

Open House
The Future of Real Property Practice in Nova Scotia

With the LRA on everyone's mind, we invited four real property practitioners to discuss the current challenges in their practices, and what they see coming in the future. Taking part were Alan MacNeill, who practices with Grant, MacNeill in Truro; Trinda Ernst, from Waterbury Newton in the Valley; Catherine Walker, a sole practitioner in Halifax; and Elizabeth Haldane, with Stewart McKelvey Stirling Scales in Halifax.

SB As practitioners who focus on real property in your practices, in different areas of the province, what are your biggest challenges, and what do you see in the future? With recent real estate fraud cases in BC and Newfoundland resulting in millions of dollars of losses for clients and financial institutions, and serious financial ramifications for members of those provinces' law societies, what should lawyers, and the Society, be thinking about in terms of ethical issues, and particularly education issues?

TE Big topic!

CW Some of the mortgage lenders are dealing with it directly by requiring photo ID, whether you know your client or not.

AM Another burden laid on us by the lenders.

EH You'd think that the bank branches must know their clients.

AM With Maple Trust and President's Choice doing mortgages, we seldom have lenders on the ground in Truro, and when we do, it's such a joy, rather than dealing with some voice in Winnipeg. It's certainly one of the big issues we're facing: the changes in the demands being made by the lenders these days. We just faxed 48 pages to a lender somewhere to do a closing. The downloading of that sort of stuff on our shoulders has become quite noticeable in the last few years. Getting the ID, swearing to that, picking up income tax data – sometimes they want two years of income tax returns, two days before the closing!

TE Collecting post-dated cheques, or voided cheques. That was all done in-house by the bank in the past.

CW You can say you already provided it to the mortgage broker, and it's "never mind, give it to me again."

EH Banks, to protect their own profit margins, are offloading the work, and then they can say to the clients, "Well, if it's expensive, that's the lawyer's fault." It's not us.

TE The perception is that it's all our fault if we require insurance or surveys. And it's all our

fault that it's slow. Even though we still don't have mortgage instructions, two days before the closing.

AM We're facing, more and more frequently, clients coming in who know nothing about the mortgage that they're getting. Even the basics.

CW "A mortgage? It's not a mortgage, it's just a line of credit!" Those are my favourites. It is interesting, the banks' psychology behind the marketing of products with consumers, trying to separate the whole notion of mortgage security with the giving of the money. All they really want to do is give the money to the client, and all the client wants to do is take it, and everything else is secondary.

AM I've got clients who believe that terms like "pre-approved" mean something. It means nothing at all, except that the bank wants to hold you into their loans system for as long as possible, so that you feel that it's too late to jump out and go to another lender. And then, it's move on to the next client as quickly as possible, while sending all the papers to us to process at the same time. So we're playing a larger role in instructing the client in the basics of what the mortgage means, what the duties are, and also doing the paperwork. My closings now are taking easily an hour, if not more, to go through paperwork. I think that real estate lawyers are the bottom-line lawyers – everyone else can say "I'll charge by the hour," or I'll take a percentage of the fee, but we're the people who have to say, "I'm going to do this transaction for \$600," and then make sure we move it through efficiently, cost-effectively, and get a dollar out of it to feed the children if we can.

CW And still feel that you've served your client well.

EH That's the danger, isn't it? You're going to have the lawyers with a conscience who are going to go through all the hoops, and you're going to have the lawyers who will say, I have to make a buck here too, I've got to cut some corners.

CW So the secretary sees the clients, and the lawyer doesn't.

EH The secretary answers questions, and perhaps doesn't necessarily know the answers, and then the banks simply say, that's fine, if the lawyer is negligent, we'll simply sue him. And who picks it up? Our insurance. We're in a no-win situation.

TE The market is demanding lower fees, because of supply and demand. There are people who are willing to lower their prices to do a higher volume. And then you have the LRA government people telling you it should only take you two more hours, so that's all you should be charging for. On average, it's probably more than two hours now, and the people who are setting the price in the marketplace are doing it on volume. I know that some of them aren't seeing clients, and we know that they've got staff working around the clock, and I still know that there are closings that are two weeks late because they can't cope.

I'm not making money on most of my files with LRA. I do have some clients who are

experienced, and I don't have to spend as much time with them as I have to with newer clients. But we're explaining why the government is doing what it's doing, and why the banks require what the banks require. You've mentioned President's Choice, and they're not user friendly. There's no human being for clients to deal with. We end up being the human being.

AM And you're doing all of what you've just said in the context of the fixed fee. Our letters to clients always state "here's what we're going to charge you," although we may go above that in exceptional circumstances.

CW But how often does that happen?

AM More and more frequently now, because of changes I've implemented at the office. If you're Maple Trust, it's another \$200 dollars on a mortgage, and President's Choice, it's another \$150, because we know from experience that it's going to take extra time, and we have to find some way to budget for it. The extra stress is falling so hugely on staff, and it didn't used to. That's a big change in the last few years.

CW Paralegals have a lot of stress placed on them. Some offices just keep throwing more and more on paralegals, thinking that that's making it more efficient – adding more staff time – pushing the extra work out without an assessment of what's appropriate. The lawyering role is becoming much more complicated, and that should not be forgotten.

AM I know of a firm that was crippled this week when they lost an assistant, mostly because of pressures brought on by the registry act.

EH What concerns me is the turnover in the registry staff here in Halifax. They're stressed out in their office too. They're going to be left with new, young people who have never worked in the Registry system. Okay, so they don't have the old ideas, they only have the new ideas, but they don't have the experience of dealing with the registry.

EH The registry system is the backbone of the economic system of the province. If you can't get transactions done because of technical difficulties that have nothing to do with anything except the technicality of getting something on record – this slows down deals and is bad for the economy.

TE They have to fix this. I know they have working groups, and that we were consulted. I know we borrowed from New Brunswick. Is that where all these problems originated?

CW It's hard to say. A lot of it is in the application. You have the computer experts (I was on the steering committee) and they give you the progress and the updates, but until you have an application of the system, you're not going to really know how it works. You can only take the experience of another province to a certain point. If you look at the product in terms of when we started in Colchester, whether it's in terms of easements or flagging other properties or mutual notification of paper title holder and possessory title holder, I found that they've been extremely responsive to substantive issues that we've raised. A lot has improved. There's no question that

it's taking a long time, because they're trying to deal with demands in each of the counties, but again, it's another layer on a property transaction that you have to work through. It's highly technical, and not always rational.

TE In King's County, we're saying just wait until Halifax comes on board! We know that we're just small voices in the wilderness, and when we get another 700, 800 lawyers coming on board, they're going to fix so many problems. As Elizabeth says, the commercial world is not going to wait.

Did you get the memo about black ink? "Documents that have to be scanned in must be done in black ink or very dark blue." I do all my documents in blue, so that I know it's an original. We can make sure it's legible and scannable, but I don't think we should be using black pens.

AM We have reasons, as barristers, not to want to use the black pen, but that doesn't fit here. Where does the lawyer play a role in the process? We're becoming functionaries for the mortgage lenders, and now we're the functionaries for the bureaucrats. Who's the driving force in the transaction?

CW There's a constant balance needed between process versus lawyering, and between the vendor, the realtor, the client. You've got someone coming through the door that needs something done, and wants you to be the driving force to get it moved from here to there. In the middle, you've got the process, and you've got to decide how you're going to get it from here to there. Some lawyers will decide that it's all through their paralegals, some will decide it's all through title insurance. And then we've got LRA sitting in the middle. Part of the new world of property is how to maintain your effectiveness, figure out how your role has changed in getting your clients from point A to point B, and still coming out of it feeling as though you've done your job effectively.

AM I don't want to keep harking back to the mercantilism of it all, but we have to bundle that into the understanding in that we're fairly unique in the Bar, in that we've got to do that for a fixed rate. I don't care about profit, but . . .

EH . . . but how do we bundle our services? Real Estate practice in a firm – it's something that they have to have, but it's a non-profit field for a firm.

AM There was an article in the paper recently about the new move afoot for people to represent themselves in a property sale. We've got more and more people capable of doing it. The article covered how you can draw up your own agreement, but it kept coming back to the fact that you needed a lawyer who could review your agreement for you.

And increasingly, we're being drawn into the role of agents in property transactions. I get people calling me up because there's tires in the backyard – usually something the agent would handle, but there's no agent in this transaction. We get calls at all hours. I have to stop myself and say, "This is something an agent would do. Should I be doing this as a solicitor? Am I covered?"

SB When we did the survey about the articling year and the bar admissions course, almost two-thirds of the respondents said that they didn't feel adequately prepared for real property practice. The things that you've been discussing aren't things that a course could prepare them for. Is real property practice something that can be taught?

AM We were lucky enough to get into it at a time when these factors didn't exist. Clients with no agents is a new problem, the Land Registration Act is new, and the downloading by the mortgage companies, that's in the last few years. We're so lucky to have been deeply implanted in the process before this all hit us. I feel badly for new folks coming in, thinking, how can we grasp all of this?

TE I think that years ago, lawyers still did their own searching, at least in small communities. You felt in charge of your file, and you knew where your property was. I miss that part. I learned a lot by doing it myself.

EH Learning the academic side is so different from actual practice. I took Property II with Alan Crowe, and he was great. But I couldn't have done a property transaction after that course. I could have pointed out some issues, but not done a transaction. That's where the articling comes in. You have to get them sitting down and actually doing property transactions. It's there on the checklist. I know, because I'm in charge of that at our office. I have to make sure that every single one of our article clerks does this. At the moment, I'm almost loath to get them to do them, because I'm not confident under the new system! I don't think I will be until I've lived through the LRA here for many months.

TE Most files you learn by the seat of your pants anyway. Every file is different.

EH In the bigger firms, it's usually the more senior people helping out the more junior members. Our doors are always open and you can always go to someone else and ask questions. For sole practitioners? God help them.

CW It's moving toward a more specialized field. It used to be talked about as a lawyer's bread and butter, something no one should refuse to do.

AM It used to be the lost leader.

CW Nobody would refuse to do it. Your secretary handled the paperwork, and you sat and chatted with your clients. There's been a big move away from that.

EH But there are people in the big firms who say "I'm not touching this stuff!" Lots of things are profitable, and this isn't.

SB If you think ahead to when the whole province has been working in this system and we're dealing with many more properties that are already in the system, can you imagine the benefits, and the streamlining of the work?

TE I've only had one file that's been in the new system. The problems mentioned about the

mortgage companies are going to get worse. Representing the purchaser, you might not have search responsibilities, but you still have to deal with the realtors, you still have to deal with the self-represented. As a seller, you have less of a responsibility, and right now, that's where all our pressure is, representing vendors. It hasn't been too bad. Explaining to them that it's beneficial to the whole province, and they're doing their part – except for one or two with multiple PIDs, they get another bill for another transaction – most of them are understanding what's going on. Representing vendors, down the road, will be a treat.

CW From my point of view, the benefits are immediate. This one-time investment means that the next time around on the next provision or the next transaction, my client no longer has a \$175 search bill. Doesn't take long to multiply that by a number of transactions.

AM I think 13 to 15 percent of Colchester has now been moved in, and I was thinking that when LRA is behind us, costs aren't going to drop for the consumer at all. Because of this surge in offbeat lenders, boutique lenders, and lenders out of town, and because of the interest in self-representation, there are going to be other costs that will replace those earlier costs.

CW But I think there are cost savings.

AM Perhaps, but I honestly don't know what benefit is going to the consumer from LRA. Give it a few more years, and see what happens.

CW I don't think change is ever going to be easy, and there are certainly lawyers who will say that the old system worked fine. I guess you could say that we could have gone on forever with the old registry system, but that's just not where the world is. I don't think the economic foundation of Nova Scotia could withstand another 200 years of the Registry system. If you agree with that, and if you agree that a Land Titles system was overdue, then you work with it, and try to make it the best as it can be for the province.

EH There's nothing to be gained by not working with it at this stage, because it's not going away. We've got to do our best, and hope that practical decisions are made on the government side which will help the lawyers to deal with it. I think there's going to need to be some education on the government side. It's not all computers.

SB In terms of resources for lawyers and their staff, what would you like to see?

AM Real strong courses on law office economics. Small and medium-sized firm economics, linked into that interesting juxtaposition between ethics and economics that we all seem to have missed. My father used to say, in communist Russia, they taught you how to be a good communist, but in Canada, no one teaches you how to be a good capitalist. None of us were trained to be good and efficient business people. Those people who are setting low fees, they're going to find themselves in a really horrendous economic situation six months or a year down the line.

TE The Bar Admission course used to have good materials. I don't know what else you can do,

except try to give them the tools.

CW I think our side has been so swamped with getting everyone educated first time around, that we haven't lost sight of, but don't have the resources to do this. It's like every entity, whether it's the law office, the government or the Bar Society, we don't have enough time, energy or resources. And never mind the Property 101, or the LRA 101, we need the LRA 202, 303, and the 404. You need to understand how it's changed phenomenally from how we taught it the first time and what we're teaching now.

SB What do you see as the future of the LRA education, once everyone's been through it once?

CW I don't think mandatory education can stop after this initial authorization. I think it will just become more and more specialized. It will get easier, as people become more familiar with it. It's like when the Matrimonial Property Act started, and everyone was trying to learn the implications. It's like learning the Charter, it's like anything that is going to have a big impact on your practice. As you work with it, you will understand it better.

AM We're certainly looking at a future in which solicitors coming in to the field won't be able to practice real estate as a matter of course.

CW But there will always be property lawyers. I just think there will be fewer of us doing the work.

EH There's going to have to be an opportunity every single year for new students coming out of law school to do an LRA course.

TE It should be part of the Bar Admission Course. Quite frankly, it can be done in less time. I would rather have been tested on what I had studied, rather than have spent the time listening to someone repeat the written material. The hands-on training was the best way to learn.

AM Someone is going to have to come to grips with the issue of fees, and appropriate fees. The practice in Truro is comfortable, because of what we charge for property transaction there, and for the first time in my life as a property practitioner, I feel like I'm getting paid for the work that I'm doing. I'm there until ten o'clock at night sometimes, but I'm getting proper remuneration for my work, and for the role I play. I think the pressures must be greater in big firms. They dread the firm's annual retreat. The civil litigation people are coming with wheelbarrows full of cash, and the property department has to start explaining itself again.

TE And the property department needs extra staff to keep up.

EH Then they're asking for more people, at more expense.

CW I knew there was a reason I was a sole practitioner! [laughter]

AM I think a property practitioner has to be prepared to stand up and clearly outline what they

need from the client.

CW Lawyers have to stop apologizing for their fees.

AM One thing that I've noticed recently is since we're bringing clients in early to do the forms, we're not getting any complaints about fees. We're getting a chance to chat with them about the process.

AM We've got to be proud of what we do. We feel like we're driven by all the other factors, but without us in the middle, the whole thing falls apart.

CW And as with any other lawyer, we have to be prepared to say no. Saying no is really hard for property practitioners.

TE My biggest fear is that pressure will be brought to bear by external forces – realtors, consumers, banks, and other lenders – to take the authorized lawyer out of the transaction. That's what the Bar Society did for us, to ensure that you need an authorized lawyer to do any transaction at the Registry. I've had the self-represented seller say "I don't want a lawyer." But I've said, "I'm sorry, you can't register your documents without a lawyer." You can charge a flat fee to do that, and you're not representing them, just recording their documents. My disclaimer letter covers that, but I'm afraid that at some point, once more and more properties get in the system, there's going to be pressure to take the lawyers out of the transaction. The realtors want that – they shop around, cut deals – and the consumer doesn't think they need a lawyer, they just need somebody to sign the forms. I fear that the market will demand that lawyers come out of it.

TE Have you seen the BC project, where lawyers are estate agents the way they are overseas? You'd never have much of a real estate practice if you got involved in selling real estate here, right now. You'd have no chance of a positive relationship with a realtor.

SB What would you say to younger practitioners who are looking to build a real estate practice?

TE Make friends! That's how you build a practice. You have to know realtors and mortgage companies.

AM You need a long term commitment to the field, because you build. And what a lovely building practice it is, too, because the more people you deal with, the more who come back. Long-term commitment to your community, the agents you deal with, that more than anything else will benefit you in the long run. It's the bright side of my family practice, because it concludes. There's a clear ending, usually, and you can move on.

CW I think it's a fascinating field, because you deal with so many different aspects – right through society. So many different arms of real estate. I agree with what was said, young practitioners should be in it for the long term. It's not an area anymore where you dabble. You may not know until you do it for a while, but if you want to try it, take it seriously as an area of law, and not a sideline.

TE There's nothing more exciting, whether you're in business, buying a commercial property and the potential that it represents; or people buying their first home, up-sizing, down-sizing, whatever. In most cases, it's a positive experience, certainly for the buyer. We're a service business, and we help them make the transaction go smoothly.

You're helping them, and that's what we're all about.