Module One: Abstract and Title Searching

LEARNING OBJECTIVE(S)

This section, will discuss the principles of title searching and abstracting necessary to understand the legal issues involved with a title search. It will discuss how to identify legal interests disclosed by the title search and what issues are important to consider. It is important to understand what legal interests are to be displayed in the electronic system and to understand how those interests will be interpreted.

INSTRUCTIONS

- Read the Module Introduction below.
- Review the Sample Abstract.
- Review the Legislation and Reference Materials. Read the Content Materials for this section.
- Complete the Judgments Name Exercise.

INTRODUCTION

This portion of the materials will attempt to answer the 5 W's of Title Searching:

WHO is responsible for completing an Abstract of Title?

WHAT is an Abstract of Title?

WHERE does one 'search' an Abstract of Title?

WHEN is it necessary to obtain an Abstract of Title?

WHY is it necessary to provide an Abstract of Title?

The reference section of this paper lists a number of materials that can be reviewed detailing **HOW** to title search and how to construct an Abstract of Title. There is also a complete Abstract of Title for a parcel of land that has already been Land Registered included in your materials. Please carefully review the sample Abstract both prior to and during your reading of this section of the materials.

The historic search of title is the cornerstone of transferring a parcel into the land registration system. This should be the last historic search of title ever performed on this parcel. Generally it will not be necessary for another lawyer to search behind this conversion to ensure the accuracy of the parcel register. There may however, be cases where the lawyer deems it necessary to look behind the Parcel Register – most notably in certain situations when dealing with potential rights of way or easements and more information is required.

One fundamental shift in the practice of real property since the land registration system was introduced is that the purchaser's lawyer no longer completes the historic search of title; the owner's lawyer now generally performs this task. There are occasional exceptions as a matter of contract, usually in the case of insolvencies or foreclosures. Lawyers have required time not only to adjust their practice, but their internal office systems.

The lawyer's obligation in this area goes beyond compliance with the Land Registration Act ("LRA") and compliance with the requirements imposed by SNSMR. Real property lawyers should familiarize themselves with the Legal Profession Act regulations, ss.8.2.2 and 8.2.3, as to the obligations imposed with respect to abstracts of title. See also Legal Profession Act regulations Part 13, dealing with the retention of documents used to establish an opinion on title and the obligation to answer queries respecting this.

Professional Standard 3.1 sets out the essential elements which are to be included in an Abstract of Title:

Before preparing an opinion of title, a lawyer must prepare or cause to be prepared an abstract of title derived from a search of the records in the appropriate land registration office. A lawyer must base the lawyer's opinion of title on the abstract of title. An abstract of title must:

a. Be in writing;
b. Commence with a root of title as prescribed by legislation and common law;
c. Be complete; and
d. Be capable of being read and understood by a person who has not searched the title him/herself.

MODULE MATERIALS

Click here for printable copy of Module One content materials.

INTAKE

The intake process is perhaps the most important step in the solicitor client relationship when converting properties into the Land Registration system. At this point you can discuss with your client the overview of the entire conversion process. During the course of your discussions with your client, you will be able to obtain information about the access to the property, its use, and the current ownership of the property. The title search together with the owner's input will provide you with most (if not all) of the information that you will need in order to complete the conversion of the property.

Abstracting and Title Searching are considered the first steps of the conversion process. We will discuss those concepts starting at Section III of this section of the materials when we discuss Title Searching. Step 2 of the process is the Parcel Description Certification Application ("PDCA"). Section 7(7) of the *Land Registration Administration Regulations* ("LRAR") provides that "before an AFR in final form is submitted, the PDCA submitter must assist the parcel owner or authorizing person under subsection (6) in identifying the parcel's PID and take reasonable steps to identify the parcel, including:

a. reviewing the legal description;

b. reviewing the Provincial mapping of the parcel;

c. placing a comment in the comments field if errors in the Provincial mapping of the parcel are identified.

Steps 2 (PDCA), 3 (AFR) and 4 (Working with Land Registered Parcels) will be discussed in detail further on in these materials.

Essentially, when converting a parcel of land into the Land Registration system the lawyer is providing an "opinion" of the state of title to the property to both the land owner and the Government. Section 37(4) of the *Land Registration Act* ("LRA") requires an opinion of title setting out:

- ownership of the fee simple and of all other interests in the parcel;
- direct or indirect right of access to the parcel, if any, from a public street, highway or navigable water way (or other – access and resource materials are dealt with in Module 3);
- evidence of compliance with Parts V (deed transfer tax) and IX (subdivision) of the *Municipal Government Act* ("MGA");

While it may not be possible to consult in person with the owner in every instance, it is best that we do so. LRAR 10(7) sets out the circumstances in which the lawyer, not the owner, may execute a declaration, it is by far preferable both for reasons of certainty and defensive practice for the client to do so after a detailed consultation. LRAR 10(5) provides for situations in which the person authorizing conversion may assert that they have no knowledge of occupation one way or the other – usually foreclosure situations.

Note also the requirements of the *Legal Profession Act* Regulation to ascertain, and often (usually, in property transactions), verify the identity of the client. The writer's view is that this consultation, and identification, are conveniently done at the same time.

You are essentially "building" the parcel description and this cannot be done in isolation. The owner, the searcher, the mapper and the lawyer are all part of this process. It is important to be wary of stepping over the line and creating a description which is materially different from that which has existed. In other words, know when to enlist the services of a surveyor. The Society and the Association of Nova Scotia Land Surveyors have worked extensively on setting out where our professional functions complement and where they are exclusive.

See https://www.lians.ca/sites/default/files/documents/DiscussionPaper-HartlenDeWolfeGordon_(00009136).PDF

The LRAR set out what forms must be signed by the owner. The main form at this stage is Form 5. This is signed by the owner after the consultation with the lawyer. Be sure to discuss adverse occupation and mapping issues with the owner rather than simply presenting the Owner with a completed Form 5 stating that he/she is not aware of any adverse occupation. Most clients are trusting by nature and are willing to sign whatever a lawyer places in front of them.

When consulting with the owner, we need to consider the following:

1. When printing the graphic, click on “LR Parcel Shading”, “Topo”, and review each with the owner.
2. Are you dealing with one parcel or more than one parcel (check the POL graphic and Deed to see if they are consistent)? If a public highway or street runs through the property, there are two parcels. The same applies to a railway if the rail bed is owned by a third party (i.e. if the third partyholds the fee simple rather than simply an easement). Refer to LRAR 7(16) and 7(17) to determine if a watercourse creates a natural boundary. 7(18) provides that it is NOT a boundary if the plan has received subdivision approval, even if the plan shows the lands separated by a watercourse.
3. Information about abutting parcels (i.e. who owns land around this parcel?)
4. Is a survey plan/location certificate available?
5. Does any available plan/certificate appear to accurately reflect the situation on the ground today?
6. Did Owner add or carve off any area of land since acquiring the parcel or since the survey plan was prepared?
7. What does the Owner know about the extent and period of occupation? Has occupation been documented for the required relevant time period (20, 25 or 40 years as mandated by the Limitation of Actions Act on your particular facts)?
8. Is Owner aware of any occupation without permission? For example: encroaching fence?
    - encroaching buildings?
    - encroaching driveway?
    - encroaching lawn area?

Remember that “occupancy” includes use of a parcel or a portion of a parcel as a traveled way. If so, is the occupation:

- By Owner of adjacent parcel?
- Does it exceed 20% of the area of this parcel?

Can these be prescriptive, e.g.: prescription and adverse possession cannot accrue against

- Streets and roads under the MGA?
- Railway lands used for railway purposes under the *Railways Act*?

Any occupation without permission requires a notice in Form 9 to be sent to the occupier. (This is a change from the original regulations which only required notice if the encroachment was more than 20% of the adjoining parcel). If the occupation is under 20% of the lot, the LRA allows the user to continue to accrue possessory rights, although the net effect of this is the subject of some dispute (discussed in the sections on possessory title). Be careful of making the determination unless the percentage is clearly and obviously well under 20%. Also note that Form 5 (or your own consent/authorization form) will have to be completed to reflect the occupation and note the requirement of sending a Form 9 Notice of Parcel Registration to the occupier, keeping proof of service. LRAR 10(10) requires notice to be sent to the paper owner as show in the Grantor-Grantee index, or as otherwise directed by the Registrar General (“RG”). You must send notice of this Form 9 to the RG, using form 26N (unless the RG exempts you from doing so), and you must retain copies for your file.

9. Do telephone/gas/power/sewer/water lines or drainage ditches cross the property, except to service the buildings on this particular property? If so, are these documented by grant or other registered or registerable instrument? If not documented by grant, are they shown on a plan? If not documented by grant, they will have to be identified as unregistered burdens.
10. Is there a lane or private driveway across the property? If so, the same considerations apply as those identified under the heading of “Is owner aware of any occupation without permission?” appearing above. Consider the effect of shared driveways, lanes openly used and enjoyed, etc.
11. If there is an easement which benefits or burdens the property, what if any other properties are affected, and do such affected properties properly show the corresponding benefit or burden (whether in or outside the LR

system)? More on this in Modules 3 and 4.

Always ask your client the following questions:

1. Is anyone on your land?
2. Are you on anyone else's land?
3. Does anyone cross your land?
4. Are you crossing anyone else's land?
5. How do you get to your property? (frontage on a controlled access highway, for example, may be "road frontage" but it would not usually be a means of access; same with the side of a cliff!)
6. What is your source of water (if not municipally serviced), and are there any agreements in place re anyone else's use of your well, or your use of someone else's?
7. If a recreational property – how do you get to the water?

TITLE SEARCH

Gathering the Information

The most critical step in the title search process is collecting the information which pertains to the lands to be searched (often referred to as “lands under search” or LUS). Often clients will have copies of their deed, survey plan, location certificate or other documents in their possession. This information can be extremely useful to you as you commence the title search process.

The next source of information to be consulted is Property Online. This database contains a wealth of information about parcels of land in the province. A word of caution, the information contained within Property Online is not always accurate. Property Online should be used as tool only and should not be the sole basis for any title opinion you may provide. Property Online provides the following caveat:

Non-Land Registration parcels ARE NOT REGISTERED PURSUANT TO THE *Land Registration Act*. As such, ownership and all information in this report is believed to be an accurate reflection of registered documents affecting the parcel of land to which it relates, however, it is not intended to be relied upon by the reader as advice on the current state of any title to land. A search of the records at the appropriate Registry of Deeds office may be required to determine the current owner(s) of the parcel of land under consideration. THESE ARE NOT OFFICIAL RECORDS.

Throughout this section reference will be made to the sample abstract and related information. In an effort to provide a “real life” example, information pertaining to an actual land registered parcel will be used. As you work through this section you can access the real time information for the parcel using Property Online. You should note that most of the information contained in this section is historical in nature and the Land Registration View of the parcel will contain only the most up to date information. Selecting the Details View will allow you to view how the Property Online information may have appeared prior to migration.

Let us now examine the Property Online Information (POL) for the property in our abstract – 3 Lakeside Drive, Lakeside in the Halifax Regional Municipality which has the assigned PID 40051039. Prior to migration the POL information for the PID appeared as follows:

PROPERTY Online

NOVA SCOTIA

Property Details

PID	40051039	Parcel Type	STANDARD PARCEL	Status	ACTIVE
Area	6000.0 SQUARE FEET	Parcel Access		Manag. Unit	MU0807
Lot	LOT B	Updated	Dec 22, 2005 03:11:05PM	Created	
PDCA Status	No Description	Municipal Unit	COUNTY OF HALIFAX	Manner of Tenure	JOINT TENANTS

Location	GSA Name	County	Primary Location
3 LAKESIDE DRIVE LAKESIDE		HALIFAX COUNTY	Yes

Comments

LOC:[V]
MAP:05N1144SE

Assessment Account	Value	Tax District	Tax Ward	Tax Sub
01632841	$101,300 (2005 RESIDENTIAL TAXABLE)	22	000	0

Owner Name	Interest Holder Type	Qualifier	Province	Country
DAVID WILLIAM MARRIOTT	FEE SIMPLE			
TAMMI IDONA MARRIOTT	FEE SIMPLE			

Inst Type	Inst No	Year	Type	Book/Page	Registration System	Registration Date
Document	55442 View Doc	2002	MORTGAGE	Book 7239 Page 689	REGISTRY OF DEEDS	Dec 19, 2002
Document	55441 View Doc	2002	DEED	Book 7239 Page 685	REGISTRY OF DEEDS	Dec 19, 2002
Document	31081 View Doc	1992	DEED	Book 5265 Page 788	REGISTRY OF DEEDS	Jul 01, 1992
Document	14891 View Doc	1965	DEED	Book 2050 Page 493	REGISTRY OF DEEDS	Dec 01, 1965

Inst Type	Inst No	Year	Type	Plan Name	Drawer Number	Registration Date
Plan	1646	1952	SUBDIVISION & AMALGAMATIONS	LOTS A, B, C & D - SUBDIVISION OF LANDS OF V. E. NICHOLSON - GOVERNORS LAKE	10	Sep 24, 1952

Inst Type	Inst No	Year	Type	Plan Name	Filing Reference	Instrument Date

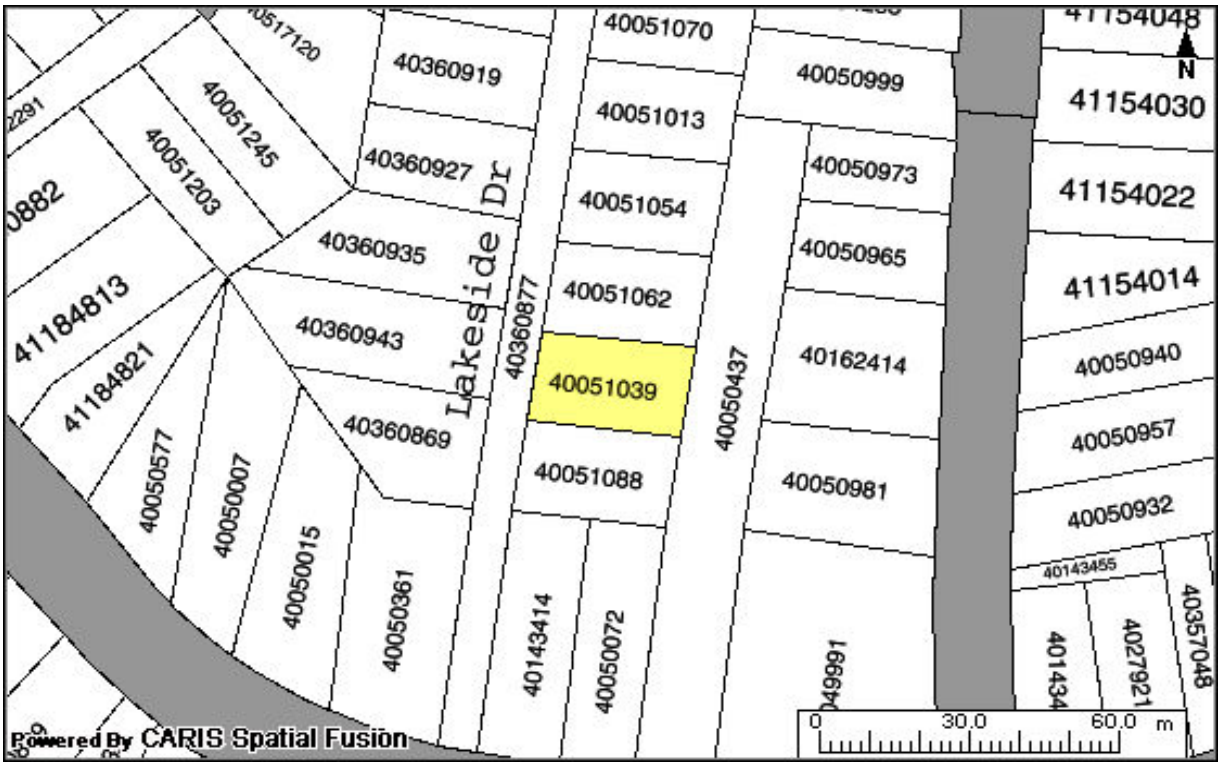
No Non-Registered Instruments Found

Parcel Relationships

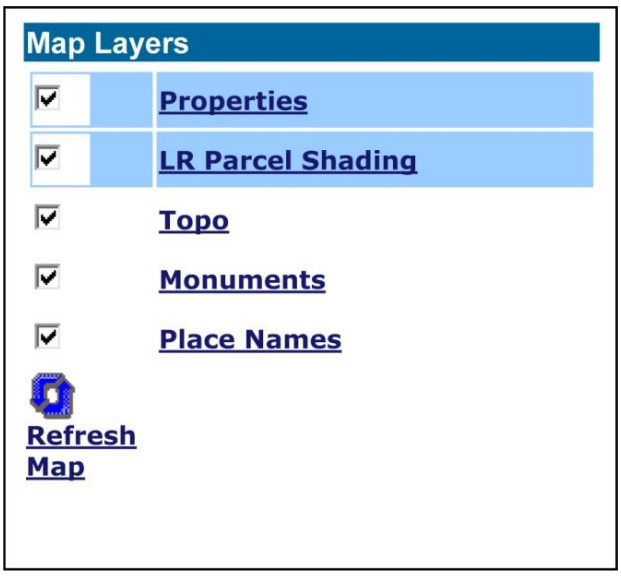
Related PID	Type of Relationship

No Related PIDs Found

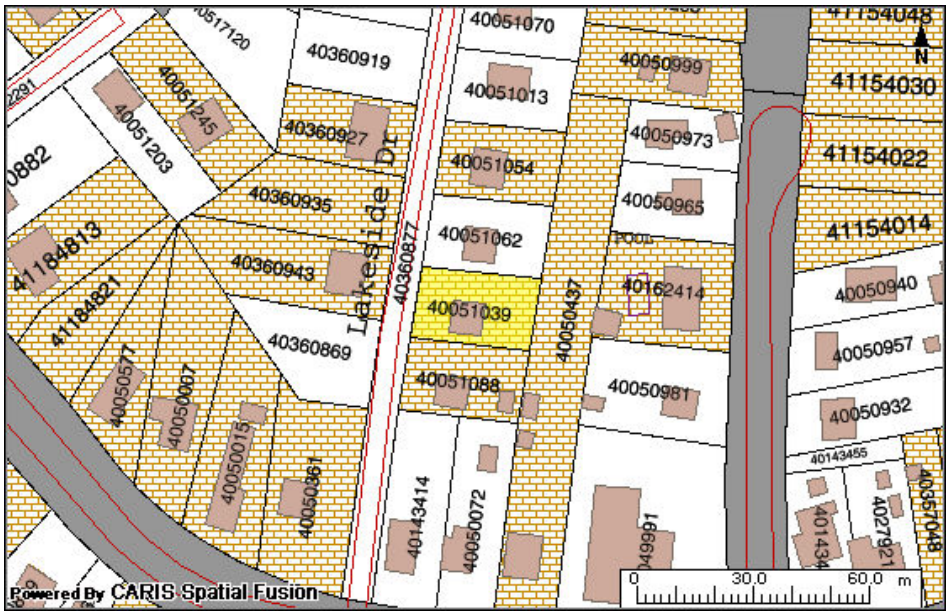
At this point in the process, you should also click on the “Map View” button in order to obtain the current graphical depiction of the PID - it is either shown in yellow (computer viewing) or the shaded area (printed material) - which is maintained by the province. Once again it is important to note that this depiction is not always accurate. For our sample parcel the “Map View” is as follows:



The above depiction can be referred to as the “Properties Layer”. This layer contains very basic graphical information about the parcel you are searching and the surrounding parcels. You are strongly encouraged to enable all of the layers available. This can be done by “checking” the boxes located on the left hand side of the screen under the heading “Map Layers”. Once the boxes are “checked” click on “Refresh Map” and the map will reload with the additional layers you have selected.



For our sample property, enabling all of the layers provides the following (Please note that our sample PID is "cross-hatched" indicating that it is migrated):



The POL information can also provide some "clues" as to what to look for during the title search. For example, the sample parcel fronts on what appears to be "Lakeside Drive", however, notice that "Lakeside Drive" has its own PID number and is not depicted in grey as adjacent public roads are. This is our first indication that access may not be public. By selecting one or two of the other LRA parcels fronting on Lakeside Drive it can be seen that other migrating lawyers have selected "Private (by Grant)", "Right-of-Way/Driveway" and Public. Obviously, it will be important to review the situation carefully before a determination is made with respect to access.

Property Online has also revealed that the parcel was conveyed in a Deed in 1965. As will be discussed in the next section, this may be the "root of title" for the title search.

The Root of Title

In simple terms the "root of title" is the starting point for the title search. It is the first or beginning document from which the title will be searched forward to the present day. A good root of title can include (but is not limited to):

- ✓ A Crown Grant
- ✓ Quieting Titles Act order
- ✓ A vesting order
- ✓ An expropriation
- ✓ A registered instrument other than a will

In certain areas of the province there were local practices in which some lawyers accepted as a starting point a document which does not constitute a root of title as mandated by the legislation. Such deviations from the standard are not acceptable.

The foregoing is by no means a complete list of what constitutes a good root of title. Please refer to the *Marketable Titles Act*, the *Limitation of Actions Act*, and the *Land Registration Act* ("LRA") for complete information on what documents constitute a sufficient root of title.

In order to determine whether our 1965 Deed in the Abstract of Title found at the back of this section of materials, forms a good root of title for the sample parcel, an examination of subsection 4(2) of the Marketable Titles Act, S.N.S. 1995-96, c. 9 is required:

> 4(2) A chain of title commences with the registered instrument, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined.

In her paper entitled "Bill 53 – *Marketable Titles Act: A New Beginning*" Catherine S. Walker QC provides her interpretation of subsection 4(2):

> This defines the starting point for the search. It must be "a registered instrument other than a will". This broadens the familiar common law and standard practice of a requisite warranty deed root of title. The required instrument must either "convey" or "purport to convey" the interest in land. In determining whether a registered instrument will qualify as a root, a lawyer must be satisfied that the grantor has, or purports to have, the interest in land that is being conveyed. For example, a quit claim deed that "releases and quits claim to the Grantee all the interest of the Grantor in the lands described in Schedule "A" attached hereto", is operative to convey the fee simple only if the grantor owns the fee simple. The quit claim may not on its face reveal the interest that the grantor has in the land. However, a quit claim deed wherein the grantor "grants and conveys" the lands, absent any specific limitation, may satisfy the requirement set out for a root in s. 4(2) as it "conveys or purports to convey" the entire interest in land. Whatever the registered instrument relied on as the root, a lawyer must be satisfied as to the nature of the interest "purportedly" conveyed for purposes of the requirements of s. 4(2).
>
> Pursuant to this section, a deed dated 40 years ago even if it is not registered until 1980 can operate as a valid root from its date. This supports the principle set out in *Dooks v. Rhodes* (1982), 52 N.S.R. (2d) 650. An unregistered deed, until it is registered, cannot operate as the commencement point for the chain of title under this section which requires a "registered instrument".

Various articles on this and other topics can be found through the LIANS resources page.

As Property Online has evolved over the years the quantity and quality of information available has greatly improved. One of those improvements was the ability to view documents online thereby eliminating the need to attend at the registry office to obtain or review the document. By clicking on the 1965 Deed (as noted above) link the following image is available:

14893

493

This Indenture made this 14th

day of June A. D. 19 65

Between

PAT KING LIMITED, a body corporate, having its head office and principal place of business at Dartmouth, in the County of Halifax, Province of Nova Scotia;

hereinafter called the "GRANTOR"

of the One Part

— and —

WILFRED AMBROSE GALLANT, Freight Handler, of Lakeside, in the County of Halifax, Province of Nova Scotia, and JUNE MARIE GALLANT, his wife, of the same place;

hereinafter called the "GRANTEES"

of the Other Part

Witnesseth that in consideration of the sum of One Dollar of lawful money of Canada and other good and valuable consideration

The Grantor hereby convey s to the Grantees the lands described in the Schedule marked "A" hereto annexed as joint tenants.

THE GRANTOR covenant with the Grantee s that the Grantee s shall have quiet enjoyment of the lands, that the said Grantor ha s a good title in fee simple to the lands and the right to convey them as hereby conveyed, that they are free from encumbrances and that the said Grantor will procure such further assurances as may be reasonably required.

IN WITNESS WHEREOF PAT KING LIMITED has hereunto affixed its corporate seal attested to by the hands of its proper officers in that behalf the day and year first above written.

IN THE PRESENCE OF

James R MacKay

PAT KING LIMITED
per:

PROVINCE OF NOVA SCOTIA
COUNTY OF Halifax SS

On this 14th day of June , A. D. 1965 , before me, the subscriber personally came and appeared James R MacKay a subscribing witness to the foregoing Indenture, who having been by me duly sworn, made oath and said that PAT KING LIMITED

. one of the parties thereto, ~~signed, sealed and delivered the same in h presence~~ caused the same to be executed and its corporate seal thereunto affixed in h/s presence.

J. S. Davy
Barrister
A ~~Commissioner~~ of the Supreme Court of Nova Scotia
J. S. DAVY

PROVINCE OF NOVA SCOTIA
COUNTY OF SS

I certify that on this day of A. D. 19 ,

of the parties mentioned in the foregoing and annexed Indenture, signed, and executed the said Indenture in my presence and I have signed as a witness to such execution.

A Commissioner of the Supreme Court of Nova Scotia

Province of Nova Scotia
County of Halifax

I hereby certify that the within instrument was recorded in the Registry of Deeds Office at Halifax, in the County of Halifax, N. S. at 4:14 o'clock P. M., of the 22nd day of June A. D. 1965 in Book Number 2050 at Pages 493 - 495

A. Geraldine Keefe - Deputy
Registrar of Deeds for the Registration District of the County of Halifax

In this case, the 1965 Warranty Deed shown on the previous page and above satisfies subsection 4(2) of the *Marketable Titles Act* and is a good and proper root of title for our sample abstract because it is a registered instrument (other than a Will) that conveys or purports to convey that interest in the land and is dated more than 40 years ago.

It will not always be this easy to establish the root of title in your title search. Often it will be necessary to "go back" through the registry records to locate your starting point or root of title. This can be accomplished in one of two ways. The easiest method is to look for "tie-in clauses" in the legal description. These often appear as "being the same lands" or "being part of the lands described in a Deed from X to Y recorded in Book A at Page B".

The other method of finding your root of title is to utilize the Grantee index and perform a Grantee search. Before discussing the process of searching a Grantee it is important to have an understanding of how documents at the Registry of Deeds are indexed. Benjamin Fairbanks provides an excellent overview in his paper entitled, "*Title Searching Basics*":

> The use of the grantor and grantee registration systems is established on the double entry bookkeeping system of accounting by debits and credits. Every entry on the grantor side has a corresponding entry on the grantee side. Every single document recorded since 1749 to the present was recorded in two index books, listing the documents by grantor and grantee in each of the two index books. The grantor index book is alphabetized by grantor. The grantee index book is alphabetized by grantee.
>
> A purchaser or recipient of a property interest is always going to be the grantee. The owner or vendor giving away a property interest is always going to be the grantor. An individual shifts by starting out as a purchaser or grantee, and once the grant is made, that same individual becomes the grantor.
>
> Our search process relies on these simple principles. To find a chain of title of ownership, going back in time, we search the name of the individual who currently owns the property in the grantee indices. We start with the current year grantee index and search each year back in time until we find the deed wherein the grantor conveyed to the current owner as grantee. We then search the grantor in that deed and year in the grantee index of that year and each year back in time until that person purchased the land as grantee from the earlier grantor. This process is why we say "do a grantee search!--go back in time!" Conversely, to do a grantor search – "come forward" from a fixed point in the past up to the present. This grantor search is a process of detailed note taking reflecting all grantor listings in the indices in order to prepare an abstract of the particulars of each document that affects or has affected title to the land concerned.

For a moment, let's assume that the 1965 Warranty Deed in not a good root of title. It would then be necessary to find the instrument where Pat King Limited obtained its title to the property. The search would commence with the Grantee index for the year 1965 (as June 22, 1965 was the date of registration of the above Warranty Deed). The Grantee index for each previous year would be checked until the instrument in which Pat King Limited received title is located. Once located a determination would have to be made as to whether or not the instrument constituted a good root of title. Fortunately, for our sample parcel, it is not necessary to "look behind" the 1965 Warranty Deed.

Note that POL and "tie-in clauses" are often incomplete and as such should not be heavily relied upon. It may be advantageous to perform a grantee search back to the root of title each and every time despite the presence of POL information or "tie-in clauses".

Chain of Title

Once the root of title has been established the title search will then focus on “coming forward” and completing a chain of title to present day. Similar to the Grantee search, this will involve performing a Grantor search for each of the owners’ names from all of the owners starting with the root of title (from the date of execution) and working forward through the various computerized indices [until recently we were able to search the index books at the Registry – now that every document (or almost every document) has been scanned into the new system the index books have been removed)] until a conveyance of the property is found. This process will continue until the most recent owner is searched up to the last recorded document.

As can be seen from the sample abstract a Grantor search of Willard Ambrose Gallant and June Marie Gallant revealed a number of recorded documents including mortgages and a well agreement. Each of these documents is viewed online and reviewed to determine if the document has any effect on the lands under search (“LUS”). In the case of mortgages, each mortgage is reviewed to determine if it has been released.

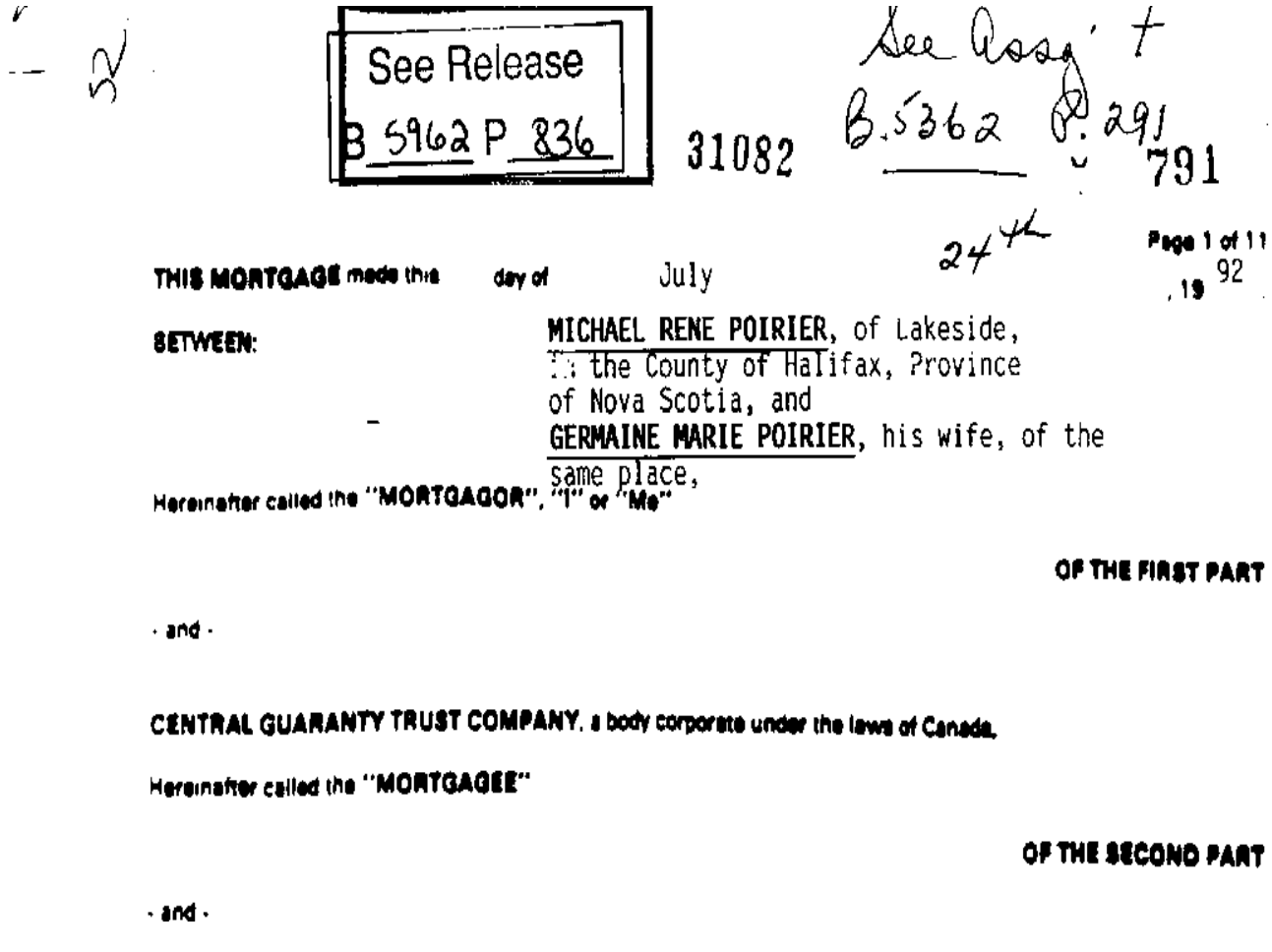
In the previous section a caveat was issued regarding the accuracy of the information contained within Property Online. That same caveat applies to the accuracy of the indices maintained by the Registry of Deeds. For example, turn to page 5 of the sample abstract. The Grantor search of June M. Gallant revealed an “other instrument” in Book 2050 at Page 916. According to the Grantor index the Grantee in this “other instrument” should also be June M. Gallant. Now take a look at page 6 of the sample abstract. Here you will note that the “other instrument” is in fact a Well Agreement in favour of a neighbouring parcel. You will note that June M. Gallant is a Grantor in the agreement; however, she is not the Grantee. The index should have indicated that Joseph A. Isner was the Grantee. This is an example of a mistake in entering data.

For our sample abstract the Gallants are searched forward until July 27, 1992, the point at which a Warranty Deed to Michael Rene Poirier and Germaine Marie Poirier is recorded for the land under search. The Poiriers are then Grantor searched forward from the date of execution of their deed (July 24, 1992) and not the date of registration of the document. And so it goes until the present owners are searched to the last recorded document (at the time of completion of the initial search).

Mortgages

For each recorded mortgage it will be necessary to determine if the mortgage has been released by the mortgagee. In order to assist you in this regard, the Registry of Deeds may have made a notation (in writing or by stamp) on the face page of the mortgage directing the searcher to a subsequently recorded document. It is important to examine the subsequently recorded document. You should not rely on the Registry of Deed’s notation that the mortgage has been released. For each notation made by the Registry of Deeds the actual document should be viewed and examined to determine its effect. If the mortgage is not marked “released” on the document, it could still be released. If you do a Grantee search on the mortgagor’s name, you may find releases of mortgages that can not be found in any other way. Also note s. 40 LRA with respect to unreleased and unamended residential mortgages over 40 years old.

In the sample abstract you will note on page 12 that the previous owners, Michael and Germaine Poirier mortgaged the LUS by virtue of a mortgage recorded in Book 5265 at Page 791. A portion of the face page of that mortgage appears as follows:



See Release
B 5962 P 836

31082

See Reg't
B.5362 P. 291
791

24th

Page 1 of 11

THIS MORTGAGE made this day of July , 19 92

BETWEEN:

MICHAEL RENE POIRIER, of Lakeside, in the County of Halifax, Province of Nova Scotia, and GERMAINE MARIE POIRIER, his wife, of the same place,

Hereinafter called the "MORTGAGOR", "I" or "Me"

OF THE FIRST PART

- and -

CENTRAL GUARANTY TRUST COMPANY, a body corporate under the laws of Canada,

Hereinafter called the "MORTGAGEE"

OF THE SECOND PART

- and -

Judgments

Prior to the LRA if during a judgment search a similar name was discovered, then common practice was to file a statutory declaration in instances where the person or company was not the judgment debtor. This is still the practice today; however, the rules have been made more certain regarding the circumstances in which a statutory declaration is necessary.

The LRA introduced the concept of "**materially different**" names which is a substantive change in the law and is designed to relieve owners of the need to file statutory declarations confirming that they are not the same person when their name is similar to the debtor's name on a judgment.

LRA s.66(8) states "**A judgment does not affect a person's interest in any parcel if the person's name is materially different from that of the judgment debtor**." (emphasis added)

If a person's name is the same or similar to the name on the judgment they may still be required to file a statutory declaration (which is recorded in the judgment roll) stating they are not the person named in the judgment. The necessity to include distinguishing information on a Certificate of Judgment will assist with this exercise.

This is the process to follow when searching judgments:

1. If the surnames are identical, given names must be considered. Unless the surname is deemed to be identical as per LRAR s.26(2), then any misspelling of the surname will be fatal to the creditor's ability to enforce their judgment as against land. Clearly, the obligation rests with creditors and lawyers to take great care to collect the correct information when the debt is entered into and should debt collection be necessary, to draft all documents with care. If there are different ways to spell the surname then these should be identified on the judgment. It is also recommended that if people go by other names of which you are aware that these "aka's" also be included on the judgment. Therefore if you are doing a search and the names are not identical you can ignore the judgment. There are certain examples for Mc and Mac. shown – see LRAR 26(2) below.
2. If the surnames are the same, the next step is to see if all of the given names, or their common variations, are different.
3. Where all the given names are different, there is a material difference in names.
4. Where the surnames are the same and there are the same number of given names, a material difference in names will be found if at least one given name is not identical to, or is not a commonly used variation of, any of the given names in the other name.

   Example: John Robert Samuel MacDonald & John Bob David MacDonald

   The middle names Samuel and David are different, and there is no commonly used variation of either, so there is a material difference in names.

5. Where the surnames are the same and there are a different number of given names, a material difference will be found if at least one given name in the name with fewer given names is not identical to, or is not a commonly used variation of, any of the given names in the other name.

   Example: John Robert MacDonald & John David Samuel MacDonald

   Robert is different from David and Samuel. Further, it is not a common variation of either of those names.

Authority for these propositions can be found in the following legislative provisions and standards. LRA s.66A provides the interpretation of "given name" and "material differences in names":

5 (1) In subsection (2),

(a) "given name" includes an initial used in the place of a given name; and

(b) an initial and a given name are considered to be commonly used variations of each other only where the initial is the same as the first letter of the given name.

(2) In this Act, there is a material difference in names where

(a) the surnames are not identical;

(b) there is not any given name in one name that is identical to or a commonly used variation of any given name in the other name;

(c) one name contains the same number of given names as the other name but one of the given names in one name is not identical to or a commonly used variation of any of the given names in the other name; or

(d) one name contains fewer given names than the other name but one of the given names in the name with the fewer given names is not identical to or a commonly used variation of any of the given names in the other name. *2001, c. 6, s. 66A*.

LRAR s.26(2) refines the definition of identical surnames in LRA s. 66A(2)(a) as follows:

26(2) For the purposes of clause 66A(2)(a) of the Act,

(a) surnames that begin with "Mc" are identical to surnames that begin with "Mac" and vice versa;

(b) surnames that include apostrophes, accents, spaces or a mixture of upper and lower case letters are identical to names of the same spelling that do not include these features; and

(c) names of legal entities that include "the", "a" or "an" are identical to names of the same spelling that do not include these words.

Practice Standard 3.5

When a lawyer searches for judgments before the *Land Registration Act* comes into force, or after the Act comes into force1 and the search is of parcels that are not registered under the Act, the lawyer must search for judgments against the names of:

(a) the purchaser;

(b) each owner of the parcel during the 20 year period prior to the date of the search; and

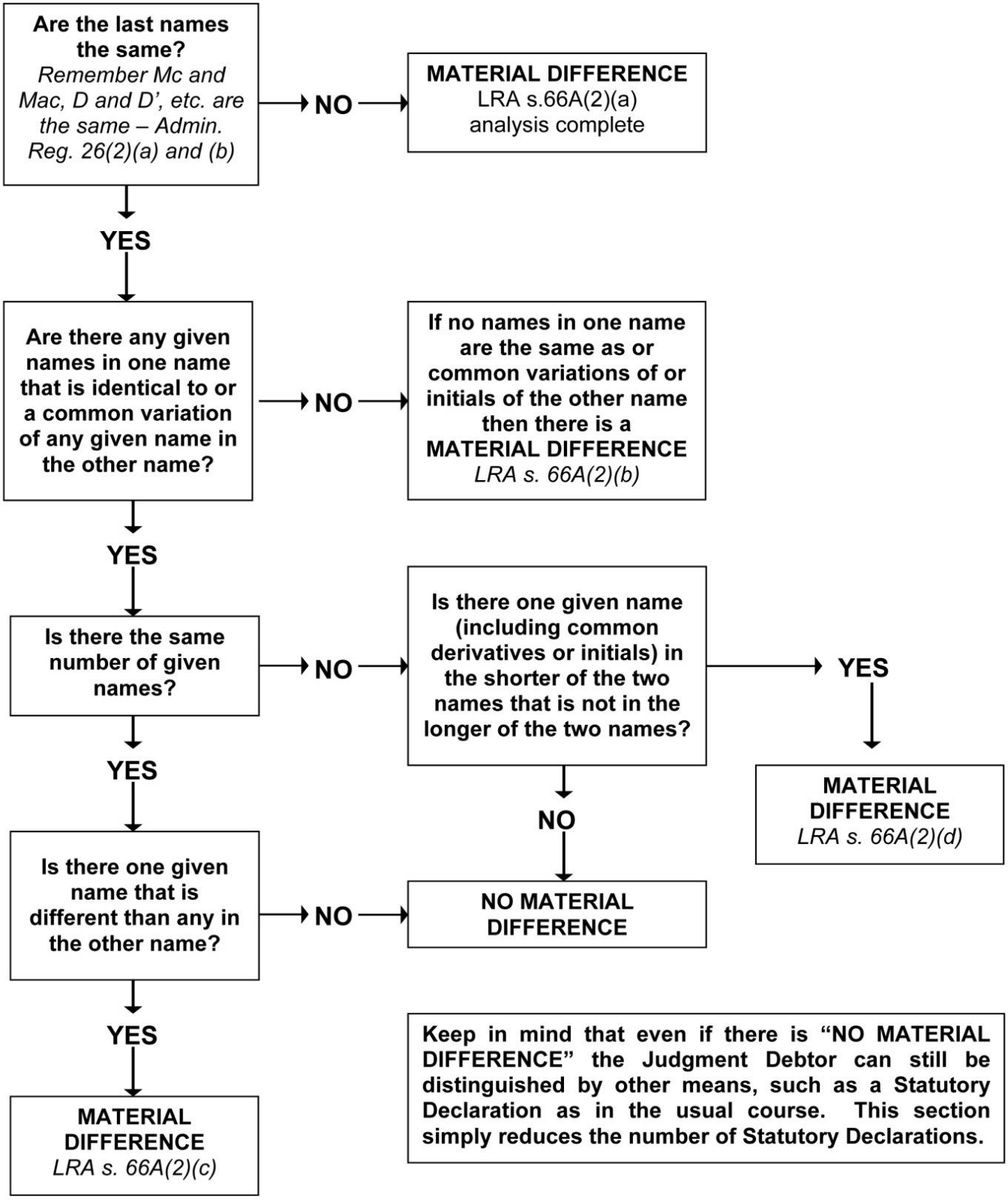
(c) if the owner or the purchaser is a company or a company that is an amalgamation of a number of companies, the company or the name of each of the amalgamating companies as the case may be for judgments for the lesser of 20 years or from its date of incorporation.

You will note that on pages 31 and 32 of the sample abstract there are two judgments registered against David Marriott, one of the owners of PID 40051039 at the time the abstract was completed.

Working through the chart on the next page, you can see the answer to the first question is “yes” as the last names are the same. The answer to the second question is also “yes” as “David” is the name on the judgments and the name on the Warranty Deed shown on page 22 of the abstract. The answer to the next question is “no” since in the Warranty Deed the owner has two given names while there is only one given name in the judgments. In order to answer the final question we must determine whether or not there is one given name in the shorter of the two names that is not in the longer of the two names. In this case the answer is “no” as the shorter name “David Marriott” does not contain any given names not found within the name “David William Marriott”. As such there is no material difference in the names. On page 32 of the abstract you will note that a Statutory Declaration was prepared as a result. Note LRAR 25(5) requires these declarations to be recorded in the judgment role. There is no fee for this.

How to Determine Material Difference in Names

created by Frank DeMont, DeMont Law



Crown Grants

As any interest of the Crown is an overriding interest under the *Land Registration Act* it is important to ensure that the parcel has been granted by the Crown. The following may assist you:

- Crown Grants Index
- Crown Grant Sheets
- Records maintained by the Department of Natural Resources
- Online resources for Grant Sheets

Expropriations

In some counties expropriations are or at times have been indexed separately from the Grantor/Grantee indices and it will be necessary to check the index cards for expropriations against all owners in the chain of title. Also, you may need to check for streets, subdivisions, and for some villages, the name of the village.

Access

You will note from the sample abstract that it was not necessary to abstract the access to the parcel separately from the parcel itself. The reason for this is the fact that the “private access” for this parcel had been granted for the entire marketable title time frame (please refer to Access (Standard 2.3) in the next section. There will be more information on this in the next section.

Well Agreement

As mentioned previously, there is a well agreement contained on page six of the sample abstract. At the time of the original search of this PID, the title search simply indicated that the agreement did not apply. Upon reviewing the abstract for this paper it was determined that the well agreement has not been released and continued to burden the PID. As a result, the parcel register was rectified to include this burden.

Condominiums

There are special considerations when dealing with a condominium. The search must be of the unit and the common interest; in some cases there is also a separate condominium parking "unit" (as opposed to exclusive use of the parking area in question) with a separate unit description. The search will have to identify the ownership of the unit or units and of the common interests, and the benefits and burdens which are associated with the common elements and all recorded interests associated with each such unit or units and common interests.

ABSTRACT OF TITLE

Review of Abstract of Title

After you prepare or procure an Abstract of Title, you should review it carefully to form an opinion as to whether or not there is marketable title and identify any qualifications (Standard 1.3). You need to document this, so as you review, write marginal notations on your search beside any matter requiring comment and/or explanation. Among the items you should consider are:

Crown Interest

Has the land been granted by the Crown? If not, this needs to be noted and addressed.

Root of Title (Marketable Titles Act)

Does the Abstract go back to a Warranty Deed or other good root of title executed at least 40 years ago, or for a lesser permitted period (such as for a subsequent Crown Grant, expropriation, Quieting Titles Certificate, etc.)? Also, most of the other available documents on file at the Registry are not appropriate and do not constitute a good root of title. You will need to consult the *Marketable Titles Act*, *Limitation of Actions Act* and the *Land Registration Act* to find a full list of all acceptable root(s) of title.

It is helpful if you flag the root of title in your abstract as you will need the execution and registration particulars when completing the final migration of the parcel. The selection on the AFR drop-down box is not exhaustive, so try to select the most appropriate entry.

Form and Content of Abstract (Standard 3.1)

Here are some questions you should ask yourself when reviewing an abstract of title:

- Is the abstract in writing and legible and copyable – beware blue, green and red inks??
- Is the abstract complete?
- Are pages (or documents) numbered sequentially?
- Is the abstract in chronological order? (Note the effect of any late registrations.)
- Can the abstract be read and understood without reference to external records or documents?
- Are all relevant documents summarized (or where desirable, copied in full)? (e.g., wills, powers)
- Does the abstract include the original legal description, any changes in the description, any approved plan, and any restrictive covenants?
- Is the first item an acceptable root of title as prescribed by legislation or common law?
- Are details of all recitals and other documents explaining the chain of title included?
- Does the abstract include lists of Expropriations and possible Judgments?
- Does the abstract contain the searcher's summary of outstanding interests, undischarged securities, etc.? (Such a summary identifying registered interests, benefits, burdens and recorded interests is very useful but must be carefully checked for accuracy and completeness. It may be helpful to read the summary only after you have reviewed the abstract.)

See also the helpful comments of Nathanson, J. in *Ratto v. Rainbow Realty* (1984), 68 NSR (2d) 44 (S.C., T.D.) at 51

LEGAL DESCRIPTION (Standards 2.1, 2.3)

When reviewing the legal description for the LUS (prior to submitting the PDCA), here are some important considerations:

- Is the metes and bounds description complete, current and proper?
- Does the description clearly identify the parcel and meet all LRA requirements?
- Does the description resemble what is depicted in the Property Online graphics? If not, why not? Keep in mind that the graphics have not been prepared by a surveyor. While they are a useful tool, they cannot be relied upon for accuracy.
- Does the description reflect what is shown on any available survey plan or location certificate? If not, can you reconcile any material discrepancies? (Consider having a surveyor prepare a new description if there is a problem.)
- If the description has changed during the abstracting period, does each amendment comply with the legislative requirements for transfer of title to land? If a description originates since April 15, 1987, is it based on an approved Plan or qualify for an exemption pursuant to s. 268 of the *Municipal Government Act*? (If there is no subdivision plan, the abstract should include a detailed drawing by the searcher reflecting the changes in the parcel and distances, directions and adjoining landowners.)
- Are typographical errors covered by a "Being and intended to be" clause?
- See PDCA checklist in Module 2. You are certifying to compliance on submission.
- Are all benefits and burdens (e.g. easements) properly shown, and have you made due enquiry as to the corresponding benefits or burdens on any other affected parcels, whether registered or not? More on this in Modules 2 and 3

CHAIN OF OWNERSHIP (See Name Standard 4.3)

When reviewing each document in the chain of title, consider:

- Are all owners, the manner in which title is taken, and the extent of each interest identified?
- Has title passed effectively from the original owner(s) and each subsequent owner?
- Are any changes in the names of owners satisfactorily documented?
- If an owner has died, did his or her interest pass properly through joint tenancy, probate or intestacy?
- If an interest passed by inheritance:
    - Is a copy of the pertinent death certificate recorded or a recital over 20 years old registered?
    - Is sufficient probate information filed in the Registry of Deeds or if not, has the Probate file been checked and reported on?
    - Is there adequate documentation of the heirs at law in the case of intestacy? (Descent of Real and Personal Property Act from February 21, 1924; Descent of Property Act from February 21, 1955; Intestate Succession Act from September 1, 1966, including the significant amendment of December 13, 1975.)
    - Has the widow made an election with respect to the matrimonial home?
    - Is the will registered but not probated, as sometimes happened until relatively recently?
    - If so, this is not effective to pass title.

COMPETENCE AND CAPACITY

- Is there anything in the record to suggest a lack of capacity or competence by any grantor?

SEARCH CONSIDERATIONS

The following are some specific considerations that you should address, if applicable in your search. Please note: pertinent *Professional Standards for Real Property Transactions in Nova Scotia* are in parentheses.

Access (Standard 2.3)

Access is a part of the search. It is important to consider:

- Does the searcher indicate the nature of access to the parcel, if any, and whether such access is public or private?
- If access is public, is it qualified? (e.g., controlled, restricted, listed but not maintained.)
- If access is private, has it been granted?
- If private access has been granted for less than the entire marketable title time frame, is there an abstract of title for the grant of easement?
- If private access has not been granted, is there authority for its continued use in conjunction with the parcel?
- If private access crosses other lot(s), do the description(s) of servient parcel(s) describe the access in the same manner as it is described in the description of the parcel being abstracted?
- If shown on a Plan, does the access granted correlate with the actual traveled way?

See the most helpful paper, and flowchart, of Garth Gordon QC in "Red Flag Issues Under the L.R.A."

- Have the "flip sides" of easements (i.e. the corresponding burden to a benefit, and vice versa) been treated properly, and in accordance with Regulations 10(14) and 14-18 of the Administration Regulations? This is treated in detail in Modules 2 and 3.

Bankruptcy (Standards 3.11 and 3.9)

See Registrar General's Directive 2008-1 at

http://www.gov.ns.ca/snsmr/pdf/property/Emails_2_Lawyers/65_RG_Directive_Assign_in_Bankruptcy.pdf

Also consider:

- Has the receiving order or assignment in bankruptcy been registered?
- Have all required signatures and consents been secured? It may not always be necessary to record a disclaimer or other instrument from a trustee, if there is nothing to indicate an assignment or petition in bankruptcy on the record, but if you know of the bankruptcy you should obtain such a disclaimer as part of your abstract.
- If the seller has made a proposal under the *Bankruptcy and Insolvency Act*, have all terms of the proposal been met? (This may require inquiry beyond the Abstract.)
- Is the title conveyed by the Trustee's Deed otherwise marketable?
- Please refer to Paul Radford's paper, "Judgments/Bankruptcy – Priorities – Things to Watch For In Search"

Boundary Line Agreements

These must be noted in the parcel description.

Builders Liens (Standard 3.18)

Have any undischarged liens been filed? If a *lis pendens* has been filed, has a court order vacating it and all liens sheltering under it been recorded in a timely fashion? See s. 58(1) LRA.

NOTE: As of 2005 when the *Mechanic's Lien Act* became the *Builders' Lien Act* it is no longer possible to shelter under a prior action.

Condominiums

Does the Abstract include all documents pertaining to the condominium corporation and common elements as well as the individual unit?

Have you examined parcel registers of migrated units in the same development for purposes of comparison?

Corporations and Other Entities (Standard 3.13)

If the parcel has been or is being purchased from an entity (such as a corporation, municipal unit, university, church, society or charitable organization), you should examine its memorandum of association, legislation, charter or other incorporating document to determine:

- Has the entity power to acquire, hold and alienate real property?
- Is the entity in existence and good standing?
- Has the entity taken all actions required to authorize the sale?
- Has the entity caused its proper officers to execute (and, if required, seal) the instrument of conveyance?
- Has the entity received any consent required for the intended disposition?

If there is a conveyance from an entity in the chain of title, are you satisfied that the conveyance was properly authorized, executed and delivered? (In exercising your professional judgment on this, you are to consider the availability of supporting evidence, the age and apparent regularity of the conveyance, and any recitals or affidavits contained in the conveyance.)

See s. 83 LRA with respect to signing authority notwithstanding indoor management rules.

Crown Grants and DVLA Grants

Has the land been granted by the Crown? If not, this needs to be noted and addressed. See s.75 of the *Land Registration Act* and the *Limitation of Actions Act*.

In the case of a conveyance by the Director of the *Veterans' Land Act*, consider s. 5(3) of the VLA which deems such a conveyance to be a Crown Grant. C.W. MacIntosh QC. in his seminal Nova Scotia Real Property Practice Manual (section 5.1D) states that this has the effect of a Federal Crown Grant and "if the property is subject to competing property interests arising under provincial law, there might still be uncertainty as to the title conveyed thereby."

Debentures (Standard 3.15)

If any debentures affect the parcel being searched, do the terms of a floating charge debenture permit the proposed disposition of a real property interest? If so, require a release only if a notice of crystallization has been recorded, or you or your clients have reason to believe that the floating charge has crystallized. If not, the written consent to the proposed disposition must be obtained from the holder.

Note that a floating charge debenture is a potential claim and must be entered as a recorded interest when migrating. If it does not crystallize, it can be removed by operation of law using a Form 24. You will become familiar with this form in later sections.

Easements (other than for Access purposes)

Easements include utility easements, well agreements and others. As with access easements, you must establish if there is good title of the easement which purports to be for or to the benefit of the parcel.

Even if the easement is no longer in use it is not thereby extinguished. For example, a well agreement which was entered into before public water service was provided to the area would still exist, regardless of whether or not the well is still in use. Note the definition of "utility easement" in the LRA as meaning in existence (March 24, 2003), and s. 75 re easements in general being used and enjoyed.

Again, have you checked for compliance with LRAR 16-18 and the practice directives applicable to these? (see modules 2 and 3)

Encroachments (Standard 2.5)

- If there is an encroachment by your clients, is it permitted by a written agreement of the adjoining landowner and any mortgagee?
- If not, does it qualify for application of the doctrine of prescription?
- If there are any third party encroachments upon the parcel being searched, flag the abstract for purposes of completing Form 5 (or your own consent/authorization form). Refer to s. 75 of the *LRA* for the wandering boundary rule to be discussed later.
- If the encroachment is of unknown (at least to the present owner) duration, you may want to consider the advisability of making a textual qualification.
- If there is an encroachment upon a public highway, it will not be possible to establish adverse possession. However, if the encroachment is upon a public street, see s.314(1) of the *Municipal Government Act.*

Escheats (LRA, s. 40(3), (4))

Has an interest escheated to Her Majesty from the immediate predecessor in title of the applicant? (If not, it is not an interest in a parcel.)

Estates (Standard 3.10)

- Does the old *Probate Act* apply or the new Probate Act that came into force on October 1, 2001?
- If dealing with an intestacy, which legislation applies? (See the statutes listed in the *Chain of Ownership* section above.)
- Have all required consents been obtained?
- Is there an Order for Sale, under the old Probate Act or the new one? (While an Order for Sale is not usually required for those who died solvent and with a will, or intestate after October 1, 2001, such an Order may have been issued and you need to determine if that is the case.)
- Does the personal representative possess proper authority?
- Is any testamentary instrument valid?

Execution of Documents (Standard 4.2)

- Have all deeds been properly executed by the registered owner(s), and witnessed?
- If the name of an owner has changed, is there satisfactory documentation of this?

- If a document is signed under a Power of Attorney, is the POA registered or recorded and does it authorize the conveyance?
- Are Releases executed by the original Mortgagees? If not, are Assignments, Amalgamations or Change of Name Certificates registered?
- Have the proper parties executed the documents?

Note there has been some debate on the form of affidavit of execution / certificate of an attesting witness – ie if John and Mary Smith are the Grantor, whether the certificate/affidavit should refer to them as "one" or as "two" of the parties. Some instruments saying "two" have been rejected by the LRO. Until resolved, the author suggests using "one" or "John and Mary Smith, the Grantor in the foregoing indenture…." Until otherwise advised by a Registrar's directive, it may be preferable to avoid document rejection by saying, "John and Mary, one of the parties," "John and Mary, parties," or "John and Mary, the Grantor…." rather than "two of…."

Expropriations (Standard 3.16)

- Has the searcher checked for all expropriations affecting the parcel and reported on this?
- If there is such an expropriation, what is the nature of the interest expropriated?

Guardians (Standard 3.12)

If title is being conveyed by a guardian, is there authority for the appointment and has the authority for the guardian to convey been registered (usually a Court Order)?

Judgments (Standard 3.5; LRA ss. 65-69, LRAR 26(2), 27)

Has the searcher checked for and reported on possible judgments against all owners in the last 20 years? If an amalgamated company has been an owner, have the names of all amalgamating companies been searched? Have nicknames and previous surnames of married women been checked? (There should be a list of the full names of all owners in this time frame and a note showing no judgments if applicable, or abstracts of any possible judgments. If available, the abstract should show court and file number, debt owed, debtor's address, and plaintiff's solicitor.)

Are satisfactory Statutory Declarations against possible judgment debtors recorded?

If not, can possible judgment debtors who are owners be distinguished under the rules? (See Frank DeMont's *Material Differences Chart* and the *Judgments Names Exercises*.)

Judgments and the material difference rules are covered separately.

Leaseholds (Standard 3.20)

Has a leasehold title been searched in the same manner as a freehold one? A lease granted by the freehold owner is only valid if the freehold owner was such at the time of granting the mortgage. Therefore, the underlying title is very important. Imagine if you owned a camp on leased land. You would want to be sure that you had the right to occupation under the lease and that no one could have you removed prior to the end of the lease period.

Legislative Restrictions (Standard 1.1)

Have you explained any legislative restrictions to your clients and confirmed their instructions?

Matrimonial Property Act / Vital Statistics Act (Standard 1.7)

- Is the marital status of all owners addressed in deeds or declarations?
- Are there any possible outstanding matrimonial or registered domestic partner interests?
- Have documents since October 1, 1980 complied with the *Matrimonial Property Act*?
- Have documents since February 15, 2002 complied with the *Vital Statistics Act*?
- An unreleased dower interest is not an interest in a parcel: *LRA*, s. 40(2).

Mortgages (Standard 3.4)

Has the parcel been released from all mortgages against it?

Note: Pursuant to subsection 40(1) of the *LRA*:

> … an unreleased security interest in a residential mortgage that is more than forty years old and that has not been amended or supplemented by an instrument registered during the preceding forty years is not an interest in a parcel.

Note: this section does not apply to Commercial Properties

For releases in general, see s. 60 LRA and 28(2) *Real Property Act*.

Options and Rights of First Refusal (Standard 3.17)

- If there is an option or right of first refusal, are the rights created contractual ones or do they run with the land?
- If an interest in land has been created, is it void as infringing the rule against perpetuities?
- If an interest that runs with the land will not be released, have you explained this to your clients and confirmed their instructions?

Partnerships (Standard 3.14)

A partnership, as a non-legal entity, cannot hold title to real property: Charles MacIntosh, Q.C., Real Property Practice Manual, s. 1.2A. It may, however, pass to the individual partners. Accordingly, all partners must sign personally or by representation.

If the chain of title includes a deed vesting title in a partnership:

a. How was title taken?

b. Did all partners required to execute the conveyance sign personally or by a duly authorized representative?

Possessory Title or Prescriptive Rights ***(Standards 3.2 and 3.3; LRA ss. 73-76)***

Possessory title is a critical part of property law in general, and has undergone considerable change under the LRA. It is discussed in detail in Module 3. For current module (title enquiry) purposes, consider:

Is there adequate recorded documentation to support a professional opinion that possessory title or a prescriptive right has been established? (e.g., recorded affidavits or statutory declarations by knowledgeable and disinterested persons such as surveyors or neighbouring property owners). Full copies of documents evidencing possessory title or prescriptive rights should be included. Remember that there may be limits on prescriptive rights under acts such as the *Public Highways Act* and *Municipal Government Act*.

While the fundamentals of establishing adverse possession or prescriptive rights may not have changed significantly (with the exception of the period of occupation/use required) with the introduction of the *LRA* the ability to cause irreparable harm to third parties has increased as a consequence of the fact that the lawyer's opinion improperly expressed may deprive a rightful owner of his/her property rights.

In the case of prescriptive easements, has the "flip side" been documented on the public record through the relevant provisions of LRAR 14-17?

As pointed out by Catherine Walker in her "Certifying Title and Qualifying Title Under the Land Registration Act" paper:

> *The fact that the public record includes a statutory declaration or declarations purporting to establish possessory title (or for that matter a prescriptive right) is not determinative. The lawyer reviewing the Abstract must exercise professional judgment, in the context of the applicable legislation, and the Professional Standard.*

Powers of Attorney ***(Standard 4.1; LRA, s. 72)***

- Have you reviewed the Power of Attorney to ensure that it is effective to do what it purports to do? (e.g., if the POA is for an incompetent person, is it a duly executed Enduring Power of Attorney?)
- Was the Power of Attorney executed before the instrument made under it?
- Has the Power of Attorney been recorded?
- Is the matrimonial status of the grantor under a Power of Attorney reflected in the abstract?
- Is the affidavit of execution based on the attorney's personal knowledge and belief?

Public Roads or Streets

Is title to the property affected by the *Public Highways Act* or other such statute? (For example, is a portion of the described parcel used as a public highway or street, or is there evidence of encroachment of buildings upon a public highway or street? If so, is there a registered license (benefit) and does it comply with s. 314 of the *Municipal Government Act*? Remember that one cannot acquire possessory title to a public highway or street.)

If a street is not public, is there a license to use it?

Quieting Titles Act ***(Standard 3.19)***

Have you examined the certificate and advised your clients regarding the exceptions in the certificate and in the *Act*?

Quit Claim Deeds

These require special scrutiny. Is something less than the entire interest being conveyed? For a discussion of Quit Claim Deeds as roots of title, see "The Root of Title" section of these materials.

Receiverships ***(Standard 3.11)***

If a deed is from a receiver where there are no subsequent encumbrancers, is the deed executed by the receiver and (in the absence of a court order) the company granting the debenture security?

If the deed is from a receiver where there are subsequent encumbrancers:

a. is the deed executed by the receiver and
b. is the order approving the sale registered (or have all subsequent encumbrancers released their encumbrances to the extent of the interest being conveyed)?

Is the title conveyed by a Receiver's Deed otherwise marketable?

Recitals (Standard 1.6; Vendors and Purchasers Act, s. 2(a))

If you are accepting recitals as rebuttable presumptions of fact, are they at least 20 years old? Is the wording of the recital sufficient for the intended purpose?

When considering recitals, compare and contrast *Inter Lake Developments Limited v. Slauenwhite* (1988), 86 N.S.R. (2d) 23 with *T.C.C.* v. *Gunning* 1998 CanLii 3370 (NSCC).

*Restrictive Covenants (**Standard 3.6**)*

If there are any, are there breaches that would affect the use of the parcel or its marketability? Have the covenants expired or is there a date upon which they will expire? Is there an expiry date? If so, and if that expiry date is in the future, consider using a textual qualification to flag the expiry date.

Sheriff's Deeds (Standard 3.8)

Is the title conveyed by a Sheriff's Deed otherwise marketable?

A Sheriff's Deed is just another link in the chain of title. It conveys the interest of the mortgagor at the time the foreclosed mortgage was granted. It has no curative effect upon prior title flaws and has no impact upon prior mortgages, judgments, liens, etc.

Statutory References

Does the Abstract note sections of all public or private statutes that affect the Parcel?

Survey Plans (Standard 2.4)

- Has the searcher checked for all relevant survey plans and enclosed full copies?
- Are there any material discrepancies between the description or other abstract information and a survey plan? If so, can you reconcile them? For example, are the bearings expressed consistently as magnetic, grid or astronomic, as the case may be?
- If there is an applicable subdivision plan, has the parcel under search has been approved and if so, do any conditions apply to it? Among other things, check for any easements (whether or not documented by grant) that may be shown, encroachments either by buildings owned by your client or owners of adjoining parcels, errors in the description, plan or graphic, and evidence of consolidation or subdivision which is not reflected in the parcel description.

Tax Deeds (Standard 3.7; Municipal Government Act, s. 156)

Tax Deeds constitute a good root of title six years after registration (as opposed to date of execution) of the deed. Prior to that time, a Tax Deed is just another link in the chain of title. Whether or not the Tax Deed was registered more than six years prior to the search, you should look at prior deeds in the chain to see if there is a reference to easements or exceptions. See s. 156(3) MGA.

Trustee's Deeds (Standard 3.9, S. 28 LRA)

Are the terms of the trust met (on the face of the record or as known to you)?

Is the title conveyed by a Trustee's Deed otherwise marketable?

Waters – Tidal and Non Tidal (Standard 2.6)

Does the parcel border on any water?

If the parcel boundary is under or adjacent to water, have you cautioned clients of the danger that all or some of the parcel may be "infill" and lost through migration?

Consider whether the waterfront is federal or provincial. Possessory title cannot accrue against federal

lands unless it existed and matured prior to 1950.

See Anthony Chapman QC, Of Wharves, Waterlots and Kings, in the "Conveyancing" tab under the articles on the LIANS website.

REPORTING AFTER REVIEW (STANDARD 1.5)

Once you have reviewed the Abstract, you must explain (and report in writing) any qualifications to your clients and obtain their instructions, and note these in your opinion of title to the Registrar General. Remember to qualify every opinion as being “subject to survey”. You should write marginal notations on the Abstract regarding any exercise of your professional judgment.

Bear in mind the requirement that the abstract be complete and that it must be capable of being read and understood by a person who has not searched the title, without reference to any documents or records external to the abstract. If you have reached certain conclusions, document them in the abstract. This is your opportunity to speak with the Auditor or with others who might be reviewing the abstract.

OFF TITLE INQUIRIES

The following is a list (though not exhaustive) of "off title inquiries" to discuss with your client during your initial meeting. These inquiries are the recommended areas of discussion that you should discuss with your clients and some points to make your clients aware of (if they apply). Each property transaction is different from the rest and though not all of the below noted inquiries must be discussed with each client, they should all be kept in mind when you review the abstract of title for the property in question.

1. Zoning. See Professional Standard 5.1
2. Occupancy permits. See Professional Standard 5.1
3. Municipal taxes – see s. 73 LRA
4. Betterment charges. (Contact the Municipal unit in question.)
5. Harmonized Sales Tax
6. Non-Resident tax (s.116 *Income Tax Act* (Canada)
7. Change of Use Tax. See s.77 of *Municipal Government Act*
8. Personal Property Security Act search respecting chattels/fixtures (Professional Standard 5.2)
9. Corporate status (revoked/struck-off?) If it is struck-off, real property will have escheated to the Crown. Distinguish between revoked (no escheat) and struck off.
10. Overriding interests pursuant to Section 73(1) of the *LRA* (this includes but is not limited to an easement which is used and enjoyed, and a Workers' Compensation assessment)
11. Location Certificates or Survey Plans which are not filed at the Registry. Pursuant to the LRAR s. 7(12) we must send available previously unfiled retracement plans or subdivisions plans to the Land Registration Office. There is no charge for this filing. Valuable evidence will be preserved.
12. Issues specific to Development:
    a. If the parcel is not serviced by municipal sewage, is the client aware of parcel size and percolation test requirements?
    b. Is client aware of the requirement for Department of Transportation and Public Works' approval of driveway location?
    c. Bearing in mind NSPI's requirement of a 40 foot wide easement, is there sufficient frontage and width to create a utilities easement?