of newly created benefits/burdens to parcel registers under the LR system. The Directive discusses what changes the RG is prepared to consider when these regulations are applied in an AFR context.

The Directive:
If when you are migrating a property, you are of the opinion that there is a benefit/burden that is properly part of the attributes of the title being registered- what do you do?

1. Identifying whether there is a benefit/burden on an AFR (Paragraph 1 of the Directive)

If, during the course of an AFR, the migrating lawyer is of the opinion that there is a benefit or burden that forms part of the title to be registered, then that lawyer must identify, if possible (or "practicable") what other parcel(s) is(are) affected by the benefit/burden that will be part of the migrated property. If you can identify the other affected parcels, you proceed to undertake a process of determining whether, once the migration process is completed, all affected parcels will 'match' with the benefit/burden you are registering.

In considering the benefits/burdens that apply to a parcel that is being registered, reference should be made to amended s.20 of the *Land Registration Act:*

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

If you are of the opinion that you cannot identify the other parcels affected by the benefit/burden, or if you are of the view that it is not 'practicable' to identify all the affected parcels, you may consider applying for an exemption pursuant to Regulation 17 (and Paragraph 4of the Directive). This may include authority to use "Various PIDs" or "Various Owners" in lieu of identifying the affected 'flipside' parcels. What will constitute 'practicable' may vary, but some themes may emerge fairly quickly as to what will generally be considered in these kinds of applications.

Legislative obligation to both notify of and correct errors in parcel registers:

Lawyers are reminded of their legislative obligation, once they become aware of an error in a

parcel register, (or are made aware), to take steps to correct the error. Regulation 22 provides:

> " Regulation 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 the 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.." (Emphasis added)

Before a Form 6A can be filed, the original certifying lawyer must be satisfied as to one of the following:

a)that he/she continues to have the written authorization of the owner for the correction to take place;

b) if the parcel has changed ownership, that the authorization of the new owner is secured before the correction is made; or

c) the consent of the RG has been secured.

Note:

There are many different kinds of benefits and burdens. Some are more easily described and identified than others. A few samples that create challenges are as follows:

-**Deemed (from root doc forward)-** Some are 'deemed' to have been granted (even if the grant itself does not appear in the title search time frame) if they are described in the root document of the chain of title, and while for purposes of the exercise of professional judgment it is considered reasonable to 'deem' that they were properly created, there may be some limitations in determining the identity of the 'flipside' or other affected parcels. This 'deeming' is not statutorily sanctioned, but is generally accepted as a matter of practice. These kinds of easements can present challenges. For example, the "together with a right of way to the shore" that may have been granted over what was once a 100 acre parcel may now be 600 subdivided parcels. As with other aspects of your inquiries, your clients will likely be able to assist in clarifying the nature of their use of this kind of easement during their ownership and occupation of the property.

-**Easements -grant/use mismatch-** In some cases a right of way may be granted, but the grant may not match where the physical access ends up on the ground. We may or may not be aware of this kind of mismatch when migrating on behalf of a client. This and other issues of extent of title often impact benefits/burdens, and make it difficult, if not often impossible at times, to identify affected parcels. Again, reviewing the available survey fabric with the client may assist in clarifying whether there is an extent of title issue. If there is, you need to assess how it will impact your opinion you are giving to your client and the system.

-**Community 'quirks'** - these include cottage country, coal roads, milk lanes,

underground private water lines, old lines now unused, 'paths' to the beach, old wood roads to name a few. For purposes of an application under s.17 for use of Various PID's, while the mile long coal road properties affected may be identifiable, it would not likely be 'practicable' as it would soon clutter up parcel registers for all 100 lots to be specifically listed on 99 others etc. But, it may be that if the RG considered an application of this nature under s. 17 exemption as appropriate, you might be asked to qualify, as an example, the Various PID's entry with a TQ which states "This property abuts a coal road which extends from Apple Street to Zinc Street".

For a discussion of what will be considered when applying for an exemption on the basis of not 'practicable' see the discussion in relation to Regulation 17 under paragraph 4.

2. Assessing the 'Match' or 'Mismatch' of the parcel being migrated, with the affected 'flipside' parcel(s) (Paragraph 2 of the Directive)

Once the identification of the flipside parcels affected by the benefit/burden in the AFR has taken place, the migrating lawyer must then examine the other parcels affected, to determine whether the parcel attributes will 'match' once the migration process has been completed. Assistance with assessing a match is set out in Paragraph 2A of the Directive. If you determine there is a 'mismatch' the steps required are set out in Paragraph 2B of the Directive (for flipside LR parcels) and 3 of the Directive (when flipside parcel is non LR). Those steps are reviewed below after a discussion of the process for undertaking a 'match' assessment.

A Assessing whether there is a 'Match' with the affected 'flipside' parcels

i) If the corresponding or 'flipside' parcel has the benefit/burden already included in the parcel register, noting the PID of your client's parcel, so that when your migration is completed, the jigsaw puzzle pieces will match (ie. your benefit is shown as a burden in the corresponding parcel or the reverse), then you do not need to take any further action. The enabling instrument(s) should be examined by the migrating lawyer, to assess whether you are satisfied that it is the same benefit/burden as the one contemplated to be added to your client's parcel that is the subject of the AFR under way. The PDCA should also be examined.

ii) If the corresponding or 'flipside' parcel has the appropriate entry of the benefit or burden, but your client's PID is not noted, but there is a "Various PIDs" designated, as long as you satisfy yourself that the benefit/burden is the same one, either because it is the same enabling instrument, or is enabled by another similar instrument for the same benefit/burden, then a match is presumed, and no further action is required on the part of the migrating lawyer, other than a check for the match with the PDCA. The flipside parcel may also 'match' by way of reference in a TQ, if you are satisfied that the TQ refers to the corresponding benefit/burden.

Note: **Overriding interests**

Overriding interests still appear to retain statutory priority notwithstanding their non appearance in a parcel register by virtue of s.73(1)(e) of the LRA.. No action is required if a lawyer's opinion is that the benefit or burden is this kind of interest and it is not being recorded in the parcel register. However, the client ought to be advised as to the effect of this kind of interest and the implications, if any, of the decision not to document it in the parcel register, and whether it has the characteristics of a prescriptive right which is capable of being documented (Reference Professional Standard 3.3). See section 47(4) of the *Act* which provides that any person who has an overriding interest in a parcel may record that interest. Further Administration Regulation 18 provides that any person recording an overriding interest in a parcel register must give notice to the registered owner in Form 8 and the requirements of Regulations 14, 16 and 17 must be met.

B. If there is a 'Mismatch'- the Steps

If the corresponding or 'flipside' parcel is LR (Paragraph 2B of the RG Directive)

Step 1:
(i) Notify the original certifying lawyer of the mismatch, explaining the foundation for your opinion that there is a missing interest in the flip parcel that needs to be added/corrected. This is a 'heads up I think there is an error' notice to the original certifying lawyer. This is a notice pursuant to Regulation 22, and if you are contacted in this manner with respect to the opinion as to a 'mismatch', it is incumbent upon you, pursuant to that regulation, to either correct the error, or provide an explanation to the person contacting you as to why you disagree with the assertion that there is an error. You should provide reasons why you disagree, if that is the case. If the original certifying lawyer agrees that an error has been made in the original certification, he/she will file a 6A to correct the error, pursuant to the obligations set out in Regulation 22, and as there will be a resulting 'match' with the correction, once made, (including the corresponding correction to the PDCA), the migrating lawyer can proceed to complete the migration as intended, and no further action is required.

Note:
Lawyers should consider whether the mismatch is an extent of title issue as opposed to a 'true' mismatch, especially in circumstance in which there is no survey fabric, and reliance is on POL mapping. POL mapping improves every day. As lawyers and surveyors file retracement plans, and other kinds of survey fabric, the integrity of this system grows. All those who come into contact with the mapping rely on it, at some level, intentionally or otherwise. While lawyers are reminded to remain ever vigilant in awareness of its declared limitations, practically it is often the only tool we have to aid both us, and our clients, on migration. It is for this reason that the identification of a 'mismatch' in some cases is appropriately qualified as being an 'apparent' mismatch.

Note:
Lawyers may be well advised to continue the practice of securing the former Form 4 authorization, (or an in-house variation) extended to authorize both changes to the parcel

description and parcel register including after migration, if required, **if the corrections relate to the status of title at migration**, even if notice is provided subsequent to the migration if such notice is pursuant to Regulation 22. The standard Form 4 as originally drafted, contemplated subsequent changes to PDCA only, not the parcel register. However one might argue that consent is implied to parcel changes as well, as any changes required to the PDCA also entail the appropriate changes to be mirrored in the parcel register.

If the original certifying lawyer does not agree that there is an error, but consents to you correcting the parcel, and filing the necessary Form 6A, you are reminded that you may only do so if you are satisfied that you are in a position to confirm that it is appropriate to do so.

Note: Intervening interest holders
Before filing a Form 6A, lawyers should be mindful of any effect that a correction may have on intervening interest holders (registered or recorded) and assess whether any notice or consent needs to be secured in order to maintain priority or security of interests. Lawyers are also reminded to consider report implications/obligations under their E&O insurance policy (LIANS) where appropriate.

Note: Identifying certifying lawyer
The above discussion presumes that the mismatch occurred at the time of migration and that therefore the original certifying lawyer is the initial contact for any reconciliation discussion. However it may be that the issue is one that relates to post migration, and that a revising lawyer's certificate may also be involved. When there is a subsequent certifying lawyer (ie. When the property has changed hands post-migration), the last certifying lawyer should also be contacted for his/her views (remembering though that they will not have the historic title search) and to seek the consent of the current owner to file the 6A. If all three counsel (alerting, migrating and last revising) do not agree on the appropriateness of the correction, the solicitor who has identified the mismatch will then proceed as in Steps 2, or 3 which are discussed below.

Step 2:
ii) If the original certifying lawyer disagrees that there has been an error, either as a matter of professional judgment having reviewed his/her search, or for example because the benefit/burden is outside of the relevant marketable title search period, and is therefore not willing to file a Form 6A correction, and you remain of the view, having considered the reasons why the certifying lawyer disagrees with you, that the benefit/burden is still appropriate for the property you are registering, you may consider contacting the RG's office for assistance. While the RG's office, as the Directive notes, cannot adjudicate differences of opinion between lawyers, they have proven helpful in sometimes bringing a different perspective to the issues involved. The important point is that at all times it is incumbent on a certifying lawyer to be satisfied that the appropriate foundation for an opinion is present, that information provided is reviewed and considered carefully, and that any opinion formed can be defended.

Step 3:

iii)If contact with the RG's Office does not result in a reconciliation of the differing opinions, and you remain of the view that the benefit/burden is still appropriate for the property you are registering,**you must notify the RG's office to seek an exemption, pursuant to Regulation 17 from the requirement that you file a Form 24 as it is not 'practicable' given the difference of opinion, to proceed with the addition of the benefit/burden. See below for the section discussing Regulation 17 exemption**.

Reminder Note- If you make any change to an LR parcel, adding a benefit/burden, you must also make the appropriate amendments to the PDCA for the benefit/burden added to the LR flip parcel (Regulation 14(4)).For purposes of Regulation 14(4) notwithstanding the standard language that is part of a PDCA application, you will be responsible only for the amendment you are making, and are authorized (and in fact required) to make, notwithstanding the broader language that is part of the PDCA standard certificate of legal effect.

3. Obligations of 'notice' if flipside parcel is non LR (Paragraph 3 of the RG Directive):

You must file notice in the non LR parcel that you have placed a benefit or burden in another parcel that may affect the non LR parcel. You do so by filing a Form 44 and a Form 8A. This notice in Form 8A is intended to better ensure that a reconcilation for a match between all affected parcels will occur on a subsequent AFR for the non-LR parcel(s).

A document filed in a non LR parcel must reference the owner as shown on the consolidated index (GGI) maintained under the *Registry Act* (which means a full search on the flip parcel)

UNLESS there is an assessment account number associated with the non LR parcel on POL, in which case the document filed may reference the owner as shown on POL (Regulation 14(7a))

OR the RG has determined it is not 'practicable' to identify the owner on the consolidated index and there is no associated assessment account number, in which case the RG will provide direction(s) to you about how the owner must be referenced [in accordance with Regulation 14 (7(b)(I) and (ii)] and you are required to keep such directions on file for examination by an NSBS auditor or the RG upon request.

The Form 44 and/or Form 8A **do not** have to be served on the parcel owner. The form 8A currently does not require any 'apparent' PID, just the assessed owner's name. However, it may be that you can, if you wish, add the 'apparent' PID if you are confident that this is the PID which you wish to identify. The Form 8A is NOT linked to the PID, but is be found on a GGI search out of the assessed owner, and a lawyer, having had the Form identified in their search, might find it of assistance to have the PID(s) specifically identified. Lawyers are reminded however, that there may be other PID's affected other than those that may be voluntarily shown on the Form 8A filed.

Note: If more than one non LR parcel is affected, but all have the same benefit or burden, only one Form 8A needs to be filed, listing all of the non LR parcel owners.

Note: The regulations identify a means by which, in lieu of having to do a full search on a 'flipside' parcel, an authorized lawyer may rely on the assessment rolls appearing with a PID on Property Online for purposes of identifying the "apparent" owner of a non LR parcel to whom notice is required to be sent. Certainly an authorized lawyer, when reviewing POL mapping information with a client owner, attempts to identify which 'flip' parcels are affected to the best of his/her ability. While we are all aware of the limitations of the POL mapping which underscore the reliability of accuracy of this mapping, it is often the only indicia available to assist both lawyers and our clients in identifying 'flipside' parcels, or potential flip parcels, and it has been hugely helpful for property lawyers, especially when there is little or no survey fabric to be found.

4. Seeking an exemption under Regulation 17 (Paragraph 4 of the RG Directive)

Regulation 17 authorizes the RG to exempt an authorized lawyer from the regulatory requirements to either identify the corresponding or 'flip' parcel affected by a benefit/burden being added to a parcel, or from the requirements to add the corresponding benefit/burden in the corresponding or 'flip' parcel.

The RG has, in the Directive, outlined some of the thinking that will underlie a request for such an exemption:

- ❑ If you believe that it would not be practicable to identify the corresponding parcels affected you may be granted an exemption from the requirement to identify all parcels and may be authorized to simply indicate on the AFR that the 'flip' parcels are "Various PIDs". The Directive stresses however that a large number of affected PID's is not the only factor considered in what is 'practicable'. Other factors may include :
    - difficulty in identifying the affected PID's (which includes extent of title issues); or
    - large additional cost or administrative burden in adding the corresponding benefit/burdens

  With regard to extent of title issues, there may be insufficient survey fabric or other objective evidence to lead you to be able to exercise your professional judgment with regard to what other affected parcels will be. In any case, the RG will consider the specific circumstances and may permit "Various PID's" for all of the PIDs or may require you to comply with Regulation 14 in relation to some of the PIDs but allow you to use "Various PIDs" for other affected parcels.

  In reconciling any difference of opinion on any matter, it is always useful to review any survey fabric that may exist, for your lot under search, or adjoining lots, or seek the assistance of a surveyor to assess whether there is any objective evidence available that may assist, and consider whether there are any overriding interests that are being 'used and enjoyed' that may impact your considerations in reconciling a difference of opinion.

- **Blanket Condo exemption-** There is a blanket exemption granted if the corresponding or flip parcels are condos where you are of the opinion that it is not 'practicable' to comply with Section 14. In this case the Directive authorizes you to use the "Various PIDs" designation, without seeking specific permission to do so from the RG's office, PROVIDED HOWEVER that you add a Textual Qualification, the language (standardized if possible) for which will be as prescribed by the RG.

  As an example, the following TQ was recently approved in the context of a s.17 exemption, in a situation in which the flip parcels were condo units:

  TQ: "Various PIDs" refers to the Condo units in HCCC #_____. The benefits/burdens shown on this parcel register may not be reflected in the flip side benefits and burdens for the parcel registers for the units of HCCC #_____."

  PDCA Note-When condos are the corresponding or flip parcels, then no change is required for the PDCA as the descriptions are standardized.

- **Various PID's- Points for ongoing consideration and discussion**

  The most useful discussion that authorized lawyers can continue with government, is one around how applications for 'Various PID's" can be streamlined- for government and lawyers alike. What are the overarching principles that should apply? Some have been identified in the RG Directive, and we can work with government in identifying others.

  While the use of "Various PID's" may seem the answer to achieve ease of a 'match' being assured in all situations, we are still required to exercise professional judgment in each situation, and to attempt to be as clear as possible in identifying the parcels affected by any benefit or burden being added.

Summary:

The new system continues to evolve, and as it does, it requires our careful consideration to ensure it is as 'intuitive' as possible in how information is both placed in the system, and how it is changed, if appropriate. Under the new system, as under the old, we may be called upon to explain or defend any opinion that we have given, and the foundation for it. This is not new, but what has changed is the process and environment within which we may be called upon to do so.

The issue of easements- or other benefits or burdens- is a complex one. Sample case situations, and checklists can aid both the assistant and lawyer alike when dealing with issues involving an assessment of 'mismatches' between parcel registers- and what notices will be required and to whom. It is important to remember that the parcel registers must be as complete as possible, reviewed whenever you are making any changes to it, reviewed with the owner, or buyer, for completeness, whether at the time of migration, or subsequent revision. The process of assessing

whether there is a match or mismatch applies:

- when adding a benefit or burden to a parcel (newly created);
- on an AFR (documenting existing easements);
- when acting for a buyer on a subsequent purchase (and revision);
- when acting for a lender on a refinance;

A careful review of the regulations, policies, procedures and guidelines available will assist with a general understanding of how the practice of property is evolving in our new land registration system. Suggestions as to what aids may be helpful to develop are always welcome.

v.9 August 30th, 2009