The Continuing Legal Education Society of Nova Scotia

The Proposed Land Registration Act
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The Proposed *Land Registration Act*

The goal of the proposed *Land Registration Act* is to take the information that has been painfully garnered over the last twenty or more years in property mapping, graft it on to a notice-based registry system such as we have now, and create a better property registration system that eliminates many of the problems of the existing system.

The elements of the proposal are:

1) a parcel-based registry. Present technology permits us to establish, in effect, a mini-register for each identified parcel. If a parcel is not in the LIMS system now, it can be added. The mapping is admittedly imperfect, but there is enough existing information, finally, to let us start. The boundaries will not be guaranteed; our information is not that good.

2) a block or curtain when property enters the system, eliminating the need for repetitive searches of the back title. When a parcel enters the system, title is guaranteed to the system by the responsible solicitor. Afterwards, the system is responsible for the accuracy of the records, and lawyers or property owners will be responsible for interpreting the documents incorporated in the parcel register.

The system will accept imperfect titles, so long as the imperfections are described. The draft lists certain title imperfections that are deemed to be acceptable risks, such as old mortgages and dower interests. A process is included to permit certain imperfections to be accepted as additional low-risk problems for which a solicitor is not responsible. If the outstanding interest turns out to be real, the one case in 100 we all have to keep in mind, bringing the parcel into the system will eliminate it. If this happens, compensation will be paid to the owner of the interest.

It is as important to know what the proposed legislation to establish a new titles system is not as to know what is being proposed. It is not a full-fledged land titles system based on the Torrens model. Achievement of that goal is likely near to impossible within a reasonable time frame. The problems with the present registration system are such that we cannot wait that long. Nor do we need to. A parcel-based system with recertification every time title changes will do nearly as well.

The statute does not guarantee boundaries, nor does it eliminate possessory title. So long as much of the province has not been surveyed and people are unclear as to the extent of their holdings, neither concept is feasible.

While the draft legislation does not specifically require the establishment of an electronic registry system, it is designed to permit the incorporation of modern technology. Administrative matters are essentially left to regulations to increase this flexibility. The proposed system was, of course, designed with electronic registration in mind, and an electronic registry is contemplated.

The proposed system provides for *registration* of basic titles, generally the fee simple. Ownership of this interest is the basic guarantee provided by the proposal. What is guaranteed is

clear title to the fee simple, *subject to*, first, interests outstanding when the parcel was entered into the system, and, second, interests *recorded* after the parcel has entered the system.

An interest less than the fee simple, a mortgage, for example, will be recorded in the parcel register for the property. Any other interest in that property will be recorded in the same register. To search a title, find the property register and determine the effect of the various documents in it. Check for judgments and you are done at the registry. At some point, this can be done from your desk.

Overriding interests are those the proposed registry system does not guarantee against. *Most statutory liens will have to be recorded to affect the property.* This is another major change. Some, such as municipal taxes, continue. There are also other interests that will be outstanding, such as utility interests, short-term leases, easements or rights of way in use, rights acquired by adverse possession and the like. Liens under the *Environment Act*, *Labour Standards Code* and *Workers' Compensation Act*, among others, will have to be recorded to be enforceable against land in the system.

To get a property into the system requires an application, a solicitor's title opinion based upon an abstract, the abstract, affidavit of verification and proof subdivision requirements have been met or do not apply. Entry should be a simple process, not much more complex than recording a document is today.

A parcel must migrate to the land registration system if:

- it is sold for value
- it is mortgaged or charged
- it is subdivided into three or more pieces
- title is quieted or clarified. [Section 45]

Voluntary conversions are possible and will be encouraged. There are some advantages to migration, such as simpler conveyancing, protection from some unrecorded liens and a secure base title. Voluntary migration is likely to be especially valuable for lands about to be included in a significant subdivision.

At this time we do not know what the new fees are likely to be. They will have to be sufficient to recover the cost of the system and deliver about the same amount of additional revenue as is obtained from the system now. The existing registry system will have to be maintained into the indefinite future, although the new system can impose some conversions. It is probable that some kind of a fee break to encourage voluntary conversion will be established.

Terms for recording judgments are stricter. A judgment must include information that tends to distinguish the debtor from all other persons of the same or similar names. A judgment may not be recorded against a specific parcel unless the registrar can be satisfied that the judgment debtor and at least one of the recorded owners are one and the same. Further, a judgment does not affect ownership where there is a material difference in names between the judgment debtor and the registered owner. A material difference is defined. Finally, a process for an owner to require the

removal of a judgment that cannot or will not be proved in court is included. Equally important, it is proposed that judgments be effective for five years with a simple process to renew for a further five years, and no more.

These are the highlights.

To look more closely at some of the major provisions of the draft, refer first to Section 18, which might be described as the heart of the proposed statute. "The registered owner of a registered interest owns the interest . . . " Registered owner is the person shown in the register as the owner, and the registered interest is what that person is registered as owning, subject to boundaries and any flaws shown on the entry or recorded subsequently. This is the title guarantee.

The other critical Section is 11, which requires the establishment of a parcel register for every parcel brought into the system.

To get into the system essentially requires a solicitor's certification of the title, under Section 35. This certification will be relied on by the registrar to confer the absolute title guaranteed by Section 18. Of course, if the solicitor is wrong, the solicitor is liable to the system for ten years. After that, the system assumes liability since the chance of a problem erupting is significantly reduced. On the other hand, the solicitor is effectively certifying to the world at large, rather than to one client.

The document package required to enter the system includes an opinion of title (certificate), an abstract, and an affidavit of verification that essentially says the certification is based on the abstract, plus some indication whether the property requires subdivision approval or not.

The Act, in Section 38, defines problems considered to be of negligible potential liability for which the system accepts the risk. These include old mortgages (over 40 years), unreleased dower interests (no more questions about whether Harold was married when he conveyed in 1945), and escheats from persons other than the immediate predecessor in title. This last item covers corporate escheats and removes the need to ascertain whether or not every company in the chain of title had at least not been struck off when it conveyed, an issue that in practical terms was impossible to verify.

Section 37 provides an adjudication mechanism whereby the Registrar (through an adjudicator) decides if there is some other risk that the system, rather than the solicitor, ought to accept. Essentially this will be a matter of evaluating the risk associated with some outstanding interests that the "owner" of a parcel wants to exclude. The effect of a positive decision (such as, ignore the potential for there to have been additional heirs in 1922 when the heirs deed is unclear as to whether or not all of the heirs signed) is to deprive those people of whatever their interests might be in the affected parcel, and to change it to a right to compensation from the system.

Once the parcel is registered in the system, further changes to the state of title are recorded in the parcel register. A mortgage or similar charge short of the fee simple interest is recorded. The

system does not judge what the document provides, or require any specific format. There is some provision for simplifying documents, particularly for defining standard charge terms, in Sections 95 and 96. It is the responsibility of a solicitor to explain to a client the effect of any recorded documents. If the fee simple is transferred, then the registration is revised to show the new owner. There are a number of other circumstances in which a registration may be revised, such as a change of name (21), subdivision (requiring new parcel registers) (22), probated wills (the Act does not permit a transfer of a registration as a result of a will unless there is a certificate from a solicitor verifying what was conveyed to whom)(23), intestacies (same certificate) (24), death of a joint tenant (25), expropriations (27), bankruptcies (28), tax sales (29) and court orders and the like (30). The provisions of the Act may finally make tax sales a clean title, at least for a subsequent purchaser, since once the registration has been revised to show the purchaser as the new owner, that person is the owner (18).

The draft also contains provisions to correct registrations, while maintaining priority for innocent purchasers for value without actual notice. Constructive notice is abolished.

If someone suffers a loss as a result of an error in the system, compensation determined along the lines of expropriation compensation becomes payable. If there is competition for a parcel, priority is given to the person in possession. The other "owner" may then be entitled to compensation.

Interests that are less than the fee simple are recorded. The system makes no effort to determine what they mean so long as they legitimately affect title to land. It is probable that the present "record anything" approach will continue if it meets the statutory form (certificate of execution etc.). There is, however, direct liability from the person recording to the person affected if something is recorded that ought not to have been, or is not released when it ought to have been (64).

There are some special rules for various recorded interests. A foreclosure order must be recorded. A floating charge debenture does not affect land until a notice of crystallization is filed. A security interest must be released when paid out. There are particular rules for a lis pendens.

Recorded interests will be removed from the visible register (archived) when released, when the term for which they were recorded expires, or the recording is cancelled. Some interests, such as a lis pendens (5) and a judgment (5+5), have statutory time limitations built in.

Judgments may be recorded in either, or both, of the judgment register and the parcel register. The only real reason for a judgment register is to continue the present system where a judgment applies to after-acquired property. The judgment should include some identifying feature to distinguish the debtor from others of similar name (in Ontario, for example, birth dates are used), and if the name is materially different the judgment does not affect the land. Accordingly, recording a judgment in the parcel register is a more effective way to secure the charge, but you had better be right: 72.

A separate register is suggested for powers of attorney, simply because some financial institutions use them as the basis for hundreds of transactions. The power of attorney may be recorded in the attorney register or the parcel register (if it is restricted to one property expressly or in practice), or it may be included with the document when it is intended to authorize only that transaction. If it is conditional, the draft provides that it is presumed the conditions are met.

Some interests will continue to exist outside the proposed registry. These overriding interests are similar to those contained in the *Marketable Titles Act.* The most significant is the continuation of the right to obtain title or an interest by adverse possession or prescription. These are unusual in a land titles system, but consistent with the system's refusal to guarantee boundaries, the history of land in Nova Scotia and the fact that most of our land has never been surveyed. Other overriding interest include municipal liens (except for electricity), statutory Crown reservations (highways and water), utility interests (water, sewer, electric), and easements or rights of way in use. Provincial Crown rights to establish unregistered liens have been eliminated.

The execution of documents must be proved in much the same manner as at present. Some form of certificate of execution is required. Seals are dispensed with. Regulations may allow for electronic signatures, and the draft allows for electronic registration.

Generally land registration or titles systems work well. The incidence of claims is small. Accordingly, the proposal does not provide for the establishment of a separate claims fund. Errors will be compensated from general revenues.

The regulation powers have been drafted so as to ensure all the substantive law is contained in the statute as passed by the Legislature, but administrative matters will be dealt with and prescribed by Cabinet or the Minister to give the system the necessary flexibility to respond to changes in the technology available to operate it.

A significant number of other statutes are affected by the proposals. Some are simple changes in references to the registries of deeds. Others are more far-reaching.

Changes to the *Condominium Act, Environment Act, Labour Standards Code, Revenue Act* and *Workers' Compensation Act* are designed to eliminate unregistered liens while at the same time providing a mechanism to record them. New condominiums will have to be established on registered land. Possessory title to "water" that is not under water is permitted.

Major changes are made to the *Statute of Limitations*. The standard twenty-year limitation period is retained. However, absence from the Province would cease to be a disability, the period after a disability expires to commence action is reduced to five years, and the overall limitation period is dropped to twenty-five years. No change is made to reduce the forty-year period in the *Marketable Titles Act*. The limitation period against the Crown would be reduced to forty years.

The *Marketable Titles Act* is amended to make it clear that old interests do get extinguished, and to conform to the recommended limitation periods.

In the subdivision provisions of the *Municipal Government Act*, a new section will require the consent of any person with an interest in the land to a subdivision. While this will likely make it more complex to get approval for a subdivision, it should reduce the problems mortgagees have when a foreclosure of an altered parcel is required. The proposal also includes a provision for cancelling subdivisions where the appropriate consents have not been obtained, always reserving the rights of those who have acquired property before the cancellation.

As to coming into effect, it is anticipated that some provisions may be useful everywhere as soon as the Act is passed, but that the entire system will probably be field tested for a time in one county before being applied across the Province. Supposing the Act is passed next fall, the first county would likely be some time in 2001 and the entire province some time the year after. Changeovers would likely be around the end of the year when activity is as low as it gets. There are no firm plans. We need some confirmation that the proposal is acceptable first.

This draft is being published for consideration and comment. Assuming a general level of acceptability, and a commitment from the government, the statute, after further revision to incorporate comments, may go to the House of Assembly in the fall. At this point the government has not adopted the proposal.

It was our intention to develop a better land titles system for Nova Scotia. We think that we have done so, doing relatively little to the existing state of property law, except where it was clearly deficient. We look forward to improving the draft with your assistance, and, before too long, a better property titles system.