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TITLE SEARCHING BASICS
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The bulk of this material was presented on Wednesday, April 12, 2006 during a joint meeting between the CBA Young Lawyers and Real Property Sections (Nova Scotia).

We must understand the basic principles of title searching: why we search title, how we search title and what we must deliver—certainty of ownership.

Why Search Title?

We must not forget the reason we search title. It was clearly stated by Charles W. MacIntosh in his article entitled "How Far Back do You Have to Search?" 1987, N.S.L.N. 14:37, which provides as follows:

> A lawyer searching a title must not only check transactions involving the present owner of a property to identify outstanding encumbrances, but must also take his inquiries back in time a number of years to ensure that the ostensible owner can deliver good title.
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> This measure is required for several reasons.
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> First, the lawyer does not want to disappoint his client, who expects to get a good title and may become annoyed if the quality of ownership is less than his expectations.
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> Secondly, the lawyer may be sued personally if the title is flawed. It is in his own best interests to ensure there will be no trouble.
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> Thirdly, news that a title is bad and that the lawyer has not alerted his client to this fact can spread quickly throughout the community, and the reputation of the lawyer involved may be damaged as well as that of the legal profession generally.
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> If, however, a lawyer can point to generally accepted professional standards and show that he has followed them, he may escape both liability and blame. In fact, if the standards are adhered to, the problems with the title may be uncovered and corrective action taken before closing.

The *Professional Standards Real Property Transactions in Nova Scotia*, guideline/online resource, approved by Bar Council on November 22, 2002, ought to act as a guide to our property practice. It is located on the Lawyers Insurance Association of Nova Scotia website. This is probably one of the most important documents for property practitioners in the Province.

Reference is also made to our *Legal Ethics & Professional Conduct Handbook* which contains the rules for ethical and professional conduct deemed appropriate for lawyers in Nova Scotia.

Old vs. New – Where to start your search

MacIntosh's article, *supra*, came to the conclusion: "that a 60 year search is not really a practical standard in this century. Many jurisdictions in the United States, as well as Ontario and Prince Edward Island, have passed acts to deal with this problem. This is known as marketable title legislation." Fortunately, our *Marketable Titles Act* received Royal Assent January 11, 1996.

Without diving into the legislation, articles written by Catherine S., Walker, "Bill 53 – *Marketable Titles Act* : A New Beginning" 1996, N.S.L.N. 22:37 and Anthony L. Chapman, "Bill 53 : *Marketable Titles Act*" 1996, N.S.L.N. 22:52 explain how the statute operates. Walker interprets Section 4(2) of the *Marketable Titles Act*:

> "A chain of title commences with the registered instrument, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the 40 years immediately preceding the date the marketability is to be determined."
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> This defines the starting point for the search. It must be "a registered instrument other than a will". This broadens the familiar common law and standard practice of a requisite warranty deed root of title. The required instrument must either "convey" or "purport to convey" the interest in land. In determining whether a registered instrument will qualify as a root, a lawyer must be satisfied that the grantor has, or purports to have, the interest in land that is being conveyed. For example, a quit claim deed that "releases and quits claim to the Grantee all the interest of the Grantor in the lands described in Schedule "A" attached hereto", is operative to convey the fee simple only if the grantor owns the fee simple. The quit claim may not on its face reveal the interest that the grantor has in the land. However, a quit claim deed wherein the grantor "grants and conveys" the lands, absent any specific limitation, may satisfy the requirement set out for a root in s. 4(2) as it "conveys or purports to convey" the entire interest in land. Whatever the registered instrument relied on as the root, a lawyer must be satisfied as to the nature of the interest "purportedly" conveyed for purposes of the requirements of s. 4(2).
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> Pursuant to this section, a deed dated 40 years ago even if it is not registered until 1980 can operate as a valid root from its date. This supports the principle set out in Dooks v. Rhodes (1982), 52 N.S.R. (2d) 650. An unregistered deed, until it is registered, cannot operate as the commencement point for the chain of title under this section which requires a "registered instrument".

Anthony L. Chapman tracks this reasoning and elaborates on this in his article:

> Query whether a second mortgage could constitute a good root of title, since it would only convey the equity of redemption and not the legal fee simple estate in

> the lands. To the extent that it is clear from the instrument that it is a second mortgage, I would suggest that one should take the title back to a first mortgage or a deed and commence the chain of title with this instrument.
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> Note that under subsection 4(2) a chain of title may not commence with a will, presumably because wills do not normally contain legal descriptions of lands conveyed and in fact may make no reference to any lands at all, as where lands pass under a "rest and residue" clause.
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> Note as well that a sheriffs deed would not likely qualify as a good root of title, since typically it would convey only the "estate, right, title, interest, claim, property, and demand" of the mortgagor in certain lands at the time of execution of the mortgage being foreclosed. Again, one would have to search behind the sheriff's deed in order to ascertain what interest in land is actually being conveyed. If, for example, a second mortgage is being foreclosed, the interest being conveyed is only the equity of redemption and not the legal fee simple estate.
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> **In summary, in all cases the exact wording of the instrument which is to commence a chain of title should be examined, so that the lawyer can analyse what interest it "conveys or purports to convey".** [emphasis added]

If I were to decipher Mr. Chapman's words they would be "a healthy dose of paranoia never hurt anyone Ben." These words were often heard by me when discussing noisy title issues with him.

Reference is made to Mr. Chapman's article, "Remember When? What Happened to 60 Years of Paper Title Being as Good as Gold", *2006 Relans Conference on Crown Interests and Due Diligence under the LRA* February 2, 2006, and Section 9 of the *Marketable Titles Act*. At page 2, he states:

> The *Marketable Titles Act* was generally viewed as shortening the minimum 60 year period required to establish marketable title at common law to a shorter minimum period of 40 years. However, Section 9 of the Act preserved Crown interests and provide that nothing in the *Marketable Titles Act* affected any interest of Her Majesty in any land.

It is imperative that Crown Grants be checked in all cases when searching title. Crown land is "guarded closely" by the Department of Natural Resources. Accordingly, even though a chain of title more than 40 years can be found, if the subject land is not from the subject of a Crown Grant or was later re-conveyed to the Crown at some time more than 40 years ago this represents a significant title issue. Mr. Chapman's article identifies arguments which may assist us in certifying title despite the lack of a grant. One must proceed with caution. I invite you to read his article and the other articles contained in the 2006 Relans conference binder.

For the LRA parcels, your title search will begin by examining the parcel register for the parcel you are searching. All documents affecting title should be examined, including plans and the

parcel description. Title can be brought forward in one of two ways. Firstly, by generating a new certified statement of registered and recorded interests or by searching forward (a grantor and grantee search) out of the registered owners. In both cases, the documents in progress must be searched and I normally search the plan indices as well. It is necessary to search by name for non-land registration documents in process for judgments and power of attorneys. When I talk about searching forward I mean searching the grantor/grantee index contained under the "query user options" section of Property Online.

How We Search Title

In Halifax County, real property indices start in the year 1749, when Halifax was incorporated by the Royal Charter. Each year has both a grantor and grantee index. The index books from 1749 to 1958 combine both the grantor index and the grantee index in the same physical book. Grantors are on the left hand side of the sheet. Grantees are on the right hand side of the sheet. Please be careful not to mix up the grantee and the grantor signs. From 1946 to the current year, grantor, grantee and 20 judgment indices are on the computer (work in progress).

As you know, the access registration index is also on the property online system. Registry offices were set up pursuant to the *Registry Act* by registry district. I have only searched title in three different registries and in all cases there are differences. Local inquiry is necessary to know what is different in each registry. Just like the old system, the *Land Registration Ac*t system has differences according to district and I would always suggest contacting local agents and the registry to find out “the way it is done here.”

The use of the grantor and grantee registration systems is established on the double entry bookkeeping system of accounting by debits and credits. Every entry on the grantor side has a corresponding entry on the grantee side. Every single document recorded since 1749 to the present was recorded in two index books, listing the documents by grantor and grantee in each of the two index books. The grantor index book is alphabetized by grantor. The grantee index book is alphabetized by grantee.

A purchaser or recipient of a property interest is always going to be the grantee. The owner or vendor giving away a property interest is always going to be the grantor. An individual shifts by starting out as a purchaser or grantee, and once the grant is made, that same individual becomes the grantor.

Our search process relies on these simple principles. To find a chain of title of ownership, going back in time, we search the name of the individual who currently owns the property in the grantee indices. We start with the current year grantee index and search each year back in time until we find the deed wherein the grantor conveyed to the current owner as grantee. We then search the grantor in that deed and year in the grantee index of that year and each year back in time until that person purchased the land as grantee from the earlier grantor. This process is why we say "do a grantee search!--go back in time!" Conversely, to do a grantor search – “come forward” from a fixed point in the past up to the present. This grantor search is a process of detailed note taking reflecting all grantor listings in the indices in order to prepare an abstract of the particulars of each document that affects or has affected title to the land concerned.

Full Search

The history of a piece of land starting with a deed (reference to the *Marketable Titles Act* of course) is the starting point. Often a full search of title is referred to as the back title, an abstract, or an abstract of back title. The term "abstract" can be confusing because a lawyer may ask you to do an abstract of one document which would only mean about seven lines of information or an abstract of the parcel which would mean a full search of title.

Try to think of a full search of title as having three distinct steps:

1. Find your chain of title – starting point. This is a process of searching the grantee indices back until you have a grantee receiving appropriate conveyance under the *Marketable Titles Act*.

2. Once you have your 40 year old starting point, then you search the grantor indices, taking detailed notes from both the grantor indices and abstracting the particulars of documents that affect or have affected title of the land you are searching. Your notes should specify where your search began and where your search ended. It is important to note the day, month, current year and document number for the real property. You should also search judgments and make notes of the last document number in your search.

3. Everyone who has owned land within 20 years must be searched for judgments. The current owner and the purchaser must be searched up until the present.

If you are searching a condominium unit, you must do a full search out of the Condominium Corporation up to the present. It is also helpful (and required) to search the grantor/grantee index out of the Condominium Corporation to ensure that the common elements have not been further encumbered beyond the declaration. This also allows you to pick up any amendments to the declaration, by-laws or other documents forming the Condominium Corporation.

Sub-search

Sometimes we update title and this is called a sub-search. This is normally done at the time of closing before the advance of funds on the closing of the transaction. An update allows you to determine whether there have been any transactions affecting title since the full search was completed. This is to be noted in your search results the same way you ended your full search by referencing day, month, current year and document number for the real property, and document number for the judgments.

It is important to search documents in process as well and any loose documents. Your documents in process can be searched online and the loose documents can be found at the front counter of the Land Registration Office. You should also put in your notes that you searched the loose documents to a certain document number to the current day, month, year and the time of the last document. You should also check loose judgments as well in the same manner.

Liens and Lis Pendens Searches

Under the new *Builders' Lien Act*, someone who supplied materials and/or labour for the improvement of real property has a right to claim an interest in the property up to the value of materials and/or labour supplied. Claims are initiated by recording a notice of claim within 60 days from the last day materials and/or labour were supplied.

A lien must be followed up by a *lis pendens* for a lien to remain a valid charge against the land. *Lis pendens* is a court action and therefore is assigned a court number. The lien claimant has 105 days from the last day materials and/or labour were supplied to record a *lis pendens* at the land registration office/registry of deeds. After 105 days, a lien not followed up by a *lis pendens* is no longer a valid charge against the land. Reference is also made to Practice Standard 3.18.

Condominium Searches

Under the *Condominium Act*, condominiums are be set up with an incorporating document called a Condominium Declaration with attached Condominium Plan. All condominium declarations and amendments, with by-laws are indexed in the general grantor/grantee indices, but the actual documents are put into condominium books.

The condominium plans are stored with the condominium books, at least in the Halifax registry. All deeds and mortgages etc. are recorded in the regular grantor/grantee document books and/or on optical disk and/or in the parcel register. Real property and judgment searches of the condominium unit should always search the name of the condominium corporation from the condominium declaration to the present to see what is on title to the common elements.

Expropriation

The Crown has the power to take back lands granted out and owned by individuals. Both the federal and provincial governments have the power to expropriate lands, and each government can assign by legislation or regulation a power to expropriate. The federal government can assign to various transportation entities certain rights of expropriation. The province can assign to the municipalities, utilities or other entities the power to expropriate. To search for expropriations one must check the card index for all owners in the chain of title and also check for streets, subdivisions and, for some small villages, the village's name.

Crown Grants

Crown Grants start in Halifax in 1749 and continue to the present. The Halifax Registry of Deeds does not have a comprehensive collection of Crown Grants, it starts in 1854 to the present, with books 1 to 13 on microfilm. The Crown Grant index is separate from the grantor/grantee indices. The Registry of Deeds also has the county laid out in grant sheets showing the approximate boundaries of Crown Grant. A comprehensive record of Crown Grants in Halifax and the additional 17 counties in Nova Scotia is at the Department of National Resources, Crown Records Office, 5th Floor, Founders Square, Hollis Street, Halifax.

Probate

I do not plan to recount the problems surrounding the manner in which title to land is transferred upon the death of a land owner and our inadequate statutory solutions. Basically, land can be owned individually or with others. If there is more than one person that owns the land, they can

hold as tenants in common or joint tenants. If land is held in joint tenancy then the death of one owner means that the land vests immediately in the other surviving tenants. This is called right of survivorship. It means that land does not pass through the deceased's estate or will.

If land is owned individually or as tenants in common, then title to land passes through the deceased's estate and must go through probate. The Probate Court registries are sometimes located at the Land Registration Office and other times are located in a separate office. Prior to 1992 in Halifax, certain wills were recorded at the Probate Registry but they never made it to the Land Registry. Often it will be necessary to check the probate records to see when a person died and who the heirs were when searching title. This will assist you in filling gaps in title. Some registries indexed heirs as grantees, but not the Halifax registry, so there can be difficulties establishing a root of title where an estate is involved.

Checklists and Abstracts

There are a number of checklists used by practitioners. Garth Gordon has allowed me to attach his checklist. It provide a solid outline for what information is required for searching title.

On the issue of abstracting, I attach a copy of practice standard 3.1 and refer you to C. Walker, Q.C. "Abstracts and the Land Registration System". This again is a most useful guide. A good abstract is the product of a successful title search.

What We Must Deliver—Certainty of Ownership

At the end of the day, we must be able to produce an opinion on title. Land is the basis for wealth and most of the time your title work forms part of your opinion to a secured party. Both lenders and our clients rely upon us to protect their investments and give them certainty.

References

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OTHER STATUTES

Assessment Act

Beaches Act

Beaches and Foreshores Act

Builders' Lien Act

Conservation Easements Act

Conveyancing Act

Crown Lands Act

Descent of Property Act (prior to Intestate Succession Act)

Expropriation Act

Intestate Succession Act

Land Holdings Disclosure Act

Land Registration Act

Land Titles Clarification Act

Matrimonial Property Act

Municipal Government Act

Partition Act

Probate Act

Quieting Titles Act

Real Property Act

Registry Act

Sale of Land Under Execution Act

Statute of Frauds

Vendors and Purchasers Act

Wills Act