Introduction

"It is therefore our opinion, that a strong argument can be made that, in a case where, without more, a solicitor agrees to act for a purchaser, the solicitor will be liable for all title defects that may arise, whether or not the existence of any such defects could have been discovered by a search undertaken by a reasonably competent practitioner who acts in accordance with the generally accepted standards in the geographical area of his practice." (emphasis mine)

"A client typically expects more than a simple promise to do only a careful search. *There is* the expectation that a solicitor is in same sense guaranteeing a marketable title." (emphasis mine)

The above quotations by Professors, John Swan and Barry J. Reiter are indicative of their thoughts that the duty of real estate practitioners is, in effect, almost guaranteeing the title to the purchasers. While the scope of this "mini paper" is beyond trying to determine the extent of such a question, it does not appear that general case law supports such an imposing interpretation of a lawyer's responsibilities in a real estate transaction. Certainly however, the opinion of such learned authors, as expressed above, causes all real estate practitioners to sit up and take notice.

Every real estate practitioner is **painfully aware** that the largest percentage of negligence actions against lawyers involve real estate claims, and by far the largest number of these involve titles that have been improperly certified.

In a real estate transaction involving certificates of title the title certificate is usually the last document signed and delivered to the client. Too often this is the way the certificate of title is considered -at the end of the transaction.

The certificate of title is one of the few "tangibles" that passes between a lawyer and his client and because of this assumes a false and disproportionate importance. Matters become even more compiicated when one considers the respective interpretations each party places on the certificate. For example, the client feels that you have certified and guaranteed title, while the lawyer feels that the certificate is a mere recital of qualifications and exclusions.

Perhaps one of the reasons why so many negligence cases turn on this point is because the whole process of certification of title is misunderstood or perhaps even ignored. Too often the lawyer considers his job done when he approves the title notes (more times than not prepared by the paralegal) and pulls out his standard form certificate of title, signs it and delivers it to the client (or perhaps even worse than that say nothing and deliver nothing to the client).

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The mistake that is made all too often is to spend too much time and energy trying to draft the "perfect qualification certificate" to ensure if there is a problem there is either no liability or our responsibility is minimized. The problem is that by itself this practice will be largely ineffective.

The purpose of this paper is neither to suggest what is right and wrong in certifying titles nor to tell you how to "qualify your certificate". Rather, it is to provide an overview of factors that the courts have indicated as being relevant and to provide sane guidance to a real estate practitioner in *their use* of certificates.

2. STANDARD OF CARE In order to approach the question of how to properly qualify a title certificate one has to clearly understand the standard or duty of care that is placed upon a lawyer who carries out this task on behalf of a client. Allan M. Linden in Canadian Negligence Law3 comments as follows:

"A lawyer is obliged to act like a *'prudent* solicitor'. In other words, an attorney is liable if it is shown that his 'error or ignorance was such that the ordinarily competent solicitor would not have made or shown it'. He must 'bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client' .

...A lawyer's duty is not 'absolute, ascending into the realm of insurance against loss. It involves only careful, unnegligent advice on matters of law.' The creation of an absolute standard for lawyers was wisely resisted so as to insulate the gar from too many crippling law suits. Chief Justice Robinson warned long ago that 'the profession of the law would be the most hazardous of all professions, if those who practice it in any of its branches were to be held strictly accountable for the accuracy of their opinions.'...

There is no liability for a mere 'error in

judqnent', because a solicitor does not undertake with his client not to make mistakes, but only not to make negligent mistakes. The determination is obviously a 'question of degree' and there exists a 'borderland' in Which it is hard to distinguish between negligence and no negligence.

Liability is generally imposed when a solicitor fails to take sane 'routine step' that any lawyer would realize is necessary. Thus, when there is doubt about the location of a sewer easement over real property a survey mast be sought. Similarly, the mission to inform a mortgagee client that the subject property was *owned by* the mortgagor's wife,

was encumbered and other such matters, amounts to negligence ...."

Let us look briefly at what some of the cases are saying with respect to the standard of care expected of a lawyer. Before proceeding you should appreciate the fact that up until recently the courts have based a solicitor's liability for negligence in contract as opposed to liability in tort. 4 However, in the recent case of Central & Eastern Trust Co. v. Rafuse et a1.5 the Supreme Court of Canada has decided that a solicitor's liability can be founded in tort as well as in contract. This allows the plaintiff to frame the action in a way most beneficial to him. This decision does not change the standard or duty of care imposed on a lawyer, but does provide a potential plaintiff with sore advantages, particularly with respect to the limitation period.

In Maple Leaf Enterprises Limited v. MacKay et al. 6 Mr. Justice Hallett defined the standard of care expected of a lawyer in the following terms:

"As to the law, it is well established that among the duties a lawyer owes to his client is the duty to exercise reasonable care in the performance of the duties he has assumed for the client; he must bring a degree of expertise and care to his work equivalent to the standard exercised by reasonably competent solicitors in the province. He has an obligation before giving advice to fully acquaint

himself with the facts of the case and an

obligation to give candid and honest advice and a duty to disclose and certainly avoid conflicts of interest." (at page 65) .

In a recent decision Jetaway Investments Limited v. Salah, et- al. 7 Mr. Justice Nunn in quoting another decision of Mr. Justice Hallett stated:

"The law respecting the duty owed by a solicitor to his client is well established. Hallett, J., in Central & Eastern Trust Company v. Rafuse and Cordon (1982), 53 N.S.R. (2d) 69; 109 A.P.R. 60, revsd. 57 N.S.R. (2d) 125; 120 A.P.R. 125 (C.A.) 2, at page 72 stated:

'I shall summarize the law respecting the standard of care required of a solicitor. A solicitor contracts with his client to be skilful and careful and the standard is that of a reasonably competent and diligent solicitor or, as it is sometimes stated, he has an obligation to act like a prudent solicitor; that is, he is liable if it is shown that his error or ignorance was such that the ordinary competent solicitor would not have made or shown it. He must bring to the exercise of his task for his client a reasonable knowledge, skill and care in connection with the business of his client.. There is no liability for an error in judqnent nor is there an undertaking that the solicitor will not make a mistake, only that he not make negligent mistakes. He could not be liable for every error on a complicated issue of law as, if that were so, it is conceivable that almost every law suit could generate a negligence action against the losing lawyer. He is not an insurer. Liability is generally imposed when a solicitor fails to take sore *routine step* which any solicitor would realize is necessary."

In a similar vein Henry, J. of the Ontario High Court noted

in Banks et al v. Reid 8:

"Generally speaking, a solicitor holds himself out to his client as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. He is not, however, required to act as if he were infallible, nor can he be held liable because his honestly formed opinion on a question of law proves to be wrong. He is, however, bound to exercise care in the performance of his services and his negligence therein renders him liable to his clients for damages caused thereby:...

Having set out briefly the effect of the jurisprudence on negligence of a solicitor, I **observe that the standard of care to be applied** is

that of the reasonably competent solicitor. He is not to guarantee success, but is too exercise his best judgment ...."

The commentary noted above provides sufficient reference so as to indicate the standard of care that is expected of lawyers. For the purposes of this paper it is important to note that the duties, obligations and liabilities of a solicitor acting for a purchaser are determined both by the terms of the contract entered into by the solicitor and his client, and by virtue of their very relationship as solicitor and client. Even in those cases where the purchaser client asks the solicitor to act for him in a particular transaction and the solicitor agrees to do so, and nothing else is said about the solicitor's obligations, there is an implied terns to act as a reasonably competent practitioner.

Professors Swan and Reiter in "Solicitor's Responsibilities in Real Estate Transactions" 9 advise that the courts have expanded the statement of the obligation of a solicitor in a real estate transaction. They note at page 163:

"There must be sane way of determining the precise standard by which the solicitor's performance is to be measured. This standard has been generally set in real estate transactions as the standard applied in the area in which the solicitor practices."

A decision of Mr. Justice Meldrum of the New Brunswick Court of Queen's Bench probably illustrates, as well as any case, this additional standard that is placed upon real estate practitioners to know the area in which they are carrying out the title search. In the case of LeBlanc et al. v. DeWitt et al. 10 the land in question was in one of the Acadian areas of the province. Meldrum, J., was sensitive to the problems inherent in "Acadian searches". In a lively

narration of the difficulties, Meldrum, J., manages to clearly explain how the negligence of a solicitor will depend on the area where the transaction transpired. At pages 153 and 154, he remarks:

"That problem of searching is compounded in the case of Acadian searches of the province. Any lawyer experienced in such searches can cite numbers of anecdotes relating to the problems of Acadian searches.

The late A. Tessier LeBlanc, Q.C., whose total career was at the Westmorland Registry Office, once in dismay and exasperation, looked up from the unconsolidated indices of the letter "L" and cried 'I wish the good lord had made sane of the LeBlancs black!'.

Had sane been LeNoirs *instead of* LeBlancs it would still have not been a canplete answer to sane of the unique problems. There were at one time, and perhaps still are, five Rlcmeo LeBlancs in Westmorland County. Two had wives named Juliette. The situation may have been romantic but it was only a headache for the title searchers. In my cyan searching I was once confronted with a Hypolite . Legere. Finding Polite Legere posed no problem. The dropping of a syllable fran the name Little Louis to call a former Premier of the Province, 'Ti Louis' is not unique. To confirm my opinion, I telephoned the niece of Hypolite. I asked her, 'Who was Polite Legere.' She replied 'Oh, Uncle Paul'.

No one, particularly not our English-speaking lawyers can fully appreciate the degree to which the Acadian's native courtesy led him to calmly accept the English-speaking habit of transforming the French name to an English similar one. One of the legal expert opinions filed in this matter points out that 'Henry' is not an English translation of 'Honore'. It is not, but that misses the point. An English tongue could not get around, 'Honore'. It would say, 'Henry' and Mr. Landry would not think it courteous or necessary to correct him.

The lawyer who searches a city property undertakes to provide the necessary,care and skill to meet the needs of that particular property.

The lawyer who deals with title to waterfront land must be able to search and deal with riparian rights.

The one who searches among Justice of the Peace deeds in the Acadian areas must, in fact, DeWitt assured the plaintiffs that he did, have the necessary skill, knowledge and ability to do that search."

Professors Swan and Reiter note that the courts have even gone beyond this standard of a reasonably competent solicitor practising in the area to protect clients. They note:

"...While in many cases the standard applied will be that of the reasonably competent or prudent solicitor practising in the same area as the solicitor (defendant), the courts can find a violation of the standard without any evidence. This will happen when the courts either conclude that the breach of a duty is so obvious as to need no evidence of standard practice or use their own knowledge of what solicitors should *do. This* has two important consequences. First, it permits the court to require a general standard of performance across the province, and, second, it permits the courts to find that it may not be sufficient to perform up to the level of the reasonably competent local practitioner if that standard gives the client inadequate protection ...."

Before leaving this general discussion of the standard of care expected of a lawyer, it would be helpful to look at the various factors the courts have looked to *in* setting the standard that has to ire reached. In their article, Saran and Reiter 12 make reference to the following sorts of considerations:

(1) The evidence of local solicitors. Various local cases confirm the importance of this type of evidenoe.13

(2) The court's own knowledge;

(3) Evidence of the standard of practice as it is found *in* published checklists;

(4) Loss control information published by professional liability insurers;

(5) Any notice from the Law Society or frcan the Government;

(6) Information generally available to members of the profession regarding correct or careful practice in real estate transactions. In this regard see also the Jetaway Investments 14 case where the court made specific reference to the Nova Scotia Barristers' Society Record and the Nova Scotia Law News in deciding on the standard of care;

(7) The "tariff" provisions of the County Law Associations are another source of evidence - the list of duties that are indicated as justifying the "tariff" fee would be evidence of the obligations of a solicitor who, at least, charges that fee. While the Nova Scotia Barristers' Society tariff has been repealed many of the County Bar Associations have drawn up their own "suggested minimum fee guidelines" and in so doing have itemized the types of things that they are expected to do in justifying their fee.

The courts then will look at all these factors in determining whether or not in a particular case the lawyer has acted reasonably. There may well be others. As Swan and Reiter noted in their conclusion on this point, if two standards can be referred to by the court this may well result in the court's selection of the higher standard. 15

3. APPLICATION OF STAB OF CARE TO REAL ESTATE PRACTICE -

COMINICATIng WITH CLIENT

The last three words of the heading for this sub-section cannot be over-emphasized - CommunICATION WITH CLIENT. In the next section the paper will take a brief look at score of the common exclusion or qualification clauses that are found in certificates of

-10title in Nova Scotia. However before doing so it is important to carry the standard of care expected of a real estate practitioner one step further.

Too often lawyers rely on the exemptions, exclusions or qualifications contained in the certificate of title as being their protection fran a negligence claim with respect to the title they have searched for their client. One may have the best drafted certificate of title in the world, but this in and of itself will not provide protection for the lawyer. The certificate is just one small step (and the last one at that) in the procedures that must be followed by a real estate practitioner to properly qualify the title he has searched.

Fran the time the contract is entered into between the real estate lawyer and his client the lawyer has a duty to keep his client fully informed with respect to items that are of concern to the client. obviously the state of the title that the client is purchasing (or the mortgage company wants a first charge against) is very much of concern to the client.

How many lawyers with their busy schedules open up a file, search the title or review the notes of a paralegal, make a decision that the title appears to be satisfactory, prepare a standard certificate with the exclusions they feel are necessary on this particular title, close the transaction and provide the certificate to the purchaser - with very little or no ccmm<uiication with the client? Such a practice, if one is doing any amount of real estate work at all, is bound to cause serious problems at same point in timm.

What have the courts been saying about our obligations to keep our clients informed?

In Finance America Realty Ltd. v. Gillies[16] D.C.J., found the lawyer negligent in acting for a mortgage company which wanted a first charge on the property when he did not obtain a survey certificate (even though it was not specifically asked for) and searched the wrong lot. At page 28 of the decision Adams, D.C.J., quoted from the case of Major v. Buchanan, et al (1976), 61 D.L.R. (3d) 46 at page 69:

"These two decisions, in my opinion, established a principle mentioned only incidentally, if at all, in the other cases referred to me by counsel namely, that a solicitor has a duty of warning a client of the risk involved in the course of action, contemplated by the client or by his solicitor on his behalf, and of exercising reasonable care and skill in advising him. If he fails to warn the client of a risk involved in the course of action and it appears probable that the client would not have taken the risk if he had been so warned, the solicitor would be liable. If he warns the client of a risk involved in the course of action, then he can only proceed to follow such course if the client instructs him to do so. If he fails to exercise reasonable care and skill in advising the client with respect to his risk and the client or solicitor on his behalf adopts a course of action which the client would probably have not have taken or authorized if he had been properly advised, again, the solicitor will be liable if the client suffers a loss.

In LeBlanc v. DeWitt, et x1[17] Meldrum, J. said:

"He relied on a number of facts which proved to be in error. The reliance on those facts is not wrong in itself. The failure to disclose those facts to the client and in the certificate led directly to the problems which then arose." (emphasis mine).

In Clements et al v. Wyatt et a1[18] the court found the lawyer negligent for certifying title where a number of other lawyers in the same area would not certify because of concern over possible

-12breaches of The Planning Act of Ontario. Mr. Justice Rutherford states at page 31:

"In their reporting letter to the plaintiffs dated January 9th, 1974, the defendants should have detailed their concerns to the plaintiffs that some solicitors, unfamiliar with simultaneous conveyances, would not be satisfied with Clements' chain of title. Also, the defendants should have explained in the letter the significance of Austin Burke's affidavit and why they felt it satisfied their requisition. Of course, given the uncertainty of the loss surrounding The Planning Act, they should never have certified the title under any circtanstances.

The defendants ought not to have closed the transaction without requisitioning a consent pursuant to The Planning Act. If canpelled to close the deal by the plaintiffs, notwithstanding that the requisition was not satisfied, they should not have unequivocally certified the title ...."

In Smaldon v. Lawrence 19 where the lawyer was found not negligent in certifying title that was based on possession, Judge McDermid of the Ontario County Court noted at page 134:

"I think it is fair to say that if such a risk exists, it must be borne either by the solicitor or the client. Unless the solicitor makes full disclosure of the problem to the client, advises him of the alternative courses of action open and receives instructions fran him, the solicitor must bear the risk." (emphasis mine).

Professors Swan and Reiter in their article "Solicitors' Responsibilities in Real Estate Transactions" also deal with this question of properly communicating with one's client. The following are quotations fran this article which seem to be on point. First at page 195 they note:

"The case, therefore is in line with the Ontario Court of Appeal judgment in Tilden v. Clendenning, supra, and supports an argument along

the following lines: Courts are going to consider what the reasonable expectations of the person purchasing any service are and are likely to seek to insure that any attempt by the person providing the services to cut dawn the extent of the services being offered will only be effective if the purchaser has had it explained to him that what would otherwise be his reasonable expectations are not, in fact, going to be met ...."

On page 198.they note:

"The point that has now been reached by the court is that any attempt to cut dawn the reasonable expectations of one party that has any elements of unfairness or surprise will be subject to review by the court. It is of course, admitted by the courts that there may be nothing objectionable in one party seeking to reduce the level or performance so long as the other is not caught by surprise. The problem facing the solicitor is that he will have great difficulty convincing a court that the client fully understood that, for example, he was buying a house that may. be subject to several statutory liens..."

They state further at page 199:

"As a practical matter, it may be expected that the courts would pay little attention to an argument by a solicitor that the client orally agreed to a reduction in the services provided by the solicitor. Careful conveyancing would acknowledge the risk run by a solicitor who only has an oral understanding with his client in respect of anything that may be solicitor's normal duty to perform."

They conclude on this point at page 200:

"It may, of course, be the case that a solicitor acting for a purchaser discovers same. defects on the vendor's title or sane other matter affecting the property. If the solicitor discloses the existence of this defect or problem to the client he has discharged his obligation. Should he be instructed to proceed to close despite this defect, the client may have no cause for complaint if he subsequently suffers loss. However, in this case, before the risk of loss may be effectively transferred to the client it is our opinion that the solicitor has to meet an obligation to inform the client precisely of the risks he is running by

going ahead with the deal . . . . . It is likely, as a

> matter of practice, that it will be easier to transfer the risk of loss to the client. where the solicitor has precisely identified the risk and may be assumed, therefore, to be better able to explain the risk to the client. An obvious example would be the case where the solicitor discovers that there is no survey and the client is unwilling to incur the cost of obtaining one ....A similar case might-arise where there is an undischarged mortgage for a small amount or an insignificant easement..."

Fran all of this it seems obvious that a properly worded certificate of title is just not enough. What moist a lawyer do to satisfy this obligation to properly communicate with a client?

First of all, the lawyer must understand what his client has hired him to do and confirm this with the client. The cases are clear that in representing a purchaser it is assumed that he wants good title. It is not enough to say after the fact that he never asked to have the title searched. However, each of us have had cases where the purchaser does not want us to search the title. If this is the case, you must protect yourself by confirming this in writing with the client at the outset of the file.

If after the title search has been completed, the certificate is going to be qualified in any way the client must be notified immediately. If the title search discloses that the title is subject to a right-of-way or building restrictions or shared well agreement, for instance, the particular qualification waist be communicated to the client in a way that the client understands it. It is not enough to say that your property is "subject to building restrictions" but rather you must provide him with a copy of the building restrictions and explain the significance of these to him.

Third, the communication of this information to the client must be clearly recorded in the file. There are three or four different approaches which may be followed. Often with the lawyer's busy schedules he will call the client and explain the significance of the title search over the telephone. Sometimes the client is brought into our office and discuss the title search with him. There is nothing wrong with either one of these practices but there should be something more in your file in order to protect yourself. A memorandum summarizing a telephone conference or office conference is of some assistance. However, it is strongly reccd that the best protection is a letter to the client explaining the telephone conference, confirming the office conference or simply summarizing the results of our title search in a way that the client can understand the significance of the report.

In the Bar Admission Course, 1986 for the Nova Scotia Barristers' Society Real Estate Volume 2 at page 191 Alan Crowe has produced a copy of a sample "letter to purchaser advising of details of search, etc. "Appendix I, attached to this paper, is a sample of reporting on the marketability of the title.

Fourth, as the last step the lawyer must properly draft the certificate to include any qualifications to the title. This should be reviewed with the client at the time of closing so that he fully understands it.

In view of the importance of putting in writing any restrictions on a certificate of marketable title there is one other step that should be taken at the commencement of the file. Every lawyer has a standard first letter to his client which is sent out upon

-16being retained. Given the comments that it is unlikely that a lawyer could effectively restrict his liability at the conclusion of a file without previous communications, there would be nothing wrong with having provisions in that original letter to our client indicating, for exale, that the title search is and must be premised on the accuracy of the Registry of Deeds records. This allows lawyers to take advantage of the protection offered in this province by the existence of certain standard practices in Nova Scotia which, if followed, are consistent with the duty of "full disclosure" raised by the courts.

4. EXAMINATION OF CERTIFICATES OF TITLE

(a) Generally

Attached as Appendix II to this paper are sales of certificates of title that have been collected fran different firms in the province. *These have* been retyped to remove any reference to parties and have removed the names of any law firms in case they would object to these being printed without their consent. The purpose of reproducing these is two fold:

(a) It provides score sample forms of certificates of title for people who may be interested;

(b) But more importantly to indicate the types of exclusions and qualifications that are found in certificates of title.

Perhaps just a few general ccmments about certificates of title:

(1) There is no "ideal" certificate. It must reflect what your title search has disclosed and what you have previously reported to your client. If there is an exclusion clause or an assumption upon which the search is based it must be one that you are legally entitled

-17to rely on as a reasonably competent solicitor practising in the area in which the title search was carried out.

(2) Make sure your practice is to always review the certificate of title with the client either prior to or at the time of closing. There is probably no better defence to a suggestion by a client in a trial sane number of months or years after you have done the work that you did not discuss a certain point of the certificate with him, than to be able to honestly say "It is my standard practice to always review my certificates of title with my clients".

(3) Professors Swan and Reiter make it very clear in their article that there is no difference to the liability of a solicitor depending on whether their certificate says for example "We hereby certify that..." or "It is our opinion that..." In so reaching that opinion, the authors were in fact accepting the realities of the duties, responsibilities and liabilities of a solicitor in a real estate transaction, and were sensitive to the limited effectiveness of a certificate in protecting the solicitor.

(b) Possible Qualifications to Certificates of Title - Can They

Be Qualified?

(1) Accuracy of Registry of Deeds Records

The law is clear that a lawyer's certificate of title can be subject to the accuracy of the indices of the Registry of Deeds where the title search is carried out. Keeping in mind the practices "frcm the area where the lands are located", if a reasonably competent solicitor would not have discovered -a title defect due to the inaccuracies of the records at the Registry, the lawyer is not negligent.

In Carson v. McMahon 20 Baxter, C.J. commented on this point. At page 254 he said:

"Both of these cases turn on the use of the means of the Registry Act for tracing titles. Until superior authority camels me to do so, I cannot extend their application to instruments which by no conceivable possibility, except that of pure accident, could be found by a person searching a title. There is not even the circumstance that the searcher might be put upon enquiry by the occupation of the land. In this case it was wild land with no visible occupant.

The Registry Act provides for the keeping of indexes and I think if a person searching a title uses all the means provided by the Acts it would be an unreasonable construction of the section relating to notice to hold that if there were any adventitious entry on the Registry he must be held to have notice of it. All that was intended by the section was that if a document was on the Registry, which he might have seen *in* the course of a proper search, he would be fixed with notice of it, whether he actually looked at it or not:"

A similar statement is found in the decision of Hallet, J., in Maple Leaf Enterprises Limited v. MacKay et al21. He ccmments at page 73 and 74:

"...There could be no claim against the defendant law fine based on the 1941 tax deed which was registered as it does not appear to affect the Lansdown property. Furthermore, the certificate of title was qualified *in* that it only certified title based on instruments affecting title to the Landsown property that were registered at the Pictou Registry. A lawyer is entitled, in the absence of evidence to the contrary, to search a title in a chronological sequence in accordance with indexes at the Registry of Deeds and has no liability with respect to documents which cannot be disclosed by normal searching procedures.

It would appear, following investigation by both Mr. Blackwood and the defendant MacKay, that there was a possessory,claim being made by the MacKays. Such a claim is not a matter which would came to the attention of a solicitor in search of title

under normal circumstances. Therefore, the failure at the time of the initial search to determine that there may have been a possessory claim was not a breach of the defendant's duty to their client.

furthermore, the certificate disclaimed any liability for rights in other persons that were 'unrecorded'."

(2) Prescriptive or Possessory Rights

While this is not a standard clause for all certificates of title, sane lawyers do include it.

The comments by Baxter, C.J., in Carson v. McMahon and Hallett, J. in Maple Leaf Enterprises Limited v. MacKay, et al above both appear to lend support to the proposition that not only is a lawyer entitled to rely on the accuracy of the Registry of Deeds records, but that he could not be expected to certify as to prescriptive or possessory rights of which he had no notice. It should be noted, however, that if the client can provide reasonable evidence that the solicitor knew or should have known of this possibility, such as the case where the client himself may have brought the matter to the solicitor's attention or the other party brought it to the solicitor's attention, then, based on the solicitor/client relationship and the standard of care requirements discussed in detail above, a lawyer cannot simply rely on such a restriction contained in a certificate of title to protect himself fran liability. In such a case the lawyer would have an obligation to advise his client of the problem and to counsel the client to pursue this.

However, in most cases these prescriptive or possessory claims would not cane to the lawyer's attention and it appears that based on decisions such as those noted above, the lawyer would not be found negligent for such claims. It would appear to be wise,

-20therefore, to include such a standard paragraph in the certificate of title so as to reinforce this position. In addition, the consequences of this paragraph should be raised with a client prior to the closing and discussed a second time when the certificate is reviewed at closing. (3) Subject to Survey

While the standard "survey" clause is probably worded in as many different ways as there are law firms in the Province, there is a common purpose when such a clause is included in the certificate.

There appear to be two aspects involved in a survey clause. First of all, the lawyer is informing his client that he has not "verified the measurements and courses in the description with the metes and bounds as established on the ground". Simply put, he is not certifying as to the location of the property boundaries. The second aspect of this exclusionary clause deals with the building itself. Here again, he is not verifying "that the buildings, if any, are located properly within the boundaries of the lands...".

The purchaser obviously is concerned generally that the building he is buying is on the lot in question, but he may also have particular concerns about where the actual boundaries are and whether he owns an extra foot or two. It is important, therefore, *to* discuss and distinguish these points with your client at the outset, and at the time the certificate is delivered prior to or during the closing. A lawyer may be *protected better* if specific reference is made *to* both of these survey qualifications of title rather than simply saying "subject to survey".

obviously the question of expense is a relevant factor here to the client and the client may **well choose after** a full and open

-21discussion not to have a survey certificate done or not to want a full survey of the lot in question. However, as long as the issue has been discussed with the client openly and fully so that he understands them, and we have taken the additional steps to include this in written form, preferably in a letter at the early stages and in our certificate, a lawyer should be protected fran any negligence action.

The courts appear to be clear on this whole question of "survey" and it would be useful to consider three or four decisions that give credence to the conclusions stated above.

In the case of Marwood v. Charter Credit Corporation 22 the Nova Scotia Supreme Court, Appeal Division, was involved with a case *where the* plaintiff purchasers were not advised to obtain a survey certificate nor was the exclusionary clause in the certificate discussed with them. Justice Coffin noted at pages 744 and 745 that the purchasers were inexperienced in buying real estate and found further that neither the defendant nor *anyone else* involved in the transaction suggested a survey to them. It was not until after the sale was closed that they were given a statement by the solicitor that the search of title bras subject to survey. The evidence of the plaintiffs was that they had not seen or examined this statement before the sale, but that if a survey been conducted the error would have been detected.

The lawyer was not joined in this action so the comments of Justice Coffin on page **746 are obiter** dicta. However, they are clearly on point and are of considerable importance to the law on this point

"It may well be that purchasers do not always wish to go to the expense of making a survey, but as a matter of practice it is my view that solicitors should always advise them in advance on this matter and make it clear that the certificate of title which will be issued is at all times subject to a survey. If this is done ahead of time and a purchaser still insists on going forward without retaining a surveyor, then the responsibilities are obvious. In the present case, the evidence is that the purchasers did not even see the report on title until the transaction had been completed."

In the Dreisorner v. Romney23 case the purchaser of three lots of land found out after the transaction that the size of the lands purchased was overstated in the deeds and an action in negligence for damages against the solicitor was commenced. The court noted at page 128:

"The burden I believe, is on the solicitor with the retainer to show that his. client has refused a

survey in circumstances. such as these. Without a'

> survey, the solicitor must make it clear that he will not certify without cogent qualification."

In the Finance America v. Gillies, supra, Justice Adams noted at page 28:

"The defendant knew that the dwelling house was an important element of the security the plaintiff required and he ought to have advised his client that a surveyor's certificate was necessary in order to confirm the location of the house ....

...In my opinion the only way the defendant could have discharged the duty and standard' of care he owed to his client was to advise him that a survey of the property was necessary: to certify the security without a location certificate was exposing the plaintiff to the risk that the security may be faulty or incomplete as, in fact, it was later found to be."

(4) Taxes
and
(5) Zoning

While it is not a standard clause per se, a number of certificates of title include an exclusionary clause to the following effect:

"Taxes, including change of use tax, if any, unpaid

relevant zoning and building by-laws and to any unregistered encumbrances, restrictions or

covenants which nun with the lands."

Taxes

At one time it was the practice of most Municipalities not to charge for their tax certificates, and to clearly deny any liability for the ocntents of the certificates. Understandably, there was confusion as to whether a tax search was a duty on the "reasonable practitioner", and, if so, where the responsibility for the information would lie.

Fortunately, it is now standard practice that Municipalities hcarge a search fee for the certificates, and, while they may not want to do so, have to accept responsibility for the accuracy of the information. Given these new practices it would seem quite improper for a lawyer to exclude the *question of* taxes for a real estate transaction. Indeed, it would seem incumbent on solicitors to make that simple request for information from the respective Municipality.

A number of certificates of title now include a clause *to* the following effect:

"We further certify that all property taxes

relating *to* the lands have been paid in full

until (state time) and there are no

municipal . improvement or betterment charges, capital charges or utilities municipal charges due and awing, except as follows:

(then the relevant unpaid charges are noted)."

This sort of clause is consistent with the responsibility that is placed *on* lawyers in representing a purchaser client or a mortgage client. The standard of care of a reasonably competent solicitor requires that a lawyer review the tax records'.

It seems, then, that perhaps another type of exclusion could be included in the certificate. Given that the courts have made it very clear that title searches are premised on the accuracy of the Registry of Deeds, it seems but a logical extension to include a premise tax searches *on* the accuracy or correctness of the tax certificate provided by the Municipality.

Zoning

In their oft-cited article, Professors Swan and Reiter, looked briefly at the question of zoning. At page 172 they refer to the decision of Hauck v. Dixon 25. In that case the Court found that reasonable solicitors practising in Ottawa in 1969 would not have checked for zoning regulations. The decision was largely influenced by the fact that the Agreement of Purchase and Sale did not include a condition precedent clause dealing with zoning. In disagreement with that conclusion Swan and Reiter note:

"mss my be a much narrower view of the purchaser's rights than is justified. It could be argued in such a case that the purchaser had made a mistake and that this would offer a ground on which he could escape frcaa the contract before closing..." while this article has already taken issue with the suggestion by Mr. Swan and Mr. Reiter when they seen to be implying

-25that real estate solicitors are in effect "guaranteeing title", it seems that on this issue of zoning records, they are correct.

The reasonable solicitor in Nova Scotia would find it very difficult to suggest that he did not check the zoning regulations, merely because there was no such requirement in the Agreement of Purchase and Sale.

With the importance of *The Planning* Act 26 it should now be common practice to discuss the intended use of the land by the purchaser and to check the zoning requirements. This can be covered very silly at the outset of the file by requesting a certificate from the development officer in question. It may well be that the purchaser has locked himself into a corner and has given no indication to the vendor of his intended use and has included no such "conditional precedent" clause in the Agreement of Purchase and Sale. If this is the case the purchaser may have to purchase *despite the* difficulties with zoning but there could also be a strong argument made which would allow the purchaser to escape from the deal.

If zoning is a relevant factor in a transaction, then a certificate of title should reflect this. The issue should be discussed thoroughly with the client and these discussions should be confirmed in a letter to the client. By recording the conversation a lawyer is protected in those situations where a client is willing to purchase a property despite possible conflict with zoning regulations.

As was the case with a certificate of title and the tax certificate, a lawyer should indicate that a certificate from the Development Officer is subject to the accuracy of the Municipality's records. If zoning regulations appear not to be relevant, and the

-26issue has been discussed with the client, a reference in a certificate indicating that it is subject to zoning regulations would sufficiently protect a solicitor.

(6) Unregistered Liens and other Statutory Interests

It is standard practice to check for unregistered liens that are not found at the Registry of Deeds Office, for example, a check is always made for taxes. When it is relevant to a file one should, as a matter of practice request a clearance from Worker's Compensation, Labour Standards and and the Provincial Tax Commission, among others.

In their article, Professors Swan and Reiter, suggest at page 169:

"A partial list of those statutes that impose liens could easily run to 30 or more statutes. A purchaser of land who found out later that the land was subject to one of those liens would probably have an action against his solicitor. It is our *opinion that* it may be no defence to the action that the solicitor had acted in accordance with accepted practice and had not thought that it was necessary to check for the more esoteric liens...

It might be thought possible to prevent the result by informing the client that there are more possible liens than it would be worth a solicitor's time *to* check. Such a *defence is* unlikely *to* be effective. This is because it would be extremely difficult to word a disclaimer in terms that the court would accept as being fully informative to the client and, at the sane time accurate as to the scope of the solicitor's obligations ….A solicitor would not be allowed bay the court to undertake an obligation less than that imposed on him by his simple agreement to act for the purchaser."

While a lawyer could presumably be held to be negligent, there is same small comfort in further comments by Swan and Reiter where they acknowledge that it is unrealistic to expect lawyers to be

-27checking for all of these possible unregistered clam. They note at page 170:

"It appears that the failure on the part of solicitors generally to check for all liens is a calculated risk. It is likely that the extra costs involved do not justify steps being taken to eliminate the risk, especially since the incidence of problems arising from these liens is low. So far as we are aware there is no reported case of a solicitor being sued by a purchaser in respect of any of the more esoteric liens that can, in theory, at least, cause difficulty for a purchaser.

Therefore, while it may be possible *to* word an exclusion in a certificate of title covering such possible unregistered liens, it is highly unlikely that such a clause would be effective. It would be almost impossible to properly advise a client of the meaning of such a clause and the ramifications of such possible interests caning to light at sane later *date. While* it may seen like an unreasonable standard, it is suggested here that the courts would probably find that when a statutory claim canes to light it does affect the title to the property for which a certificate of title has been issued, and that the lawyer who issued the certificate failed to act as a reasonably competent practitioner.

f 7) MISCELlANEOUS QUALIFICATIOnS

Many title searchers presumably have specific qualifications that are pertinent only *to* the particular title that is being reported on. To try and itemize all of these is beyond the scope of this paper. It is enough rather, to include under a general heading, topics such as rights-of-way or easements, building restrictions, restrictive covenants that run with the land, shared wells or driveways.

All of these are restrictions that take away fran title in fee simple and therefore have to be reported to the client. Again, it is not enough to simply report these on a certificate of title, rather, there is a duty to discuss these defects with the clients when they are discovered, explain the significance in a way that the client understands it, protect ourselves by confirming this in writing, and finally, including a properly worded qualification in the certificate.

CONCLUSION

Perhaps the most useful way of concluding this paper is to repeat and re-emphasize the theme which has been consistent throughout. Each lawyer engaged in the practice of real estate law must carefully assess his or her practice so as to insure our communications with our clients are up to the standard expected of a reasonably com
petent solicitor. only by encompassing proper and complete reporting practices in your "routine" can you minimize the likelihood of a successful negligence action.

To this end, the certificate of title or final reporting letter, and the qualifications contained therein, should be a review or summary of all that has transpired before.

FOOTNOTES

1. John Swan and Barry J. Reiter, "Opinion Submitted to the Real Property Section, The Canadian Bar Association: Solicitors' *Responsibilities in* Real Estate Transactions.", contained in (1979), 8 RPR 155
2. John Swan, "Annotation in Kienzle v. Stringer" (1981) 14 RPR 29 (Ont. H.C.)
3. Allan M. Linden, Canadian Negligence Law, (Butterworths: Toronto, 1972) pp. 39-40
4. Banks et al v. Reid (1975), 6 OR (2d) 404 at p. 411 (Ont. H.C.)
5. (1987), 42 RPR 161 (SCC)
6. (1980), 42 NSR (2d) 60 at p. 65
7. (1986), 73 NSR (2d) 12 at p. 19
8. Supra, note 4 at p. 411 ,
9. Supr.A, note 1
10. (1985), 57 NBR (2d) 141 (NBQB)
11. Supra, note 1 p. 164
12. Ibid, p. 166
13. - Ravina et al v. Kaniqsberq et al (1986) unreported, S.H. No. 50608 (NSSC, T.D.)
14. See: Jetaway Investments Ltd. v. Salah et al (1986), 73 NSR (2d) 12
15. Supra, note 1, p. 167
16. (1981), 32 Nfld & P.E.I.R. 15 (N.D.C.)s **apps** dismissed (1983), 40 Nfld & P.E.I.R. 169 (NCA)
17. Supra, note 10
18. (1980), 9 RPR 1 (Ont. H.C.)
19. (1983), 31 R.P.R. 126 (Ont. Co.Ct.)
20. [1940] 4 DLR 249 (NBSC, A.D.)

21. Supra, note 6
22. (1971), 2 NSR (2d) 743 (NSSC, A.D.)
23. (1986), 73 NSR (2d) 123 (NSSC, T.D.)
24. Supra, note 16
25. (1975), 10 O.R. (2d) 605 (Ont. H.C.)
26. Plan_ning Acct, S.N.S., 1983, Chapter 9, as amended
27. Nova Scotia Law News, Vol. 2, no. 3; (Vol. 11, No. 3)