CANADIAN BAR ASSOCIATION

NOVA SCOTIA

2013 ANNUAL PROFESSIONAL DEVELOPMENT CONFERENCE

JANUARY 31, 2013

PREPARATION OF LEGAL DESCRIPTIONS UNDER THE *LAND REGISTRATION ACT*

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January 10, 2013

Preparation of Legal Descriptions under the *Land Registration Act*[1]

1. Background to Discussion

This discussion is focused on a few of the extent of title and risk issues that arise when working with legal descriptions under the *Land Registration Act* ("LRA") and *Land Registration Administration Regulations*[2] ("LRAR") and in accordance with the Nova Scotia Barristers' Society Professional Standards[3] ("Standards"). I would heartily recommend to all a careful reread of the discussion paper "Where is the Line?" presented in 2008 to a joint conference of surveyors and lawyers involving issues of extent of title by Carl Hartlen N.S.L.S., Derik DeWolfe N.S.L.S. and Garth Gordon Q.C.[4].

Some examples of the kinds of work lawyers engage in are as follows:

- New descriptions that are required when a large parcel is divided by natural boundaries into two or more parcels, where there is insufficient survey fabric to objectively confirm boundaries and only POL mapping to determine the number of parcels and location of natural 'dividers';
- New descriptions that are required for remainder parcels for which there is either no survey or insufficient survey fabric available;
- New descriptions required for defacto consolidated lots pursuant to s.268A of the *Municipal Government Act*[5];
- Descriptions for easements not located by survey fabric, and only evidenced by 'red line' notation on POL mapping[6]
- Descriptions for parcels claimed by adverse possession.

As lawyers, we do not work in isolation. Extent of title and survey issues significantly impact our work, particularly in the area of legal descriptions. These issues may affect our ability to carry out our work

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[1] Prepared for the CBA Professional Development Conference January 31st, February 1st, 2013 by Catherine S. Walker, Q.C.

[2] *Land Registration Act* s. 19, 37 and *Land Registration Administration Regulations* 7 (PDCA) and 10 (AFR).

[3] Approved by Council November 22, 2003 and referenced in s. 37(9) of the *Land Registration Act.* The standards dealt with specifically in this paper applicable to legal descriptions are Standards 2.1 (Legal Descriptions and Parcel Identification- previously 2.1 and 2.2) and 2.4 (Plans and Surveys)- See Appendix I

[4] Hartlen, Carl; DeWolfe, Derik; Gordon, Garth C / Discussion paper prepared for Nova Scotia Barristers' Society & the Association of Nova Scotia Land Surveyors by the Working Group Respecting Parcel Description Questions revised January 15, 2008; incorporating responses from members of the professions to the draft discussion paper dated September 5, 2007 (April 2008), in Where is the line? lawyers, surveyors and the Land Registration Act

[5] S.N.S. 1998 c.18 and amendments thereto

[6] See PIDs 10059699 and 10071611 for examples of red line 'easements'

and provide an opinion in relation to a parcel of land. Understanding the context for our work and the issues raised will better prepare us to remain alert to the potential improvised explosive devices ("IEDs") along our way.

2. Government mapping disclaimer:

On every map that appears on Property Online (POL), there is the following disclaimer:

> "The Provincial mapping is a graphical representation of property boundaries which approximate the size, configuration and location of parcels. Care has been taken to ensure the best possible quality, however **this map is not a land survey** and is not intended to be used for legal descriptions or to calculate exact dimensions or area. **The Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel** [*Land Registration Act* subsection 21(2)]THIS IS NOT AN OFFICIAL RECORD[7]. (emphasis added)

This disclaimer is an important one to remember as many who view the POL mapping seem to be inevitably drawn to the magnetism of its apparent visual features, not appreciating that it is NOT a survey and cannot be relied on as such.

3. Risk

Whenever a legal description is changed, in the absence of adequate survey fabric, the risk of error is introduced. Our goal as lawyers is to strive to preserve the integrity of the historic description, and consider only those minimal changes necessary to comply with the LRA and LRAR and always with a view to compliance with the Professional Standards. With recent amendments[8], any changes made to parcel descriptions by lawyers are tracked by the author of any such change- so every change, no matter how minor, should be treated in the same careful and thoughtful manner.

4. Some of the Legislative requirements under the *LRA* and *LRAR*

LRA:

> s.19 " Where a document is submitted for registration or recording pursuant to this Act, the legal description for the parcel shall be referred to in the manner prescribed in the regulations."
>
> "21(1) The legal description of a parcel in a register is not conclusive as to the location boundaries or extent of the parcel."
>
> "37(7) An [AFR] application shall include sufficient information concerning the size and location of the parcel as will permit the registrar to assign the parcel identification number for the parcel and

[7] See Appendix II to this paper for an example of the POL disclaimer and its location on the POL mapping

[8] See LRAR s. 10A N.S. Reg 189/2010

create a geographical representation of the parcel in Provincial mapping, showing it in relation to neighbouring parcels with reasonable accuracy."

LRAR:

Regulations 7,8 and 9 are the primary regulations prescribing the Property Description Certification Application (PDCA) requirements.[9]

5. The different situations in which a legal description change is likely required:

a) Division of a parcel by natural dividers (lands owned by HMQ or other intervening land owner):

Issue: Under the LRA, any parcel that is divided by a highway or watercourse (although not every watercourse will serve to subdivide property[10]) requires a new PID assignment so that each parcel thereby created (an 'infant' parcel) has its own unique identifier. Unless there is survey fabric which confirms the location of the natural dividers, there is no objective way to confirm the accuracy of the POL mapping that shows the number, shape and/or location of these 'infant' parcels. Considering the risk factors, and in the absence of adequate survey fabric, how can the parcels be described in such a manner as to effect minimal change and best protect the integrity of the historic legal description?

Recommendation:

- When drafting a written description for a parcel created by the 'parent' parcel naturally divided by a public highway, watercourse or railway, it is recommended that lawyers use the original description of the 'parent' parcel, and except out that area encompassing the public highway, watercourse or railway and lands on the opposite side of it.[11] The safety aspect is that "the dividing boundary is a physical entity the extent of which is readily determinable."[12]

- In the absence of adequate survey fabric, you should provide a comment to the mapper that you are relying on the POL mapping as to how the parent parcel is shown to be

[9] See Appendix III for the SNSMR PDCA Checklist for clients effective February 2011 as included in the Module Two portion of the LRA training material on the LIANS website (www.lians.ca)

[10] Those watercourses between 30'-80' will require the submitter to consider the size and nature of the watercourse, and if in their opinion the submitter feels it does not create a natural boundary they will be required to provide a comment in the PDCA to that effect. Any watercourse over 80 feet will be considered to subdivide property and is not open to an opinion from the submitter.

[11] See the SNSMR Policy relating to defacto consolidations last modified October 16th, 2012 in the note relating to lands intersected by public roads, railways or abandoned railways and watercourses attached at Appendix IV. See also the 'Where is the Line' discussion paper cited in Footnote 4 supra

[12] Supra footnote 4 at page 14 comment #19.

divided, and if it is subsequently determined that the highway, railway, watercourse etc. does NOT divide the lands, any resulting amendment(s) that may be required to the parcel description will not be considered to flow from any error or omission of the certifying lawyer.

Example:

" [parent parcel description] saving and excepting therefrom all those lands lying to the south of the northernmost limit of the public highway;" or

"[parent parcel description] saving and excepting therefrom all those lands lying to the north of the southernmost limit of the public highway;"

Caution:

Lawyers are cautioned about the risks associated with attempting to describe parcels that are divided in this manner through the adjoiners/abutting property owners shown either on POL mapping, or from identification by the owner/client. "This is an inadequate approach as often the owner relies on property mapping for this information…any attempt to 'update' adjoiners could further confuse the situation".[13] So, the advice to lawyers? Don't do it.

b) D**escriptions for remainder parcels where there is no survey**:

There are some situations in which there have been a number of conveyances out from a parent bulk parcel without any new legal description being prepared for the remainder lands, and no survey of the remainder lands. Considering risk factors, and in the absence of adequate survey fabric, how can a remainder parcel be described so as to maintain the integrity of the historic description?

Recommendation:

- A lawyer may draft the description of a remainder parcel, but should only consider doing so, without the benefit of a surveyor, if it is based on the original parent parcel description saving and excepting the various parcels of land that have been conveyed. [14]

[13] Supra footnote 4 at page 5 paragraph 10 a) ii Comment

[14] Ibid at page 16 item 26. See also the Best Practices Schedule C, paragraph 20 on page 20 of that same paper supporting this recommendation.

c) **New descriptions for de facto consolidated lots**:

As a general rule, consolidation must follow the subdivision rules as established by the *Municipal Government Act* ("MGA")[15]. De facto consolidation is a specific exemption from the rules and is set out in s.268A of the MGA. The requirements to fit within this exemption include having a 'description of the consolidated single lot'[16]. This has led lawyers to drafting improper new parcel descriptions.[17] Keeping in mind the risk factors, how is this new description to be prepared in such a manner as to limit the changes required to the historic descriptions, in the absence of either a surveyor drafting it, or adequate survey fabric?

The description

As noted in the discussion paper 'Where's the line?'[18]:

> "(4) The LRA System should permit surveyors and lawyers to describe the infant parcel in a de facto consolidation using the existing parcel descriptions with a notation that they are consolidated as one parcel. These "chained" descriptions do not change the external perimeter of the combined parent parcels and maintain the survey fabric. This should not be a significant burden on the LRA System as no changes in the external boundaries of the consolidated parcel are required. On the other hand, combining and eliminating elements of two previously separate descriptions ***can*** alter boundary retracement."

The de facto consolidation policy of SNSMR, last modified October 16th, 2012,[19] describes the following to be the policy around the legislative requirement for a description of a consolidated single lot:

> "**Note:** The interpretation of this requirement is to require a single description that describes the consolidated parcel. Chained descriptions are interpreted to be non-compliant with this section of the MGA. *This differs from the PDCA acceptance criteria, where if no plan exists for the consolidated parcel showing equivalent information, then chained descriptions are acceptable*."[20] [emphasis added]

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[15] Supra footnote 5- s.268

[16] S.268A requires in part.."..and the description of the consolidated single lot."

[17] Supra at footnote 4 at page 4, Paragraph 10 a. i. (3) "Four of the 27 survey related complaints [to the date of the paper] to the Registrar General result from lawyer prepared parcel descriptions in *de facto* consolidations".

[18] Ibid at page 4 Paragraph 10 a. i. (4)

[19] Supra footnote 11 and Appendix IV attached

[20] Ibid at page two

So while the chained descriptions **are acceptable** for PDCA criteria purposes (in the absence of a plan), SNSRM policy indicates they **are not interpreted as acceptable**[21] to meet the either the MGA requirements or the acceptance criteria for the recording of the statutory declaration claiming the exemption.

On migration, if essential survey information has been lost in the creation of the consolidated perimeter description, the lawyer will be required to amend the description[22] . This may provide the necessary springboard for an amended PDCA (ie, a chained description, in compliance with the PDCA policy) *after* the statutory declaration claiming the de facto exemption has been accepted for registration, thereby reinserting the information as to bearings and distances removed in the de facto consolidated description.

The PDCA Standards for Descriptions of Existing Consolidated Parcels, found in the Module Two LRA materials[23] further supports the position that absent sufficient survey fabric, separate descriptions or 'chained' description will be acceptable in some circumstances.

If one accepts that from a risk perspective, it is better not to amend a description absent sufficient survey fabric to do so, it is my view that chained descriptions should arguably be acceptable for purposes of compliance with the MGA requirement. The MGA legislation does not prescribe a standard, and one could argue the reasonable exercise of professional judgment could conclude that a chained description DOES meet the MGA requirements set out in s.268A, and chained descriptions, while not desirable by any means, are a better alternative, from an integrity perspective, than a non surveyor crafting a description in the absence of sufficient survey fabric to do so. After all, the LRA does NOT guarantee matters of extent, and de facto consolidation is a matter of extent of title, not quality of title.

However, to be clear for the record, this is **NOT** currently acceptable practice as determined by SNSMR for the LRO acceptance of statutory declarations claiming the de facto consolidation exemption.

Recommendation:

- That lawyers, for MGA compliance purposes, use a description which will comply with the current interpretation for 'consolidated single lot' by whatever means available, but that the description used for PDCA purposes, **where no plan exists for the consolidated parcel showing equivalent information** then chained descriptions be submitted for

[21] Supra at footnote 11 and Appendix IV attached

[22] See the PDCA Checklist for clients in the POL Resource Manual- Plan References and Lot Identifier provision. See also the RG's Communique of September 2006 which states in part "Mappers have been instructed to set the 'correcting description required' flag for PDCAs that remove important information from a description such as details on bearings and distances in a de facto description."

[23] See Appendix V attached

approval. In this way, the integrity of the historic fabric is preserved, absent sufficient survey information to update to a consolidated description.

- For PDCA purposes then, absent a retracement plan, or other survey opinion regarding the consolidated description, it is suggested that de facto descriptions contain one of the following:
    - "Being and intended to be the single lot created by a de facto consolidation of the following two parcels: [then follow the historic descriptions];
    - "Being and intended to be the single lot created by a de facto consolidation of parcels described in Book/Pg 123/456 and 678/901"; or
    - "Being and intended to be the single lot created by a de facto consolidation, enabled by the declaration recorded as document 123456 on ddmmyy, reference being had thereto for the historic descriptions of the underlying parcels

    the idea being to preserve, either in text or by cross-reference, the underlying historic descriptions so that any ambiguity or future remediation can be addressed more easily."[24]

- It is suggested that the lots be individually migrated before a de facto consolidation is effected. In this way if, for any reason, the de facto is determined to be void (ie. statutory requirements not met), the lots will at least be registered and capable of standing on their own.

Cautions and reminders regarding de facto consolidations:

Lawyers are cautioned to always be satisfied that there is enough extent of title evidence to support the subject parcels qualifying for the de facto consolidation exemption (ie. are they in fact adjoining?) and fulfilling the other requirements, which include

> "..a statutory declaration..stating that the lots were in common ownership and used together on or before April 15th, 1987, and have continued to be so owned and used, and **including the facts that support the statement**, the present descriptions of the lots including any property identifiers assigned by Service Nova Scotia and Municipal Relations and the description of the consolidated single lot."[emphasis added][25]

Further, the October 16th 2012 modification made to the SNSMR policy regarding defacto consolidations added the following note:

[24] Thanks to Raffi Balmanoukian for his thoughts and suggested language on this

[25] Supra footnote 16, and see also the comments of Justice Warner in *Polycorp Properties Inc. v. Halifax (Regional Municipality),* 2011 NSSC 241 as to the sufficiency or insufficiency of the statutory declaration. In that case, there was no reference in the statutory declaration files as to the 'facts that support' the common use, so it was insufficient to meet the legislative requirements. However Justice Warner did allow for the facts to be filed after the fact to support the efficacy of the defacto consolidation.

> "**Note**: A statement that only states the lots were used and continued to be used together since or before April 15th, 1987 does not satisfy the requirement of 268A. There would need to be an additional statement specifying how they were used together."[26]

Care should be taken in proceeding with a de facto before all of the requirements have been met and any unintended possible negative consequence considered (eg. loss of grandfathered municipal development exemption for example). All these matters should be reviewed with the client and specific instructions sought to confirm the exemption is appropriate for the circumstances relating to the parcels in question. The default should be NOT to consolidate as the risk of unintended negative consequences far outweigh any possible 'benefits' of consolidation. Further, the cost of the migration process itself, or any perceived 'savings' should NOT be a factor in considering this as an appropriate option to pursue[27].

d) Descriptions for parcel access not located by survey fabric, and only evidenced by 'red line' on POL mapping

In providing an opinion on title, lawyers are obliged to determine, by both Professional Standard and legislation, the nature of the access, if any, to a parcel of land and whether that access is public or private.[28] If the access is private and ungranted

> "the lawyer must be satisfied that there is authority for its continued use in conjunction with the parcel. Authority for continued use must be based on a factual foundation as documented on record."[29]

Consider the following circumstances:

(i) While property owners are usually aware whether their property can be accessed by some kind of road, they do not necessarily have the information to know specifically where that access is on the ground, or its character (ie. public, private etc). If we have had reason to carry out a full title search, we will have the information at hand as to whether the right of way is granted or not, and thus the basis for opining whether it is marketable, but there may or may not be any survey fabric available to identify whether the right of way, as conveyed, is in the same location as its actual physical placement on the ground.

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[26] See highlighted portion of Appendix IV attached

[27] See the September 2010 newsletter from LIANSwers for the article "De Facto or De Fiction" at www.lians.ca and the checklist prepared by Ian MacLean, Q.C. updated to November 2010, a copy of which is appended to this paper as Appendix VI

[28] See Professional Standard on "Access" 2.3. See also the *Land Registration Act*, S.N.S. 2001, c.6, s.37(4)(b)(c) and see also Garth Gordon's paper on Access listed as a resource in the Standard at www.lians.ca

[29] Ibid Professional Standard 2.3

If a **red line** appears on POL mapping for the clients' property (a feature on the topographical layer of POL, if the feature exists), it will show a general location of the access- perhaps compiled from some historic aerial photography of unknown date. In the absence of adequate survey fabric confirming the extent of the access to the property however, how are we to know what parcels are affected? The deed into your clients may include a granted right of way, but without a survey to identify its specific location, how is a lawyer to confirm which other parcels are affected and how it is to be documented? Lawyers cannot rely on the '**red line**' information as a foundation for certifying which other parcels may be affected, either by way of benefit or burden.

Recommendation:

- Lawyers need to exercise great care in placing any weight on the physical location of an access to a parcel based on either POL **red line** mapping or an owner's declared information. If there is a granted right of way to the property for which title is assured, then it is appropriate to add it as a benefit to the registered parcel. However a lawyer should not guess (educated or otherwise) as to its extent, absent adequate survey fabric or the opinion of a surveyor as to other lots affected. If the location of a right of way is uncertain (in terms of where it is on the ground and/or which other lots may be affected), then the lawyer is required to submit a request to the RG for an exemption from the requirement to add a corresponding benefit or burden on affected parcels, commonly known as a "Various PIDs exemption". The application for such an exemption is described as follows by representatives of SNSMR:

> "The lawyer must satisfy the RG that it would be impracticable to add the benefit/burden, generally by providing all of the relevant information and the reason why it is not possible or practicable to identify the affected PIDs with certainty. If granted the exemption, the lawyer will be required to add a textual qualification which gives enough information for a subsequent purchaser to ascertain what potential PIDs may be affected, provides the basis for their information and opinion or believe, and provides a qualification that the corresponding benefits or burdens, as applicable, may not be reflected in the parcel registers of the affected PIDs."

A related but separate issue arises for those properties for which a property owner does not have a granted right of way, but for which an owner confirms that they have always 'used and enjoyed' the benefit of some kind of physical access to their property. The access may or may not be documented as a prescriptive right, and if not, may or may not be *capable* of being documented as a prescriptive right. Lawyers must review their professional obligations when faced with an undocumented access in light of the Professional Standards, and the requirements of the LRA.

Considering the risk factors, and in the absence of adequate survey fabric, what are some of the considerations in how these access rights are documented in the LRA system?

- When documenting prescriptive rights, the statutory declarations that provide the facts and foundation for those rights must be recorded and used as enabling instruments in the parcel register. If the extent and location of the access is not evidenced by survey fabric or a surveyor's opinion, then the obligation of the lawyer if intending to use 'Various PIDs' entry is to follow the process outlined above, as described by SNSMR.

Cautions:

As can be seen, this area of practice is fraught with IEDs. Reference to a portion of Schedule C "Best Practices" from the Hartlen, DeWolfe, Gordon Discussion Paper gives a great insight into the extent of that minefield

"9. When entering information about easements in parcel descriptions (particularly private rights of way) indicated when and how the easement was created. Examples:

a. For a **private granted right of way**: "Being and intended to be the right of way first granted by Amy Grantor to Harry Grantee [by][before]the instrument dated[date] recorded on [date] in Book #, Page # and Document #."
b. For a **private ungranted right of way** created by implication of law: "Being and intended to be the right of way created by implication of law by the deed granted by Amy Grantor to Harry Grantee dated [date] recorded on [date] in Book #, Page # as Document #."
c. For a **prescriptive easement**: "Being and intended to be the prescriptive right of way evidenced by the statutory declarations of Amy Deponent dated [date] recorded on [date] in Book#, Page #, as Document # and Harry Disinterested dated [date] recorded on [date] in Book#, Page #, as Document #."

It is extremely important for searchers to know when private easements were first created and recorded as this enables searchers to determine the priority of the easements relative to other interests in the servient tenement. It is also important for the searcher to know how an ungranted easement was created. Section 74(2) of the *Land Registration Act* can void prescriptive easement unless they come under section 75- the "wandering boundary line" exception. Easements created by implication of law are not made void by section 74(2). "Easements used and enjoyed" are protected by section 73(1)(e) of the *Land Registration Act* but these are not defined- these may include easements created by implication of law…..[30]"

And some final words of wisdom on prescriptive easements:

[30] Supra footnote 4 at page 18

"11. **NEVER** refer to prescriptive easements as 'easements used and enjoyed' in a parcel description. Prescriptive easements may be made void by section 74(2) of the *Land Registration Act* while section 73(1) of the Act protects "easements used and enjoyed". Classifying a prescriptive easement benefitting a parcel as an "easement used and enjoyed" may cause a person acquiring an interest in the dominant tenement to innocently accept an easement that will become void ten years from migration under section 74(2) of the Act. "Easements used and enjoyed" are not defined in the act but may include easements created by implied grant or by statute. Easements other than those created by prescription- e.g. those created by implied grant- are not subject to being made void by section 74(2) so it is important to determine and state the legal grounds by which an easement was created. It is also important to disclose the date on which an easement was created and the date on which it was first recorded if it is recorded; these dates enable a searcher to determine the relative priority of the easement and other competing interests in the servient tenement."[31]

Some Summary Cautions:

Lawyers are cautioned to remember that plans, subject to s.280(2) of the *Municipal Government Act,* do not currently create easements.

Drafting a written description of the physical extent of an easement in the absence of a survey plan may determine or change limitations on title.[32]

e) Descriptions for parcels that are based in whole or in part on claims of adverse possession

It is not within the scope of this paper to discuss certification of title based on adverse possession, the standards for doing so, or the nature or sufficiency of statutory declarations acting as the foundation documents for such titles. However, any discussion of legal descriptions would be incomplete without some reference to factors lawyers ought to consider when drafting legal descriptions for parcels of land, title to which is based, in whole or in part, on adverse possession.

Very generally speaking, there are two categories of legal descriptions for these kinds of parcels:

i) The first are those parcels for which fractional interest is claimed, and for which there is already a historic legal description in the paper chain of title (ie. three heirs claiming extinguishment of the fourth heir's one quarter interest through adverse possession). These descriptions are generally less troublesome than those parcels which have never been the subject of a prior conveyance as there is

[31] Ibid

[32] Supra footnote 4 at pages 13,14 items 15 and 16

historic description fabric in existence to rely on, although as with any other historic description, it is subject to extent as to how it is found on the ground; and

ii) Secondly, those parcels that have not been previously described (ie occupation of 2 acres of a 50 acre parcel). It is hard to imagine the circumstance in which it would be reasonable for a lawyer to create a description and give an opinion as to the veracity of that description, absent sufficient and specific survey fabric identifying the area occupied and for which adverse possessory title is claimed. For this kind of parcel, title is based solely on possession, so how can we give an opinion as to the appropriate legal description without the requisite information as to the area of land that has been possessed?

Recommendation:

- Those parcels of land which are based solely on possession, without the benefit of a historic legal description in a paper chain of title, should described solely by reference to a plan of survey, filed at the LRO or ROD and with the assistance of a surveyor as to the extent of title claimed. A lawyer should NOT give an opinion as to the description of the parcel area possessed, absent sufficient survey fabric enabling him/her to do so.

Note:

The right to assert adverse possession to land based solely on possession is well founded in common law, equity and also in legislation[33]. Titles based on possession qualify for registration under the LRA and do not attract any qualified title[34]. An AFR generally must be accompanied by evidence that Part IX of the MGA has been complied with or "..certification by the qualified lawyer that Part IX does not apply".[35] If a parcel of land did not receive formal subdivision approval, and does not otherwise qualify for an exemption from Part IX pursuant to s. 268(2) of the MGA, there appears to be a gap between the provisions of the *Limitations of Actions Act* [36] and the requirements of both the LRA and MGA for those interests based solely on possession, that matured after 1987. It is arguable that until a specific exemption is added to the MGA for these kinds of interests, that the language of the LRA s.37 cited above *may* provide a means by which a lawyer can certify these kinds of interests for purposes of migration into the land registration system. There *may* be room for a lawyer to exercise professional judgment that Part IX does not apply to these parcels of land for registration purposes. [Note the emphasis on *may*..] We should continue to explore the best means by which these kinds of interest can be dealt with

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[33] C. S. Walker QC, "Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment" in *Real Property Conference: Property Practice in New Environments: The Ground is Shifting: Creating a Strong Foundation for Your Practice* (February 2003)- for historic review and not to be relied on for the effect of any legislative change post February 2003

[34] see the *Land Registration Act*, supra s.3(1)(g) and (h) for definition of 'interest' and 'law'

[35] s. 37(4)(f) of the *Municipal Government Act*, supra at footnote 5

[36] R.S.N.S. c.258

in the new system balancing principles of fairness to those land owners who have owned and occupied them for many years, and the system, the objective of which is to register those interests that are properly registerable.

Summary comments:

The Hartlen, DeWolfe, Gordon Discussion Paper referenced at the outset[37] describes the first principles of working with legal descriptions in the LRA environment[38]

> "..as a matter of public safety, lawyers must not make changes that change the extent or limitations of title of a parcel unless the changes are based on a plan of survey."[39]

And in the same vein,

> "..surveyors should not draft or complete documents that affect the legal rights or responsibilities of a person- for example drafting terms of an easement."[40]

The preparation of legal descriptions will, quite naturally, involve a consideration of elements that are at times both exclusive to each profession, and at times common to both.[41]

As articulated at the outset of this paper, in either the preparation of a legal description, or in the change to a legal description, in the absence of adequate survey fabric, lawyers should strive to preserve the integrity of the historic descriptions and should make only those minimal changes required to comply with the LRA and LRAR and Professional Standards.

[37] Supra at footnote 4

[38] Ibid at pages 2-4 paragraph 7 a.-c.

[39] Ibid at page 3 paragraph 7 a.

[40] Ibid at page 3 paragraph 7 b.

[41] Ibid at page 4, paragraph 7 c.

Appendix I- PROFESSIONAL STANDARDS

2.1 Legal Descriptions and Parcel Identification (previously 2.1 and 2.2)

REGISTRY SYSTEM

Legal Description

1. A lawyer who examines a legal description of a parcel or a condominium unit found in the Registry system when giving an opinion on title, must be satisfied that the legal description

a) is a proper and complete description of the parcel of land or condominium unit;

b) identifies the parcel; and

c) when based on a plan of survey, reflects the parcel as shown on the plan.[1]

Abstract of Title

2. If a lawyer determines that an abstract of title shows that the legal description has been amended from time to time, the lawyer must assess each amendment to determine whether the amendment complies with legislative requirements for transfer of title to land.[2]

Opinion of title

3. A lawyer must ensure that an opinion of title prepared by the lawyer clearly identifies the parcel by a metes and bounds description or in another form as authorized by legislation or common law.[3]

LAND REGISTRATION SYSTEM

Migration

Legal Description

1. When a lawyer registers a parcel pursuant to the Land Registration Act, the Act and Regulations require that the legal description of the parcel

(a) reflects the contents of the parcel register, unless the parcel is a condominium unit.[4]

(b) where a short form description has been approved, accurately reflects the information contained in the plan on which the short form description is based;[5]

(c) accurately reflects the information contained in the description in the Declaration on file with the Registrar of Condominiums when the parcel is a condominium unit;[6]

Errors in Property On Line

2. At the time of migration, the Regulations under the Land Registration Act require a lawyer who identifies errors in the Property Online mapping to bring the information to the attention of Property Online.[7]

Historical Information

3. A lawyer must give consideration to retaining historical information in the parcel description to assist with interpretation of the parcel register.[8]

Registration and Recording

Legal Description

1. When a lawyer registers or records a document in the parcel register pursuant to the Land Registration Act, the Act and Regulations require that the legal description of the parcel:

(a) reflects the contents of the parcel register in the form of full text, short form legal description or PID, unless the parcel is a condominium unit;[9]

(b) where a short form description has been approved, accurately reflects the information contained in the plan on which the short form description is based;[10]

(c) where the parcel is a condominium unit, the description accurately reflects the information contained in the description in the Declaration on file with the Registrar of Condominiums;[11]

Errors in Property On Line

2. At the time of revision, the Regulations under the Land Registration Act require a lawyer who identifies errors in the Property Online mapping to, bring the information to the attention of Property Online.[12]

Historical Information

3. A lawyer must give consideration to retaining historical information in the parcel description to assist with interpretation of the parcel register, and particularly when adding an easement benefit or burden to the parcel register during a revision.[13]

Notes

[1]Precision in legal descriptions: *Countway v. Haughn and Chataway* (1975), 15 N.S.R.(2d) 138, per MacKeigan C.J.N.S. (N.S.S.C.A.D.), T.O. Boyne, "Conveyancing Legal Descriptions" (1992) 3 The Claims Wise Bulletin, Claims Wise No. 20 at 1; T.O. Boyne "Legal Descriptions/Surveys"(1992) 3 The Claims Wise Bulletins, Claims Wise No. 23 at 4;

[2]Subdivision compliance: *Municipal Government Act*, S.N.S. 1998, c. 18, ss. 268 292, as am., *Land Registration Act*, S.N.S. 2001, c. 6 ;

[3]See footnote 1;

[4]*Land Registration Act*, s. 19, Reg 5(8), Reg 7(10), 7(11);

[5]Regulation 2(1) definition of short form legal description, Regulation 5(8) and 7(10)(a)(ii). See also 7(12) and 7(13);

[6]Regulation 7(11)(b);

[7]Regulation 7(7)(c), 7(8);

[8]Regulation 7(10A)*, Registrar General's Communique Sept 2006, Land Registry Resource Materials- PDCA standards checklist; Gordon, Garth, Access and Red Flag Issues Under the LRA: http://lians.ca/documents/AccessRedFlag.pdf;

[9]Land Registration Act, ss. 19, 37(A)(1)(e), 47(3), 47(9), Reg 2(1) definition of **short form legal description**, 5(8), 7(2), 7(10), 7(11), 14(4) 15(2), and 16(2)(b);

[10]Reg 2(1) definition of short form legal description, Reg 5(8), Reg 7(10)(a)(ii);

[11]Reg 7(8), 7(11)(b);

[12]See Footnote 4;

[13]Regulation 7(7)(C), 7(10A) Registrar General's Communique Sept 2006, Land Registry Resource Materials- PDCA standards checklist; Gordon, Garth, Access and Red Flag Issues Under the LRA: http://lians.ca/documents/AccessRedFlag.pdf

Additional Resources

- C. Walker, QC, "Abstracts and the Land Registration System"; http://lians.ca/documents/AbstractsAndTheLandRegistrationSystem.pdf
- Where's the line: Surveyors, Lawyers and the Land Registration Act: http://lians.ca/documents/WheresTheLine.pdf; http://li

2.4 Plans and Surveys

In preparing an opinion of title, a lawyer must advise the client that any opinion provided to the client will be qualified as being subject to survey.[1]

A lawyer must advise the client that the lawyer does not deal with 'extent' and that boundary and location are only ascertained through a survey and recommend that the client retain the services of a surveyor to determine the extent of title to the parcel being examined.

A lawyer must confirm the qualification of the opinion as subject to survey prior to closing. The lawyer must confirm the client's instructions prior to closing.[2]

Before finalizing an opinion of title, a lawyer must examine plans arising from the search and survey information affecting the parcel. A lawyer should identify and reconcile where possible any material discrepancies between the legal description for the parcel or any information contained in the abstract, and survey information.[3]

After preparing an opinion of title, a lawyer should advise the client of material discrepancies between plans arising from the search and survey information affecting the parcel.

Note:

1. Opinions subject to survey: *Ravina and A & R Properties Ltd. v. Stern* (1987), 77 N.S.R. (2d) 406, per Clarke C.J.N.S. (N.S.S.C.A.D.)
2. Standard 1.5 - Documentation
3. Advice about survey matters: *Marwood v. Charter Credit Corp.* (1971), 2 N.S.R. (2d) 743, per Coffin J.A. (N.S.S.C.A.D.)

Additional Resources:

- Parcel descriptions: *Land Registration Act*, S.N.S. 2001, c. 6, s. 21(1)
- MacLean, Ian H / Title searching land registered parcels (May 2011)