the question. The Legal Ethics Committee of the Nova Scotia Barristers' Society has recently considered the question and recommended to the Council of the Society that "institutional mechanisms" not be developed or approved by the Society and that the Professional Conduct Handbook not be amended to introduce such accommodations. The Committee recommended that the dilemma of "double imputation", left open by the Supreme Court, should be addressed in the courts rather than by a set of rules introduced by law societies. Bar Council has not yet decided upon the recommendations of the Committee and will be addressing these issues prior to the CBA Annual Meeting in August of this year. It will obviously be important to monitor developments in the courts and in other law societies to observe whether the Supreme Court decision in *Martin* v. *Gray* has not started a new round of balkanized legal ethics, this time having raised the balkanization to the level of rules of law.

Ideas for this article were contributed by Professor Archie Kaiser, Rick Southcott and Susan MacKay.

Instrument of Subdivision

by
Jim Gunn, NSLS,CLS*

For the past three years, fourteen rural municipalities in Nova Scotia have been using Instrument of Subdivision. This procedure was introduced as a replacement for the infamous "four lot rule" through revisions to the *Planning Act* in 1987. Instrument of Subdivision provides for subdivision approval of lots without the usual formalities. Title is assured for subdivisions of this nature insomuch as compliance with the *Planning Act* is concerned.

The basic underlying principal behind Instrument of Subdivision and its predecessor the four lot rule, is not without merit. They were both designed to facilitate the occasional single lot transfer between family members and neighbours in rural communities. They are based on the premise that people in low value, slow growth areas of the province should be offered some relief from the onerous subdivision process.

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We should indeed give the rural property owner every consideration, provided of course, that any such benefit to this particular group is not detrimental to any other members of society or to the long term development of the province. In particular, we must weigh the short term benefit to the land owner/developer against the added costs and risks to subsequent owners and adjoiners.

The four lot rule was far from perfect, but it did accomplish its objective in exempting a minimal amount of subdivision activity from the rules. The major problem that led to its downfall was the difficulty of interpreting the wording of the rule. Lawyers, in particular, found the wording ambiguous and often disagreed with each other as to whether the remnant parcel formed the fourth lot. There was also the question of whether a newly created lot could then be further subdivided into four new lots using this rule. Since there was no requirement to record this subdivision activity, searching was difficult at best.

Good title to a property depends on compliance with prevailing legislation. It was often difficult however, to determine if an unapproved lot had truly qualified for the four lot rule exemptions. In response to this expanding problem, legislators changed the *Planning Act*, did away

with the four lot rule, and replaced it with Instrument of Subdivision. They also introduced a form of amnesty over all prior subdivision activity.

The problem with Instrument of Subdivision comes in drafting some sort of standard form so the planning offices will have a document to approve. In keeping with the spirit of the four lot rule, a simple form was introduced that required a sketch of the property on one side and certain assurances as to minimum size, on the other. The whole thing could be prepared by the landowner in a matter of minutes and approval was assured on presentation to the development officer.

The main difference between the Four Lot Rule and Instrument of Subdivision is that the former allowed for the creation of a limited number of *unapproved* lots whereas the latter allows for any number of *approved* lots. It should be pointed out however, that lots approved by Instrument differ substantially from those created and approved by the traditional use of a Subdivision Plan. Instruments carry a number of disclaimers, i.e.:

Approval of Instrument of Subdivision

> This approval does not warrant the size, location, or boundaries of the lots described in the instrument and the development officer has no duty to verify the information submitted by the applicant as to the size, location, or boundaries of the lots.
>
> As a result, these lots may not have access to a public street or highway.
>
> This approval does not in any way imply that the lots created by this instrument would be eligible for any or all of the following permits:
>
> 1. Municipal building permit
> 2. Department of Transportation Access and Building permit
> 3. Department of Health Permit to install an on-site sewage disposal system.
> 4. Municipal Development Permit.

The generality of these disclaimers leaves a person wondering exactly what, if anything, has been approved.

Instrument of Subdivision has replaced the four lot rule simply because subdivision activity under the four lot rule was difficult to track and often resulted in poor title. Instrument of Subdivision on the other hand, assures good title with respect to subdivision approval, however, little or no attention is paid to the actual location and extent of the property.

There is no provision within the Instrument of Subdivision to have the new lot(s) or the parent parcel surveyed or defined on the ground. To use a recent example, it is possible, using this procedure, to create approved subdivision lots where no land even exists. The entire transaction is certified correct by no one other than the well intentioned vendor and the development officer who approves the subdivision has no duty to verify the information. This certainly gives new meaning to the expression "buyer beware".

The *Planning Act* places no restriction on the number of lots that can be created using Instrument of Subdivision. This leaves the procedure susceptible to indiscriminate use by developers.

Nova Scotia has a long tradition of using qualified people in the survey and subdivision of land. From the earliest times, every effort has been made to properly define and monument the physical limits of title. One might ask how such a departure from traditional practices could occur at this time. This is especially true when one considers the recent strides made by LRIS towards overall improvements in the land tenure system. The entire LRIS program is contingent on all subdivisions being properly surveyed and mathematically related to one or more of the 40,000 control monuments positioned throughout the province.

This is an example of how minimum standards will negatively influence the quality of a product. The services of the Land Surveyor are not required in preparing an Instrument of Subdivision nor is there any involvement of other usual participants such as the Department of Health and the Department of Transportation. Just because these professionals are not formally required to participate, should not preclude their involvement altogether. There is a wealth of expertise available to land owners in Nova Scotia from both the public and private sector. Anyone considering a subdivision should be encouraged to access these

resources to their full advantage.

We should continue to offer some consideration to rural property owners who from time to time, find it necessary to exchange parcels of land for what ever reason, i.e.: forest utilization, farming operations etc.. These transactions must, however, be limited in number and in purpose. The boundaries of these newly created lots must also be properly located and monumented on the ground.

Each time an Instrument of Subdivision is used to create new lots without benefit of survey, the possibility and likelihood of future litigation increases. No matter how well intentioned a property owner may be, it is unlikely that an Instrument of Subdivision will agree completely with a subsequent survey. Each instrument provides a new array of overlaps and wedges for someone else to sort out down the road.

Since the introduction of the Instrument of Subdivision, people in Nova Scotia can no longer purchase an approved subdivision lot with confidence that the property has satisfied the usual subdivision requirements. As a matter of fact, the lot may well have no development potential what-so-ever. The continued use of Instrument of Subdivision in its present form puts the first time home owner and the novice investor at a severe disadvantage. This procedure is relatively new and its full effect is yet to be seen. The short term monetary benefits derived from not surveying these properties will burden generations of Nova Scotians to come. Perhaps worst of all, the *Planning Act* seems to have turned its back on its basic raison d' etre of consumer protection.

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