Revised version
January 4/16

RELANS 2015: OUR CHANGING LANDSCAPE CONFERENCE

DECEMBER 8, 2015

DEFACTO REFRESHER: UPDATE AFTER BILL 75

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BACKGROUND

1. As private ownership of land evolved, so too have rules respecting definition of boundaries, subdivision of land, and the uses to which land may be put.

2. The evolution in Nova Scotia from common ownership and use has occurred rapidly when compared with the history of the Old World. It would appear that native North Americans did not define boundaries nor ownership as between individuals as theirs was essentially a collective usage, although there were territorial boundaries as between different tribes or groups. All of this began to change with European settlement of Nova Scotia more than two hundred and fifty years ago. Crown grants were made, conferring ownership upon individuals or upon groups of persons, and these grants were usually supported by some survey evidence. A Registry was created, to serve as a repository of information respecting land transfers and titles to lands. This Registry system remained largely unchanged until the proclamation of the Land Registration Act (Chapter 6 of the Acts of 2001) which was rolled out, in stages, across the Province. The first roll-out occurred in the Colchester Registry on March 23, 2003 and by 2005 the rest of the Province had followed suit. Thus, the transition from a "names" based Registry to a "parcel" based system began.

3. Neither the Registry Act (R.S.N.S. 1989, Chapter 265) nor its earlier incarnations purport to regulate subdivision of land nor use of land. Although extent of title (i.e. boundary-related issues) were ideally addressed with the assistance of a land surveyor, all too often homemade solutions were applied, or homemade attempts created new problems. It is not known if the old English practice of beating the bounds (wherein the landowner would take his young son and heir-apparent to the four corners of the property, giving him a sound switching at each corner, in the expectation that this would cause the young boy to remember forever the boundaries of the property) was transported to Nova Scotia. Suffice it to say the subdivision and re-subdivision over the generations resulted in a plethora of extent of title issues, and different uses of neighbouring properties resulted in new conflicts. This led to erosion of a landowner's right to do as he/she

pleases with his property. Provincial and Municipal officials enacted planning and zoning by-laws, and some property developers introduced restrictive covenants, all of which impose limits upon creation of new lots and the use which may be made of new or existing lots.

4. The Municipal Government Act (Chapter 18 of the Acts of 1998) is the principal mechanism by virtue of which land use in Nova Scotia is regulated. It was preceded by the 1969 and 1989 Planning Acts, which were in turn preceded by Town Planning Acts enacted in 1948, in 1954 and in 1967, respectively.

5. Section 190 of the Municipal Government Act provides as follows:

> "The purpose of this Part is to
>
> a) enable the Province to identify and protect its interests in the use and development of land;
>
> b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;
>
> c) establish a consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning strategies and by-laws, including the right to be notified and heard before decisions are made pursuant to this Part, and
>
> d) provide for the fair, reasonable and efficient administration of this Part."

It should be noted that the "Part" referred to above is identified in the legislation as "Part VIII, Planning and Development".

6. Section 263 of the Act, which also forms part of Part VIII, provides that "in the event of a conflict between this Part and this Act or another Act of the Legislature, this Part prevails."

7. It is significant to note that Section 191 reads, in part:

> "In this Part and Part IX, unless the context otherwise requires . . .
>
> (q) "subdivision" means the division of an area of land into two or more parcels, and includes a resubdivision or a consolidation of two or more parcels;"

8. Part IX has the heading "Subdivision" and it begins with Section 268 and ends with Section 292.

9. Section 268(1) mandates that an application be made for subdivision approval, and sets out certain requirements thereof. Subsection 2 provides certain exemptions from the approval requirement. There were some additional exemptions (what was known as the three lot rule (sometimes known as the four lot rule) and subdivision by Will) but these have been repealed and are in any event not relevant to the subject matter of this discussion.

10. By virtue of Section 9, Section 69 of the Acts of 2003, the Province amended the Municipal Government Act by the addition of Section 268A which provided lawyers, surveyors and property owners with a new tool to effect consolidation of two or more parcels. Such consolidation is thus possible without the necessity of seeking approval from the planning authority, thereby avoiding

the associated additional costs and delays. As well, it may be possible to effect defacto consolidation in circumstances where planning approval would not be forthcoming.

THE EXPERIENCE SINCE 2003

11. Over the years since 2003 this process has been widely used, and not always appropriately so. In fact in the early days I used it with much more enthusiasm than I care to remember.

12. Before engaging in an examination of the requirements set out in Section 268A of the Municipal Government Act, it is useful to consider the comments of Justice Warner in Polycorp Properties Inc. v. Halifax (Regional Municipality), 2011 NSSC 241.

13. Beginning at paragraph 145, Justice Warner held that:

> [145] The purpose of the s. 268A exemption appears to be to provide an exemption from the normal criteria that must be met before municipal subdivision approval can be obtained The exemption is only available for lots that were owned and used together before April 15, 1987. Because there is no approval process for deemed subdivisions, and the Registrar General does not "police" the registration of deemed consolidation, [*however, by 2015 the LRO has been providing some scrutiny of statutory declarations purporting to effect defacto consolidation]* it makes sense that the statutory declaration contain, not simply a statement that the lots were in common ownership and used together but the facts upon which the exemption from subdivision approval is obtained.
>
> [146] In answering the question of what the legislature intended, which requires a review of the Act as a whole, the Court notes that subdivision of

lands, including consolidation, is a matter that by the MGA is the responsibility of municipality. Municipal planning is an attempt to bring reason to decision-making respecting the complexities of the physical development of municipalities. It is an important component of the municipal planning, and has a significant impact upon not just the regulation of land use, but on the policies and economics of a municipality's physical infrastructure: transportation, schools, sewer and water, to name but a few. This observation respecting the relevance, importance and purpose of municipal planning is described in the Rogers and Makuch texts cited in this decision. Section 268A is an exception to the otherwise required supervision and control the MGA and provincial planning legislation assigns to municipalities, including HRM.

[147] It would be inconsistent with the scheme and purposes of the MGA to permit subdivisions or consolidations that are exempt from municipal planning and development controls, and which had significant implications as well as consequences on municipalities, unless the entitlement to the exemption is strictly complied with.

Further analysis of the Polycorp Decision will appear later in this paper.

BILL 75 AMENDMENTS TO MUNICIPAL GOVERNMENT ACT AND HALIFAX REGIONAL MUNICIPALITY CHARTER

14. Effective May 11, 2015 the legislation respecting defacto consolidations was amended. The amended version of Section 268A(1) of the Municipal Government Act provides as follows:

"Two or more lots that are contiguous, are parcels registered pursuant to the Land Registration Act and are and have been in

common ownership and used together since April 15, 1987, or earlier are deemed to be consolidated if the owner or the owner's agent registers a statutory declaration in the parcel registers for the lots stating that the lots were used in common ownership and used together on or before April 15, 1987, and have continued to be so owned and used, and including the facts that support the statement."

15. Similar changes were made to Section 279 of the Halifax Regional Municipality Charter.

16. The full text of Bill 75 is attached and identified as Resource 1. A blacklined version appears as Resource 2.

HOW DO THESE AMENDMENTS AFFECT OUR PRACTISE?

17. The changes are as follows:

a) The introduction of the term "contiguous". This is not a new concept but it is new language. The requirement of contiguity is implicit in the consolidation process. Nonetheless, some lawyers have purported to effect defacto consolidation of parcels which are not contiguous.

b) Each of the parcels being must be migrated before defacto consolidation. This is a new requirement.

c) References to registration in the Registry of Deeds or Land Registration Office have been replaced with a requirement that the Statutory Declaration be registered in the Parcel Registers. This doesn't impose any new requirement beyond that noted

immediately above (ie. the requirement that the parcels be migrated).

d) There is no longer a requirement that the Statutory Declaration include the descriptions of the individual parcels being consolidated nor of the perimeter of the consolidated parcel. **This change is significant as it means that there is no longer a rule (to the extent there was ever a prohibition) against chained or linked descriptions when effecting defacto consolidation.**

e) Section 268B. While the provision that "*a watercourse does not subdivide a lot unless the watercourse creates a natural boundary, considering the nature and use of both the watercourse and the land through which it flows*" and the subsequent provision that a parcel which has been migrated or which has received subdivision approval is not subdivided by the existence of a watercourse does not appear to have broad application, I would surmise that two or more parcels which are separated by a watercourse and which have been migrated are not then eligible for defacto consolidation. A portion of one (ie. one side of the watercourse) may be eligible for consolidation with another parcel as long as both are on the same side as the watercourse. [*For a discussion of Watercourses, please see Resource 5]*

ELIGIBILITY FOR DEFACTO CONSOLIDATION POST-BILL 75

18. With the exception of the requirement that the parcels must be migrated prior to defacto consolidation, and with the removal of the requirement for a perimeter description of the consolidated parcel, the fundamentals remain essentially unchanged. These requirements are as follows:

a) The parcels must have had common ownership at all times since at least April 15, 1987. It is not a requirement that the Owner at the time of the

consolidation has had ownership at all times since at least April 15, 1987; it does however require that there has been common ownership at all times. Thus "A" could have owned the parcels for a period of time, followed by a transfer of both parcels to "B", and subsequently "C" acquired ownership. The requirement is that at each moment in time since at least April 15, 1987 to and including the time of consolidation there has been common ownership of the parcels in question.

b) The evidence of common ownership throughout the requisite period of time is to be contained in a statutory declaration registered in the Parcel Register.

The Declarant will need to have evidence, based upon personal knowledge or upon examination of the public records, to confirm common ownership at all times since at least April 15, 1987.

c) The Declaration must include evidence that the parcels were used together on or before April 15, 1987 and it must contain evidence that the parcels have continued to be used together at all times since April 15, 1987.

d) The declaration must include "the facts that support the statement". In other words it is not enough to state that the parcels were used together on or before April 15, 1987 and that they have continued to be used together at all times since then. Personal knowledge of such use or irrefutable evidence of such use is required. Having said that, I think it is acceptable to state that "My lawyer Jane Doe advises me and I believe that there has been common ownership of the lands at all times since April 15, 1987 . . ." followed by a recitation of the facts of common ownership taken

from the public record. While one would ordinarily expect the declaration to be based upon personal knowledge, it is conceivable that the evidence could take the form of a survey plan dated on or prior to April 15, 1987, presumably placed on the public record, showing a building or other improvements straddling the common boundary of the parcels proposed to be consolidated. This would have to be coupled with evidence that that building or those improvements have remained in place at all times since April 15, 1987, to and including the present time.

It is not enough to simply state that the parcels have been used together; the facts must be set out. There should be sufficient recitation of the facts to support the statement.

e) The property identifiers assigned by Service Nova Scotia and Municipal Relations must appear in the declaration.

f) From a procedural perspective, Form 1 is first submitted and a PID is assigned to the consolidated parcel. This is followed by submission of the amending PDCA of the consolidated parcel. As noted earlier, this can (but does not need to be) a chained or linked description. See Resource 3 being the Land Registry Client Resource Material. **Note at the bottom of page 2 and on page 3 the special procedure to be followed where there is a single non-LR parcel consisting of two or more interior lots, and the procedure for situations where there are difficulties with mapping the interior lots prior to migration. I am optimistic that the Mappers and others in the LRO are committed to working with us to ensure that our clients are not unfairly and inappropriately burdened.**

19. Registration of the Statutory Declaration is deemed to consolidate the parcels as of the date of registration.

ADDITIONAL CONSIDERATIONS

20. As noted above, one cannot consolidate parcels which are not contiguous. They cannot be separated by another parcel, by a highway or railway (unless the railbed is leased from the same party owning the lands on either side of the railbed) or by a body of water which constitutes severance. In addition to the Section 268B the Municipal Government Act definition, a watercourse is defined in Land Registration Administration Regulations 7(16) and 7(17). For additional guidance on this subject matter see "Water Lots, Watercourses & Wetlands (Nova Scotia) - An Aide Memoir for Reviewing Title & Uses" presented to the Real Estate Section at the 2010 Annual Meeting, Nova Scotia Barristers' Society, by Garth C. Gordon, Q.C.

21. The lawyer undertaking a defacto consolidation should consider whether there is any survey fabric upon which to base the creation of the new description. As a general rule, lawyers need to consider the risks inherent in an attempted defacto consolidation without the involvement of a surveyor. An attempt to consolidate in the absence of survey fabric may create new problems. Property Online graphics and the Owner's perception of the situation on the ground may not reflect reality. Creation of a description of the consolidated parcel may and probably will extend beyond the point where a lawyer ought to go, in the absence of the involvement of and guidance by a surveyor. A person creating a new legal description must be cognizant of liability issues and the possibility of committing an offence pursuant to Section 22 of the Land Surveyors Act (Chapter 249 of the Revised Statutes of Nova Scotia, 1989). While description of the perimeter of the consolidated parcel would be ideal in my opinion, this is not a task which I would urge upon any lawyer. Bear in mind the option of a chained or linked description. Thus, an outside perimeter description is not essential.

22. If you are brave enough to create the consolidated description yourself, here is a sobering thought: The author's name appears, for posterity, when an LR description is new or changed. Thus, the previously existing cloak of anonymity has been lost.

23. If any of the lots forming part of the consolidated parcel includes a benefit or burden, care has to be taken not to unintentionally nor inappropriately expand the scope of the easement. If the consolidation is of Lots A and B, and if only A has the benefit of an easement giving access to a public highway, the description ought to include a notation to that effect. When creating or revising the Parcel Register, a textual qualification should (rather than must) be added. If one of the lots is burdened, why burden the entire consolidated parcel by failing to add a textual qualification?

24. When considering whether or not to consolidate, you should take into account the effect upon the client's ability to subdivide in the future. The owner's right to create parcels without road frontage may be limited as a consequence of consolidation. Many Municipalities permit creation of one such parcel; upon consolidation the ability to create new parcels without road frontage may be reduced from two to one.

25. Be aware of the risk of running afoul of development restrictions which may "grandfather" development of a parcel for certain purposes. The ability to "grandfather" may be lost upon consolidation.

26. Subdivision (including consolidation) may trigger HST which would not otherwise be payable upon the next transfer of ownership.

27. If the consolidation is taking place after an agreement of purchase and sale has been entered into, the Buyer should be consulted. The end result may be quite different than that which was contemplated by the Buyer.

28. How do you take corrective action if you have registered a deficient Declaration? In the absence of an application to the Court to perfect the attempted defacto consolidation, the remedy (unless the owner wishes to bring an application to the planning authority for subdivision/consolidation approval), is to prepare and register a supplementary Declaration setting out the required evidence. Use a Form 28 to register the Declaration. This may result in removal of the original Declaration but it should still be viewable in "Details View". The supplementary Declaration should make reference to the registration particulars of the original Declaration. The LRO should be asked to create an instrument association between the two Declarations so that a person viewing the supplementary document will be directed to the original, on the chance that the original is removed.

29. Generally speaking defacto consolidation is a one-way street in the absence of planning authority approval (which may or may not be forthcoming). Once you have effected such consolidation, it may be impossible to reverse. Having said that, I have encountered situations where it is clear that the attempt to consolidate is a legal fiction. If the two parcels are not contiguous, then they cannot be consolidated despite the Statutory Declaration which states otherwise. Similarly, if they have not enjoyed common ownership for the requisite period of time, they cannot be consolidated. If the parcels were not in fact used together, how can they qualify for consolidation? In the handful of situations where I have encountered such fatal flaws, I have registered a Statutory Declaration identifying the fatal flaw and expressing the opinion that the attempt to consolidate is without legal effect. Of course the Declaration must be limited to those facts which are known to me, and thus my own Declaration may need to be coupled with that of the Owner or some other knowledgeable person. This is not a procedure to be undertaken lightly; prior consultation with the LRO is essential. Success is by no means guaranteed, a court application might be necessary.

I have been advised by the Registrar General that *"Each instance in which an error is noted in a previously registered de facto would be considered on a case by case basis by the Registrar General's office. There are many factors at play - including reliance by municipalities and/or purchasers on the consolidation - which may complicate the issue"*.

30. There does not appear to be any authority for the proposition that one can rely upon a Statutory Declaration purporting to effect defacto consolidation in circumstances where the parcels are not eligible for the Section 268A exemption, nor for the proposition that such a Declaration can only be "undone" by subdividing the "consolidated" parcel by application to the planning authority. Unlike the situation which existed in Polycorp where the deficient Declaration was capable of being cured by supplementary evidence placed on the public record, a Declaration which purports to consolidate parcels which are not eligible for defacto consolidation is, in my opinion, a show-stopper.

31. So why do we have to examine the Statutory Declaration to see if it is apparently compliant? Why can't we simply take it at face value?

Section 20 of the Land Registration Act reads as follows:

> *"A parcel register is a complete statement of all interests affecting the parcel, as are required to be shown in the qualified lawyer's opinion of title pursuant to Section 37, subject to any subsequent qualifications, revisions of registrations, recordings or cancellation of recordings in accordance with this Act."*

32. However, Section 3(1)(g) of the Act defines "interest" as *"any estate or right in, over or under land recognized by law, a prescribed contract, or a prescribed statutory designation . . ."*.

33. A Statutory Declaration effecting or purporting to effect defacto consolidation does not constitute or create an interest in land. Its effect is limited to varying the extent of title to a particular parcel or parcels. While the Act contemplates that a Registrar may accept a document effecting consolidation of parcels, by so doing the Registrar is not in any way validating the Declaration and it would seem that acceptance for registration does not give rise to entitlement to compensation if the attempted consolidation is deficient.

34. What if you discover, in the course of doing a revision or a recording respecting an LR parcel, the existence of a deficient Declaration registered at an earlier date by another lawyer? Some might argue that you are under no obligation to examine a Declaration relating to an LR parcel. However, bear in mind the fact that entitlement to government compensation is limited to matters relating to title rather than extent of title. Review of survey fabric and for that matter defacto consolidations remain a fundamental part of the review of the revising/recording lawyer. Furthermore, generally speaking the Declaration appears in the Parcel Register and thus the necessary review of the Parcel Register must include a review of the Declaration as is the case with any document in the Parcel Register. We cannot assume that the Declaration was done properly nor that it is effective to consolidate the parcels simply because it has been accepted by the Land Registration Office for registration purposes. Our role and our obligations go beyond satisfying or being satisfied by the requirements of the LRO. We have the responsibility of complying with legislation, the common law and the Professional Standards. Standard 2.4 (Plans and Surveys) has particular application in these circumstances.

35. The most common shortcoming with respect to attempts to effect defacto consolidation is the failure to set out facts that support the statement of common usage. At paragraph 150 of his Polycorp Decision, Justice Warner held that:

> *"[150] The grammatical and ordinary meaning of the words in s. 268A clearly require that the affiant state both that the lots are and have been owned in*

common and are and have been used together since April 15, 1987, and set out the facts that support the statement."

Then, at paragraph 153, Justice Warner stated:

"Not all commonly owned lands, whether adjacent or not, are used in common . . . The presumption that the legal owner (holder of the paper title) of a lot has possession of the lot does not assist the respondents on this issue. It is not relevant. The required facts to satisfy s. 268A relate to the use of two or more lots together, not separately. Based on the evidence in this proceeding, the presumption of use together is without foundation in the case law or texts. Section 268A clearly requires that the facts that support the statement be contained in the statutory declaration. This makes sense. An owner of adjacent lots (and possibly lots that are not adjacent) may or may not use the lots together. Each case depends on its particular factual matrix."

36. In the end, Justice Warner found that defacto consolidation had occurred in accordance with the requirements of the legislation. However, that finding was based upon the fact that a supplementary Declaration, setting out the required statement of the fact of common usage, was prepared and registered between the time the action was commenced and the Decision was rendered.

37. Among other things, Polycorp highlights the importance of making sure that the client understands the nature and content of the Declaration he/she is being called upon to sign.

38. Are there two different standards respecting attempts to effect defacto consolidation, one of which is pre-Polycorp, and one of which is post-Polycorp? The answer is "no". While many of us may have adopted certain practices prior to the Decision in Polycorp, the fact is that the law did not change. Polycorp confirms that interpretation of the law was incorrect. The Polycorp Decision

does not provide us with the benefit of any grand-fathering of practices adopted prior to the Decision being handed down. Thus it is incumbent upon us to review any defacto consolidation affecting the parcel under review, just as we would with a plan of subdivision, a retracement plan, an instrument of subdivision, or any document purporting to establish one of the various exemptions identified in Section 268(2) of the Municipal Government Act.

39. Let us suppose that a wife owns one parcel and a husband owns the other, or that one of them owns one parcel and the two co-own the other. Does that amount to common ownership? It would appear not. The Registrar General (at least at one point in time) has taken the position that this does not constitute common ownership and this position would appear to be correct. While Section 8 of the Matrimonial Property Act confers certain rights upon a non-owning spouse in certain circumstances, this does not equate with "common ownership" pursuant to Section 268A of the Municipal Government Act and it does not necessarily extend to all properties which are owned by a spouse.

40. Let us suppose that one of the lots has been mortgaged at some point since April 15, 1987, while the other has not. Does that mean that the parcels are not eligible for defacto consolidation? The Municipal Government Act does not define "common ownership". On the one hand I would submit that the fact one parcel was mortgaged and the other was not, is suggestive that the parcels were not used together. On the other hand this may not run afoul of the common ownership requirement given the fact that the Black's Law Dictionary definition of "Owner" includes the following:

> *"One who has the right to possess, use and convey something".*

41. The Canadian Law Dictionary definition of the term "Ownership" includes the following passage:

> *"The term has been given a wide range of meanings but is often said to*

comprehend both the concept of possession and, further, that of title, and thus to be broader than either".

42. Thus I don't have the definitive answer to these common ownership scenarios. These are issues to be considered when contemplating defacto consolidation.

43. Does the manner of tenure have to be the same? For example, let's suppose that two parties own one parcel as joint tenants and the other as tenants in common, and the ownership has been common throughout the requisite period. It would seem that this would not be a bar to defacto consolidation, but again I don't have the definitive answer.

44. What are the implications of consolidating a parcel which is subject to a recorded interest with a parcel which is not subject to that same recorded interest? Title to the consolidated parcel will be affected by the recorded interest, perhaps with adverse consequences. What happens when it is time to foreclose? It would seem that the written consent of the Lender is critical in this scenario. Whether subdividing into two or more parcels or effecting a consolidation, the consent of any secured Lender should be obtained. The Registrar General advises that the Mappers treat a court-ordered sale of pre-subdivided land as if it were a re-subdivision. They react to the foreclosure deed and take the position that they do not need municipal approval for any resulting re-configuration. Accordingly, failure to obtain the consent of the Lender (and this consent should form part of the public record), whether subdividing or consolidating, is a critical part of the process and is necessary if one is to eliminate the possibility of a subsequent "undoing" of the subdivision/consolidation.

45. Remember that approval by the LRO is not the sole standard to be met. I again point to the obligation to comply with the legislation, the common law, and the Professional Standards. Passing the litmus test of LRO approval will not necessarily constitute a valid defence to a negligence claim.

46. If title to one of the lots proposed to be consolidated is based upon adverse possession, when did that title mature? If it matured after April 15, 1987, I don't believe that one could successfully argue that common ownership existed throughout the requisite period of time.

47. I have seen Statutory Declarations where the evidence is given by a person acting pursuant to a Power of Attorney for the Owner. I have difficulty with any Declaration which states "I, [the Owner], by my duly appointed attorney John Doe, solemnly declare as follows . . .". It is one thing if the attorney has personal knowledge; in that case the evidence should come from the attorney himself/herself. I have serious reservations about the quality of evidence which can result from the Owner speaking through his attorney. How can an Owner who is, for all we know to be mentally incapacitated, able to provide the requisite evidence?

48. Should the lawyer become the Declarant? While the lawyer can attest to common ownership on the public record, absent the requisite personal knowledge it is considered dangerous for the lawyer to attempt a defacto consolidation based only upon the Declaration of the lawyer. If the accuracy of the Declaration is later called into question, the owner may or may not be available to confirm the accuracy of the evidence, or may not recall (or choose to recall) the discussions leading up to the decision to consolidate. It is submitted that there are very few situations where it would be prudent for the lawyer to be the sole Declarant.

49. Any Statutory Declaration must comply with the evidentiary requirements. A useful summary is contained in the Decision of the Supreme Court of Nova Scotia in Waverley Village Commissioners et al v. Nova Scotia (Minister of Municipal Affairs), 126 N.S.R. (2d), 46. As well, reference is made to the Decision of the Nova Scotia Court of Appeal in Wolfridge Farm Ltd. v. Bonang, 2014 NSCA 41 (CanLII). Paragraph 14 of the Decision states that:

> *"It is not appropriate to file an affidavit which contains speculative and inadmissible material. Facts should be within the personal knowledge of a deponent. Grounds of*

information and belief should be described with the source of that information named. "I am advised", without more, is inadequate. Moreover, counsel should avoid becoming a witness except with respect to uncontroversial matters: Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs), 1993 CanLII 3403 (NS SC), [1993] N.S.J. no. 151, 123 N.S.R. (2d) 46 (S.C.); Huntley v. Larkin, 2007 NSCA 75 (CanLII); Armoyan v. Armoyan, 2013 NSCA 99 (CanLII)."

50. Thus, I have difficulty with defacto consolidations where the Declarant purchased the property in 2014 and does not purport to have personal knowledge of the facts that support the statement of common usage prior to that date, and at all times since at least April 15, 1987. Similarly, how can a lawyer be the Declarant, except as to common ownership evidenced on the public record, unless that lawyer is personally familiar with the history of usage of the property.

51. Sometimes two or more Declarations may be needed. This is increasingly likely as we move further away from April 15, 1987. Personal knowledge may not extend that far back, nor may personal knowledge extend to the present time. In that case the Declarations can be complementary, so as long as the totality of the evidence is sufficient.

52. Bear in mind the fact that it is possible and in fact usual to have common ownership in situations where the parcels are not used together. I don't believe there is any authority for the proposition that common ownership is synonymous with use together.

EXAMPLES OF EVIDENCE WHICH ESTABLISHES OR HELPS TO ESTABLISH USE TOGETHER

Generally:

1. A building was constructed so that it straddles the boundary of two or more lots, and it has existed in its present location since at least April 15, 1987.

2. A building is on one lot and it is serviced by an on-site sewage disposal system on another lot, both of which have existed in their present location since at least April 15, 1987.

3. An absence of physical characteristics, fences or markers or other means of dividing or intending to show any division lines between the lots. This is weak and not much weight is to be attached to such a statement, but it may be of some assistance when considered in the context of other evidence.

4. A survey plan or location certificate was prepared on or prior to April 16, 1987 showing the lots as if they were a single parcel.

5. Aerial photography may be quite valuable.

Residential Properties:

1. Conveyance or mortgage of the lots using a single consolidated legal description (useful in situations where there is insufficient evidence to establish validation of consolidation in accordance with Section 102A(1) of the Planning Act).

2. Access to one lot is gained by crossing the other.

3. The lots have been landscaped as if they were a single lot.

4. Trees and other vegetation have been cleared from the lots in a manner so as to suggest usage as a single lot.

5. The lots are in cottage country. One has lake frontage; the other does not and it has no legally granted access to the lake.

6. The lots are not sufficiently large so as to legally or practically develop each on its own. This, on its own, is not persuasive.

7. The house is located on one lot and a garage or other outbuildings used in conjunction with the house are on a different lot.

8. The outside perimeter of the lots is enclosed by a fence.

9. The outside perimeter of the lots is marked by a hedge.

Forestry Properties:

1. A woods road or roads have been constructed/maintained, crossing from one lot into the other or others.

2. A forestry management plan has been prepared, dealing with the lots as if they were a single parcel.

3. Harvesting operations have been conducted as if the lots constituted a single parcel.

4. Silviculture operations (including planting, spraying, and spacing) have been conducted as if the lots constituted a single parcel.

5. Lines marking the boundaries with neighbouring parcels have been blazed, painted, or other otherwise marked, as if the lots were a single consolidated parcel.

Agricultural Properties:

1. Cropping has occurred without reference to the boundaries of the individual lots.

2. Pasturing (as evidenced by pasture fencing) has occurred without reference to the boundaries of the individual lots.

3. Drainage tile has been installed without reference to the boundaries of the individual lots.

4. Farm management plans have been prepared without reference to the boundaries of individual lots.

5. Farm roads have been constructed/maintained without reference to the boundaries of the individual lots.

This list is by no means exhaustive. The possibilities are limited only by the facts of common usage.

53. I don't think it is particularly helpful for the Declarant to state that the property can be used only as single commercial lot or only as a single residential lot, in the absence of the facts that support that particular statement.

54. Remember that if a Declarant professes to have personal knowledge, the nature of that personal knowledge should be evidenced in the recitation of the facts.

55. Care should be taken to select the appropriate Municipal Government Act compliance statement. It is not correct to state that the subdivision (ie. in this case consolidation) complies with Part IX of the Municipal Government Act; rather it is an exemption from that requirement. Section 7(10) of the Land Registration Administration Regulations provides as follows:

> "s.7(10)...every legal description submitted to a registrar must be accurate and complete and must contain...
>
> > (d) a statement that the parcel complies with, is exempt from, or is not subject to the subdivision provisions of Part IX of the Municipal Government Act; and
> > (e) if exempt from or not subject to the subdivision provisions of Part IX of the Municipal Government Act, a statement of the exemption relied upon and the facts supporting the exemption, or an explanation of why the parcel is not subject to the subdivision provisions, as applicable."

An example of an acceptable compliance statement is attached and identified as Resource 4.

56. The Form 45 requirement must be kept in mind, post-registration of a defacto consolidation Statutory Declaration. The authority is found in Land Registration Administration Regulation 9(3)(a). It is noted that "subdivision" is defined in Section 3(1)(ab) as having *"the same meaning as in the Municipal Government Act"*. Reference to Section 191(q) of the Municipal Government Act states that *"subdivision means the division of an area of land into two or more parcels and includes a resubdivision or a consolidation of two or more parcels"*.

CONCLUSION

57. The ability to effect defacto consolidation is a useful tool in appropriate circumstances. It is perhaps cheaper and certainly quicker than an application to the planning authority for subdivision approval. There are certain situations where defacto consolidation can be effected where Department of Environment or other approvals might not be an option.

58. However, effecting defacto consolidation is not be to considered lightly, for the various reasons discussed in this paper.

59. A less risky alternative when dealing with larger parcels of land is subdivision by deed (subdivision where all lots to be created, including the remainder lot, exceed ten hectares in area). This is not limited to situations where we start with one parcel and divide it into two or more parcels each of which has an area of more than ten hectares. Rather, we can start with two or more smaller parcels which can be consolidated to form a single parcel having an area of more than ten hectares, given the fact that consolidation falls within the definition of subdivision under the Municipal Government Act. In any event, subdivision by deed is a useful tool as there is no need to establish common ownership (except at the time of consolidation) nor is there any requirement to establish use together. Subdivision/consolidation can occur prior to migration.

60. See Resource 6 for a discussion of subdivision by deed.

61. I am grateful to Catherine Walker for having articulated the following:

> *"I think the difficulty is that at the end of the day the final measure is a subjective one at least after the basic requirements are met as prescribed by the legislation. Aside from the specific legislative elements required, which Justice Warner was clear on for defactos, the balance is subject to*

some professional judgment. Is it not really unlike judging the sufficiency of statutory declarations for establishment of adverse possession. There are basic elements required, and then there is the assessment of quality of the evidence set out in the declarations. At some point, the lawyer has to determine if the evidence is sufficient to warrant the exercise of professional development in favour of a CLE."

RESOURCES (attached):

1. Bill 75 **(in its entirety as passed, with amendments, revising Municipal Government Act and Halifax Regional Municipality Charter)**

2. Black-lined version of Bill 75 (showing amendments to the Municipal Government Act)

3. Land Registry Client Resource Material: Defacto Consolidation

4. Defacto Consolidation Municipal Government Act compliance statement (see attached)

5. Watercourses (from a paper presented by Ian H. MacLean Q.C. to the Pictou County Barristers' Society on September 11, 2015)

6. Subdivision where all lots to be created, including the remainder lot, exceed 10 hectares in area (from a paper presented by Ian H. MacLean, Q.C. to the Pictou County Barristers' Society on September 11, 2015)

RESOURCES

1. Leslie Hickman: "Defacto Consolidations" (RELANS March 2, 2007)

2. Christopher Folk: "Practical Tips on Land Registration" (RELANS December 3, 2012)

3. Robert Grant, Q.C. and Elizabeth Haldane: "Polycorp v. HRM: Land Use and Defacto Consolidations" (RELANS December 3, 2012)

RESOURCE 1

BILL NO. 75

(as passed, with amendments)

2nd Session, 62nd General Assembly
Nova Scotia
64 Elizabeth II, 2015

Government Bill

Municipal Government Act (amended) and Halifax Regional Municipality Charter (amended)

CHAPTER 24 OF THE ACTS OF 2015

The Honourable Mark Furey
Minister of Municipal Affairs

First Reading: April 1, 2015 (LINK TO BILL AS INTRODUCED)

Second Reading: April 30, 2015

Third Reading: May 11, 2015 (WITH COMMITTEE AMENDMENTS)

Royal Assent: May 11, 2015

An Act to Amend Chapter 18 of the Acts of 1998, the Municipal Government Act, and Chapter 39 of the Acts of 2008, the Halifax Regional Municipality Charter

Be it enacted by the Governor and Assembly as follows:

1 Subsection 268(3) of Chapter 18 of the Acts of 1998, the Municipal Government Act, is repealed and the following subsection substituted:

(3) In order to create a subdivision based on an exemption from the requirement for approval set out in any of the clauses in subsection (2), except clause (b), a document that

(a) specifies the intent to create the subdivision, the exemption on which the subdivision is based and the facts that entitle the subdivision to the exemption; and

(b) provides proof of the consent of the person entitled to create the subdivision,

must be registered or recorded in the registry.

2 Subsection 268A(1) of Chapter 18, as enacted by Chapter 9 of the Acts of 2003, is amended by

(a) adding "are contiguous, are parcels registered pursuant to the Land Registration Act and" immediately after "that" in the first line;

(b) striking out "appropriate registry of deeds or records a statutory declaration in the land registration office" in the fourth and fifth lines and substituting "parcel registers for the lots"; and

(c) striking out ", the present description of the lots including any property identifiers assigned by Service Nova Scotia and Municipal Relations and the description of the consolidated single lot" in the last four lines.

3 Chapter 18 is further amended by adding immediately after Section 268A the following Sections:

268B (1) Notwithstanding Section 103 of the Environment Act, a watercourse does not subdivide a lot unless the watercourse creates a natural boundary, considering the nature and use of both the watercourse and the land through which it flows.

(2) Subsection (1) does not apply to subdivide a lot that

(a) has received subdivision approval; or

(b) is a parcel registered pursuant to the Land Registration Act.

268C The Registrar General appointed pursuant to the Land Registration Act may validate a subdivision that is not in compliance with the subdivision approval or exemption requirements of this Part, if the affected lots are parcels registered pursuant to the Land Registration Act and it would not be practicable to rectify, repeal or nullify the subdivision.

4 Subsection 278(3) of Chapter 39 of the Acts of 2008, the Halifax Regional Municipality Charter, is repealed and the following subsection substituted:

(3) In order to create a subdivision based on an exemption from the requirement for approval set out in any of the clauses in subsection (2), except clause (b), a document that

(a) specifies the intent to create the subdivision, the exemption on which the subdivision is based and the facts that entitle the subdivision to the exemption; and

(b) provides proof of the consent of the person entitled to create the subdivision,

must be registered or recorded in the registry.

5 Subsection 279(1) of Chapter 39 is amended by

(a) adding "are contiguous, are parcels registered pursuant to the Land Registration Act and" immediately after "that" in the first line;

(b) striking out "appropriate registry of deeds or records a statutory declaration in the land registration office" in the fourth and fifth lines and substituting "parcel registers for the lots"; and

(c) striking out ", the present description of the lots including any property identifiers assigned by Service Nova Scotia and Municipal Relations and the description of the consolidated single lot" in the last three lines.

6 Chapter 39 is further amended by adding immediately after Section 279 the following Section:

279A The Registrar General appointed pursuant to the Land Registration Act may validate a subdivision that is not in compliance with the subdivision approval or exemption requirements of this Part, if the affected lots are parcels registered pursuant to the Land Registration Act and it would not be practicable to rectify, repeal or nullify the subdivision.

Bill 75 Amendments to *MGA*

268(3):

~~An affidavit of the person making a disposition or encumbrance of land that would create a subdivision that specifies the exemption from the requirement for approval and the facts that entitle the subdivision to the exemption is sufficient proof that approval of the subdivision is not required, unless the person to whom the disposition or encumbrance is made has notice to the contrary.~~

In order to create a subdivision based on an exemption from the requirement for approval set out in any of the clauses in subsection (2), except clause (b), a document that

(a) specifies the intent to create the subdivision, the exemption on which the subdivision is based and the facts that entitle the subdivision to the exemption; and

(b) provides proof of the consent of the person entitled to create the subdivision,

must be registered or recorded in the registry.

268A:

Two or more lots that **are contiguous, are parcels registered pursuant to the *Land Registration Act* and** are and have been in common ownership and used together since April 15, 1987, or earlier are deemed to be consolidated if the owner or the owner's agent registers a statutory declaration in the ~~appropriate registry of deeds or records a statutory declaration in the land registration office~~ **parcel registers for the lots** stating that the lots were in common ownership and used together on or before April 15, 1987, and have continued to be so owned and used, and including the facts that support the statement, ~~the present descriptions of the lots including any property identifiers assigned by Service Nova Scotia and Municipal Relations and the description of the consolidated single lot~~.

268B:

(1) Notwithstanding Section 103 of the *Environment Act*, a watercourse does not subdivide a lot unless the watercourse creates a natural boundary, considering the nature and use of both the watercourse and the land through which it flows.

(2) Subsection (1) does not apply to subdivide a lot that

(a) has received subdivision approval; or

(b) is a parcel registered pursuant to the *Land Registration Act.*

268C

The Registrar General appointed pursuant to the *Land Registration Act* may validate a subdivision that is not in compliance with the subdivision approval or exemption requirements of this Part, if the affected lots are parcels registered pursuant to the *Land Registration Act* and it would not be practicable to rectify, repeal or nullify the subdivision.

Land Registry Client Resource Material

DeFacto Consolidation

Land Registration and **Non Land Registration**

Royal Assent was passed on Bill 9 on May 22nd 2003
Amendments to MGA, Bill 75 received Royal Assent May 11,2015

The following is an amendment to the *Municipal Government Act.*

****

Section 268A

(1) Two or more lots that are contiguous, are parcels registered pursuant to the Land Registration Act and are and have been in common ownership and used together since April 15, 1987, or earlier are deemed to be consolidated if the owner or the owner's agent registers a statutory declaration in the parcel registers for the lots stating that the lots were in common ownership and used together on or before April 15, 1987, and have continued to be so owned and used, and including the facts that support the statement

(2) Registration or recording of the statutory declaration referred to in subsection (1) is deemed to consolidate the lots as of the date of registration or recording.

(3) Subdivision approval of the consolidation is not required

****

Acceptance Criteria

Mappers will apply the following acceptance criteria to determine compliancy:

- Statement(s) regarding common use.

  Note: A statement that only states the lots were used and continued to be used together since or before April 15th, 1987 does not satisfy the requirement of 268A. There would need to be an additional statement specifying how they were used together.

- Statement(s) regarding common ownership.

  Note: when considering if common ownership is compliant, it is the date the documents were executed that the decision is to be based on.

- All existing PID numbers assigned to the parcels being consolidated must be contained in the document .

- Signed by the owner or owner=s agent. If the declaration is signed by someone other than the owner or owner's agent then we must investigate further to evidence consent.

The submission of a PDCA is evidence of consent. If consent is not evidenced then we cannot react to the declaration (see below).

Should supplemental statutory declarations be required from previous owner(s) as to usage details, they should be included as attachments to the Defacto Consolidation document.

Non-compliant

Land Registration De Factos

- For De facto declarations submitted for registration in the Land Registration system that are non-compliant;
    - The document is to be rejected.
    - A "Documents Returned Form" is to be completed giving explanation of why the document was not registered.

The submitter has the option to appeal the decision under section 90 of the *Land registration Act.*

Process Steps for Existing LR parcels to be consolidated

1) Submit Form 1 (Request For PID Assignment)
   PID assigned for consolidated LR parcel
2) Submit Amending PDCA for PID assigned
3) Register Defacto consolidation

Process steps for multiple existing Non LR parcels to be migrated

1) Submit Form 1 (Request For PID Assignment)
   PID assigned for consolidated parcel
2) All Non LR PIDS must be migrated separately prior to recording of defacto
3) Submit Amending PDCA for consolidated parcel
4) Register Defacto consolidation

Process steps : single Non LR parcel is mapped, but consists of several interior lots

1) Submit Form 1 (Request For PID Assignment) indicate on Form 1 intention to file a defacto consolidation. Mapper returns form 1 with:
   - New NLR PIDs created for underlying lots
   - PID assigned to consolidated parcel for defacto
2) All Non LR PIDS must be migrated separately prior to recording of defacto

3) Submit Amending PDCA for consolidated parcel
4) Register Defacto consolidation

Process for situations where there is difficulties with mapping interior lots prior to migration

In cases where the interior lots to be consolidated cannot be located with reasonable accuracy by the migrating lawyer, prior to migration, the mapper will create new PIDs for the separate parcels to be consolidated, with parcel type "pending de facto consolidation", however:

- PIDs will not be added to the graphics and
- Assessment account will not be created for each interior PID

In these circumstances, the following is required:

- Form 1 (Request for PID Assignment) submitted to the LRO, which should include:
  - a statement that PIDs are required in order to de facto after migration
  - a copy of the statutory declaration which is intended to be used to support the de facto consolidation
  - a statement that all of the lots to be consolidated are contiguous
  - a statement about the location of the lots, including if they cannot be located with reasonable accuracy within the consolidated lot

Note: if upon review, the mapper can locate the parcel with the information provided by the submitter, the mapper would add the parcels to the graphics, but no new assessment accounts are to be created.

DEFACTO CONSOLIDATION

MUNICIPAL GOVERNMENT ACT COMPLIANCE STATEMENT

The parcel is exempted from subdivision approval under the Municipal Government Act because the parcel was created as a consequence of defacto consolidation pursuant to Section 268A of the Municipal Government Act. The Declaration effecting defacto consolidation was registered at the Land Registration Office on _____ as Document Number _____.

RESOURCE 5

WATERCOURSES *(from a paper presented by Ian H. MacLean, Q.C. to the Pictou County Barristers' Society on September 11, 2015)*

Subdivision by watercourse in the LRA environment is governed by Land Registration Administration Regulation 7, subsections (16), (17) and (18):

"(16) Subject to subsection (17) and notwithstanding that watercourses are vested in the Crown by virtue of Section 103 of the Environment Act, a watercourse is deemed not to subdivide the parcel or parcels through which it flows.

(17) Except as provided in subsection (18), if after considering the nature and use of both a watercourse and the land through which it flows, a PDCA submitter or a registrar determines that the watercourse creates a natural boundary,

(a) the watercourse is deemed to subdivide the parcel or parcels through which it flows; and

(b) the parcel owner must make a request for PID assignment in Form 1 and provide such information as will enable the preparation of an electronic geographical representation of the parcel before making a PDCA.

(18) A parcel for which subdivision approval has been granted under the Municipal Government Act, or the former Planning Act, may not be subdivided under subsection (17)."

Authority

Authority for the proposition that a watercourse creates a subdivision is found in Section 103 of the Environment Act which states in part:

> "Every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in Her Majesty in right of the Province and is deemed conclusively to have been so vested since May 16, 1919 . . .".

Of course the federal government exercises jurisdiction and ownership rights with respect to certain watercourses, including those which are tidal.

The concept of "navigable waterway" has been used to identify access. However, that term is not particularly helpful in determination of the identification of a watercourse as such.

It should be noted that the term "watercourse" is not defined in the Land Registration Act nor in the Regulations. The term is defined in Black's Law Dictionary as "a body of water flowing in a reasonably definite channel with bed and banks".

Land Registration Administration Regulation 7(17) appears to give the submitter the authority to make the determination. However, you will note the use of the words "submitter or a registrar".

The only real guidance can be found in the "PDCA Standard - Watercourses", a copy of which is attached hereto as Appendix 1.

Key points to consider include the following:

1. Use the topographical function for property mapping. If the body of water is not shown as a double line, it is deemed not to be a watercourse for purposes of the LRA.

2. If the body of water measures between 30 feet and 80 feet in width along the entire length of that portion of the body of water which is within the described parcel, the submitter must treat it as a watercourse or, to avoid rejection, must add a comment stating that it does not create a natural boundary and therefore does not subdivide the parcel.

3. If the width of the body of water is more than 80 feet along the entire length of that portion of the body of water which is within the described parcel, the submitter will be rejected unless the watercourse is treated as subdividing the property. However, the effect of Land Registration Administration Regulation 7(18) is to prevent further subdivision if the parcel has already received subdivision approval under the Municipal Government Act or its predecessor, the Planning Act. In those cases the watercourse is deemed not to subdivide the parcel.

4. If the watercourse is treated as subdividing the property, Form 1 will have to be submitted as will descriptions of each of the resulting parcels.

Care will have to be taken when effecting subdivision/consolidation pursuant to the "in excess of ten (10) hectares exemption" or defacto consolidation, to ensure that the property is not subdivided by a watercourse.

The following is a Municipal Government Act compliance statement which would be appropriate for use in a situation where a watercourse separates two or more parcels:

> "The parcel is exempted from subdivision approval under the Municipal Government Act because, given the nature and use of the adjoining watercourse and the land through which it flows, the watercourse creates a natural boundary".

Appendix 1	"PDCA Standard - Watercourses" (attached)
Appendix 2	"Water Lots, Watercourses & Wetlands (Nova Scotia), an Aide Memoir for Reviewing Title & Uses", presented to the Real Estate Section at the 2010 Annual Meeting, Nova Scotia Barristers' Society by Garth C. Gordon, Q.C. on June 18, 2010.

Appendix 1

Land Registry Client Resource Material

PDCA Standard Watercourses

Land Registration and Non Land Registration

Land Registration Administration Regulations: (amended May 2009)

(16) Subject to subsection (17) and notwithstanding that watercourses are vested in the Crown by virtue of Section 103 of the *Environment Act*, a watercourse is deemed not to subdivide the parcel or parcels through which it flows.

(17) Except as provided in subsection (18), if after considering the nature and use of both a watercourse and the land through which it flows, a PDCA submitter or a registrar determines that the watercourse creates a natural boundary,

(a) the watercourse is deemed to subdivide the parcel or parcels through which it flows; and

(b) the parcel owner must make a request for PID assignment in Form 1 and provide such information as will enable the preparation of an electronic geographical representation of the parcel before making a PDCA.

(18) A parcel for which subdivision approval has been granted under the *Municipal Government Act* may not be subdivided under subsection (17).

Standard:
It is the submitter's opinion whether or not the watercourse creates a natural boundary.

Exception: Watercourses that are obvious in that they appear significant enough to create a natural boundary are to be rejected.

Parcels having received subdivision approval from the municipality can not be subsequently subdivided by a watercourse.

Process:

1. Watercourses contained within a parcel description for a property that has received municipal subdivision approval.
   These water courses cannot be used to further subdivide the property.

2. Those watercourses shown as single line in the 1:10000 topographic layer in the Map Library Module (not the topographic layer in POL).
   These are accepted with respect to the watercourse issue and do not require a comment from the submitter.

3. Those watercourses shown as double line in the 1:10000 topographic layer in the Map Library Module and measures between 30 and 80 ft in width along the entire length of the portion of the watercourse that is within the described parcel.
   These are considered to be significant enough to be questionable and require a comment from the submitter that the watercourse(s) does not create a natural

boundary and thus does not subdivide the parcel.

- If there is no comment in the PDCA.

  Mapper set the correcting description flag and request the submitter to confirm the watercourse(s) does not create a natural boundary to subdivide the parcel."

4 Those watercourses shown as double line in the 1.10000 topographic layer in the Map Library Module and measures greater than 80 ft in width along the entire length of the portion of the watercourse that is within the described parcel.

These are considered to be significant enough to sever the parcel and are rejected. If submitter feels it does not subdivide the property they can appeal under section 90 of the LRA.

RESOURCE 6

SUBDIVISION WHERE ALL LOTS TO BE CREATED, INCLUDING THE REMAINDER LOT, EXCEED 10 HECTARES IN AREA

(from a paper presented by Ian H. MacLean, Q.C. to the Pictou County Barristers' Society on September 11, 2015)

Section 268(2)(a) provides that subdivision approval is not required for a subdivision where all lots to be created, including the remainder lot, exceed ten hectares in area. Prior to the coming into effect of the Municipal Government Act on April 1, 1999, such divisions were governed by Section 102(2)(l) of the Planning Act which provided that the Act does not apply to *"a division of land resulting in lots which are all twenty five acres or more in area, where the instrument creating the division expressly and bonafide states therein that the lot and all others created by the instrument, including any remainder lot are twenty five acres or more in area, and which is supported by an affidavit of the person making the transfer affixed to the instrument*".

It should be noted that Section 268(3) of the Municipal Government Act (as amended earlier this year) provides that:

> "In order to create a subdivision based on an exemption from the requirement for approval set out in any of the clauses in subsection (2), except clause (b), a document that
>
> (a) specifies the intent to create the subdivision, the exemption on which the subdivision is based and the facts that entitle the subdivision to the exemption; and
>
> (b) provides proof of the consent of the person entitled to create the subdivision,
>
> must be registered or recorded in the registry."

There is thus an interesting dichotomy in terms of establishing that the resulting parcel or parcels qualify for the exemption. Under the Planning Act it appears that the exemption could be established only by including, in the instrument creating the division, an express and bonafide statement that each of the resulting lots has an area of 25 acres or more, and

this statement is to be supported by an Affidavit of the person making the transfer, affixed to the instrument. On the other hand the Municipal Government Act (as it existed prior to the 2015 amendment) stated that an Affidavit "*is sufficient proof that approval of the subdivision is not required . . .*", without going so far as to require inclusion of an Affidavit. The recent amendment introduces new requirements, but not unreasonably so, in my opinion. In any event, there are certain requirements to be met when availing ourselves of this exemption and this will be discussed later in this paper.

Another distinction between the Planning Act and the Municipal Government Act should be noted. Under the Planning Act approval was not required if each resulting lot had an area of at least twenty five acres, while the Municipal Government Act requirement is for lots exceeding ten hectares in area. Bear in mind the fact that one hectare equals approximately 2.47 acres.

The Municipal Government Act is effective from April 1, 1999 and thus subdivisions pursuant to the Planning Act must meet the twenty-five acre requirement.

MEANS BY WHICH PARCELS CAN BE CREATED IN ACCORDANCE WITH THE EXEMPTION

The exemption is often referred to as "Subdivision by Deed". However, it can be accomplished in a variety of ways:

1. **Deed**

   Typically the subdivision occurs with the conveyance of an infant parcel and reservation of the remainder, or vice versa. The Deed may or may not be accompanied by a plan.

   The Affidavit of Execution must (according to the recent amendment) specify that the intention of the conveyance is to create a subdivision in which each of the

resulting parcels has an area in excess of ten hectares and that the subdivision is therefore exempt from the subdivision approval requirement, in accordance with Section 268(2)(a) of the Municipal Government Act.

2. **Statutory Declaration**

Rather than conveying either parcel, at least at the time of subdivision, the Owner may register a Statutory Declaration stating the intention to thereby create the subdivision. Again, this may or may not be accompanied by a plan.

A sample Declaration is attached as ① in the Appendix section found later in this paper.

3. **Plan**

Subdivision can be effected by virtue of a plan, in the absence of a Deed or Statutory Declaration. However, in that case, the LRO will require a clear statement of the exemption relied upon, the facts that support the exemption, and evidence of the consent of the registered owner. This can appear on the face of the plan or, perhaps more logically, in a supporting and attached Affidavit or Declaration. The authority for these requirements is found in Land Registration Administration Regulation 5(7) which provides as follows:

> To record a plan of subdivision as exempt from the approval requirements under the *Municipal Government Act*, a submitter must provide all of the following, either on the face of the plan or in an attached affidavit:
>
> (a) a clear statement of the exemption relied upon and the facts that support the exemption;
>
> (b) evidence of the consent of the registered owner.

4. **Will**

Pursuant to Section 268(2)(j) of the Municipal Government Act, subdivision approval is not required for a subdivision "*resulting from a devise of land by will executed on or before January 1, 2000*". Presumably execution of a Codicil after January 1, 2000 would negate the exemption which might otherwise exist respecting a devise of land in a Will executed prior to January 1, 2000. However, that still leaves open the possibility of an exemption from subdivision approval for Wills dated after January 1, 2000 if the devise of land results in parcels having an area in excess of ten hectares. In that case it would be necessary to state in the Will that each of the resulting parcels has an area in excess of ten hectares and that the exemption is therefore claimed. I would want to go one step further and incorporate, in the Affidavit of Status attached to the Personal Representative's Deed or Deeds, a statement to that effect.

CONSOLIDATION

Pursuant to Section 190(q) of the Municipal Government Act "'*Subdivision' means the division of an area of land into two or more parcels, and includes a resubdivision or a consolidation of two or more parcels*".

Thus, Section 268(2)(a) can be used to consolidate as well as to subdivide, even if the end result is creation of a single parcel in excess of ten hectares, with no remainder parcel.

See the sample Statutory Declaration attached as ② in the Appendix section found later in this paper.

Some surveyors see consolidation under Section 268(2)(a) as a useful tool allowing them to reconfigure parcels of land prior to subdivision requiring planning authority approval. The end result may be creation of a parcel or parcels which would not otherwise be eligible for such approval.

As well, this method of consolidation, if done properly, avoids some of the difficulties associated with defacto consolidation. For example, common ownership and use together since at least April 16, 1987 is not a prerequisite to consolidation in accordance with Section 268(2)(a).

CAUTIONS

Here are some points to consider:

1. Consider the reliability of the evidence upon which the estimate of acreage is based and the risks associated with an incorrect estimate. Thus consider the benefit of having a surveyor prepare the description while still avoiding the delays and costs associated with subdivision approval by the planning authority. A surveyor might be prepared to create a sketch which can be given to the Mapper as a non-enabling plan or the surveyor might prepare a description in the absence of a plan or a sketch.

   As a general rule it is dangerous to attempt, without the involvement of a surveyor, to attempt creation of a new parcel or parcels. Property Online graphics and the Owner's perception of the situation on the ground may not reflect reality. Creation of a description of the new parcel or parcels probably extends beyond the point where a lawyer ought to go, in the absence of the involvement of and guidance by a surveyor, a person creating a new legal description must be cognizant of liability issues and of the possibility of committing an offence pursuant to Section 22 of the Land Surveyors Act.

2. Prior to the 2015 amendment of Section 268(3) of the Municipal Government Act, an Affidavit of the person creating the subdivision was sufficient proof of the exemption "unless the person to whom the disposition or encumbrance is made has notice to the contrary". Thus, when acting for a Buyer we need to be vigilant. **[One possible interpretation of this wording is that the parcel is validly created even if the area does not exceed ten hectares, so long as the person to whom the**

disposition or encumbrance is made has no notice to the contrary. However, I don't buy into that argument. I believe that if the result is purported creation of a parcel having an area which does not exceed ten hectares, the attempted subdivision is ineffective, to the extent that it purports to have created a parcel of less than the required area. We could have a situation where a Declaration purports to create two new parcels and a remainder parcel, and it is eventually discovered that only one of the three falls short of the required area. In that case, it seems to me that the newly created parcel meeting the size requirement would be validly created, so as long as there also exists a remainder parcel into which the undersized lot is "collapsed".]

Even with the 2015 amendment the risk of falling short of the requisite area of land is very real.

In any event my thought is that if the Affidavit falsely (whether or not intentionally) exaggerates the area of the land when in fact it does not exceed ten hectares, subdivision is not effected. In reaching this conclusion I am attaching considerable weight to the following conclusion reached by Justice Warner in Polycorp Properties Inc. v. Halifax (Regional Municipality) 2011, N.S.S.C. 241:

> *"[145] The purpose of the s. 268A exemption appears to be to provide an exemption from the normal criteria that must be met before municipal subdivision approval can be obtained The exemption is only available for lots that were owned and used together before April 15, 1987. Because there is no approval process for deemed subdivisions, and the Registrar General does not "police" the registration of deemed consolidation, it makes sense that the statutory declaration contain, not simply a statement that the lots were in common ownership and used together but the*

facts upon which the exemption from subdivision approval is obtained.

[146] In answering the question of what the legislature intended, which requires a review of the Act as a whole, the Court notes that subdivision of lands, including consolidation, is a matter that by the MGA is the responsibility of municipality. Municipal planning is an attempt to bring reason to decision-making respecting the complexities of the physical development of municipalities. It is an important component of the municipal planning, and has a significant impact upon not just the regulation of land use, but on the policies and economics of a municipality's physical infrastructure: transportation, schools, sewer and water, to name but a few. This observation respecting the relevance, importance and purpose of municipal planning is described in the Rogers and Makuch texts cited in this decision. Section 268A is an exception to the otherwise required supervision and control the MGA and provincial planning legislation assigns to municipalities, including HRM.

[147] It would be inconsistent with the scheme and purposes of the MGA to permit subdivisions or consolidations that are exempt from municipal planning and development controls, and which had significant implications as well as consequences on municipalities, unless the entitlement to the exemption is strictly complied with.

However, I'm thus left with the question: If an Affidavit doesn't protect the Buyer, what is the meaning and effect of Section 268(3)?]

3. As a consequence of the Decision of the Supreme Court of Nova Scotia in Silver Sands Realty Ltd. v. Nova Scotia (Attorney General), 2007 N.S.S.C. 291, the effect of the Crown's ownership of watercourses must be taken into consideration when

determining the extent of the parcel. The existence of a watercourse within the confines of what might otherwise be a parcel of just over ten hectares may well reduce the area so that it is below the minimum requirement.

We can take comfort from the fact that the 2015 amendment of the Municipal Government Act, by the addition of Section 268B(1), provides that a "watercourse does not subdivide a lot unless the watercourse creates a natural boundary, considering the nature and use of both the watercourse and the land through which it flows".

4. The existence of a public highway, a railway (the title to which is in fee simple rather than leasehold) or a watercourse creating a natural boundary in accordance with Land Registration Administration Regulation 7(17) must be considered when determining eligibility for the exemption.

5. Care must be taken not to unintentionally nor inappropriately expand the scope of any easement affecting the property.

6. The effect upon the Owner's ability to subdivide in the future should be considered. The Owner's right to create parcels without road frontage may be limited as a consequence of consolidation. Some Municipalities permit creation of one such parcel; upon consolidation or subdivision the ability to create new parcels without road frontage may be negatively impacted.

7. Creation of a new parcel may run afoul of the two-lot rule provision of the Excise Act, thereby triggering payment of HST upon transfer of ownership.

8. Be aware of the risk of running afoul of development restrictions which may "grandfather" development of a parcel for certain purposes. The ability to "grandfather" may be lost upon consolidation.

9. Consider the possibility that one or more of the resulting parcels may not necessarily qualify for development due to frontage or other requirements.

10. Whether subdividing into two or more parcels or effecting a consolidation, the consent of any secured Lender should be obtained. The Registrar General advises that the Mappers treat a court-ordered sale of pre-subdivided land as if it were a re-subdivision. They react to the foreclosure deed and take the position that they do not need municipal approval for any resulting re-configuration. Accordingly, failure to obtain the consent of the Lender (and this consent should form part of the public record), whether subdividing or consolidating, is a critical part of the process and is necessary if one is to eliminate the possibility of a subsequent "undoing" of the subdivision/consolidation.

APPENDICES:

1 Statutory Declaration creating subdivision into two or more parcels, including the remainder parcel

2 Statutory Declaration consolidating, with no remainder parcel

3 Checklist - Subdivision/Consolidation of LR Parcel

4 Land Registration Office "Requirements for Subdivision Approval Exemptions"

①

STATUTORY DECLARATION creating subdivision into two or more parcels, including the remainder parcel

PROVINCE OF NOVA SCOTIA

IN THE MATTER OF: **The Canada Evidence Act**

- and -

IN THE MATTER OF: **The subdivision of lands located at _____, Nova Scotia and presently identified by the single PID _____**

STATUTORY DECLARATION

I, ____, of _____, in the Province of Nova Scotia, do solemnly declare that:

1. I am the Owner of the lands more particularly described in Schedule "A" hereto annexed and as such have personal knowledge of the matters set out in this Declaration, the same having been conveyed to me by Deed registered at the Land Registration Office in ___, Nova Scotia, as number _____ on _____.

2. The parcel of land described in Schedule "A" hereto annexed has an area of __ hectares. It is a portion of the larger parcel presently identified as PID ____, and which is described in Schedule "B" hereto annexed.

3. The purpose of this Declaration is to evidence an intention to subdivide and to in fact subdivide the above-mentioned larger parcel in accordance with the provisions of Section 268(2)(a) of the Municipal Government Act. Each of the parcels resulting from this subdivision (consisting of the parcel described in Schedule "A" hereto annexed and the remainder parcel) has an area in excess of ten hectares.

4. This Declaration is made pursuant to Section 268(3) of the Municipal Government Act.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

DECLARED BEFORE ME at _____,)
Province of Nova Scotia this)
_____day of ____, A.D., 20___;)
)
_____) _____
A Commissioner of the Supreme Court)
of Nova Scotia)

② **STATUTORY DECLARATION consolidating, with no remainder parcel**

PROVINCE OF NOVA SCOTIA

IN THE MATTER OF: **The Canada Evidence Act**

- and -

IN THE MATTER OF: **The consolidation of lands located at _____, Nova Scotia and presently identified as PIDs_____ and _____**

STATUTORY DECLARATION

I, ____, of _____, in the Province of Nova Scotia, do solemnly declare that:

1. I am the Owner of the lands more particularly described in Schedule "A" hereto annexed, the same having been conveyed to me by Deed registered at the Land Registration Office in ___, Nova Scotia, as number _____ on _____. I have personal knowledge of the matters set out in this Declaration.

2. Hereto annexed and marked Schedule "B" is the description of the single consolidated parcel comprising the lands described in Schedule "A". The area of the consolidated parcel is in excess of ten hectares and I am making this Declaration for the purpose of consolidation pursuant to the provisions of Section 268(2)(a) of the Municipal Government Act.

3. The purpose of this Declaration is to evidence an intention to subdivide and to in fact subdivide the above-mentioned larger parcel in accordance with the provisions of Section 268(2)(a) of the Municipal Government Act. Each of the parcels resulting from this subdivision (consisting of the parcel described in Schedule "A" hereto annexed and the remainder parcel) has an area in excess of ten hectares.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

DECLARED BEFORE ME at _____,)
Province of Nova Scotia this)
_____day of ____ , A.D., 20___;)
)
_____) _____
A Commissioner of the Supreme Court)
of Nova Scotia)

③

Checklist - Subdivision/Consolidation of LR Parcel

1. Ask the Mapper to assign a pending PID if an additional parcel is being created. Use Form 1 for this purpose.

   Prepare and submit the parcel description or descriptions. Remember that a short-form description can be used only if a plan or plan of subdivision is registered. Each of the resulting descriptions, including the remainder parcel, must contain an MGA compliance statement substantially in the following form:

   > "The parcel is exempt from the subdivision provisions of Part IX of the Municipal Government Act because it was created by virtue of a subdivision in which all parcels created, including the remainder parcel, exceed ten hectares in area in accordance with Section 268(2)(a) of the Municipal Government Act."

   Of course existing benefits and burdens which are to be retained should be added to the respective descriptions.

2. If a plan is available, submit it to the LRO (in duplicate, except in cases where the size of the plan is less than 11 inches x 17 inches, in which case a single plan will suffice) along with Form 28. The applicable plan filing fee is that of a standard document.

   It must be a plan of survey or a plan of subdivision in order to be registered by itself (sketches, compiled plans, etc. cannot be registered except as a document attachment, although they may be useful to submit as a non-registered plan or document).

3. File Form 45 respecting each of the resulting parcels including the remainder area.

4. Contact the Mapper to advise that a Deed or other document will be registered on the basis of Section 268(2)(a) of the Municipal Government Act.

5. Submit the Deed or other document for registration/recording. The document should include a sworn statement that each of the resulting parcels has an area in excess of ten hectares and that the intention is to create a new parcel or parcels in accordance with Section 268(2)(a) of the Municipal Government Act.

   Note that at the present time this Deed or other document creating a subdivision cannot be e-submitted because the option "This Form 24 creates or is part of a subdivision or consolidation" is not available on e-Form 24.

(4)

LAND REGISTRATION OFFICE

Requirements for Subdivision Approval Exemptions

From the *Land Registration Administration Regulations*:
In order to record a plan of subdivision as exempt from the approval requirements under the Municipal Government Act, the submitter must provide a clear statement of the exemption relied upon and the facts that support the exemption and provide evidence of the consent of the registered owner, either on the face of the plan or in an attached affidavit.

Staff Note: *Regulation added to establish the exemption claimed and to require proof of consent of the owner on a plan not required to go through the subdivision approval process. Consent of the owner may be in the form of a statement and signature on the plan itself or may be in the form of an affidavit. Plans submitted without consent present* ***will not be reacted to by mapping staff.***

A subdivision is exempt from subdivision approval (*see clauses 268(2)(a through j) of the Municipal Government Act* ***and subsection 22(2) of the Nova Scotia Power Privatization Act***). To qualify for the exemption the following must be true or present:

1 All parcels must meet the exemption requirements as specified in clauses a through j and subsection 22(2) of the Nova Scotia Power Privatization Act. Unless there is evidence to the contrary, information received that the subdivision meets the requirement is sufficient.

Example: *clause 268(2)(a) of the MGA* - All parcels (subdivided including the remainder) exceed 10 hectares in area.

Example: ***subsection 22(2 of the NS Power Privatization Act)*** - **the conveyance document into NS Power is to be submitted for registration to ensure the purpose of the subdivision is in accordance with the exemption.**

Exception: A legal opinion has been received that lands held by Her Majesty is not bound by the MGA with respect to having to obtain subdivision approval.

2. Intent - Notice of exemption. The following are acceptable notices of intent to subdivide as per exemptions in Subsection 268(2) of the *Municipal Government Act*:

- Plan shows evidence of the exemption. Example: *clause (a)* - All parcels (subdivided including the remainder) are shown on the plan as exceeding 10 hectares in area.
- acknowledgement of the exemption contained in an instrument.
- an affidavit of the person making a disposition or encumbrance of land that would create a subdivision that specifies the exemption from the requirement for approval and the facts that entitle the subdivision to the exemption is sufficient proof that approval of the subdivision is not required, unless the person to whom the disposition or encumbrance is made has notice to the contrary. 1998, c. 18, s. 268; 2002, c. 10, s. 22; 2003, c. 9, s. 68; 2004, c. 7, s. 17.
- A MGA compliance statement where the reason stated for the exemption clearly refers to the appropriate clause under subsection 268(2).

- Evidence of consent. The following is required to evidence consent:
  - A signature of one of the land owners is required (e.g. deed, statutory declaration, plan, affidavit or letter).
  - A PDCA submitted for the new subdivided or consolidated parcel. (The rationale is that the submitter has authorization from the owner to submit the new parcel, therefore the owner would have consented to the subdivision or consolidation).

Note: If you are processing a subdivision that is exempt from subdivision approval by a document, ensure you code the document an instrument type "Owner Transferring and Subdivision Document" - code *123*. This will allow you to register the document which is linked to PIDs containing inherited interests. The following document types can not be registered if any inherited interests exist against any of the linked PIDs: