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Overriding Interests in Land

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Many practitioners do not become aware of the existence of overriding interests — that miscellaneous group of liens, charges and restrictions upon the use of real property — until their attention is forcibly drawn to the matter by reason of a client having purchased a property subject to one of these interests. The majority of overriding interests are enforceable without registration in the Registry of Deeds. Thus, not even the most exhaustive title search would reveal their existence.

In the research connected with the development of draft legislation for the proposed *Land Titles Act* for Nova Scotia, all statutorially created incidents affecting the title to real property were categorized and analysed. A surprisingly long list resulted and those which can properly be called overriding interests are as follows:

1. Civic Tax Lien
2. Civic Betterment Charge
3. Estate Tax Lien
4. Land Tax Lien
5. Non-resident Income Tax Lien
6. Nova Scotia Power Corporation Bill Lien
7. Lien Under Workmen's Compensation Act
8. Liens under Labour Standards Code
9. Mechanics' Liens during unexpired registration period
10. Unpaid Vendor's Liens
11. Dower Rights
12. Public Highways
13. Abandoned Highways
14. Restrictions under Public Highways Act
15. Necessary Rights of Way—Private Ways Act
16. Crown Rights of Expropriation, Access, User
17. Utility Corporation Easements to Maintain overhead wires.
18. Watercourses—Water Act
19. Marshland Reclamation
20. Rights to Access and to Fish

21. Flooding Rights
22. Beaches Preservation and Protection
23. Historic Artifacts
24. Treasure Trove
25. Mining Leases and Licenses
26. Salvage Yards Act
27. Title by improvements by adjoining owner
28. Condemnation under Public Health Act
29. Lease for less than three years, accompanied by actual possession
30. Street Tree Lien
31. Quieting Titles and Land Titles Clarification Applications
32. Airport Zoning Regulations

We are living in an age of increasing public concern for the manner in which property is used and this concern finds expression in the number and form of laws and regulations prohibiting conduct considered undesirable and vesting in government authority to make use of privately owned lands. It is evident that a lawyer must make inquiries and investigations in several places other than the Registry of Deeds to determine not only who is the true owner of a property but to what use the land may be put and to what government rights it might be subject.

In some cases this simply means a careful look at the statute creating the interest. In others it means a telephone call or letter to the government department charged with the administration of the statute.

Difficulties Frequently Encountered

Some of these overriding interests are of such importance that the prudent solicitor dealing with property matters should be familiar with them. Lawyers deal with several of them frequently but even the most common interests are not without difficulties. For example, dower rights are

particularly vexatious to the practitioner since there is no certain means of determining from a title search whether or not a property may be subject to a claim for dower.

Likewise, several recent experiences by lawyers in the Maritimes involving tax sales should alert the profession to the possibility that although it may not show in the Registry of Deeds, the property may have been sold for taxes under the name of a previous owner.

Opinions still differ as to the effect of a mechanics' lien placed on record within the forty-five days allowed for the filing of the claim but following a sale to a bona fide purchaser for value without notice. The safest course with respect to a purchase of a new house is to require a holdback or satisfactory evidence that there are no outstanding liens.

Most of the interests referred to in the list however, are those which come to the attention of the solicitor after a property transaction has been completed. Under the *Land Tax Act* every owner of more than 1,000 acres of land in the province must pay a tax of 1% of the value of the land, each acre being valued at \$2.00. This tax is a first lien upon the land and any portion thereof. The lands are subject to forfeiture for non-payment of the tax. Accordingly any purchaser of a parcel of land from the owner of more than 1,000 acres may be subject to a *Land Tax Act* lien.

Liens under the *Workmen's Compensation Act* and *Labour Standards Code* attach to land whether registered or not. It should be noted that *Labour Standards Code* liens are deemed to be mortgages enforceable by foreclosure proceedings and that these liens attach to all the real and personal property of the employer, not only his industrial property.

Many old public highways are not documented in the Registry of Deeds and in many cases buildings are constructed within the limits of such highways.

The *Public Highways Act* sets out numerous restrictions with respect to the use of land adjacent to a highway. These restrictions and prohibitions are frequently ignored. The Act covers such matters as the erection of structures on highways 300 feet from the highways' centre line; the construction of fences, utility poles and signs and the planting of trees near the highway and the sale of merchandise within 150 feet of the limits of a controlled access highway.

By virtue of the *Water Act*, the title to every water course, including the bed and source thereof, is vested in the Crown.

Airport zoning regulations preclude building in areas surrounding airports. Each airport has its own set of zoning regulations which are published in the *Canada Gazette* at the time of approval. In some cases the flight path extends several miles from the centre of the airport and the regulations

preclude development or even replacement of an existing structure if it is damaged.

These few examples should serve to illustrate the importance of overriding interests to the property practitioner. A lawyer can always endeavour to protect himself against liability by giving his client a certificate of title sufficiently restrictive in nature as to relieve himself from such liability with respect to the existence of most overriding interests. However, the more professional approach to the problem is seen as a duty to become knowledgeable of these interests so that they can be detected and their nature and effect explained to the client before a purchase is finalized.

PUBLIC ACTS 1975

Acts passed at the November-December 1975 sitting of the Nova Scotia Legislature.

In the case of amending acts, references in brackets are to the chapter of the Revised Statutes (1967) of the original act, unless otherwise noted.

- An Act to Amend the Assessment Act (c.14)
- *An Act to Amend the Public Service Act (c.255)
- *An Act to Amend the Executive Council Act (c.95)
- An Act to Amend the Health Services Tax Act (c.126)
- An Act to Amend the Income Tax Act (c.134)
- An Act to Amend the Social Assistance Act (c.16 of the Acts of 1970)
- An Act to Amend the Intestate Succession Act (c.153)
- An Act to Amend the Environmental Protection Act (c.6 of the Acts of 1973)
- **An Act to Establish a Rent Review Commission and to Provide for the Review of Rents
- An Act to Amend the Workmen's Compensation Act (c.65 of the Acts of 1968)
- **An Act to Amend the Residential Tenancies Act (c.13 of the Acts of 1970)
- ***An Act Respecting Control of Beverage Containers
- ***An Act Respecting the National Anti-Inflation Program
- *In force December 18, 1975
- **In force December 22, 1975
- ***Subject to proclamation

Copies of these Acts are available at 25c each, post-paid, from:

NOVA SCOTIA GOVERNMENT BOOKSTORE
P. O. Box 637
Halifax, Nova Scotia
B3J 2T3

"There are some general considerations that support the view that I would take. It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants, may be associated with an estate in land. Finally, there is merit here as in other situations in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant." *Laskin, J., in Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., [1971] S.C.R. 562.*