PROFESSIONAL STANDARDS

Real Property Transactions in Nova Scotia

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Part IV – Conveyancing Practice

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Note: Standard 5.2 and 5.3 combined on March 5, 2014 to form Standard 5.2.

REAL ESTATE STANDARDS

STANDARDS

- Family Law Standards
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Complete Real Estate standards (PDF package - current to April 9, 2018)

PREFACE

Never before have there been greater professional demands on the real estate lawyer. Lawyers are expected to have ever more efficient processes. There are constant demands for lawyers' time from all of the participants in a real estate transaction - clients, agents, lenders, surveyors and title insurers. We need time to review agreements, draft documents, review title abstracts, prepare opinions, deal with title objections, and supervise staff. Once the closing has been successfully completed, the demands on our time do not end - there are the reports to clients, lenders, and the fulfilment of undertakings to other lawyers. At the heart of all these demands, the real estate lawyer daily strives to achieve a balance between the business efficiencies sought to be achieved, and the fulfilment of professional obligations.

In 1994 the Standards Committee of the Nova Scotia Barristers' Society unveiled Practice Standards for real property transactions in Nova Scotia. Those Standards were declared to be a "living" document which would change with the changes in practice. The change to real estate practice with the implementation of the *Land Registration Act (LRA)* is one such

change. Yet in a way, the *LRA* is but an embodiment of the way in which real estate lawyers have served the public for over 250 years. Over time as land was conveyed, lawyers carefully reviewed the state of title and in so doing became the weavers of the historical fabric preserved in the Land Registration Office. It is that fabric that is to be enhanced in the new system. We have been the keepers of the old system and are afforded the privilege of having a unique role in the new one to ensure that the quality and integrity of information we have so long worked to improve, is preserved for the future.

One of the underlying tenets of professional responsibility in the land title system is the exercise of professional judgment. This is not a new responsibility, but it is one that bears a careful re-examination and review in light of the LRA. These Professional Standards provide guidance and clarification of the principal elements inherent in the exercise of professional judgment. They are not confined, as in the past, to being a reflection of existing practices, but also incorporate elements required for lawyers practising under the *Land Registration Act*. At the same time, the Standards are intended to be a practical tool to assist lawyers in the demands of their practices to achieve the balance sought. Access to common law authorities and academic and conference materials will be maintained so that there is always current information available to assist with interpretation and application.

These Standards could not have been developed without the concerted effort of many and the continued work of the Committee, whose members provide the benefit of their years of experience and their varied practices to support the development of the Standards.

As lawyers, we may be widely divergent in the ways in which we exercise professional judgment. However, it is the hope of the Committee that as we move forward, these Standards will be “live” enough to help us respond in a professional fashion to the demands on our practices in these changing times and to ensure that neither the quality of our practices nor our ethics will be compromised.

INTRODUCTION

PART I - GENERAL PRINCIPLES OF CERTIFYING TITLE

PART II - EXTENT OF TITLE AND ACCESS

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

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PRACTICE TOOLS

INTRODUCTION

The preface to the 1994 version of the Practice Standards for Real Property Transactions in Nova Scotia noted:

"The Committee understands that some of the standards will be modified or replaced and new standards developed as practice evolves. This document, will, and should undergo revision, addition and deletion. This is intended to be a living document."

NEW ROLES AND RESPONSIBILITIES

The *Land Registration Act* ("LRA") created a new relationship among the legal profession, the Nova Scotia Barristers' Society ("the Society"). as the profession's governing body, and the Government. Each player has its own role.

Lawyers are responsible for assisting their clients to migrate their properties to the land registration system. During the process of migration, the lawyer completes a final search of the historic title, gives an opinion on the quality of that title and certifies the nature of such title in the land parcel to both the client and the land registry system. These revised standards are intended to assist in clarifying the nature of the lawyer's work and support the vital role of the lawyer as professional advisor.

The Society is contractually bound to stand behind lawyers who are qualified to certify titles to the land registry system. The

Society is supporting real estate lawyers in their enhanced role under the LRA with the following:

1. The provision of insurance and the assumption of liability for negligent errors or omissions;
2. The development and maintenance of current professional standards;
3. The creation of an audit program to ensure compliance with lawyers' obligations under the LRA;
4. The *Legal Profession Act* and applicable regulations; and
5. Resources.

FORMAT OF STANDARDS

Each Standard is laid out in a similar format. The text of the Standard is drafted by the Committee and forwarded to Council for approval. Each year the Committee reviews the Standards that require revision based on new case law and legislative or regulatory change. Each Standard contains footnotes which are references to the case law and legislation supporting the Standard. The Committee amends these references from time to time as applicable, and the approval of the Council of the Society is not required.

The Committee also provides "practice notes," developed with a view to being more proactive within a changing area of law.

The Committee develops practice assistance guides, tools and checklists to support the day to day practice of the real estate practitioner. Although the checklists are the result of a careful consideration of each area of the law covered, these are guides only and are not intended to create or replace a standard. Each practitioner must use his or her own professional judgment when using such guides or checklists.

An attempt has been made to be comprehensive, but the checklists are not exhaustive, nor are they intended to impose mandatory guidelines for practice in any of the areas covered. In many cases, it will not be necessary to carry out all of the activities outlined in the checklists; in other cases, alternative procedures may be more appropriate. The checklists are intended primarily to assist in the organization of a matter and to suggest things that a lawyer should consider. A lawyer may find it useful to customize some of the checklists for use in his or her practice.

INTERPRETATION

The Standards provide guidance in the exercise of discretion by the use of the words: “must,” “should” and “may” in the text. These words are used to direct a lawyer’s conduct and are to be interpreted as follows:

- (a) “must” means that the lawyer is required to follow the Standard. There is a legal (common law, statutory, or regulatory) requirement relating to the Standard. When a Standard uses “must” to require a lawyer to “determine”, “consider” or “ensure” or carry out similar actions, the lawyer is called upon to exercise professional judgement in carrying out those actions;
- (b) “should” means that the lawyer is required to follow the Standard; however, if the lawyer determines, in the exercise of professional judgment, that compliance is not appropriate under the circumstances, that decision rests with the lawyer; and
- (c) “may” means that it is an acceptable standard for the lawyer to follow, subject to the lawyer determining that compliance is an appropriate exercise of professional judgment.

New to these written standards, but not new to practice, is the requirement for written evidence that an issue was identified, that advice was given to a client and what the client’s instructions are.

The advice is to be given prior to receiving instructions and some form of written notation of the process is to be produced. The documentation may be achieved by various means – memos, email messages, written notes in the file, or correspondence to the client. The documentation is to be in the lawyer’s file. The case authorities that support Standard 1.5 show the value of such documentation. The presence of a written record will ensure the availability of the best evidence of the lawyer’s advice and the client’s instructions.

Citations of statutory references in the Standards do not include a reference to amendments to the statute, except for amendments made by the LRA. Therefore, the statutes cited in the Standards are to be read as amended - that is to say, to include any amendments which may have been made. For

example, a reference in the Standards to a citation of the *Vital Statistics Act* includes all amendments to the Act, even though the amendments are not cited.

Lawyers are urged to obtain the latest updated consolidation of cited statutes and ensure that all amendments to a statute are included in the statutory review undertaken by the lawyer. It is particularly important for lawyers to check for the latest consolidations and amendments because a number of omnibus statutes, sometimes with names dissimilar to the names of amended statutes, have been enacted in recent years which amend a number of statutes referenced in the Standards.

CONCLUSION

The LRA introduced rules and relationships among the Government, the legal profession, and the Society, requiring the revision of standards for the real estate professional. Like their predecessors, they must be viewed as a work-in-progress to be amended and altered as necessary. They must be the subject of discussion among the profession as they are interpreted and applied.

Standards must also be seen as flexible and meant to apply to widely divergent situations. Through use and application they will mature, as will the practice that they support. They will enable and guide the exercise of professional judgment which is the foundation of the practice of real estate law.

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1. The background to the LRA and all details of the Registry 2000 Project have been reported on frequently to the profession since 1996. Relevant materials are available on the Registry 2000 website: http://www.gov.ns.ca/snsmr/property/registry/default.asp

2. Two types of new standards make this clear. Standard 1.1 - Legislative Review states a clear obligation for a lawyer to be familiar with legislation which will affect title and ownership. The new legislative regime created by the LRA made it obvious that this requirement be clearly stated. See also Standards 1.4 and 1.5. The LRA itself in Sections 73-75 has necessitated the development of standards to address Standard 3.2 - Possessory Title and prescriptive rights (Standard 3.3) which are new and are drafted in light of the specific statutory regime created to address these types of interests.

PART I - GENERAL PRINCIPLES OF CERTIFYING TITLE

Note: Standard 1.2 (Migration under the *Land Registration Act*) was repealed May 23, 2014

1.1 LEGISLATIVE REVIEW

1.3 OPINION OF TITLE AND CERTIFICATE OF LEGAL EFFECT

1.4 CONFLICT OF INTEREST

1.5 DOCUMENTATION OF ADVICE AND INSTRUCTION

1.6 REBUTTABLE PRESUMPTIONS

1.7 MATRIMONIAL PROPERTY ACT/VITAL STATISTICS ACT

LAWYERS' INSURANCE
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1.1 LEGISLATIVE REVIEW

PART I - GENERAL PRINCIPLES OF CERTIFYING TITLE

STANDARD

A lawyer should maintain familiarity with new and existing legislation affecting title or ownership rights and responsibilities. A lawyer should inquire as to the nature of a parcel and a client's proposed use of the parcel and then ensure the lawyer is familiar with any particular legislation affecting the use.

When a client decides to acquire a parcel subject to legislative restrictions, a lawyer must explain the restrictions to the client and confirm the client's instructions prior to closing. [1]

FOOTNOTES

1. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

- Nova Scotia Barristers' Society 2001 - *Practice Materials* (Carswell 2001) [CD-ROM] (available through Admissions and Professional Development), Real Estate Law, Section 1 - Conveyancing, Introduction
- Local restrictions: See, for example, *Aeronautics Act*, R.S.C. 1985, c. A-2, an *Act Respecting Rosebank Park*, S.N.S. 1915, c. 108
- *Land Registration Act*, S.N.S. 2001, c. 6, s. 37

1.3 OPINION OF TITLE AND CERTIFICATE OF LEGAL EFFECT

STANDARD

Non *LR* parcels not being migrated

A lawyer may give an opinion that a parcel or an interest in a parcel which has not been registered under the *Land Registration Act* is marketable[1] if, after examining the abstract of title, the lawyer is satisfied that title to the parcel is marketable in accordance with legislation, common law and equity.

A lawyer who provides an opinion on title must explain any qualifications to the opinion to the client and confirm that explanation and any instructions relating thereto[2].

Application for Registration on migration

A lawyer may give an opinion that a parcel or an interest in a parcel which has not been registered under the *Land Registration Act* is marketable[3] if, after examining the abstract of title, the lawyer is

satisfied that title to the parcel is marketable in accordance with legislation, common law and equity.

A lawyer who completes a final Application for Registration of a title under the *Land Registration Act* must first ensure that all obligations under the Act and its associated Regulations have been met.[4]

LR Parcels

A lawyer who provides an opinion on title respecting a parcel registered under the *Land Registration Act* must examine the parcel register, review the documents included in the parcel register, and conduct all necessary searches in order to determine the registered ownership and interests pertaining to the parcel.

A lawyer who provides an opinion on title respecting a parcel registered under the *Land Registration Act* must also be aware that there are Overriding Interests which may affect the parcel[5].

A lawyer who provides an opinion on title must explain any qualifications to the opinion to the client and confirm that explanation and any instructions relating thereto [6].

A lawyer who provides a Certificate of Legal Effect[7] to the Registrar General with respect to a parcel must examine:

a. the Parcel Register,
b. the enabling documents in the Parcel Register;
c. the Judgment Roll and
d. any document to accompany the Certificate of Legal Effect to ensure that the registration or recording will be effective to change the Parcel Register as required.

PRACTICE NOTES

The following is a general guide to conducting a review of title to an LR parcel

1. Confirm that the apparent “Parcel Access” is specified, appears accurate and, if other than public, is substantiated by other information in the parcel register.
2. Review the Instrument(s) filed under “Registered Interests” to ensure that the registered owners are correctly described in the parcel register and the legal description in the Deed(s) reflects the lands described in the Parcel Description. If lands have been consolidated while under current ownership, the lawyer should review the approved Survey Plan, if any, to ensure that all component lots were conveyed to the Registered Owner(s) and are included in the current Parcel Description.
3. (A) Review all “Benefits” and “Burdens” to determine how they apply to the property and to confirm that they have not expired.
   (B) for lands other than condominium units, check that all benefits and burdens are accurately

reflected in the Parcel Description.

(C) Where appropriate check that the matching burden or benefit is recorded against title for the affected neighbouring lands.

4. Consider the impact of any Textual Qualifications and whether they still apply.
5. Review the “Recorded Interests” to ensure that the interest holder is accurately reflected in the Parcel Register and the provisions of the recorded document(s) do not prevent or compromise the current transaction contemplated.
6. Review notes put on the Parcel Register by Registry staff.
7. Review the current Parcel Register, Property Online mapping, and any relevant survey information on record for obvious discrepancies.

FOOTNOTES

[1] *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4
[2] Standard 1.5: Documentation of Advice and Instruction
[3] *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4; *Land Registration Act*, S.N.S., 2001, c. 6, s. 37(9)(b)
[4] *Land Registration Act*, S.N.S. 2001, c.6,
[5] *Land Registration Act*, S.N.S., 2001, c.6, s.3(1)(k) and s.73
[6] Standard 1.5 – Documentation of Advice and Instruction
[7] The following Forms contain a Certificate of Legal Effect: i.e., require to the lawyer to certify that in the lawyer’s professional opinion “it is appropriate to make the changes to the parcel register(s)” as set out in the Form:
Form 6A – Request for correction of a previous Certificate of Legal Effect
Form 15 – Notice to the Registrar to cancel the recording of a security interest
Form 15A – Notice to the Registrar to cancel a recorded interest or judgment
Form 21 – Correction of Misspelling of Name
Form 24 – A change to the Registered Interests, Benefits or Burdens
Form 26 – Adding a Recorded Interest or a Power of Attorney
Form 27 – Cancelling a Recorded Interest
Form 45 – Updating the Parcel Register re access, Benefits and Burdens following subdivision
Form 49 – Correcting a Form 26 or a Form 27 which contains an error

ADDITIONAL RESOURCES

C. Walker, QC, “Abstracts and the Land Registration System” in *Land Registration Act* Education Program, *LRA* Education Materials

C. Walker, QC, “Certifying Title and Qualifying Title under the *Land Registration Act*” in *Land Registration Act* Education Program, *LRA* Education Materials

I. MacLean QC, “Searching Land Registered Parcels”, CBA Professional Development Conference, January 8, 2010.

I. MacLean QC, "Title searching land registered parcels" (April 2016)

Revised by Council on March 26, 2021

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1.4 CONFLICT OF INTEREST

STANDARD

General Comment

When a lawyer is acting in a real property transaction, the lawyer must consider the issue of whether there is a conflict of interest, or a potential conflict of interest between any party being represented by the lawyer (or any other lawyer in their firm), and any other party to the transaction.[1]

When a lawyer is acting in a real property transaction, where a party is not represented by counsel, a lawyer should:

1. advise an unrepresented party that their interests are not being protected by the lawyer;

2. advise the unrepresented party which party the lawyer is representing in the transaction;[2]
3. recommend independent legal advice to the unrepresented party.

When a lawyer (or their firm) is acting in a real property transaction for more than one party, the lawyer must advise each client in writing that:

a) the lawyer has been asked to act for both or all of them:

b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.[3]

When a lawyer is acting in a mortgage transaction, the lawyer must consider the provisions in the Nova Scotia Barristers' Society, *Code of Professional Conduct*, relating to acting for lender and borrower.[4]

FOOTNOTES

[1] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3-4.1;

[2] This applies in particular if the unrepresented party might reasonably feel entitled to look to the lawyer for guidance and advice in respect of a transaction.

[3] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3-4.5; also *Urquhart v. MacIsaac*, 2017 NSSC 313

[4] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rules 3-4.12 through 15 inclusive.

ADDITIONAL RESOURCES

- Duty on the lawyer to advise unrepresented party that their interests are not being protected: *Hants County Business Development Centre Ltd. v. Poole et al*. (1998), 172 N.S.R. (2d) 393 (N.S.C.A.), affirming (1997), 165 N.S.R. (2d) 393 per Kelly J.; *Klingspon v. Ramsay*, 1985 CanLII 548 (BC SC);
- *Kwak v. Odishaw* (1984), 59 B.C.L.R. 54 per Seaton J.A. (B.C.C.A.)
- *R.v. Neil*, 2002 SCC 70
- *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 SCR 177
- *Canadian National Railway Co. v. McKercher LLP.*, 2013 SCC 39
- Reliance of unrepresented party on the lawyer may result in a duty of care: *Tracy v. Atkins* (1979), 83 D.L.R. (3rd) 46 (BCSC.), aff'd 105 D.L.R. (3rd) 632 (C.A.); *Elliott v. Hossack*, 1999

CanLII 6001 (BCSC); *Paton v. Shaw*, 1995 CanLII 2859 (PEISCTD)

- *Bank of Nova Scotia v. Halef*, 2003 NSCA 70 (CanLII)
- *Rice v. Condran*, 2012 NSSC 95 (CanLII)
- Real Property Standard 1.5: Documentation of Advice and Instruction
- Real Property Standard 4.5: Limited Scope Retainers
- Model 'Conflicts of Interest' Checklist, Law Society of British Columbia
- CBA Task Force Conflicts of Interest: Final Report, Recommendations and Toolkit - 2008
- Nova Scotia Barristers' Society, *Code of Professional Conduct* (Particularly Chapters 3 and 4)
- Sample Joint Retainer Consent – Real Estate Transaction (for Multiple Buyers)
- Sample Waiver of Conflict of Interest

PRACTICE NOTES

Conflicts in transactions can be difficult to identify in certain transactions. A lawyer should use his or her professional judgment in each case.

In a real estate transaction it is the best practice for each side of the transaction (i.e. seller and buyer) to be represented by a separate law firm and not simply another lawyer in the same firm. Concurrent representation may be permitted in certain circumstances. Review rule 3-4.4 of the *Code of Professional Conduct* before acting. If acting for both sides, each side must be advised of the potential conflict and the consequences of a conflict in writing and the lawyer must document as per Standard 1.5 the client's written waiver.

Where there is more than one client (such as with spouses/partners, parent/child) the matter will usually require a written joint retainer agreement. See sample above and in Practice Tools section of these Standards.

A lawyer should use professional judgment to determine if two parties in a transaction (such as two or more buyers or sellers)may have a potential conflict issue. If the contributions of the parties or relative power of the parties are unequal, this may be an issue. A lawyer should not assume there is no conflict when representing two or more members of one family in a property transaction.

A lawyer representing a buyer and mortgagee in the same transaction should assess whether a conflict may exist. The lender will often require written waiver of conflict of interest. If not requested, the lawyer should not ignore whether obtaining a written waiver of conflict of interest is the best practice. In large value transactions, often the lender retains their own counsel for this reason.

In the event of a joint retainer, it is recommended that the joint retainer letter be sent to the client early on in the retainer and not wait to bring up the issue on closing. This ensures proper communication with the client. It is also important to ensure that communication with only one of the clients is considered to be communication with all of the clients. This can be accomplished using the sample precedent for joint retainer found above and in the Practice Tools section.

Other samples for conflict precedents may be found with the *CBA Conflicts Toolkit* noted above.

When dealing with an unrepresented party: In the agreement or instrument you are preparing for your own client, it may be good practice to include a clause expressly stating that you prepared the agreement or instrument as a lawyer representing only [your client] and that [unrepresented party] should consult with its/her/his own lawyer regarding the agreement or instrument before signing/accepting.

Amended by Council on February 26, 2016

1.5 DOCUMENTATION OF ADVICE AND INSTRUCTION

STANDARD

A lawyer should document in writing:

1. advice to the client, including explanations and confirmation of the explanations, the lawyer's advice with respect to restrictions, if any, on the client's quiet use and enjoyment of the property and qualifications to the opinion on title[1]; and

2. instructions received from the client, including instructions limiting the lawyer's retainer and instructions arising out of the lawyer's advice described in clause (a).

It is advisable for a lawyer to document the disclosure of and client consent to conflicts of interest and joint retainers.[2]

It is advisable for a lawyer to document in writing the lawyer's communications with an unrepresented party, particularly those communications pursuant to Standard 1.4 - Conflict of

Interest.[3]

When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client's signature evidence of the client's instructions. It is advisable for the lawyer to communicate personally with clients in order to explain the effect of the document. A lawyer should be aware of the limits with respect to delegation to a non-lawyer as it relates to providing advice and obtaining instructions from a client.[4]

FOOTNOTES

1. *Ravina and A & R Properties Ltd. v. Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406 (sub nom. *Ravina v. Stern*) 191 A.P.R. 406 (C.A.). See also *Rice v. Condran*, 2012 NSSC 95 (CanLII).

2. For example, rule 3.4-15 of the NSBS *Code of Professional Conduct* provides, "...When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction…" Where the lender is a "lending client", a lawyer's obligations to document consent and to provide advice can be more limited: see rules 3.4-5, 3.4-6, 3.4-7, 3.4-13, 3.4-14 and 3.4-16.

3. A lawyer should be cognizant that, even in absence of a solicitor- client relationship, in some circumstances he or she may owe a duty of care to a non-client. See *Tracy v. Atkins* (1979), 1979 CanLII 760 (BC CA) and *Begusic v. Clark, Wilson & Co.* (1992), 1992 CanLII 447 (BC SC)

4. This potentially gives rise to the supervision of employees and issues of delegation: See *Code of Professional Conduct* (See Chapter 6).

PRACTICE NOTES

Due to volume and repetition of common issues, a lawyer may develop and use precedents to document common advice and practice. Examples of documents wherein a lawyer's advice can be documented include: (1) retainer agreements\opening letters;(2) authorizations and directions; (3) closing\disengagement letters; (4) certificates of title.

In documenting advice and instructions, a lawyer should consider the client's background including but not limited to:

- The client's capacity;
- The client's relationship with any other party involved in the transaction;
- The client's level of sophistication with legal and\or business matters;
- The client's potential communication barriers; and
- Any apparent cultural or other similar issues which may impact the ability of the client to understand the substance of what the lawyer is intending to communicate.

Where a client is acting against the lawyer's advice, in addition to documenting their advice, the lawyer should attempt to have the client execute a written acknowledgement of their instructions and prepare a memorandum to file.

ADDITIONAL RESOURCES

Duty to explain risks, obtain written instructions: *Edmond & Associates v. Angelatos* (1997), 120 Man.R. (2d) 70 (Q.B.), *Credit Foncier v. Grayson, Rushford* (1987), 54 Sask.R. 203 (Q.B.)
Absent documentation, client's recollection of scope of retainer preferred over lawyer's: *Bergman v. Williams* (1980), 22 B.C.L.R. 317 (S.C.), *ABN Amro Bank Canada v. Gowling, Strathy & Henderson* (1994), 20 O.R. (3d) 779 (Gen.Div.). Failure to document advice, scope of retainer not conclusive: *669283 Ontario Ltd. v. Reilly* [1996] O.J. No. 273 (Gen. Div.), *Hants County Business Development Centre Ltd. v. Poole et al.* (1997), 165 N.S.R. (2d) 365 (S.C.), (1998), 172 N.S.R.(2d) 393 (N.S.C.A.)
Lawyer's notes as documentation: *Mazerolle v. Maynes*, [2000] N.B.R.(2d) (Supp.) No. 5 (T.D.); and also *Webb v Tomlinson*, 2006 CanLII 18192 (ON S.C.)
Effective advice may require delivery to client in writing
C. Walker, KC, "Abstracts and the Land Registration System" in Land Registration Act Education Program, LRA Education Materials
D. Gillis, KC, "LIANS : giving independent legal advice" in The Society, 2010 July
D. Gillis, KC, "Tips for Reducing Negligence Claims in Your Property Practice" RELANS Conference, April 12, 2010 (see p. 8 – Documenting Your File).

Amended by Council on March 24, 2023

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1.6 REBUTTABLE PRESUMPTIONS

STANDARD

A lawyer should accept recitals, statements and descriptions of facts contained in title documents which are more than 20 years old as rebuttable presumptions of fact.[1]

FOOTNOTES

1. *Vendors and Purchasers Act*, R.S.N.S. 1989, c. 487, s. 2(a)

1.7 MATRIMONIAL PROPERTY ACT/VITAL STATISTICS ACT

STANDARD

A lawyer must ensure that the provisions of the *Matrimonial Property Act*[1] and *Vital Statistics Act*[2] are considered when effecting any revision, registration, or recording and when documenting marital status. The statutory protections afforded to spouses, as well as to parties relying upon an affidavit of spousal status[3], make it essential that the lawyer be satisfied, after inquiry, that signatures of all those with an interest have been secured.[4, 5, 6]

FOOTNOTES

1. *Matrimonial Property Act*, R.S.N.S. 1989, c. 275
2. *Vital Statistics Act*, R.S.N.S. 1989, c. 494
3. *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s.8(3). It should be noted that the statutory protection afforded by this section is limited to situations where there is an affidavit of status as

opposed to an unsworn statement.

4. See *Mills v. Andrewes* (1980), 54 N.S.R. (2d) 394, where a conveyance was declared void for want of spousal consent.
5. See *Sherwood v. Sherwood, Roynat Inc. and Peat Marwick Limited* (1982), 52 N.S.R. (2d) 631 at page 638: ". . . the entitlement of a non-owning spouse is a statutory right to possession rather than a matter of title . . . the joinder of a nonowning spouse in a conveyance or encumbrance may be taken ascompelling evidence of an intention either to surrender or subordinate statutory rights. I may note in passing that the statute does not prescribe any mode of signifying consent other than a signing of the instrument".
6. In the *Bank of Nova Scotia v. Halef* (2003), 216 N.S.R. (2d) 89, the Court of Appeal found the affidavit of status to be deficient, and that the Bank was therefore not entitled to rely upon the affidavit. The encumbrance was therefore set aside.

ADDITIONAL RESOURCES

Garth C. Gordon, "Domestic Partners - Vital Statistics Act Amendments", Canadian Bar Association Nova Scotia, Real Estate/Probate Seminar 2001, October 12, 2001

PRACTICE NOTES

The Committee members strongly believe that a best practices approach dictates provision of an affidavit as opposed to an unsworn statement of status.

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PART II - EXTENT OF TITLE AND ACCESS

Note: New Standard 2.1 (Legal Descriptions and Parcel Identification) was approved by Council on June 15, 2012 to replace old Standards 2.1 and 2.2.

2.1 LEGAL DESCRIPTIONS AND PARCEL IDENTIFICATION

2.3 ACCESS

2.4 PLANS AND SURVEYS

2.5 ENCROACHMENTS

2.6 TIDAL WATERS/NON-TIDAL WATERS

2.1 LEGAL DESCRIPTIONS AND PARCEL IDENTIFICATION

PART II - EXTENT OF TITLE AND ACCESS

STANDARD

[previously Standard 2.1 and 2.2]

REGISTRY SYSTEM

Legal Description

1. A lawyer who examines a legal description of a parcel or a condominium unit found in the Registry system when giving an opinion on title, must be satisfied that the legal description

a) is a proper and complete description of the parcel of land or condominium unit;

b) identifies the parcel; and

c) when based on a plan of survey, reflects the parcel as shown on the plan.[1]

Abstract of Title

2. If a lawyer determines that an abstract of title shows that the legal description has been amended from time to time, the lawyer must assess each amendment to determine whether the amendment complies with legislative requirements for transfer of title to land.[2]

Opinion of title

3. A lawyer must ensure that an opinion of title prepared by the lawyer clearly identifies the parcel by a metes and bounds description or in another form as authorized by legislation or common law.[3]

LAND REGISTRATION SYSTEM

Migration

Legal Description

1. When a lawyer registers a parcel pursuant to the *Land Registration Act*, the *Act* and Land Registration Administration Regulations require that the legal description of the parcel

(a) reflects the contents of the parcel register, unless the parcel is a condominium unit.[4]

(b) where a short form description has been approved, accurately reflects the information contained in the plan on which the short form description is based;[5]

(c) accurately reflects the information contained in the description in the Declaration on file with the Registrar of Condominiums when the parcel is a condominium unit;[6]

2. Except in the case of a condominium unit, a lawyer submitting a PDCA must assist the owner or authorizing person[7] in identifying the PID and must take reasonable steps to identify the parcel. This includes reviewing the legal description and the mapping and placing a comment in the PDCA Comments field if an error in the mapping is identified.[8] The Registrar must be provided with sufficient information concerning the size and location of the parcel to permit assignment of a PID and mapping of the parcel in relation to neighbouring parcels, with reasonable accuracy.[9]

Errors in Property On Line

3. At the time of migration, the Land Registration Administration Regulations under the *Land Registration Act* require a lawyer who identifies errors in the Property Online mapping to bring the information to the attention of Property Online.[10]

Historical Information

4. A lawyer must give consideration to retaining historical information in the parcel description to assist with interpretation of the parcel register.[11]

Registration and Recording

Legal Description

1. When a lawyer registers or records a document in the parcel register pursuant to the *Land Registration Act*, the *Act* and Land Registration Administration Regulations require that the legal description of the parcel:

(a) reflects the contents of the parcel register in the form of full text, short form legal description or PID, unless the parcel is a condominium unit;[12]

(b) where a short form description has been approved, accurately reflects the information contained in the plan on which the short form description is based;[13]

(c) where the parcel is a condominium unit, the description accurately reflects the information contained in the description in the Declaration on file with the Registrar of Condominiums;[14]

Errors in Property On Line

2. At the time of revision, the Land Registration Administration Regulations under the *Land Registration Act* require a lawyer who identifies errors in the Property Online mapping to, bring the information to the attention of Property Online.[15]

Historical Information

3. A lawyer must give consideration to retaining historical information in the parcel description to assist with interpretation of the parcel register, and particularly when adding an easement benefit or burden to the parcel register during a revision.[16]

Amendment of Parcel Description
The lawyer's obligation to assist the owner or authorizing person with identification of the parcel applies equally to an amending PDCA.[17]

FOOTNOTES

[1]Precision in legal descriptions: *Countway v. Haughn and Chataway* (1975), 15 N.S.R.(2d) 138, per MacKeigan C.J.N.S. (N.S.S.C.A.D.), T.O. Boyne, "Conveyancing Legal Descriptions" (1992) 3 The Claims Wise Bulletin, Claims Wise No. 20 at 1; T.O. Boyne "Legal Descriptions/Surveys"(1992) 3 The Claims Wise Bulletins, Claims Wise No. 23 at 4;
[2]Subdivision compliance: *Municipal Government Act*, S.N.S. 1998, c. 18, s. 268-292, as am., *Land Registration Act*, S.N.S. 2001, c. 6 ;
[3]See footnote 1;
[4] *Land Registration Act*, s. 19, Land Registration Administration Regulations, 5(8), Reg 7(10) and 7(11);
[5] Land Registration Administration Regulations, s. 2(1) definition of short form legal description, Land Registration Administration Regulations, s. 5(8), 10)(a)(ii), 7(12) and 7(13);
[6] Land Registration Administration Regulations, s.7(11)(b);
[7] Land Registration Administration Regulations, s. 7(6);
[8] Land Registration Administration Regulations, s. 7(7);
[9] Land Registration Administration Regulations, s. 37(7);

[10] Land Registration Administration Regulations, s. 7(7)(c) and 7(8);
[11] Land Registration Administration Regulations, s. 7(10A), Registrar General's Communique Sept 2006, Land Registry Resource Materials- PDCA standards checklist; Gordon, Garth, / Access and Red Flag Issues Under the LRA
[12] *Land Registration Act*, ss. 19, 37(A)(1)(e), 47(3) and 47(9), Land Registration Administration Regulations 2(1) definition of short form legal description, 5(8), 7(2), 7(10), 7(11), 14(4) 15(2) and 16(2)(b);
[13] Land Registration Administration Regulations., s. 2(1) definition of short form legal description; Land Registration Administration Regulations, s. 5(8) and 7(10)(a)(ii);
[14] Land Registration Administration Regulations, s. 7(8) and 7(11)(b);
[15] See Footnote 4;
[16] Land Registration Administration Regulations, ss. 7(7)(C) and 7(10A) Registrar General's Communique Sept 2006, Land Registry Resource Materials- PDCA standards checklist; Gordon, Garth / *Access and Red Flag Issues Under the LRA*

ADDITIONAL RESOURCES

- C. Walker, QC, Abstracts and the Land Registration System
- Where's the line: Surveyors, Lawyers and the Land Registration Act; Discussion Paper
- *Delport Realty Ltd. v. Nova Scotia* (Service and Municipal Affairs), 2012 NSSC 416, para 52: "... a parcel description is not a document as defined to be recorded but only the first step in the process of registering a parcel. ..."

PRACTICE NOTES

- Note that a PID for a parcel which has been subdivided may remain the same PID number after the extent of the parcel is altered by the subdivision. Caution should be exercised when the extent is altered, especially in regard to easements. The extent of an easement at the time the easement is created is not altered even though the extent of the parcel which has been assigned the same PID has changed.
- The parcel description should match the parcel register whether the description is long form or short form. All benefits and burdens should be described in the parcel description unless the property is a condominium unit.
- Consider using the long form description when the plan on which the short form description was based contains less information than the long form description.

LAWYERS' INSURANCE
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2.3 ACCESS

PART II - EXTENT OF TITLE AND ACCESS

STANDARD

A lawyer who prepares an opinion of title must confirm the nature of the access, if any, to the parcel and whether the access is public or private.[1]

If the lawyer determines the access to be private, the lawyer must determine whether the access has been granted.

If the lawyer determines the access to be private and granted, the lawyer must ensure that there is marketable title for the grant of easement to the parcel.[2] If access is referenced for the whole of the marketable title time frame, the grant may be presumed.

If the lawyer determines the access to be private and not granted, the lawyer must be satisfied that there is authority for its continued use in conjunction with the parcel.[3] Authority for continued use must be based on a factual foundation as documented on record.

A lawyer should consider the implications of the legal description of a servient parcel that does not reference a private access to which it is subject.

A lawyer should examine plans arising from the search and survey information affecting the parcel to ascertain whether the access granted and the actual travelled way correlate, and advise the client with regard to any material discrepancies.

A lawyer must explain to the client any limitation associated with a private right of way access and confirm the client's instructions prior to closing. [4]

FOOTNOTES

1. *Land Registration Act*, S.N.S. 2001, c. 6, s. 37(4)(b) and (c), Public Access: *Public Highways Act*, R.S.N.S. 1989, c. 371
2. Standard 3.1 - Abstracting
3. Standards 3.2 - Possessory Title, Standard 3.3 - Prescriptive Rights and *Herman v. Whynot* (1976), 21 N.S.R. (2d) 201 (N.S.S.C.T.D.) for authority for easements dedicated to public use
4. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

Cron v. Halifax (Regional Municipality), 2010 NSSC 460
Private Ways Act, R.S.N.S. 1989, c. 358

Gordon, Garth C / Access - red flag issues under LRA

MacLean, Ian H / Title searching land registered parcels (February 2014)

Revision approved by Council November 24, 2006

LAWYERS' INSURANCE ASSOCIATION OF NOVA SCOTIA

2.4 Plans And Surveys

Standard

A lawyer must advise the client that the lawyer does not deal with 'extent' and that boundary and location are only ascertained through a survey. In preparing an opinion of title, a lawyer must advise the client that any opinion provided to the client will be qualified as being subject to survey as soon as practicable and in any event prior to closing.[1]

Before finalizing an opinion of title, a lawyer must examine plans arising from the search and survey information affecting the parcel and advise the client of any encroachments, or easements shown on the plan. A lawyer should identify and reconcile where possible any material discrepancies between the legal description for the parcel or any information contained in the abstract, and survey information.[2]

After preparing an opinion of title, a lawyer should advise the client of material discrepancies between plans arising from the search and survey information affecting the parcel. The lawyer must confirm the client's instructions prior to closing.[3]

A lawyer should explain to their client the difference between obtaining an up-to-date survey or location certificate and obtaining a title insurance policy.[4]

Footnotes

1. Opinions subject to survey: *Ravina and A & R Properties Ltd. v. Stern* (1987), 77 N.S.R. (2d) 406, per Clarke C.J.N.S. (N.S.S.C.A.D.)
2. Advice about survey matters: *Marwood v. Charter Credit Corp.* (1971), 2 N.S.R. (2d) 743, per Coffin J.A. (N.S.S.C.A.D.)
3. Standard 1.5: Documentation of Advice and Instruction
4. See Standard 5.5: Title Insurance

Additional Resources

- Parcel descriptions: *Land Registration Act*, S.N.S. 2001, c. 6, s. 21(1)
- MacLean, Ian H / Title searching land registered parcels (April 2016)
- Robinson, K. H. Anthony / Location Certificates, (Continuing Legal Education Society of Nova Scotia, March 1982)

Practice Note

It is good practice to provide a copy of any survey or plan material showing the approved lot to the client for review, particularly if the approved plan is an instrument of subdivision, as instruments of subdivision are not usually drawn to the same standard as survey plans. A client who is familiar with the land may identify a problem which the lawyer would not have the knowledge to recognize. It is also good practice to request any plans that the client may have in their possession, especially in instances where no plan arises from the title search conducted as they provided valuable information that can assist the lawyer.

Revised by Council on September 25, 2020 and January 25, 2025.

Standards

- 2.6 Tidal Waters/Non-Tidal Waters
- 2.7 Subdivision/Consolidation
- 2.1 Legal Descriptions and Parcel Identification
- 2.3 Access
- 2.4 Plans and Surveys
- 2.5 Encroachments

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

2.5 ENCROACHMENTS

PART II - EXTENT OF TITLE AND ACCESS

STANDARD

When a lawyer examines relevant and available information on the extent of title to a parcel, the lawyer should assess material encroachments on another parcel, or on the parcel being examined, and review the assessment with the client.

The lawyer should ensure that the encroachment

1. is permitted by a written agreement of the adjoiner, and any mortgagee if required; or
2. qualifies, to the satisfaction of the lawyer exercising professional judgment, for the application of the doctrine of prescription.

A lawyer must explain the encroachment to the client and confirm the client's instructions prior to closing.[1]

NOTES

1. See Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES:

- Easement or right of way as overriding interest: *Land Registration Act*, S.N.S. 2001, c. 6, s. 73(1)(e) and *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 7(1)(e)
- Prescriptive rights: *Land Registration Act*, S.N.S. 2001, c. 6, s. 74-75; Standard 3.3 - Prescriptive Rights

2.6 Tidal Waters/Non-Tidal Waters

Standard

A lawyer must explain to the client the limits of a parcel boundary located beneath or adjacent to water.

Where a parcel is bounded by water, the lawyer should include in the explanation of the limits of the parcel that there is an increased risk that all, or a portion, of the parcel is "infill". The lawyer should explain to the client how title to infilled areas may be acquired and the risk of losing the opportunity to acquire title pursuant to the provisions of the *Land Registration Act*.[1]

The lawyer must confirm the explanation of the limitations to the client. The lawyer must confirm the client's instructions prior to closing.[2]

Footnotes

1. *Land Registration Act*, S.N.S. 2001, c. 6, ss 74-75
2. Standard 1.5: Documentation of Advice and Instruction

Additional Resources

- Caselaw on Qualifications: *Ravina and A & R Properties Ltd. v. Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406, 191 A.P.R. 406 (C.A.)
- Caselaw on riparian rights: *Corkum v. Nash*, 1990 CanLII 4127 (NS SC); See also "Water Law in Canada – The Atlantic Provinces" (Ottawa: Queens Printer, 1973) by Gerald V. LaForest
- K.H.A. Robinson, "Alteration of a Water Course" in Real Estate (C.L.E.S.N.S., April 1994)
- Caselaw on adverse possession of water lot: *Nickerson v. Canada (Attorney General)*, 2000, NSSC 9 (CanLII)
- Chapman, Anthony L. / Of Wharves, Water Lots and Kings – Paper and Schedule (2005)
- Gordon KC, Garth C. / Water Lots, Watercourses & Wetlands (Nova Scotia): an Aide Memoire for Reviewing Title and Uses (June 2010)
- Definition of watercourse and vesting of watercourses: *Environment Act*, S.N.S. 1994-95, c. 1, ss. 3(be), 103
- Acquisition of an interest in a water lot, wharf, watercourse or infill by adverse possession or prescription: *Environment Act*, S.N.S. 1994-95, c. 1, s. 108(2). See also *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, s.14, *Crown Lands Act*, R.S.N.S. 1989, c. 114, ss. 39(1), 51(1)(k), *Real Property Limitations Act*, R.S.N.S. 1989, c. 258, ss. 21-22, and *Land Registration Act*, S.N.S. 2001, c.6, ss.74-75.

- Acquisition of interest by grant, release, easement, licence or lease from Crown: *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, s.4, *Fishing and Recreational Harbours Act*, R.S.C. 1985, c. F-24, *Crown Lands Act*, R.S.N.S. 1989, c. 114, s. 51, *Beaches and Foreshores Act*, R.S.N.S. 1989, c. 33, s. 2
- Determination of beach area: *Beaches Act*, RSNS 1989, c 32, s. 5(1)
- Approval, permit or licence requirements for development or activities: *Environment Act*, S.N.S. 1994-95, c. 1 and its Regulations; *Canadian Navigable Waters Act*, R.S.C. 1985, c. N-22; *Fisheries Act*, R.S.C. 1985, c. F-14 and its Regulation entitled Maritime Provinces Fishery Regulations (SOR/93-55); *Fisheries and Coastal Resources Act*, S.N.S. 1996, c. 25; Fishing Regulations made under the *Wildlife Act*, R.S.N.S. 1989, c. 504; *Angling Act*, RS.N.S. 1989, c. 14.

Practice Notes

It is advisable for a lawyer to recommend a survey to the client to determine the boundaries of the client's parcel of land abutting tidal or non-tidal waters or to suggest the client obtains title insurance coverage, and to document such recommendations. See *Ravina and A & R Properties Ltd. V. Stern (1987)*, 1987 Carswell NS 348, 77 N.S.R. (2d) 406, 191 A.P.R. 406 (C.A.). See also Standard 2.4: Plans and Surveys.

When searching title to a wharf, water lot, foreshore, watercourse or land no longer covered by water claimed by a client, careful consideration is to be taken by a lawyer in providing their opinion for the purpose of registration of the title pursuant to section 37(9)(b) of the *Land Registration Act*, including and not limited to the location, description and nature of the interest, its ownership in 1867, its conveyances and any evidence of adverse possession. It is more likely that the federal and or provincial Crowns have jurisdiction over these interests and have legislative protective provisions for its usage. See Gordon KC, Garth C. / Water Lots, Watercourses & Wetlands (Nova Scotia): an Aide Memoire for Reviewing Title and Uses (June 2010). See also Practice Tools below.

Practice Tools

Checklist for Water Lots, Wharves, Infills and Waterfront Lots

Approved by Council on November 22, 2002; revised March 21, 2025.

Standards

- 2.6 Tidal Waters/Non-Tidal Waters
- 2.7 Subdivision/Consolidation
- 2.1 Legal Descriptions and Parcel Identification
- 2.3 Access
- 2.4 Plans and Surveys
- 2.5 Encroachments

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LAWYERS' INSURANCE
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2.7 SUBDIVISION/CONSOLIDATION

PART II - EXTENT OF TITLE AND ACCESS

STANDARD

A lawyer may only certify title to (and therefore migrate under the *Land Registration Act*[1]) a parcel which has a chain of title in which each conveyance either complies with, is exempted by or is validated by subdivision legislation. A conveyance of a parcel which does not comply with, is not exempted by, or is not validated by, subdivision legislation is ineffective.[2]

Compliance

In order to determine that a parcel complies with subdivision legislation, the lawyer must find:

1. an approved plan of subdivision[3] or instrument of subdivision[4] is filed in the Registry Of Deeds/Land Registration Office[5]; or
2. Satisfactory evidence of a *de facto* consolidation has been registered.[6]

Exemption

A lawyer who is preparing the documents to subdivide land based on an exemption[7] after May 11, 2015[8] must ensure that the documents effecting the subdivision:

1. state an intention to create a subdivision;
2. specify the particular exemption;
3. set out the facts upon which the exemption is based;
4. evidence the consent of the owner or other person entitled to subdivide; and
5. be registered.[9]

Validation

In order to determine that a parcel has been validated by subdivision legislation, the lawyer must find:

1. the title or interest in the real property conveyed, or purported to have been conveyed, was created by deed, lease, mortgage or other instrument before April 16, 1987[10]; or
2. the subdivision is validated by the Registrar General.[11]

***De Facto* Consolidation**

A lawyer who relies on a *de facto* consolidation in order to certify subdivision legislation compliance must ensure that the statutory requirements for de facto consolidation are met.

In order to effect a *de facto* consolidation a lawyer must first ensure that the parcels which are to be consolidated are contiguous and migrated.[12] The lawyer must then record a statutory declaration or declarations which must comply with evidentiary requirements[13] on a balance of probabilities[14] which attests or attest to all of the following:

1. that the lots have been and remain in common ownership since April 15, 1987;
2. that the lots have been used together since April 15, 1987; and
3. the facts that support the statements in the declaration.

Post-Subdivision Requirements

Following subdivision of a migrated parcel, before any request is made to change the registered owner, the lawyer representing the registered owner who effected the subdivision must file:

1. a Form 45 for each resulting parcel, adding, confirming, deleting or correcting any interests, textual qualifications and parcel access type in the parcel registers, and
2. corresponding amendments to the parcel description.[15]

A lawyer who amends a parcel description after a subdivision in which any interests are inherited by any part of the new parcel should do so in such a way as to indicate the part of the parcel to which the interest attaches unless this is otherwise clear in the parcel register.[16]

PRACTICE NOTES

Intervening Parcel, Road, Watercourse

One legal description may upon investigation contain multiple parcels of land separated from each other on the ground by any one or more of an intervening parcel, a public road[17], a railway[18] or a watercourse which creates a natural boundary.[19] In such cases the original land has been legally subdivided.[20]

It is common for non-LR parcels on opposite sides of a road, railway or river assessed to common owners to be mapped as single PID even though they are separate parcels subdivided by the road, river or railway. When migrating such a parcel, the migrating lawyer must file a Form 1 request for PID Assignment in order to obtain separate PIDs for each parcel.

Post-Subdivision Registrations

While the lawyer for the registered owner selling the property is usually responsible for updating inherited interests in a newly subdivided lot, the lawyer representing the buyer must update the parcel register with any new interests created by the deed registered immediately after subdivision. Having said that, the lawyer for the registered owner who created the subdivision, should consider whether it might be better to register the benefits or burdens and restrictive covenants which will affect the entire subdivision immediately after the subdivision and before any lots are conveyed. Easements and restrictive covenants can be entered into parcel registers by the registered owner granting an easement to itself or imposing restrictive covenants on itself prior to any sale. It is preferable in many cases for the developer to undertake these tasks in order to preserve consistency from parcel to parcel within a subdivision and to ensure accuracy as the seller developer's counsel generally will have greater knowledge of the interests intended to be created than the buyer's counsel.

De Facto Consolidations

Although the legislation specifies a single statutory declaration, multiple declarations may be required to prove the facts required in a de facto consolidation see, e.g., Polycorp, para159-160.

Migration Triggered

A parcel must be migrated in order to be approved for subdivision[21] unless the subdivision:

1. creates fewer than three lots, including any remainder;
2. is for the sole purpose of creating lots to be gifted to family;[22]
3. is a consolidation of exclusively non-LR parcels;[23] or
4. is exempt from subdivision approval.[24]

Adverse Possession

There is authority to support the proposition that a parcel may be created by adverse possession without compliance with subdivision regulation, especially in cases where such parcels are evidenced by documentation which is registered before April 16, 1987.[1] This would appear to be well settled in Ontario.[2] Nova Scotia jurisprudence has not confirmed whether the legislation is to be interpreted the

same way in this province. Lawyers should exercise professional judgment in certifying parcels which are created by adverse possession, and which are not otherwise in compliance with, exempted by or validated by subdivision legislation.

FOOTNOTES

[1] *Land Registration Act* , S.N.S. 2001, c.6, s.37(1)(e); Land Registration Administration Regulations, N.S. Reg. 207/2009, s.7(10)(d).

[2]*Municipal Government Act*, S.N.S. 1998, c.18, s.287. Note throughout this standard Part IX of the *Halifax Regional Municipality Charter*, S.N.S. 2008 applies in that municipality. See also Toulany v. Abboud, 174 N.S.R. (2d) 347 (S.C.), *Canadian Imperial Bank of Commerce v. Hi-Tech Woodworkers Ltd.* (sub nom. *Bedford Ready-Mix Ltd. V. Canadian Imperial Bank of Commerce*) (1992, 118 N.S.R. (2d) 73 (C.A.). Note also that "subdivision" includes consolidation: *Municipal Government Act*, s.191(q).

[3]An approved plan of subdivision approves the remainder parcel as well as those specifically subdivided. *Municipal Government Act*, s.281A deems any underlying subdivision lots to have been consolidated. Lawyers are cautioned that, although complying with subdivision legislation, remainder lots are usually not certified in the survey plans depicting them, and clients should be particularly cautioned that the lawyer's opinion will be subject to survey.

[4]*Municipal Government Act*, s.269.

[5]*Municipal Government Act*, s.287(1). Note an approved plan can be registered before and, in some cases, after transaction. See *Toulany v. Abboud*, 174 N.S.R. (2d) 347, esp. para.29.

[6]*Municipal Government Act*, s.268A. See below for quality of evidence required.

[7]*Municipal Government Act*, s.268(2); *Nova Scotia Power Privatization Act*, S.N.S. 1992, c.8, s.22(2); *Agriculture and Rural Credit Act*, R.S.N.S. 1989, c.7. *Planning Act*, R.S.N.S. 1989, c.346, s.102 (2)(1) permitted minimum 25-acre parcels without subdivision approval between 1983 and April 1,1999, expressly requiring an affidavit. These are examples and other exemptions also apply.

[8]*Municipal Government Act (Amended)*, S.N.S. 2015, c.23.

[9]*Municipal Government Act*, s.268(3).

[10]*Municipal Government Act*, s.291(1).

[11]*Municipal Government Act*, s.268C

[12]*Municipal Government Act*, s.268A; *Polycorp Properties Inc. v. Halifax (Regional Municipality)*, 2011 NSSC 241, esp. para.150-152.

[13]Including, eg., Nova Scotia Civil Procedure Rule 39.04(2)(b), that any evidence not within the witness's personal knowledge be supported by evidence of the source and belief in the truth of the

information. See also *Waverly (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, 126 N.S.R. (2d) 147 (S.C.).

[14]*Polycorp Properties Inc. v. Halifax (Regional Municipality)*, 2011 NSSC 241, esp. para.155-156

[15]*Land Registration Act*, s.13(5), Land Registration Administration Regulations, s.9.

[16]Land Registration Administration Regulations, s. 7(10); Real Estate Professional Standard #2.1: Legal Desciptions and Parcel Identification.

[17]*Public Highways Act* , R.S.N.S. 1989, c. 371, esp. s.11(2).

[18]Various statutes vest title in some railroads. See, e.g., Garth C. Gordon QC, "Access – Red Flag Issues under LRA", (revised March 2, 2007): http://www.nsbs.org/archives/CPD/80622.pdf , Part 13, various exceptions applying.

[19]*Environment Act*, S.N.S. 1994-5, c.1, s.103 & Municipal Government Act, s. 268B. See also Ian H. MacLean QC, "De Facto Refresher: Update After Bill 75", presented to the Real Estate Lawyers' Association of Nova Scotia on December 8, 2015.

[20]But see *Municipal Government Act*, s.268B(2), which may mean the parcel is not legally subdivided if it has been migrated as one parcel.

[21]*Land Registration Act* , s.23.

[22]*Land Registration Act*, s.46(1)(b).

[23]*Land Registration Act*, s.46(3)(ae).

[24]See footnote 7 (above).

[25]Garth C. Gordon QC "How to Convert Possessory Title to Paper Title" (December, 2012). *Municipal Government Act*, S.N.S. 1998, c.18, s.291(1).

[26] *Re Turner and Turner Funeral Home Ltd* ., [1972] 2 O.R. 851, 27 D.L.R. (3d) 30; *Re Duthie and Wall* (1979), 24 O.R. (2d) 49 (H.C.); *MacMain v. Hurontario Mgmt Services Ltd* (1980), 14 R.P.R. 158.

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

3.1 ABSTRACTING

3.2 POSSESSORY TITLE

3.3 PRESCRIPTIVE RIGHTS

3.4 DISCHARGE OF MORTGAGES

3.5 JUDGMENTS

3.6 RESTRICTIVE COVENANTS

3.7 TAX DEEDS

3.8 JUDICIAL SALES

3.9 TRUSTEE'S DEED

3.10 ESTATES

3.11 BANKRUPTCY AND RECEIVERSHIP

3.12 GUARDIANS

3.13 CORPORATIONS AND OTHER ENTITIES

3.14 PARTNERSHIPS

3.15 DEBENTURES

3.16 EXPROPRIATIONS

3.17 OPTIONS AND RIGHTS OF FIRST REFUSAL

3.18 BUILDERS' LIEN

3.19 QUIETING TITLES ACT

3.20 LEASEHOLDS

3.21 CONDOMINIUMS

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.1 ABSTRACTING

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer who prepares an opinion of title must prepare or cause to be prepared an abstract of title derived from a search of the records in the appropriate land registration office. A lawyer must base the lawyer's opinion of title on the abstract of title.[1]

An abstract of title must

1. be in writing;
2. commence with a root of title as prescribed by legislation and common law;[2]
3. be complete; and
4. be capable of being read and understood by a person who has not searched the title, without reference to any documents or records external to the abstract.[3]

A firm or lawyer that certifies title to real property must keep available the foundation documents on which the firm or lawyer relied which would justify the certification of title by a reasonably competent lawyer.[4]

A lawyer who prepares a certificate of legal effect on an application for revision under the *Land Registration Act* must review the parcel register records[5] in the appropriate land registration office and document or cause to be documented the evidence of the review.[6]

FOOTNOTES

1. Statutory requirement for application for registration: *Land Registration Act*, S.N.S. 2001, c. 6, s. 37(9)
2. Root of title - legislation and common law: *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4(1)-4(2) [as to root] as am. *Land Registration Act*, S.N.S. 2001, c. 6, s. 116(1), *Land Registration Act*, S.N.S. 2001, c. 6, s. 37(9) as am, *Quieting Titles Act*, R.S.N.S. 1989, c. 382; Cases: *Olsen Estate v. ASC Residential Properties Ltd.* (1990), 102 N.S.R.(2d) 94, per Hall L.J.S.C. (N.S.S.C.T.D.); *Hebb v. Woods* (1996), 150 N.S.R.(2d) 16 (S.C.)
3. Content of abstract: (*Ratto et al v. Rainbow Realty Ltd., Clarke Huestis, Purcell, Thompson and Thompson & Purcell Surveying Ltd. et al*. (1984), 68 N.S.R.(2d) at 51, per Nathanson J. (N.S.S.C.T.D.)
4. *Legal Profession Act*, S.N.S. 2004, c 28; Regulations made pursuant to the *Legal Profession Act* , S.N.S. 2004, c. 28, s. 8.2.3.1
5. *Land Registration Act*, S.N.S. 2001, c. 6, s. 13(3), and Standard 1.3 - Opinion of Title and Certificate of Legal Effect.
6. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

- C. Walker, Q.C. / "Abstracts and the Land Registration System" in *Land Registration Act Education Program, LRA Education Materials*
- MacLean, Ian H / Title searching land registered parcels (February 2014)

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.2 POSSESSORY TITLE

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer may certify title established by possession in accordance with legislation, common law and equity.

A lawyer must document sufficient actual facts evidencing possession that will meet all the tests set by the courts for establishing possession sufficient to extinguish the interest of the paper title holder. The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence. The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing possession and address the extent of the area of land possessed [1]. In determining whether the standard of proof of possessory title has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title established by possession, a lawyer must consider the effect of the *Land Registration Act* with respect to possessory interests and lasting improvements[2] and advise the client accordingly.

When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the *Land Registration Act*, a lawyer must explain the qualifications to the client and confirm the client's instruction prior to closing.[3]

FOOTNOTES

1. Evidence of knowledgeable and disinterested persons: *Hebb v. Woods*, 1996 CanLII 5480, 150 N.S.R. (2d) 16 (S.C.) at para. 12: "'The declarations or affidavits to prove possession should not be confined to general statements that the trespasser has been "in possession" or "occupation." There ought to be evidence of the actual facts which are relied upon as constituting the possession or occupation under the Statute. Thus the person in possession should show whether the land has been fenced and whether that is what is relied upon; whether it has been resided on, and if so, whether continuously or at intervals; whether it has been cultivated, and how - whether by continuous occupation or by taking crops off and leaving the land vacant between visits. In all cases the purchaser should be put in possession of the actual facts, so that he may exercise his judgment upon their effect, instead of stating the effect, leaving him in ignorance of the facts upon which the vendor relies."

2. *Land Registration Act*, S.N.S. 2001 c. 6, ss. 73-76. See also *Limitations of Actions Act*, R.S.N.S. 1989, c. 258, *Quieting Titles Act*, R.S.N.S. 1989, c. 382, *Public Highways Act*, R.S.N.S. 1989, c. 371, *Municipal Government Act*, S.N.S. 1998, c. 18, s. 308(4), *Vendors and Purchasers Act*, R.S.N.S. 1989 c. 487, *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, ss. 13-14, Marketable title: *Parsons v. Smith*, 1971 CanLII 49, 3 N.S.R. (2d) 561 (S.C. (T.D.)), Hart J.

3. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

- Marketable title: *Parsons v. Smith*, 1971 CanLII 49, 3 N.S.R. (2d) 561 (S.C. (T.D.)); declarations: *Hebb v. Woods*, 1996 CanLII 5480, 150 N.S.R. (2d) 16 (S.C.), Carver J.; exclusivity: *Robertson v. McCarron*, 1985 CanLII 192, 71 N.S.R. (2d) 34 (S.C. (T.D.)), Hallett J.; *O'Neil v. MacAulay*, 1976 CanLII 63, 21 N.S.R. (2d) 210 (S.C.), and *Spicer v. Bowater Mersey Paper Co*., 2004 NSCA 39 (CanLII), 222 N.S.R. (2d) 103; commencement: *Keohane v. McNaulty*, 1989 CanLII 1493, 92 N.S.R. (2d) 261 (S.C. (T.D.)); continuity: *Taylor v. Williga*r, 1979 CanLII 88, 32 N.S.R. (2d) 11 (S.C. (A.D.)), Cooper J.A.; co tenant: *Lynch v. Nova Scotia (Attorney General)*, 1985 CanLII 191, (sub nom. Lynch et al. v. Lynch et al.) 71 N.S.R. (2d) 69 (S.C. (T.D.)), Hallett J.; nature of possession: *Gillis v. Gillis*, 1979 CanLII 87, 32 N.S.R. (2d) 40 (S.C. (A.D.)), MacDonald J.A.; acts of possession: *Keohane v. McNaulty*, 1989 CanLII 1493, 92 N.S.R. (2d) 261 (S.C. (T.D.)); colour of right: *Wood v. LeBlanc* (1904), 34 S.C.R. 627, 1904 CarswellNB 58 (WC), Davies J., and *Board of Trustees of Common Lands v. Tanner*, 2005 NSSC 245 (CanLII), 236 N.S.R. (2d) 295; tenancy at will: *MacLean v. Reid*, 1978 CanLII 72, 30 N.S.R. (2d) 499 (S.C. (A.D.)), MacDonald J.A.; mutual mistake: *Gould v. Edmonds*, 2001 NSCA 184 (CanLII), 203 N.S.R. (2d) 163, Freeman J.A.
- C.W. MacIntosh, Nova Scotia Real Property Practice Manual, looseleaf (Toronto: Butterworths, 1988) c. 7
- Acquisition of an interest in a watercourse by adverse possession or prescription: *Environment Act*, S.N.S. 1994-95, c. 1, s. 108; *Land Registration Act*, S.N.S. 2001, c. 6, s. 103(3)
- C. S. Walker QC, "Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment" in *Real Property Conference: Property Practice in New Environments: The Ground is Shifting: Creating a Strong Foundation for Your Practice* (February 2003)
- J. A. Keith, "Adverse Possession - Pulling Out All the Stops" in *Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year"* (February 2006)
- G. C. Gordon QC, "Access - Red Flag Issues Under LRA" in *Real Property Conference: Year III: the Junior Year: Best Practices: Topics, Tools & Methods* (March 2007)
- G. C. Gordon QC, "Affidavit Templates & Comments for Documenting Possessory Interests" in *Real Property Conference: Crown Interests And Due Diligence Under LRA: "The Sophomore Year"* (February 2006)
- *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69

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LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.3 PRESCRIPTIVE RIGHTS

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer may certify title to interests acquired by prescription in accordance with legislation, common law and equity.

A lawyer must document sufficient actual facts evidencing prescriptive rights that will meet all the tests of establishing prescription. The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence. The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing prescription and address the extent of the prescriptive rights. In determining whether the standard of proof of prescriptive rights has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title to interests acquired by prescription, a lawyer must consider the effect of the *Land Registration Act* with respect to prescriptive rights [1] and advise the client accordingly.

When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the *Land Registration Act*, a lawyer must explain the qualifications to the client and confirm the client's instruction prior to closing. [2]

FOOTNOTES

1. *Land Registration Act*, S.N.S. 2001 c. 6, ss. 73 75. See also *Limitation of Actions Act*, R.S.N.S. 1989, c. 258; *Vendors and Purchasers Act*, R.S.N.S. 1989, c. 487; *Marketable Titles Act*, S.N.S. 1995 96, c. 9, s. 7; *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, ss. 13-14.

2. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

- Nature of use: *Gilfoy v. Westhaver*, 1989 CanLII 1494, 92 N.S.R. (2d) 425 (S.C. (T.D.)) at para. 31, Tidman J.: "open, continuous, unobstructed, and without permission of the landowner" and *Publicover v. Publicover*, 1991 CanLII 4464, 101 N.S.R. (2d) 75 (S.C. (T.D.)), Roscoe J.; Permission: *Bellefontaine v. Ivany Apartment Co. Ltd.*, 1974 CanLII 48, 19 N.S.R. (2d) 581 (S.C. (T.D.)), Cowan C.J.T.D.; Lost modern grant: *Langille v. Tanner*, 1973 CanLII 62, 14 N.S.R. (2d) 311 (S.C. (T.D.)), Hart J.; Successive users: McLean v. McRae (1917), 50 N.S.R. 536, 1917 CarswellNS 16 (WC)(S.C.); Nature of prescriptive right: Moore v. Ritchie et al. (1900), 33 N.S.R. 216, 1900 CarswellNS 28 (WC)(S.C.)

- C.W. MacIntosh, Nova Scotia Real Property Practice Manual, looseleaf (Toronto: Butterworths, 1988) c. 7
- A.G.H. Fordham, "Easements, Licenses and Rights of Way" in *Real Property*, C.L.E.S.N.S. (April 1987)
- Acquisition of an interest in a watercourse by adverse possession or prescription: *Environment Act*, S.N.S. 1994-95, c. 1, s. 108; *Land Registration Act, S.N.S. 2001, c. 6*, s. 103(3)
- C.S. Walker QC, "Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment" in *Real Property Conference: Property Practice in New Environments: The Ground is Shifting: Creating a Strong Foundation for Your Practice* (February 2003)
- J.A. Keith, "Adverse Possession - Pulling Out All the Stops" in *Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year"* (February 2006)
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- *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69

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LAWYERS' INSURANCE
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3.4 DISCHARGE OF MORTGAGES

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A lawyer who pays out a mortgage or makes a partial payment on a mortgage for the purpose of releasing one or more lots secured by the mortgage is responsible for ensuring that a release of mortgage or partial release of mortgage, as appropriate, is recorded to remove the security from the title to the subject lots.[1]

A lawyer who is preparing a release of mortgage or recording a release of mortgage must:

a) Confirm with the client and document instructions to release all parcels (if more than one) to be released including any parcels created by subdivision subsequent to recording of the mortgage;

b) Determine if the Releasor has authorized release of all parcels, if the mortgage attaches to more than one;

c) Determine if there has been an amendment or if there is a related instrument such as an assignment of rents, postponement or textual qualification which ought to be released/removed;

d) Ensure that any release by a corporate Releasor is given under seal, failing which the Release must set out the authority of the person executing the Release[2];

e) Ensure, when recording a Release, that the name of the Commissioner or other authorized person before whom it is sworn or signed, is typed, stamped, or printed legibly below the signature of such person[3];

f) Ensure the accuracy of the information contained in Form 27, bearing in mind the fact that the Form contains a certificate of legal effect.

A lawyer who has given an undertaking for the release of a mortgage must ensure that this is done in a timely manner, either by obtaining and recording a release or by effecting removal pursuant to s.60 of the Land Registration Act[4].

FOOTNOTES

1. Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28, ss.8.2.7 and 8.2.8
2. *Land Registration Act*, S.N.S 2001 c.6, ss.79 and 83
3. Land Registration Administration Regulation, 5(10)
4. Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c.28, ss.8.2.6-8.2.10. See also 2007 Mortgage Payout Protocol available on LIANS website

ADDITIONAL RESOURCES

Mortgage Discharge Escalation Contact List, LIANS website
Form 27 Checklist

PRACTICE NOTES

Release of Multiple Lots

A lawyer should not rely solely on a Property Online search based on document or book/page number of a mortgage if the lawyer is aware that there are multiple parcels of land to be discharged by a release of mortgage. The lawyer must determine if parcels were subsequently consolidated or subdivided or if those parcels related to the original mortgage have different document numbers due to the number of parcels exceeding the recording limit as they may not have been included in the search results. A lawyer should review the original mortgage description as well as all relevant plans to ensure that all parcels that are subject to the mortgage have been captured in the release.

Removal pursuant to *Land Registration Act* s.60

Where there are reasonable and probable grounds to believe that all of the obligations have been performed, the security interest holder has agreed to the release, the security interest does not affect the parcel, or no security interest exists, a written demand may be served upon the holder of the security interest and if that holder does not comply with the demand within thirty days following service, the Registrar may be required to cancel or amend the recording.

***Land Registration Act* s.40**

An unreleased security interest in a residential mortgage that is more than forty years old and that has not been amended or supplemented by an instrument recorded during the preceding forty years is not an interest to be included in a parcel register and should not be included in the Application for Registration when migrating. If the mortgage is dated less than forty years ago at the time of migration or if it has been revised or supplemented by a document less than forty years ago, it must be included in the Application for Registration but once the forty year period has elapsed, it can be removed by operation of law.

***Real Property Limitations Act* s.24(2)**

If a period of more than twenty years has elapsed from the maturity date set out in the mortgage or any registered or recorded renewal thereof, the mortgage does not constitute an interest in the parcel and is not to be included in the Application for Registration. If it already exists in the parcel register, it can be removed by operation of law. It should be noted that the application of this provision is not limited to residential mortgages and, unlike s.40(1) of the *Land Registration Act*, the time period for this remedy is twenty years as opposed to forty years. If there is no maturity date set out in the mortgage or any registered or recorded renewal thereof, section 24(2) is not relevant.

Approved by Council on November 22, 2002; Amended by Council on January 24, 2020.

LAWYERS' INSURANCE
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3.5 JUDGMENTS

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

3.21 Condominiums

STANDARD

Searching for Judgments

A lawyer who searches for judgments and identifies a judgment that is recorded against a debtor whose name is not materially different than the name of the owner or the purchaser must determine if the judgment affects the title being examined.[1]

(a) Non-Land Registered Parcels

A lawyer who searches for judgments on parcels that are not registered under the *Land Registration Act* must conduct the search against the names of:

1. each Grantee for a period of twenty years; and,

2. each owner of the parcel during the 20-year period prior to the date of the search, up to and including the registration of the conveyancing document out of that prior owner, and up to and including the date of the search for any current Grantor.[2]

Note: If any parties being searched are a corporation, a lawyer must only search from the date of incorporation forward, even if this is less than the prescribed period. The corporate search must also include each corporation that has been amalgamated with the corporation being searched.

If a lawyer finds a judgment which attaches or may attach to the lands under search, on migration the lawyer must include the judgment in the Application for Registration[3] as a recorded instrument[4].

(b) Land Registered Parcels

A lawyer who searches for judgments on parcels that are registered under the *Land Registration Act* must conduct the search against the names of:

1. each Grantee for a period of 20 years prior to the date of search[5]; and,

2. each registered owner of the parcel at the time of search from the date of the last revision of the registered ownership, including former names of such registered owner if a Form 21 has been filed since the last revision of ownership, as well as each ownerremoved by virtue of Form 21 since the last revision[6].

If it is determined that one or more judgments do, or will (being against a purchaser), affect the land registered title(s) under sale, the lawyer registering the Deed must add the judgment(s) to the affected parcel register(s) along with the Deed by way of Form 24[7], whether or not the purchaser's

solicitor has received undertaking(s) that a Certificate of Satisfaction for the outstanding judgment(s) will be filed[8].

Recording Judgments

A lawyer who undertakes to record a judgment on behalf of a client must ensure that the judgment is recorded in the desired registration district.[2]

PRACTICE NOTES

Searching for Judgments

1. The requirements regarding the information judgments must include may be found in the *Land Registration Act*, S.N.S. 2001, c.6, s.67 and in the Land Registry Client Resource Material under 'Judgment Recording Requirements'.

2. Note that a judgment issued by a Court in a jurisdiction outside Nova Scotia cannot be recorded against title until it has been re-issued by the Supreme Court of Nova Scotia, whether under the *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c.388, amended by S.N.S. 2002, c.9, s.60, the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c.30 as amended by S.N.S. 2005, c.49 or pursuant to some other authority.

3. When a Deed lists an alternate name for a Grantor or Grantee as “also known as”, all variations of the names are to be searched.

4. When searching names, a lawyer should be aware that cultural differences may mean that family names may not be an individual’s last name as listed on their identification.

Recording Judgments

5. If a judgment debtor owns real property situate in multiple registration districts, the judgment must be recorded in each applicable registration district in order to create an enforceable encumbrance against all properties.

6. A lawyer assisting with the recording of judgment should notify the client who, as between the lawyer or the client, is responsible for diarizing and attending to the renewal of the judgment.

FOOTNOTES

1. *Personal Property Security Act*, S.N.S. 1995-96, c. 13. Note that the name standards prescribed under the *Personal Property Security Act* General Regulations, s. 19-22 are not applicable to searches under the *Land Registration Act*; *Land Registration Act*, S.N.S. 2001, c. 6, s. 66(A); *Creditors Relief Act*, R.S.N.S. 1989, c. 112, ss. 2 and 2A-2D. A judgment may now create a security interest in personal property; *Land Registration Act*, S.N.S. 2001, c.6, ss.5

and 66(8); Land Registration Administration Regulations made under Section 94 of the *Land Registration Act*, S.N.S. 2001, s. 26 (5).

2. *Registry Act*, R.S.N.S. 1989, c. 392, s. 20-21, *Land Registration Act*, S.N.S. 2001, c. 6, ss. 5 and 65-69. Note s. 65 (judgment roll) and s. 66(4)(e) - judgments recorded under the *Land Registration Act* expire in five years unless renewed.; Land Registration Administration Regulations made under Section 94 of the *Land Registration Act*, S.N.S. 2001, s. 26 (5).

3. Reg. 23 (1) (h) of the Land Registration Administration Regulations made under Section 94 of the *Land Registration Act* S.N.S.2001, c.6.

4. If it is uncertain whether or not the judgment is in fact against a prior owner, the lawyer may include a textual qualification to that effect in the Application for Registration.

5. See Footnote 2.

6. See Footnote 2.

7. Note that the requirement to add the judgment to a parcel register does not apply when a Form 21 is filed. (Land Registry Client Resource Material: Notice - Judgment Searches & Form 21)

8. Land Registration Administration Regulations made under Section 94 of the *Land Registration Act*, S.N.S. 2001, s. 23 (1) (h). The judgment(s) will automatically be removed from the parcel register(s) when the appropriate Certificate of Satisfaction is filed in the Judgment Roll.

Amended by Council on March 24, 2023.

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.6 RESTRICTIVE COVENANTS

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer must examine restrictive covenants and similar restrictions on the use of the parcel in conjunction with all title information and survey information to determine if the restrictions may affect the client's proposed use of the parcel or the marketability of title.

A lawyer who determines that there are restrictive covenants that impact the use of the parcel or the marketability of the title must bring the restrictive covenants to the attention of the client prior to closing. The lawyer must specifically make the client aware of the restrictions that may have a potential and significant impact on the parcel.[1]

A lawyer to whom a specific proposed use of the parcel has been communicated must examine the restrictive covenants to ensure that the restrictive covenants do not prohibit the use.

LAND REGISTRATION SYSTEM

(a) ON MIGRATION

The *Land Registration Act* and Land Registration Administration Regulations require the migrating lawyer to identify the restrictive covenants that impact the parcel being migrated and require that the restrictive covenants are reflected in the parcel register and in the parcel description.[2]

The *Land Registration Act* and Land Registration Administration Regulations require the migrating lawyer to ensure that the restrictive covenants affecting the parcel are included in full text in the parcel description or are referenced in the parcel description. If the restrictive covenants are referenced in the parcel description the migrating lawyer shall ensure that the enabling document referenced in the parcel register contains the full text.[3]

(b) REVISION AND RECORDINGS

A lawyer who revises a parcel register must add to the parcel register and parcel description as a burden any new restrictive covenants contained in the document being registered. A lawyer who revises the parcel register where restrictive covenants are referenced in the parcel description must ensure that the enabling document referenced in the parcel register contains the full text of the restrictive covenants.[4]

FOOTNOTES

1. *Rice v. Condran*, 2012 NSSC 95, Paragraph 65 Boudreau J.: "I can say, however, that the common practice of not pointing out the potential and significant impact of a waiver clause may, in appropriate circumstances, leave a real estate practitioner susceptible to liability and an award of damages. This cannot be considered an onerous or burdensome duty for any lawyer."; Standard 1.5 - Documentation of Advice and Instruction

2. Land Registration Administration Regulations, s.7(10)(b); *Land Registration Act*, s. 37(9)(a)(i)
3. Land Registration Administration Regulations, ss.23(1)(b); (e); and 7(10)(b)(i)
4. Land Registration Administration Regulations, ss.14(1) and (4)

ADDITIONAL RESOURCES

- *Land Registration Act*, S.N.S. 2001, c. 6, s. 61
- A.G.H. Fordham QC / *Restrictive Covenants*, Article prepared for the "Practical Property" CLE Conferences, October 12 and 13, 1984.
- Elias Metlej / "Post Subdivision Registration" Nov. 2, 2011 RELANS Presentation
- Elizabeth Haldane and Fraser MacFadyen / *Restrictive Covenants Revisited*, CLE paper April 12, 1996
- Loss prevention: *The Claims Wise Bulletin,* No.1 and No.15
- Standard 1.1 - Legislative Review

PRACTICE NOTES

A lawyer who revises the parcel register should examine the restrictive covenants and it is recommended that any applicable expiry date is documented as a textual qualification. The lawyer should take note of any expired restrictive covenants and should remove the expired covenants from the parcel register.

A lawyer who revises a parcel register for a parcel located in a subdivision may consider examining abutting parcels in the subdivision to determine if there are any differences or omissions between the parcel and the abutters. If there are differences or omissions the lawyer should advise the client and consider requesting rectification of the discrepancies by the vendor's lawyer.

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.7 TAX DEEDS

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

A lawyer must not certify title to land described in a tax deed until either six years have passed since the date the tax deed was registered or the lawyer has examined an abstract of title for the lands and determined that there is a good root of title.[1] Alternatively, a lawyer may certify title to the lands based on such other enquiries or documentation as may be required to determine that good and marketable title exists pursuant to the *Marketable Titles Act*, the *Real Property Limitations Act* or the common law.

A lawyer may migrate a parcel using a tax deed as the root of title only if six years have passed since the tax deed was registered, subject to any qualifications that may apply under the applicable legislation or the common law.

FOOTNOTES

1. Refer to Standard 3.1: General Principals of Title Review

PRACTICE NOTES

1. A Tax Deed does not ensure compliance with Section 268 of the *Municipal Government Act*. A lawyer may need to search behind a tax deed root to ensure compliance.
2. While a Tax Deed may be a good root of title in some instances, the lawyer must consider that there may be pre-existing benefits and burdens that are not extinguished, that may affect the parcel that may not be reflected in the Tax Deed. (See *Municipal Government Act*, s. 156(3))

   Setting aside - *Desmond v. Guysborough (Municipality)*, (2000) 186 N.S.R. (2d) 123, per MacLellan J. (N.S.S.C.)
   Changes to Tax deed Policy as per Registrar General - December 2, 2021

Approved by Council on November 22, 2002

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.8 JUDICIAL SALES

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

When a lawyer is advising a client on the purchase of a parcel at a sheriff's sale under the *Sale of Land under Execution Act*[1], the lawyer must advise the client that a Sheriff's Deed under the Act conveys only the interest that the judgment debtor had in the parcel at the time the judgment was first registered, or that the judgment debtor subsequently acquires.

When a lawyer is advising a client acquiring a parcel in a foreclosure action, the lawyer must advise the client that a Sheriff's or Auctioneer's[2] Deed conveys only the interest that the mortgagor had in the parcel at the time of the making of the mortgage, or that the mortgagor subsequently acquired[3]. The lawyer must further advise the client that the Sheriff's or Auctioneer's Deed cannot be relied upon as a root of title, or to convey marketable title, in the absence of a full title search.[4]

When a lawyer acting for a secured lender in a judicial sale knows or has reason to believe that a property under foreclosure or other judicial sale process is shown on public records as being owned by a person who has made an assignment or has been petitioned into bankruptcy, the lawyer must ensure that the relevant assignment has been registered or recorded and that the Trustee has notice of the proceedings, unless the lawyer is satisfied that the property has not vested in the Trustee or has re-vested in the person shown on the public record as the owner.[5]

A lawyer acting for a purchaser in a judicial sale must review the enabling order and advise the client on the nature of title, if any, transferred or authorized to be transferred by the order.[6]

FOOTNOTES

1. *Sale of Land Under Execution Act*, R.S.N.S. 1989, c. 409
2. See generally Civil Procedure Rule 72 which permits foreclosure auctions to be conducted by persons, approved by the Court, other than the sheriff.
3. Refer generally to Civil Procedure Rule 72, Form 35.12, *Rawding v. Peninsula Land Corp*. (1990), 99 NSR (2d) 77; 1990 CanLii 4242 (NSSC, AD)
4. The lawyer must also consider, in the case of a parcel not registered under the *Land Registration Act*, whether the transfer is a migration "trigger" under s. 37 of the Land Registration Act and whether and by whom the migration is to be effected. [see standard 1.5 Documentation of Advice and Instruction]

5. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 71; as to disclaimers, see s. 20. See also [*Gavel (Re)*, 2021 NSSC 5]; as to the effect of the failure to record an assignment, see Re Ross 2020 NSSC 36 and [*Gavel*, 2021 NSSC 5]
6. For judicial authority to grant vesting orders under s. 243 of the *Bankruptcy and Insolvency Act*, see *Royal Bank of Canada v. Eastern Infrastructure Inc. and Allcrete Restoration Limited*, 2019 NSSC 297.

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LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.9 TRUSTEE'S DEED

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

Although in general a lawyer is not obliged to inquire as to specific terms of a trust in a conveyance of an interest in a parcel,

1. when the lawyer is acting for the buyer from a trustee, the lawyer must be satisfied that the terms of the trust, on the face of the record or known to the lawyer, are met;
2. when the lawyer is acting for the seller and circumstances warrant, the lawyer should make further inquiries to ensure that the client as trustee is fully informed of the requirements for an effective conveyance; and
3. a lawyer who is acting for trustees on either the migration or the purchase of land held or to be held as part of the assets of the trust must be aware that the trust itself (e.g. ABC Family Trust or The CDE Personal Trust, to name common examples) must not be named as the Registered Owner of the parcel(s). The Registered Owner(s) must be the trustee(s) of the trust.[1]
4. a lawyer who is acting on the sale of trust lands must consider who has management and control of the trust. If the sole decision maker or the majority of the decision makers, whether Trustees or beneficiaries, are non-residents of Canada, the lawyer should obtain a clearance certificate from Canada Revenue Agency pursuant to S. 116 of the Income Tax Act (Canada).[2,3]
5. a lawyer acting on the sale or transfer of trust lands must determine who, if anyone, might have a matrimonial interest in the lands[4] and draft the appropriate Affidavit of Status accordingly.

FOOTNOTES

[1] *Land Registration Act*, S.N.S.2001, c.6, s.28. Note however that the individual Trustees do not always have to be named. For example, a statute creating a particular Church or organization may indicate that the Church/organization lands are to be held by its Trustees. It is acceptable to describe the Registered Owners in the Company/Entity field as “Trustees of [name of the Church or other organization]” as indicated by the constating documents.
[2] *Garron Family Trust v. Her Majesty the Queen* [2010 2CTC 2346 (TCC), aff’d 2010 FCA 309; aff’d 2012 SCC14]; Canada Revenue Agency Technical Interpretation 2012 – 0448681e5.
[3] *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp.), s.116.
[4] *Matrimonial Property Act*, R.S.N.S., 1989, c. 275, as amended

ADDITIONAL RESOURCES

Trustee Act, R.S.N.S. 1989, c. 479
Public Trustee Act, R.S.N.S. 1989, c. 379
Deeming provisions: *Land Registration Act*, S.N.S. 2001, c. 6, s. 28
See also Real Estate Standard 3.10: Estates

PRACTICE NOTES

With respect to Affidavits of Status in Deeds transferring residences which are held in trust, it is important to remember that if the Trustee is a pure Trustee, i.e. not also a beneficiary, and not married to a beneficiary of the Trust, the marital status of the Trustee is irrelevant and including in the Deed an Affidavit which states that the Trustee has not occupied the property as a matrimonial home is not helpful.

The terms of the trust should indicate whether any beneficiary of the trust has the right to occupy the residence. If a beneficiary does have the right to occupy the residence then it may be appropriate for the beneficiary and the spouse of the beneficiary to consent to the Deed and for the Affidavit of Status to reflect their interest in the property. If no beneficiary has a matrimonial interest under the terms of the trust the Trustee can swear that no beneficiary or other person can claim through the trust an interest in the property under the ***Matrimonial Property Act*** or the ***Vital Statistics Act***.

Revised by Council on September 25, 2020

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

3.10 ESTATES

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

In any conveyance from a personal representative, a lawyer must ensure that all required consents[1] are obtained and be satisfied as to the authority of the personal representative and the validity of the testamentary instrument, if any.

A lawyer should be familiar with the provisions of the *Probate Act* and the *Land Registration Act* as they affect conveyancing, in particular with respect to the changes to the law and practice embodied in those statutes.

FOOTNOTES

1. *Probate Act*, S.N.S. 2000, c.31, s.50-51

ADDITIONAL RESOURCES

- E. O'Brien Edmonds, "Property Issues: The Real Estate-Probate Interface", in Probate Procedures and Documentation Seminar, (C.L.E.S.N.S., October, 2001)
- *Probate Act*, S.N.S. 2000, c. 31 - note particularly vesting of real property in administrator
- *Land Registration Act*, S.N.S. 2001, c. 6, ss. 24 (wills), 25 (intestacy) and 26 (requirement for certificate of legal effect when application for revision is based on administrator's deed)
- A.L. Paton,"Update - Probate Act Reform", in Wills, Estates and Probate 2000, (C.L.E.S.N.S. September 2000)
- A.L. Paton, "Changes to the *Probate Act*: How They May Affect Your Practice" in Property Law: Profession and Business - Staying in the Game, (C.L.E.S.N.S., February 2001)
- A.L. Paton, "The Old and the New: A Look at Probate in Nova Scotia" in Probate Procedures and Documentation Seminar (C.L.E.S.N.S., October, 2001)
- W. M. Penfound, "Changes to the *Probate Act*: How They May Affect Your Practice" in Property Law: Profession and Business - Staying in the Game, (C.L.E.S.N.S., February 2001)

LAWYERS' INSURANCE
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3.11 BANKRUPTCY AND RECEIVERSHIP

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

Title of Trustee in Bankruptcy

Migration

A lawyer who files an application for registration under the *Land Registration Act* in which the chain of title includes a trustee of the estate of a bankrupt must ensure that the property was vested[1] in the trustee and that such vesting is evidenced by sufficient registered or recorded documentation.[2]

The lawyer must also determine whether, as required by the *Bankruptcy and Insolvency Act* , the consents of inspectors have been given, or a court order approving the sale has issued.[3]

If title vests with the trustee at the time of such registration, then the trustee should be shown as the registered interest holder.[4]

Transactions

A lawyer who acts on behalf of any party accepting title from a trustee of a bankrupt estate, or otherwise certifies the legal effect of an instrument of conveyance from a trustee of a bankrupt estate, must ensure that the trustee is shown in the parcel register as a registered interest holder.[5]

The lawyer must also determine whether, as required by the *Bankruptcy and Insolvency Act*, the consents of inspectors have been given, or a court order approving the sale has issued.[6]

Title of Bankrupt

A lawyer who a) files an application for registration under the *Land Registration Act* in which the chain of title includes a party known by the lawyer[7] to have been bankrupt,[8] b) acts on behalf of any party accepting title from a party known by the lawyer to have been bankrupt, or c) otherwise certifies the legal effect of an instrument of conveyance from a party known by the lawyer to have been bankrupt, must ensure that the bankruptcy either did not vest title to the property in the trustee in bankruptcy, or that the title was re-vested in the bankrupt.[9]

Receivership

A lawyer who files an application for registration under the *Land Registration Act* in which the chain of title includes a receiver, or acts on behalf of any party accepting title from a receiver, or otherwise certifies the legal effect of an instrument of conveyance from a receiver, must ensure that a vesting order or an order approving the sale is registered.[10]

Legacy Judgments

A lawyer may rely on registered evidence of a bankruptcy,[11] including a discharge of the bankrupt or the trustee, to conclude that a prior judgment recorded against an owner of a parcel or a predecessor in title

does not attach to the parcel, unless the judgment results from a security under the *Bankruptcy and Insolvency Act*, such as a statutory crown lien.[12]

FOOTNOTES

1. *Land Registration Act*, S.N.S. 2001, c.6, para.37(9)(b). *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss.70 & 74. Note that a bankruptcy severs a joint tenancy in cases where one joint owner becomes bankrupt but another joint owner does not, see White, Re., 8 C.B.R. 544, 33 O.W.N. 255, [1928] 1 D.L.R. 846 (S.C.).
2. *Land Registration Act*, S.N.S. 2001, c.6, para.37(9)(b). Although a registered assignment in bankruptcy is likely preferable, a bankruptcy may also be sufficiently evidenced by a registered discharge of either the bankrupt or the trustee, caveat issued under the BIA, instrument registered in the judgment roll only, recital, affidavit or declaration. Note *Vendors and Purchasers Act*, R.S.N.S. 1989, c.487, para.2(a) re. recitals and declarations over twenty years old.
3. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss.30 & 34, para.155(e), requiring consents of inspectors or court order where the bankruptcy is ordinary administration. Consents or court orders are not required for summary administration bankruptcies.
4. Property Online Client Material Updates, December, 2007. There is an exception where the bankrupt had a recorded interest and not a registered interest at the time of the bankruptcy. The materials also allow the lawyer to include a qualification on the trustee's title arising from the instrument. Lawyers should consider whether vesting is absolute before making such a qualification.
5. *Land Registration Act*, S.N.S. 2001, c. 6, s.30. See also note 4, supra. The lawyer should also record the petition, receiving order or assignment in bankruptcy in the judgment roll for the land registration district in which the document is submitted. See Property Online Client Material Updates, December, 2007.
6. See note 3, supra.
7. Based on either unregistered evidence or the lawyer's own knowledge, see LeBlanc (Re), 250 N.S.R. (2d) 225; 2007 NSSC 18; S556/23 and Tim Hill, "LeBlanc (Re)", Case Comment, (2007) 32 Nova Scotia Law News, or based on registered documentation which the lawyer determines did not vest title in the trustee.
8. Can be by assignment in bankruptcy, petition in bankruptcy, or depending on the nature of a proposal, by the operation of or by the failure of the proposal.
9. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, s. 20 of the BIA. A discharge from bankruptcy of either the bankrupt or the trustee does not re-vest the property in the bankrupt. See W. Mark Penfound, "Bankruptcy in the Chain of Title" (Presented in Practical Property 1984) [unpublished], p.5. Note that para.67(1)(c) of the *Bankruptcy and Insolvency Act* includes all property acquired by the bankrupt prior to the bankrupt's discharge. See also note 1, supra, re. severance of joint tenancies.
10. Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra, Annotated Bankruptcy and Insolvency

Act, (Toronto: Carswell, 2009), L§6.2A.

11. *Graves v. Hughes*, (2001) 194 N.S.R. (2d) 51, 606 A.P.R. 51 (S.C.), para.8-9.
12. *Bankruptcy and Insolvency Act*, ss.86 to 87, and subs.178(1); Starratt v. Turner (1989), 78 C.B.R. (N.S.) 83 (N.S.C.A.); *Income Tax Act*, subs.223(11.1); *Excise Tax Act*, subs.316(10.1). See also Robert G. MacKeigan & Paul E. Radford, "Nova Scotia Real Estate Lawyers Association - Conveyancing Standards of Practice 3.11 and 3.14" (Presented at the Real Estate Practice Seminar Series, Continuing Professional Development, Nova Scotia Barristers' Society, 7 February 2003) [unpublished], p.4, which cautions lawyers concerning judgments protected by subs.178(1). But see also W. Mark Penfound, "Bankruptcy in the Chain of Title" (Presented in Practical Property 1984) [unpublished], which states that even protected unsecured judgments cease to attach to pre-acquired property in a bankruptcy.

ADDITIONAL RESOURCES

- Effect of an order or assignment prior to registration: *Land Registration Act*, S.N.S. 2001, c. 6, s. 45, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 75
- Garth C. Gordon, "Notes on Bankruptcy & Land Registration in Nova Scotia" (Presented at the Joint Dinner Meeting of the Real Property and Bankruptcy & Insolvency Sections of the Canadian Bar Association - Nova Scotia, 18 October 2007) [NSBS Library, KB 170 G662 2007].
- D. Bruce Clarke, "Land Registration in Nova Scotia, Registering and Recording Bankruptcy Interests," October, 2008 [Unpublished.]

PRACTICE NOTES

re: Proposals

When a lawyer is acting in a migration or transaction where the lawyer knows an owner has made a proposal under the *Bankruptcy and Insolvency Act*, the lawyer should take reasonable steps to ensure that the effects upon title, if any, of the proposal or its failure have been considered. Where property vests in trustee, accepted practice would be to require registered evidence of vesting. Where property does not vest in trustee, accepted practice would require written acknowledgment from trustee that title has not vested.

re: Title of bankrupt

Section 20 of the BIA sets out a process which allows a trustee to divest itself of property by way of notice of quit claim or renunciation. This requires the permission of inspectors. Subsection (2) sets out that registration of such a notice acts as a discharge or release of any previously registered documents. A lawyer should require registered evidence of divesting or revesting when relying on the bankrupt's title, but may rely on unregistered documentation where the bankruptcy is not registered.

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3.12 GUARDIANSHIP ACT AND ADULT CAPACITY AND DECISION-MAKING ACT

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

When a lawyer acts in a transaction to which a guardian or representative of an interest holder is a party, each lawyer must ensure that a court order authorizing the transaction has been issued and recorded.[1]

FOOTNOTES

1. *Guardianship Act*, S.N.S. 2002, c. 8, ss. 18 and 22; *Adult Capacity and Decision-making Act*, S.N.S. 2017, c.4, s.31.

ADDITIONAL RESOURCES

NS Civil Procedure Rule 71: Guardianship
Information from NS Gov on the *Adult Capacity and Decision-making Act*

Amended by Council on November 23, 2018

LAWYERS' INSURANCE
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3.13 CORPORATIONS AND OTHER ENTITIES

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A lawyer acting for a corporation, municipal unit, university, church, society, charitable organization, or other organization (each being an "entity") should generally[1] take reasonable steps to confirm the legal existence of the entity[2] and the authority of the person giving instructions[3].

A lawyer acting for an entity giving land as security for a loan should also take reasonable steps to ensure that the entity has the power, and is properly authorized[4], to borrow money and charge the entity's land under the constating documents of the entity or by statutory authority[5], and that the proper person or persons execute the document(s) effecting the charge[6].

A lawyer acting for an entity selling or transferring an interest in land should likewise take reasonable steps to ensure that the entity is properly authorized under the constating documents of the entity or by statutory authority[7] to sell or transfer the interest and that the proper person or persons execute the document(s).

A lawyer acting for a client obtaining an interest in land from an entity should take reasonable steps to confirm the legal existence of the entity and to identify the officers and directors currently on any public record. If the transaction documents are executed by publicly listed officers and/or directors, particularly if they are under seal, the lawyer may assume that the transaction documents have been properly authorized and executed[8].

Footnotes

1. Note the exemptions listed in Regulations made pursuant to the *Legal Profession Act,* SNS 2004, c 28, s 4.13.
2. See *Ibid* at s 4.13 for suggestions for independent source documents.
3. *Ibid,* s 4.13 and Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: NSBS, 2012, ch 3, "Relationship to Clients", rule 3.2-3, commentary [1]. Note the requirements for non-resident and identification of persons authorized to give instructions set out in the Regulations made pursuant to the *Legal Profession Act,* SNS 2004, c 28, s 4.13. Assuming no changes occur, the lawyer only has to confirm the identity the first time he acts for the entity (*ibid*, s 4.13).

4. See, for example, the First Schedule to the *Companies Act*, RSNS 1989, c 81, "Regulations for Management of a Company Limited by Shares", s 71(b) which requires a special resolution of the Company to allow the Directors to use their power to borrow on the security of a mortgage or debenture.
5. e.g., *Companies Act*, RSNS 1989, c 81, s 102 gives all companies incorporated under the *Act* the power to borrow money and execute mortgages "for the purpose of carrying out the objects of its incorporation" and the *Societies Act*, RSNS 1989, c 435, s 10(d) allows a society to give a mortgage or a debenture with the sanction of a special resolution.
6. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: NSBS, 2012, ch 3, "Relationship to Clients", rules 3.1-1 and 3.1-2, commentary [1]. Note the requirements for proof of execution by corporations in the *Land Registration Act*, SNS 2001, c 6, ss 83 and 79(1).
7. See, for example, the First Schedule to the *Companies Act*, RSNS 1989, c 81, "Regulations for Management of a Company Limited by Shares", s 147 which vests the management of the Company business in the Directors but which is limited by s 26(9) of the *Act* which requires a special resolution if the Company is divesting itself of a substantial part of its undertaking.
   Or: *Municipal Government Act*, SNS 1998, c 18, ss 51-53 and by-laws of the individual municipalities.
8. See, for example, the *Companies Act*, RSNS 1989, c 81, s 30 and *Canada Business Corporations Act*, RSC 1985, c C-44, s 18.

PRACTICE NOTES

1. **Existence of Entity**

The first place to look for the existence of an entity is the Nova Scotia Registry of Joint Stock Companies[1]. Companies incorporated and societies created in Nova Scotia and companies incorporated under other legislation but doing business in Nova Scotia should, for the most part, be listed on the Registry. The records indicate whether the entity is "Active", "Revoked for Non-Payment", "Dissolved" or "Struck-Off".

"Active" means the entity is in good standing and has paid its fees. Further reference to the specific entity will generally indicate when fees are next payable.

"Revoked for Non-Payment" means that the entity has not paid the annual fee to keep it in good standing. The entity still exists and can still deal with its assets. It can get back into good standing simply by paying its fees.

"Dissolved" and "Struck-Off" mean the entity is dissolved[2] and no longer exists. If the entity owned property when it was struck-off, ownership of that property escheated to the Crown[3]. It may be possible to revive the entity[4] but it is a costly and time-consuming process.

If the records at the Registry of Joint Stock Companies indicate that the name the lawyer is researching is a “Partnership/Business Name”, this means that the name is just that, a name only. There is a legal entity behind the name which can be found by scrolling down. For example, ABC Antiques may actually be John Desmond Smith carrying on business as ABC Antiques and the documents should be executed by “John Desmond Smith c.o.b. as ABC Antiques”. Likewise a corporation might stand behind the name: e.g., 3329573 Nova Scotia Limited uses the name ABC Antiques as its business name. In that case the numbered company should sign the documents.

2. **Signing Authority**

If documents are being provided by in-house counsel for a corporation (e.g., Nova Scotia Power Inc.), unless the lawyer has cause for concern, the lawyer can rely on in-house counsel to provide properly executed documents. Likewise, if documents are provided by a bank or other major financial institution, the lawyer may assume authority to sign was given.

In the case of an entity without in-house counsel, if the document is not signed by any of the officers or directors listed on the records of the Registry of Joint Stock Companies, the lawyer should ask for a copy of the directors’ resolution giving signing authority for the transaction. If the directors signing the resolution are not the directors listed at the Registry of Joint Stock Companies, then the lawyer should also request a certificate of incumbency (and an explanation).

Footnotes

1. Access is available at http://novascotia.ca/sns/access/business/registry-joint-stock-companies.asp
2. *Companies Act*, RSNS 1989, c 81, s 136. See also *Societies Act*, RSNS 1989, c 435, s 25.
3. *Corporations Miscellaneous Provisions Act*, RSNS 1989, c 100, s 27.
4. *Companies Act*, RSNS 1989, c 81, s 136.

Amended by Council on November 23, 2018

3.14 PARTNERSHIPS

STANDARD

A lawyer representing a party acquiring a parcel from individuals carrying on as a partnership must examine the manner in which title was taken and ensure that all partners required to execute the conveyance, sign either personally or by representation.[1]

A lawyer representing a limited partnership with respect to a transaction involving land should ensure that the interest in the land is held, acquired or transferred, as appropriate, by the general partner of the limited partnership.[2]

FOOTNOTES

1. See *Partnership Act*, R.S.N.S. 1989, c. 334. See also Registrar General's Communique Issue 6: "AFR Rejection Criteria – Trusts and Partnerships".

2. See *Limited Partnerships Act*, R.S.N.S. 1989, c.259 s. 8(3) which requires that the general partner of a limited partnership hold the title to the real property owned by the limited partnership.

ADDITIONAL RESOURCES

- A.H. Oosterhoff, and W.B. Rayner, Anger and Honsberger *Law of Real Property*, 2d ed. (Toronto: Canada Law Book 1985) at p.1256.
- D.H. Lamont, *Real Estate Conveyancing*, (Toronto: Law Society of Upper Canada, 1976) at p.294-295.

Amended by Council on November 17, 2017

LAWYERS' INSURANCE
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3.15 DEBENTURES

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A lawyer must search the Land Registration Office for debentures which may affect the parcel.

A lawyer must examine the terms of a floating charge debenture to determine whether the proposed disposition of an interest in real property is permitted. If the lawyer determines that the proposed disposition is permitted, the lawyer should not require a release unless a notice of crystallization has been recorded,[1] or the lawyer or the client has reason to believe that the floating charge has crystallized.

When a lawyer is conducting a search of title of a parcel that has been registered pursuant to the *Land Registration Act*, the lawyer must examine all fixed charges, and all floating charges for which notice of crystallization has been recorded,[2] which are contained in debentures recorded against the parcel. The lawyer must obtain and record, in a timely fashion, discharges for those charges being discharged.

FOOTNOTES

1. If the proposed disposition is not permitted, then the lawyer must obtain the holder's written consent to the proposed disposition.
2. *Land Registration Act*, S.N.S. 2001, c. 6, s. 53(3). See also s. 49(1) regarding priorities.

Approved by Council on November 22, 2002

LAWYERS' INSURANCE
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3.16 EXPROPRIATIONS

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A lawyer may certify title in fee simple where the root of title commences with the required expropriation documents evidencing that a fee simple interest was expropriated.

When a lawyer identifies expropriation documents affecting a parcel, the lawyer must examine these documents and determine the nature of the interest expropriated and include the documents in the lawyer's abstract of title.[1]

FOOTNOTES

1. Standard 1.5 - Documentation of Advice and Instruction

Approved by Council on November 22, 2002

LAWYERS' INSURANCE
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3.17 OPTIONS AND RIGHTS OF FIRST REFUSAL

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

When a lawyer conducts a title search and identifies an option or right of first refusal, the lawyer must determine if the option or right of first refusal is still applicable. If the option or right of first refusal is still applicable, the Lawyer should consider how the option or right of first refusal can be exercised, and how it can be released.

A lawyer who drafts an option or right of first refusal should set out in the document how the option or right of first refusal can be exercised, and how it can be released or terminated.

FOOTNOTES

1. P.M. Perell, “Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land” (1991), 70 Can. Bar Rev.1
2. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

F.J. Powell, “Options and Rights of First Refusal” in Real Property, (C.L.E.S.N.S. April, 1987)

Revised by Council on September 25, 2020

LAWYERS' INSURANCE
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3.18 BUILDERS' LIEN

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer who acts in a transaction must consider the applicability of the *Builders' Lien Act* [1] with particular emphasis on the hold back provisions, and advise the client accordingly.

A lawyer must check for any undischarged liens and certificates of *lis pendens* filed relating to the parcel.

A lawyer who vacates a lien for which no lis pendens has been filed, but for which a lawyer has determined that the lien has ceased to exist pursuant to legislation or common law, should take the necessary steps to have the lien removed from the parcel register at the appropriate land registration office. A lawyer who vacates a claim for lien for which a certificate of *lis pendens* has been filed must ensure a court order is obtained and recorded to remove the lis pendens from the parcel register.

FOOTNOTES

1. *Builders' Lien Act*, R.S.N.S. 1989, c. 277

ADDITIONAL RESOURCES

- *Land Registration Act*, S.N.S. 2001, c. 6 - "lien" defined: s. 3(1)(i) - interest may be recorded: s. 47(1) - certificate of *lis pendens* expires ["may be removed"] after five years: s. 58(2)(d) - filing lien under *Registry Act*, R.S.N.S. 1989, c. 392 has no effect on migrated parcel: s. 70
- John Kulik / "Liening in a New Direction: Recent Amendments and Case Law on Construction Liens" (January 28, 2005).

PRACTICE NOTES

The *Builders' Lien Act* requires the person primarily liable on the contract to holdback 10% of the value of the contract price or actual value of work, service, and/or materials provided.

When construction or renovation is being carried out, a lawyer has an obligation to advise the client of the holdback provisions under the Act.

Agreements of Purchase and Sale

(i) For the purchase of a new construction home, where the Buyer purchases both the land and home on the closing date from the Seller/Builder, the person primarily liable would be the Seller.

Where lawyers are involved in the transaction, the usual practice is for the Seller’s lawyer to retain the holdback for the required period. The Buyer is protected when the Seller’s lawyer retains the holdback.

Where no lawyer is retained by the Seller (which is unusual), the Buyer or the Buyer’s lawyer would retain the holdback.

Where the work is ongoing or substantial performance of the work occurred less than 60 days before the closing date, the holdback will be required.

Construction Contracts and Renovations

(ii) The *Builders' Lien Act* also extends the liability to a person who has any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished. When a land owner contracts with a Builder to construct or renovate a home on the land, the person primarily liable will be the owner of the land.

In the case of a contract with progressive draws to a builder, the holdback is deducted each time a payment is made. The accumulated holdback amounts are held for a period of 60 days after the work has been substantially performed. In most custom built home contracts, the owner’s solicitor will retain the holdback, unless the contract specifies otherwise.

In the majority of transactions, there will be a lender involved. Lawyers must consider the applicability of the *Builders' Lien Act* when dealing with lenders and how the holdback provisions of the *Builders' Lien Act* apply.

A lawyer must follow the lender’s instructions if they specifically direct that a holdback must be maintained.

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3.19 QUIETING TITLES ACT

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A certificate of title issued pursuant to the *Quieting Titles Act* and registered pursuant to the *Land Registration Act* is absolute and indefeasible as regards the Crown and all persons subject to such exceptions or qualifications as enumerated in the certificate or the *Act*[1].

A certificate of title issued under the *Quieting Titles Act* is a good root of title where the certificate recognizes a fee simple interest.

A certificate of title issued under the *Quieting Titles Act* is a trigger for migration unless the certificate of title was recorded under the *Registry Act*. The migrating lawyer must contact the Registrar General so that a form 32 can be issued which forms the enabling instrument for the migration. The application for registration must include a textual qualification that indicates the certificate of title issued by the court will be registered on title after the migration is complete.

FOOTNOTES

1. *Quieting Titles Act*, R.S.N.S. 1989, c. 382, s. 1
2. *Land Registration Act*, S.N.S. 2001, c. 6, s. 46(1)(d)

ADDITIONAL RESOURCES

Recording of plan: *Land Registration Act*, S.N.S. 2001, c. 6, s. 41(2)
Nova Scotia (Attorney General) v. Brill, 2010 NSCA 69
Supreme Court of Nova Scotia Practice Memorandum #11

Approved by Council on November 22, 2002

LAWYERS' INSURANCE
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3.20 LEASEHOLDS

PART III - ESSENTIAL ELEMENTS RESPECTING TITLE

STANDARD

A lawyer must search leasehold titles in the same manner as freehold titles.

ADDITIONAL RESOURCES

Notice of lease: *Land Registration Act*, S.N.S. 2001, c. 6, s. 55
Subdivision approval - leases for terms exceeding 20 years: *Municipal Government Act*, S.N.S. 1998, c. 18, s. 268(2)(i)

Approved by Council on November 22, 2002. Standard reviewed by Committee on March 10, 2021. No changes required.

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3.21 CONDOMINIUMS

PART III - ESSENTIAL ELEMENTS IN THE REVIEW OF TITLE

STANDARD

A lawyer who represents a buyer of a condominium unit must obtain and review the estoppel certificate, declaration, by-laws and common element rules for the corporation.[1]

A lawyer who represents a buyer of a condominium unit must ensure that the following information has been provided to the client:

- Floor plans for the unit showing the unit's location and configuration[2]
- Unit boundaries
- Estoppel Certificate details
- Information on the 'super priority' of a condominium corporation's lien for unpaid common expenses and the amount of any assessment[3]
- Information on the provisions for a Parking unit or space, if applicable[4]
- Information on the provisions for a storage unit or space, if applicable[5]
- Standard Unit Definition (applicable to condominiums registered after September 2011)
- Insurance details (Corporation) and requirements (unit owner)
- Shared common element services, if applicable (e.g. sewage treatment plant, wells)
- Exclusive use details pertaining to the unit
- Common element rules if provided[6]
- Corporation amenities details

A lawyer who represents a buyer of a condominium unit must advise the client, in writing, as to any limitations on the lawyer's documentation review[7]

In addition to the reviews and documentation noted above, a lawyer who represents a buyer of a condominium unit must carry out the following specific tasks, depending on the type of condominium unit involved:

New Construction & Phased Condominiums

A lawyer who represents the buyer of a new construction condominium unit must review the Declarant's budget for first year of the Corporation with the client, and the Declarant's responsibility for a holdback from the sale of the first unit in support of the accuracy of the Declarant's budget.[8]

A lawyer who represents the buyer of a new construction condominium unit must consider the requirements outlined in the Condominium Regulations respecting requirements for Agreements of Purchase and Sale.[9]

A lawyer who represents the buyer of a condominium unit that is contained in a phased condominium development must ensure that the property reservedfor future phases is bound by a restrictive covenant

that states that the affected property can only be used for a purpose that is materially similar to the purpose stated in the declaration and description.[10]

A lawyer who represents the buyer of a condominium unit that is contained in a phased condominium development must advise the client that a Declarant is not required to create a phase after the creation of the present phase.[11]

Mixed-use and Bare land Condominiums[12]

The Declarations and By-Laws for these types of condominiums typically contain provisions that restrict the size and future use of units. Bare land developments include restrictions on commercial and/or residential uses and the type of structures that may be built on the units. Shared services (water and waste water) are often involved in these corporations.

A lawyer who represents a buyer of a condominium unit in a mixed-use or bare-land condominium development must review with the client:

a. any provisions that restrict the size and future use of units; and
b. Any shared services provisions contained in the declaration.

FOOTNOTES

1. Estoppel Certificates may not exist [or be required under the Agreement of Purchase and Sale] for new construction condominiums. In that case, the lawyer who represents a buyer of a condominium unit must obtain and review the Corporation's Master Insurance Policy details. For a review of the standard of care required by a lawyer, see for example *Rice v. Condran*, 2012 NSSC 95. See also *Major v. Buchanon*, 1975, 9 O.R. (2d) 491 and Sykes et al. v. Midland Bank Executor & Trustee Co., Ltd. Et al., [1969] 2 All E.R. 1238. See also Real Estate Standards Part III, Essential Elements in the Review of Title.
2. *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2009 69104 (ON SC) as to importance of reviewing the unit's floor plans with the client. See also Real Estate Standard 2.1: Legal Descriptions and Parcel Identification
3. *Condominium Act*, RSNS 1989, c85: subsections 31(6) & (7)
4. Parking arrangements vary with condominium corporations. It may be handled in any of the following ways: (a) the parking may be separately-conveyed units, (b) exclusive use space assigned to the unit in the corporation's declaration or (c) by assignment by the Board of Directors. The lawyer must verify the particular parking arrangements with the client.
5. Storage arrangements apply in the same way as parking, mutatis mutandis.
6. The rules are not always provided to the buyer's lawyer. Depending on the Corporation, they may be placed in the elevator or not circulated to owners. For a discussion of pet rules and restrictions, see *Condominium Plan No. 762 1302 v. Stebbing*, 2014 ABQB 487 (CanLII).
7. See Real Estate Standard 1.5: Documentation of Advice and Instruction
8. See *Condominium Act*, R.S.N.S. 1989, C.85, section 44B. The first operating budget is merely the declarant's estimate of expenses, but the holdback requirements encourage the developer's

estimate to be more reliable / accurate.

9. See Cassidy, Patrick I.; Nova Scotia Association of Realtors / Advising purchasers of new construction condominiums: agreement cautions in Condominium law and insurance 101, February 2009
10. *Condominium Act*, RSNS 1989, c85, section 12AA.
11. Condominium Regulations, Part J Phased Development Property, clause 76(1) (f).
12. See *Condominium Act*, RSNS 1989, c85 Section 12B; Condominium Regulations subsections 54(2), & 70(d) & (e)

ADDITIONAL RESOURCES

1. See Condominium materials on Service Nova Scotia's web site
2. See O'Brien Edmonds, Q.C., Erin / 'Condominium conversions: existing and new condominiums step by step' and 'Condominiums revisited - achieving consistency under LRA' Real Property Conference 2006: Crown interests and due diligence under LRA: The Sophomore Year, February 2006
3. Lem, Jeffrey / The Dirt: Get used to unfolding those condominium plans, the Law Times October 17, 2011
4. See Ontario Working Group on Lawyers and Real Estate Draft Master Chart of Items to Review with Buyers in a Standard Resale Condominium Purchase Transaction
5. See LIANS' Single Family Residential Real Estate Purchase Checklist, January 3, 2013, p. 11
6. See O'Brien Edmonds, Q.C., Erin, Properly Conducting Condominium Transactions to Minimize Risks Unique to Atlantic Canada, Managing Risk and Exploiting Opportunities in Atlantic Canada Commercial Real Estate
7. See Coffin, C.A. Mark / Condominiums and the Land Registration Act: PDCA's, AFR's and Advil (February 2005), in Real Property Conference 2005: from challenges to opportunities...navigating the real property paths.
8. See McGrath, Mary Ann / Condominiums (November 2006)
9. For a discussion if insurance issues and condominiums, see Canadian Condominium Institute Winder 2015 newsletter

PRACTICE NOTES

The overarching reason for lawyers to review the unit's architectural plans with the client is to ensure that the unit to which title is to be taken is the unit that the client intends to purchase.

Under the Standard Realtor's Agreement for re-sale condominiums, an estoppel certificate is provided by the Seller at the Seller's expense.

Lawyers should review the balance in the Reserve Fund as noted in the Estoppel Certificate, and compare that balance to the amount listed in the Corporation's financial statements. In new construction

condominiums, the Agreement may provide that there is no estoppel certificate or that the certificate is the buyer's responsibility (and expense). If there is no estoppel certificate under the agreement, the lawyer should at a minimum obtain insurance information for the condominium corporation.

When undertaking a refinance of an existing condominium, an estoppel certificate is often required by the lender. Most title insurance policies do not provide the same coverage as an estoppel certificate.

3.22 Land Title Clarification Act

Standard

When there are defects in the chain of title and the land is located within the boundaries of a Land Titles Clarification area a lawyer should consider whether the *Land Titles Clarification Act* is an appropriate mechanism for clarifying title.

Practice Notes

A certificate of title issued pursuant to the *Land Titles Clarification Act* and registered pursuant to the *Land Registration Act* vests an absolute and indefeasible fee simple interest in the person named in the certificate subject to any liens, judgments, encumbrances, reservations and such exceptions or other qualifications mentioned in the certificate or the *Act*[1].
A certificate of title is a good root of title.
Entitlement to land located in a land titles clarification area can be established through evidence of use and occupation but does not require that an applicant meet the common law standard of adverse possession.

Claims are to be determined on a case-by case basis[2].
A certificate of title issued under the *Land Titles Clarification Act* is a trigger for migration. The migrating lawyer must contact the Registrar General so that a form 32 can be issued which forms the enabling instrument for the migration. The application for registration must include a textual qualification that indicates the certificate of title issued by the court will be registered on title after the migration is complete.

Footnotes

1. *Land Titles Clarification Act*, R.S.N.S., c. 250.
2. *Downey v. Nova Scotia*, 2020 NSSC 201

Additional Resources

Beals v. Nova Scotia (Attorney General), 2020 NSSC 60

Approved by Council on March 21, 2025.

LAWYERS' INSURANCE
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PART IV - CONVEYANCING PRACTICE

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4.2 PROOF OF EXECUTION OF INSTRUMENTS

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4.6 UNDERTAKINGS

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

4.1 POWERS OF ATTORNEY

PART IV - CONVEYANCING PRACTICE

STANDARD

When a lawyer encounters a document executed or to be executed pursuant to a Power of Attorney, the lawyer must ensure

a) that the donor of the Power of Attorney can or could legally delegate the powers listed in the Power of Attorney[1];

b) that the wording of the Power of Attorney gives the Attorney the authority to execute the specific document[2] and

c) that the Power of Attorney is properly recorded in order to be effective[3].

A lawyer must ensure that any Affidavit sworn by a person acting as an Attorney pursuant to a Power of Attorney contains only information known to the Attorney personally and is executed by the Attorney in their personal capacity, and not in their capacity as Attorney[4].

A lawyer must ensure that the execution of the Power of Attorney is properly proven[5].

A lawyer meeting with a donor to execute a Power of Attorney or meeting with an Attorney to execute a document pursuant to a Power of Attorney must confirm the identity of the donor/Attorney[6].

A lawyer who instructs someone else, wherever they are located, to meet with a donor to execute a Power of Attorney, or to meet with an Attorney to execute a document pursuant to a Power of Attorney, must also instruct the staff member/lawyer to confirm the identity of the donor/Attorney and should obtain written confirmation by way of copies of the identification used or by Certificate, Declaration or Affidavit that the staff member/lawyer has done so[7].

FOOTNOTES

1. Infants and mentally incapacitated persons cannot give a valid Power of Attorney and generally persons who stand in a fiduciary position, such as Trustees, Executors, Directors and Officers of companies etc., cannot delegate to others activities which involve the exercise of judgment or discretion for which they are responsible by virtue of their position, though they can delegate specific acts about which a decision has already been made. Thus, a company, following a decision of the Board of Directors, may give a person who is neither an Officer nor a Director a Power of Attorney to execute a specific document or kind of document on behalf of the company (e.g. Banks often appoint attorneys to execute Releases of Mortgage). As always there are exceptions to the general rule. See, for example: "Fiduciary Duties: Obligations of Loyalty and Faithfulness", Ng, Michael, Canada Law Book, 2015, vol 2, c.9; "Fiduciary Law", Rotman, Leonard, Thomson Carswell, 2005.
2. If the donor is incapacitated at the time the Attorney is acting, the Power of Attorney must not only grant the Attorney the authority to do what is being done but also must comply with s. 3 of the *Powers of Attorney Act*, R.S.N.S.1989, c.352 in order to be effective.
3. For non LR parcels see s. 24 of the *Registry Act*, R.S.N.S. 1989, c.392; for LR parcels see s. 72 of the *Land Registration Act*, S.N.S. 2001, c. 6
4. An Affidavit is " A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the person making it, taken before a person having authority to administer such oath or affirmation", Black's Law Dictionary, 5th ed. It follows that a person cannot swear an affidavit pretending to be someone else: i.e., the Attorney cannot swear the Affidavit as if the Attorney is the donor. The Attorney can only swear to facts within the Attorney's own knowledge.
5. See *Land Registration Act*, S.N.S. 2001, c. 6, s. 79 and *Registry Act*, R.S.N.S. 1989, c.392, ss. 30 – 35.
6. See Real Estate Standard 4.4: Identification.
7. See Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, c. 6, s. 6.1; Regulations made pursuant to the *Legal Profession Act*,

S.N.S. 2004, c.28, s 4.13.

PRACTICE NOTES

1. If a lawyer is examining a chain of title for migration purposes and comes upon an historical properly executed and recorded Power of Attorney which does not contain a provision stating that it may be exercised when the Donor is incapacitated, unless there is evidence to the contrary or the lawyer is personally aware that it was not the case, it is reasonable for the lawyer to assume that the Donor was competent when the Power was exercised.
2. A lawyer should never instruct a non-lawyer to meet with a donor to execute a Power of Attorney unless the lawyer has first explained to the donor the effect and ramifications of giving the Power of Attorney and the lawyer is satisfied that the donor understands the risks as well as the benefits of the document. The lawyer should put written confirmation in the file that this conversation has taken place.
3. If the donor owns real property, it is generally good practice to arrange for the donor of a Power of Attorney to swear an affidavit of marital status at the time when the Power of Attorney is executed. Then, if required, the Attorney need only provide evidence of the marital status between the date of the Power of Attorney and the date of the document which the Attorney is executing.
4. When an Attorney is swearing an affidavit confirming the marital status of the donor of the Power of Attorney, the lawyer should ensure that Attorney states the facts upon which the Attorney is relying to reach the conclusion as to marital status so that the lawyer reviewing the affidavit can determine whether the Attorney has the appropriate familiarity with the donor or the situation in which the donor lives to be reliable.
5. When a Deed removing all of the donor's interest in a property is executed pursuant to a Power of Attorney and the Power of Attorney is recorded in the property's parcel register, the lawyer registering the Deed should remove the Power of Attorney from the parcel register when the lawyer registers the Deed by requesting the removal by operation of law on the Form 24 attached to the Deed. The Deed must be then be forwarded in hard copy to the relevant Land Registration Office.

ADDITIONAL RESOURCES

Land Registry Resource Material, Access Nova Scotia, Property Online

Amended by Council on November 23, 2018

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ASSOCIATION OF NOVA SCOTIA

4.2 PROOF OF EXECUTION OF INSTRUMENTS

PART IV - CONVEYANCING PRACTICE

STANDARD

A lawyer may simplify proof of a party's execution of an instrument for registration purposes by having the party acknowledge execution of the instrument in the Grantor's Affidavit. If an acknowledgment is made, the lawyer should modify the jurat of the affidavit so that the affidavit and the jurat will act as the certificate of execution or acknowledgment.

ADDITIONAL RESOURCES

- *Registry Act*, R.S.N.S. 1989, c. 392, ss. 31(a) and 32(2)
- *Land Registration Act*, S.N.S. 2001, c. 6, s. 79(2)-79(3)
- Documents not under seal: *Corporations Miscellaneous Provisions Act*, R.S.N.S. 1989, c. 100, s. 13(1) and *Land Registration Act*, S.N.S. 2001, c. 6, s. 78
- Standard of formality: *Miller v. Prest Bros. Ltd.*(1992), 116 N.S.R. (2d) 150, per Saunders J. (N.S.S.C.T.D.)

4.3 NAME STANDARDS

STANDARD

Real Property

Registry Act

A lawyer who is retained to offer an opinion of title for a parcel of land not registered pursuant to the *Land Registration Act* must conduct searches based on the applicable naming standard to determine any party with an interest affecting real property interests and judgments, or advise the client(s) in writing if no applicable name searches are conducted and the possible consequences of not conducting those searches.[1]

Land Registration Act

A lawyer shall conduct searches based on the applicable naming standards prescribed by the *Land Registration Act*[2] and its regulations[3] to determine any party with an interest affecting real property interests and the applicability of judgments.[4]

Personal Property

When conducting searches in the Personal Property Security Registry, a lawyer shall conduct inquiries[5] based on applicable

naming standards prescribed by the *Personal Property Security Act* General Regulations[6] to determine encumbrances and judgments which attach to the personal property.

A lawyer whose retainer does not include offering an opinion of encumbrances and judgments[7] should advise the client in writing if no applicable name searches are conducted and the possible consequences thereof.[8]

FOOTNOTES

1. Standard 1.5 - Documentation of Advice and Instructions.

2. *Land Registration Act*, S.N.S. 2001, c. 6, ss.66A and 68.

3. Land Registration Administration Regulations, ss.2(2) and 26

4. Standard 3.5 - Judgments

5. Standard 5.2 - Personal Property

6. *Personal Property Security Act* General Regulations, s. 19-21; see also *Robie Financial Inc. v. Pye*, 2009 NSSC 397 for the consequence of an error in registering the name of a debtor pursuant to the *Personal Property Security Act*.

7. Standard 5.2 - Personal Property

8. Standard 1.5 - Documentation of Advice and Instructions

Amended on May 18, 2018.

4.4 IDENTIFICATION

STANDARD

A lawyer who is retained by a client must obtain and record the client's identification as prescribed by the Regulations made pursuant to the *Legal Profession Act* for the purpose of identifying the client.

A lawyer must take reasonable steps to confirm the identity of a person who:

(a) signs a document in a transaction where the lawyer is responsible for the proper execution of the document;

(b) executes a document the lawyer witnesses;

(c) swears an affidavit before the lawyer; or

(d) gives a solemn declaration to the lawyer.[1]

The lawyer must be aware of what identification may be relied upon.[2]

The lawyer must take reasonable steps to document the confirmation in the lawyer's file or by other means.[3]

FOOTNOTES

1. Regulations made pursuant to the *Legal Profession Act*, S.N.S 2004, c.28, s. 4.5; *Yamada v. Mock*, 1996 CanLII 8024 (ON SC). Supervision of employees: Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, section 6.1: Supervision (See rules and commentaries under rule 6.1-1 (Direct Supervision Required), rule 6.1-2 (Application) and rule 6.1-3 (Delegation)).
2. *Personal Health Information Act*, S.N.S 2010. C.41, s.27: Lawyers not authorized to collect or use an individual's health card number.
3. Standard 1.5 - Documentation of Advice and Instructions.

Approved by Council November 24, 2006; amended May 18, 2018.

LAWYERS' INSURANCE
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4.5 LIMITED SCOPE RETAINERS

PART IV - CONVEYANCING PRACTICE

STANDARD

Limited scope retainer means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client.[1]

A lawyer who accepts a limited scope retainer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client what services will be provided, prior to completing the work. The lawyer should set out in writing the limitations of such limited scope retainer and caution the client on the risks.[2]

A lawyer who provides legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client.[3]

FOOTNOTES

[1] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, ch 1-1.1(i).
[2] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, ch 3-2.1A; *Lenz v Broadhurst Main*, 2004 CanLII 5059 (Ont SC); *669283 Ontario Ltd. v Reilly*, (1996) OJ 273 (Ont Gen Div).
[3] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, ch 3-2.1A, commentary.
[4] Lawyers' Insurance Association of Nova Scotia, Real Property Standard 1.3: Opinion of Title and Certificate of Legal Effect

ADDITIONAL RESOURCES

Kimbro, Stephanie L., "Limited Scope Legal Services: Unbundling and the Self-Help Client", ABA 2013

O'Brien Edmonds QC, Erin, "Joint Property"; and Rumscheidt, Peter "Joint Property: Don't let your plans go up in smoke" (Papers delivered at the Canadian Bar Association Nova Scotia Annual Professional Development Conference, 27 January 2012).

Canadian Bar Association, Alberta Branch "The Limited Scope Retainer"

Winter, Ivo, "Deed Preparation" (Paper delivered at the 2013 RELANS Conference, Halifax, 2 December 2013).

Pinnington, Dan: "Unbundled Legal Services: Pitfalls to Avoid" *LawPro Magazine*, 11:1 January 2012, p. 6

Matthews QC, Timothy C., "Joint Accounts, Presumption of Resulting Trust and Presumption of Advancement" (Paper delivered at the Canadian Bar Association 2008 Professional Development Conference, Halifax, 11 January 2008).

Avis (Re), 2011 CanLII 21681 (NL LS), online: Adjudication Tribunal.

PRACTICE NOTES

Notwithstanding a limited scope retainer a lawyer must comply with the Land Registration Act and Land Registration Administration Regulations, the Real Estate Professional Standards and applicable legislation when registering or preparing a deed or other document and submitting the certificate of legal effect.[4]

The lawyer must conduct the required searches and must ensure that any judgments which attach to the parcel are properly documented on the parcel register at the time the deed is registered.[5]

A lawyer who is only retained to prepare a deed or other document affecting real property such as an easement or release should review with the client the implications and effect of executing such a document.

A lawyer who prepares any document including a certificate of legal effect must consider the duty and obligation imposed on the lawyer when doing so. A lawyer who submits any Land Registration Administration Regulation Forms must carefully consider the lawyer's duties and obligations before submitting such forms.

The Lawyer must always consider if the limited scope retainer is "reasonable" in the given circumstances. A lawyer should not curtail the scope of the services in an effort to minimize legal fees when to do so would compromise the standard of competence. A lawyer must therefore assess in each case in which a client desires abbreviated or partial services whether, under the circumstances, it is possible to render the services in a competent manner.[6]

END NOTES

[4] Lawyers' Insurance Association of Nova Scotia, Real Property Standard 1.3: Opinion of Title and Certificate of Legal Effect

[5] *Land Registration Act*, SNS 2001, c 6, ss 65 - 69

Walker QC, Catherine S. / Judgments under the Land Registration Act: Back to Basics (January 2013) in *CBA-NS 2013 Annual Professional Development Conference* (January 31, 2013)

Land Registration Administration Regulations, NS Reg 207/2009, s 23 (1)(h)

Lawyers' Insurance Association of Nova Scotia, Real Property Standard 3.5: Judgments

Lawyers' Insurance Association of Nova Scotia, Real Property Standard 4.3: Name Standards

[6] Nancy Carruthers, "Ethically Speaking:The Ethics of Limited Scope Retainers", The Advisory 10:1 (January 2012) 11.

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4.6 UNDERTAKINGS

PART IV - CONVEYANCING PRACTICE

STANDARD

A lawyer who has given an undertaking must personally fulfil that undertaking in a timely manner.[1] A lawyer must not give an undertaking which the lawyer cannot fulfill.[2] Undertakings should be unambiguous and reduced to writing.[3] A lawyer who permits a non-lawyer to give an undertaking on the lawyer's behalf must do so in accordance with the Code of Professional Conduct.[4]

A lawyer who undertakes to record the release of a mortgage or to cancel a security interest, must take steps to ensure the removal of the security interest from the registry or parcel register in a timely manner. A lawyer who pays out, or causes to be paid out, in full or in part, a mortgage recorded in a parcel register must be aware of and comply with the Mortgage Payout Protocol[5].

A lawyer must not accept an undertaking that he or she knows or ought to know cannot be fulfilled by the lawyer giving the undertaking. A lawyer who accepts an undertaking should follow-up on undertakings in a timely manner. A lawyer who accepts a non-lawyer's undertaking or who

permits a non-lawyer to accept an undertaking must do so in accordance with the Code of Professional Conduct.[4]

FOOTNOTES

1. *Cain v. Genereux* (1981), 21 R.P.R. 156 (O.S.C.) (Lawyer found in contempt for failing to honour undertaking).
2. The words “on behalf of my client” or “on behalf of the vendor” do not relieve the lawyer of personal responsibility: NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers’ Society, 2017: Chapter 7 “Relationship to the Society and Other Lawyers” and rule 7.2-11 “Undertakings and Trust Conditions”, Commentary [1].
3. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers’ Society, 2012: Chapter 7 “Relationship to the Society and Other Lawyers” and rule 7.2-11 “Undertakings and Trust Conditions” and Commentary. NSBS Legal Ethics Handbook Chapter 13 “Duties to Other Lawyers” and sections 13.6 and 13.16 and Note 8.
4. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers’ Society, 2017: rule 6.1-3 (c).
5. Mortgage Payout Protocol: *Land Registration Act*, S.N.S. 2001, c. 6, s. 60; Land Registration Act Administration Regulations, S.N.S. 2001, c.6, s. 28; and Legal Profession Act Regulations, S.N.S. 2005, c. 28, s. 8.2.4 – 8.2.8. See also Real Estate Practice Standard 3.4: Discharge of Mortgages.

ADDITIONAL RESOURCES

Gillis, Deborah E., QC, “Elevating Undertakings to the Top Floor”, RELANS Conference 2006, February 2, 2006

Gordon, Garth, “Solicitor’s Undertakings – An Outline”, Continuing Legal Education Conference 1987, April 11, 1987

Lawyers’ Insurance Association of Nova Scotia Mortgage Payout Protocol: http://www.lians.ca/resources/real-estate/mortgage-payout-protocol.

Lawyers’ Insurance Association of Nova Scotia Risk Management Tools (Undertakings): http://www.lians.ca/resources/risk-and-practice-management/risk-management/undertakings

PRACTICE NOTES

Steps to enforce an undertaking may include:

1. Reminding the lawyer of the outstanding undertaking (link to letter resources);
2. Making an application to discharge the mortgage or security interest on behalf of the current owner, in accordance with the Mortgage Payout Protocol;
3. Applying to the court to enforce the undertaking; or
4. Reporting the refusal to complete the undertaking in a timely manner to the Nova Scotia Barrister's Society or the Lawyers' Insurance Association of Nova Scotia.

A lawyer who considers giving an undertaking based on another lawyer's undertaking should consider:

1. Whether the lawyer can fulfill the undertaking (see footnote 2 above); and
2. Whether he or she should require the lawyer to provide a direct undertaking to the other lawyer.

Approved by Council on November 23, 2018.

PART V - OFF TITLE INQUIRIES AND MISCELLANEOUS MATTERS

NOTE: Standard 5.2 and 5.3 combined on March 5, 2014 to form Standard 5.2.

5.1 ZONING AND OCCUPANCY PERMITS

5.2 PERSONAL PROPERTY

5.4 HARMONIZED SALES TAX (HST)

5.1 ZONING AND OCCUPANCY PERMITS

PART V - OFF TITLE INQUIRIES AND MISCELLANEOUS MATTERS

STANDARD

When a lawyer is acting for the buyer in a conveyance of an interest in a parcel, the lawyer should inquire as to the client's intended use for the parcel and advise the client on the appropriateness of obtaining zoning and occupancy permit confirmations.[1]

When a lawyer is acting for the buyer or mortgagee of new construction, the lawyer should ensure that an occupancy permit has been issued, or that all final inspections required to ensure issuance of the permit have passed.

When a lawyer is acting for the buyer or mortgagee of commercial or residential income property, the lawyer should determine whether the use and occupancy is permitted by the appropriate authorities.

When the client elects to proceed without appropriate confirmations or assurances or where there is non-compliance, the lawyer must explain to the client the associated risks and confirm the client's instructions prior to closing.[2]

FOOTNOTES

1. *Building Code Act*, R.S.N.S 1989, c. 46, s.8: The *Building Code Act*, adopts by regulation, the National Building Code.
2. Standard 1.5 - Documentation of Advice and Instruction

ADDITIONAL RESOURCES

- *Municipal Government Act*, S.N.S. 1998, c. 18
- *Land Registration Act*, S.N.S. 2001, c. 6

5.2 Personal Property

NOTE: Standard 5.2 and 5.3 combined on February 28, 2014 to form the Standard 5.2 below.

Standard

A lawyer who represents a client in a transaction that includes the purchase and sale of personal property must consider whether to search the Personal Property Registration System ("P.P.R.S.") for encumbrances and judgments which may attach to the property under conveyance, or to all of the vendor's or purchaser's personal property.[1]

A lawyer who considers whether to conduct a P.P.R.S. search may consider the exemptions for consumer goods having a purchase price of $1,000.00 or less.[2]

A lawyer who conducts a P.P.R.S. search must search the serial number if the personal property includes serial numbered goods as defined,3 and in all cases search the name of the "debtor, having regard to the PPSA naming rules"4 When reporting the results of such searches, the lawyer should not certify title to

personal property except that they have not found any relevant filings in the Nova Scotia PPRS, or as the case may be.[5]

A lawyer must consider the possibility of other security instruments, statutory liens, or deemed trusts that may affect the personal property.[6]

A lawyer who represents a lender where the collateral includes personal property must consider registering a notice in the land registry to protect perfection of the security interest in the event the personal property becomes a fixture.[7]

A lawyer for the purchaser of a mobile home should inform the relevant municipal official or Property Valuation Services Corporation of the transfer.

Footnotes

1. *Personal Property Security Act*, S.N.S. 1995-96, c. 13.
2. *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s.31 & *Creditors Relief Act*, R.S.N.S. 1989, c.112, s.2B(6).
3. See *Personal Property Security Act* – General Regulations, N.S. Reg. 129/97 for the definition of "serial numbered goods."
4. *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s.2(1)(m) defines "debtor" to include owners, obligors and transferees in various circumstances. Therefore the buyer and seller should both be searched in purchase and sale transactions, and the owner should be searched in refinancing transactions. See Section 20 of the PPRS regulations, supra, which sets out the naming requirements for registration. See also referenced materials: "What's in a Name?: PPSA Registration Name Requirements" from LIANSwers edition 66, November 2020 (page 20); and "'Caught in the Middle': PPSA Requires Full Name" from LIANSwers edition 60, November 2019 (page 1).
5. R. Wright, "Certifying the Uncertifiable – Chattels" (1993) 5. *The Claims Wise Bulletin* No. 29 at 2.
6. These may arise, for example, under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), *Excise Tax Act*, R.S.C. 1985, c.E-15, the *Bank Act*, S.C. 1991, c.46, s.427, municipal liens and liens in foreign jurisdictions. While these will not apply to personal property in most residential transactions, the lawyer

should have regard to these kinds of charges when considering transactions involving personal property.

7. *Personal Property Security Act*, S.N.S. 1995-96, c. 13, ss. 37 and 50; *Registry Act*, R.S.N.S. 1989, c. 392, ss. 1A(1) and 18A; *Land Registration Act*, S.N.S. 2001, c. 6, s. 59.

Practice Notes

The potential for personal property to become a fixture will often affect security interests in mobile homes, modular homes, furnaces and water heaters, for example. Typical lenders' instructions on mobile home and modular home transactions vary, and often include express instructions not to register the security in the land registry. It is recommended that lawyers review the lenders' instructions in each case to determine the extent of their obligations.

A lawyer should always search by name, and variants thereof, as well as (where applicable) by serial number. *Rizzatto (Re)*, 2020 NSSC 63

Additional Resources

Manufactured Home Transfer Form: Bridgewater (PVSC)

Manufactured Home Transfer Form: Dartmouth (PVSC)

Manufactured Home Transfer Form: Port Hawkesbury (PVSC)

Manufactured Home Transfer Form: Truro (PVSC)

MacLean KC, Ian H. / "Personal Property Security Act and Regulations as they apply to mobile homes: Some basic principles" (April 2014)

Approved by Council on February 28, 2014; amended March 22, 2024.

Standards

- 5.1 Zoning and Occupancy Permits

5.4 HARMONIZED SALES TAX (HST)

PART V - OFF TITLE INQUIRIES AND MISCELLANEOUS MATTERS

STANDARD

Every supply by way of sale of real property is a taxable supply unless specifically exempted under Schedule V, Part I of the Excise Tax Act. A lawyer who represents a client in a real property transaction must consider whether or not the sale of the real property is partially or fully a taxable supply.[1]

Subject to certain exceptions[2], the obligation to collect and remit HST rests with the seller[3] regardless of whether the seller is an HST registrant.[4]

A buyer may rely upon a certificate from the seller stating that the real property is an exempt supply provided that the buyer does not know or ought to know that the sale of real property is a taxable supply.[5]

Where the buyer is an HST registrant and is required to self-assess, the lawyer representing the seller must verify the buyer's registration status with Canada Revenue Agency.[6] Where the buyer is required to self-assess for the HST, it is still advisable for the lawyer representing the seller to obtain from the buyer an affidavit, statutory declaration or certificate confirming the buyer's registration status.

A lawyer who represents a client must recognize when to seek expert advice including expert tax advice and should consider whether such advice should be obtained from another lawyer or from experts in non-legal fields.[7] In considering whether to obtain expert advice from a non-lawyer, the lawyer must

consider whether there is a need to maintain solicitor-client privilege in the circumstances.[8]

FOOTNOTES

1. *Excise Tax Act*, R.S.C. 1985, c. E-15, s.123 (please refer to the definitions of “commercial activity”, “supply”, “taxable supply” and “real property”) and s. 165
2. *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 221(2)
3. *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 221(1)
4. *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 238(2)
5. *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 1946.
6. To search for registration status please contact Canada Revenue Agency, Business Inquiries – 1-800-959-5525 or www.cra.gc.ca/esrvc-srvce/tx/bsnss/gsthstrgstry. See also *Franklin Estates Inc. v. Canada* [1994] G.S.T.C. 64 (T.C.C.); and *Hutton, Malof & Henriksen v. R.* [2004] G.S.T.C. 115 (T.C.C.)
7. Nova Scotia Barristers’ Society, *Code of Professional Conduct*, ch 3: “Relationship to Clients”, ch 3.1:“Competence”
8. Nova Scotia Barristers’ Society, *Code of Professional Conduct*, ch 3: “Relationship to Clients”, ch 3.3:“Confidentiality”

ADDITIONAL RESOURCES

R. Daren Baxter, TEP, “Real Property Transactions and HST”, CBA Nova Scotia Real Property Section Meeting (November 4, 2010).

The Law Society of British Columbia, “GST Traps for the unwary”, Insurance Issues: Risk Management 2012: No. 2 Summer.

Wayne Mandel, “GST/HST and Real Property Transactions”, Wolters Kluwer (November 20, 2014).

John F. Oakey, “HST and Real Property Issues”, Real Estate Lawyers Association of Nova Scotia (RELANS) Annual Real Estate Conference (December 9, 2014).

Mark Singer, “What Real Estate Lawyers Want to Know”, CBA Nova Scotia Real Property Section Meeting (February 26, 2015).

David M. Sherman, "What’s in a name? The GST/HST new housing rebate, for one" (June 2015)

PRACTICE NOTES

There are also real property exemptions available under Schedule V, Part V.1 (charities) and Schedule V, Part VI (public sector bodies other than charities). In addition, a supply by way of sale of real property which is otherwise a taxable supply for HST purposes may also be exempted if the buyer has an applicable constitutional or aboriginal tax exemption. In addition to considering whether or not the sale of the real property is partially or fully a taxable supply, the lawyer should consider; 1) whether the sale

of any tangible personal property (that is not a fixture), intangible personal property or services sold in conjunction with the real property is a taxable supply, 2) if there is uncertainty in the application HST, which party is to bear that risk, 3) the applicable HST rate for each supply, 4) whether applicable HST is included or in addition to the purchase price of the real property and 5) which party is required to remit any applicable HST to the Receiver General for Canada.

The buyer may be obligated to self-assess and remit applicable HST if the seller is a non-resident of Canada or if the buyer is registered and is not an individual purchasing a residential complex or a cemetery plot (or place of burial, entombment or deposit of human remains or ashes). These rules may not apply to any tangible personal property; intangible personal property or services sold by the seller to the buyer in conjunction with the real property, and thus applicable HST must be collected and remitted by the seller in respect of such supplies.

The purpose of the certificate confirming an exempt supply is to protect the buyer in the event that it is later determined that the sale is a taxable supply. Should this happen the effect of the certificate is to deem the sale of the real property to include the applicable HST which shifts the HST risk and burden to the seller. The certificate may not apply to the supply of personal property or services supplied in conjunction with the real property.

Where the buyer is required to self-assess for the HST, the seller should obtain satisfactory evidence from the buyer confirming that the buyer is in fact an HST registrant. Usually this will take the form of an affidavit, statutory declaration or a certificate from the buyer (an officer or director of a corporate buyer) affirming that the buyer is an HST registrant and providing the HST registration number. Should the affidavit, statutory declaration or certificate prove to be incorrect and the buyer is not in fact an HST registrant, the seller will be liable for the uncollected HST. There is no due diligence defence available to the seller in such a situation. Accordingly, the lawyer who represents a seller should ensure that the affidavit, statutory declaration or a certificate from the buyer contains a representation that the buyer is registered together with the HST registration number, an acknowledgement of the buyer that the seller is relying on the representations of the buyer and an indemnity from the buyer in favour of the seller for any losses and costs (any applicable HST, interest and penalties that may be assessed against the seller) which the seller incurs as a result of the inaccurate representations of the buyer. The lawyer representing the seller should ensure that the Agreement of Purchase and Sale requires the buyer to provide such representations and indemnities and that the representations and indemnities are intended to survive the closing. The lawyer representing the seller should exercise his or her professional judgment with respect to the contents of the affidavit, statutory declaration or certificate as no prescribed form exists. Please refer to the sample form "HST Warranty Indemnity and Undertaking".

A lawyer who represents a buyer who is purchasing new residential housing (including new rental units) should be aware of and should communicate to the buyer the existence of any HST rebate programs offered by the federal and provincial governments. (*Excise Tax Act*, R.S.C. 1985, c. E-15, s. 254; *Sales Tax Act*, S.N.S. 1996, c. 31, Part IVC)

5.5 TITLE INSURANCE

PART V - OFF TITLE INQUIRIES AND MISCELLANEOUS MATTERS

- 5.1 Zoning and Occupancy Permits
- 5.2 Personal Property
- 5.4 Harmonized Sales Tax (HST)
- 5.5 Title Insurance

STANDARD

A lawyer must be aware of the existence of title insurance and should have knowledge in broad terms about the protections a policy may provide. A lawyer should use professional judgment to determine whether to recommend title insurance to a buyer, a lender or both. A lawyer must recognize when to seek advice about title insurance from an expert such as a title insurance underwriter.[1]

A lawyer who receives a fee, commission, rebate or other compensation for securing a policy of title insurance for a client or the client's lender must fully disclose such fee, commission, rebate or other compensation to the client and obtain the prior consent of the client.[2]

FOOTNOTES

1. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: Chapter 3 "Relationship to Clients" and section 3.1 "Competence"

2. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: Chapter

3 “Relationship to Clients” and section 3.6 “Fees and Disbursements” and commentary number 2.

ADDITIONAL RESOURCES

Chicago Title Insurance Company www.chicagotitle.ca

FCT Insurance Company Ltd. (carrying on business under the name First Canadian Title) www.firstcanadiantitle.com

FNF Canada www.fnf.ca

Lawyers’ Professional Indemnity Company (TitlePlus) www.titleplus.ca

Stewart Title Guarantee Company of Canada www.stewart.ca

Travelers Guarantee Company of Canada http://www.travelerscanada.ca/business-insurance/surety/title-insurance/index.aspx

Barnes, Robert L. / Title insurance policies: What are they? What do they do? (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

Bucknall, Brian; Lau, Scott / Advising clients about options for assuring title (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

Carter, Craig / Title insurance in 1998 (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

Everett, Mark G / Title insurance (February 2003), in Real Property Conference 2003: property practice in new environments.

Gordon QC, Garth C. / Introduction to title insurance case problem - "Greenacre" (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

McInnes, Cameron, Transaction Protection Endorsement, Risk Practice Management Conference, October 21, 2016

McInnes, Cameron, Reduce Risk on Real Estate Transactions through Title Insurance Solutions, LIANS Webinar, December 8, 2016

Romanin, Maurizio; Waters, Kathleen A. / The conveyancing solicitor's role in title insurance (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

Walker QC, Catherine S / Options for assuring title in the current market (January 1998), in The future of real estate practice: from title insurance to technology - what you need to know.

Winter, Ivo / Residential title insurance (April 2010), in Real property conference 2010: refreshing and renewing your property practice.

PRACTICE NOTES

A lawyer should advise the client about the coverage offered by title insurance both in lieu of certain items (e.g. survey, tax certificate, building and zoning certificate) and for items not otherwise covered by a lawyer's opinion on title (e.g. fraud, gap coverage, post-policy encroachments). The lawyer should confirm the instructions of the client in writing.

Title Insurance Letter (sample letter to clients)

Confirmation of Instructions Regarding Title Insurance (sample letter)

Approved by Council on November 17, 2017.

5.6 Property Taxes

Standard

Where acting for one or more of a buyer, a vendor, a borrower or a lender, a lawyer must make reasonable enquiries concerning the payment status of property taxes attributable to the property[1] being transferred and\or mortgaged, regardless of whether the property is real property or a mobile home[2].

A lawyer should take reasonable steps to ensure any tax information received from the municipal tax authority[3] includes any amounts due with respect to demolition and property remediation, municipal improvements, betterment charges and capital improvements for utility or municipal services. For a purchase\sale transaction, a lawyer should make their client aware of adjustments to the purchase price arising out of contractual provisions imposing an obligation on a party to pay property taxes or arising out a change in use of the property[4].

A lawyer must use their best efforts to ensure that the payment status of property taxes, including arrears and related amounts, are accurately recorded as an adjustment to the purchase price on closing subject to the reliability of the available information. A lawyer must determine lender's requirements for

collection of and payment of property taxes on closing. Where appropriate, a lawyer may recommend an undertaking to re-adjust between the parties, and obtain an undertaking[5] from the other party to pay any outstanding property taxes and related amounts.

In the case of a mobile home, a lawyer acting for a buyer should take the necessary steps to provide notice of a change of ownership to the municipal tax authority[6].

Practice Notes

Reasonable enquiries can take the form of obtaining a tax certificate[7] or a verbal confirmation from the municipal tax authority where the property is located; however, said enquiries should be independent of information received from the other party. For vendor's counsel, an independent enquiry can take the form of reviewing the property tax adjustment with their client.

It is prudent for a lawyer to determine the juncture of the transaction when they ought to initiate enquiries for tax information and the form of the tax information requested[8].

Lawyers should be aware that other types of charges (i.e. sanitary sewer charges) can have the same status as lien against real property as property taxes and that the same can be administered by different municipal tax authorities and non-taxing authorities. When obtaining tax information, it is prudent to confirm whether that property tax information includes all charges, including sewer charges and road maintenance fees (private subdivisions).[9]

Various provisions of the Assessment Act, including but not limited to Sections 42, 45A, 52 and 57, allow a municipal tax authority to re-assess a property at a future date. Therefore, a lawyer should be cautious in relying exclusively on a tax certificate\verbal confirmation, and should consider recommending title insurance to mitigate the risk of reassessment.

A lawyer should be aware of when change in use tax may apply to a transaction.[10]

If property taxes are unpaid on closing, counsel for the parties should confirm in writing which party (as between the lender[11], vendor, or buyer, as context requires) will pay the outstanding property taxes.

It may be helpful for a lawyer acting for a buyer to determine whether a portion of the risk for outstanding taxes can be mitigated by recommending title insurance to a buyer, a lender or both.

It may be helpful for a lawyer acting for a buyer to advise their client about the timing for payment of property taxes (interim and final).

It may be helpful for a lawyer acting for a buyer (including a transferee for nominal value) to make their client aware that the transfer could impact whether the property continues to receive a capped assessment and that there is a process to pursue to retain a capped assessment.[12]

When verifying property taxes for mobile homes situated in a land-lease community or mobile home park, contact the administrator for the community/park in order to determine whether the lot has previously received a tax assessment number.[13]

Additional Resources

- O'Brien Edmonds, Erin, "Tax Adjustments", (1994) Continuing Legal Education Society of N.S., 1994 Apr
- Cameron, John R., "Highlights of the provisions of the new Municipal Government Act", (1999), Continuing Legal Education Society of N.S., 1999 Mar
- MacLean, Ian H., "Change in Use Tax", Real Estate Lawyers of Nova Scotia, 2017 Conference.
- Nova Scotia Department of Municipal Finance and Statistics – Link (https://novascotia.ca/sns/access/land/deed-transfer-property-tax.asp)
- Property Valuation Services Corporation – Link (https://www.pvsc.ca/en/home/default.aspx)

Footnotes

1. Different types of real property in Nova Scotia (i.e. residential, commercial, forest, etc.) are subject to property tax pursuant to the *Assessment Act*.
2. 2 Section 133(1) of the *Municipal Government Act* states that, "Taxes levied in respect of real property are a first lien upon the real property". Section

133(2) states that, “Taxes levied in respect of a mobile home are a first lien upon the mobile home”. Section 133(8) states that, “Taxes in respect of business occupancy assessments are not a lien upon property.”

3. Municipal tax authorities can include villages and marsh bodies, which can also levy other charges.
4. For residential transactions, the standard form agreement of purchase and sale provides that, “The cost of municipal improvements, betterment charges and capital improvements for utility or municipal services completed as of the date of this Agreement, whether billed or not, are to be paid by the Seller on or before the closing date unless otherwise stated.” See also Stevens et al. v. Grant et al., [1976] N.S.J. No. 556.
5. See Real Property Practice Standard 4.6: Undertakings.
6. For transfers of mobile homes, Buyer’s counsel typically will file notice of the transfer (https://www.pvsc.ca/sites/default/files/inline-files/Manufactured%20Home%20Transfer_Jan%202023.pdf)
7. See Sections 132 of the *Municipal Government Act*.
8. See Footnote 3.
9. Sometimes, other charges (e.g. sanitary sewer charges), may be levied by a village or marsh body. If the village (or the marsh body) has not delegated the collection of those charges to the municipal tax authority, a separate request may be required to verify their payment status. Private road maintenance fees are another example of “other charges” that may not be captured in property tax information received from a municipal tax authority. These “other charges” can have the same status as a lien against real property as property taxes and may be administered by different municipal tax authorities and non-taxing authorities.
10. For more detail, see Ian MacLean’s article, “Change in Use Tax” which is noted in Additional Resources.
11. A discharge statement received from a lender should be reviewed to determine whether a lender has made provision for and provided directions concerning the payment of outstanding taxes.
12. See Section 45 of the Assessment Act. In certain circumstances, a capped assessment can be retained if appropriate documentation is filed: see

Property Valuation Services Corporation's Form 3 – Notice of Residency (https://www.pvsc.ca/pvsc-forms-and-guides).

13. In transactions involving the purchase and installation of a new mobile home in a trailer park or land lease community, it is possible that the lot may not have been previously issued a property tax assessment.

Approved by Council on March 22, 2024.

Standards

- 5.1 Zoning and Occupancy Permits
- 5.2 Personal Property
- 5.4 Harmonized Sales Tax (HST)
- 5.5 Title Insurance
- 5.6 Property Taxes