

PROPER TITLE SEARCH REVIEW

A friend who is a lawyer recently said that lawyers are the only profession which makes mistakes and then records them where everyone can see them forever.

Gone are the days when we had the luxury of wandering down to the Registry of Deeds ourselves, searching for a while, having a break, perhaps even a smoke, and going back to finish the search.

Conducting the search yourself, I believe it was possible to develop a feel for the property and maintain a good grasp of the title. Besides which, lawyers applied a different standard than today. Our present higher standard may be a direct result of higher insurance deductibles ?

Today, in most cases it is not economical nor practical for the lawyer to personally attend at the Registry. Therefore, different skills must be learnt. It is more difficult to review a title done by a searcher than to do the entire search from scratch.

It is certainly possible for any lawyer practising real property law, even the most conscientious, to make an error in reviewing a title. Always remember that the review of the abstract, or lack thereof, is one of the main causes of claims upon our insurance. Most lawyers that have claims ~~do~~ know the law, they are simply careless.

STANDARDS FOR TITLE REVIEW

In Nova Scotia, there are no standards for title review set by our Bar Society. Therefore it can be said that three standards of title review exist - yours, that of the next purchaser's lawyer (or more often these days, the lawyer acting for the bank on a foreclosure), and finally, the standard of the Supreme Court Justice.

Hopefully your standards will usually be the same as the next lawyer's and **always** the same as the Court's. Our standards for what constitutes good title in Nova Scotia are defined by practice and by our courts. The standard evolves with time. For example, the practice years ago was never concerned with a recorded statutory declaration of certain facts in many cases, it was enough if the lawyer verified the facts by a phone call, and made a note in the file.

THE ABSTRACT ITSELF

The review of the abstract only begins after the searcher has completed the abstract. You are required by Regulation 48B(2) of the Barristers and Solicitors Act to have an abstract or other similar information on file when you certify a title.

Regulation 48(2) states:

" (2) Where a firm or a lawyer certifies title to real property either with or without qualification, the firm or lawyer shall keep available either an abstract of title which discloses the chain of title, or such title information or certificate of title on which the firm or lawyer relied which would justify the certification of title by a reasonably competent solicitor."

In *Ratto et al. v. Rainbow Realty Ltd.* 1, Mr. Justice Nathanson commented on the abstract of title provided the Court in that case and set out guides for the preparation of the abstract, as follows:

" (a) It is desirable that an abstract is able to be read and understood by a person who has not searched the title, without reference to any other documents or records. Therefore, it should contain an exact copy or accurate summary of each legal description, at least the first time it appears in the chain of title.

(b) If more than one lot is searched or more than one title is examined, the legal description for each must be clearly numbered or labelled.

(c) Where any portion of a recorded document is quoted, quotation marks should be used.

(d) References to documents not relating to the land under search should be omitted.

(e) Obscure abbreviations should not be used.

(f) An abstract of title constitutes a precis of the relevant contents of recorded documents. Sometimes those contents require clarification. Where law is quoted, its source must be cited. Where opinions or comments are set forth, they must be clearly labelled and distinguished as such.

(g) Every abstract must contain a certificate of title, and all exceptions to good title must be stated explicitly in the certificate."

If the abstract is properly prepared, you will have a good start on avoiding errors.

MY ABSTRACT

I shall describe my own system. It is not a perfect one, nor the only one. It is simply a system that has developed over time and works.

We are fortunate in that most of our searches are done by our own title searcher. In this way we have evolved a system respecting the appearance of the abstract.

I want the abstract to contain:

1. A cover page indicating the present owner of the property, its location, registry, date and time of search, a reference to persons other than the owner whose name should be placed on our abstract file system, such as the purchaser or developer of the subdivision, and the name of the searcher who prepared the abstract.

2. The next page is a copy of the description under search.

3. The next page is a drawing of the "chain" from the past (at the top) to the present (at the bottom).

4. Next, the "problem" page. This details any problems that the title searcher notes, queries or concerns.

5. The names searched for judgments, and the time period covered.

6. The "meat", being the instruments which make up the title. Each instrument is abstracted on a separate form. Copies of the actual deed or its description are often attached. These documents are arranged in the abstract from the present backwards. They are numbered sequentially, starting with the most recent.

7. Copies of the conveyances "out". Again, these are abstracted on a separate form, with a copy attached if important.

8. The listing of the years searched "out" and any findings.

9. The conclusion page. I complete this myself once my review of the abstract is complete and insert it after item two above. Any exceptions to our certificate, other than the

standard ones respecting survey and the like are noted.

10. A copy of our certificate of title is eventually attached at the end before the abstract is filed away.

Copies of these items are attached to this paper. We color code many of the different items in the abstract, for easy identification.

As an aside, ensure that your searcher actually examines the documents, all of the documents affecting title, especially releases of mortgage. Do not let the searcher rely on the "release stamp". At the Liverpool Registry, my searcher recently discovered that a mortgage upon which there was a "release stamp" was not in fact released. Upon looking up the actual release of mortgage, it was discovered that another mortgage involving the same parties was released and the Registry staff had stamped the wrong mortgage as released.

TITLE REVIEW

When reviewing a title, isolate yourself and do not take telephone calls or interruptions. If you are consistently reviewing the title on the closing date, or the afternoon of the last day for objections, something is wrong. This is how, and when, mistakes are made.

Review the abstract thoroughly and methodically, following the guidelines in the attached Title search Review form. You will notice many of the matters of my form are not "title" matters as such. However, they serve to remind me that these are matters to be considered in reviewing the matter before the transaction proceeds.

As you proceed with your review, note: (i) any matters requiring further investigation by the searcher or yourself, (ii) objections to title which must be made, or (iii) statutes that must be consulted. Put a reference to any statute or decided case on which you rely in the abstract.

Ensure these matters are followed up within the time limits allowed by the agreement of sale.

Finally, ensure that the lender or purchaser is advised in writing of any limitations or restrictions which you have discovered well prior to the closing. Otherwise, you may get sued, even though you were well aware that the property has a right of way through it, but forgot to tell your client.

SUBSEARCHES

This is very fertile ground for generating claims against you. Do not rely on your memory as to the last time you searched a property or a subdivision, or as to the problems encountered. Do not get lulled into thinking "it's OK, we've done that subdivision, or that lot."

I am not concerned with the type of subsearch routinely performed in a construction advance mortgage. There, the title has been reviewed a short time ago and it is only a matter of advancing the date forward. You are still dealing with the same client or lender, who has been advised of any restrictions or defects.

I am referring to two scenarios. In both, the prior search was done a while ago - at least enough time that you may have forgotten some of the salient details.

In the first situation, you are searching the same property for a new person or mortgage company. Here, be careful there is not something in the file you do not spot. What is not a problem for one buyer may be the reverse for another.

This may not even be a title problem, but will still get you in trouble. As an example, the client is purchasing a vacant country lot which you have searched before. You know there was a sewage disposal permit before. You check and it is still current. You have not given a copy to the new client and after closing he discovers that the field bed is in the place they want the house. You may perhaps not be negligent here, but you will lose a client and good will.

In the second case you are asked to search another lot in the same subdivision. A problem which, such as an easement, which may not have affected the last lot, may be crucial to this one. As an example, I just completed a search where there is a high tension line through several of the lots in the subdivision. It did not affect my lot. However, in any future search of another lot, it may be very important, as it will severely affect where the home can be placed. In some subdivisions, not all the roads have been turned over to the public authority. Your first search may not have had this problem, but the next lot does.

You or your searcher must get out the old file before doing the subsearch, and review it **thoroughly**. Note the date of the last search, the names of the title holders at that time and any problems or restrictions in your certificate. Because of the changing standard of practice, you may want further clarification of a matter which you noted in the prior search. Then and only then is it safe to "carry the search forward".

CASES AND REFERENCE

1. Ratto et al. v. Rainbow Realty Ltd., (1985), 68 N.S.R.(2d)44 at 51 affirmed on appeal to Nova Scotia Supreme Court, Appeal Division, 68 N.S.R.(2d) 34.

SEE ALSO:

Kimball, Mary, **How to Check an Abstract,** Continuing Legal Education Society of Nova Scotia, April 11, 1987, Chapter 11

MacIntosh, Charles W., **Nova Scotia Real Property Practice Manual,** Butterworths, 1988, especially Chapter 11, "Standards for Title Review", which is excellent respecting the standards for title review and is very valuable for guidance when unusual circumstances are encountered.

RECENT CASES TO NOTE:

Olsen Estate v. ASC Residential Properties Ltd., (1991), 102 N.S.R.(2d)94, a decision of County Court Judge Hall respecting what constitutes a good root of title, (and it was not a "warranty" deed).

Boland v. Berthelot, (1992), 107 N.S.R.(2d)187, a recent decision of Mr. Justice Boudreau on the same topic

ABSTRACT OF TITLE

LANDS OF :

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LOCATION:

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COUNTY.....

REGISTRY OF DEEDS AT:

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DATE:.....

TIME:.....

OTHER FILING REFERENCES:

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⊖ **SEARCHER:.....**