PLEASE NOTE:
As an enhancement to the materials we have created, where possible, external web links to those cases and legislation that were available on the CanLII website. Please note, however, that not all links are reliable. The incorrect links appear to be especially problematic for the statutes, especially if the complete citation for the statute is not present at that exact spot in the materials. If you use the web links, please always double-check to ensure that you are being directed to the correct place.

The Nova Scotia Barristers' Society has prepared these Bar Review Materials for the sole purpose of assisting applicants to prepare for the Nova Scotia Bar Examination. These materials are reviewed and updated annually, and published May 1 each year as study materials for the upcoming July and January exams. These current materials are the study outlines for the July 2020 and January 2021 Bar Examinations and may be relied upon for that sole purpose. The materials are not intended to provide legal advice, and should not be relied upon by articled clerks, transfer applicants, lawyers or members of the public as a current statement of the law. Members of the public who access these materials are urged to seek legal advice and are specifically warned against reliance on them in any legal matter or for pursuit of any legal remedy. The Society will not be liable for any use you made of these materials, beyond their intended purpose.

NOVA SCOTIA
BARRISTERS' SOCIETY

REAL ESTATE

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APPENDIX C – *Title Searching Quick List* by Mary Ann McGrath

I. INTRODUCTION

This section provides the academic framework for common issues encountered in Nova Scotia real estate practice. It covers substantive law about the most common

- interests in land;
- issues of title, both documentary and non-documentary;
- conveyances;
- security;
- leases; and
- remedies.

This section does not include

- items that you rarely see (such as contingent or springing interests);
- mechanics of property procedure, such as the crucial matters of adjustments, mortgage documentation, trust obligations, reporting, and so on.

Other issues are briefly touched on as reminders.

You must take a separate course to be certified to practise real estate law under the *Land Registration Act* (the "LRA"). Although this section covers the basic concepts of the LRA, especially where it creates different rules under the "old" and "new" systems, it does not duplicate the mechanical and substantive aspects of the LRA taught in the other course.

Title searching and abstracting are cornerstones of any property practice – in order to identify and deal with property issues, you first have to be able to find, and analyze, what is on title! You will be expected to have practical exposure to real abstracts in your articles – nothing but experience will attenuate you to this topic, and this is treated in more detail in the LRA course, but short primers are annexed and form part of these course materials.

You will be required to keep abstracts and any other information you use to derive an opinion on title, as "foundation documents" under Part 13 of the regulations made under the ***Legal Profession Act***.

The torts section of the Bar Admissions materials covers tortious issues affecting real property, such as occupier's liability, nuisance, trespass, *Rylands* v. *Fletcher*.

Finally, and critically – as in all areas of practice, ethical canons have both general overriding considerations as well as specific rules applicable to the topic at hand. In addition to the trust account issues that come into play with financial transactions, and the Professional Standards to which you must adhere pursuant to Part 8 of the ***Legal Profession Act*** regulations, the issue of conflict of interest and conjoint clients arise in almost every property file. The ethics portion of this course delves into this in detail, but is mentioned here to emphasize that you can never forget ethical considerations and constraints when dealing with property matters. The Society's *Code of Professional Conduct* contains updated and in some cases changed rules on multiple party representation, including (as is normally the case) joint representation of borrower and lender.

II. INTERESTS IN LAND/TITLE

Real Property includes any estate, interest or right to or in land, but does not include a mortgage secured by real property. ***The Dictionary of Canadian Law***, Dukelow & Nuse, 1990, p.884

III. ESTATES IN LAND

1. In general

Canada has a *tenurial* landholding system: Ownership of the land remains in the Crown. Strictly speaking a person cannot own the land, but is always a tenant of the Crown. This remains important in considering Crown rights of expropriation, and in dealing in lands for which a Crown grant does not exist, or has been lost or is ambiguous, but which has a private claimant either by a chain of paper title or by possession: ***Attorney General v. Brill***, 2010 NSCA 69.

At common law, the person owns an *estate* in the land. An estate is a "term that signifies the relation between a person and the property in which he has an interest … and also the interest itself. More technically, it refers to the degree, nature and extent of an interest or ownership in land." (John A. Yogis QC, ***Canadian Law Dictionary***, 2nd ed. (New York: Barron's, 1990) p. 80.)

2. Types of estates

Estate = the rights a person may have in land for a period of time:

Fee simple
The *fee simple* estate is the greatest interest in land that a person can have. It originates with a Crown grant and is essentially absolute ownership. It is subject only to the Crown's right of *expropriation* (compulsory taking, usually with compensation, sometimes known as eminent domain) and *escheat* (reversion to the Crown when an owner dies with no will or heir on intestacy). The estate is indeterminate and may be passed on by transfer (conveyance) or succession. Fees tail (conveyance restricting inheritance of a property) do not exist in Nova Scotia.

Minerals
Most, but not all, mineral resources always remain vested in the Crown, regardless of underlying title. (***Mineral Resources Act,*** SNS 2016 c. 3). The Crown can lease mineral rights, or otherwise provide mineral rights to third parties (e.g., coal mines). Some substances, most notably gypsum, have special licensing and regulatory rules under the Act. Resources below the ocean high water mark are constitutionally federal, but may be subject to federal –provincial agreements (e.g., the ***Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act***.

Life estates and remainders
Life estates are not inheritable (if it is for the life of the estate holder). They continue only for the duration of the life of a named (or ascertainable) person. The holder of the estate is the *life tenant* and is usually the measuring life. (In the form known as an estate pur autre vie, another person is the measuring life and can be devised, if the measuring life survives the estate holder – estates pur autre vie are rare) Life estates can be created different ways: by deed, lease or will, by statute, or otherwise

by operation of law. The person who holds the balance of the interest – i.e., what is left after the life by which the life interest holder is measured dies – is the remainderman. That becomes a fee simple upon the relevant demise.

LRA parcels

For parcels registered under the ***Land Registration Act***, the parcel register is deemed, subject to exceptions described later, to be a complete state of the title to the parcel (see *Brill*, supra and s. 20 of the *Land Registration Act*). Registered interests consist of Crown interests, fees simple, and life interests/remainders. All other interests are appurtenances to registered interests (i.e., benefits or burdens such as covenants or easements), or recorded (most commonly, mortgages) Lawyers are still called upon to certify title to buyers and lenders as before; the impact of certification to the system (on conversion or updating of the parcel) is discussed in the LRA course in detail.

Leasehold estates

A *leasehold* estate is created by contract (expressed or implied) for a fixed duration. The property owner (usually in fee simple) confers on another person the right to exclusive possession of the property (or part of it) for a period of time, usually in exchange for rent. This is termed a "Chattel Real." (See 'Landlord and tenant' section.)

3. Ownership

Sole ownership
The sole owner of an estate is said to hold it in ***severalty*** because she holds it in her own right with no one having any interest jointly with her.

Co-ownership
More than one person can own any estate or interest in land as co-owners. There are two main classes of co-ownership: (1) tenancy in common and (2) joint tenancy.

(1) Tenancy in common
As *tenants-in-common,* co-owners have undivided possession of the property but their interests do not have to not be identical. If a co-owner dies, that co-owner's interest passes to his or her heirs. (The interest can pass directly or through the personal representative. An intestacy or a will executed after September 2001 passes through the personal representative. Before 2001, the interest would pass directly under a will, or directly to an intestate's heirs.)

(2) Joint tenancy
As *joint tenants*, co-owners have identical interests, *i.e.*, they take undivided possession of the same property under the same instrument for the same interest, which vests in them at the same time. The survivor of them takes the entirety. In other words, if two people own property as joint tenants and one person dies, then the remaining person becomes the sole owner of the property.

Since the law presumes tenancy-in-common, a joint tenancy must be expressly declared.

(Exception: Every estate vested in trustees or executors is held by them in joint tenancy. ***Real Property Act*** s. 5(1)). The courts have construed joint tenancies narrowly, so the common wording in deeds to avoid ambiguity is: B conveys property to C & D "as joint tenants and not as tenants in common". Some practitioners add "with right of survivorship" as well.

It is also possible to mix joint tenants and tenants in common, and this is becoming more common with joint-venture type investments and intergenerational holdings – e.g., John and Mary may hold an undivided three-quarters interest in a property as joint tenants with each other, and as a tenant in common with Sally (their daughter or co-investor) with respect to the other one-quarter interest.

Creation of joint tenancy: Four unities

Oosterhoff and Rayner state the following with respect to the "four unities" in *Anger and Honsberger Law of Real Property*, 2nd ed., vol. 1 (Aurora, Ont, Canada Law Book, 1985) at p. 788:

A joint tenancy arises by the act of the person who creates the estate. It is distinguished by what are known as the four unities: (1) *unity of title*, that is, all joint tenants must take under the same instrument, (2) *unity of interest*, that is, the interest of each joint tenant must be identical in nature, extent and duration, (3) *unity of possession*, that is each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the exclusion of the others and (4) *unity of time*, that is, at common law, the interest of each joint tenant must vest at the same time.

These common law requirements have been somewhat eroded by modern law. For example, an owner can convey land to her/himself and another as joint tenants, and this is sufficient to create a joint tenancy, despite the fact that the unities of *time* and *title* are not satisfied.

Severance of joint tenancy: How it happens

At section [5.3B] of the ***Nova Scotia Real Property Practice Manual*** (Markham, Ont.: LexisNexis Canada, 1988) (loose-leaf updated December 2015, release 90), C.W. MacIntosh QC sets out three ways in which a joint tenancy may be severed to become a tenancy in common:

1) One party conveys his interest to a third party. Note that if the joint tenants are married, then to be effective the conveyance must comply with the *Matrimonial Property Act* [unless the purchaser is equity's darling under s.8];
2) Agreement of the parties.
3) A course of dealings sufficient to intimate that the interest of each was mutually treated as constituting tenancy in common. This requires more than the parties separating and discussing the possibility of division of assets between them. If the parties exchange correspondence in which they indicate

> that they wish the property to be divided or sold, the court may infer that they had an intention 'wholly inconsistent with the notion that a beneficial joint tenancy in the property was to continue', then the court might find the joint tenancy to be severed. Although there is a line of judicial reasoning to the contrary, wherein it has been held that the weight of authority is against severance of a joint tenancy by means of a declaration allowing sale of the property or commencement of a partition action

The decision of Dellapina, J. in ***Presseau v. Presseau Estate***, 2010 NSSC 201 holds that a conveyance from oneself to oneself of a matrimonial home, without the consent of that spouse, is a nullity and, accordingly, an attempt to do so for the apparent purpose of severing a joint tenancy was invalid. It is worth noting that the deed in *Presseau* explicitly recited that it was for the purpose of severing the joint tenancy and creating a tenancy in common.

This decision did not deal with the "course of dealing" noted by Mr. MacIntosh QC; from a practice perspective creation or severance of joint tenancies among the same grantor and grantee should therefore be done with care, such as a conveyance to a third party (e.g., to the lawyer in trust and back to the party again).

More recently, Justice Moir reinforced the notion of "deed from self to self is void" in ***DeLong v. Lewis Estate***, 2012 NSSC 369. That case involved a joint tenant who also purported to convey to herself in order to sever a joint tenancy. She then died. The estate (and the intervening lawyer who prepared the deed) sought to distinguish ***Presseau*** on the basis that ***Presseau*** did not consider equitable principles, including estoppel.

Justice Moir concluded that the joint tenancy was not severed either at common law or equity, and that the deed from self to self was void, at para. 18:

> And so, estoppel by deed and estoppel by convention require parties who make an agreement. (And, the later requires detrimental reliance.) Estoppel by representation, promissory estoppel, and proprietary estoppel all require a speaker and a recipient. Also, each of these kinds of estoppel require detrimental reliance on the part of the recipient. Election, which is a related branch of law, involves the communication of a choice. Abandonment is still difficult to characterize, but it appears to involve communication and it has no application on the present facts.

In brief written reasons, the Court of Appeal upheld Justice Moir's decision at 2013 NSCA 74. Bryson, JA for the Court explicitly rejected the notion that a deed "from self to self" would act in equity or as an estoppel to sever the joint tenancy. At para. 19, the Court stated "An invalid deed which coveys nothing cannot sever a joint tenancy. A unilateral and uncommunicated act of one joint tenant that is ineffective at law should not be rescued by equity in the absence of inequitable conduct by the other tenant."

These cases are different from Roy v. Cashen, 2019 NSCA 62. In that case, a mother and daughter (Deborah) owned a home as joint tenants. The mother (alone) then conveyed to herself and daughter

Deborah as tenants in common, then executed a will devising her real property to her daughter Brenda. At trial, Justice Robertson found that this was not a "deed from self to self," and severed the joint tenancy. This finding was upheld on appeal, but the trial finding that the mother intended to create a 50-50 tenancy in common was found to be irrelevant. Since the Grantor had only a 50% interest to begin with, she could not give what she did not have; the result was Deborah had a 50% interest from her original ownership, a 25% interest by virtue of the second conveyance, and Brenda a 25% interest by devise under the mother's will.

The Court further held that the interpretation of the deed was a question of law and that the mother's intention to create a 50-50 interest between the daughters was irrelevant.

Note that judgments against and mortgages by a co-owner under the ***Land Registration Act*** do not sever a joint tenancy. ***Land Registration Act***, ss. 51(1), 66

4. Remedy of partition

Partition is a proceeding where real property previously owned by tenants in common or joint tenants is divided into different parts, by agreement or court order. The ***Partition Act*** provides that all persons holding land as joint tenants, co-partners or tenants in common may be compelled to have land partitioned or to have it sold, and the proceeds distributed among the persons entitled. The normal restrictions on subdivision of land apply to partitions (i.e., if it could not be subdivided under the ***Municipal Government Act***, it could not be partitioned).

In ***MacMillan v. MacMillan***, 2013 NSSC 393, Justice Murray stated at para. 52:

> In Nova Scotia, the general principles of partition may be summarized as follows:
> (i) [sic] Co-owners may be compelled to divide or sell;
> (ii) Where the land cannot be divided without prejudice to the owners, it may be set off in whole or in part to any of the parties who will accept it upon payment by him or her to one or more of the parties;
> (iii)The Court may appoint three (3) Commissioners to effect the partition; and
> (iv)The Commissioner shall determine the amount of compensation in any set off.

In ordering the appointment of commissioners to effect the partition, the Court emphasized the discretion available, and also the variety of factors to be taken into account – including the contributions to and use made of the land by the parties over the years, their sentimental attachment and practicality (financially, and in terms of subdivision approval) of division "on the ground."

Although it appears that the remedies under the Act are partition OR sale ***(Roach v. McNeil***, 2014 NSSC 112), at least one case has interpreted this to mean that the court has jurisdiction to order that one party "buy out" the interest of the other, at least if an arm's length sale proves impracticable: ***Braithwaite v. Turner***, 2015 NSSC 221.

5. Possessory title

Possessory title, sometimes loosely referred to as "squatter's rights," can form the basis for a claim of title. As this serves to defeat the paper title holder's claim in whole or in part, the evidentiary basis for

the claim is all-important. Possessory title and prescription, and the types of evidence required to establish them, are discussed at various places through these materials, including under descriptions of land and statutory declarations.

The true owner is strongly presumed to be in possession: ***Cunard v. Irvine*** (1853-5), 2 N.S.R. 71; ***Legge v. Scott Paper Company*** (1972), 3 N.S.R. (2d) 206.

Possessory title can accrue both against individuals and against the Crown: ***Brill***, *supra*. The difference is the length of time possession is required under the ***Real Property Limitations Act*** (formerly the Limitation of Actions Act or Statute of Limitations). Possession can also accrue against conjoint tenants: ***Land Registration Act***, s. 75(1A) [with respect to parcels registered under the ***Land Registration Act***].

The same result for non-LR [*i.e.*, Registry of Deeds] lands followed in ***Boudreau v. Pellerine***, 2010 NSSC 188. In that case, Mr. Boudreau obtained a deed from some, but not all, descendants of the original Crown grantee and adversely possessed the lands for the period required by the ***(now) Real Property Limitations Act***. An application for a certificate of title under the ***Quieting Titles Act*** on this basis was successful on a contested basis, including against other descendants from the paper title holder, whom the Court found did not interfere with that chain of possession (note that this appears to conflict with the Court of Appeal's decision in ***Spicer v. Bowater Mersey Paper Co.,*** 2004 NSCA 39 which held that any incursion – "setting foot on the lands" – would reset the limitation of actions clock.

Although, as noted above, possessory title exists under both Land Registration and non-Land Registration parcels (*i.e.*, those converted, or "migrated" under the ***Land Registration Act***, and those that remain governed by the ***Registry Act***), there are critical differences. The common law has remained unchanged for lands that have not been converted to the Land Registration system. The only difference has been to the relevant periods under the ***Real Property Limitations Act***, discussed below.

However, once a parcel that is subject to an adverse possession claim – or which adversely possesses another parcel (*e.g.*, an encroachment) is converted to Land Registration, very important changes to the substantive law kick in.

In both cases, it is possible to certify title to – and compel a purchaser to take – a possessory title. These involve critical assessments of available evidence, the exercise of professional skill and judgment, and an appreciation of evolving case law and professional standards, all of which are discussed below and in particular detail in the LRA course.

The superb paper, "Adverse Possession and Prescriptive Rights: Old Doctrines in a New Environment," by Catherine S. Walker QC should be considered "required reading" as a primer in both the old and new worlds. See all the discussions of *Brill* and *Creighton,* later in these materials under Statutory and practical mechanisms to solve title problems.

Common Law and Non-LRA Land

To extinguish the true owner's title, the adverse possessor must be in open, notorious, continuous, exclusive, actual possession for the requisite time periods. Simple non-use by the true owner is not

dispossession. There must be an actual adverse use by someone else: ***Taylor v. Willigar*** (1979), 32 NSR (2d) 11 (CA); ***Elzbeidy v. Phalen*** (1958), 11 DLR (2d) 660 (NSSC). So, for example, possession without permission but with incursions by the true owner (for example, a "squatter's camp" that is also used by the paper owner) is not "exclusive" so as to found possessory title: ***Spicer v. Bowater Mersey Paper Co.***, 2004 NSCA 39 (cited with approval in ***Nelson (City) v. Mowatt***, 2017 SCC 8, which in turn distinguished between "possession" and "occupation"); similarly, in ***Hatt v. Peralta,*** 2014 NSCA 15 the Court upheld the trial judge's finding that "the limitation clock is reset when a true owner sets foot on the lands in dispute" – in that case, minimal indeed (standing on the lands, leaning against cars on it, and the like), and this in turn was applied when the evidence was unclear that the adverse use was "exclusive" (a fence that was maintained by both the squatter and paper owner): ***Pettipas v. Hunter Noel Holdings Ltd.,*** 2015 NSSC 313.

- Successive possessors in privity with each other (by conveyance, devise, etc.) can accumulate possession for the requisite number of years, sometimes referred to as "tacking"
- The true owner's title is extinguished only with respect to the land actually possessed.
- If a possessor enters with some colour of title (*i.e.*, under an honest belief of legal ownership, and the parcel is included in the possessor's – not just a predecessor's deed: *McInnis v. Stone*, 2016 NSSC 69) he may claim constructive possession of the whole parcel even though only a portion may have been occupied. Note that there is a difference between constructive possession and adverse possession. Constructive possession under colour of right can lead to ownership of the entire lot; adverse possession accrues only to the portion actually possessed, to the required standard: ***Creighton v. AGNS***, 2011 NSSC 131 An intent to exclude others from an area that they "think" they own is insufficient. There must be actual exclusion: ***Johnston v. Roode***, *2019 NSCA 98.*
- Adverse possession cannot accrue against streets or roads (***Municipal Government Act,*** S.N.S. 1998, c. 18 as amended), including roads acquired by dedication and acceptance (***St. Mary's (Municipality) v. Cook***, 2019 NSSC 374), or federal Crown land unless the adverse possession "matured" prior to 1950 (***Public Land Grants Act***, S.C. 1950, c. 19), or railway-owned lands used for railway purposes,
- It is worth emphasizing that possession by permission does not, even after long passage of time, give rise to title by adverse possession (or, except as below, easements or other rights by prescription) as the requirement of "adverse" is not met. For a recent example, see ***Bain v. Nova Scotia (Attorney General)***, 2012 NSSC 355. Acquiescence is not permission: ***MacNeil v. MacNeil***, 2014 NSSC 171. Permission will defeat a prescription claim based on 20 years' use under s. 32 of the *Real Property Limitations Act*, but not if the use has been for 25 years and otherwise meets the requirements of the statute: *Burgoyne v. Hutton*, 2016 NSSC 60
- As noted above, "possession" and "occupation" are distinct concepts. While possession for the requisite period is required for operation of the doctrine, continual "occupation" is not: ***Nelson***, *supra*.

In ***Cook v. Podgorski***, 2013 NSCA 47, Justice Bryson, for the Court of Appeal, stated at para 49:

[49] It will be useful to remind ourselves of the relevant principles before turning to their application to the facts:

(1) The law presumes the legal owner to be in possession; *i.e.*, that seizin follows title. This

presumption is not compromised because the owner is not in actual occupation, (***Ezbeidy* v. *Phalen***, (1957), 11 D.L.R. (2d) 660 (N.S.S.C.) approved in ***Fralick*** at at para 40);

(2) To oust the legal owner, it is necessary to establish actual adverse occupation that is exclusive, continuous, open and notorious for the requisite period of 20 years, (***Fralick*** at para 40);

(3) The conduct of the possessor must be that of an owner that would exclude the true owner from the land, (***Brown* v. *Philips et al***, (1963) 42 D.L.R. (2d) 38, (Ont. C.A.) approved in ***Fralick*** at para40);

(4) A possessor may have constructive possession of more than what he occupies if he has colour of title – i.e., a deed – whether or not the deed is valid, (***MacDonald* v. *MacCormack***, 2009 NSCA 12 at para 93). Otherwise, he can only claim what he actually occupies;

(5) To claim constructive possession, the adverse possessor must have a *bona fide* belief that he has title, (***MacDonald* v. *MacCormack*** at para94);

(6) But there can be no constructive possession based on the possessor's belief where his deed does not include the land over which possession is claimed, (***MacDonald* v. *MacCormack*** at para95; ***Mason* v. *Mason Estate***, 1999 CanLII 2804 (NS CA), 176 N.S.R. (2d) 321 (C.A.), paras 31 to 33; ***R. B. Ferguson Construction Ltd.* v. *Nova Scotia (Attorney General)*** (1989), 91 N.S.R. (2d) 226 (N.S.C.A.); ***Rafuse and Rafuse* v. *Meister***, (1979) 32 N.S.R. (2d) 217 (N.S.C.A.) at paras 22-25; ***Wood* v. *LeBlanc***, [1904] 34 S.C.R. 627).

(7) As outlined at §29:60.80 in *Anger and Honsberger Law of Real Property*, 3rd ed. (Aurora, Ont.: Canada Law Book, 2006) (loose-leaf updated December 2015, release 15), the type of possession required varies with the nature of the land:

> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.

And for a very useful history and summary of applicable principles, see ***Nova Scotia (Attorney General)* v. *Brill***, 2010 NSCA 69, ¶ 127-155.

Real Property Limitations Act

On September 1, 2015, the former ***Limitations of Actions Act*** was substantially amended. A new Statute of Limitations now deals with non-property matters. What remains of the old statute has been renamed the ***Real Property Limitations Act***, and deals with matters germane to this course. Further amendments may follow.

The limitation periods for actions to recover land are as follows:

- no action may be taken to recover Crown land after 40 years;
- no action may be taken to recover privately held land after 20 years unless the owner is under disability, in which case the limitation period is extended a further five years from the time the

owner ceases to be under disability;

- the ultimate (non-Crown) limitation period is 25 years. An acknowledgement of the paper title holder's title by the possessor (e.g., by licence or boundary agreement) will stop the time from running.

Note that the above limitation periods, with the exception of the basic 20-year period, have all been reduced by the ***Land Registration Act***, S.N.S. 2001, c. 6. The period for Crown land was formerly 60 years, the extended period for disabilities 10 years, and the ultimate limitation period for non-Crown land 40 years. These new periods have been made *retroactive* by an act amending the ***Land Registration Act***, S.N.S. 2002, c. 19, adding a new s. 115A. Thus prior claims that weren't "old enough" might be now. For example, an individual who was told by the Ministry of Natural Resources in 2000 that their 40 years of adverse possession was insufficient against the Crown may now be able to go back and ask for a release from the province pursuant to s. 37 of the ***Crown Lands Act***.

Note too that absence from the province has now been abolished by the same Act as a disability under the ***Real Property Limitations Act***.

Lastly, note that the period of possession must be for at least the relevant time period and immediately before the bringing of the action (*i.e.*, not "just any 20 year period in the past"): ***Nickerson v. Hatfield***, 2013 NSSC 133. Notably, the Court went on to say that although the 20 years' possession can normally be through successive holders of the paper title, that is not the case when the Crown had, but no longer has, that title (in Nickerson, lands had been deeded to the Crown in 1970, which owned them until 1990. Possession began in 1965. At para 52, Justice Coady stated:

> [52] The 5 years between 1965 and 1970 are not sufficient to establish a prescriptive right. The conveyance from the Crown to the Wilsons in 1990 does not assist the Hatfields in establishing the required 20 years. In ***Moran v. Pappas***, 1997 CanLII 12161, 34 O.R. (3d) 251 (O.N.S.C.) the issue before the Court was stated as follows:
>
> > Can an individual who had adverse possession against the Crown for a period of years tack on that period of time to his adverse possession against a successor in title to the Crown?
>
> The Court answered that question as follows:
>
> > [20] If a claimant of adverse possession against the Crown is unable to satisfy the time requirements of s. 3 of the *Limitations Act* at the time the Crown transfers the land to an individual, the accumulated time of adverse possession is extinguished because the claimant's rights are personal to his claim against the Crown. The period in which the Crown lands are adversely possessed will not enure against the individual taking title from the Crown.
>
> I am satisfied that the Hatfields use of the looped road between 1970 and 1990 does not apply to the twenty years needed for their claim of a prescriptive easement. This reality means that the Hatfields have failed to establish the twenty years required for a claim based on lost modern grant. Of course it is equally as fatal to their statutory claim.

Land Registration

The "race to the Registry" is alive and well with LRA parcels. While covered in detail in the LRA course, a nutshell summary is as follows:

- Any person converting a parcel must disclose, under oath, whether any portion of the land being converted is occupied without permission. **Land Registration Administration Regulations**, Form 5 and clause 10(6)(b)
- If so, the converting owner must give notice to the encroaching party.
- If the paper title holder is subject to the encroachment and does not recognize the matured possessory title, the possessor's title is defeated unless they take court action within 10 years of registration to establish their interest. No compensation is payable to the paper title holder (which makes sense since their interest was defeated by operation of law prior to conversion). s. 74
- If the converting parcel holder is the encroacher, they must demonstrate that the encroachment has run for the full limitation period (*i.e.*, usually 20 years, or 40 against the Crown) to be registrable, and must convert title before the paper title holder does. S. 74
- If the paper title holder is subject to an UNMATURED encroachment and converts title, the clock stops and the encroachment cannot continue to run for the limitation period (the time is calculated at the time of conversion, both pre- and post-LRA: subs. 75(2))
- An exception exists for "wandering boundary lines" that do not consist of more than 20% of the abutting parcel (query, can the encroacher abandon the excess and claim only 20%? Legislation is unclear on the point). s. 75 In National Gypsum Ltd. v. Veinot, 2019 NSSC 326, Smith, J. confirmed that migration by the paper holder, (and lack of notice to the possessor) does not in itself preclude a "wandering boundary" claim by an adjoining squatter; however, the usual requirements for establishing possessory title apply.
- There are also exceptions, and wide-ranging remedies by the decision maker (Registrar-General or the court) for lasting improvements or improvements made under mistaken belief in title. S. 76
- Conjoint tenants can obtain possessory title against other conjoint tenants (useful for, e.g., long-lost heirs). s. 75
- The substantive law changes from non-LRA to LRA therefore include
    - The ability to "stop the clock" on running but not yet matured possessors by converting the lands to LRA;
    - The restriction on the amount of LRA lands that can be subject to a possessory title claim;
    - The ability to assert possessory title against a non-possessing co-tenant; an
    - The "use it or lose it" notice provisions in the case of parcels converted that do not recognize the rights of another.
    - As at writing (2020), the Land Registration Office does not accept possessory claims against parcels that have already been converted, citing s. 74(2) of the ***Land Registration Act***. There is some difference of opinion among practitioners as to the effect of this section. For an example of a *Quieting Titles Act* action commenced within the ten year limitation period referenced in s. 74(2), see *Roode v. Johnston*, 2018 NSSC 293. (appeal allowed on other grounds 2019 NSCA 98). See also ***National Gypsum v. Veinot***, *supra*, for a discussion of the interplay between s. 74(2) and s. 75.

Confirming or conveying possessory title

Statutory declarations may be recorded in the Registry evidencing acts of possession (and MUST be recorded to raise possessory title to a ***Land Registration Act*** parcel). These are subject to the normal rules surrounding statutory declarations: the more objective the person and the evidence, the better; self-serving declarations or those with conclusions of law are weak. Because it is possible to certify to a possessory title – without judicial review – under the LRA, the Nova Scotia Barristers' Society Practice Standards require such declaration(s) to be by "knowledgeable and disinterested persons." These can be surveyors, neighbours, local historians or prior owners. A current owner's assertions would require stronger evidence, such as exhibits incorporating receipts, plans, letters and the like. Note the ***Vendors and Purchasers' Act*** provides that statutory declarations over 20 years old take on the colour of rebuttable presumptions, a useful tool since they are not instruments under the ***Registry Act*** and are not normally either admissible or subject to cross-examination. These are, ideally, in plain language (unless the declarant is an expert), and by objective persons. See *Lynch v. Lynch*, 1985 CanLII 191 (NSSC (TD)).

An application may be made pursuant to the ***Vendors and Purchasers Act*** to determine an objection to title based on possession. Note that the court will not certify title, and it does not cure a valid objection; it will only determine if an objection is valid based on the evidence before it, and contested evidence will be determined on a full trial, not on an application**: *Atlantic Wholesalers* v. *Rainbow Realty Limited*** (1980), 41 N.S.R (2d) 18 (S.C.T.D.), per Hallett, J. . Although a VPA application will generally not be appropriate for cases of contested fact, or where potential third party rights could be affected, the Court will interpret documents.

An action pursuant to the ***Quieting Titles Act*** provides a mechanism to prove possessory title and obtain a certificate of title, which is also sufficient as a root of title. It is, however, expensive and requires a full boundary survey as well as making the Attorney General a party, whose costs are generally borne by the plaintiff. It does have the advantage of being a final and determinative resolution of title (for example, in ***Rankin v. Joudrey***, 2007 NSSC 7, a 1984 certificate of title was conclusive of the rights of the parties despite an assertion that the description in the certificate was incorrect). See also ***Boudreau***, *supra*.

At page 14, Ms. Walker's paper, *supra*, also notes that "[p]ossessory title does not carry with it all of the rights incidental to ownership by express grant, for example the benefits of covenants running with the land, or implied easements of necessity". Note as well that if there is more than one possessor, the resulting title is a tenancy in common and not a joint tenancy. This is particularly worth bearing in mind if, for example, your clients have paper title to Lot X in joint tenancy and are claiming possessory title of a ten foot strip on one side. They would own Lot X in joint tenancy and the ten foot strip as tenants in common.

IV. RESTRICTIONS ON TITLE OR USE OR RIGHTS IN THE LANDS OF ANOTHER

1. Easements

A right of one landowner to utilize land belonging to another and impose a burden on that land for the benefit of the owner of the land to which the easement is attached. ***Ross v. Hunter*** (1882), 7 S.C.R. 289

There are four essential attributes of an easement:

- There must be a dominant tenement and a servient tenement (at common law – this is no longer the case with utility easements or those in favour of the Crown or a Municipality – s. 61 LRA).
- The dominant tenement and the servient tenement must have different owners [at common law. This is not the case with ***Land Registration Act*** parcels].
- The easement must be for the benefit of the dominant tenement [subject to statutory exceptions, such as utility easements, Conservation Easements and Community Easements]
- The easement must be capable of forming the subject matter of a grant.

SEE MacIntosh, ***Nova Scotia Real Property Practice Manual***, Ch.13.3 Easements.
SEE ALSO Professor Diana Ginn, "Easements - Part 1: Back to the Basics" (February 2005 in *2005 Real Property Conference for lawyers and legal assistants: From Challenges to Opportunities…Navigating The Real Property Paths*).

An easement and a public road are mutually exclusive; mere use by persons other than the easement holder does not, in itself, make it a public road. It must come within one of the definitions of Public Road pursuant to the ***Public Highways Act***, RSNS 1989, c. 371, including dedication and acceptance: ***Shannon v. Frank George's Island Investments Ltd.***, 2015 NSSC 76, appeal dismissed 2016 NSCA 24 That dedication and acceptance must be overt – mere use by the public "here and there," including with the knowledge and apparent approval of public authorities who owned the land at the relevant time, does not create a public road or even a burden on the subject lands: ***Livingston v. Cabot Links,*** 2018 NSSC 138. Conversely, once it is a road, it is by definition for the use of all and one cannot obtain prescriptive rights over it, even if it is primarily used by identifiable lot-holders more than the public at large: ***St. Mary's (Municipality) v. Cook***, 2019 NSSC 374

Types of easements

Right of Way

The right to pass over the land of another or make use of a designated strip of land to run pipes, wires or cables.

Right to Air or Water

The right to the continuation of an unobstructed flow of water or unpolluted air. These are rare, and are distinct from legislated requirements (*Health Act*, *Environment Act*) or tort (***Rylands* v. *Fletcher***).

Riparian rights of access

In ***Day v. Valade***, 2017 NSSC 175, Justice Wood explained, at para. 23:

> A person who owns land on the shore of a body of water such as Rocky Lake is entitled to exercise what are known as riparian rights in relation to that water, including the right of access.

He went on to state that this meant the owner was "entitled to get to the navigable waters adjacent to their property without interference" (para. 25), and to distinguish it from a right of public navigation.

Right to Light
The right to continued access to unobstructed light. (These are generally abolished in Nova Scotia; for exceptions see ***Real Property Limitations Act***, s. 33.)

Right to Divert Water
The right of an owner of dominant lands to continue to flood servient lands. Cross-easements for ditches and swales are increasingly common.

Right to Support
The right of an owner of land to have it supported in its natural state by the neighbouring land or a right acquired by grant or prescription to have buildings on the land supported by land or structures on the adjoining property.

Miscellaneous Easements
Includes such things as the right to overhang eaves of a barn over a neighbouring property, the right to pollute air, the right to wander at large over a beach reserve, the right to draw water from a well and the right to park cars on the neighbour's property. Well agreements in rural areas are common, for example, and careful consideration is needed to determine if they are a licence, an easement, or something else again.

Conservation Easements
Under the ***Conservation Easements Act***, S.N.S. 1992, c. 2, the Minister of Natural Resources or a designated conservation organization may enter into an "easement or covenant" with a land owner within a "natural area" for a stated period or in perpetuity. The purpose of such easements or covenants is to prevent development and promote conservation of the natural environment. Such easements or covenants need not comply with all the usual private law requirements; s. 4.

Community Easements
These are consensual easements between an owner and a specified entity permitted under the ***Community Easements Act***, SNS 2012, c. 2, either in perpetuity or for a specified period, for specified purposes. In general, they are created for recreational or conservation purposes, and are in favour of the Crown, a municipality, a Mi'kmaw band or non-arm's length entities thereof, or certain non-profit organizations designated by regulation.

Utility Easements
These are easements – with or without a grant – that, if used and enjoyed, are valid whether or not they appear on a parcel register under the ***Land Registration Act***. It is quite common to have water, sewer, power or telephone lines for which no express grant exists. Utility interests (as defined in the LRA s. 2(1((ae)) are valid with or without registration, as they are "overriding interests" under s. 73(1)(d).

Deemed rights of way
Under s. 280 of the Municipal Government Act, a lot shown abutting a private road is deemed to have a right of way over it. There is disagreement among the property bar whether that

provision, proclaimed in force in 1999, is retrospective. An obiter comment in ***Frank George's Island Investments Ltd.*** v. ***Shannon,*** 2016 NSCA 24 at para. 16 suggests not: "Nevertheless, respondents' counsel noted that 280(3) of the Municipal Government Act was only passed in 1998 and would have no application to subdivision plans filed in the 1950s and 60s."

Creation of easements

by prescription

A person who uses another's land for the requisite period of time may acquire a right (by prescription) to continue to use it pursuant to Section 32 of the ***Real Property Limitations Act***. The use must be open, adverse, notorious and continuous (taking into account the nature of the use – *e.g.*, seasonality: *Gilfoy v. Westhaver*, 1989 CanLII 1494, 92 NSR (2d) 425 (NS SC); *Croft v. Cook*, 2014 NSSC 230; used as needed (e.g., an encroaching fire escape: *Armour Developments v. Manga Hotels (Halifax) Inc.*, 2016 NSSC 274, appeal dismissed 2017 NSCA 77). Under the ***Land Registration Act*** when a parcel is converted to the new system, s. 74 provides that already existing prescriptive easement over the land may be preserved if within ten years of the conversion, appropriate documentation (listed in s. 74) is registered or recorded in the Land Registry Office, but new prescriptive easements cannot be created.

by doctrine of lost modern grant

If a property owner can show that he enjoyed use of an easement for a period of twenty years with the knowledge of the servient owner, the court will presume that a grant of the easement had been made but was lost: *MacIntyre v. Whalen* (1990), 97 N.S.R. (2d) 317 (T.D.). See also *Nickerson v. Hatfield*, *supra*, for the interplay between prescription and lost modern grant. In practical terms, the difference is that a prescription claim must be based on a period for at least 20 years *immediately prior* to the bringing of the action, whereas lost modern grant can be based upon *any* adverse uninterrupted period of 20 years or more. See, e.g., ***Miller* v. *Hartlen***, 2014 NSSC 296; ***MacNeil v. MacNeil,*** 2014 NSSC 171.

by express grant

A properly drawn grant of easement describes the dominant tenement, the servient tenement, the nature of the right granted, the consideration being paid for its use, and the period of time for which the grant has been created.

by reservation or exception from conveyance

A reservation or ***exception*** occurs when the grantor excludes or reserves out an easement from lands being conveyed. The grantor retains the right reserved.

In ***Purdy v. Bishop***, 2017 NSCA 84, the Court stated, at para. 17:

> The cases distinguish between an exception in a deed and a reservation. Typically, a reservation is a creation of a right in the conveyance which previously did not exist. An exception operates to take something out of what is being granted, which would otherwise pass to the grantee in the deed.

by doctrine of way of necessity
A right of way of necessity is presumed to have been created when land is sold which is inaccessible except by passing over the adjoining land of the grantor. This has been sometimes been interpreted as "practical necessity," for example when the only other means of access is not granted by law, but is more than mere inconvenience: ***Shea v. Bowser***, 2013 NSCA 18, and sometimes as "absolute necessity." For example, the appeal in ***Shea*** was allowed in part because although the only means of access to a parcel was by water, "[w]here the water is navigable as a public right, the access will be sufficient to trump a claim of necessity." [Para. 48].

Note that an easement of any time being used and enjoyed is an overriding interest under the ***Land Registration Act***. That is, it is valid whether or not it appears on the parcel register, or was created by instrument or not (see, for example, ***Langille*** v. ***Penney***, 2017 NSSC 133, appeal dismissd 2018 NSCA 43 in which an easement used and enjoyed, but left off of a parcel register, was valid as an overriding interest and the parcel register was ordered corrected accordingly). Utility easements under the Act, similarly, are preserved, whether granted or not, if they were in existence at the time of proclamation of the LRA on March 24, 2003.

by doctrine of implied grant or reservation
Where a vendor subdivides property, all continuous, apparent and reasonably necessary easements that she used to enjoy by reason of owning the whole will be implied in the grant to a purchaser (*i.e.*, where the vendor retains the servient tenement); where the vendor retains the dominant tenement the test for an implied easement is much stricter.

Our Supreme Court refused to declare an implied easement in ***3021386 Nova Scotia Limited v. Barrington (Municipality)***, 2014 NSSC 1, appeal dismissed 2015 NSCA 30. The Municipality sold a parcel of land which, it turns out, received its water from another municipal lot unbeknownst at the time to either party. Justice Muise stated that the Court should be "loathe to imply "easements and found that the claimant failed to establish the first and second required criteria (all three must be met), which he set out at para. 21:

[21] In *Canada Lands Company CLC Limited v. Trizechahn Office Properties Limited*, 2000 ABQB 166, at paragraph 15, the Court stated:

> "The rule in ***Wheeldon v. Burrows*** has been applied in various Canadian cases. It provides that to establish an easement of this nature, Trizec must show:
>
> (a) the easement was continuous and apparent,
>
> (b) the easement was necessary for the reasonable use of the property granted, and
>
> (c) the easement was used by an owner before the transfer.
>
> The rule, as stated by Professor Ziff, 'serves as a form of consumer protection, allowing a purchaser to acquire amenities (in the form of easements) that the

purchased land appears to enjoy': *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at p. 399."

in equity
A contract to grant an easement may function as an easement in equity before the formal deed of grant is signed. Usual principles of contract law (e.g., certainty of subject matter, consensus ad idem) apply.

by reliance/estoppel
A licence can become a proprietary, irrevocable right when the grantee spends money in reliance upon the grant, and the grantor does nothing to stop it: ***MacLean v. Williams***, 2008 NSSC 293, per Edwards, J.

by statute
A private way may be obtained by land owners or persons through a petition to the municipal authorities, coupled with compensation regime, e.g., by operation of the ***Private Ways Act***. While ancient in origin, this legislation remains valid and operative to provide a regime for the setting out of a right of way over one or more private owners' properties for the benefit of another, without consent but subject to compensation. See ***Cron v. Halifax***, 2010 NSSC 460 (Rosinski, J.)

For other examples of easements enabled or deemed by statute, see ***Conservation Easements Act***, ***Municipal Government Act*** s. 280, and the ***Community Easements Act***, all *supra*.

by expropriation
Easements can be compelled by statute, such as for public utilities or for private interests (hydro, telecommunication, gas pipeline).

by implication of law
In ***Knock v. Fouillard***, 2007 NSCA 27, the Court was faced with the following fact situation: Knock's lot was separated from the road by lands of Fouillard. Fouillard's 1993 deed was subject to a right of way in favour of Knock et al. Knock's did not contain a corresponding benefit (it did contain a separate right of way which the Court found ineffective at law). The Court found that the reservation had the effect of creating a right of way in favour of Knock's lands, although Knock was not a party to the instrument itself, and despite a finding that no pre-existing prescriptive easement existed.

Termination of easements
An easement may be extinguished by an express release in writing. An easement is also extinguished if, by the terms of the grant creating it, its operation is for a set number of years or during a certain person's lifetime, and the years have passed or the person has died. An easement may also be extinguished by the happening of a physical event that makes it no longer possible to use. Easements may be considered abandoned in certain circumstances (non-use is not generally an abandonment *per se*). A burden that is accepted by a successor in title is binding upon that successor, even if that successor attempts to characterize it as an *in personam* license that only bound a predecessor: *Landry v. Kidlark*, 2018 NSSC 208.

At common law, when one person became the owner of the dominant and servient tenement the easement was extinguished; however, under the ***Land Registration Act*** this is no longer the case as s. 61 (formerly 19A) provides there can be common owners.

Scope and extent of easements

There is a difference between the purpose of an easement and its use. Purpose relates to the reason it exists (e.g., access); mode relates to the permitted use and scope (e.g., on foot or by vehicle): ***Knock v. Fouillard,*** 2007 NSCA 27; ***PATCO Developments Ltd. v. 3195972 Nova Scotia Limited,*** 2016 NSSC 9. When the easement arises by grant, contractual principles of interpretation apply: ***Patco***, *supra.*

Excessive use of easements beyond that reasonably contemplated by the parties at the time of creation of the easement may be restrained by injunction or give rise to a claim in damages. Older easements (for example, permitting passage by horse and carriage) may be updated to more "modern" uses (e.g., ***Levy v. Stevens*** (1978), 26 NSR (2d) 236 (CA)) and a right of way in favour of a large lot, later subdivided, may extend to the infant lots (***Dutto v. St. Louis*** (1993), 36 RPR (2d) 169 (Ont. Gen. Div).

In ***Jerome v. Akers***, 2013 NSSC 154, the lands benefitted by a right of way had been subdivided for profit. In finding that a general right of way "to pass and repass for the purpose of access and egress to and from the lands…." extended to the subdivided lots, Justice LeBlanc refused to imply that the grant was only for access to a particular dwelling, but instead the lands themselves. He stated, at para. 44:

> [44] It has to be underlined that when a parcel is subdivided it is generally the case that any right-of-way benefiting that parcel attached to each of the subdivided parts.
> In *Laurie* v.*Winch,* 1952 CanLII 10 (SCC), [1953] 1 SCR 49, Kellock J. wrote on behalf of the Supreme Court:
>
> > [T]here is nothing in the circumstances to restrict the plain words of the grant to the use be made of the farm lane at that time. Further, upon the severance of the dominant tenement into several parts, the easement attached to those parts. [Emphasis added by LeBlanc, J]

By the same token, an easement that is for the benefit of one parcel cannot be used to access an adjoining (or probably consolidated) parcel. Thus, if you have an easement over Lot 1 for access to Lot 2, and you also own the abutting Lot 3, you cannot use the right of way over Lot 1 to access Lot 3 via your own lot 2: *Miller v. Tipling* (1918), 43 DLR 469 (Ont. CA); *Shea v. Bowser,* 2016 NSCA 18; *Burgoyne v. Hutton*, 2016 NSSC 60.

Evidence of "what must have been intended at the time of the grant" can be used to clarify and arguably expand the scope of easement. For example, in ***Viehbeck v. Pook***, 2012 NSSC 48, a 20' recreational right of way that did simply provided for a "right to use the road" was found to include a right for vehicular as well as pedestrian use, when it was consistent with both historic practice and practical consequence. This was cited with approval in ***MacNeil***, *supra.*

Similarly, in ***Pink v. Lohnes-Davis***, 2014 NSSC 304, appeal dismissed 2015 NSCA 110, the Court found that a grant of "the use of the right of way….in the same way the Grantors now use the said Right of Way" included, on the evidence, the right to temporary parking and access for

cottage/garden repairs and maintenance, subject to the limitation that such uses could not interfere unreasonably with the use of the owner or those of equal entitlements. The Court stated the following:

> *[75] In this case there are express grants of Rights of Way. In Anger & Honsberger Law of Real Property, Third Edition at 17:20:30(a), the author describes how an express grant is to be interpreted:*
> *"A right-of-way may be created by any of the methods described previously. The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument:*
> *(1) the grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.(3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee."*
> *[76] The author then goes on to discuss the use of a Right of Way by express grant stating at 17:20:30(b):*
> *"The use of a right-of-way must be within the terms of the grant or of the accustomed use (in the case of a right acquired by implied grant, implied reservation, or prescription), and it must be reasonable. As a general rule, the use of a right-of-way depends on the nature of the servient land and the purposes for which the right-of-way is intended to be used. If the grant of a right-of-way is not limited to any particular purpose, or if a way has been used for several purposes, a general right-of-way may be inferred. However, this will not be the case where the evidence shows intended use for particular purposes only.*
> *There are certain general limitations on the use of a right-of-way:*
> *(a) a right -of-way to one property does not include a right-of-way to a place beyond that property;*
> *(b) the owner of the dominant tenement is restricted to the legitimate use of the right; and*
> *(c) the burden on the owner of the servient tenement cannot, without their consent, be increased beyond the terms of the grant or, where the right-ofway is based on implied or prescriptive rights, beyond the accustomed use.*
> *The use that is permitted usually turns on the facts. The grantee of a right-of-way cannot enlarge the privilege conveyed by the grant. Unlawful or excessive use of a right-of-way is a trespass on the servient tenement.*
> *…*
> *82] In Gale on Easements, Seventeenth Edition by Jonathan Gaunt, Q.C. and Paul Morgan, Q.C. Sweet & Maxwell 2002 the authors deal with a grant of a right to "use" at page 355:*
> *" The grant of a right to "use" a way, however, as opposed merely to pass and repass over it, does entitle the grantee to stop to load and unload and to use the*

> *way for all other purposes by which property adjoining a street would normally be accommodated, provided that such use does not interfere unreasonably with the use of the way by its owner or those equally entitled. That description would appear to include parking (so long as this does not obstruct use of the way by others)…*

Conversely, however, a lane for passenger vehicles may not be expanded for heavy trucks (***Brown v. Bellefontaine*** , 1999 CanLII 2705 (NS SC); a private residential right of way does not imply an expansion to commercial use for public access (*Burgoyne, supra)* and a roadway does not (at least in the absence of s. 280 of the ***Municipal Government Act***, *supra*) carry with it the right to erect power poles, water lines, etc. (***Devoe v. Hoeg*** (1990), 95 N.S.R. (2d) 361 (TD)). See also ***Croft v. Cook,*** 2014 NSSC 230 (a prescriptive right of way over a logging road could not be expanded into a roadway for heavy shale trucks, as this was a "substantial alteration in the character or mode or user beyond the accustomed use established by prescription" (para. 94)) – similarly, the Court in finding and then settling the location and nature of a prescriptive easement, did not expand it to allow for more modern, heavy logging equipment instead of what may have been used in the past: ***Miller v. Hartlen,*** 2015 NSSC 209.
Disputes over the scope of easements, both as to use and to lots benefitted, have increased in recent years. *Oostdale Farm v. Oostvogels*, 2016 NSSC 146 offers the following guidance:

[27] The grantee of a right of way cannot "overburden" the right of way. In other words, the grantee cannot use the right of way "excessively". In *Sunnybrae Springbook Farms Inc. v. Trent Mills (Municipality)*, 2010 ONSC 1123 (CanLII), [2010] O.J. No. 3715, aff'd 2011 ONCA 179 (CanLII), [2011] O.J. No. 965 at para. 93 [*Sunnybrae*], Lauwers J. explained, "Overburdening of a right of way occurs when it is used excessively or significantly beyond the rights and nature conveyed in the grant of easement."

[28] Some examples of excessive use are:

1. The grantee unreasonably interferes with other users;
2. The grantee's use is inconsistent with the purpose of the right of way;
3. The grantee's use exceeds the permitted scope or mode of use; and
4. The right of way is being used to access property beyond the dominant tenement.

And:

[32] The words of the grant in our case do not expressly resolve the problems before the court. The grant does not specify the right of way's purpose, beyond giving a right of access between the Church Street Extension and the defendant's property. It also does not specify the permitted scope or mode of use. An examination of the surrounding circumstances is necessary. There are various factors that may form the analysis.

1. The past use of the right of the way and its use at the time of grant;
2. Why the right of way was created
3. Physical characteristics of the right of way surrounding servient land;
4. Characteristics of the dominant tenement;
5. Relationship of the parties;

6. Passage of time.

See also Laamanen v. Cleary, 2017 NSSC 55, appeal dismissed 2018 NSCA 12. In that case, Oostdale was applied and an "unrestricted" right of way over a private road was allowed to be widened and used for commercial purposes.

While extinguishment of a granted easement will be rare without an express release, it is possible when the purpose has been completely extinguished. In *Jerome, supra*, LeBlanc, J. stated at para. 13:

> I do not believe that such a change in purpose will extinguish the right of way. An express granted right of way will only expire if it can *never* serve the clearly defined purpose for which it was granted [italics in original]

The upshot is that any change in the scope and burden that the servitude carries should be viewed with extreme caution and with a careful reading of the grant.

The scope and extent of easements may also change by prescription. In ***Warnock v. Wiechert***, 2010 NSSC 79, there was a deeded easement to pass over a lane. Various prescriptive rights – such as an oil tank, a hydro meter, and a set of steps – arose over time by virtue of their long use by the dominant tenement. Since enough time had not passed, these rights did not, for example, include the right to keep refuse or recycling bins in the same lane. Similarly, however, the legal title holder could not obstruct the lane with a large flower garden, but the placement by the same person of a heat pump was held not to be a unreasonable interference with the easement-holder's rights. The upshot is perhaps best stated by Justice Boudreau at para. 36:

> The authorities as to what uses a title holder is permitted to make regarding an easement granted to another land owner are not so clear. What constitutes a reasonable use or a minor or reasonable infringement on the easement rights of another appears to be a question of fact to be decided on the particular circumstances of each case.
>
> ***See also: Nova Scotia Real Property Practice Manual,*** MacIntosh, sections 13.4, 13.5 and 13.6

In ***Cobalt Investments Limited v. Panko,*** 2012 NSSC 34 Justice Wood (as he then was) was faced with a dispute over the use of a right of way.. Ultimately, Panko's fee simple ownership of the area over which the right of way pass did not include the right to block it so as to interfere with the passing and repassing of vehicles, but confirmed that judicial intervention would not be warranted "unless it is substantial," and "[w]hat is substantial is a question of fact that needs to be determined in all of the circumstances." As remedial action had been taken prior to the hearing, the Court declined to issue an injunction. For an example in which an interlocutory injunction *was* issued pending trial, see ***Henderson v. Quinn***, 2019 NSSC 190.

In ***Johnston v. Roode***, 2019 NSCA 98, the Court found that the location of a prescriptive right of way could not be changed simply because a new location was more convenient; the same applies to a

granted right of way: ***Payne v. Elfreda Freeman Alter Ego Trust*** (2015), 2020 NSSC 59

2. Restrictive covenants

General
Restrictive covenants operate in equity only and equitable defences such as laches and acquiescence apply.

Requirements
These are covenants respecting the use of land that bind not only the parties to a present document but also their successors in title. The following is a summary updated from A.G.H. Fordham QC's ***Restrictive Covenants***, in Practical Property 1984 (CLE Society of Nova Scotia, October 1984) .

- Land use covenants attach to and run with the land, binding successive owners.
- Usually created by restriction in deed, but can be by separate instrument.
- The obligation imposed must be negative in nature (substance and form). [***Knoester* v. *A.S.C. Residential Properties Limited*** (1997) S.P. 04110 (Hamilton, J.)], reasonable and not against public policy (void / severable: ***Human Rights Act*** and common law). The obligation can also be subject to statutory override. For example, the ***Clothesline Act***, SNS 2010, c. 34, provides that notwithstanding any restrictive covenant, an outdoors clothesline can be placed at any single family dwelling or on the ground floor of a multi-unit residential building, subject to "reasonable restrictions."
- Although the covenant must be negative to run with the land, as noted above, it may still be enforced in person if the owner has agreed to be burdened, for example by signing the covenants: *e.g.*, ***Greater Molega Lake Owners Association v. MacLure***, 2017 NSSM 42
- To enforce against each other, there must have been a common vendor who created a building scheme and the covenants.
- The covenants must touch or concern the land and have been intended to run with the land, and not merely personal.
- Covenants are only extinguished if released by all landowners with a right to enforce them, ***i.e.,*** in the building scheme (note, however, that most modern covenants contain a right of the developer to waive some or all provisions without impacting on the scheme as a whole – see, e.g., ***Rice v. Armco***, 2010 NSSC 369).

Under the ***Land Registration Act***, the benefit and burden holders can be the same.

Many if not most modern covenants arise in the context of building schemes – *i.e.*, subdivisions or land developments. ***Armco***, *supra*, reiterates with approval the following from ***Sawlor v. Naugle*** (1990), 101 NSR (2d) 160 (SC, TD):

> It must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3)

> that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other lots retained by the vendor; (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

The authority to waive covenants and its impact on a building scheme was recently considered by Justice Moir in ***Moorehouse v. Black***, 2014 NSSC 13. A lot owner built in violation of the covenants, without permission of the developer. The covenants contained an authority to waive by the developer, but that permission does not appear to have been sought or granted, and the developer was not a party to the litigation. Justice Moir found that the waiver provisions, in the context of the particular wording used, did not meet the mutuality requirement in ***Sawlor***, and accordingly the plaintiff (an adjoining lot owner) could not enforce them against another lot owner.

Many modern building schemes contain a provision in the restrictive covenants to the effect that the developer may waive,alter or modify the covenants for some owners without affecting the building scheme or "doing it for everyone." The effect of ***Moorehouse*** remains to be seen, particularly where the consent is had and obtained (unlike, apparently, in that case), but in any event it is incumbent upon the solicitor to draw these to the attention of a potential purchaser: ***Rice v. Condran,*** 2012 NSSC 95.

Relation between benefit and burden
"If the covenant does not clearly define the land to be benefited (the dominant tenement) it may be void. There must be either a metes and bounds description of the lands to be benefited, a reference to a plan, or some other specific reference to the lands to be benefited." (C.W. MacIntosh QC, ***Nova Scotia Real Property Practice Manual***, p. 5-52)

3. Licences

A licence grants a limited personal, usually non-exclusive right to use the land of another. The holder of a licence need not own land and the licence does not require a dominant tenement. A bare licence (for no consideration) is revocable, while a licence for valuable consideration may only be terminated in accordance with the contract that created it. It can be for a fixed or determinable period of time. It can be recorded as an interest in land under the ***Land Registration Act***, but does not create a property interest in the manner of a benefit or burden as is the case with easements. However, see the discussion above whereby, in limited cases, licences can be "elevated" to non-revocable proprietary status.

4. Profits à prendre

A right to enter the land of another person and take some profit of the soil or a portion of the soil itself for the use of the owner of the right, e.g., gravel, hay, etc. ***Atlantic Concrete Ltd.* v. *MacDonald Lavatte Construction Co***. (1975), 12 N.S.R. (2d) 179 (C.A.). Mere non-use of the right does not extinguish it, and can exist in gross as opposed to requiring a dominant tenement as a necessary constituent element: ***Chisholm* v. *Snyder***, 2014 NSSC 36, reversed on other grounds 2015 NSCA 39. It is worth nothing that,

on appeal, ***Chisholm*** discussed the distinction between a "profit appurtenant," for which the same prerequisites exist as for an easement, and a profit in gross, for which no such conditions exist.

Note leases and profits à prendre are distinct. Profits à prendre are also recordable under the ***Personal Property Security Act*** and should be searched as such.

Note as above, most mineral resources are vested in the Crown under the ***Mineral Resources Act***, with the notable exception of gypsum.

5. Matrimonial Property Act

***Matrimonial Property Act*, R.S.N.S., c.275**

- One spouse may not dispose of or encumber the matrimonial home without the consent of the other, a release, or court authorization. (Section 8)
- Non-compliance may void a conveyance (equity's darling protected). (Section 8)
- An affidavit of marital status and/or consent of the grantor's spouse is required for any conveyance or encumbrance of real property. (Section 8)
- There may be more than one matrimonial home (Section 3) or a property may be designated as the matrimonial home. (Section 7)
- Applies to corporations; ownership of a share or shares may create an interest in a matrimonial home. (Section 3)
- Parties may contract out of these provisions of the Act. (Section 23)
- Note same-sex or opposite-sex couples living in a conjugal relationship may now register a declaration of domestic partnership under the ***Vital Statistics Act***, S.N.S. 1989, c. 494, s. 53 (as amended by S.N.S. 2000, c. 29); in such cases the ***Matrimonial Property Act*** and a variety of other legislation affecting title to property (*e.g.*, the ***Intestate Succession Act***) applies to the partners as if they were married.

As of writing (2020), the Nova Scotia government has announced an intention to amend or replace the Matrimonial Property Act; among other things, the property rights of spouses and registered domestic partners may be expanded to include different types of common-law relationships, in whole or in part.

See also discussion under mortgages.

6. Remedies

Statutory and practical mechanisms to solve title problems

The means and mechanisms most commonly used for solving title problems in Nova Scotia are as follows:

1. Tax sales, see ***Municipal Government Act***, S.N.S. 1998, c. 18; prior ambiguity of tax deeds now generally resolved: *Marketable Titles Act* (therefore, view pre-1996 cases on tax deeds in

light of this legislation).

2. Quieting titles, see ***Quieting Titles Act***, R.S.N.S. 1989, c. 382; – a QTA certificate is a root of title and a guarantee of fee simple subject to any restrictions in the certificate, the exceptions re leases, right of expropriation and municipal taxes in s. 16(2) and the one-year fraud exception in s. 17 – note that except for these provisions, issue estoppel applies and the certificate cannot be reopened: ***Rankin v. Jodrey***, 2007 NSSC 7 per McDougall, J.

   The QTA received extensive consideration by our Court of Appeal in ***Nova Scotia (Attorney General) v. Brill***, 2010 NSCA 69, including the following at paras 37-8:

   > *The QTA does not enable a court to create title. Rather it authorizes a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the QTA.*
   >
   > *The judge should be satisfied that all interested persons have been joined or sufficiently notified, or are before the court. Then, if there is no other apparent title holder and the contest is between just two parties, the court may quiet title based on the better claim. This practical approach reflects that title is relative and heirarchial, not absolute…*

For an example of this, see ***Cleary v. Nova Scotia (Attorney General),*** 2015 NSSC 90. The Court could not determine where a piece of land lay, and for which there was at least potentially competing paper title. The Court found that one chain was "no worse and perhaps just a bit better" than the other, that chain prevailed. At para. 59, the Court stated that "[h]e has to establish not that he has a valid legal title to the land…[he]has to show that his claim….is just better than [the only other competing claimant]." ***Cleary*** was successfully appealed on the evidentiary grounds (2016 NSCA 56)and remitted for a new trial, but this statement of the law does not appear to have been impugned (Specifically, the Court of Appeal found that the Trial Judge had effectively elevated probate documentation to the level of an instrument in the chain of title). At the retrial (2017 NSSC 98), the results were somewhat different on the Court's assessment of the chains of title before it, but not the underlying law.

3. Vendors and purchasers applications, see ***Vendors and Purchasers Act***, R.S.N.S., 1989, c. 487; this determines but does not resolve valid objections to title, but see the provisions re recitals over 20 years old as presumptive facts; the scope of VPA applications when only the interpretation of documents, as opposed to determining rights of third parties or substantive disputes of fact, is discussed above.

   Recently, ***Creighton v. Nova Scotia (Attorney General)***,2011 NSSC 131 affirmed that recitals should be included to explain confirmatory deeds and the following quote from Anger & Honsberger, Law of Real Property, 3rd edn.:

   When the words in the operative part of the deed are clear and unambiguous they cannot be controlled by the recitals or other parts of the deed but, when the operative words are doubtful, the recitals and other parts may be used as a test to discover the intention of the parties and fix

the true meaning of the words.

4. Partition of land, see ***Partition Act***, 1989, c. 333.

5. Discharge and removal of encumbrances, see ***Real Property Act***, R.S.N.S., 1989 c. 385; ***Land Registration Act***, ss. 60 and 63. Unamended residential mortgages over 40 years old, s. 40; mortgages more than 20 years past specified maturity dates without recorded renewals; see ***Real Property Limitations Act***, s. 24(2). The payout and discharge provisions in s. 28(2) of the *Real Property Act* allow for a discharge for a paid mortgage, or payment into court when a discharge cannot be obtained due to the absence of the lienholder, or when "a proper release…cannot be obtained without undue delay or expense." This does not extend to administrative or commercial convenience: *Meadow Ridge Estates v. Moskowitz Capital Mortgage Fund II Inc.*, 2016 NSSC 261.

6. Clarification of title, see ***Land Titles Clarification Act***, R.S.N.S., 1989, c. 250 amended, S.N.S. 1992, c. 22; although ***Beals v. Nova Scotia (Attorney General)***, 2020 NSSC 60 was decided on the basis of judicial review, it appears also to stand for the proposition that the statute, at least insofar as it has already been applied to a parcel, does not extend to replace general requirements to transfer land (e.g. probate):

7. Legislative public/private - private members' bills of Nova Scotia Legislature; ***Marketable Titles Act***, S.N.S., 1995-96 c. 9.

8. Insurance – Title Insurance; does not remove title problems but insures against claims against them.

10. Crown lands – see s. 37 ***Crown Lands Act***, R.S.N.S., c. 114.

11. Adverse possession – see ***Real Property Limitations Act***, R.S.N.S., 1989, c. 258 amended S.N.S. 1993, c. 27. See discussions throughout these materials.

12. "Comfort letters" – issued by LIANS for a negligent error or omission when no claim has actually been made (e.g., a successor solicitor discovers an error in title certification made by a prior lawyer).

13. Settlement agreements or adjudication of claims – ss. 87 and 88 LRA – Registrar's and court's authorities very broad – "what is just".

14. Retrospective validation of non-compliant subdivisions: s. 287 MGA (providing for retrospective approvals), s. 268C MGA (providing for validation of Land Registration parcels by the Registrar General when it is otherwise "impracticable") and retrospective "grandfathering" of lots created prior to April 16, 1987 in s. 291 MGA.

15. Retrospective legislative resolution of title issues that can be "more academic than real," such as:

- the legislative abolishment of dower and certain other interests as parcel interests under s. 40

of the LRA;

- the ***Perpetuities Act***, SNS 2011 c. 42 abolishes the confusing and little-understood Rule Against Perpetuities, including against non-crystallized previously created interests. Courts have expanded powers to vary (and compensate for) property interests under the ***Real Property Act*** and the ***Variation of Trusts Act***.

Remedies for breach of contract

1. ***Damages***: Defined by John Yogis QC in the *Canadian Law Dictionary*, 2nd ed. as follows: "Monetary compensation the law awards to one who has suffered damage, loss or injury by the wrong of another; recompense for a legal wrong such as a breach of contract or a tortious act."

2. ***Specific performance****:* Defined by John Yogis QC in the *Canadian Law Dictionary*, 2nd ed. as follows: "An equitable remedy available to an aggrieved party when his remedy at law is inadequate, which consists of a requirement that the party guilty of a breach of contract undertake to perform or complete performance of his obligations under the contract. It is grounded on the equitable maxim that equity regards as done what ought to have been done."

   Traditionally, specific performance was available (at the option of the plaintiff) virtually as a matter of course for the sale of land. This may not automatically follow with "commodity-type" transactions, but an injunction will still enjoin a defendant from dealing with land that is subject to a claim for specific performance, in the event a purchaser establishes (or perhaps simply claims?) that it is unique to him/her in some way: ***Sheetharbour Offshore Developments v. Tusket Mining Inc.***, 2005 NSSC 307, appeal dismissed at 2007 NSCA 59, 254 N.S.R. (2d) 256. The usual requirement (among others) of a serious question to be tried is intact: ***Cape Breton Ski Club v. Ben Eoin Golf Limited***, 2019 NSSC 172.

   When the land is simply being purchased for profitable development, other lands are available for that purpose, and there is no evidence of "uniqueness", specific performance for the sale of land may be refused, and the innocent party is required to mitigate, at least in the absence of actual evidence of impecuniosity: ***Southcott Estates v. Toronto Catholic District School Board***, 2012 SCC 51.

3. ***Rescission****:* Defined by John Yogis QC in the *Canadian Law Dictionary*, 2nd ed. as follows:

   > The cancellation of a contract and the return of the parties to the positions they would have occupied if the contract had not been made; 'The right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contact no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by law in vindication of a breach.' ***Hirji Muulji* v. *Cheong Yue S.S. Co.,*** [1926] A.C. 497 at 509-10 (P.C.).
   >
   > In addition to the right of a party in certain circumstances to treat a contract as at an

end, rescission may be brought about by the mutual consent of the parties, or by a decree of a court exercising its equitable jurisdiction to grant rescission of a contract that has been entered into as a result, *e.g.*, of a false representation or fraud.

NB: in real property, rescission and damages are mutually exclusive remedies. ***Johnson v. Agnew***, [1980] A.C. 367 (H.L. (Eng.))

4. ***Equitable remedies****:* Various equitable remedies are available respecting real estate,, including injunctions. Jeffrey B. Berryman et al. in their casebook, *Remedies: Cases and Materials*, 2nd ed. (Toronto: Emond Montgomery, 1992) at p. 541 state the following regarding injunctions: "An injunction is an order, available to protect a wide array of substantive legal rights, requiring a person to refrain from or to take a course of action. A failure to obey such orders may result in a conviction for contempt of court and a fine or imprisonment." Other equitable remedies are available under equitable principles, including remedies for unjust enrichment – so where a person expended money on a property in the expectation of a life interest, and then was found to have been dispossessed, the Court ordered compensation for the remaining value of that interest: *Murphy v. Colborne*, 2016 NSSC 211. To the same effect, see ***Reid v. Reid***, 2019 NSSC 229 (property held by son and daughter-in-law as joint tenants; mother spent money on the property in the expectation of having an in-law suite, and was dispossessed upon death of son; reimbursement for unjust enrichment, plus punitive damages, less value received)

5. ***Other****:* Courts have jurisdiction to rectify deeds or instruments (*e.g.*, by correcting descriptions, validating documents without proof of execution as required by the ***Registry Act*** or LRA – see, e.g., s. 84 LRA), issuing declaratory orders, varying trusts (***Variation of Trusts Act***), setting aside or invalidating instruments (duress, undue influence, error *in substantialibus*), relief from forfeiture, determination of compensation for expropriation or for loss under the ***Land Registration Act***, etc. ss. 85-92A of the LRA provide for extremely broad ranges of remedies by the Registrar-General and the courts for various losses under the Act or as a result of negligent errors or omissions pertaining to property generally.

V. CONVEYANCING

1. Practice standards

Real Property conveyancing in Nova Scotia is governed, in part, by the *Professional Standards for Real Property Transactions in Nova Scotia*. These have the force of law by virtue of Regulation 8.2.1 under the ***Legal Profession Act***, and in general you will be required to adhere (and generally, under the LRA, certify that you have adhered) to the Real Estate Standards. They are available, together with footnotes and explanations that are updated regularly, at http://www.lians.ca/standards. You are not required to review them to prepare for the Bar Exam.

While it is fairly common for the same lawyer (or firm) to act for vendor, purchaser, and lender in a transaction, be fully aware of your obligations under the *Code of Professional Conduct*, including informed consent of all parties and the potential for actual or perceived conflict or favouritism for one

party or another, such as when acting for a new client and a long-standing one. For a recent example of the potential consequences – both in terms of civil liability and professional reputation, see ***Urquhart*** v. ***MacIsaac***, 2017 NSSC 313, appeal dismissed 2019 NSCA 25.

2. Client identification

Regulation 4.5 under the ***Legal Profession Act*** requires you to obtain and retain identification information for clients (with certain exceptions such as public companies) and, prior to processing trust funds, to verify that identification. As a matter of course, get in the habit of doing so as soon as you are retained on a property transaction.

3. Agreements of purchase and sale

What are they?
The purchase agreement is the document setting out the bargain made between the buyer and seller of a piece of real property. It is a binding agreement for the purchase and sale of real property, and as such, it creates legal rights and obligations for the parties to it. The purchase agreement is what is known as an executory contract; it is an exchange of promises to do something in the future, but as soon as those promises are made, in writing, they bind the promissors. In general, agreements for the purchase and sale of land are specifically enforceable.

Statute of Frauds

Section 7 of the ***Statute of Frauds*** provides that an action may not be brought upon an agreement of purchase and sale unless it is in writing. It provides in particular as follows:

> No action shall be brought:
> …
> d) upon any contract or sale of land or any interest therein; or
> e) upon any agreement that is not to be performed within the space of one year from the making thereof;
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

As noted in MacIntosh's *Nova Scotia Real Property Practice Manual*, the agreement must be signed or initialed by a person against whom the action is brought, or by his or her agent.

A receipt or cheque, or even a clause in a will, may constitute a sufficient memorandum under the statute if it contains the essential terms of the contract.

As with other applications of the ***Statute of Frauds***,

- part performance will remove the contract from the statute's operation. Part performance must be referable "unequivocally" to the specific oral contract, and not merely in reliance upon a contract relating to the land (a less stringent English test): ***Self v. Brignoli Estate***, 2012 NSSC 81, ***101252 P.E.I. Inc. v. Brekka***, 2013 NSSC 289, appeal dismissed 2015 NSCA 73; see also

infra under Landlord and Tenant.

- the statute is a defence, not a cause of action;
- issue estoppel and estoppel in pais (conduct) may remove the statute's application;
- the statute cannot be used as a cloak for fraud.

See also ***MacIsaac Estate v. Urquhart***, 2019 NSCA 25 at paras. 45-47

Main elements of the purchase agreement

(**Note:** This section is based on the wording in the standard-form contract of the Nova Scotia Real Estate Association "approved form". These change periodically, most recently in July 2018)

The agreement of purchase and sale, together with the listing agreement or "cut sheet", constitutes an important initial source of information about a conveyance. Practitioners are well advised to contact clients, if the initial documentation is obtained from a source other than the clients, to verify instructions to act in a particular transaction before proceeding. As well, real estate agents may not forward to you automatically a copy of the "listing cut", which is a summary of the information contained on the listing agreement, the contract between the vendor and the broker. This listing cut sets forth important information about representations upon which the purchaser may have relied in submitting his or her offer. This information is useful when advising your client. It is NOT, however, a part of the contract (although it may be a pre-contractual representation or warranty if the facts warrant) and should be treated accordingly.

- ***Listing agreement***

The real estate industry is governed by the ***Real Estate Trading Act***, S.N.S. 1996, c.28**.**

A listing agreement is a contract between a landowner and real estate broker, authorizing the listing of a property for sale and establishing the terms upon which a commission will be paid.

The agreement may give the broker the exclusive right to offer the property for sale or (more commonly) may authorize sub-agents to offer it for sale by way of a multiple listing system.

Traditionally, the realtor was agent for the vendor alone (whether listing or selling agent). Currently, the agreement will provide whether one or both agents are in an agency relationship with the buyer and/or the seller, whether there is no agency relationship, or whether there is a transaction brokerage relationship. This can be important in determining what if any information or authority is imputed to the parties involved, and the agreement should be scrutinized at the outset to determine what relationship(s) apply.

- ***Description of parties***

The purchasers are described in the contract at the very top, at the very bottom where they sign, and possibly in the listing cut, in the case of a vendor. The Property Identifier Number ("PID"), if available, is generally also included and should be part of your initial enquiry (both to determine

whether it is correct and for your preliminary view of owners, whether it is Land Registered, and the apparent state of title). In some cases, reference may be made to a purchaser "or assignee", or to a limited company or a company which is to be incorporated. Under no circumstances should you rely on the description of the purchasers for your transfer documents, as appears on the agreement of purchase and sale. Purchasers, or their solicitor, if you are acting for the vendors, should be contacted to determine precisely how they wish to be described on the deed of conveyance. When acting as a purchaser's solicitor, you should discuss the nature of the ownership of your clients (whether ownership will be as joint tenants or as tenants-in-common or as a limited company) and advise the vendor's lawyer accordingly. You should also determine the residency of the vendors to ensure compliance with the provisions of the ***Income Tax Act*** (s. 116 provides that a purchaser is responsible for any tax a non-resident vendor would have had to pay on the sale unless the purchaser has used due diligence. Usually, this is a sworn confirmation that the vendor is a Canadian resident, or if that is not the case, the purchaser has obtained the vendor's solicitor's undertaking to provide a clearance under the Act.) If you are acting for a non-resident vendor, you will need to determine when they bought it and for how much (plus any capital expenses such as renovations), when they became non-residents, and the amount of tax to be paid. This amount should be held back by you as vendor's lawyer and remitted to the Canada Revenue Agency.

Care should be taken at the outset that all of the owners of the property have joined in the execution of the agreement of purchase and sale. For example, if a husband and wife are joint owners, and only one of them has signed the purchase agreement, you must be sure at an early stage that the other party has authorized the signing party to act as agent and that he or she will join in the signing of the conveyance document (a preferred practice would be to get an amending agreement adding the other owner). In short, you must always establish the line of authority between the vendors identified in the contract and the registered owners appearing on the title once you conduct your title search. Particular attention is needed when a person signs on behalf of a company, under a power of attorney (which must be recorded and specifically allow for the sale of land), is an estate (probate or administration is required and, post-September 2001 unless the will predates this or otherwise provided by any will executed after that date, consent of the beneficiaries pursuant to s. 50 of the ***Probate Act***), or is the property of an incompetent (court approval required, usually with evidence of value and that that the sale is in the interests of the estate).

If there is a bankruptcy in the chain of title (including perhaps of your client), you must ensure that the trustee has disclaimed any interest in the property, as the assignment or order vests real property of the bankrupt in the trustee: S. 71 ***Bankruptcy and Insolvency Act***; ***Re Bray*** (2006), 250 NSR (2d) 132 (SC); the disclaimer is pursuant to s. 20 BIA. If the Trustee is on title, it will have to execute a Trustee's deed, generally at a significant cost. See also Real Estate Standard 3.11.

- ***Description of the property***

Generally speaking, the property is described by a civic street address, unless it is a vacant lot. In the case of a vacant lot, often the lot number, if there is one, and the name of the subdivision will be indicated in the property description. It is important that you identify exactly what it is that your clients have purchased and whether or not there is more than one parcel of land included in the property to be conveyed. In practice, the vendor will usually be responsible for converting title to Land Registration, which requires them to locate the property with reasonable accuracy. This is

NOT a guarantee of boundaries or extent, and this must be made clear to your clients.

Occasionally, you will encounter a transaction in which more than one lot is involved. Determine at an early date whether your client is seeking to obtain title to separate lots, or a consolidated one if they adjoin. Depending on whether the properties qualify for consolidation pursuant to s. 268A of the ***Municipal Government Act*** (the "de facto consolidation" provisions), it may be possible to combine them without formal subdivision approval; your client may or may not wish to do this depending on the circumstances of the transaction. *De facto* is dealt with in detail in the LRA course. If a property has been, or is going to be, consolidated pursuant to this section, review the enabling declaration carefully, in light of the requirements of the section [such as contiguity of the parcels, common and continuous ownership since prior to April 16, 1987, and treatment as a single parcel *together with the facts supporting such treatment]*. Many older declarations do not meet this standard and require remediation (which fortunately can be done *ex post facto* if the factual basis is available). See the comments of Warner, J. in ***Polycorp v. Halifax (Regional Municipality),*** 2011 NSSC 241 at paras. 135-156. In any event, you must be satisfied that the lot(s) comply with or are exempt from the subdivision provisions in Part IX of *the Municipal Government Act*. For lots converted to Land Registration on and after December 1, 2004, the parcel description will generally contain a statement of compliance (exception: descriptions system-generated on subdivision, and condominiums).

Review the parcel description(s) of the lands under conveyance at the earliest opportunity; see "description of lands conveyed," *infra*.

- ***Purchase price***

The agreement sets out the amount to be paid for the property and how the amount is to be paid. Generally there will be a deposit which tends to be larger if the property is very expensive or if there is a good reason to establish good faith, e.g., the closing date is a long way off. There is usually a provision similar to clause 1 on the standard form agreement that indicates if the purchaser does not "complete this agreement in accordance with the terms thereof, he will forfeit the above deposit in addition to any other claim which the vendor may have against the purchaser for his failure to so complete." "He will forfeit the above deposit" has been interpreted to be subject to a definition of what constitutes deposit money and also subject to relief from forfeiture: see ***Deber Investments v. Roblea Estates Limited*** (1976), 21 N.S.R. (2d) 158 T.D.. The purchaser may agree to assume a mortgage or give a mortgage back to the vendor (pay attention to your bank mortgage instructions as to whether this will be permitted by them). The balance is usually payable "in cash, by certified cheque or solicitor's trust cheque".

- ***Conditions of completion***

Many agreements of purchase and sale are conditional, *e.g.,* financing, subdivision approval. The standard form now divides these between "seller's obligations" (most generally related to disclosure) and "buyer's obligations" (which are generally conditions)

The standard form contains pre-printed conditions for the "big 4" – inspection, appraisal, insurability and financing. There is also a blank space for special conditions or ones applicable to

the specific transaction. Care should be taken by the lawyer to review the time frames set out in these conditions, the exact nature of the conditions, and whether they have in fact been satisfied, before proceeding to incur expenses on behalf of the client with respect to the completion of the transaction. Reference should also be made to the language of the conditions and to the discussion above with respect to conditional clauses.

It is common not to receive the agreement until these dates are passed. This is dangerous. Ask for the agreement to be sent to you as soon as you are retained, even if not all the conditions are satisfied, or be clear to the prospective client that you have not seen the agreement, are not yet retained, and have not diarized any deadlines or dates. Some clients (and realtors) are understandably reluctant to bring lawyers "into the picture" with the associated expense (or otherwise) until the deal is "firm," but the editor has seen many occasions in which a client (for example) has been told financing is "not a problem" but has not been committed by the deadline in the agreement; absent the lawyer giving the required "notice to the contrary" and obtaining an extension, the client could be and sometimes is placed in a very difficult situation (older judgments against the purchaser can have a similar result). Another example of conditions with deadlines that should be in the lawyer's hands prior to their expiry are insurance (e.g., an old oil tank can be problematic). For an example of the damages that can flow after a "deemed satisfaction" date has come and gone without "notice to the contrary," see ***Whelan v. Murphy***, 2011 NSSC 19.

A "subject to lawyer approval" clause is now preprinted (understandably, usually with a short time frame) in the standard form agreement – it doesn't do the client much good if you don't see it until after that date has passed!

It should also be noted that this clause is of apparent wide scope, despite the "acting reasonably" qualifier in the standard clause. It also appears to have two stages: (1) the lawyer "disapproval," for reasons that may be privileged, does not inself void the agreement; and (2) whether, following such disapproval (apparently at any time up to closing), either party terminates the agreement as a consequence. See: ***Dicaire*** v. ***Livingstone***, 2017 NSSM 3, and cases cited therein.

For deadlines for title objections, see the discussion *infra*.

CONDITIONS PRECEDENT:

A true condition precedent cannot be waived by either party. A true condition precedent is one dependent upon a future uncertain event at the will of a third party (usually financing and insurance). ***Turney v. Zhilka***, [1959] S.C.R. 578. ***Turney*** and a more recent reiteration, in ***Hilchie v. Waterton Condominiums Inc.***, 2012 NSCA 126, are discussed in more detail in the Contracts materials of this course. Thus, It is advisable to stipulate if a condition can be waived and by whom. In the event of termination, it is important to do so before the "deemed satisfaction" dates pre-printed in most standard form Nova Scotia agreements; however, the form of termination does not need to be in the Realtor-approved form: ***Regan-Cottreau v. Blackburn***, 2014 NSSM 47. In fact, in some instances that form may be inappropriate (such as in the case of a unilateral breach), as it purports to deal with the deposit and otherwise constitute a mutual release by all of the parties.

The parties have an obligation to act in good faith to fulfil conditions; all contracts have an implied obligation of honesty and good faith: ***Bhasin v. Hrynew***, 2014 SCC 71

Also note that most conditions have deadlines after which they are deemed to be satisfied; note especially that it is now usual practice for the vendor to provide a property disclosure statement (PDS), formerly known as a Property Condition Disclosure Statement, which the purchaser will usually only have a day or two to review and be satisfied, or otherwise.

- ***Closing date***

The closing date determines your timetable for the particular file. Reference to the closing date is made in the standard form as follows:

> This agreement shall be completed on or before the day of , 20 (hereinafter called the closing date). Upon completion, vacant possession of the property shall be given to the purchaser unless otherwise provided as follows:

The preprinted form provides for "best efforts" for the property to be vacant at a certain time of the day on the closing date for the purposes of a pre-closing inspection; and, in some instances, the agreement will provide for a fixed closing time as well. While this is a useful guideline for vendors, in a multi-transaction situation where purchasers are moving out of one property and moving into another property on the same date, this is not always practical. Care should be taken that your client's expectations with respect to a time frame for moving in are addressed at a very early stage in the transaction. Your timetable will to a certain extent be determined by the closing date.

Completion date and possession date are usually the same. Clients will often not appreciate the importance of timing with respect to arranging closing dates (especially, as is usually the case, another transaction hinges on it, such as a seller buying another property). At times, closing dates are scheduled for weekends, or clients may be of the opinion that irrespective of the closing date set out on the agreement, they are free to move their possessions in early if the property is vacant earlier than the closing date. Your clients' plan should be discussed at an early date, and clients are generally discouraged from relying on any early access to the property until the closing date. Possession prior to completion date is fraught with difficulties for both purchaser and vendor, and practitioners are well advised to ensure that if these dates are different, they do not have legal ramifications for the clients. Insurance coverage and liability for pre-closing damage must be addressed.

- ***Deposit***

Deposits are forfeited in the event of non-performance by the purchaser for whatever reason and are applied to the purchase price upon completion: ***Stockloser v. Johnson***, [1945] 1 Q.B. 476 (C.A.). Note, as above, that in the event of a default by a purchaser, the deposit is forfeited under the standard agreement "in addition to" the vendor's other claims. It is important that the clients are aware of this, as many believe the deposit is either the entire claim, or at least applied to the claim. Thus, in ***Gilbert*** v. ***Marynowski***, 2017 NSSC 227, a solicitor was relieved of liability for having advised the defaulting client accordingly (despite their assertions to the contrary) and the plaintiff's claim was for the $10,000 deposit plus the losses on the resale.

In the event you are holding a client's deposit, be aware of your restriction on taking any more than $7,500 in cash in one or a related series of transactions under the Trust Account regulations under the ***Legal Profession Act***. Best practice remains a bank draft or certified cheque.

- ***Part-payment***

Part-payments are applied to the purchase price upon completion but refunded if the contract is not completed. ***Lozcal Holdings Ltd. v. Brassos Dev. Ltd***. (1980), 111 D.L.R. (3d) 598 (Alta. C.A.)

- ***Risk of change***

Upon the signing of an agreement of purchase and sale the purchaser becomes the beneficial owner of the property and is at risk if the property is damaged or destroyed. ***Paine v. Meller*** (1801), 31 E.R. 1988 (Ch.)

Mr. MacIntosh discusses the above doctrine under the rubric of the "Lysaght Principle." His view is that this extends the doctrine to mean:

1. The vendor is a trustee for the purchaser and the purchaser is the beneficial owner, to be conveyed when the purchaser has performed its contractual obligation.
2. Judgments against a vendor after execution of the agreement do not bind the land.
3. The purchaser has an insurable interest in the property.
4. The purchaser, absent agreement to the contrary, assumes risk of damage.
5. "The trust relationship between the vendor and purchaser may be dubious before closing, but once the agreement is completed the trust relationship is solidified retroactively in accordance with the 'relation-back' theory."

The common law on "risk of change" was accepted by the Court of Appeal in ***MacIsaac v. Marmura,*** 2015 NSCA 12, leave to appeal to SCC dismissed February 15, 2015; however, the Court found that the LRA had changed this common law in at least one respect: a judgment against a vendor that is recorded after the execution of a purchase and sale agreement, and before a change in the registered owner, binds LRA-registered land. The Court stated the LRA is intended to be a complete record of the state of title, subject only to the exceptions stated in the Act. It remains open whether other aspects of the common law (such as risk of physical damage to the property) remain unaffected.

In any event, the standard form agreement of purchase and sale shifts the risk to the vendor and gives the purchaser the choice of withdrawing or completing and taking the proceeds of the vendor's insurance; the choice may be problematic as the existence or payment of insurance may be uncertain and mortgage funds in jeopardy when the property has been damaged.

Wile v. Cook, [1986] 2 S.C.R. 137. There appears to be a duty on the part of the vendor to cooperate in providing insurance particulars to a buyer in the event of a pre-closing loss, in order for the buyer to make an informed choice, in a reasonable time, of which remedy to choose. Thus, in ***McCulley v. MacMullin***, 2015 NSSC 256, when a vendor did not provide that information and terminated the transaction, the Court applied ***Wile*** and assessed the buyer's damages (deposit, sunk costs, and – somewhat arbitrarily – the extra cost of purchasing another somewhat more

expensive home) accordingly. Chipman, J. concluded:

> Having regard to *Wile*, *supra*, and as a matter of common sense, when damage occurs, the seller's insurance policy must be provided. That is to say, as a starting point, if the vendor has insurance, the complete policy has to be given to the purchaser to assess. [His Lordship also found, at para. 31, that the purchasers would have a reasonable time to assess and decide what to do.]

It would therefore be prudent to advise a buyer either to verify that there is satisfactory insurance in place by the vendor for the parties as their interests may appear, or that the buyer has been advised to place their own insurance even prior to closing. This has the additional advantage of generally ferreting out any insurability issues early in the transaction.

It should be noted that although the standard form agreement provides for a shifting of risk and for allocation of insurance proceeds, it does not contain a covenant by a vendor TO insure the property.

- ***Fixtures***

Unless specifically contracted otherwise, personal property attached to the land becomes part of the realty.

The intention, purpose and degree of annexation are relevant.

Prima facie, articles attached only by their own weight are not fixtures, unless the circumstances show that they were intended to be part of the land.

Prima facie, articles affixed to the land even slightly are considered part of the land unless the circumstances show a contrary intention. Leasehold fixtures are normally dealt with in the lease and as such should be reviewed by the parties prior to any agreement. The presumption is leaseholds that can be removed without causing damage to the real property remain the property of the tenant and, as such, would not pass to a purchaser of the fee.

The circumstances necessary to alter the *prima facie* assumption must be patent for all to see and show the degree and nature of annexation.

The intention of the parties is material only insofar as it can be presumed from the degree and nature of annexation. ***Stack v. T. Eaton Co. et al.*** (1902), 4 O.L.R. 335 (Div. Ct.)

The ***Personal Property Security Act***, S.N.S. 1996-96, c.13, s.37 provides guidance in certain cases of conflicting priorities where chattels over which security interests exist are affixed to land.

The PDS and agreement of purchase and sale will indicate if there is any leased equipment and how it is to be disposed of (assumed, paid out, removed). In the case of assumptions, you should verify that the leases are assumable and are up to date. It is not abnormal for a purchaser to need to be approved by the leasing company (and perhaps take on obligations as well, such as to purchase fuel from a specific company).

- ***The PDS***

Most realtor-generated agreements provide for the vendor to supply a Property Disclosure Statement (formerly called Property Condition Disclosure Statement). The client should be advised to view this as background information, and not a substitute for a professional inspection, for the following reasons:

1. Many questions relate to the vendor's actual knowledge, rather than an ascertainment of facts that may or may not be known; it is not, in and of itself, a warranty: ***Gesner v. Ernst***, 2007 NSSC 146. More recently, Adjudicator Sloane paraphrased this as "[w]hen a court is faced with sellers who testify that the statement was true to the best of their knowledge, there must be some evidence that convinces a court to draw the inference that they were lying (or being grossly negligent in their statement) when they made it": ***Zafiris v. Surette***, 2019 NSSM 18. See also ***Moffatt v. Finlay***, 2007 NSSM 64.
2. The standard wording provides for the PDS to become part of the contract (and that warranties survive the closing), but in the author's view it remains unclear whether all PDS statements are warranties that so survive.
3. Recent case law has distinguished between a vendor's intended truthful (but wrong) statement, and a warranty, and has emphasized the obligation of a purchaser to make their own enquiries. In particular, recent cases have emphasized the wording in PDSes to that effect, and the warning that information may be incorrect. See ***Allen v. Thorne***, 2007 NSSM 31; ***Young v. Clahane*** (2008), 263 NSR (2d) 286, and ***Gesner v. Ernst,*** *supra*. Caveat emptor, as a starting point, remains alive and well; however, a vendor will be liable for known misstatements (fraud) and negligent misrepresentations: ***Curran v. Grant***, 2010 NSSM 29; this is so , even if the buyer could have discovered the misstatement as to a latent defect, but did not in fact do so before closing the measure of damages will, at least when repairs are effected, be the cost of such repairs less the Court's assessment of any betterment: ***Crann v. Hiscock***, 2012 NSSM 9. For another example of betterment, see ***Turnbull v. Beattie***, 2018 NSSM 21 (misrepresentation respecting well; cost of a new well less allowance for resultant "new well" versus "purchase of a property with an old well.")
4. While there is an obligation for ongoing disclosure (in cases where a PDS is provided), they can be weeks, sometimes months, old at the time of the transaction and may be out of date. Both vendor and purchaser should be wary of any intervening material change, as this may attract liability or undue reliance. So, in ***Carter v. Savage***, 2015 NSSM 51, the purchaser discovered "undisclosed" changes to the property and backed out of the transaction. The vendor resold at a loss. Although the purchaser was successful in rescission and obtaining the return of the deposit, it's likely fair to say neither party was satisfied with the outcome of events.

- ***Defects in the land and buildings***

Patent defects (discoverable by ordinary inspection) in the land or buildings are subject to *caveat emptor*. There is no duty to disclose (except where a contract, such as a requirement to provide an accurate PDS, provides otherwise). See ***Dennis v. Langille***, 2013 NSSC 42, ***Shortall v. Stagg***, 2013 NSSM 22

A vendor must disclose latent defects (not discoverable by ordinary inspection) of which he knows, if they render the property dangerous or unfit for the purchaser's purpose (***Halsbury's***

Laws of England, 4th ed., v. 42, p. 47.) However, absent fraud, mistake, or misrepresentation, or a contract to the contrary (such as a warranty or a contractual statement in a PDS), caveat emptor appears to apply to other types of latent defects: ***Gesner v. Ernst***, *supra*; ***Paterson v. Murray***, 2011 NSSM 34; ***Shortall v. Stagg***, *supra* (despite some Ontario case law cited in Nova Scotia with approval: e.g., in ***Thompson v. Schofield***, 2005 NSSC 38). A vendor will also not be liable for latent defects that have not manifested themselves to the vendor (or, a fortiori, may have come into existence after a vendor has sold the property): ***MacLean v. LeBlanc,*** 2014 NSSM 77. Concealment of a defect that would otherwise be patent does not give rise to *caveat emptor* or relieve a vendor of liability: ***Apogee Properties Inc. v. Livingston***, 2018 NSSC 143.

There is no duty of disclosure or liability on the part of a non-party (e.g. a predecessor in title or a benefit holder not privy to the PDS or agreement): ***Chapman v. C.A. Realty, in bankruptcy***, 2018 NSCA 81.

Implied warranties of fitness for habitation and completion in a workmanlike manner apply to homes incomplete at the time of the agreement. ***Fraser-Reid v. Droumtsekas***, [1980] 1 S.C.R. 720; ***Cormier Ent. Ltd., v. Costello*** (1980), 108 D.L.R. (3d) 472 (N.B.S.C.)

The usual common law of fraud and pre-contractual warranties inducing a contract still apply (see PDS discussion above).

When a property is sold "as is," unless there is fraudulent misrepresentation, caveat emptor continues to apply. Mere silence must include an intention to deceive in order to be fraudulent. For a recent review of case law, albeit at the Small Claims level, see ***Giles v. Boissonneault***, 2014 NSSM 12.

- ***"Time is of the essence" and tender***

A "***time is of the essence***" clause makes timely performance an essential element of the contract.

Due diligence is not an excuse for failure to perform on time. ***Williams Lake Realty (1978) Ltd. v. Symyuk*** (1982), 39 B.C.L.R. 313 (B.C.C.A.)

The purpose of tender is to show a party is ready, willing and able to complete. It must be in the exact form required by the contract. John A. Yogis QC defines **tender** as follows: "An unconditional offer to perform coupled with a manifested ability to carry out the offer and production of the subject matter (money, etc.), unless such production is waived by the creditor." (*Canadian Law Dictionary*, 2d ed., p. 219)

Actions or extensions may result in waiver of the essentiality of time. ***Landbank Minerals Ltd. v. Wesgeo Ent. Ltd.***, [1981] 5 W.W.R. 524 (Alta QB); this is the case even if the action or extension is a good-faith indulgence on the party later seeking to terminate due to untimeliness: ***Braid v. Destiny Homes Inc.***, 2012 NSSM 62.

There is no need to tender if the other party has made it clear he cannot perform, although caution may dictate tender in the face of non-performance. ***Beckett v. Karlins*** (1975), 50 D.L.R. (3d) 21

(Ontario High Court)

The Nova Scotia practice is "deed walks to money," meaning that the vendor goes to the purchaser for money. As a matter of practice, it is prudent for the party ready, willing and able to close to tender as evidence of that. There is authority that there is no need for a vendor to tender at all until the purchase price is paid (***Kuntz* v. *Toms*** (1978), 14 A.R. 442 (Dist. Ct.) and ***Centurian Ridge Farms and Stadnick* v. *McCallum Estate and Forlari*** (1978), 14 A.R. 391 (S.C. (T.D.)), which would contradict the "vendor comes to purchaser" practice. There is also more binding authority that there no duty to tender if either it is clear the purchaser is unable or unwilling to perform (***Hickey* v. *Paletta***, [1974] S.C.R. vi, 14 N.R. 1) or if the purchaser has indicated a willingness to complete only on changed terms (***Sylnor Realties Limited* v. *Karameros*** (1975), 9 N.S.R (2d) 1 (S.C. (A.D.)); the better practice remains that if there is a dispute, the party that seeks to close should tender as evidence of readiness, willingness and ability to close.

Amendments to the agreement

Any changes to a purchase agreement must be in writing. This not only complies with the ***Statute of Frauds*** and provides a written proof of the alteration, but in addition, the process of drafting the change may help clarify the negotiation process. In drafting an amendment, care should always be taken always to affirm the remaining terms of the original agreement so as not to collapse the original agreement (see Chapter 2.3, MacIntosh's *Nova Scotia Real Property Practice Manual*). In requesting an amendment, or confirming an amendment – for example, to the closing date – care should be taken to add to your request, "time remains of the essence and all other terms of the agreement of purchase and sale remain the same."

The *Nova Scotia Real Property Practice Manual* proceeds to discuss the admissibility of parole evidence in amendments and variations to agreements. Mr. MacIntosh states as follows:

> While parole evidence is admissible in some situations, generally a written contract may not be varied, contradicted, added to or subtracted from by parole evidence [*Fidelity Realty Limited v. Rockingham Realty Limited* (1976), 17 N.S.R. (2d) 527 (C.A.)]. Therefore, evidence of an oral agreement to extend the 14-day period provided for the purchaser to obtain financing was inadmissible under the statute, and the purchaser's failure to provide written notice of his inability to obtain financing within the time provided in the agreement disentitled him to a return of his deposit [*MacIntyre v. Spierenburg* (1979), 41 N.S.R. (2d) 584 (T.D.)]. However, while an oral variation may be unenforceable, the **Statute of Frauds** does not render it void; it is valid for all other purposes. Therefore, the oral variation may be used as a defence to an action brought on to the original contract. For example, in *Wauchope v. Maida* (1971), 22 D.L.R. (3d) 142 (Ontario C.A.), the purchaser, discovering that the interest rate of the mortgage would be ten and one-half percent instead of ten percent, orally agreed to accept a reduction in the principal of the second mortgage. The purchaser subsequently changed his mind, and brought an action to recover the deposit. The vendor successfully defended the action on the basis of the oral agreement.

Conditional clause removal

It is very common for purchase agreements to contain certain conditional clauses that are in fact

conditions precedent, normally for the benefit of the purchaser, which must either be fulfilled or waived before the purchaser is bound to complete the contract. You will often receive an agreement containing a conditional clause at a time before the removal of this clause. Care should be taken regarding for whose benefit the clause is inserted at the time of receiving an agreement (the current standard form differentiates between "vendor conditions" and "purchaser conditions"). Also, when reviewing the agreement, you should, where possible, before proceeding to act on behalf of the client, satisfy yourself that the conditions outlined in the contract have been satisfied or removed, and that the vendor is aware of this. Most of the conditional clauses in Nova Scotia will contain the following provision: "this condition shall be deemed satisfied unless the vendor or vendor's agent is notified to the contrary in writing on or before [date]."

In the absence of a provision such as the one just cited, a question arises as to the obligation and position of the parties with respect to completion in the absence of notification to the vendor or vendor's solicitor. In ***McNabb v. Smith*** (1981), 30 B.C.L.R. 37 (S.C.) the wording was as follows: "Subject to the purchaser arranging a first mortgage...by September 22, 1980". Mr. Justice Bouck indicated in that case that "unless Mrs. McNabb gave notice to the Smiths by September 22, 1980 that she was unable to arrange financing, the cause was no longer a means for her to escape the bargain," and she was bound to complete.

However, subsequent decisions have not followed ***McNabb*** and have provided that the purchaser's silence did not constitute a waiver of the condition precedent. See, e.g., ***Whelan v. Murphy***, *supra*.

If you have an opportunity to participate in the drafting of conditional clauses, the practitioner is well advised to ensure that the following are effected:

a) describe as clearly as possible what it is the purchaser wishes to do before the contract will become firm and binding;
b) see there is clarification as to whether the condition you are inserting is intended to constitute a condition precedent to the agreement being binding;
c) clearly indicate the time frame within which the inquiry or act is to be completed, and by whom;
d) indicate for whose benefit the clause is being inserted; and
e) indicate what will happen if the clause is not satisfied within a particular period of time.

Merger on closing

Legal and equitable estates coalesce and all rights under an agreement of purchase and sale are merged in the conveyance; acceptance of the conveyance implies the contract has been completely performed. ***Fraser Reid v. Droumtsekas***, [1980] 1 S.C.R. 720.

Fraud and error *in substantialibus* cannot be merged out. ***Hyrsky v. Smith***, (1969) 2 O.R. 360 (H. Ct. J.).

To avoid merger of a warranty the commonly used clause is "all warranties . . . shall survive the closing" or like form.

4. Remedies for non-performance

Tender is advisable in the face of non-performance {see TIME IS OF THE ESSENCE}.

The ***purchaser's remedies*** when the seller defaults are:

- damages, including general and in extraordinary cases punitive damages;
- rescission, return of the deposit or part payments;
- specific performance, including interlocutory injunctive relief.

The ***vendor's remedies*** when the purchaser defaults:

- retention of the deposit (see discussion above regarding the treatment of deposits under the standard form agreement of purchase and sale);
- damages, including general and in extraordinary cases punitive damages;
- specific performance.

Note, as above, that damages and rescission are mutually exclusive.

VI. INSTRUMENTS AFFECTING TITLE

1. Deeds

Form and content

The ***Conveyancing Act***, R.S.N.S. 1989, c. 97 provides for an effective form of deed and execution as follows:

> **Effective conveyance**
> 10 (1) A conveyance that identifies the parties and property, and specifies the property right to be conveyed, and which is validly executed, is effective to convey that property right.
> (2) A conveyance does not require a habendum or any special form of words, terms of art or words of limitation.
> …
>
> **Valid execution of instrument**
> 12 Except in the classes of conveyances where an enactment prescribes the mode of execution and in addition to any other mode now in use a conveyance is validly executed where it is
> (a) signed by the party who conveys or some other person in his presence by his direction, or by his attorney;
> (b) where the Land Registration Act does not apply, sealed by the party who conveys or some other person by his direction, or is given for good or valuable consideration; and
> (c) delivered or, in the case of a deed poll, published and declared. R.S., c. 97, s. 12; 2001, c. 6, s. 101.
>
> **Electronic submission of information and documents**
> 12A (1) Where the Land Registration Act applies, electronic submission of information and documents in accordance with regulations prescribed by the Minister of Service Nova Scotia and Municipal Relations has the same effect as registration or recording of the documents in original form that are represented by the electronically submitted information, without the necessity of registering or recording the documents themselves.

S. 31 of the ***Registry Act*** and ss. 79-83 of the LRA contain the rules respecting execution of documents. Notably, under the LRA, a corporate document can be executed by any one officer or director; and in all LRA documents, seals are not required, and a witness cannot be a party (or the spouse of a party, if that spouse's consent to the transaction is required.)

Formalities

- **Statute of Frauds**

The *Statute of Frauds* provides that any conveyance of land except a lease under three years must be in writing (see also ***Self. v. Brignoli*** and ***301252 P.E.I. Inc. v. Brekka***, both *supra*). Under the LRA, leases under three years may but need not be recorded if the occupation is ascertainable on reasonable investigation: 55(5).

- ***Description of lands and parties***

The lands must be described in such a way that the property can be ascertained (under the LRA this is also a requirement to have the parcel converted to Land Registration). The parties to the deed must also be identified. Usually there are at least two parties to a deed, and they must be able to contract (or have court approval, in the case of an infant or incompetent). The parties must be described by their own names, or by names by which they are known or have assumed, or the deed will not be valid. If the grantee is a corporation, it must be legally recognized as such in Nova Scotia, or the conveyance will be ineffective.

- ***Words of intent***

No special form of words is necessary as long as the deed evidences an intention to transfer land.

- ***Consideration***

As a type of contract, there must be consideration. However, note that LRA does not require consideration or a seal for a conveyance to be registered (see s. 78), and s. 20 is a statutory guarantee of the registered title holder.

- ***Seal***

Seals are desirable, but strictly no longer required for LRA documents: s. 78.

- ***Attestation and acknowledgement***

There must be proof of execution, and there are three ways to accomplish this:

1) the parties to the deed acknowledge its execution under oath;
2) a subscribing witness to the instrument swears an oath that the parties executed it in her/his presence; or
3) the parties execute the instrument in the presence of a person authorized to take the acknowledgement of the parties' execution.

All three are used in Nova Scotia, and are mirrored in the Registry and LRA worlds.

- ***Signature***

There are conflicting authorities to whether or not a deed must be signed in order to be effective; Registry of Deeds documents will not be accepted for registration unless they are signed and the execution proved. Under the Land Registration Administration Regulations, however, the Registrar is entitled to, and generally will, rely on the information on the cover forms and will not look to the body of the instrument for defects, missing signatures, etc.

- ***Parts of deed***

MacIntosh states as follows at page 5-9 and 5-10 of the *Real Property Practice Manual*:

> Traditionally, the formal parts of a deed are: the words describing the instrument, that is, whether it is a conveyance, mortgage, or otherwise; the date; the parties' names; the recitals stating the agreements or facts which explain the reasons upon which the transaction is founded; the legal description of the property conveyed and easements and restrictions to which it is

subject; the habendum defining the quality of the estate granted; and the testimonium stating that the parties have sealed the deed in witness of what is written. However, s. 10(2) of the ***Conveyancing Act*** has altered this traditional format. It states that a conveyance does not require a habendum or any special form of words, terms of art, or words of limitation.

- ***Description of land conveyed***

The description must be certain enough that the property is identified with reasonable accuracy. Often lands are described with metes and bounds descriptions, by reference to natural or artificial monuments, to adjacent landowners, and to references to plans or surveys. A PID reference on Land Registered parcels is also a sufficient description, but in the editor's view is poor practice (PIDs may change in what they encompass over time, for example due to a subdivision or change in benefits/burdens).

Meander Lines – "Lines run in surveying particular portions of the public lands which border on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser." (*Black's Law Dictionary*, 6th ed., p. 980)

Effect of Insufficient Description – Courts can review extrinsic evidence of surrounding circumstances to look at the intention of the parties to assist with the interpretation of a legal description if the description is uncertain, vague, or if a latent ambiguity exists (e.g.: where the words used could apply to more than one piece of land). Courts will attempt to give meaning to a clause that is poorly drafted; however, if the court cannot ascertain the description by the use of extrinsic evidence, the deed may be void. See also discussions of recitals in deeds, above.

The decision of Bourgeois, J. (as she then was) in ***MacCormick v. Dewar***, 2010 NSSC 211 illustrates both the hierarchy of evidence, and its application, at pp. 7- 8:

> In reaching his conclusions regarding the boundary determination, Mr. MacDonald [surveyor] asserted that he relied upon principles long-recognized by the Courts to prioritize sources of evidence. In his report he appended excerpts from *Survey Law in Canada*, Carswell, 1989, relating to the proper approach to the establishing of boundaries. Of particular importance to the witness in terms of the approach taken to the present determination was the "order of priorities" attributed to American legal scholar Greenleaf, outlined at page 129 as follows:
>
> > Where there is ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give most effect to those things about which men are least liable to mistake. On this principle, the things by which the land granted is described are thus ranked according to the regard which is to be given to them: (1) natural boundaries; (2) lines actually run and corners actually marked at the time of the grant; (3) the lines and courses of an adjoining tract, if these are called for an d if they are sufficiently established, to which the lines will be extended; and (4) the courses

> and distances, giving preference to one or the other according to circumstances.
>
> Madam Justice Bourgeois continues at p. 13:
>
> > This dispute does not involve complicated legal principles. The Defendants seek to rely upon case law that requires a clear and unambiguous deed should be given its plain meaning….The Plaintiffs assert that the hierarchy of evidence as relied upon by Mr. MacDonald in terms of the proper determination of boundaries is correct, and that a distance specified in a deed, can be superceded by more credible evidence….
>
> As I see it, both lines of authority reflect good law.

Robichaud v. Ellis, 2011 NSSC 86 approves a similar statement from Ziff, *Principles of Property Law*, at para. 25. The same basic hierarchy is accepted in ***Goulden***, noted below, and *Oostadale Farms v. Oostvogels*, 2016 NSSC 146. In ***Podgorski***, the Court of Appeal decided that it was unnecessary to decide whether the "hierarchy of evidence" applied in Nova Scotia, preferring instead to consider it a matter of "for the expertise and opinion of the surveyors in question."

It should be noted that this extrinsic evidence will only be admitted if there is, in fact, an ambiguity. In ***Goulden v. Nova Scotia (Attorney General)***, 2013 NSSC 253, Madam Justice Stewart stated:

> [12] ***Boundary determination.*** Before embarking on a review of the evidence, it will be of use to set out several of the general legal principles that govern the rather technical field of boundary determination. Various legal principles govern deed interpretation and boundary demarcation when the court is required to resolve boundaries. The general rules of evidence apply to boundary disputes, which are typically heavily concerned with documentary evidence of title. In deed interpretation, the question is not the grantor's subjective intent. Rather, the court is concerned with the meaning of the words used in the deed. That is to say, the question is "what is the expressed intention of the grantor?": *Knock* v. *Fouillard*, 2007 NSCA 27, at para. 27. If the terms of the conveyance are clear, extrinsic evidence is not admissible: Anne Warner Le Forest, *Anger and Honsberger's Law of Real Property*, 3d ed. (Aurora, Ont: Canada Law Book, 2010) at §18:30:30.
>
> [13] When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required: *Herbst* v. *Seaboyer*, 1994 CanLII 3982 (NS CA), (1994) 137 N.S.R. (2d) 5 (C.A.), at para. 15; *McCormick v. MacDonald*, 2009 NSCA 12, at para 73. A latent ambiguity occurs when the words of a document on their face do not admit a different possible meaning, but surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention. A patent ambiguity, by contrast, is "apparent from the face of the document": *Taylor v. City Sand and Gravel Ltd.*,

2010 NLCA 22, at para. 21; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d edn. (Toronto: Lexis Nexis Butterworths, 2012) at §2.8.5.

Goulden and Podgorski were both considered in ***Leblanc v. TerreNoire Surveys***, 2014 NSSC 165.

Rectification of Deeds – Rectification is an equitable remedy that may be used by the courts to correct a deed (as of the date of the original conveyance) if there is a discrepancy between the parties' intention and the physical document. Rectification is unavailable if a third party has relied upon the original form of the conveyance; it is also not available to a non-party to the instrument: ***Landry v. Kidlark***, 2014 NSSC 154 at paras. 98 et seq.. Note again, however, that the remedies available under the L.R.A. for mistakes (ss. 85-92) are extremely broad.

For further discussion of interpretation of deeds as a question of law, the admissibility of extrinsic evidence with respect to intention, and objective interpretation with respect to the words used in the instrument, see the analysis of Arnold, J. in ***Romkey v. Osborne***, 2019 NSSC 56 at paras. 77-90.

2. Types of deeds

The following types of deeds are normally found at the Land Registration Office:

1. Warranty deed
A warranty deed is the most common type for purchase and sale of a property.

Covenants required: This deed conveys the property from the grantor to the grantee and warrants that the title is free and clear from encumbrances, that the grantee will have quiet enjoyment of the land, that the grantor has good title in fee simple, that the grantor has the right to convey the lands and that the grantor will procure any further assurances which may be required in the future.

Breach of covenants:

- Right to convey – When this covenant is breached, it appears that the measure of damages is the difference between the contract price and the value of the land the grantor actually had the right to convey, plus special damages within the contemplation of the parties. The purchaser need not have been removed from possession in order to found an action, as damages flow from the fact that the possibility of eviction reduces the value of the land.

- Quiet enjoyment – To bring an action, there must be actual interference with the purchaser's possession, and a new cause of action arises with each interference with the land. If the purchaser is completely evicted, the damages will be the market value of the land, including the value of any improvements. If the purchaser is only partially evicted, the damages will be the difference in value between what was purportedly conveyed and what the purchaser actually received.

- Freedom from encumbrances – Liability is triggered when a third party with rights to the property under an encumbrance interferes with the purchaser's property. Damages are equal to the difference in the value of the land without and subject to the encumbrance.

- Further assurances – If the grantor will not give a further assurance that is reasonably requested by the purchaser (such as removing a judgment), the grantor breaches the covenant, and the purchaser can sue for specific performance of the covenant and may also be entitled to nominal damages for the breach.
  (*Anger and Honsberger Law of Real Property*, 2nd ed., p. 1233-4)

2. Executor and trustee's deed
By means of this deed, the executors and trustees of a particular estate convey the property from the estate to the purchaser. There is no warranty of title other than a clause whereby the executors and trustees covenant that they have done nothing to encumber the title.

3. Trustee's deed
When property is held in trust by one individual for another, that trustee can convey the property to a third party. The trustee will not warrant the title, but will state that he or she has done nothing to encumber the title.

Note that trusts under the ***Land Registration Act*** are registered as "Trustee in trust," and that conveyances by the trustee are deemed to be in furtherance of the trust (*i.e.*, the grantee need not look to compliance with the terms of the trust, but only to the regularity of the instrument on its face; the Act further abolishes constructive notice in general). Finally, note that it is the trustee – not the beneficiaries – who must sign, an issue which arises not infrequently in practice (where, for example, a property is devised to an executor in trust but the next instrument is a conveyance from the *cestui que trustent* without the trustee's execution). In the event of a bankruptcy, a Trustee's deed is sometimes referred to as a "bankruptcy deed" and is to the same effect.

4. Tax deed
A tax deed is given from the real property taxing authority to a purchaser at a tax sale. The tax deed is executed by the appropriate authority of the municipality and recites the particulars of the sale. A tax deed is only issued six months after the sale of a redeemable property, because if taxes are less than six years in arrears, the owner of the property has the ability to pay the arrears of taxes and costs (plus interest) and redeem the title to the property within that time. No redemption is available if the taxes are more than six years past due. In a redeemable sale, a certificate of sale will be issued by the municipality indicating that the purchaser was the successful bidder at the tax sale. That certificate of sale is filed at the Registry but does not convey the title to the property.

Note that a tax deed **registered** for more than six years may, absent fraud, be considered a good root of title under the ***Marketable Titles Act***. This is an important change from case law and statute prior to 1996 and older cases that cast considerable doubt on tax deeds should be read accordingly. It is the date of **recording**, not the date of the **deed**, that is important in determining the six-year period.

5. Sheriff's deed
The most common form of sheriff's deed is made pursuant to a foreclosure sale where the mortgage company has taken proceedings against the borrower and sells the title at a sheriff's sale to another. The sheriff's deed conveys all the interest that a person had in a particular piece of property against whom a particular action was taken. In a foreclosure sale, the sheriff's deed will recite the particulars of the order for foreclosure, the fact of a public sale having been held, the confirming order issued by

the court, etc. There are other types of sheriff's deeds; for example, one conveying property pursuant to the ***Sale of Land Under Execution Act***.

6. Quit claim deed
A quit claim deed contains no covenants as to title. The grantor quits claim or releases any claim he or she may have in the property in favour of the grantee, but does not profess that the title is valid. This is common in the case of multiple owners. Not all quit claim deeds look exactly alike. Some "convey or purport to convey" either the fee simple or a partial interest, others simply are releases. This can be an important difference in determining whether a quit claim deed is a root of title (since the ***Marketable Titles Act*** requires a deed that "conveys or purports to convey" the fee simple)

7. Confirmatory or correcting deed
A confirmatory deed is used to correct a minor error in order to confirm the intention of the original deed. As noted by C.W. MacIntosh QC at p. 5-6, a confirmatory deed would be used in situations where the legal description in the original deed is incorrect, if a party was left out of the original deed, or where the original deed has been lost. At p. 4-44, MacIntosh notes that the confirmatory deed should also state the reason for its execution and reference the intention and registration particulars of the prior document. ***Creighton* v. *AGNS***, 2011 NSSC 131 approves this concept.

Note the ***Vendors and Purchasers Act*** provides that recitals more than 20 years old (regardless of the form of deed) are rebuttable presumptions of fact, so can be especially useful in resolving questionable titles. See discussion of recitals, above.

[MacIntosh, *Nova Scotia Real Property Practice Manual*, section 5]

3. Delivery and acceptance of deeds

General
Delivery of a deed is a matter of intention. It is not necessary that the grantor physically hand over a deed to the grantee; it is simply essential that "the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein." (***Re Metropolitan Theatres Ltd.*** (1917), 40 O.L.R. 345 at 347.) To determine the intention of the grantor, one looks at words, conduct and the surrounding circumstances.

Manual delivery
This occurs when the grantor physically delivers the deed to the grantee.

Presumptions relating to delivery
- Delivery is presumed when a deed is executed in the presence of an attesting witness, unless a contrary intention is established by persuasive evidence.
- A deed takes effect on the day of delivery, rather than on the day the instrument is dated. There is also a rebuttable presumption, however, that the deed was delivered on the day it is dated.

Canceling delivery

After a deed has been effectively delivered and the land has been conveyed, title passes to the grantee, and delivery cannot be cancelled. It can, however, be refused (acceptance is presumed in the absence of evidence to the contrary).

Retention of interest by grantor or conditional delivery
Sometimes grantors retain an interest in the property (e.g., a life interest), or make the conveyance conditional. For delivery to be effective, the grantor must evidence a present intention to deliver the deed.

- ***No delivery –*** If there is no intention to deliver the deed, title will not pass to the grantee. However, given that there is no requirement for physical delivery, very strong evidence will be necessary to set aside a deed which otherwise appears valid on its face (e.g., escrow).

- ***No registration*** – A deed need not be registered in order to be effectively delivered. However, the priority of title can be defeated by the "race to the Registry."

- ***Express condition of death –*** An instrument cannot be delivered in escrow if the death of the grantor is the condition on which the instrument is to become effective as a deed (e.g., *donatio mortis causa*).

Escrow delivery, and where grantor gives deed to third party
If a grantor signs and seals a document, but then gives the deed to a third party until a specific event occurs, or a condition is performed, the document is an escrow, and it remains inoperative and will not become a deed until the event occurs or the condition is met. The maker of an escrow may not deal with the land in derogation of the grant, but if the condition is not fulfilled within a reasonable time, (s)he may renounce the escrow. Once the condition is fulfilled, the title passes to the grantee. See the effect of ***Marmura,*** *supra*, on the common law "relation back" theory. NB: *Code of Professional Conduct* relating to escrow conditions.

4. Other instruments affecting title

Crown grant
The instrument of original conveyance from the Crown to a private individual; the origin of title. (Note: assertions of Aboriginal title are before the courts). Note that even Crown grants can be the subject of dispute, such as in the case of overlapping grants: ***Creighton v. AGNS***, 2011 NSSC 131.

Will
A will may convey real property directly to a beneficiary or to an executor or trustee on conditions. Wills must be probated and registered to be effective in the chain of title (***Boyer v. Throop*** (1993), 129 N.S.R. (2d) 60). Wills executed before October 1, 2001 may either devise real property directly on heirs, or to a personal representative. Wills executed after that date devise property to a personal representative, regardless of who is beneficially entitled. Note it is the date of execution, not the date of death or the date of probate, that is determinative.

The real property of an intestate dying before the coming into force of the "new" ***Probate Act***, S.N.S. 2000, c. 31 (1 October 2001), vests immediately in the heirs and not the administrator of the estate;

Intestate Succession Act, R.S.N.S. 1989, c.236 (you may also occasionally encounter the Descent of Property Act – "DOPA" - for those who died intestate before September 1, 1966). Since the coming into force of the 2001 ***Probate Act***, s. 46 states that the real property of a deceased person vests in the personal representative (executor or administrator) as if it were personal property.

Statutory declaration
A sworn declaration of facts, not conclusions of law, generally used to confirm acts of possession or clarify ambiguity about the identity of a judgment debtor; it does not convey title. NOTE that although statutory declarations are commonly used to outline facts, particularly those which do not appear on a chain of title, they are NOT instruments under the ***Registry Act*** and their weight varies according to their contents (see possessory title above).

Judgment
Formerly under the ***Registry Act***, R.S.N.S. 1989, c.392, a registered certificate of judgment attached to a judgment debtor's present and after acquired property. Judgments recorded prior to March 24, 2003 are valid for 20 years from the date of judgment. Judgments recorded after March 24, 2003 are valid for five years but can be renewed, prior to expiry, for up to three further periods of five years each. If not renewed, they expire and cannot be renewed thereafter.

One year after registration a judgment debtor's interest in land (including a partial interest or interest subject to a mortgage) may be sold pursuant to the ***Sale of Land Under Execution Act***.

Bankruptcy and Insolvency Act **documents**

If there has been a bankruptcy in the chain of title, ordinarily the assignment or order will be recorded. This is often recorded in the judgment roll and not the parcel register (in the case of Land Registration Act lands) or the Grantor-Grantee index (in the case of non-LR lands); however, this does not change the fact that such recording is notice of the fact of vesting in the trustee: BIA, ss. 20 and 71; ***Re Meredith*** 2018 NSSC 153 If the trustee has disposed of the property, there will also ordinarily be a trustee's deed. If not, the trustee will have to disclaim its interest in the property, as discussed above, as the assignment or order vests real property in the trustee even if the bankrupt remains in possession and the trustee takes no steps to possess or manage the asset. This does not apply to accepted proposals (where the proposal does not provide for a transfer of real property), or Orderly Payments of Debts (which normally take the form of a recorded judgment).

Marketable Titles Act
A MTA Notice of Claim can be filed for non-land registration parcels (but not LRA parcels). This Notice of Claim sets out facts upon which a person asserts a partial or full title so as to prevent it expiring under the ***Real Property Limitations Act*** or being defeated by a subsequent instrument (e.g., in favour of equity's darling), but it does NOT create title where it did not exist before.

Interests may also be extinguished, outside the MTA by the ***Real Property Limitations Act*** and laches and a Notice of Claim will not revive such interest – see s.5(4) of the Act. See also ***Nemeskeri v. Nova Scotia (Attorney General) and Meisner*** (1993), 125 N.S.R. (2d) 67 (C.A.) on the application of the ***Real Property Limitations Act*** and laches. The trial judge's decision is considered extremely important by practitioners as regards the application of the doctrine of "constructive displacement":

see (1992), 115 N.S.R. (2d) 271 at paragraphs 67-71.

Quieting Titles Act **order**
As discussed above, a QTA order, subject to any qualifications in it and the one-year "re-opening" provisions in the Act, serves as a root of title. See also the comments of Fichaud, J.A. in ***Brill***, *supra*., and of Campbell, J. in ***Cleary*** *supra.*

Builders' liens
A worker or supplier of material has, for a period of time, a right of lien against the property improved.

As MacIntosh QC states in his *Real Property Practice Manual* at section 3.4B.1

> A lien under the act comes into effect upon the services being performed or when the materials are delivered to the property. A lien expires and is at an end if a claim for lien is not registered during performance of the work, or within 60 days after its completion or abandonment (ss. 24, 25), and in the case of materials during the furnishing of the materials or within 60 days after the last material was supplied (s. 24(2), 25). When the contract calls for payments to be made pursuant to the certificate of an architect or engineer, the claim must be registered within 60 days of completion or abandonment of the contract, or within seven days after the architect has issued a certificate or refused to do so. (s. 24(5)) Every party who registers a lien is required to give notice of its registration to the owner of the property, but failure to do so does not nullify the lien. (ss. 24A, 24B) The lien will again cease to be effective if the claimant fails to commence an action to enforce it and register in the appropriate registry of deeds a certificate of *Lis Pendens* within the time specified. There would appear to be some confusion as to the date wherein this has to be accomplished.
>
> 1) In the case of a contract calling for payments to be made pursuant to an architect's or engineer's certification, the time limited for registration of the *lis pendens* is 30 days from registration of the claim (s. 26)
> 2) When a period of credit is mentioned in the claim for lien, the action must be commenced and the *lis pendens* registered within 105 days after expiry of the period of credit. (s. 26(1)
> 3) Section 26(1) states that every lien for which a claim has been registered shall expire if an action and *lis pendens* are not in place within 105 days after completion of the work or delivery of the materials, while section 27 states that if there is no period of credit or if no period of credit is mentioned in the claim for lien the action and *lis pendens* must be in place within 90 days after completion of the work or delivery of the services. Accordingly it would be prudent to have the action commenced and *lis pendens* in place before the 90 day limit.

MacIntosh QC notes at page 3-56: "Lienholders must commence an action in order to preserve their lien. If an action is not commenced within the specified time, the lien ceases to exist. The practice of 'sheltering', by joining in an action started by another lien claimant is abolished."

Note s. 70 of the LRA: "Filing or recording a builders' lien or a certificate of lis pendens pursuant to

the Registry Act has no effect with respect to a parcel registered pursuant to this Act [the LRA]: ***Builders' Lien Act***, R.S.N.S., c. 277; 2004, c. 14.

Recent amendments (in effect June 30, 2017) to the *Builders' Lien Act* allow for "staggered" releases of holdbacks as various trades complete their portion of a project – so, for example, the contractor pouring the basement no longer has to wait until the painters and drywallers have completed the house in order to obtain payment in full: SNS 2013 c. 14 and SNS 2014, c. 42

Powers of attorney
Powers of attorney may be specific or general.

The authority under a power of attorney lapses if the donor becomes incompetent, unless (as is usually the case) it is an enduring power of attorney created as set out in the ***Powers of Attorney Act, R.S.N.S. 1989, c.352***. ***Note that as of writing (January 2017), a replacement and much more detailed Act is under legislative consideration, but with no known timeline.***

Powers of attorney must be recorded before any document executed pursuant to it may be recorded or registered. In practice, they can also be incorporated into and referenced in the same document (e.g., a deed with the original POA as a schedule). You must review the power of attorney to ensure it authorizes the proposed action (e.g., an authorization to mortgage would not include an authorization to sell).

Conditions precedent in contingent powers of attorney (e.g., in the event of illness, etc.) are presumed met for the purposes of Land Registration instruments executed under a power of attorney. (LRA, s. 72(7))When giving or receiving a document which purports to be executed under a power of attorney, pay extra attention to any 'fraud flags' of which you become aware; also, most mortgagees and title insurers have special clearance rules for instruments executed under powers of attorney, and these will require your attention on a case-by-case basis.

Expropriation
A duly completed and registered instrument of expropriation by a competent authority is conclusive as to the title being expropriated, a function of the Crown's exercise of Eminent Domain. An older version, in the case of public highways, was known as "receipt and release" and were usually not recorded. They are occasionally used by surveyors in determining boundary lines vis-à-vis roads.

Expropriation may be of the fee simple, or of a lesser interest (e.g., an easement).

Declaration of possession
This is a form of statutory declaration used to assert facts in support of a possessory title claim. See discussion above.

Election under *Intestate Succession Act*
A surviving spouse may elect to take a matrimonial home either as part of or in lieu of that spouse's priority claim to the first $50,000 equity in an estate. The regulations under the Act provide that such an election constitutes a transfer of the subject lands. There is some question whether this earlier regulation takes precedence over the later (2001) ***Probate Act***, which provides that all real property vests in the personal representative. The prevailing view at the Justice Department is that it does,

although this appears to conflict with principles of statutory interpretation as it applies to latter-conflicting statutes. The editor is unaware of any judicial pronouncement. As of writing (2020), a common law partner who is not a registered domestic partner under the ***Vital Statistics Act*** is not a "spouse" for the purposes of the Intestate Succession Act (***Jackson Estate v. Young***, 2020 NSSC 5) or the Testators' Family Maintenance Act (***LeBlanc v. Cushing Estate***, 2019 NSSC 360). These are worth observing for developments given the announced Nova Scotia government's intention to revisit domestic relationships in the property context (ie the ***Matrimonial Property Act***). This may well include a reconsideration of domestic rights and obligations in related situations, such as the death of a common law partner.

Options and rights of first refusal
These are contractual rights and obligations respecting land. An option is usually proprietary and obliges an owner, under the specified conditions, to sell. A first refusal is usually personal and while it does not compel an owner to sell, it obliges the owner to give "first crack" at the property to the other party under the agreed-upon conditions. Both should be registered. They are "prescribed contracts" on Land Registration parcels under the Land Registration Administration Regulations, and thus recordable under that Act.

Restrictive covenants
These are discussed in detail above and are common in building schemes (subdivisions) but also in certain commercial properties (Irving Oil, for example, routinely restricts its lands from being used for retail purposes).

***Matrimonial Property Act* claims**
Although the MPA does not purport to create or confer property rights in rem, the LRA allows for a claim under the MPA to be recorded. It remains unclear what effect a recorded claim will have on title to land; however, it is clear that the MPA itself does not create a property right until and unless it is proclaimed by a court, and accordingly a prior registered interest (such as a judgment) takes priority over that inchoate right: ***Gill v. Hurst,*** 2011 NSCA 100.

Easements, licences and ground leases
These are discussed separately.

Non-disturbance agreements with a municipal unit or neighbour
Sometimes, a survey will reveal an encroachment on a street or neighbouring parcel. A specialized form of transferable licence, usually with a municipal unit, permits the encroachment to continue without any rights accruing to the owner, but (normally) of the property is destroyed it must be reconstructed (if at all) "within the lines."

Boundary line agreements
These cannot be used to "create" a lot, or resubdivide it, contrary to subdivision law, but are commonly used to define a boundary that is unclear from existing descriptions. These are discussed further below, under "boundary problems."

Plans
Plans of survey, including retracement, subdivision and consolidation, are critical in defining boundaries, abutters and "quantity" (as opposed to quality) of title. They do not in themselves create title. However, note that parcels must comply with the subdivision requirements of the ***Municipal Government Act*** in one of three ways:

1) by existing prior to April 16, 1987 (s. 291 MGA);
2) by being on an approved plan or instrument of subdivision (which can be retroactive – *i.e.*, – a lot that does not comply with the Act can be retroactively validated by a later plan approving the lot); or
3) by being within one of the exceptions to subdivision approval, the most notable of which in subsection 268(2) of the MGA and which include

- subdivisions in which both the parcel created and remainder are more than 25 acres each;
- subdivisions created by will executed before January 1, 2000 (regardless of the date of death);
- "natural" subdivisions, such as parcels divided by roads, railways, watercourses or other Crown lands;
- specified special purpose lots such as cemeteries.

Note: It is quite common for legally separate lots to have been treated as one – for example, a small strip conveyed as a separate strip to accommodate a driveway, a prior boundary error, or to square off an original lot.

A discussion of multiple lots, which may or may not be sought to be consolidated, is contained above under the topic of "Description of property."

When working with descriptions created or required by a change to prior descriptions (such as by way of consolidation or subdivision), bear in mind: lawyers are not surveyors, and surveyors are not lawyers. Generally, each should practice within their respective field. See the joint paper of the Barristers' Society and the Association of Nova Scotia Land Surveyors at http://www.lians.ca/documents/NSBS-ANSLS_DiscussionPaper.pdf.

Releases, assignments, assumption agreements
These are most frequently seen with respect to mortgages, judgments and debentures and may be total or partial.

Mortgage
Mortgages are discussed separately.

Debenture
A debenture is a security document granted by a limited company.

It may contain a fixed charge against specific property as well as a floating charge and charge on after acquired assets.

Lease
A lease is a contract that creates a leasehold estate in land and is a conveyance for a limited term (see TYPES OF ESTATES, LANDLORD AND TENANT).

Exotica
Note that many "more academic than real" interests cease to apply to *Land Registration Act* parcels under s. 40. These include unamended residential mortgages over 40 years old, equipment leases over 10 years old (Registry of Deeds-recorded Irving Oil equipment leases were once common), dower interests and escheatments that are one owner or more removed. A person whose interests are defeated by this section, however, is entitled to compensation but not to the property. Certain contingent interests are affected by the abolition of the rule against perpetuities.

5. Overriding interests

Rights, incidents, claims, restrictions and liens enforceable against land with or without registration or recording are referred to as overriding interests. They may arise from statute or common law and may protect private and public rights or place restrictions on title or land use, sometimes arising without the landowner's knowledge.

There is a very substantial difference between overriding interests for Land Registration and non-LRA lands. "Old world" lands are subject to myriad potential liens, from the everyday (taxes, environmental, and betterment charges) to the Byzantine (Marshlands Reclamation, treasure trove, even fossils!): *Real Property Practice Manual*, section 3.4

LRA parcels are subject only to the interests noted in the parcel register and the "overriding interests" in s. 73 LRA. Most common among these are:

- *Workers' Compensation Act* lien;
- property taxes and capital charges;
- utility and other easements being used and enjoyed;
- statutory rights of entry, regulation, land use and rate collection;
- reasonably ascertainable leases for less than three years.

Note, however, that s. 73(1)(i) LRA allows for an overriding interest to be created in any statute that expressly refers to the LRA, which leaves open the possibility of overriding interests arising in other statutes.

6. Boundary problems

Boundaries are established by professional land surveyors applying legal principles and available evidence in the following priority: natural, stable features in the environment (*e.g.*, body of water; original monumentation – the markers used to create the lot; evidence of possession {see ADVERSE POSSESSION}); and documentary evidence – deeds, plans, maps. The hierarchy of evidence to determine boundaries is discussed earlier in these materials.

When a boundary is lost or obscured, adjoining owners may re-establish it by boundary line agreement; the agreement should:

- be executed by all parties having an interest in the lands;
- re-establish the location of the boundary by specific reference to a plan and location;
- quit claim to each other lands on the opposite side of the line;
- a boundary line agreement that is intended to establish new boundaries or reconfigure parcels rather than re-establish a lost or obscure boundary will need subdivision approval. ***Municipal Government Act*; *Survey Law in Canada*** (Toronto: Carswell, 1989). In ***Robichaud v. Ellis***, *supra*, the Court approved the following statement from Ziff, *Principles of Property Law*, 5th ed.:

> When the parties are unsure of the boundary,it may be settled by agreement under a principle known as the conventional line doctrine. Such an agreement is capable of

> running with the land, and so is binding on successors. Moreover, even absent an agreement, when the parties have assumed, wrongly, that a fence marks the boundary between two plots, the law of adverse possession may alter title….[I]f a party has occupied land belonging to another for a requisite period of time (10 years in some places; 12 or 20 in others), the adverse possessor will be entitled to retain the land.

The Court continued, approving the following passage from Norman Siebrasse, "The Doctrine of Conventional Lines," 44 U.N.B.L.J. 229 at 229:

> The doctrine of conventional lines may be concisely stated as follows: if neighbouring parties intend to settle the boundary between them, then any boundary line agreed to by them is binding on the parties and their successors in title notwithstanding that it is not the true line according to deeds or Crown grant.

The intention must be mutual and not just "what one party thinks they have agreed upon as the boundary line": ***Gallagher v. Gallagher***, 2016 NSCA 2. See also prior discussion of "description of land conveyed" under deeds.

Trees on a boundary line with trunk, roots, and/or limbs on both properties are frequent causes of angst. In general, the "boundary line is the boundary line," but one cannot trespass across it for the purposes of dealing with the portion of the tree, etc. that is on "your" lot or, perhaps, if it is fatal to the flora. See discussion in ***Isaac v. Harris***, 2018 NSSM 92.

7. Objections to title

The standard form agreement of purchase and sale contains an annulment clause stipulating the length of time a purchaser has to investigate title and raise objections.

Objections that go to the **root** of title (the vendor's ability to convey and thus the consideration of the bargain) and objections as to matters of conveyance (the manner and form of conveyance, things within the vendor's control) may be made at any time prior to closing. ***Armstrong v. Nason*** (1896), 25 S.C.R. 263.

Objections to title not going to the root of title, (*e.g.*, easements, restrictive covenants) must be made within the time allotted in the annulment clause. As a matter of practice, it is imprudent to rely on an objection going to the root of title rather than ensuring it is made within the time limited by the agreement (or if no time is specified, within the 30 days set out in the ***Vendors and Purchasers Act***).

Objections are divided between matters of title (discussed above) and matters of conveyancing. Matters of conveyancing are those that are within the vendor's power to remove (such as mortgages, unless perhaps the discharge balance exceeds the purchase price) and may be made at any time.

An application may be made to the court with an agreed statement of facts, under the ***Vendors and Purchasers Act,*** R.S.N.S. 1989, c. 487, for a determination as to the validity of an objection to title. See also *Civil Procedure Rules* 13 and 25.

An action may be brought under the ***Quieting Titles Act,*** R.S.N.S. 1989, c. 382, discussed above. Again, note the LRA does not guarantee boundaries or recorded interests and the parcel is subject to overriding interests preserved by the LRA. Particular reference should be made to the standards for certifying possessory title, and the extent to which possessory title is preserved for LRA parcels.

8. Chain of title generally

Currently, and for the foreseeable future, Nova Scotia will be operating under two property systems while the centuries-old *Registry Act* regime is slowly converted (usually on a transaction-driven basis) to a parcel-based Land Registration system. Over half of the parcels in Nova Scotia are now land registered, but this varies substantially throughout the province.

The essential difference is this: The Registry is a names-based system in which title to land and interests therein are indexed, searched and found by a person's name. Thus, John Smith who owns five parcels of land needs to be searched for the whole time he purports to own the land (along with any other John Smith who might have dealings with property in that county at the relevant time). Over time, as more and more people did more and more things with more and more parcels of land, the system became unwieldy. This was aggravated only further by the fact that a full search had to be conducted each time a new solicitor was called upon to work on a piece of land. The solicitor guaranteed title according to usual contract and tort principles, but there was no governmental involvement other than to provide a central repository for documents and an indexing system open to the public.

The Registry is a paper-driven system with physically existing documents in books at county Registries that must be accessed by physical attendance (personally or by hiring a title searcher) each time enquiry is needed. Only some indices are computerized.

Land Registration in Nova Scotia is a much-modified adaptation of Torrens Title, which looks to the current owners and interest holders "on the ground" for a specific parcel of land. The adaption process is the subject of a specific and intensive course by the Barristers' Society (only those who have completed it may become authorized in the system). In a nutshell, one last "old world" search is required and then an authorized user "converts" the parcel to an electronic parcel-based system based on his/her professional assessment of the state of paper title as it exists at the time of conversion. Thereafter, all transactions respecting the parcel are updated by the relevant document (deed, mortgage, release, etc.) and can be accessed anywhere in the world. The historical enquiry is thus eliminated as what appears on the parcel register, not the name index, is what matters, with the exception of judgments (which remain names-based).

Under the ***Land Registration Act***, the state of title is deemed to be a statement of the status of title by s. 20 subject to the restrictions in that section (most notably, overriding interests) and s. 21 (which says that boundaries, location or extent are not guaranteed). That does not relieve the purchaser from an obligation to search the parcel register or judgments (because those remain names-based), and in most cases it will be a vendor who will convert "old world" lands (*i.e.*, those still under the Registry of Deeds regime) to Land Registration.

Because conversion requires one last full historic search and the majority of property will only be converted over time (most often by sales and certain other "triggering" transactions), the standards of title review and of searching remain relevant and will for a long time to come.

It is important to remember that in reviewing title (both Land Registration and non-LRA), you will be held to the standards in force at that time under the *Professional Standards: Real Property Transactions in Nova Scotia* (again in the LRA materials, and on the web at http://www.lians.ca – see discussion at the beginning of the Conveyancing section above.

Attached to, and forming part of, these materials are three papers that provide a very general overview of title searching non-LR parcels in Nova Scotia, by Catherine Walker QC; Benjamin Fairbanks; and Mary Ann McGrath; study them as part of your preparation for the Bar Exam. As noted in the introduction, however, you will be expected to have had actual exposure to "real world" abstracts in your articles; this topic, and that of searching parcels already converted to Land Registration, are covered in more depth in the LRA course.

9. Mortgages

Operation of a mortgage

A mortgage is:

- a contract between lender and borrower setting out the terms and conditions of repayment of a debt; and
- (at common law, and for non-LRA parcels), splitting of title, with the legal title passing to the mortgagee as a security for repayment of the debt while the equitable title (equity of redemption) remains with the mortgagor.

Under the ***Land Registration Act***, S.N.S. 2001, c. 6, however, s. 51, "security interests [including mortgages] do not transfer the title of the land charged by them and do not sever a joint tenancy." Mortgages registered under this Act operate by way of charge rather than transfer of title. All traditional rights and remedies of the mortgagee are preserved by s. 52.

See the *Matrimonial Property Act* previously in these materials, and below, for a discussion of requirements for spousal consent to the mortgaging or disposition of a matrimonial home.

"Once a Mortgage Always a Mortgage"

- A mortgage cannot be made irredeemable – EXCEPTION: Mortgage contained in a debenture: ***Companies Act***, s. 112.
- A collateral advantage (*e.g.*, to buy products) is acceptable while a clog on the equity (*e.g.*, an option to purchase at the end of the term) is not.

Contractual aspects of a mortgage

A mortgage is a contract. One of the essential elements of a contract is that there be privity between

the parties. At common law, once privity is established with a contracting party, that party remains bound under the contract until it is specifically released or until the contract is otherwise determined.

Accordingly, at common law, the original mortgagors (and guarantors) under a mortgage, being in privity of contract with the mortgagee, remain bound to the contractual provisions under a mortgage even though they may no longer be the owners of the land (practically speaking, today, it is often the case that a selling mortgagor will require as a condition of the sale that if the purchaser is to assume the mortgage, such must be completed by formal Assumption Agreement, approved by the mortgagee, and accompanied by a formal Release of Covenant from the mortgagee releasing the seller (the original mortgagor) from the contractual obligations of the mortgage). This is more common in high interest rate environments, where older mortgages at lower rates than the market make assumption attractive to buyers. Similarly, at common law, subsequent purchasers of the land are not in privity of contract with the mortgagee, even though they have bought the land against which the mortgage is secured, unless they enter into an assumption agreement or other agreement with the mortgagee which specifically creates the privity.

Conveyance and security aspects of a mortgage

This aspect of a mortgage is more difficult to understand. In the process of evolution over many centuries, both common law and equitable principles have been applied to it. As a result, a mortgage represents many things which are not apparent upon a simple reading of the document.
All real property mortgages contain a "grant" of land from the mortgagor to the mortgagee. This grant or conveyance is subject to a proviso for redemption. Briefly put, this permits the mortgagor to require a reconveyance of the land by paying off the debt owing under the mortgage.

Initially, at common law the mortgagor had to repay the debt owing under the mortgage on the exact date specified in the mortgage, or the conveyance to the mortgagee became absolute and the mortgagor lost all rights to the land. The courts of equity modified this harsh result of the common law conveyance by allowing the mortgagor the right to redeem the property after the contractual date for redemption had expired. Eventually, this equitable right to redemption evolved into an equitable estate known as the equity of redemption. Because there is only one legal estate in a property, only the first mortgagee can receive a conveyance of the legal estate. Any subsequent mortgage given by a mortgagor cannot then transfer the legal estate to the subsequent mortgagee. Therefore, all subsequent mortgages are equitable mortgages conveying an equitable estate or interest in the equity of redemption. A second mortgage conveys the first right to redeem the first mortgage to the second mortgagee, and in effect, creates a new second right of redemption in favour of the mortgagor to redeem the first mortgage.

As noted, however, under the LRA, mortgages act as a charge on the land, and do not transfer the legal title to the mortgagee.

Form of mortgage

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2:

> The courts, exercising equitable jurisdiction, will sometimes look beyond the outward form of

> a transaction to find that what might appear to be an absolute conveyance or other type of arrangement, might in fact, after appropriate examination, have to be regarded as a mortgage. [See, for example, *Banks v. Elliott and Kwell Farm Machinery Syndicate* (1988), 83 N.S.R. (2d) 198 (T.D.); see 87 N.S.R. (2d) 126 for the assessment of damages and settlement of accounts in this case.]
>
> Such a finding may not always be forthcoming, however, so it is prudent to structure any lending agreement in such unmistakably clear terms that there can be no doubt as to the nature of the transaction.

In practice, the Nova Scotia Farm Loan Board commonly takes title to the subject property, then reconveys it when the debt is repaid. The Director of Veterans' Land Act also did so, but this is now uncommon (and the DVLA had the advantage, at least in the absence of a conflict with provincial law, of being a root of title).

Sharia-compliant mortgages (instruments that comply with the Muslim prohibition against charging or paying interest) are a very specialized product that are still rare, but not unknown, in Nova Scotia. Pay special attention to their restrictions on redemption, sale and the like.

> Vol. 2, at 191, a mortgage document may contain some of the following items:
>
> ***a. The mortgagor***
>
> At section 12.2A.1 MacIntosh QC states: "All persons who sign a mortgage in the capacity of mortgagor not only encumber their interest in the lands described, but generally bind themselves to repay the mortgage. Care should be taken to ensure that only the required parties sign in the capacity of mortgagor."
>
> Under the ***Matrimonial Property Act***, a non-owing spouse may be a signatory and give written consent to the transaction in his or her capacity as a spouse without incurring a liability to repay the mortgage. When the time comes for renewal of the mortgage, the lawyer should carefully examine form documents provided by the mortgage company to ensure that a non-owing spouse who was not previously liable on the covenant to repay does not become liable due to the wording of the mortgage lender's standard renewal form (however, in the vast majority of cases a lawyer is not engaged by mortgagors at the time of routine renewals, and thus the opportunity for review of the documents and advice to the client does not arise).
>
> *Nova Scotia Real Property Practice Manual*, MacIntosh QC s. 12.2A.1
>
> ***b. Mortgagee***
>
> MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.2:
>
> > The name of the lender should be clearly set out in the mortgage. While the courts have given effect to documents which lack completeness and even omit names of

> parties [see *General Trust & Executor Corp. v. Bishop* (1933), 7 M.P.R. 79 (N.S.C.A.)], this important question should not be left open to speculation. Therefore, if the mortgagee is an individual, the full name, address and occupation should be set out. If the mortgagee is a corporation, the correct name should be included in the mortgage document as well as the location of the office in the locality where payments are to be made. If there is more than one [individual] mortgagee, it is good practice to suggest that they take as joint tenants and not as tenants in common so as to avoid the necessity at some future date of taking out probate or administration in order to obtain the authority necessary to execute a release of the mortgage.

c. Proviso for redemption

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.3:

> A mortgage is executed to secure to land certain obligations entered into by the mortgagor. While generally it is the promise to repay money borrowed, it may be a guarantee to ensure the payment of money by another, or it may be a promise to complete the construction of a road. Sometimes a mortgage is used to secure obligations arising from family arrangements. A typical example is the so-called "Maintenance Mortgage", which is usually executed following conveyance to younger family members of a property in return for which the grantees enter into a mortgage guaranteeing that they will "maintain, lodge and clothe" the older persons during their natural lives. Such a mortgage is enforceable. One such document was interpreted as requiring the lodging to be performed at the home of the mortgagors. [See *Bouchard v. Gauvin* (1950), 25 M.P.R. 173 (N.B.C.A.).]

d. Interest

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.4:

> The rate of interest should be clearly set out in the repayment clause. The special requirements of the ***Interest Act*** [R.S.C. 1985, c. I-15] should be closely examined to ensure compliance with s. 6. Unless it is clearly set out in the mortgage, no interest is chargeable after the maturity date of the mortgage [see *St. John v. Rykert* (1884), 10 S.C.R. 278], so care should be taken to ensure that a provision is inserted in the mortgage to state that interest at the stipulated rate is chargeable after, as well as before, maturity.

Restrictions on interest and payment are set out in the ***Mortgage Brokers' and Lenders' Registration Act***, R.S.N.S. 1989, c.291; ***Interest Act***, R.S.C. 1985, c.I-15.

- No interest is payable unless the annual interest is stated.
- Parties are free to set whatever interest rate they like, but rates over 60% may be subject to both criminal prosecution and civil recourses by the debtor under the *Criminal Code* and

the *Unconscionable Transactions Relief Act*, R.S.N.S. 1989, c. 481; see ***Olympic Enterprises Ltd. v. Dover Financial Corp***. (1995), 149 N.S.R. (2d) 239; ***Oceanus Marine v. Saunders*** (1997), 175 N.S.R. (2d) 153 (S.C.).

- If there are blended payments, the equivalent annual interest rate compounded semi-annually must be shown, or referred to (e.g., it is common in variable rate mortgages to show the current monthly rate, the semi-annual equivalent, and the method by which the rate varies – with or without a table of semi-annual equivalents as an appendix).
- Residential mortgages may be paid out after a maximum of five years with a maximum three-month interest penalty; however, if the borrower enters into a renewal agreement, the Supreme Court of Canada has interpreted the renewal as an amendment to the mortgage, which starts a new five-year period (***Royal Trust Co.* v. *Potash***, [1986] 2 S.C.R. 351).
- A mortgage executed after 30 June 1985 and silent with regard to prepayment can be prepaid without penalty at any time. The mortgagor under a residential mortgage which is subject to the ***Mortgage Brokers and Lenders Registration Act*** (*i.e.*, residential mortgages not governed by the ***Bank Act***) may, instead of obtaining a discharge, may on payment of a fee (currently not exceeding $25) require the mortgagor to assign the mortgage

Nova Scotia Real Property Practice Manual, MacIntosh, s.12.5.

e. Entry or sale on default

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.5:

> Most mortgages in Nova Scotia contain a clause entitling the mortgagee to enter the lands in the event of default by the mortgagor. A number, prepared for general use throughout Canada, contain a clause authorizing the mortgagee to use power of sale as a remedy. Neither of these procedures is appropriate, since the normal method of enforcing the security in Nova Scotia is by way of foreclosure and judicial sale. People from other parts of Canada are often unaware of this distinction, and it is often necessary to explain the special Nova Scotia foreclosure process to mortgage managers in other parts of the country.

f. Description of lands mortgaged

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.6:

> The same general rules apply to a mortgage as to a deed with respect to the degree of precision which is required in the description of lands contained in an indenture.
>
> In some cases, the doctrine of equitable mortgage will apply to cover a defect, but generally, a realty mortgage will not cover property not covered and charged by the mortgage. [See *Continental Bank Realty Corp. v. Woodbury*, (1984), 63 N.S.R. (2d) 119 (T.D.).] In an appropriate case, the Court will rectify the mortgage document so as to include part of a lot that is intended to be mortgaged but is not owned by the mortgagor at the time the mortgage was executed, being acquired by him at a later

> date. [See *Continental Bank Realty Corp. v. Woodbury*.] In the case cited, the Court amended the mortgage so as to grant to the mortgagee an easement over a strip of land which the house in question covered, and which had not been included in the original mortgage since the mortgagor had not owned it at the time the mortgage was signed.

The **Land Registration Administration Regulations** permit LR documents to describe the property by PID. The editor, however, considers preferred practice to be the approved description. General considerations respecting descriptions are contained elsewhere in these materials.

g. Equitable mortgages

MacIntosh QC states as follows in the *Nova Scotia Real Property Practice Manual*, s. 12.2A.7:

> Not all mortgage transactions are documented by means of a normal mortgage format. This may not be fatal to the character of the transaction if the court finds, on equitable grounds, that the contract should be treated as one of conveyance subject to a proviso for redemption of the property concerned. The courts may decide that such a situation exists in circumstances where there has been no conveyance of the legal estate but instead the creation of an equitable charge on the property. Very convincing evidence is required before they will arrive at this conclusion. [See ***Pierce v. Empey***, [1939] S.C.R. 247.] This may occur when there has been a deposit of title deeds only without execution of a proper mortgage instrument, or where the mortgage itself is defective in failing to convey the property in question.

Nova Scotia courts have made use of this doctrine in a number of instances.

Examples include "mortgages" that omitted the defeasance clause, deeds that were in fact a conveyance used to secure a loan, a conveyance used so a subsequent grantee could secure a loan (then advanced to the original owner), and mortgages that intended to include but mistakenly omitted a particular lot.

Equitable mortgages may also be found to exist in circumstances where a party has agreed to give security, but either has not done so or the security is defective for some reason – for example, where all owners have signed a mortgage commitment, but a signature is missing from the actual indenture.

Covenants in mortgage

Review a sample mortgage document and in particular, the covenants of the borrower. In considering the covenants, refer to the ***Conveyancing Act***, R.S.N.S. 1989, c. 97.

In essence, a mortgage is a promise to do four things:

1) repay the principal and interest, on the terms set out in the mortgage and subject to any

prepayment penalty set out therein;
2) keep the property insured for its full value, with loss payable to the financial institution;
3) pay taxes, charges, and anything else that can form a lien at law in priority to the mortgage; and
4) keep the property in good repair and not commit waste.

Other common covenants are prohibitions on rental, maintaining of Canadian residency, advising the mortgagee of change of name or marital status, and prohibitions against secondary, take-back, or other financing.

Default of payment

Upon default, the standard acceleration clause makes the total debt secured by the mortgage due and payable immediately at the option of the mortgagee. What obligations are and are not secured will depend upon the scope of the security and loan agreements (so, for example, a mortgage for a specific loan would not include a delinquent credit card with the same institution, but a collateral mortgage that secures all debts and liabilities would). For example, the loan language in ***Scotia Mortgage Corporation v. Misener***, 2016 NSSC 66 was insufficient to capture a cashback payment, despite default and provision for repayment of the cashback in certain other circumstances.

By order of the court, the mortgagor's equitable title (or right to have the charge removed against the lands, as the case may be) is foreclosed. Title continues in the name of the mortgagor, both in terms of LRA registrations and at common law (***Pew v. Zinck***, [1953] 1 S.C.R. 285), but the foreclosure order is recorded as notice of the default and impending sale. It can be removed if the mortgage is paid out or brought back into good standing; if, however, it proceeds to sheriff's sale, the sheriff's deed is then recorded and the title registered in the name of the purchaser, "foreclosing" or extinguishing the title of the borrower or any person claiming by or under them (such as a subsequent title holder).

Deficiency judgment may be had against the mortgagor should the sale of the property not realize an amount at least equal to the balance owing plus costs, subject to the conditions laid down in the *Civil Procedure Rules*, and subject to the inherent jurisdiction of the court to determine equitable results. For example, sales for less than market value, unnecessary or excessive disbursements, or improvident decisions may lead a court to recalculate or refuse deficiency claims. The title confirmed in the mortgagee is that of the mortgagor on the date the mortgage was executed; prior encumbrances remain effectual while subsequent charges will not encumber the land sold. MacIntosh, *Nova Scotia Real Property Practice Manual*, s. 12.

The mortgagor may redeem the property by making full payment (principal, interest, and costs) anytime until the moment of sale.

Mortgagees have other options on default, other than foreclosure and sale. These other options include:

1. The mortgagee may elect to take title to the mortgaged property by quit claim deed, rather than proceed to foreclosure and sale; however, this option would only be feasible if the title is clear of subsequent encumbrances to the mortgage. The mortgagee cannot be forced to take a quit claim deed instead of foreclosing; this option is completely at the mortgagee's discretion. In practice, whether or not a mortgagee does so will depend on a number of factors, including

subsequent encumbrances, the likelihood of recovery on a deficiency, and whether or not the property is insured against default under the *National Housing Act* (a/k/a CMHC).

2. Attornment – By this clause, the borrower in default becomes the tenant of the mortgagee, responsible for rent in the amount of the mortgage payments. The idea is that the mortgagee can use landlord and tenant processes to collect arrears and evict the mortgagor/tenant. Changes to the landlord/tenant laws in recent years have resulted in such clauses being of little use to mortgagees, and attornment clauses are now rarely found in Nova Scotia mortgages.
3. Assignment of Rentals – As opposed to using attornment clauses, the current practice in appropriate cases is to have the borrower execute an assignment of rentals. The mortgagee can then require any tenants of the borrower/landlord to pay their rent to the mortgagee in the event of default, while the borrower/landlord remains responsible to the tenants for other duties.
4. Action on Covenant – Most mortgages bind the mortgagor to pay the mortgage out of his or her personal estate. Whenever the mortgagor is in default, the mortgagee may sue for arrears. If the security is of questionable value, but the borrower has other assets, the mortgagee may choose to sue for arrears, rather than to foreclose on the security. In theory, the mortgagee may choose to commence separate actions as each payment becomes due, thus, maintaining the original terms of mortgage, or the mortgagee may accelerate the mortgage, treat the entire sum as due, and sue on this full amount. Mortgagees may also place their mortgagors into bankruptcy or take an action on a guarantee.
5. Entry – The mortgagee may choose to take possession of the mortgaged property, usually done in Nova Scotia to preserve the physical condition of the premises when abandoned by the owner. The mortgagor loses management and control of the property; thus, the mortgagee takes on the following responsibilities:
    a. The mortgagee in possession must manage the property in a prudent manner and be reasonably diligent in obtaining rents and profits therefrom.
    b. The mortgagee becomes a trustee of the property for the owner and can be held liable for mismanagement or ordinary negligence if proper measures are not taken to guard against freeze-ups, flooding and similar damage to the building. (Editor's note: A mortgagee in possession who does not maintain adequate insurance may not be able to claim the resultant shortfall as a deficiency: **Bridgewater Bank v. Viner**, 2019 NSSC 363)
    c. The mortgagee in possession must account for the rents received by him.
    d. A mortgagee in possession is liable to maintain the property in reasonable repair insofar as the revenue from the property permits and is liable for waste or for inappropriate improvements.

[C.W. MacIntosh QC, *Nova Scotia Real Property Practice Manual*, pages 12-81 to 12-83]

In addition to the remedies cited above, a Court may also order "simple foreclosure" rather than foreclosure, sale, and possession. The distinction is that there is no public sale, simply an order declaring the mortgage in default and then a subsequent order, after notice to the owner, ratifying possession. At present, this is not commonly used, but it is available should a mortgagor simply wish to shortcut the auction process, presumably in circumstances where it does not anticipate a greater recovery or recovery on a deficiency: ***CIBC Mortgages Inc. v. Dima Estate***, 2019 NSSC 61, per Campbell, J.

Note the following restrictions on foreclosure:

a. A mortgage can be reinstated – once – under the ***Judicature Act***, s. 42 upon it being brought up to date with interest and costs. "A day late and a dollar short" will work once, but not twice, during the term of the mortgage with Court approval. This only applies to mortgages that are not payable on demand or which are not collateral mortgages: ***Canadian Imperial Bank of Commerce v. Hurlburt***, 2008 NSSC 408, per Warner, J.
b. Equitable relief against forfeiture, including unconscionable transactions, duress, non est factum, lack of independent legal advice (e.g., mortgages to support guarantees, mortgages solely to benefit one co-mortgagor. See, e.g., ***MacKay* v. *Bank of Nova Scotia*** (1994), 20 O.R. (3d) 698 (S.C.); ***Landry v. Tivey***, 2014 NSSC 426, in which the spouse proved she was induced to sign as releasor for the sole benefit of her estranged spouse, and not as a co-borrower.
c. In respect of agricultural properties, see the ***Farm Debt Mediation Act***, S.C. 1997, c. 21.
d. General debtor-creditor law including proposals under the ***Bankruptcy and Insolvency Act*** and the ***Companies' Creditors Arrangement Act***.
e. Part Performance – see discussion under **Statute of Frauds**.

The practice respecting foreclosures in general has been significantly modified as of January 2009 with the "new" *Civil Procedure Rules*, and reference should be made to those materials for the required "mechanics" of judicial sales; case law turning on the wording of the former Rules should be scrutinized accordingly.

The *Matrimonial Property Act*

At section 5.4E, MacIntosh QC states: "Generally, neither spouse can dispose of or encumber any interest in a matrimonial home without the consent of the other spouse": see ***Matrimonial Property Act***, R.S.N.S. 1989, c. 275, s.8(1). This includes common law and same sex couples **if** they register their relationship with Vital Statistics (pursuant to the changes in the *Act* brought about by the ***Law Reform (2000) Act***, proclaimed June 4, 2001).

MacIntosh QC goes on to state: "There are exceptions when there has been a separation agreement releasing rights to the property or where a court has either authorized the disposition or encumbrance, or has granted an order releasing the property as a matrimonial home [s.8(1)]. Such court order must be obtained before the transaction takes place." [See ***Mills v. Andrews*** (1982), 54 N.S.R. (2d) 394 (T.D.).

Spouses may have more than one matrimonial home [s. 3(4)].

MacIntosh QC continues:

> Where there has been registered in the Registry of Deeds the designation of another property as the matrimonial home of the spouses and the property in question is not designated as a matrimonial home, then the owning spouse may dispose of or encumber the property without the consent of the other spouse.
>
> The effect of a disposition contrary to the provisions of s.8(1) of the ***Matrimonial Property Act*** is that the transaction can be set aside at the instance of the non-consenting spouse. It has

been held that a transaction which lacked the necessary consent is void, but an innocent purchaser for value without notice of the fact that the property was a matrimonial home may be protected by the provisions of s.8(2).

The statute sets up a mechanism whereby a purchaser may protect himself against buying a title subject to matrimonial interest. An appropriate affidavit of marital status is sufficient proof of the fact that the property is not a matrimonial home [s.8(3)].

This affidavit must be made by the person making the disposition. It would appear that an affidavit from any other person, or from a person holding a power of attorney from the owner, does not satisfy the requirements of the section.

Several problems have arisen from the application of this section in actual practice:

There is no specific requirement in the section that the affidavit be made on the same date as the deed or mortgage, but a prudent solicitor for a purchaser should demand an affidavit made shortly before the closing and dated the same day as the document or later.

When acting under a power of attorney, some solicitors proceed to execute the affidavit of marital status. This does not appear to comply with the precise requirements of the section. Others obtain an affidavit of status and append it to their power of attorney. This may be dated days or months prior to the closing. Because it is made before the deed or mortgage, such an affidavit cannot comply with the requirement that it state that "the person is not a spouse *at the time of making* the disposition or encumbrance." [s.8(3)(a)].

In Ontario, this difficulty has been addressed by a special section authorizing the holder of a power of attorney to make the necessary affidavit.

Corporations fall into a special category. Ownership of a share in a co-op housing corporation is made an interest in matrimonial property [s.3(3)]. It is the practice to require deeds and mortgages from any corporation to be accompanied by an affidavit negating this possibility.

A New Brunswick County Court Judge has held that in that province in the case of corporations such an affidavit is not required [see ***Jost v. Gomagan Gun Club Inc***. (1983), 54 N.B.R. (2d) 353 (Q.B.)], but until a Nova Scotia court rules on this matter, it would probably be wise to continue this present practice.

Note that where spouses are co-tenants, both must sign as principals if the intent is to mortgage the entire interest in the home. In ***Royal Bank of Canada v. Fraser*** (1994), 139 N.S.R. (2d) 27 (S.C.), where the wife was a co-tenant in her own right but signed the mortgage only as “spouse of mortgagor,” the bank was not allowed to foreclose against her share. Note too that signing as a spouse only (*i.e.*, as releasor but not as mortgagor or guarantor) does not render the spouse liable on the covenants under the mortgage.

Mortgage fraud

Unfortunately, mortgage fraud is one of the fastest-growing problems in property practice, and recent economic downturns have only exacerbated this. New practitioners, inexperienced in transactional

environments, are special targets for fraudsters. So, a note on this phenomenon is warranted in these materials despite its status as a practice (rather than purely substantive law) issue.

For additional resources, see the Risk and Practice Management: Fraud section of the LIANS website.

VII. RECORDING

1. Title Registration - The Registry Act, *R.S.N.S. 1989, c.392 as amended & the* Land Registration Act*, S.N.S. 2001, c. 6 as amended*

General Purpose – The general purpose of title registration/recording is to provide notice of ownership and other interests with respect to property, as well as to establish priority among documents.

2. Registry Act

Operation

Documents may be registered in the appropriate registration district with the required proof of execution.

Documents are time and date stamped ensuring that the order of registration is clear.

Effect of registration

An instrument or document of conveyance is valid as between the parties on execution, but may be defeated by a subsequent instrument unless it is registered. That is, registration confers priority: S. 18 ***Registry Act***.

Indices

Instruments and documents are registered and indexed in one or more alphabetical indices:

grantor/grantee
An index of all who give or receive an interest (*e.g.*, mortgagor/mortgagee, grantor/grantees, assignor/assignee).

judgment
An index of judgment creditors and judgment debtors

expropriation
An index of expropriations by expropriating authority and landowner (smaller registries combine these with the GGI and are generally combined in online searches).

condominium
An index of condominium corporations; conveyances by unit owners are found in the grantor/grantee index (See CONDOMINIUMS).

Plans

Plans may be filed in the Registry of Deeds. For their use and effect, see types of instruments above.

Condominiums

Only freehold land can be converted into a condominium; leasehold properties do not qualify. To create a condominium corporation, the owner must file with the Registrar of Condominiums, a declaration, a description, an Abstract of Title, a plan of survey, proposed by laws and in some instances common elements rules. Section 6(3A)(c) of the ***Condominium Act*** also states that "any information that the Registrar thinks is necessary for the purpose of the submission" shall also be submitted.

Before a condominium corporation is created, title to the property must be certified and all encumbrance holders must consent. New condominium corporations must be created under the ***Land Registration Act***.

Units in condominiums are fee simple realty and the owner of each is also a tenant in common owner of the common areas, along with all other unit holders.

Unit holders are members of the condominium corporation which administers the property through a board of directors.

The corporation collects monthly common fees from unit holders and can levy special assessments.

The condominium corporation can lien a unit for non-payment; the lien takes priority over other encumbrances except taxes or power bills [s. 31(6) and (7)] and if it remains unpaid, may result in foreclosure and sale of the unit. The lien must be recorded in the Land Registry in order to be a charge against the unit [s. 31(7A)].

Condominium corporations will, generally for a fee, issue estoppel certificates certifying as to the status of common fee, special assessment and reserve fund accounts for use for adjustment/credit purposes on closing.

VIII. LANDLORD AND TENANT

1. General

The relationship of landlord and tenant is at common law a contractual one wherein a landowner allows another to exclusively possess realty, for a fixed or ascertainable period of time, usually but not necessarily at a rent.

In addition to privity of contract, they share privity of estate, the tenant having a leasehold interest, the landlord a reversionary interest.

2. Types of tenancy

Tenancies may be for a fixed term; periodic (weekly, monthly, yearly); for life (for the life of the tenants); a tenancy at sufferance (a tenant remaining after the lawful right to do so has expired); or a tenancy at will (occupation by a tenant at the will or pleasure of the landlord). Tenancies at will do not exist for residential circumstances; in the absence of a current written lease, there is deemed to be a month-to-month tenancy on the terms set out in the prescribed form of lease under the ***Residential***

Tenancies Act.

3. Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended*

There is a standard form lease under the *Residential Tenancies Act*; however, s. 8(1) of the Act states that landlord and tenants may provide for additional benefits and obligations that do not conflict with the Act.

The Act does not apply to commercial occupancies, raw land, occupancy under an agreement of purchase and sale, hotels, homes for special care or university residences but does apply to rooming houses.

Minors are bound to leases they enter into, if a "necessity of life."

A landlord may not dispose of a tenant's personal property, with very limited exceptions in the case of perishables, without first receiving an order from the Director of Residential Tenancies.

Landlords must provide at least one tenant with a copy of the Act and a copy of the lease signed by both landlord and tenant; failure to do so results in the tenant's right to give notice they will deliver up possession within three months (Subsection 7(3)) (they can also pay rent to the Board in trust, with approval of the Director of Residential Tenancies):

- at any time if a copy of the Act or the lease has yet to be supplied, or
- within one month after its receipt.

When no written lease has been provided (and thus there is deemed to be a month-to-month lease), this section means that a tenant can give any length of notice – even one day – of when they will terminate the lease; and this prevails over the one month's statutory notice otherwise: ***Crane v. Arnaout,*** 2015 NSSC 106.

The Director under the Act has original, but not exclusive jurisdiction, to hear disputes arising out of the Act, both in contract and in tort; the Supreme Court has concurrent jurisdiction, both in contract and in tort: ***Roumeli Investments Ltd. v. Gish***, 2018 NSCA 27; note that this concurrent jurisdiction is of the RTB and the Supreme Court and does not extend that concurrency to the Small Claims Court: ***Johnson v. Sarty***, 2019 NSSM 17. Appeals from Small Claims are to the Supreme Court and usual appeal rules, including those respecting fresh evidence, apply: *Luke v. Chopra*, 2019 NSSC 145

Statutory conditions apply to every residential tenancy, notwithstanding any lease, with respect to:

- condition of the premises: the landlord's obligation to keep the premises in a good state of repair and fit for human habitation; in the event of a breach, the tenant may vacate and there is no requirement to give the one-month's notice to quit: ***Osmond v. Burt***, 2014 NSSC 272;
- services: the landlord may not discontinue the provision of included services without proper notice of a rent increase or permission of the Director;
- good behaviour: neither landlord or tenant may interfere with the occupancy of the tenant or landlord and other tenants; this includes nuisance by the landlord eg. for renovations: ***3010282 Nova Scotia Ltd. v. MacNeil,*** 2018 NSSM 1; however, incidental or "bad behavior

at times" will not result in eviction except in egregious circumstances: ***Majak v. Metro Non-Profit Housing Association***, 2018 NSSM 59. The landlord may set rules not inconsistent with the Act or Regulations: RTA s. 9A

- obligation of the tenant: the tenant's obligation to keep the interior of the premises in a state of ordinary cleanliness and for repairing damage caused by wilful or negligent act of the tenant or their guests;
- subletting: a landlord may not unreasonably withhold permission to sublet; a creditor who retakes possession of a mobile home is not, in and of that act alone, a "subtenant" or assignee with a corresponding obligation to pay rent: ***Bank of Montreal v. Park***, 2016 NSSM 39
- abandonment and termination: if the tenant abandons the premises or terminates the tenancy, the landlord must mitigate damages;
- entry: the landlord may only enter the premises at reasonable times with notice (emergencies excepted);
- entry doors: neither landlord nor tenant may change the locks without the consent of the other;
- late payment penalty may not exceed one per cent of the monthly rent.

Notwithstanding any agreement to the contrary, notice to quit may only be given:

- in a year-to-year tenancy, three-months' notice by the tenant;
- in a month-to-month tenancy, one month by the tenant;
- in a week-to-week tenancy, one week by the tenant.

If rent is in arrears for 15 days or more, the landlord may serve a notice to quit on 15 days' notice. If the rent is brought up to date within that time, the notice to quit is void.

Tenants have certain abilities to terminate leases in the event of

- proven medically induced reductions in income or suitability of the premises: Ss. 10B, 10C – the "medical termination" must be exercised in good faith and not just as an excuse to "get out of a lease" – *Arab v. M.B.*, 2016 NSSM 51; *GNF Investments Ltd. v. Rossell*, 2015 NSSM 54; ***GNF Investmetns Ltd.v. Whitman and Lang***, 2017 NSSM 35 the health issue does not, however, have to have arisen as a result of issues with the demised premises: *GNF Investments v. Vriend*, 2016 NSSC 116. Whether or not there is good faith may call for an investigation of the inquiry, if any, made by the physician signing the certificate (see, *in obiter*, ***Fei*** v. ***Liu***, 2017 NSSM 44) In the editor's opinion, the requirement of bona fides likely also applies to the termination provisions below;
- admission to a home for special care: S. 10D, or
- an instance of domestic abuse certified by the Director of Victim Services: S. 10F.

Security of tenure: Tenants under a periodic (ie non-fixed term) lease have immediate tenure (previously five years' occupancy). Notice to quit may only be given if:

- the premises have become uninhabitable;
- the premises are leased by an institution to students and the tenant is no longer a student, or by an employer to an employee and the tenant is no longer an employee;
- the tenant is in default (and in the case of unpaid rent, notice to quit has been given and the "grace" period has expired);

- the landlord will be demolishing the premise or requires them for his or his family's residence;
- deemed appropriate by the Director of Residential Tenancies.

Rent may only be increased once in a 12-month period. A change in a subsidy payable to reduce the portion of a tent payable by a tenant as opposed to payable by a third party is not rent increase, if the actual gross amount payable under the lease has not changed: ***McIntosh Run Housing Co-Operative v. MacIntosh***, 2018 NSSM 58.

A landlord may not require a security deposit of more than one half of one month's rent and must return it, along with interest, unless ordered otherwise. The deposit must be held in an interest-bearing trust account or permitted interest-bearing investments and if the property is sold, the deposits must be transferred (not adjusted for as part of the adjustments to the purchase price). This must be obtained at or after the lease is entered into, not before or as an application fee, liquidated damages for failure to complete a lease, or otherwise: RTA s. 6(1); ***Musgrave v. Templton Properties***, 2016 NSSM 6, and cases cited therein.

If the parties cannot resolve a dispute on their own, they can contact the Residential Tenancies Program for assistance. Section 13 sets out that the landlord or tenant can file an application with the Director of Residential Tenancies to determine a question arising under the Act or to allege a breach of lease or a contravention of the Act, as long as they file not more than one year after the termination of the lease. The application must be served on the other party or parties. A settlement entered into before the Director is binding on the parties, even if one party does not comply with their end of the settlement: ***Walton v. McDow***, 2017 NSSM 69.

Remedies

The ***Residential Tenancies Act*** provides for remedies after the filing of the application. The parties may mediate the dispute, if both agree. If not, the matter proceeds to a hearing, which is informal. No hearing is required in the event of an "expired" rental default (*i.e.*, in default for more than 15 days, notice to quit given, and the time period expired without payment). Orders are appealed to the Small Claims Court. The Small Claims Court adjudicator only has the same jurisdiction as to complaints and remedies that the Residential Tenancies director had: *Killam Properties Inc. v. Frail*, 2009 NSSC 419; *Kearley v. Eastern Mainland Housing Authority*, 2016 NSSC 61.

4. Commercial leases

Commercial leases are subject to common law contract rules. (See CONTRACTS) They do not have a statutory regime like the ***Residential Tenancies Act*** has for residential leases. There is limited statutory oversight pursuant to the ***Tenancies and Distress for Rent Act*** and ***Overholding Tenancies Act.***

Nature of leasehold

"The estate in real property of a lessee, created by a lease. … A leasehold interest is personalty and not real property" [a chattel real] ". … It generally refers to an estate whose duration is fixed but may also be used to describe a tenancy at will, periodic tenancy, etc." John A. Yogis QC in the *Canadian Law Dictionary*, 2nd ed., at page 128.

Lease terms

Main terms of a commercial lease include:

- rent;
- description of the premises;
- period of time the lease is to run, or the term;
- commencement of the term;
- nature of work that the landlord or tenant may be contributing to the premises;
- restrictions on the use of the premises;
- other essential business terms.

Since, at its nexus, a lease is a particular form of contract, general contract principles apply except where modified by legislation. Accordingly, a commercial lease is subject those same principles; so, in ***Archibald v. Action Management Services Inc.,*** 2015 NSCA 103, where the parties agreed to settle rent arrears and end a written lease, but the tenant then stayed for another eight months, the Court enforced the agreement and held that the continued occupancy did not resurrect either the debt or the lease, but was a new tenancy at will.

Similarly, in ***Soup Pot Ideas Inc. v. Urban Spaces Limited***, 2015 NSSC 317, the Court used general contract interpretation principles in (a) admitting evidence of verbal amendments and consents when no written consent was obtained as called for in the lease and (b) taking into account the conduct of the parties as a whole in determining proper lease interpretation and whether a default had occurred.

In ***Elm Investments Ltd. v. Brown***, 2018 NSSM 96, it was found that entering into the premises, conducting renovations, and carrying on business was a "part performance" in pursuance of the contract so as to remove the requirement of writing under the *Statute of Frauds*. The result was a tenancy at will.

Tenant obligations

The tenant has certain duties/covenants, the breach of which gives various remedies to the landlord. (As set out in *Anger and Honsberger Law of Real Property*, 2nd ed., vol.1 at pages 235-252):

- **Repair of the Premises**: The tenant may covenant to repair the premises. If there is a general covenant to repair, it refers to the condition of the premises at the time of letting, and the tenant must keep the premises in substantial repair. If, however, the tenant covenants to keep the premises in good repair, and to give up the premises at the end of the lease in good repair, order and condition, the tenant must give up the premises in that condition (subject to the age and class of the premises and subject to reasonable wear and tear), and not in bad condition, even if that is how the tenant found them initially. If the tenant breaches a covenant to repair, the landlord may claim damages for the decrease in the value of the reversion because of the non-repair.
- **Use of the Premises**: If there is not an express covenant respecting repair, there is an implied covenant that the tenant will use the premises in a tenant-like manner, and that the tenant will not commit waste on the premises. In most cases, parties contract out of provisions regarding waste.

- **Rent**: The tenant must pay rent to the landlord. At common law, the landlord may ***distrain*** for arrears of rent. However s. 2 of the ***Tenancies and Distress for Rent Act***, R.S.N.S., c. 464 limits this right as: "No distress for rent shall be made unless there is an actual demise at a specific rent." Note that at common law, forfeiture of the premises and distraint for rent are mutually exclusive. Changing locks constitutes forfeiture. Many commercial leases override this by contract, allowing for both.
- **Legal Purpose:** There is an implied term that the premises be used for a legal purpose.

Landlord obligations

The landlord has certain duties/covenants, the breach of which gives various remedies to the tenant. (As out in *Anger and Honsberger Law of Real Property*, 2nd ed., vol.1, p. 235-252):

- **Possession of the Premises**: The landlord must put the tenant into possession of the premises. If the landlord does not provide possession, and there is a written contract, the tenant may commence an action. The tenant may only commence an action on a verbal lease if the term does not exceed three years (***Statute of Frauds***, R.S.N.S., c. 442, s.3).
- **Quiet Enjoyment**: The landlord must provide quiet enjoyment, meaning that the landlord is providing " 'an assurance against the consequences of a defective title, and of any disturbances thereupon', together with an assurance that the enjoyment of the premises will not be substantially interfered with, or caused by the lessor, or those claiming under him" (p. 236-7). In the event of breach, the tenant may ask the court for an injunction if damages are an insufficient remedy.
- **Adjoining Property**: The landlord must refrain from activities on adjoining property that will derogate from the grant to the tenant.
- **No implied covenant as to Fitness for Purpose**: At common law, the tenant takes the premises subject to any existing or subsequently arising defects and there is no implied covenant by the landlord as to fitness for purpose. (The one exception at common law was premises furnished for habitation.) There may be express covenants to the contrary.
- **Repairs/Improvements**: In the absence of express covenants, commercial landlords are not required to repair and improve the property. They are not responsible for losses suffered by tenants, or their customers or guests, due to any defective condition of the premises (except for dangerous premises). However, if there is such a covenant and the landlord is in breach, the tenant may claim damages (after giving notice) for:

  > "…the difference in value to the tenant during the period of non-repair, after notice, between the premises in its unrepaired condition and its repaired condition if the obligations under the covenant have been met. The tenant can also recover for damages caused to his personal property, and for direct losses such as loss of profit by the breach of covenant. If the landlord is in breach of his covenant, there is no duty on the tenant to repair so as to minimize loss. However, in the case of minor repairs the tenant may, after the elapse of a reasonable time, after the giving of notice of non-repair, make the repairs and deduct the cost thereof from his rent." (p. 242-243)

  The actual lease provisions, naturally, can specify what are or are not the parties' obligations respecting the physical premises. Except as otherwise provided in a lease, in the event that a landlord is responsible for damages, the tenant is not obligated to claim any insurance

coverage by way of abatement or mitigation.

- **Dangerous Defects**: There may be a duty on landlords, however, to take reasonable care to remedy defects that are a source of danger and damage to a tenant, although the landlord is not under a duty to disclose the defect. There are conflicting authorities on this point.
- **Occupiers' Liability**: If a landlord is responsible for the maintenance or repair of premises, then the landlord owes the same duty as the occupier to each person entering the premises: The duty to ensure that the person is reasonably safe while on the premises. ***Occupiers' Liability Act***, S.N.S. 1996, c. 27, s. 9.
- The landlord must use reasonable care to keep means of access to the premises in reasonable condition.

Assignments and subleases

A tenant may need to sublet or assign its lease, especially if the tenant is selling its business.

- **Landlord's Consent**: Most commercial leases require the landlord's prior written consent to a lease transfer. If the landlord's lease form provides that the landlord may unreasonably withhold its consent, it is vital that counsel for the tenant negotiate this provision and seek a change so that consent cannot be unreasonably or arbitrarily withheld. Otherwise the landlord may simply say "no" to any proposed transfer.
- **Option to Terminate if Lease Transfer Requested**: Another common clause in commercial leases permits the landlord to terminate the lease if the tenant makes a request to transfer the lease. This clause may hamper the tenant's ability to sell the goodwill built up in its location. In most cases landlords will agree to delete this provision, or will permit a tenant to withdraw its request for an assignment and remain in possession of the premises.
- **Deemed Transfer**: It is important to provide in the lease that change in control in the voting shares of the tenant will be deemed a transfer of the lease. The landlord will not wish to have the transfer prohibition circumvented through a sale of a corporate tenant. On the other hand, counsel for the tenant should ask that the change in control provisions do not apply to a *bona fide* reorganization, to transfer of shares to related parties or to other existing shareholders pursuant to a buy-sell agreement.
- **Clauses to Consider**: When acting for a tenant, it is important to review the lease for

    - provisions regarding the increase of the rent on a transfer of the lease;
    - guidelines which the landlord has listed as grounds for withholding consent;
    - tenant obligations if the sub-tenant or assignee fails in its business and the lease goes into default.
    - The tenant should try to obtain the right to transfer its lease to an associated or affiliatedcompany or as part of a *bona fide* financing, without the landlord's consent.

5. Tort liability of landlord and tenant

At common law landlords had no duty (subject to limited exceptions) to make the premises safe, and they were not liable in tort. Today there are exceptions to this rule, such as the ***Occupiers' Liability Act***, S.N.S. 1996, c. 27. Additionally many leases contain landlord covenants, such as covenants to repair. In that case the landlord owes a duty of reasonable care.

Tenants may also be liable in tort as occupiers under the ***Occupiers' Liability Act***. (see TORTS).

IX. PROPERTY ISSUES ON RESERVE

Collective nature of title on reserve

A "reserve" is defined under the *Indian* Act, RSC 1985, c I-5 ("*Act*") as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by her Majesty for the use and benefit of a band" (s. 2(1)). The use and benefit of reserve land is vested in the entire band and is a collective right of the band members as a body, and not of any individual band member.

Reserve land cannot be alienated to any third party, except to the Crown. Under ss. 37 and 38 of the Act, reserve land must be first surrendered to the Crown (or designated) before it can be leased or sold (except for short-term leases under s. 28(2)). If reserve land is not validly surrendered, any purported sale or lease is void. A surrender can be either conditional or unconditional (s. 38(2)). A surrender is an absolute release of the band's interest in reserve land, while a designation is only a partial release of the band's interest to the Crown. One of the primary benefits of designation of lands is that it allows bands to enter into long-term commercial leases (through the Crown), with profits returning to the band.

Individual property rights on reserve

While reserve land is held for the collective use and enjoyment of a band, and is generally inalienable to third parties, except to the Crown in right of Canada, there are forms of private property on reserve. Section 20 of the Act allows a band council to allot a parcel of land to an individual band member. This allotment must be approved by the Minister, who can then issue a document called the certificate of possession. Such allotment grants a right to possession that is similar in many respects to *fee simple* ownership in that it grants the allotee an exclusive right to possession and permits the allotee to sell, lease or devise his or her lands, but only to another band member (ss. 24 and 50).

Band members can also come to be in possession of individual lots within a reserve, not through s. 20 of the Act, but through band custom. However, in such circumstances, the member's right of possession is at the pleasure of the band council. Band members can also be tenants of private landlords or the band council (*i.e.*, in Band-owed housing). Note that provincial landlord-tenant legislation will normally not apply on reserve on account of the constitutional doctrine of inter-jurisdictional immunity.

Prescriptive rights

Common law principles and provincial statutes related to adverse possession and prescriptive easements do not apply to reserve land.

Reserve land registries

Section 21 of the Act requires the Department of Aboriginal Affairs and Northern Development to maintain a "Reserve Land Register", where particulars will be entered relating to certificates of possession and other transactions respecting lands. It should be noted that this registry is not the same as provincial land registries. Instruments are registered for information purposes only, and there's no priority registration. There is also no requirement that instruments be registered.

First Nations Land Management Act

The *First Nations Land Management Act*, SC 1999, c 24 ("FNLMA"), is a land management regime that bands can opt into in order to be removed from the land management provisions of the *Indian Act*. Under the FNLMA, participating First Nations adopt their own "land code" dealing with issues such as rules and procedures governing use and occupancy of reserve land, transfers of property related to estates, rules and procedures respecting revenues, and processes for community consultation.

STEWART MCKELVEY

APPENDIX A

TITLE SEARCHING BASICS
by: Benjamin J. Fairbanks

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

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

Why Search Title?

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

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

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

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

Old vs. New – Where to start your search

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

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

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

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

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

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

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

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

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

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

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

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

How We Search Title

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

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

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

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

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

Full Search

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

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

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

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

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

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

Sub-search

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

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

Liens and Lis Pendens Searches

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

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

Condominium Searches

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

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

Expropriation

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

Crown Grants

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

Probate

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

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

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

Checklists and Abstracts

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

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

What We Must Deliver—Certainty of Ownership

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

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OTHER STATUTES

Assessment Act

Beaches Act

Beaches and Foreshores Act

Builders' Lien Act

Conservation Easements Act

Conveyancing Act

Crown Lands Act

Descent of Property Act (prior to Intestate Succession Act)

Expropriation Act

Intestate Succession Act

Land Holdings Disclosure Act

Land Registration Act

Land Titles Clarification Act

Matrimonial Property Act

Municipal Government Act

Partition Act

Probate Act

Quieting Titles Act

Real Property Act

Registry Act

Sale of Land Under Execution Act

Statute of Frauds

Vendors and Purchasers Act

Wills Act

NOVA SCOTIA
BARRISTERS' SOCIETY

APPENDIX B

ABSTRACTS
AND THE LAND REGISTRATION SYSTEM

PREPARED BY CATHERINE S. WALKER, Q.C.

Foreword

The Nova Scotia Barristers' Society's original Real Estate Standards contained a significant amount of detail about what an abstract of title should contain. The Professional Standards: Real Property Transactions in Nova Scotia (2002) are now less prescriptive about the form of an abstract. In light of that change, it was determined that the Society, for the benefit of members and as part of the education program for the *Land Registration Act*, would prepare an advisory paper to provide guidance to the real estate lawyer about both the form and content of an abstract of title.

Given the possible extinguishment of third party interests, and the possible review or audit of the abstract by others, a re-examination of the principles of abstracting is both essential and timely. Abstracts filed in support of the migration of a parcel into the new land registration system record the last historic search of the parcel's title. This search will not be repeated.

Charles W. MacIntosh, Q.C., at the Society's request, prepared a paper on abstracting. The Society is indebted to him for his efforts. This paper resulted in considerable discussion and debate among those responsible for the implementation of the *Land Registration Act,* and it was recognized, as noted above, that a different approach was required. This version was primarily authored by Catherine S. Walker, Q.C., with input and comments from the LRA trainers (J. Ronald Creighton, Q.C.; K.H. Anthony Robinson, Q.C.; Anthony L. Chapman, Q.C.; David F. Curtis, Q.C.; Erin O'Brien Edmonds, Q.C.; Frank E. DeMont, Brenda L. Rice Thomson, and Ian H. MacLean) and the Professional Standards Committee (R. James (Jim) Filliter; John W. Alward, Q.C.; Richard W. Cregan, Q.C.; David F. Curtis, Q.C.; Garth C. Gordon, Q.C.; James A. Gregg, Dwight J.W. Rudderham and Ivo R. Winter). Deborah Rozee and the staff of the Nova Scotia Barristers' Liability Claims Fund also provided assistance throughout.

The Society is indebted to all of them for their efforts as we endeavour to maintain the highest quality of practice and professionalism in the practice of real estate law.

Darrel I. Pink
Executive Director
Nova Scotia Barristers' Society

I Introduction

The abstract of title is the underpinning of a lawyer's exercise of professional judgment as to the marketability of title. This will continue under the new electronic land registration system[1]. The principles associated with the preparation of an abstract of title have not changed for the purposes of certifying title under the new land registration system. However, the lawyer's exercise of professional judgment, evidenced by the abstract of title, may undergo a new level of review as it supports the lawyer's certificate of title to the government and becomes part of the government's land registration information.

Currently, an abstract is prepared based on those documents on record in the public Registry offices. A lawyer, after reviewing the abstract, provides his or her client with an opinion as to a property's marketability. The abstract is kept in the lawyer's office, available for a review in the event that there is a subsequent challenge to the lawyer's opinion. Any subsequent buyer would follow the same process, having a lawyer procure a new title search, prepare a new abstract, and provide a new opinion as to the marketability of the title. Any concerns raised by the buyer's lawyer, would be dealt with by the seller's lawyer on behalf of the seller, or, where appropriate, the previous lawyer who certified title.

Under the new land registration system, a lawyer, after reviewing the abstract, will be required to certify the state of the title to the Registrar General, who is the representative of the provincial government, for purposes of moving or "migrating" a property from the registry system to the new land registration system. This opinion forms the basis for the government guarantee of title, and is the last historic search that will be done of that property. The abstract of title, evidencing the basis of the lawyer's exercise of professional judgment, is part of the "bundle" of documents that a lawyer must file when certifying the state of a title to the Registrar General[2]. The bundle must include the abstract, but may also include information not registered in the chain of title for the parcel that must be either put on record, if unrecorded, or included if appropriate, in the lawyer's notes in the abstract. For example, if a joint tenant dies, and there is no evidence of the death in the chain of title for the parcel being migrated, but it is documented at the Registry office in the context of another parcel of land owned by the same surviving joint tenant, then the particulars of where the death is documented should be noted by the lawyer in the abstract. In that way, although the abstract on its face indicates an outstanding interest, it will also note that the lawyer has turned his or her mind to the matter, and has satisfied himself or herself that the interest is not outstanding. If, on the other hand, there is an unrecorded death certificate or obituary evidencing the death on which the lawyer is relying for his or her opinion, that information must be registered prior to a lawyer certifying to the government. Similarly, an unrecorded declaration as to adverse possession on which a lawyer is relying for his or her opinion must be registered prior to the lawyer cerifying to the government.

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[1] *Land Registration Act*, S.N.S. 2001, c.6, s.37(9)

[2] Land Registration Administration Regulations N.S. Regs. 53/2003, s.9(3)(c); Supra, note 1 at s. 37(4)(c)

Notwithstanding that the curtain will be drawn, a lawyer must ensure that the public record as to the state of title and chain of ownership is complete prior to migration. This will involve the appropriate exercise of professional judgment. For example, if a lawyer has knowledge that a mortgage has been discharged and has a release in hand, that release must still be registered. It is not enough to include the release in the bundle. The requirement is based not only on the fulfillment of the lawyer's undertaking in relation to a sale transaction, but also on the requirement to certify the state of title reflected on the public record. If the abstract contains evidence of an outstanding mortgage, then that must be shown as a security interest in the parcel at the time of the migration, unless the release is registered prior to migration of a parcel.

The bundle, including the abstract of title in support of a lawyer's exercise of professional judgment and certificate of title, will be reviewed by others. Although not available for public viewing, it becomes part of the information of the land titles system. Bundles will be subject to random audit by the auditors jointly appointed by the government and the Nova Scotia Barristers' Society, and depending on the result of an audit, the lawyer may also be subject to a practice audit by the Nova Scotia Barristers' Society.

While the process of abstracting has not changed, the context within which an abstract will be stored, examined, and relied on has changed, and this warrants a review of the physical appearance, preparation and review process for the abstract under the *Land Registration Act*.

II The Physical Appearance of the Abstract

While there may be some variations of convention in the physical appearance of an abstract, there are generally accepted principles which govern the content and organization of abstracts. Attached as appendices are samples of abstract information organized in accordance with the recommended format described below.

a) Organization and Content of the Abstract:[3]

- it must be legible, although not necessarily typed;
- the title search requisition must identify the lands under search, by the attachment of either a copy of the certified description if the initial process under the land registration system for the certification of legal descriptions has been completed, the Parcel Description Certification Application (PDCA); or the legal description believed to be the most recent and complete;
- the abstract should be organized in historic order from the oldest to the newest document affecting the lands being searched;
- each page, or each document abstracted, should be numbered sequentially for ease of reference;
- if there is a plan filed approving the lands under search, it should be placed at the head of the abstract behind the legal description and the plan number noted on the front or summary section of the abstract. If there is no plan, this should also be noted on the abstract summary page;
- restrictive covenants affecting title, and not included in the legal description, should be placed at the beginning of the abstract behind the legal description;
- judgments and expropriations relating to the abstract would usually be found at the end of an abstract;
- it is recommended that a wide margin be included on the right or left hand side of the pages to allow for annotation of the abstract by the reviewing lawyer for ease of subsequent review by the lawyer or audit.

b) Abstracted Instruments:

Each instrument affecting the land being searched should be summarized in the manner and with the information identified in Appendix III.

c) Use of Summary Worksheets:

A summary of the title searcher's findings identifying outstanding interests in the lands, or security interests undischarged may be noted on the front, or summary portion of the title abstract to assist in the lawyer's subsequent review. A sample front page is attached as Appendix I.

A further summary form, using the language of the *Land Registration Act* is found in Appendix II. This summary sheet uses the new language of the electronic world, and will assist the lawyer in completing the initial registration process, Application for Registration (AFR), once a review has been completed by the lawyer.

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[3] Based on and consistent with the Professional Standards: Real Property Transactions in Nova Scotia (2002), online at www.nsblcf.ca, at Standard 3.1 - Abstracting

III The Process of Preparing the Abstract

While many lawyers develop a level of comfort with regard to the format for an abstract, experience varies as to a lawyer's knowledge of hands-on title searching. Some lawyers search for themselves, but most instruct searchers to carry out this work for them. This paper is not a treatise on how to prepare an abstract step by step. This section attempts to summarize the principle elements that should be kept in mind when a lawyer prepares, or causes to be prepared, an abstract of title for a lawyer's review. The list below, while not exhaustive, identifies the primary aspects of the process for preparing an abstract.

Complete Record

An abstract must be capable of being read and understood without reference to other documents outside of the record - it must be complete in and of itself[4]. This means that all instruments on record affecting the title to a parcel of land must be included in an abstract of that title. If there are documents that have been examined outside of the Registry of Deeds that relate to a parcel being searched (for example relating to a foreclosure, confirming which mortgage was foreclosed at the Prothonotary's office), this should be included in the abstract.

Root of Title

A search must "begin at the beginning" and must commence at a point that enables a lawyer to certify that the title is marketable pursuant to the *Marketable Titles Act* or other legislative or common law authority - most often this will be a point at least 40 years before the search is commenced[5].

Legal description

A search must clearly identify the legal description for the parcel that is being searched. Changes in the legal description over the time period of the search should be noted, and copies of all changes included in the search[6]. The abstract should include the title searcher's drawing of the legal description for the lot under search, and for each legal description over the time period of the search, if the legal description has changed during that period. The drawings should contain all specific references that are given in the legal description, including references to adjoining land owners, metes and bounds descriptions of distances and directions.

Ownership Interest

A search should identify the manner in which title is held (eg. joint tenants, or tenants in common) and the extent of each separate interest affecting the parcel. (eg. undivided one half, one quarter etc.).

Execution

A title searcher must review how each document has been executed and must note in the abstract if it has been executed under a Power of Attorney. A searcher must also abstract the

[4] Ibid; Supra, note 2, at s.9(3)(c)

[5] Ibid; Supra, note 1

[6] Supra, note 1, at s.37(5); Supra, note 3, at Standard 2.1 - Legal Descriptions

[7] Supra, note 3, at Standard 4.1 - Powers of Attorney

Power of Attorney document. If the Power of Attorney has not been recorded, this must be noted in the abstract and noted on the summary page.

Crown Grant

A search should identify whether the lands were granted by the Crown, and if this cannot be determined from a search at the Registry of Deeds office it should be in the summary notes. If ungranted, this should also be noted.

Plans

A search must include a copy of any approved plan for the lands being searched, or identify the evidence which allows a reviewing lawyer to assess whether the lands are exempt from the requirements of the *Municipal Government Act*[8].

Discrepancy between Legal Description and Plan

A search should note any discrepancies in the legal description either over the search time frame, or with the plan[9]. If the certified description from the PDCA is provided for purposes of the search, then the search should note any discrepancies that arise in the search from the certified description.

Access

A search should identify the means of access for the lands[10]. Access will need to be identified on the Application for Registration (AFR) [11] under the new system.

Private Access

A search must be carried out for any private access to a property, unless the access is described in the legal description for the entire marketable title time frame. If the private access crosses over another lot, then the legal description of the other lot affected should be checked to determine if the easement is described in the same manner for both lots - any discrepancy should be noted in the summary notes[12].

Prescriptive or Possessory Rights

If prescriptive rights or possessory interests appear evident from the records, the search should include copies of any documents which evidence those rights[13].

Name Change

A search should be clear with regard to the names of all parties involved in the documents affecting the lands[14], and the search should document any change in the names of the parties since they acquired an interest in a parcel.

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[8] *Municipal Government Act,* S.N.S., c.18, ss. 268-292; Supra, note 3, at Standard 2.1 - Legal Descriptions

[9] Supra, note 3, at Standard 2.1 - Legal Descriptions

[10] Supra, note 3, at Standard 2.3 - Access

[11] Supra, note 1, at s. 37(4)(b)

[12] Supra, note 1; Supra, note 3, at Standard 2.3 - Access

[13] Supra, note 3, at Standards 3.2 - Possessory Title and 3.3 - Prescriptive Rights

[14] *Personal Property Security Act,* General Regulations, N.S.Reg. 129/97 ss. 19-22; Supra, note 3, at Standard 4.3 - Name Standards

Recitals

If a deed or other document contains recitals which help to explain the chain of title to the parcel of land under search, a title searcher must include the recitals in the abstracted information.

Matrimonial Status

The matrimonial status of parties conveying an interest in land should be noted in the abstract of each instrument- usually as declared in the matrimonial affidavit attached to a document[15]. Sometimes matrimonial affidavits contain recitals or other information relevant to the title, including statements about similar name judgments. This should be included in the abstracted information.

Estates

The identification of the will or administration particulars in a search will determine how the names are entered on the AFR, and should comply with the naming standards[16]. A copy of the will should be attached to the search. As well, a search should note whether the will was executed before or after the new Probate Act effective October 1, 2001.

The above comments relating to the process of preparing an abstract are general principles, a guide to the process of gathering the information that will be needed for a lawyer's review and subsequent exercise of professional judgment as to the marketability of title in accordance with the Professional Standards.

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[15] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 8(3); *Vital Statistics Act*, R.S.N.S 1989, c. 494; Supra, note 3, at Standard 1.7 - *Matrimonial Property Act/Vital Statistics Act*

[16] Supra, note 14

IV Lawyer's Review and Opinion

The Professional Standards[17] are the cornerstones for the real estate lawyer's exercise of professional judgment in certifying whether a title is marketable. The exercise of professional judgment begins with a lawyer's review of the abstract of title. The Professional Standards direct the lawyer to specific issues that should be addressed in the process of opining as to a title's marketability, but the final determination is for the lawyer to both make, and defend.

While a lawyer may delegate the actual preparation of a search, with appropriate direction and supervision, a lawyer must review the abstract once prepared, in order to form an opinion as to the state of a title to a parcel of land[18].

The Professional Standards address the process for dealing with qualifications to title that a lawyer identifies during the review process. Any qualifications must be explained to the client, documented in the lawyer's file[19,] and noted in the opinion of title to the Registrar General. The qualifications should also be documented to the client in writing[20.]

The review of an abstract and the exercise of professional judgment by a lawyer is inherently tied to and yet distinct from the information gathering role of the person abstracting the records. For example, while a searcher is guided to include in a search both reference to and a copy of an approved plan, if any, it will be the lawyer who must determine whether the requirements of the *Municipal Government Act*[21] have been met with regard to a particular parcel. A further example would be the sufficiency of the legal description. A searcher will include reference to the changes to a legal description over the history of the title search time frame, but the lawyer must determine whether the legal description is complete. For example, if an easement has been referenced in earlier descriptions, but not in later ones, the lawyer should ensure that, if appropriate, the description to be included in the current document being prepared includes the easement[22].

The Professional Standards speak about the need for documentation[23]. This may include a lawyer's notes in the margin of a search, or may include a flow chart whereby the lawyer has summarized the ownership history of the parcel of land (see Appendix IV). It should be apparent from a review of the abstract how a lawyer has reconciled any issues apparent from the record of the title. This may include, as referenced earlier, a note of relevant information on record for another parcel (e.g. the death of a joint tenant).

A lawyer's obligation in the review process of a particular parcel may involve an assessment of other parcels. For example, if there is an easement over another parcel, a lawyer would assess whether the other parcel mirrors a reference to the same easement. If not, the impact if any, should be considered by the reviewing lawyer.

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[17] Supra, note 3
[18] Supra, note 3, at Standard 1.3 - Certified Opinion of Title and Certificate of Legal Effect
[19] Ibid.
[20] Supra, note 3, at Standard 1.5 - Documentation
[21] Supra, note 8, at ss. 268 - 292
[22] Supra, note 3, at Standard 2.1 - Legal Descriptions
[23] Supra, note 3, at Standard 1.5 - Documentation

Under the new land registration system, new obligations arise in the review process because the parcel being migrated may involve another parcel, and may affect other owners' interests. A lawyer must be aware of the impact of migration of a parcel on the client and persons other than the client[24].

One of the unique aspects of the land registration system is that it allows for a lawyer to certify titles that are based on adverse possession only, and once certified, any other interest claimed may be converted from a right *in rem* to a right to claim compensation only[25]. Again, a lawyer must assess the sufficiency of the evidence on record supporting the adverse possessory title and make a determination as to whether additional objective evidence is required[26].

As described above, the lawyer's role is to review the search and additional information relating to title to the parcel, exercise professional judgment as to the interests affecting the parcel, and document in the office file and also in the abstract filed with the government, all the information which is relied on for the opinion of title to the Registrar General.

[24] Supra, note 3, at Standard 1.2 - Migration Under the *Land Registration Act*
[25] Supra, note 1, at ss. 39 and 74
[26] Supra, note 1, at Standard 3.2 - Possessory Title and 3.3 - Presciptive Rights

V Conclusion

While the *Land Registration Act* requires lawyers to translate traditional principles associated with the review of a title into "electronic speak," and provides a new context in which an abstract will be reviewed, title certified, and bundles filed, the lawyer's opinion is still based on all of the relevant evidence that is available to the lawyer for review.

Lawyers have been afforded a special role in the preservation of the integrity of the land fabric in Nova Scotia through the process of the lawyer's opinion that is provided to the Registrar General at the time each parcel of land is migrated into the new land registration system. The role that lawyers have been performing for over 250 years is now embodied in the *Land Registration Act*, and forms a firm foundation for the new land titles system that will serve Nova Scotians well into the future.

Appendix 1

SEARCH REQUEST & ABSTRACT SUMMARY REPORT

Abstract # _____

Matter # _____

SEARCH REQUEST: Date Requested _____ 200__ Date Required _____ 200__

Vendor(s) _____ M/S? _____Tenancy _____ RJSC (escheat) OK? ☐

Purchaser/Mortgagor(s) _____ RJSC (escheat) OK? ☐

Instructions: Full search ☐ Sub-search from _____ to date Comments _____

PROPERTY PARTICULARS: PID # _____ AAN _____ POL Printout ( )

Civic address _____

Lot(s) _____ Subdivision _____

Survey Certificate: (Surveyor/Certificate #/Date) _____ Encroachments/Possessory Interests? No ☐ Yes ☐

Intended use _____ See "Access" below, for caution if no frontage on road listed & actively maintained by DOT

Back Title Info & Comments _____

ABSTRACT SUMMARY REPORT

Underlying Crown Interests: Parcel was granted: Yes ☐ Grant Sheet ☐ No _____

Root of Title (*MTA* 40 yrs +) No ☐ Yes ☐ - Deed? Yes ☐ Other Root? _____

Title is vested in: Above Vendors ☐ Other(s) _____ Tenancy? JT ☐ TIC ☐

Restrictive Covenants: None ☐ Yes ☐ - any apparent breaches? No ☐ Yes ☐ _____

Unreleased Encumbrances: None ☐ Yes ☐ _____

Unreleased Judgments: Vendor(s): None ☐ Purchaser(s)/Mortgagor(s): None ☐ O/S Judgments ☐ see Abstract

Burdens ("Subject to" interests): *e.g.* easements, rights of way, leases: None ☐ Yes ☐ _____

Interests ("Together with" interests) *e.g.* easements benefiting parcel: None ☐ Yes ☐ _____

Description matches Survey? Yes ☐ No ☐ _____

Planning: Approved parcel ☐ Plan # _____ Pre-April 17, 1987 parcel - Yes ☐ Not approved or validated ☐ _____

Access: Public Road ☐ (If parcel has no frontage on a public road both listed & actively maintained by DOT check Land Use By-law & caution client about Land Use By-law limits/prohibitions on future development permits.)

Private Granted Access ☐ - searched title to access & clear ☐ _____

Private Not Granted Access ☐ - facts evidencing right to use ☐ _____

Attach copies of:

☐ Current desc.	☐ Burdens	☐ Access
☐ Each new legal desc in chain	☐ Interests	☐ Recitals
☐ Root Inst.	☐ Wills & Administrations	☐ POL printout
☐ RestCov	☐ Proof of Death A/R	☐ RJSC printouts
☐ Jmnts	☐ B/L Survey	

Searched title & judgments to: Book _____ Page _____ Doc#_____

Notes:

_____

_____

_____

_____

Searcher's signature _____ Date _____

LAWYER'S INSTRUCTIONS: Requisition o/s mortgages & judgments ☐ Other _____

_____

_____

Index under Purchasers' & Vendors' names and _____

Lawyer's signature _____ **Date** _____

Date Indexed _____ Indexed by _____ Cards done _____

Appendix 2 Available online at
www.gov.ns.ca/snsmr/property/registry/forms.asp

Abstract Summary Form

Document # 13
October 2, 2003

PID: 20056784
Client Name: Joseph Dale Black and Maria Ann Black
Parcel Access: Public Road
Manner of Tenure: Joint Tenants

File Number: Your File No.
Cert. Date/Time: 2003-08-30 10:30 AM
Triggered by: Sale for Value
AFR #: _____

Registered Interests							
Name (individual)	*Joseph Dale Black*						
Interest Type	*Fee Simple*						
Instrument Type	*Deed*						
Date Recorded							
Doc #	*1459*	**Book**	*567*	**Page**	*219*	**NS Non-resident?**	*No*
Mailing Address							
Name (individual)	*Maria Ann Black*						
Interest Type	*Fee Simple*						
Instrument Type	*Deed*						
Date Recorded							
Doc #	*1459*	**Book**	*567*	**Page**	*219*	**NS Non-resident?**	*No*
Mailing Address							
Benefits/Appurtenances to the Registered Interests							
Name (individual)	*(no benefits for this scenario)*						
Interest Type							
Instrument Type							
Date Recorded							
Doc #		**Book**		**Page**		**NS Non-resident?**	
Mailing Address							

Abstract Summary Form

Burdens/Qualifications on the Registered Interests							
Name (enterprise)	*Nova Scotia Power Inc.*						
Interest Type	*Easement Burden*						
Instrument Type	*Easement*						
Date Recorded							
Doc #	*2346*	**Book**	*567*	**Page**	*223*	**NS Non-resident?**	*n/a*
Mailing Address							
Name (enterprise)	*Subject to Restrictive Covenants*						
Interest Type	*Covenant Holder*						
Instrument Type	*Deed*						
Date Recorded							
Doc #	*148*	**Book**	*221*	**Page**	*467*	**NS Non-resident?**	*n/a*
Mailing Address							

Textual Qualifications (if the qualification is not able to be described by reference to the registration/recording particulars of an instrument)

Abstract Summary Form

Recorded Interests							
Name (enterprise)	*Bank of Montreal*						
Interest Type	*Mortgagee*						
Instrument Type	*Mortgage*						
Date Recorded							
Doc #	*951*	**Book**	*678*	**Page**	*345*	**NS Non-resident?**	*n/a*
Mailing Address							

AFR Comments:

APPENDIX III
Requisition for Title Search

SOLIICITOR: _____*Lawyer X*_____ **DATE:** ___*August 1, 2003*_____

PURCHASER/MORTGAGOR: _____ **TITLE DEADLINE:** __*August 15, 2003*____

_____ **CLOSING DATE:** ___*September 30, 2003*___

VENDOR: __*Joseph Dale Black*_____ **PROPERTY - Lot No.** _*12*_____

_____*Maria Ann Black*_____ **S/D:** __*Logan*_____

TITLE VESTED IN: *Same*_____ **OTHER (Acreage)** _____

_____ **CIVIC ADDRESS:** ___*15 Logan Drive*____

SEARCH DESCRIPTION AT BOOK/PAGE: __*567/219*___

BACK TITLE:

INSTRUCTIONS: ___*Please do full search*_____

SEARCH REPORT

SEARCHED BY: ___*Searcher Y*_____ **SEARCHED TO:** _____*Aug 15/03*_____

REAL PROPERTY TO DOCUMENT # _*2043*_____

JUDGEMENTS TO DOCUMENT # _____ **(PURCHASER) (MORTGAGOR)**

___*2043*___ **(VENDOR)**

EXPROPRIATIONS: __*Nil*_____

PLAN #___*Nil*_____ **APPROVES LANDS UNDER SEARCH:**

TITLE NOTES: __*(1) Mtg - See item # 7 - B Mtl o/s*___

____*(3) Easement NSPI See item # 5*_

____*(4) Restrictive covenants -= copy attached item # 3*___

____*(2) See item # 2 - poss o/s interest - Mary - See Item # 2*_

APPENDIX III
ABSTRACT

			Lawyers Comments
(1)	2CD Doc # 285 160|2 Jan 1, 1962 Jan 10, 1962 1.00	John Brown et ux. Susan Brown to George Jones & Mary Jones (as J.T.) - conveys 200 a. incl. Lot 12 - see description attached	2CD OK root
(2)	WD Doc # 560 175|43 Feb 1, 1973 Feb 15, 1974 1.00	George Jones to Landing Developments Ltd - conveys 100 a. incl. Lot 12 - see description attached - no marital status	George & Mary J.T. - Mary died - see recital in deed for 50 a. parcel Deed 1974 BK
(3)	WD Doc # 1483 221|467 July 5, 1974 July 6, 1974 1.00	Landing Developments Ltd to Stanley Zinck - conveys Lot 12, with restrictive cov. - as at head of abstract	— No plan — ok - predates 1987
(4)	WD Doc # 1325 432|53 May 1, 1975 May 5, 1975 1.00	Stanley Zinck et ux Georgia Zinck to George Smith et ux Martha Smilie (as JT) - conveys Lot 12 - no reference to restrictive covenants	— ok — still attach

APPENDIX III, continued
ABSTRACT

(5)	Easement Doc # 2346 567|223 Aug 5, 1980 Aug 15, 1980 1.00	George Smith et ux Martha Smilie to Nova Scotia Power Inc. - easement for power lines over front 20 of lots fronting on Logan Drive including inter alia Lot 12 – see attached	
(6)	WD Doc # 1459 567|219 Feb 1, 1983 Feb 5, 1983 1.00	George Smith et ux Martha to Maria Ann Black et ux Joseph Dale Black as j.t. - MPA - spouses - conveys lot 12 - subject to restr. covs. (as at head of abstract) - no ref. to easement	OK - appurtenance
(7)	Mtg Doc # 951 678|345 Feb 1, 1983 Feb 5, 1983 49, 543.00 (Joe Lawyer) NOT MARKED RELEASED	Marie Black & Joseph Balck to Bank of Montreal - MPA - spouses - mtges Lot 12 - no ref to restrict. cov.	

APPENDIX III, continued

Information to be included when abstracting an instrument

1. Type of document;
2. Parties to the instrument and nature of ownership (ie. joint tenants etc.);
3. Date and registration particulars (document number);
4. Matrimonial status of Grantor declared (re MPA);
5. Interest that is subject of instrument, if other than fee simple;
   (ie. wife's interest being conveyed to husband , "all my interest" and "my one half share");
6. Lands that are the subject of the instrument;
7. Consideration, if declared;
8. If a security interest, charge or judgment - whether it is marked as released (in part or in whole) satisfied;
9. Identification of recitals, restrictive covenants or anything of note in the instrument.

Recommended Abbrevations

Lot under search	LUS (where possible this should be avoided and reference should be made to the specific lot)
Mortgage	Mtg, Mort
Warranty Deed	WD
Debenture	Deb
Release of Mortgage	Rel Mtg, RMtg
Assignment	Assgmt
Assignment of mortgage	AssMtg
Power of Attorney	P.A., POA
Expropriation	Exprop
Executors Deed	Exec. Deed, Trustees Deed
Quit Claim Deed	Q.C.D., QCD
Sheriffs Deed	Sh Deed, Sher. Deed
Crown Grant	Grant
Right of way	R.O.W., ROW

APPENDIX IV

Lawyer's Worksheet

	Type of Instrument Year/Bk/Pg	Parties	Lands conveyed
(1)	2CD 1962 160|2	John & Susan Brown ↓ George & Mary Jones (J.T.)	 200 a
(2)	WD 1973 175|43	George Jones (Where's Mary ?) ↓ Landing Dev Ltd where	100 a Mary ? – dead
(3)	WD 1974 221|467	Landing Dev Ltd ↓ Stanley Zinck	Lot 12 Rest. cov.
(4)	WD 1975 432|53	Stanley & Georgia ↓ George Smith & Martha Smilie (JT)	Lot 12 No ref rest. cov.
(5)	Easement 1980 567|223	George & Martha ↓ Nova Scotia Power Inc.	Easement 201 Lot 12
(6)	WD 1983 678|340	George Smith & Martha Smilie ↓ Maria Black Joseph (as JT)	Lot 12 - rest. con. - no ref easement

APPENDIX C

Mary Ann McGrath

LRA Co-Ordinator, McInnes Cooper

Searching & Sub-searching

Lawyers are reminded that once a parcel has been registered in the new system, a search of that parcel's register is needed in order to determine recordings that have been placed against that PID. The GGI is no longer searched for recorded interests (only for judgments or general powers of attorney). In a parcel-based system, you need to search the PID for recorded interests. Don't forget to search for LR documents in process, by PID.

Traditional Parcel Subsearch (Migrating or Updating a Parcel):

- Grantor search in the Grantor/Grantee index from date of abstract
- Judgment search from date of abstract
- Search Plan Index
- Search by Name for Non-LR Documents in Process
- Search for Plans in Process

Sub-search on a Migrated (LR) Parcel:

- Review of Parcel Register
- Judgment search of Registered Owners (from date of migration or date of last revision whichever is most recent)
- Judgment search of Purchasers (full twenty year search)
- Search by Name for Non-LR Documents in Process for Registered Owners and Purchasers (for judgments only)
- Search for Plans in Process
- Search by PID for Documents in Process on Land Registration parcels

Note: Before raising title objections on a parcel on which undertakings exist, be sure to do a search to see if the documents covered by the undertaking have been recorded. This is done by doing a Grantee search, (eg. release of mortgage is being recorded by another lawyer). If not, you will be raising title with interests shown that are no longer applicable to the parcel and a rectification will be required to remove these interests from the parcel register.