

**PROFESSIONAL COURTESY (AND OTHER) ISSUES
IN THE NEW PROPERTY WORLD**

*J. Ronald Creighton, Q.C.
Vernon B. Hearn
Ian H. MacLean
Catherine S. Walker, Q.C. **

The Land Registration Act (Nova Scotia) ("the Act") was brought into effect in Colchester County in March of 2003. The Act mandated the migration or conversion of title from the traditional Registry of Deeds system to the new Land Registration system on very specific actions with respect to land as outlined in Section 46, the most common of which is a transfer of title for valuable consideration (purchases and sales). While the Act and its regulations set out the various processes required to properly migrate or convert a title, they obviously do not cover the practice procedures involved between lawyers with respect to migration or conversion. As a result, the Real Property Section of the Colchester County Bar was left with the task of creating practice methods in the purchase and sale context.

The main result of meetings of the real property practitioners in Colchester was the creation and adoption of the "Colchester Clause" which has now been adopted in other areas for use in most property transactions by way of a "Schedule A (Form LRA)" to the Standard Agreement of Purchase and Sale. This clause has recently been amended by the Halifax Bar requiring the seller to provide the buyer with additional information in place of what clause 6 had formerly required. This Colchester Clause as amended by the Halifax Bar is attached as Schedule "A" to this paper. The Colchester Clause requires the seller to migrate title to the lands being sold prior to closing at the seller's expense.

** J. Ronald Creighton, Q.C. is a partner in the law firm of Patterson Palmer, Truro. Patterson Palmer has offices throughout Atlantic Canada. His preferred area of practice is real estate law.*

Vernon B. Hearn is a partner in the law firm of Burchell MacDougall, Barristers & Solicitors, working in the Truro office. Burchell MacDougall also has offices at Clayton Park and Wolfville. His preferred area of practice is real estate law.

Ian H. MacLean is a sole practitioner in Pictou. His preferred area of practice is real estate law.

Catherine S. Walker, Q.C. is a sole practitioner in Halifax, having graduated in 1977. Her practice focuses on real estate law.

The Colchester Clause

The main reasons for the adoption of the "Colchester Clause" relate to the seller's knowledge of both the title and other characteristics of the parcel being migrated and sold (which is invaluable in migration), the ability of the seller as opposed to the buyer to better absorb the costs of migration (usually by way of a positive cash position if there are sale proceeds) and lastly, should a transaction fail to close for any reason, any benefit of migration or work done in anticipation of migration would benefit the seller, not the buyer.

In addition to the seller being responsible for the migration, there are obvious benefits to the seller and the seller's solicitor. A motivated seller (job transfer, moving to an apartment or a nursing home, or things of that nature) may well want to have the uncertainty and possible time delays of migration out of the way knowing that they are going to sell and it is just a matter of finding a buyer. The lawyer might well be prepared to migrate now and be paid later particularly during the winter months, and even in the busy season, if it allows the lawyer to migrate at "your leisure" rather than being held to a tight timeframe imposed by a third party.

Some practitioners would maintain that the "Colchester Clause" has reversed the traditional role of the buyer's solicitor in the purchase and sale context in that normally the buyer's solicitor undertook the title investigation, satisfied themselves as to title, advised the buyer accordingly and then raised any objections to the seller's solicitor. That is simply not the case, and indeed the role of the buyer's solicitor is still to investigate and satisfy themselves as to title (only after migration) and then advise the buyer and make requisitions accordingly. In other words, the buyer's lawyer's position is similar to that which would occur had the parcel been migrated before the agreement had ever been made.

The biggest effect of the "Colchester Clause" is that the buyer's title investigation must occur after migration, and therefore later on in the transaction, and in many cases the solicitor does not have the hard information before them. As a result, the buyer's solicitor is often left in the stressful situation of waiting for the seller's solicitor to complete migration before any advice can

be provided to the buyer as to title and does not have all the necessary information at hand once migration has occurred on which to properly give that advice.

The recent additions to the “Colchester Clause” requiring the seller to provide certain information to the buyer moves what we in the Northern Region and Valley Region have been establishing as protocols in our respective areas into contractual matters. Whether it be in contract or agreed upon professional courtesies or protocols, the proper and timely exchange of information will be crucial in assisting all of us in our busy practices, help ensure the successful completion of purchases and sales and allow all practitioners to know that we are fulfilling our professional responsibilities.

New LRA Practices, or Professional Courtesies?

The seller’s solicitor is also saddled with the extra work (and stress) of migrating the parcel in a timely fashion. To lessen the new loads to all involved, other practices or professional courtesies are evolving (and will continue to evolve) which when extended between solicitors can assist transactions to conclude more smoothly.

It is obvious that the work involved in purchases and sales has been “retooled”, and as a result of that “retooling”, we have to extend certain basic courtesies to other lawyers as we all struggle to adapt to a new era. Professional courtesies revolve around two key issues – timing and providing the necessary information to allow us to carry out our professional responsibilities. Some examples include:

1. It is imperative that the seller’s solicitor should observe the time periods imposed in the Agreement of Purchase and Sale for migration to be concluded, and to ensure that is the case, the seller’s solicitor should requisition a title search as soon as possible in the transaction. The reasons for doing so are many but include the uncertainties associated with PDCAs in some circumstances (especially when the solicitor has only little

knowledge of the title), the possibility of the requirement to request new PID assignments (which delays the PDCA process), the possibility of having to provide additional abstracts in support of easement benefits to the parcel, and so on.

2. While some might suggest that there is nothing to provide to the buyer's solicitor until the property is migrated, nothing could be further from the truth. The seller's solicitor should provide the buyer's solicitor, within a reasonable time of the information being available to them, the following:

- (a) Existing metes and bounds description together with the PID and AAN for the parcels being sold. (Also remember, in the event there are PIDs which become retired or newly assigned in the course of migration, these should also be made known to the buyer's solicitor promptly.);
- (b) Copies of any approved plans and location certificates which are in the seller's possession. Some buyer's lawyers suggest that they don't want this and don't need it as their only obligation is to take the title forward after migration using the approved description. Keep in mind two things – what the Act does and the Professional Standards we are all subject to. This Act guarantees title not boundaries or extent of title. Our professional responsibilities under Standard 2(1) Legal Descriptions requires a lawyer when examining a legal description to be satisfied that the description is a proper and complete description to the parcel, identifies the parcel and, when based upon a survey, reflects the parcel as shown on the plan. Yes, in most cases, the seller's solicitor and the mapper will have made sure this has been followed. But what if they haven't? We would suggest that the buyer's solicitor might be considered to have failed in their professional responsibility if there was a mistake that could have been identified by reviewing information that was readily available such as the original description or survey plans or location certificates;

- (c) Full name of the sellers (thus allowing the buyer's lawyer to do a proper judgment search);
 - (d) Information with respect to known benefits, burdens, recorded interests and copies of restrictive covenants. In many cases, the seller's lawyer will not have this information and will only obtain it after the search is done, but as soon as this information is available, it should be made available to the buyer's lawyer;
 - (e) The approved description upon completion of the PDCA;
 - (f) Upon completion of migration, a copy of the SRRI. If the PDCA approval and SRRI approval are within a short period of time of each other, then these could both be made available at the same time. This is what the new Schedule "A" Form LRA revision contemplates. However, if there is a reasonable delay between these approvals, we would suggest that as a professional courtesy the PDCA approval should be made available when it is received as this will assist the buyer's solicitor in carrying out his responsibilities without having to do everything at the last minute;
3. Other issues arise with respect to subdivisions in the new era which results in one or more new parcel registers being created (and hence new PID assignments) and graphic changes being made in Property Online. There is a time lag between subdivision approval and the changes made on Property Online. This may affect the closing where the closing date is shortly after subdivision approval and the purchaser's lawyer cannot review the graphics and properly prepare Form 24. The seller's solicitor should provide the buyer's solicitor with a copy of the approved plan and allow the time for the proper inquiries to be made and in this way an extension of the closing date may not be required.
4. Other subdivision issues may arise when the parent parcel has been migrated during the subdivision process. Where parent parcel migration has occurred, any interests such as

easements and any textual qualifications that existed in the parent parcel register prior to subdivision will automatically find their way into each of the infant parcel registers after subdivision. As a result, irrelevant items can become part of the infant parcel registers such as a power line easement which may have encumbered the parent parcel but be located no where near the infant parcels created on the subdivision plan. It is the duty of the seller's solicitor to monitor this situation so as to remove these irrelevant items from the infant register through the use of a Form 45.

Attached to this paper as Schedule "B" is a suggested general outline of the steps to follow in acting for a seller or a purchaser in a transaction which may help to put in context our professional courtesies in the new era. Also with the permission of Catherine Walker, Q.C., attached as Schedule "C" is a suggested opening letter to the other side when acting for the seller.

Perhaps the old Golden Rule might be a useful test to apply when considering what professional courtesies should be applied in the new era – "treat and act towards other lawyers as you would like to be treated".

New LRA Duties, or Professional Responsibilities?

The life of a real property practitioner changes drastically and quickly once the Act is brought into force in your region. Each practitioner must struggle with a change in mindset as you are forced to think like a computer as well as like a lawyer. Situations you have dealt with many times in the old system will require new analysis as you attempt to "get into the system" and what were simply matters of registration before now become a battle of "forms". (And if you're practicing in Colchester, we're dealing with the third version of the forms – and you lawyers in Halifax think you've got it tough!). Our professional responsibility did not change with the introduction of the Land Registration Act. We still have the same duty to our clients we had before its implementation.

Consider the provisions contained in the "Legal Ethics and Professional Conduct - A Handbook for Lawyers in Nova Scotia" Chapter 2 which sets out the following rule:

"A lawyer has a duty to a client to be competent to perform all legal services undertaken on the client's behalf."

The guiding principles in the discussion of this rule remind us that fulfillment of this rule includes:

"Not only an understanding of legal principles but also an adequate knowledge of the practice and procedures by which those principles can be effectively applied." (at Page 5)

The handbook reaffirms some other obligations that we would all do well to keep in mind:

- to advise the client if there will be any undue delay in providing advice or services (Chapter 3 - "Quality of Service" - Page 89);
- to be honest and candid when advising a client (Chapter 4) - (do they really want our honest assessment of our ineptness?);
- to charge fees that are fully disclosed, fair and reasonable (Chapter 12, Page 51);
- to treat and deal with other lawyers courteously and in good faith (Chapter 13, Page 57)

It never ceases to amaze one how these guiding principles are timeless in their relevance and applicability, notwithstanding all of the newness of the environment within which we are now practicing.

We also have to keep in mind the "Professional Standards – Real Property Transaction in Nova Scotia" have recently been amended and have taken into consideration the new era of land registration. More discussion will take place of the way in which these standards affect our obligations in the panel discussion and paper on Certifying Title.

Of paramount importance in these situations is taking the requisite time to properly analyze the situation and communicating with the other solicitors involved so that you are all on the same page. Failure to properly analyze a migration or revision can defeat undertakings or remove interests and force you to make rectification. The following are some examples:

1. Traditionally the only duty placed on a buyer's solicitor when receiving a deed from a seller's solicitor containing new covenants to be registered against the lands for the first time was to ensure that the buyer signed the deed to evidence the buyer's agreement to be bound and then record the deed in the appropriate Registry office. Under the new system the buyer's solicitor must also ensure that the proper Form 24 is prepared so as to have the covenants reflected in the parcel register after registration. Failure to prepare the correct Form 24 would result in the buyer's solicitor being required to rectify the parcel register. In addition the buyer's lawyer will be responsible to amend the parcel description. Recent amendments as discussed in paragraph 3 below may affect this procedure with respect to a developer.
2. Similarly, if the seller's purpose is to secure covenants to benefit certain lands being retained by the seller or if the registration of the deed has the effect of creating an easement benefit to the parcel being sold over other lands or retaining an easement benefit over the parcel being sold to benefit other lands of the seller, then the seller's solicitor ought to advise the buyer's solicitor of the specific PID for the burdened or benefitted lands for use in the Form 24. Again, the failure to prepare the correct Form 24 would result in a buyer's solicitor being required to rectify the parcel register. Recent amendments as discussed in the paragraph below may affect this procedure.
3. The December 1st, 2004 amendments to the Land Registration Act are directly relevant to the above two issues when the seller is creating restrictive covenants that benefit other lands the seller owns (s. 61(2)) or easements that benefit other lands the seller owns (s. 19A). In these circumstances where a developer is creating restrictive covenants or

easements for the benefit of other lands of the developer, the seller's (developer's) solicitor can grant the restrictive covenants or benefit easement after migration before the sale and amend the parcel description accordingly. There are obvious benefits in doing this because as the seller's solicitor you can ensure your client's interests are fully protected. In addition if the restrictive covenants or benefit easements are affecting a number of parcels, this can be done in one document (Form 24) rather than having to be done each time by the buyer's solicitor.

With the permission of Ian MacLean of the firm "MacLean & MacDonald" attached to this paper as Schedule "D" is a "Checklist when revising Parcel Register (new Deed or otherwise)" which is helpful to consider in properly fulfilling our professional responsibilities in this new era.

One final point with respect to professional responsibilities is that it is important that each of us take responsibility for our own actions. If we have made a mistake, we should be filing the rectification and not leaving it for the "stonewalling" at closing with the opposing lawyer and a discussion as to who is going to rectify.

In addition, we have all experienced the frustration of rejections based on what we consider minor criteria and the temptation to enter information on the parcel register as the system allows, rather than what in our professional opinion is appropriate. However, if the system is going to develop so that it is more intuitive to the manner in which we practice, then we have to take up the challenge by taking the time, asking the questions, and advancing ideas on ways to improve the system as it goes forward. This may mean extra time on our part in a particular closing, and with our busy schedules, we may feel we do not have the time to do it, but this is the only way we are going to ensure that the system is improved so that it works in a way that allows us to more easily fulfill our professional responsibilities.

To summarize, the coming into force of the Act in your region creates many new challenges in the purchase and sale context and places new duties and responsibilities on real property practitioners. It is more important than ever that solicitors develop practices and processes to ensure these duties and challenges can be met. Essential to meeting these new obligations is that solicitors maintain good lines of communication with each other and every professional courtesy possible.

Schedule "A"

SCHEDULE "A" FORM LRA
RE: LAND REGISTRATION ACT

Attached to and forming part of the Agreement of Purchase and Sale, dated _____, 2004.

BETWEEN:

Buyer(s) _____

Seller(s) _____

on the Property known as

The Seller, at the expense of the Seller, agrees to migrate the property title from the Registry System under the *Registry Act* to the Land Registration System under the *Land Registration Act* at least 5 business days prior to closing, and failing registration, the Buyer may terminate this Agreement and the deposit shall be immediately returned to the Buyer. On final registration of the property, the Seller shall so advise the Buyer, after receipt whereof the Buyer is allowed 3 business days to investigate the title to the property, which the Buyer shall do at the Buyer's expense. If within that time frame, any valid objection to title is made in writing to the Seller, which the seller is unable or unwilling to remove, and which the Buyer will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Buyer, without interest and without liability by the Seller for any expenses incurred or damages sustained by the Buyer.

Paragraph 6, of the Agreement of Purchase and Sale, is deleted and replaced with the following;

- 6. (a) The Seller shall provide, to the Buyer, a copy of the existing metes and bounds description, for the property, within 10 days of the acceptance of this offer.
- (b) The Seller shall provide, to the Buyer, on a without warranty basis and within 10 days of acceptance of this offer a copy of any survey or Location Certificate for the property that is in the Seller's possession.
- (c) At the time the Seller, delivers to the Buyer, notification that the property has been migrated the Seller shall provide a copy of the approved legal description, a copy of the SRI, applicable restrictive covenants and that portion of any applicable approved plan showing the property in question.

Witness _____
 Date _____
 Witness _____
 Date _____

Buyer _____
 Buyer _____
 Seller _____
 Seller _____

Schedule "B"

Sales – General Process

- review Property Online and see if there is anything that needs to be addressed
- have clients in to sign documents authorizing conversion and explaining process (Form 5, Form 4 if applicable and confirmation of graphics). Confirm two current adjoining for purposes of PDCA submission for "bounded by" or difficult to locate parcels.
- order title search right away, or pull old search and order update
- send lawyer at outset of transaction copy of seller's deed and other docs as before, but also include
 - copy of plan approving lot or indication that it is a s.291 exemption, or basis for MGA compliance
 - full names of sellers
- identify benefits and burdens and recorded interests – send copy of restrictive covenants
- start PDCA as soon as possible – best to do when search back and reviewed – may save time with being able to do short form description and may also save having to do a correcting PDCA
- start draft AFR when PDCA submitted – after title search has been reviewed by lawyer – check PDCA and AFR checklists to reduce odds of rejection – keep track of odd interests as you go – you may run across them again
- send copy of PDCA when approved, and SRRI when received
- when doing deed remember to use PDCA description – consider having a "Schedule A" stamp to put on top of the PDCA approval or property description report as the schedule
- have your bundle ready before you press the final AFR button (with exception of SRRI and Form 8)
- do any reasonable rectifications requested of you by buyers lawyer

Purchases – General Process

- order judgments right away on sellers and buyers and if any results for sellers, send to seller's lawyer at outset
- review POL and see if anything there that is needed to be addressed (i.e. PID says different owners from sellers) – any evidence of the "Green" layer?
- ask seller to send info as noted above in sale process
- when reviewing PDCA review against plan provided, location certificate and also seller's "old world" deed – any corrections needed?
- when reviewing SRRI, reconcile as against property details – any corrections needed? SRRI says no mortgages, but POL shows there to be three, with no releases – ask the question of the seller's lawyer – it could be that the POL is wrong – or it could be that the seller's lawyer forgot
- no title search as such, but may need to pull some documents if questions arise (i.e. re Textual Qualifications)
- do sub-search online from registration prior to closing and releasing of funds – review results
- prepare report to client and review – only certifying with regard to revision to the parcel register, and reporting as to effect of any recorded interests and registered interests are as shown on the parcel register, with any explanations that may be required

Schedule "C"

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Sample Letter (initial) Seller's Lawyer to Buyer's Lawyer

February 8, 2005
File #

Via Fax 123-4567

Buyer's Lawyer
Law Firm
Barristers & Solicitors
Address
City, Province Postal Code

Dear:

Re: Seller to Buyer - 123 Simple Street, Halifax

I have been retained to represent the Sellers in this transaction and have been advised that you are representing the Purchasers. I note that the closing is scheduled for *.

We are in the process of migrating the property and will provide a signed copy of the SRI, once received. We will also provide a copy of the PDCA, once approved. In the meantime, please find enclosed the following:

1. A copy of the Deed into the Sellers including the metes and bounds description;
2. The PID number is * and the Assessment Account Number is *;
3. I enclose a portion of the approved plan, and approval stamp as confirmation of compliance with the *Municipal Government Act*. I also enclose a copy of the Location Certificate which is provided to you as a courtesy and without representation;
4. The full names of the Sellers are as follows: *
5. My clients are residents of Canada within the meaning of s. 116 of the *Income Tax Act* and this will be included in the Affidavit of Status in the Deed;
6. I believe this transaction is exempt from HST, and I will provide a certificate confirming the appropriate facts on closing;
7. The only known burdens at this time are: * (Provide particulars and copies - ie: Restrictive Covenants)
8. The only known benefits at this time are: * (Provide particulars)
9. The only known recorded interests at this time are: * (A Mortgage in favour of *)

As the property is/is not oil heated, we will/will not be seeking an oil adjustment on closing. (Further, as the Purchasers are required to assume the hot water heater, we will be looking for

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written confirmation on closing from the oil company that this process has been completed.)

Please provide a copy of the Tax Certificate, if available, prior to closing.

Please confirm how your clients wish to take title.

I look forward to working with you to complete this transaction.

Yours very truly,

ABC LAW OFFICE

Per: ABC LAWYER

Schedule "D"

Checklist when revising Parcel Register (new Deed or otherwise)

- Is it a District other than our registration district? _____
- Is the Seller described exactly the same as in the Land Registration View? _____
- Is the Buyer correctly described? _____
- If signed pursuant to a POA, has the POA been recorded? _____

.....
Parcel Description:

- Does it coincide with:
 - Land Registration View description? _____
 - Plan? _____
 - old world description? _____
- Is it the same as Property Online? _____
- Is it identified by PID? _____
- Is it labelled Schedule "A"? _____
- Are the easement benefits the same as on SRI? _____
- Is outgoing Owner (Seller) shown as easement benefit holder (pre-July 26, 2004 conversion?)
If so, replace Sellers' name with the new "together with" statement in paragraph 6 of Form 24. _____
- Are the easement burdens the same as on SRI? _____
- Check access:
 - how is it listed? _____
 - how does it appear in parcel description? _____
- If it shows restrictive covenants, are these also shown in the SRI? _____
- If migrated on or after December 1, 2004, are restrictive covenants shown in Land Registration View? _____

-
- If there is no separate Certificate of Execution, does the paragraph in the Affidavit of Status refer to Land Registration Act (appropriate in an LRA County) or to the Registry Act (if non-LRA County)? _____
-

- Is the name of the recorded interest holder accurately set out? (relevant if we are taking title subject to ...) _____
-

- If the SRI shows recorded instruments which are to be released:
 - Do I have undertakings? _____
 - Have I added these undertakings to my list of undertakings? _____
 - If so, have I noted more than 1 PID (if applicable)? _____
 - Have we done electronic searches of:
 - ◇ Parcel? _____
 - ◇ Seller? _____
 - ◇ Buyer? _____

.....
Completed: Date: _____ Time: _____

