

THE REGISTRY 2000 INITIATIVE, "R2000"

The Discussion Draft *Land Registration Act*: The origin of the Act

We thank Charles Darwin for the title of this paper. What follows is a brief background of the Business Area Analysis Recommendations and the Report On Land Titles Legislation which preceded the Discussion Draft *Land Registration Act*, "LRA". The author was involved in the Business Area Analysis Subcommittee of R2000, "BAA", and prepared the Report On Land Titles Legislation. The following comments are those of the author. They do not necessarily reflect the views of the Nova Scotia Government or of The Nova Scotia Barristers' Society.

The Business Area Analysis

In the Fall of 1997 R2000 commissioned BAA, a subcommittee of experienced volunteer stakeholders, to review existing Nova Scotia property conveyancing and refinancing practices. By December 1997, BAA made forty-one recommendations to R2000 about content for the new Act based on its review. These included many legislative recommendations providing a vision of what the new *Land Registration Act* should contain. The BAA recommendations therefore represent the considered opinions of representatives of the conveyancing community as a whole, not of any particular interest group such as lawyers or Government. Substantially all the BAA recommendations capable of being incorporated in LRA have been considered and are dealt with in the Discussion Draft Act. Some BAA recommendations fell outside the purview of LRA. For example, the recommendation that Nova Scotia companies be able to borrow and mortgage their properties without passing a special shareholders' borrowing resolution was realized with the subsequent repeal of s.102(2) of the *Companies Act* in 1998.

It is important to note that over 70% of the BAA participants were non-lawyers. BAA's eleven members included a banker, the Executive Directors of both the Realtors and Surveyors organizations, a tax office person, a statutory lien register keeper, two registrars of deeds (Halifax and Shelburne), a title searcher, and three lawyers (two from the city and one rural practitioner). With the help of a facilitator and a recorder, BAA used the "Line Of Vision",

"LOV", procedure to document and analyse property conveyancing and refinancing processes in detail. LOV analysis is a method of analysing and documenting a process from the viewpoint of each participant. For example, the BAA Conveyancing LOV charts have lines for each principal stakeholder *i.e.* a line for each of the buyer, the seller, their respective realtors and solicitors, the lender, the tax office, the registry office, the surveyor and so on¹.

Two LOV Models were produced for each process. These were the "AS IS" Model and the "TO BE" Model. The "AS IS" Model describes the existing process in detail. The "TO BE" Model describes the ideal process after inefficiencies in the existing processes were identified and corrected. The BAA recommendations simply identify corrections needed to change the "AS IS" process to the "TO BE" process. They correct flawed processes but leave the rest of the processes intact following the common wisdom that "If it ain't broke, don't fix it".

The Legislative Review

After considering the BAA recommendations R2000 commissioned this author to review land titles legislation and "best practices" in other jurisdictions then recommend content for the proposed land titles legislation.

We started our review by modelling the types of reports LRA would have to produce for the conveyancing community. Next we considered the remaining BAA requirements. We then looked about for the legislative provisions and practices needed to meet the BAA specifications. As part of that exercise we made a "cut and paste" mock-up of a land titles statute using provisions from several existing Acts and the Model Act to get a feel for what LRA might contain. Finally we drafted our Report. Appendix 2.a.ii to our final Report, annexed as Schedule "B", contains a side-by-side summary of the BAA recommendations and

¹ A copy of the Conveyancing LOV "AS IS" Model is annexed as Schedule "A". Note that the Buyer and Seller, the members of the public whom conveyancing community serves, are the top two lines.

the solutions suggested in our Report.

In modelling the reports the LRA system should produce, we paid particular attention to the format of the Australia Business Reports which provide subscribers with single point internet access to information about either specific parcels or about land holdings of named persons². The annexed sample ABR Property Equity Report exemplifies the type of information required by the business and lending communities from LRA. We were also mindful of the reports now available in Nova Scotia through the internet from the Nova Scotia Property Records Database and the Registrar of Joint Stock Companies as examples of what existing systems can produce.

Land Titles Legislation

In broad terms our legislative review involved two key areas. The first was to outline a system for the ongoing maintenance of land title information once parcels were brought under LRA. Next was to outline the processes for the initial registration of parcels under LRA.

The requirements for a single point of access for land titles inquiries, the ability to determine the current state of title of a parcel without a 40 year name based search, and the ability to view all currently outstanding recorded interests in a parcel virtually instantaneously mandated an electronic parcel-based land registration system and a *Land Registration Act* to implement and maintain land titles data. Certification of the fee simple was essential to eliminate repetitive historical searches. Automatic archiving of spent, but unreleased, mortgages and judgments was needed to eliminate the problems now caused by these instruments. Statutory liens had to be revealed by LRA to provide timely, one-site, searches for these encumbrances. The problems caused by "automatic attachment" of judgments to lands of persons other than the judgment debtor was essential. Finally, LRA had to be consistent with the electronic land data infrastructure and goals of the Department of Housing and Municipal Affairs.

² www.abr.com.au/cgi-bin/abr/peqsampl.pl - A sample ABR-Property Equity Report is annexed as Schedule "C".

The basic principles of land titles systems are well established. There were many mature land titles systems in Canada and elsewhere to consider as models. We paid particular attention to the New Brunswick and Ontario land titles legislation and the Model Act³. Both New Brunswick and Ontario are converting their registry office systems to land titles systems so their Acts are especially relevant to our situation. As well, we were specifically asked to consider New Brunswick's legislation because it is very similar to Nova Scotia's 1978 *Land Titles Act*. The Model Act is a draft land recording and registration statute recommended by the Joint Land Titles Committee. That committee comprised experts from Alberta, British Columbia, Manitoba, the Northwest Territories, Ontario, Saskatchewan, the Yukon and the Maritimes. Their 1990 and 1993 reports explain, in detail, how the Model Act would work, the specific problems addressed by each of its sections and the reasons for each section. We relied heavily on the Model Act in making our recommendations and note that the Legislative Review Committee has incorporated many of the Model Act's provisions in the Discussion Draft Act. We also drew heavily from the practical advice given to us by officials in New Brunswick, Ontario and Saskatchewan during several discussions throughout the review process.

Initial Registration

When considering initial registration of parcels under LRA in Nova Scotia we drew on the experience of New Brunswick and Ontario in their ongoing conversion projects. The key advice from New Brunswick was "keep it simple". This led to our recommendation to certify fee simple interests only. The key advice from Ontario was to enable considerable administrative discretion in accepting, and guaranteeing subsequent owners against, certain low

³ The Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces & Territories of Canada*, 1990, and the *Final Revisions Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for Provinces and Territories of Canada*, March, 1993. Charles Macintosh, Q.C. of Nova Scotia represented The Council of Maritime Premiers on Joint Land Titles Committee.

risk title defects. Ontario in particular began its conversion project with stringent threshold title standards. Following actuarial analysis of its experience, especially the lack of claims under certain types of title defects, Ontario has relaxed its threshold acceptance title standards considerably. Its system now accepts, and effectively insures over, many low risk title defects to facilitate conversion. Our recommendation that LRA enable administrative discretion in accepting the low risk of title problems such as corporate escheats came from Ontario's experience.

We found a paper by Barry Goldner titled *The Torrens System of Title Registration: A New Proposal for Effective Implementation*⁴ most helpful. He describes and comments on the interrelationships of marketable titles legislation, title insurance, limitations legislation, registry office systems and land title registration systems in converting a Registry Office regime to a Land Titles regime.

BAA recommended reducing limitation periods for real property interests to reduce the risk and administrative burden of converting properties to the Land Titles System. The Nova Scotia Barristers' Society Professional Standards Committee had previously made the same recommendation. These recommendations were based on the lower limitation periods in the majority of common law Canadian jurisdictions. Reduced limitations periods and the removal from the *Limitations of Actions Act* of absence from the province as a disability⁵ are incorporated in the Discussion Draft Act. While lower than existing Nova Scotia periods those in the Discussion Draft Act remain longer than those in most other Canadian jurisdictions. The apparent lack of problems from lower limitation periods in other provinces suggests that there should be no material negative impact on the public by the proposed reduction here. The Discussion Draft Act⁶ also corrects the related and lingering problems caused by judicial

⁴ UCLA Law Review, Volume 29, No. 3, February 1982. A copy is annexed as Schedule "D".

⁵ See the judicial criticism of this provision in *R.B. Ferguson Construction Ltd. v. Ormiston* (1989), 91 N.S.R. (2d) 266 (NSCA).

⁶ section 107(1), amendments to the *Marketable Titles Act*, s.4(1).

recognition of a "60 year common law title search period"⁷.

General

BAA recommended that LRA address the problem of "automatic attachment" of judgments to parcels owned by person with names similar to those of judgment debtors. This is a major problem in each jurisdiction we canvassed. There has been a variety of legislative responses to this problem in other jurisdictions and, clearly, there is no one correct solution to the problem.

The Discussion Draft Act balances the interests of property owners and judgment holders by permitting PID-specific judgment recordings or, subject to name and identification requirements, a name-based recording of judgments.

BAA recommended the automatic removal of time expired interests from the visible parcel record to the archived records. The Discussion Draft Act implements this recommendation.

BAA considered the existing freedom of documentation under the *Registry Act* to be a positive feature of the present system. Continuing this freedom under LRA provides flexibility in conveyancing documentation and eliminates the need for financial institutions and lawyers to replace their existing precedents with new forms. Freedom of documentation means that persons using LRA will continue to be responsible for the content and effect of their documentation; persons examining title documents will continue to be responsible for their own interpretation of those documents. There is no material difference between the systems in this regard.

The BAA recommendation that lawyers be enabled to enter changes in ownership of parcels in the Register under LRA came from New Brunswick, Ontario and a careful review of choices. First, officials of the Department of Housing and Municipal Affairs reported significant

⁷ *Gunning v. Trans Canada Credit Corp.* (1998), 169 N.S.R. (2d) 184; *Landry v. O'Blenis* (1995), 146 N.S.R. (2d) 76.

problems resulting from permitting untrained members of the public to enter data in the PPSA system and wanted to avoid a repeat of those difficulties. Second, lawyers are trained in the law, are accountable to the public through professional regulation, have liability insurance, are already in place, and already perform that function now. Enabling lawyers to revise registrations (change the names of registered owners in parcel registers) continues the present process with little substantive change and will save Government the costs and potential liability of training lay registry office staff in the intricacies of interpreting conveyancing documents to determine changes in ownership. This approach appears to have been taken in both New Brunswick and Ontario.

Summary

The Discussion Draft Act has considered, and implements substantially all of, the legislative recommendations for an improved land titles registration system in Nova Scotia specified by BAA. While the recent legislative drafting process has been substantially the domain of lawyers and Government Officials, the heart and soul of the Discussion Draft Act, which they have so ably drafted, comes from the whole conveyance community through BAA.

I hope these notes help put the origins of the Discussion Draft Act in context.

Thank you,

Garth C. Gordon, Q.C.