LIANSWERS

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This newsletter includes information to help lawyers reduce the likelihood of being sued for malpractice. The material presented is not intended to establish, report, or create the standard of care for lawyers. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate legal research.

Lawyers' Insurance Association of Nova Scotia

LAP WELLNESS - PREPARING FOR YOUR RETIREMENT

ANNOUNCING A NEW E-LEARNING COURSE FROM OUR PROVIDER, HUMAN SOLUTIONS.

For most of us, retirement presents a new chapter in life – a time to shift gears and create new experiences. However, retirement presents some very real psychological and emotional challenges.

While financial planning is usually top-of-mind in the years preceding retirement, the non-financial aspects of retirement are equally important. For example:

- What will you do to stay physically active in your later years?
- How will you remain connected to friends and family?
- What impact will the transition away from full-time employment have on your day-to-day interactions with your spouse or partner?

With advance planning and discussion with a spouse, partner or friend, each of uscan make the transition to this new chapter both smooth and rewarding!

Preparing for Your Retirement is Human Solutions' most recent e-learning course addition. Employees with access to this component of our e-services offering can register for access to the course through the Member Services area of our website.

COURSE SCHEDULE

SESSION 1: THE RIGHT ATTITUDE
This session helps course participants create a definition of retirement that is positive, future-focused and motivating.

SESSION 2: FINDING NEW PURPOSE
This session asks course participants to "take stock of who you are and what you want for yourself in the next chapter of your life."

SESSION 3: STAYING ACTIVE
This session helps participants take steps towards staying active in retirement (mentally, physically and socially).

SESSION 4: FOR COUPLES
The final session helps participants anticipate and plan for ways in which retirement can impact their relationships with a spouse or partner. The course includes four printable workbooks with information and activities that help employees prepare plans for a smooth transition to retirement many years before the actual transition takes place.

Enrolment is available now!

TO LEARN ABOUT THIS COURSE OR OTHER COURSES WE OFFER, VISIT US ONLINE. SEE 'MEMBER SERVICES' AT WWW.HUMANSOLUTIONS.CA.

CLEAR CLIENT COMMUNICATION

CLEAR AND EFFECTIVE CLIENT COMMUNICATION IS THE KEY TO SATISFIED CLIENTS AND LEADS TO A SUCCESSFUL PRACTICE.

SO ASK YOURSELF – ARE YOU A CLEAR COMMUNICATOR?

Do you warn your clients of the risks of litigation? Do you explain both the risk of loss and the risk of a cost award? Do you explain legal concepts in plain language at a level appropriate to your client's individual background and circumstances? Do you avoid Latin terms? Do you encourage clients to ask you questions and give appropriate time to provide the answers? Do you provide written confirmation of instructions received or advice given so as to avoid miscommunication? Do you answer questions clearly, even if your advice is not what your client wants to hear?

When a case is lost or a deal goes bad, clients who have had clear communication with their counsel are less likely to blame them. While the result may still be unsatisfactory, these clients are more likely to have been aware of the possibility of a negative result and will better understand how and why the result was reached.

MEMBER FEEDBACK

We received an important note from a very astute member following July's issue, reminding us that LRA benefits and burdens were entered under names in the early days in western Nova Scotia as well.

As always, we welcome any comments, questions or suggestions for LIANSwers via **info@lians.ca**

DE FACTOS AND DE FICTION – CONSIDERATIONS FOR S. 268A CONSOLIDATIONS

SECTION 268A OF THE MUNICIPAL GOVERNMENT ACT ALLOWS, BUT DOES NOT REQUIRE, CERTAIN ABUTTING LOTS UNDER COMMON OWNERSHIP TO BE CONSOLIDATED INTO A SINGLE LOT WITHOUT AN APPROVED PLAN OF SUBDIVISION. OF COURSE, ONE CAN ALSO CONSOLIDATE USING THE "ORDINARY" APPROVED-PLAN PROCESS. HERE ARE SOME CONSIDERATIONS IN PROCEEDING UNDER S. 268A:

- As a threshold question, SHOULD the lots be consolidated, even if they otherwise qualify? They cannot be "unconsolidated" afterwards without subdivision approval, which may be expensive or even impossible. In the case of a lot under sale, the buyer should be consulted. Consider future subdivision implications – the ability to create future lots, how many may be so created, and the loss of grandfathering provisions as to lot size, zoning, and so on. Consider a default position that you should NOT consolidate, even if the effect is a second migration (there will often be parallel chains of title so the time and cost saved by a second or third migration may not be substantial, given the extra work and risk de factos entail).
- Both lots must be LR or non-LR; normally one consolidates and then migrates, but the reverse order can also occur.
- Both/all lots must be under common ownership since before April 15, 1987 (the MGA subdivision "grandfather" date) and continually since that time. It is the writer's view that different manners of tenure qualifies (e.g. one lot as joint tenants, the other as tenants in common), but different owners does not (e.g. husband on one title, both spouses on the other).
- If a lot or portion thereof is grounded on possessory title, when did title mature? Again, if it matured after April 15, 1987, the writer's view is that there was not "common ownership" prior to that date. The writer is aware of at least one situation in which the LRO – probably correctly – rejected "Lot 1A, being Lot 1 together with parcel A" without subdivision approval, where parcel A's title was possessory but matured after 1987. We also understand "parcel A" was rejected – in the writer's respectful view, incorrectly – as a separate parcel when its title arose by operation of law (possession) that matured after the "grandfather" date, when Parcel A's paper title was part of a larger, adjoining, second lot.
- The lots must be contiguous – not separated by active or abandoned roads or railbeds, or watercourses that separate the lots. They can be burdened, for example by rights of way, but not be separated by a fee simple. How good is your survey fabric? Remember that POL mapping is not conclusive, and your client's understanding may not be correct.
- In the case of a benefit to one parcel, consider the implications of expanding the scope of an easement (one might generally add a TQ to an LR consolidated parcel that "easement benefits only the eastern half of this lot," for example). The same goes for recorded interests – such as mortgages – that affect only part of the consolidated parcel.
- The lots must be capable of being described as a single lot. Cost is often the major factor in considering a de facto, and the savings can be reduced or eliminated if a new metes and bounds description is difficult. Remember the limits on your ability to create a new description without the aid of a surveyor. See the PDCA checklist and the NSBS-Land Surveyors' discussion paper.

  In cases of possible ambiguity, it may be helpful to add, "being and intended to be the single parcel created by consolidation of the two lots described in Book 123, Page 456 and Book 234, Page 567," or similar.

  All of the implications of migration (if that is what you are ultimately doing) apply with respect to extent and quality of title, MGA compliance (in this case, the single parcel would usually contain an MGA statement that it has been the subject of a de facto under s. 268A), POL matching by the client, Form 5 declarations, etc. In other words, 268A is an extra step in the title process, not a substitute for any other requirement.
- Statutory declaration(s) based on personal knowledge, evidencing common and continuous ownership must be recorded in the appropriate registry system prior to consolidation.
- In the case of a post-LR consolidation, a Form 45 will be required to add access and confirm/remove appurtenances.
- In the case of doubt, ask Pictou lawyer Ian MacLean. Most of this article is plagiarized from his checklist.

LIMITATION PERIODS

IF YOU ARE A LITIGATOR, IT MAY SEEM PRETTY TRITE TO SAY YOU NEED TO KNOW THE LIMITATION PERIOD APPLICABLE TO YOUR CLIENT'S CASE. BUT THE REALITY IS THAT EVERY YEAR, LIANS OPENS CLAIMS BECAUSE A LIMITATION PERIOD HAS BEEN MISSED.

With the advent of the national mobility rules, this is becoming an even larger issue. As a Nova Scotia litigator, your systems are probably set to the required Nova Scotia timelines for things like car accidents. But what do you do for your client who was involved in a car accident in a different province?

If you are representing a client whose accident occurred outside of Nova Scotia, you need to pay special attention to the rules. Limitations of Actions legislation is readily available online at the following sites:

- Nova Scotia
- New Brunswick
- Prince Edward Island (Statute of Limitations)
- Newfoundland and Labrador

Be sure to check carefully to make sure you are reviewing the applicable version of the legislation.

Also remember that if you are dealing with a claims adjuster, it is not his or her job to tell you the deadline for filing your action. You may find yourself negotiating payment of medical reports one day and being asked for a copy of your filed Statement of Claim the next.

You are responsible for knowing the applicable law. If you do not file your client's claim on time, you risk having a claim filed against you.

DIRECTORS OF NON-PROFIT ORGANIZATIONS AND THE *VOLUNTEER PROTECTION ACT* [1]

WHILE THE *VOLUNTEER PROTECTION ACT* PROVIDES SOME PROTECTION TO VOLUNTEERS OF A "NON-PROFIT ORGANIZATION", YOU SHOULD NOT RELY SOLELY ON THIS LEGISLATION TO PROTECT YOU IN YOUR CAPACITY AS A DIRECTOR OF A "NON-PROFIT ORGANIZATION".

You must fit within the definition of volunteer, as defined in s. 2(h) of the Act to receive protection under it. Volunteer is defined at s. 2 (h) of the Act as follows:

> "volunteer" means an individual performing services for a non-profit organization who does not receive in respect of those services
>
> **(i)** compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or
>
> **(ii)** money or any other thing of value in lieu of compensation in excess of five hundred dollars per year,
>
> and may include a director, officer, trustee or employee of the organization.

If, for instance, you receive money or any other thing of value, in lieu, in excess of five hundred dollars per year, or are compensated for performing services as noted above, you would not receive the protection of the Act.

As well, this Act does not override federal legislation relating to directors that imposes statutory liability on them. For instance, it does not override any liability directors may have for remittances of source deductions under the Income Tax Act – See s. 227.1 (1) & s. 242.

Therefore, it is important that you attend meetings and keep yourself well informed about the organization's activities and finances. Get monthly confirmation in writing, from the treasurer, that there has been compliance with the various taxing statutes that allow for a due diligence defence. See that this confirmation is included in all meeting minutes. Review minutes to ensure accuracy.

Always exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, recognizing that often a higher standard of care is expected of professionals such as lawyers and accountants.

[1] *Volunteer Protection Act* , S.N.S. 2002, c. 14

TECHNOLOGY TRENDS – IMPROVED 'UNDO' FOR SENT MESSAGES

A NEW AND VERY WELCOME FEATURE TO THOSE WHO HAVE SENT AN ACCIDENTAL EMAIL (UNTHINKABLE!) IN THE PAST: GMAIL'S "UNDO SEND".

Users of the Google-based email service now have the option to halt the transmission of a questionable message or message without attachments by 'holding' it in your outbox for up to 30 seconds.

Until its popularity is well established, Gmail users must enable this feature manually in its' 'Google Labs' section by following these basic steps:

ENABLE 'UNDO SEND':

- Log in to your Gmail account and go to Google Labs. To find "Labs", select the word "more" in the very top left corner of the Google home page, then select "even more" from the dropdown menu.
- "Labs" is found in the right-hand column next to the beaker filled with green liquid.

- Scroll down almost all the way to the bottom until you see "Undo Send". Click "Enable" to turn on this feature. In the bottom left corner of the screen, select the "Save Changes" box.
- Return to your Gmail page and select "Settings" in the top right corner. The green "Labs" beaker icon should be visible – click this icon and return to "Labs".
- Scroll down and select "Undo Send". The default will likely be set to '10 seconds' – simply change this to '30 seconds', then scroll down to select "Save Changes".
- To undo an email, the top of the email screen will now have the word "Undo" above "Your message has been sent". From now on, when you select "Undo" you will return to the email's draft format, where you'll have 30 seconds to edit or delete your message before it is sent.

SMARTPHONES – WHAT ARE YOU USING?

Our first LIANSwers "Reader Poll" asks:

What smartphone device do you use – Blackberry, iPhone, PalmPre, maybe a Droid? Maybe you still use a traditional mobile phone to stay connected? Or perhaps you're braving a mobile technology-free life? We'd like to know…

Send your answers to **info@lians.ca**. In November's issue we'll report the results, and provide information on the top applications for each device in both your personal and professional lives.

THE BRILL DECISION

A COMMENTARY BY CATHERINE S. WALKER QC

The decision handed down last week by the Court of Appeal in the *Nova Scotia (Attorney General) v. Brill* is a very thoughtful one. It reinforces, aptly and with great clarity, the importance of context, whether in a lawyer's assessment as to the sufficiency of title to a parcel of land in Nova Scotia, or in any judicial review of that assessment. It affirms that when we opine on the state of a title, we ought to be mindful that title to land is not absolute, but rather is relative to the rights of others who may have or assert a better claim. We are reminded too how critical our opinions are to our 'new' Land Registration system, and how careful we need to be in our work - a useful reminder no matter what the occasion. The *Brill* decision affirms that the fabric of our *Land Registration Act* consists of many threads, carefully woven over hundreds of years. It has, in the words of the decision,"shifted the paradigm" and "established a comprehensive system of land registration" incorporating complex historic principles of marketable title, common law and equity. Its rich history has both shaped our current system, and cemented its strength.

Justice Fichaud, in 66 pages, concisely summarizes the legal framework in which we do our work , and in so doing, has underscored its importance to the clients we serve - the public of Nova Scotia. I say concisely, as to write any decision opining on the state of the law in a subject area spanning many centuries is no small feat. The matter before the Court began in what some might describe as an inauspicious setting, namely an interlocutory application in a *Quieting Titles* matter seeking the Court's answer to the following question of law - "did the common law rule of 60 years paper title still persist, notwithstanding the *Marketable Titles Act* and if so, did it bind the Crown?". This seemed a fairly straightforward question at first blush. However, what flowed from the Court's answer to that question in the first instance, was anything but straightforward. By the time the Court of Appeal panel retired to deliberate after a full day of argument, there were 12 facta filed to assist them in doing so - 5 from the Department of Justice, 4 from Defence counsel, and 3 from the NSBS, as Intervenor. As can be seen, the question first asked was not a simple one after all, nor was the answer to it. One aspect of the answer however was made very clear - the *Land Registration Act* confirms that a lawyer's opinion of title may rest on common law principles of marketable title, 'while standardizing for both common law **and** the *Marketable Titles Act* the length of the triggering chain at 40 years plus a day'.

Justice Fichaud reviews the manner in which the common law evolved, the legislation that supplemented and influenced its evolution over time, and the interplay between them. Against this historical backdrop spanning centuries, what was the effect of the *Land Registration Act* for those titles determined to be marketable and that met the standards for title review, but could not boast a documented Crown grant as its root? Notwithstanding the 40 year rule established by the *Marketable Titles Act* and affirmed in the *Land Registration Act*, did every title need to have its origin in a documented Crown grant to withstand the light of day or more importantly perhaps, a challenge from the Crown? Exactly how far reaching was the provision in the *Marketable Titles Act* that excepted the Crown from its application? While it might not be readily apparent, principles emanating from writs of right, actions in trespass and ejectment, and Nullum tempus and Statute of *James* legislation, were not only relevant in their historic setting; they also explain and underpin in large measure the complexity and interaction of principles for a title review in Nova Scotia in 2010.

Justice Fichaud reviews the important role that possession has in land ownership, whether that possession be actual or constructive in nature, and discusses the circumstances in which a court may 'infer' a Crown grant in the absence of specific ascertainable verification. The issue of what will constitute sufficient of acts of possession to establish title is not amenable to a "snappy axiom" to use Justice Fichaud's words, and will

depend in large measure on the underlying circumstances. Careful assessment in each case is required - further emphasis on the importance of context when forming opinions of title. Real property lawyers and their clients are well served by this decision. Justice Fichaud describes the state of law through the centuries as the "sometimes paralytic uncertainty" of land titles in this province. His decision truly does bring us a giant step closer towards realizing the often stated objective in both the *Marketable Titles Act* and *Land Registration Act* of "resolving uncertainty" in land ownership in Nova Scotia - something the conveyancing bar has believed for some time has been long overdue.

I would urge all real property lawyers in Nova Scotia to read and carefully consider this decision in a quiet moment with a very good glass of red wine in hand - it is a landmark.

Please read the following full-text decision released September 9, 2010: **Nova Scotia (Attorney General) v. Brill (Nova Scotia Barristers' Society, Intervenor) 2010 NSCA 69.**

LIANSWERS "DID YOU KNOW?" CLARIFICATION

We wish to clarify the "Did You Know?" sidebar in the Issue 2/July 2010 LIANSwers. In the sidebar we advised that the mandatory and excess professional liability insurance policies are claims-made policies, meaning you must maintain current policies in order to have coverage at the time a claim is made. This is correct for excess insurance; it is not correct for your mandatory coverage.

For excess insurance, if you do not have a current policy at the time a claim is made, you will not have coverage (subject only to you having reported a potential claim out of caution during the policy period).

Under your mandatory policy, as long as you were a practising insured member at the date the alleged error or omission occurred, you would have coverage under the policy in effect at the time the claim is made, even if your practising status has changed (assuming there are no other issues that could affect coverage, such as late reporting or exclusions). The current mandatory policy does respond to claims made against non-practising, retired or deceased members, for example, as long as the member was insured at the time the alleged error was made.

Lawyers' Insurance Association of Nova Scotia

LIANS Solo and Small Firm Conference

November 29, 2010
9am to 4:30pm

ONLINE REGISTRATION IS AVAILABLE ON THE LIANS HOMEPAGE AT WWW.LIANS.CA

Early Bird Rate: $200+tax – after Oct. 30th: $250+tax

Discounts for 2 or more registrants from the same firm! Sessions will appeal to lawyers, office managers, paralegals, and legal assistants. Lawyers and staff from all sized firms are welcome.

Please be advised that the LIANS Risk and Practice Management Conference for Solo and Small Firms is scheduled to take place on **November 29, 2010, at the Westin Nova Scotian in Halifax.** The conference will offer sessions on Risk Management, Making IT Work for You, Law as Business, Marketing and Finances, as well as a vendor expo.

Confirmed speakers include Dan Pinnington, Director of practicePRO; David J. Bilinsky, Practice Management Consultant/Advisor for the LSBC; and Michael Regular, Director of Information Technology with Merrick Jamieson Sterns Washington & Mahody.