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

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

With the advent of the Registry 2000 Project and the passage of the *Land Registration Act* (LRA) that prediction has come true. Registry 2000, a joint initiative of the Government of Nova Scotia and Nova Scotia Barristers' Society, has modernized the land tenure system in Nova Scotia. After wide consultation with affected stakeholders, the Government passed the LRA – the most significant development in real property practice in Nova Scotia in over a century. Although changes to the substantive law are minimal, the practice of that law, how land records are maintained, how property is conveyed, and the work of lawyers in conveyancing has changed dramatically.

The prescribed role of lawyers in the conveyancing process will evolve in fundamental ways. In addition to the traditional work done to certify title to a client, lawyers will also provide an opinion on title to the land registration system, providing the basis for the Government's title guarantee of the fee simple to the person shown as the owner. Because of these changes, real property standards now require revision.¹

NEW ROLES AND RESPONSIBILITIES

The LRA causes there to be a new relationship among the legal profession, the Nova Scotia Barristers' Society, as the profession's governing body, and the Government. Each player has new roles.

Lawyers will be responsible for assisting their clients to migrate their properties to the new land registration system. They will complete a last search of the historic title, give an opinion on the quality of that title, and certify the nature of the client's title in the land parcel to both the client and the land registry system. These revised standards are intended to assist in clarifying the nature of the lawyer's work and support the vital role of the lawyer as professional advisor.

The Society is contractually bound to stand behind lawyers who are qualified to certify titles to the land registry system. Through the provision of insurance, assumption of liability for negligent errors or omissions, the development and maintenance of current professional standards, the creation of an audit program to ensure compliance with lawyers' obligations under the LRA, the applicable regulations and the Professional Standards together with a compliance regime, the Society is supporting real estate lawyers in their enhanced role under the LRA.

The Government, with the assistance of lawyers and the Society, will now guarantee the fee simple ownership in land parcels in Nova Scotia. After a parcel is registered in the land registry system, the nature of the owner's interest will no longer be subject to dispute. If someone has been improperly deprived of an interest in a property, then the Province will ensure that monetary compensation is paid for that loss.

INTERPRETATION

With some exceptions, it has not been the intention of the Professional Standards Committee to

prescribe new standards for real estate practice.²

However, the Committee did revise the existing Standards to meet the requirements of the LRA. A Standard which does not refer to the LRA, in the text of the provision of the Standard, applies both before and after the implementation of the LRA. Where the Standard includes a footnote to reference the LRA, the reference identifies the relevant provision of the LRA and the reference is to be read according to its wording. A Standard which expressly refers to the LRA in the text of the provision of the Standard is a new Standard pertaining to the LRA and is to be read accordingly.

The Committee adopted a drafting style using plain language in the active voice to ensure that the Standards clearly apply to the steps taken by the lawyer in handling a real property transaction. The intent is to make the Standards a quick and easy guide for lawyers.

The Standards have been reorganized from the first edition. By grouping them in parts, the Standards applying to various aspects of a transaction now stand together. This structure will also facilitate the addition of new Standards that will likely be necessary as the profession gains experience under the LRA.

As with the initial version, professional judgment and common sense remain as touchstones for the use of these Standards. As was stated in the Preface to the first edition "these standards cannot be expected to be an answer to every conceivable situation which a lawyer might find in conducting a real estate practice ... professional judgment must always be exercised in problem solving and these practice standards are not intended as a substitute for the exercise of professional judgment." However, they have been developed to be a real guide to the expectations for real estate practice.

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

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

New to these written standards, but not new to practice, is the requirement for written evidence that an issue was identified, that advice was given to a client and what the client's instructions are. The advice is to be given prior to receiving instructions and some form of written notation of the process is to be produced. The documentation may be achieved by various means - memos, email messages, written notes in the file, or correspondence to the client. The documentation is to be in the lawyer's file. The case authorities that support Standard 1.5 show the value of such documentation. The presence of a written record will ensure the availability of the best evidence of the lawyer's advice and the client's instructions.

Citations of statutory references in the Standards do not include a reference to amendments to the statute, except for amendments made by the LRA. Therefore, the statutes cited in the Standards are to be read as amended - that is to say, to include any amendments which may have been made. For example, a reference in the Standards to a citation of the Vital Statistics Act includes all amendments to the Act, even though the amendments are not cited. Lawyers are urged to obtain the latest updated consolidation of cited statutes and ensure that all amendments to a statute are included in the statutory review undertaken by the lawyer. It is particularly important for lawyers to check for the latest consolidations and amendments because a number of omnibus statutes, sometimes with names dissimilar to the names of amended statutes, have been enacted in recent years which amend a number of statutes referenced in the Standards.

Conclusion

The LRA has introduced new rules and relationships among the Government, the legal profession, and the Society, requiring the revision of standards for the real estate professional. Like their predecessors, they must be viewed as a work-in-progress to be amended and altered as there is

greater experience with the new regime. They must be the subject of discussion among the profession as they are interpreted and applied.

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

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

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

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

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

NOTE:

1. Standard 1.5 - Documentation

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Nova Scotia Barristers' Society 2001 - *Practice Materials*(Carswell, 2001) [CDROM] (available through Admissions and Professional Development), Real Estate Law, Section 1 - Conveyancing, Introduction

Local restrictions: See, for example, [Aeronautics Act, R.S.C. 1985](#), c. A-2, An Act Respecting Rosebank Park, S.N.S. 1915, c. 108

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

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1.2 MIGRATION UNDER THE LAND REGISTRATION ACT

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When migrating a parcel under the *Land Registration Act*¹, a lawyer should advise the client of the impact of migration on the client and persons other than the client.

When a lawyer is taking instructions from a client to make an application for registration under the *Act*, the lawyer should explain the application for registration to the client and confirm the client's instructions prior to closing.²

NOTE:

1. *Land Registration Act*, S.N.S. 2001, c. 6, s. 37
2. **Standard 1.5 - Documentation**

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1.3 OPINION OF TITLE AND CERTIFICATE OF LEGAL EFFECT

Non LRA parcels (not being migrated)

For a parcel or an interest in a parcel not registered under the [Land Registration Act](#) a lawyer may give an opinion that the title is marketable¹ if, after examining the abstract of title, the lawyer is satisfied that title to the parcel is marketable in accordance with legislation, common law and equity.

When a lawyer provides an opinion of title, the lawyer must explain any qualifications to the opinion to the client and confirm the explanation of the qualifications with the client prior to closing.² The lawyer must confirm the client's instructions prior to closing.³

LRA Parcels

APPLICATION FOR REGISTRATION

For a parcel or an interest in a parcel being registered under the [Land Registration Act](#) a lawyer may give an opinion that the title is marketable⁴ if, after examining the abstract of title, the lawyer is satisfied that title to the parcel is marketable in accordance with legislation, common law and equity.⁵

When a lawyer qualifies⁶ an opinion of title to the registrar in a migration of a parcel under the [Land Registration Act](#), the lawyer must, after examining the abstract of title on which the opinion is based and considering the qualifications, document the qualifications in the opinion.⁷

When a lawyer completes an application for final registration of a title under the [Land Registration Act](#), the Regulations require that the lawyer must ensure that all the documents required under the Act to be filed at the appropriate land registration office⁸ or retained by the lawyer as part of the registration⁹ are complete¹⁰, executed¹¹, and in all respects in final form¹² and that the lawyer shall compile and maintain all foundation documents which a reasonably competent lawyer would rely upon to support the opinion of title.¹³

Parcel Registered Under Land Registration Act

When a lawyer provides an opinion or a certificate of legal effect for a parcel or an interest in a parcel registered under the [Land Registration Act](#), a lawyer must examine the parcel register and conduct all necessary searches in order to determine the registered ownership and interests pertaining to the parcel.

When a lawyer provides an opinion of title, the lawyer must explain all interests in the parcel, qualifications and limitations on the opinion to the client and confirm the explanation of the qualifications with the client prior to closing.¹⁴ The lawyer must confirm the client's instructions prior to closing.¹⁵

Revisions and Recordings of parcels under the Land Registration Act

Before a lawyer applies to revise a parcel register or record an interest in a parcel register under the [Land Registration Act](#) and provides a certificate of legal effect submitted for registration or recording under the Act, the lawyer must first examine the parcel register and any document to accompany the certificate of legal effect, and be satisfied that the registration or recording which

purports to change the parcel register is effective under the *Act*.

Additional Resources:

A lawyer must accompany an application to register a parcel pursuant to the *Land Registration Act* with an opinion of title certified by a qualified lawyer, disclosing to the Registrar General the interests being registered in the parcel and, subject to section 40, all encumbrances, liens, estates, qualifications and other interests affecting the parcel and the direct or indirect right of access to the parcel, if any. See *Land Registration Act*, S.N.S., s. 37(9)(a).

- Sheriff's Deeds: See Standard 3.8 – Judicial Sales; Standard 3.7 Tax Deeds
- C. Walker, QC, “Abstracts and the Land Registration System” in *Land Registration Act* Education Program, *LRA* Education Materials
- C. Walker, QC, “Certifying Title and Qualifying Title under the *Land Registration Act*” in Land Registration Act Education Program, *LRA* Education Materials
- Ian MacLean, “Searching Land Registered Parcels”, CBA Professional Development Conference, January 8, 2010.
- Section 13.3 of the *Legal Profession Act* Regulations provides for audit of foundation documents by *LRA* Auditors.

¹ *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4

² See Standard 1.5 - Documentation

³ See Footnote #2

⁴ *Land Registration Act*, S.N.S., s. 37(9)(b), *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4

⁵ *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69. Title to a parcel may be registered pursuant to the *Land Registration Act* even though title cannot be certified as marketable. *Land Registration Act*, S.N.S., s. 37(9)(b) and Land Registration Administration Regulations, s. 11 and definition of textual qualification in s. 2(1).

⁶ *Land Registration Act*, S.N.S., s. 37(9)(a) and Land Registration Administration Regulations, s. 11 and definition of textual qualification in s. 2(1)

⁷ See Footnote #2

⁸ *Land Registration Act*, s. 37(4)(ba), (f), and (g) and s. 37(5) and Land Registration Administration Regulations, s. 10(2)(b) and 10(3)(a)

⁹ Land Registration Administration Regulations, s.10(6)

¹⁰ *Land Registration Act*, s. 37(5) and Land Registration Administration Regulations, s. 10(6)

¹¹ Land Registration Administration Regulations, s. 4(8)

¹² Land Registration Administration Regulations, s. 10(2)(b)

¹³ *Legal Profession Act* Regulations, s. 1.1.1 (ma) and 8.2.3.1

¹⁴ See Footnote #2

¹⁵ See Footnote #2

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1.4 CONFLICT OF INTEREST

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In a transaction where a party is not represented by counsel, a lawyer should

1. advise an unrepresented party that their interests are not being protected by the lawyer;
2. advise the unrepresented party which party the lawyer is representing in the transaction;¹
3. recommend independent legal advice to the unrepresented party.

If a lawyer is acting for more than one party in a transaction, the [Legal Ethics and Professional Conduct Handbook](#) provisions on conflict of interest apply.

NOTE:

1. This applies in particular if the unrepresented party might reasonably feel entitled to look to the lawyer for guidance and advice in respect of a transaction (see [Commentary 7.1 Legal Ethics and Professional Conduct Handbook](#)).

ADDITIONAL RESOURCES:

Duty on lawyer to advise unrepresented party that their interests are not being protected: [Hants County Business Development Centre Ltd. v. Poole et al.](#) (1998), 172 N.S.R. (2d) 393 (N.S.C.A.), affirming (1997), 165 N.S.R. (2d) 393 per Kelly J.; [Klingspon v. Ramsay et al.](#) (1985) 1985 CarswellBC 228, 65 B.C.L.R. 132 (B.C.S.C.); [Kwak v. Odishaw](#) (1984), 59 B.C.L.R. 54 per Seaton J.A. (B.C.C.A.)

Reliance of unrepresented party on the lawyer may result in a duty of care: [Tracy v. Atkins](#) (1979), 83 D.L.R. (3rd) 46 (B.S.C.S.), aff'd 105 D.L.R. (3rd) 632 (C.A.); [Elliott v. Hossack](#) (1999), 1999 CarswellBC 402 (B.C.S.C.); [Paton v. Shaw](#)(1995), 134 Nfld & P.E.I.R. 271 (P.E.I. T.D.)

- [Legal Ethics and Professional Conduct Handbook, Chapter 6, Impartiality and Conflict of Interest Between Clients.](#)
- [Standard 1.5 - Documentation](#)

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1.5 DOCUMENTATION OF ADVICE AND INSTRUCTION

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A lawyer should document in writing

(a) advice to the client, including explanations and confirmation of the explanations, the lawyer's advice with respect to restrictions, if any, on the client's quiet use and enjoyment of the property and qualifications to the opinion on title¹; and

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

A lawyer should also document in writing the lawyer's advice to an unrepresented party pursuant to [Standard 1.4](#).

When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client's signature evidence of the client's instructions. The lawyer should meet personally and explain the effect of the document to the client.²

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1. *Ravina and A & R Properties Ltd. v. Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406 (sub nom. *Ravina v. Stern*) 191 A.P.R. 406 (C.A.)
2. Supervision of employees: *Legal Ethics and Professional Conduct Handbook Commentaries 19.4 (ensuring work done by qualified lawyer), 19.6 (work by legal assistant) and 19.7 (supervision and education of legal assistant)*
3. *Yamada v. Mock; Miller et al., Third Parties*(1996), 29 O.R. (3d) 731. Supervision of employees:*Legal Ethics and Professional Conduct Handbook Commentaries 19.4 (ensuring work done by qualified lawyer), 19.6 (work by legal assistant), 19.7 (supervision and education of legal assistant)*

ADDITIONAL RESOURCES:

- Duty to explain risks, obtain written instructions: *Edmond & Associates v. Angelatos*(1997), 120 Man.R. (2d) 70 (Q.B.), *Credit Foncier v. Grayson, Rushford*(1987), 54 Sask.R. 203 (Q.B.)
- Absent documentation, client's recollection of scope of retainer preferred over lawyer's: *Bergman v. Williams*(1980), 22 B.C.L.R. 317 (S.C.), *ABN Amro Bank Canada v. Gowling, Strathy & Henderson*(1994), 20 O.R. (3d) 779 (Gen.Div.). Failure to document advice, scope of retainer not conclusive: *669283 Ontario Ltd. v. Reilly*[1996] O.J. No. 273 (Gen. Div.), [Hants County Business Development Centre Ltd. v. Poole et al.](#) (1997), 165 N.S.R. (2d) 365 (S.C.), (1998), 172 N.S.R. (2d) 393 (N.S.C.A.)
- Lawyer's notes as documentation: *Mazerolle v. Maynes*, [2000] N.B.R.(2d) (Supp.) No. 5 (T.D.)
- Effective advice may require delivery to client in writing
- C. Walker, Q.C., "[Abstracts and the Land Registration System](#)" in *Land Registration Act Education Program, LRA Education Materials*

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1.6 REBUTTABLE PRESUMPTIONS

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

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

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1.7 MATRIMONIAL PROPERTY ACT/ VITAL STATISTICS ACT

A lawyer must ensure that the provisions of the *Matrimonial Property Act*¹ and *Vital Statistics Act*² are considered when effecting any revision, registration, or recording and when documenting marital status. The statutory protections afforded to spouses, as well as to parties relying upon an affidavit of spousal status³, make it essential that the lawyer be satisfied, after inquiry, that signatures of all those with an interest have been secured.^{4, 5, 6}

Notes:

1. *Matrimonial Property Act*, R.S.N.S. 1989, c. 275
2. *Vital Statistics Act*, R.S.N.S. 1989, c. 494
3. *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s.8(3). It should be noted that the statutory protection afforded by this section is limited to situations where there is an affidavit of status as opposed to an unsworn statement.
4. See *Mills v. Andrewes* (1980), 54 N.S.R. (2d) 394, where a conveyance was declared void for want of spousal consent.
5. See *Sherwood v. Sherwood, Roynat Inc. and Peat Marwick Limited* (1982), 52 N.S.R. (2d) 631 at page 638: “. . . the entitlement of a non-owning spouse is a statutory right to possession rather than a matter of title . . . the joinder of a nonowning spouse in a conveyance or encumbrance may be taken as compelling evidence of an intention either to surrender or subordinate statutory rights. I may note in passing that the statute does not prescribe any mode of signifying consent other than a signing of the instrument”.
6. In the *Bank of Nova Scotia v. Halef* (2003), 216 N.S.R. (2d) 89, the Court of Appeal found the affidavit of status to be deficient, and that the Bank was therefore not entitled to rely upon the affidavit. The encumbrance was therefore set aside.

ADDITIONAL RESOURCES

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

PRACTICE NOTE

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

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2.1 LEGAL DESCRIPTIONS

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When a lawyer examines a legal description, the lawyer must be satisfied that the legal description

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1. is a proper and complete description of the parcel;
2. identifies the parcel; and
3. when based on a plan of survey, reflects the parcel as shown on the plan.¹

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

A lawyer must ensure that a certificate of title prepared by the lawyer clearly identifies the parcel by a metes and bounds description or in another form as authorized by legislation.³

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1. Precision in legal descriptions: *Countway v. Haughn and Chataway*(1975), 15 N.S.R.(2d) 138 , per MacKeigan C.J.N.S. (N.S.S.C.A.D.), T.O. Boyne, "Conveyancing - Legal Descriptions" (1992) 3 *The Claims Wise Bulletin*, Claims Wise No. 20 at 1; T.O. Boyne "Legal Descriptions/Surveys"(1992) 3 *The Claims Wise Bulletins*, Claims Wise No. 23 at 4
2. Subdivision compliance: *Municipal Government Act*, S.N.S. 1998, c. 18, ss. 268-292, as am. *Land Registration Act*, S.N.S. 2001, c. 6
3. Parcel identification: *Land Registration Act*, S.N.S. 2001, c. 6, ss. 19 and 37(5)

ADDITIONAL RESOURCE:

- PID may remain the same after the extent is altered
- C. Walker, Q.C., "[Abstracts and the Land Registration System](#)" in *Land Registration Act Education Program, LRA Education Materials*

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Before the [Land Registration Act](#) comes into force in a registration district, a lawyer preparing an opinion of title or preparing an instrument affecting title to a parcel in the registration district, should

1. examine the information relating to the parcel found on *Property Online*¹; and
2. annotate on the legal description of each parcel its apparent Property Identification Number (PID) and Assessment Account Number (AAN),

to further the integrity of the information contained in *Property Online*.

The annotation should be clearly worded to show that it is not an operative part of the instrument and that it is given as reference information only.

A lawyer identifying any apparent or possible errors in the *Property Online* mapping should bring the information to the attention of Property Online to further improve the accuracy of parcel mapping and integrity of parcel information.

NOTE:

ADDITIONAL RESOURCE:

Reasonable steps be taken by the PDCA submitter: *Property Online* license agreement

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

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

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

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

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

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

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

NOTE:

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

Revision approved by Council November 24, 2006

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2.4 PLANS AND SURVEYS

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In preparing an opinion of title, a lawyer must advise the client that any opinion provided to the client will be qualified as being subject to survey.¹

A lawyer must advise the client that the lawyer does not deal with 'extent' and that boundary and location are only ascertained through a survey and recommend that the client retain the services of a surveyor to determine the extent of title to the parcel being examined.

A lawyer must confirm the qualification of the opinion as subject to survey prior to closing. The lawyer must confirm the client's instructions prior to closing.²

Before finalizing an opinion of title, a lawyer must examine plans arising from the search and survey information affecting the parcel. A lawyer should identify and reconcile where possible any material discrepancies between the legal description for the parcel or any information contained in the abstract, and survey information.³

After preparing an opinion of title, a lawyer should advise the client of material discrepancies between plans arising from the search and survey information affecting the parcel.

NOTE:

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

ADDITIONAL RESOURCE:

- Parcel descriptions: *Land Registration Act*, S.N.S. 2001, c. 6, s. 21(1)

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2.5 ENCROACHMENTS

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

The lawyer should ensure that the encroachment

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

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

NOTE:

1. See [Standard 1.5 - Documentation](#)

ADDITIONAL RESOURCES:

Easement or right of way as overriding interest: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 73(1)(e) and [Marketable Titles Act](#), S.N.S. 1995-96, c. 9, s. 7(1)(e)

Prescriptive rights: [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 74 and 75. See also [Standard 3.3 - Prescriptive Rights](#)

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2.6 TIDAL WATERS/NON-TIDAL WATERS

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

The lawyer must confirm the explanation of the limitations to the client. The lawyer must confirm the client's instructions prior to closing.¹

NOTE:

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ADDITIONAL RESOURCES:

Caselaw on Qualifications: [Ravina and A & R Properties Ltd. v. Stern](#) (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406, 191 A.P.R. 406 (C.A.)

G.V. LaForest *Water Law in Canada* (Information Canada, 1970) and K.H.A.

Robinson, "Alteration of a Water Course" in Real Estate (C.L.E.S.N.S., April 1994)

Vesting of watercourses: [Environment Act](#), S.N.S. 1994-95, c. 1, s. 103

Acquisition of an interest in a watercourse by adverse possession or prescription: [Environment Act](#), S.N.S. 1994-95, c. 1, s. 108, as am. [Land Registration Act](#), S.N.S. 2001, c.6, s. 103(3)

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3.1 ABSTRACTING

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

An abstract of title must

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

The Nova Scotia Barristers' Society Regulations require that where a firm or lawyer certifies title to real property, the firm or lawyer must keep available an abstract of title or such title information or certificate of title on which the firm or lawyer relied which would justify the certification of title by a reasonably competent lawyer.⁴

Before preparing a certificate of legal effect on an application for revision under the [Land Registration Act](#), a lawyer must review the parcel register records in the appropriate land registration office and document or cause to be documented the evidence of the review.

NOTE:

1. Statutory requirement for application for registration: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 37(9)
2. Root of title - legislation and common law: [Marketable Titles Act](#), S.N.S. 1995-96, c. 9, ss. 4(1) and 4(2) [as to root] as am. [Land Registration Act](#), S.N.S. 2001, c. 6, s. 116(1), [Land Registration Act](#), S.N.S. 2001, c. 6, s. 37(9) as am. S.N.S. 2002, c. 19, s. 15(6), [Quieting of Titles Act](#), R.S.N.S. 1989, c. 382; Cases: [Olsen Estate v. ASC Residential Properties Ltd.](#) (1990), 102 N.S.R.(2d) 94, per Hall L.J.S.C. (N.S.S.C.T.D.); [Hebb v. Woods](#) (1996), 150 N.S.R.(2d) 16 (S.C.)
3. Content of abstract: ([Ratto et al v. Rainbow Realty Ltd.](#), [Clarke Huestis, Purcell, Thompson and Thompson & Purcell Surveying Ltd. et al.](#)) (1984), 68 N.S.R.(2d) at 51, per Nathanson J. (N.S.S.C.T.D.)
4. [Barristers and Solicitors Act](#), R.S.N.S. 1989, c. 30; NSBS Reg. 48C

ADDITIONAL RESOURCES:

C. Walker, Q.C., "[Abstracts and the Land Registration System](#)" in [Land Registration Act Education Program, LRA Education Materials](#)

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3.2 POSSESSORY TITLE

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

A lawyer must document sufficient actual facts evidencing possession that will meet all the tests set by the courts for establishing possession sufficient to extinguish the interest of the paper title holder. The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence. The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing possession and address the extent of the area of land possessed¹. In determining whether the standard of proof of possessory title has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title established by possession, a lawyer must consider the effect of the [Land Registration Act](#) with respect to possessory interests and lasting improvements² and advise the client accordingly.

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

NOTES:

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

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

3. [Standard 1.5 - Documentation](#)

ADDITIONAL RESOURCES:

- Marketable title: *Parsons v. Smith* 1971 CanLII 49, 3 N.S.R. (2d) 561 (S.C. (T.D.)); declarations:

Hebb v. Woods, 1996 CanLII 5480, 150 N.S.R. (2d) 16 (S.C.), Carver J.; exclusivity: Robertson v. McCarron, 1985 CanLII 192, 71 N.S.R. (2d) 34 (S.C. (T.D.)), Hallett J., O'Neil v. MacAulay, 1976 CanLII 63, 21 N.S.R. (2d) 210 (S.C.), and Spicer v. Bowater Mersey Paper Co., 2004 NSCA 39 (CanLII), 222 N.S.R. (2d) 103; commencement: Keohane v. McNaulty, 1989 CanLII 1493, 92 N.S.R. (2d) 261 (S.C. (T.D.)); continuity: Taylor v. Willigar, 1979 CanLII 88, 32 N.S.R. (2d) 11 (S.C. (A.D.)), Cooper J.A.; co tenant: Lynch v. Nova Scotia (Attorney General), 1985 CanLII 191, (sub nom. Lynch et al. v. Lynch et al.) 71 N.S.R. (2d) 69 (S.C. (T.D.)), Hallett J.; nature of possession: Gillis v. Gillis, 1979 CanLII 87, 32 N.S.R. (2d) 40 (S.C. (A.D.)), MacDonald J.A.; acts of possession: Keohane v. McNaulty, 1989 CanLII 1493, 92 N.S.R. (2d) 261 (S.C. (T.D.)); colour of right: Wood v. LeBlanc (1904), 34 S.C.R. 627, 1904 CarswellNB 58 (WC), Davies J., and Board of Trustees of Common Lands v. Tanner, 2005 NSSC 245 (CanLII), 236 N.S.R. (2d) 295; tenancy at will: MacLean and MacLean v. Reid, 1978 CanLII 72, 30 N.S.R. (2d) 499 (S.C. (A.D.)), MacDonald J.A.; mutual mistake: Gould v. Edmonds, 2001 NSCA 184 (CanLII), 203 N.S.R. (2d) 163, Freeman J.A.

- C.W. MacIntosh, Nova Scotia Real Property Practice Manual, looseleaf (Toronto: Butterworths, 1988) c. 7
- Acquisition of an interest in a watercourse by adverse possession or prescription: [*Environment Act, S.N.S. 1994-95, c. 1*](#), s. 108; [*Land Registration Act, S.N.S. 2001, c. 6*](#), s. 103(3)
- C. S. Walker QC, "[Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment](#)" in *Real Property Conference: Property Practice in New Environments: The Ground is Shifting: Creating a Strong Foundation for Your Practice* (February 2003)
- J. A. Keith, "[Adverse Possession - Pulling Out All the Stops](#)" in *Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year"* (February 2006)
- G. C. Gordon QC, "[Access - Red Flag Issues Under LRA](#)" in *Real Property Conference: Year III: the Junior Year: Best Practices: Topics, Tools & Methods*(March 2007)
- G. C. Gordon QC, "[Affidavit Templates & Comments for Documenting Possessory Interests](#)" in *Real Property Conference: Crown Interests And Due Diligence Under LRA: "The Sophomore Year"*(February 2006)

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3.3 PRESCRIPTIVE RIGHTS

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

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

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

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

NOTES:

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

2. [Standard 1.5 - Documentation](#)

ADDITIONAL RESOURCES:

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

C.W. MacIntosh, *Nova Scotia Real Property Practice Manual*, looseleaf (Toronto: Butterworths, 1988) c. 7

- A.G.H. Fordham, "[Easements, Licenses and Rights of Way](#)" in *Real Property*, C.L.E.S.N.S. (April 1987)
- Acquisition of an interest in a watercourse by adverse possession or prescription: [Environment Act, S.N.S. 1994-95, c. 1](#), s. 108; [Land Registration Act, S.N.S. 2001, c. 6](#), s. 103(3)
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C.S. Walker QC, "**Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment**" in *Real Property Conference: Property Practice in New Environments: The Ground is Shifting: Creating a Strong Foundation for Your Practice* (February 2003)

- J.A. Keith, "**Adverse Possession - Pulling Out All the Stops**" in *Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year"* (February 2006)
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- G.C. Gordon QC, "**Affidavit Templates & Comments for Documenting Possessory Interests**" in *Real Property Conference: Crown Interests And Due Diligence Under LRA: "The Sophomore Year"* (February 2006)

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3.4 DISCHARGE OF MORTGAGES

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A lawyer must examine all mortgages recorded affecting a parcel. A lawyer must, in a timely fashion, obtain and record discharges for those mortgages being discharged.¹

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NOTE:

1. Undischarged mortgages: *Real Property Act*, R.S.N.S. 1989, c. 385, s. 28(2) and *Limitation of Actions Act*, R.S.N.S. 1989, c. 258. See also *Land Registration Act*, S.N.S. 2001, c. 6, ss. 40(1), 51(4) and 60.

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3.5 JUDGMENTS

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

1. the purchaser;
2. each owner of the parcel during the 20 year period prior to the date of the search ¹ ; and,
3. if the owner or the purchaser is a company or a company that is an amalgamation of a number of companies, the company or the name of each of the amalgamating companies as the case may be for judgments for the lesser of 20 years or from its date of incorporation.

A lawyer who searches for judgments on parcels that are registered under the [Land Registration Act](#) must conduct the search against the names of:

1. the purchaser for a period of 20 years prior to the date of search; and,
2. the registered owner of the parcel at the time of search from the date of the last revision of the registered ownership. ²

A lawyer who searches for judgments and identifies a judgment that is recorded against a debtor whose name is not materially different than the name of the owner or the purchaser must determine if the judgment affects the title being examined. ³

NOTES:

1. [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 5, 65-69, Note - 65 (judgment roll) and 66(4) (e) change of time frames for judgments registered under the [Land Registration Act](#) to five years unless renewed.
2. [Registry Act](#), R.S.N.S. 1989, c. 392, ss. 20, 21; [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 5, 65-69 - Note ss. 65 (judgment roll) and 66(4)(e) change of time frames for judgments registered under the [Land Registration Act](#) to five years unless renewed.
3. [Personal Property Security Act](#), S.N.S. 1995-96, c. 13. Note that the name standards prescribed under the [Personal Property Security Act General Regulations](#), N.S. Reg. 129/1997, ss. 19-22 are not applicable to searches under the [Land Registration Act](#); [Land Registration Act](#), S.N.S. 2001, c. 6, s. 66(3);

[Creditors Relief Act](#), R.S.N.S. 1989, c. 112, s. 2 and ss. 2A-2D. A judgment may now create a security interest in personal property; [Land Registration Act](#), S.N.S. 2001, c.6, ss.5 and 66(8).

ADDITIONAL RESOURCES:

I. H. MacLean, "[Title searching land registered parcels](#)" (February 2010), *RELANS Conference: in Tips for Reducing Negligence Claims in Your Property Practice* by Deborah E. Gillis QC

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3.6 RESTRICTIVE COVENANTS

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A lawyer must examine restrictive covenants and similar restrictions on use in conjunction with the abstract of title and survey information to determine whether there are breaches which would affect the use of the parcel or the marketability of title.

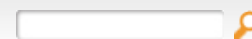
If the lawyer determines that there are any restrictions which would affect the use of the parcel or marketability of title, the lawyer must advise the client of such restrictions and confirm the instructions prior to closing.¹

NOTE:

1. Standard 1.5 - Documentation

ADDITIONAL RESOURCES:

- Restrictive covenants generally: A. G. H. Fordham, "[Restrictive Covenants](#)" in *Practical Property* 1984 (C.L.E.S.N.S., October 1984)
- Notice of restrictive covenants: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 61
- Loss prevention: *The Claims Wise Bulletin* Nos. [3](#) and [15](#)
- [Standard 1.1 - Legislative Review](#)


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3.7 TAX DEEDS

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A lawyer may certify title which has a tax deed as the root of title, after referencing the applicable legislation¹ and common law.²

NOTE:

1. *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 6, *Land Registration Act*, S.N.S. 2001, c. 6, s. 31
2. Effect of a tax deed - See the Plaintiffs' Pre-Trial Memorandum in *Stuart Dow and Sherri Dow v. Allan Zinck and Allan Young* (S.H. No. 118046), July 23, 1996, published with permission in Real Estate '99 Conference (C.L.E.S.N.S., March 1999)

ADDITIONAL RESOURCES:

- Lands affected - *MacNeil v. Nova Scotia (Attorney General) et al.* (2000), 183 N.S.R. (2d) 119, per Cromwell J.A. (N.S.C.A.)
- Setting aside - *Desmond v. Guysborough(Municipality)* (2000), 186 N.S.R. (2d) 123, per MacLellan J. (N.S.C.)

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3.8 JUDICIAL SCALE

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When a lawyer is advising a client on the purchase of a parcel at a sheriff's sale under the [Sale of Land under Execution Act](#), the lawyer must advise the client that a Sheriff's Deed under the *Act* conveys only the interest that the judgment debtor had in the parcel at the time the judgment was first registered, or that the judgement debtor subsequently acquires. The lawyer must further advise the client that the Sheriff's Deed cannot be relied upon to convey marketable title, without full enquiry.

When a lawyer is advising a client acquiring a parcel in a foreclosure action, the lawyer must advise the client that a Sheriff's Deed conveys only the interest that the mortgagor had in the parcel at the time of the making of the mortgage. The lawyer must further advise the client that the Sheriff's Deed cannot be relied upon to convey marketable title, without full enquiry.

ADDITIONAL RESOURCES:

- Effect per [Sale of Land Under Execution Act](#), R.S.N.S. 1989, c. 409, s. 13, as am. [Land Registration Act](#), S.N.S. 2001, c. 6, s. 125
- Effect on foreclosure: [Rawding v. Peninsula Land Corp.](#) (1990), 99 N.S.R. (2d) 77, per Jones J.A. (N.S.S.C.A.D.)
- Appearance in parcel register: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 32(1)
- Security interests: [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 51 and 52
- Judgments: [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 65-69

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3.9 TRUSTEE'S DEED

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

1. when the lawyer is acting for the buyer from a trustee, the lawyer must be satisfied that the terms of the trust, on the face of the record or known to the lawyer, are met; and
2. when the lawyer is acting for the seller and circumstances warrant, the lawyer should make further inquiries to ensure that the client as trustee is fully informed of the requirements for an effective conveyance.

ADDITIONAL RESOURCES:

- [Trustee Act](#), R.S.N.S. 1989, c. 479
- [Public Trustee Act](#), R.S.N.S. 1989, c. 379
- Deeming provisions: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 28

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3.10 ESTATES

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In any conveyance from a personal representative, a lawyer must ensure that all required consents¹ are obtained and be satisfied as to the authority of the personal representative and the validity of the testamentary instrument, if any.

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

NOTE:

1. [Probate Act](#), S.N.S. 2000, c.31, ss.50 and 51

ADDITIONAL RESOURCES:

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

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3.11 BANKRUPTCY AND RECEIVERSHIP

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When a lawyer is acting for the buyer in a conveyance of an interest in a parcel from the estate of a bankrupt, the lawyer must ensure that the receiving order or the assignment in bankruptcy is registered.¹ The lawyer must advise the client that the deed from the trustee cannot be relied on to convey marketable title, without full enquiry.

The lawyer must ensure that all signatures or consents that are required to give effect to the conveyance from the estate of a bankrupt are secured.²

When a lawyer is acting for the buyer in a conveyance of an interest in a parcel from the estate of a bankrupt and the seller has made a proposal under the *Bankruptcy and Insolvency Act*, the lawyer must ensure that the terms of the proposal are met.

Receivership

When a lawyer is acting for the buyer in a conveyance of an interest in a parcel from a receiver and there are no subsequent encumbrancers, the lawyer must ensure that the deed is executed by the receiver, and in the absence of a court order, the company granting the debenture security.

When a lawyer is acting for the buyer in a conveyance of an interest in a parcel from a receiver and there are subsequent encumbrancers, the lawyer must ensure that the deed is executed by the receiver and that the order approving the sale is registered, or that all subsequent encumbrancers have released their encumbrances to the extent of the interest being conveyed.

The lawyer must advise the client that the deed from the receiver cannot be relied on to convey marketable title, without full enquiry.

NOTE:

1. Registration of an order or assignment pursuant to the *Bankruptcy and Insolvency Act: Land Registration Act*, S.N.S. 2001, c. 6, ss. 28 and 30; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 74
2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss. 30(1), 155(e);

ADDITIONAL RESOURCES:

- Effect of an order or assignment prior to registration: *Land Registration Act*, S.N.S. 2001, c. 6, s. 45, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 75
- Tim Hill, "*LeBlanc (Re)*", Case Comment, (2007) 32 Nova Scotia Law News.
- Robert G. MacKeigan & Paul E. Radford, "*Nova Scotia Real Estate Lawyers Association - Conveyancing Standards of Practice 3.11 and 3.14*" (Presented at the Real Estate Practice Seminar Series, Continuing Professional Development, Nova Scotia Barristers' Society, 7 February 2003) [unpublished].
- Garth C. Gordon, "*Notes on Bankruptcy & Land Registration in Nova Scotia*" (Presented at the Joint Dinner Meeting of the Real Property and Bankruptcy & Insolvency Sections of the Canadian Bar Association - Nova Scotia, 18 October 2007) [unpublished].

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When a lawyer is acting for the buyer, the lawyer must ensure that, if a title is being conveyed by a guardian, there is authority for the appointment and authority for the guardian to convey.¹ The authority for the guardian to convey must be registered.²

NOTE:

1. *Guardianship Act*, S.N.S. 2002, c. 8, s. 18, s. 22
2. *Land Registration Act*, S.N.S. 2001, c. 6, s. 121

ADDITIONAL RESOURCES:

- N.S. *Civil Procedure Rules*: [Practice Memorandum No. 10](#) (Guardianship Application (license to sell real estate))
- Guardian of adults: *Incompetent Persons Act*, R.S.N.S. 1989, c. 218, s. 12

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3.13 CORPORATIONS AND OTHER ENTITIES

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A lawyer acting for a party acquiring an interest in a parcel from a corporation, municipal unit, university, church, society, charitable organization, or other organization, (an "entity"), should confirm that the entity, as applicable according to the nature of the entity,

1. has the power to acquire, hold, and alienate real property;
2. is in existence and in good standing;
3. has taken all actions required to authorize the sale;
4. has caused its proper officers to execute and, when required, seal the instrument of conveyance; and
5. has received any consent required for the intended disposition.

A lawyer identifying a conveyance from an entity in a chain of title should be satisfied that the conveyance was properly authorized, executed, and delivered by the entity based upon the reasonable exercise of the lawyer's professional judgment considering

1. the availability of supporting evidence;
2. the age and apparent regularity of the conveyance; and
3. any recitals or affidavits contained in the conveyance.¹

A lawyer acting for a party acquiring an interest in a parcel that has been registered pursuant to the [Land Registration Act](#) from an entity that is a corporation should confirm that the corporation

1. has the power to acquire, hold, and alienate real property; and
2. is in existence and, when necessary, is in good standing under any registration requirement to which it is subject.²

A lawyer acting for a party acquiring an interest in a parcel that has been registered pursuant to the [Land Registration Act](#) from an entity that is not a corporation, should confirm the matters as set forth in paragraph 1 respecting the entity.

NOTE:

1. P. Radford, "Corporations and Power of Attorney" in Real Estate 1994 (C.L.E.S.N.S., April 1994); J. McFarlane, "Corporate Conveyancing" in Practical Property 1982 (C.L.E.S.N.S., March 1982); C.W. MacIntosh, "Minor League Real Estate Legislation" in Real Estate 1994 (C.L.E.S.N.S., April 1994)

2. A lawyer may consider that a document is sufficiently executed by a corporation if it complies with section 83 of the [Land Registration Act](#), S.N.S. 2001, c. 6.

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

NOTE:

1. *Partnership Act*, R.S.N.S. 1989, c. 334

ADDITIONAL RESOURCES:

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

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A lawyer must search the Registry of Deeds for debentures which may affect the parcel.

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

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

NOTE:

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

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3.16 EXPROPRIATIONS

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A lawyer may certify title which has an expropriation in fee simple as the root of title.¹

When preparing an abstract of title, a lawyer must determine if there are expropriations affecting the parcel being searched.²

When the lawyer identifies an expropriation affecting a parcel, the lawyer must examine the certificate of expropriation to determine the nature of the interest expropriated. The lawyer must explain the expropriation to the client and confirm the client's instructions prior to closing.³

NOTE:

1. A.G.H. Fordham, "Certification of Title to Expropriated Land", in *Practical Property* 1984 (C.L.E.S.N.S., October, 1984)
2. After an interest in a parcel has been registered pursuant to the *Land Registration Act*, any expropriation would appear in the parcel register: *Land Registration Act*, S.N.S. 2001, c. 6, s. 29
3. **Standard 1.5 - Documentation**

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3.17 OPTIONS AND RIGHTS OF FIRST REFUSAL

When a lawyer conducts a title search and identifies an option or right of first refusal, the lawyer must determine whether the rights created are contractual or run with the land.¹

If the lawyer determines that an interest in land has been created, the lawyer should consider whether it is void as infringing the rule against perpetuities.²

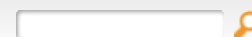
If the lawyer determines that the interest runs with the land and will not be released, the lawyer must explain the interest to the client and confirm the client's instructions prior to closing.³

NOTE:

1. P.M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991), 70 Can. Bar Rev.1
2. Options void as infringing the rule against perpetuities: *Poltizer v. Metropolitan Homes Ltd.* [1976] 1 S.C.R. 363, per Laskin C.J. (S.C.C.)
3. **Standard 1.5 - Documentation**

ADDITIONAL RESOURCE:

- F.J. Powell, "[Options and Rights of First Refusal](#)" in Real Property, (C.L.E.S.N.S. April, 1987)



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When a lawyer is acting for a buyer in a new construction transaction, the lawyer must consider the applicability of the [Builders' Lien Act](#)¹ with particular emphasis on the hold back provisions, and advise the client accordingly.

A lawyer must check for any undischarged liens filed relating to the parcel.

When vacating a claim for lien for which a lis pendens has been filed, the lawyer must ensure a court order is obtained, unless the lawyer determines that the lien ceases to exist pursuant to legislation, common law or equity. The order should also vacate all liens claimed by others sheltering under the principal action. A lawyer must, in a timely fashion, record a discharge or order vacating a lien.

NOTE:

1. [Builders' Lien Act](#), R.S., c.277, s.1:2004, c.14, s.2

ADDITIONAL RESOURCES:

- [Land Registration Act](#), S.N.S. 2001, c. 6 - "lien" defined: s. 3(1)i) - interest may be recorded: s. 47(1) - certificate of lis pendens expires ["may be removed"] after five years: s. 58(2)(d) - filing lien under [Registry Act](#), R.S.N.S. 1989, c. 392 has no effect on migrated parcel: s. 70

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3.19 QUIETING TITLES ACT

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Before accepting a certificate of title issued under the [Quieting Titles Act](#), a lawyer must examine the certificate and should advise the client with reference to the exceptions in the certificate and those referred to in the *Act*.¹

NOTE:

1. Effect of, exceptions to, certificate of title: [Quieting Titles Act](#), R.S.N.S. 1989, c. 382, s. 16, [Land Registration Act](#), S.N.S. 2001, c. 6, s. 122

ADDITIONAL RESOURCE:

- Recording of plan: [Land Registration Act](#), S.N.S. 2001, c. 6, s. 41(2)

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3.20 LEASEHOLDS

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

ADDITIONAL RESOURCES:

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

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4.1 POWERS OF ATTORNEY

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When a lawyer conducts a title search and identifies a power of attorney document, the lawyer must review the power of attorney document to ensure it is effective to do that which it purports to do.¹

A lawyer may not rely on a power of attorney unless

1. it is executed before the instrument under it is executed; and
2. it is registered pursuant to the *Registry Act*² or recorded pursuant to the *Land Registration Act*.³

A lawyer should ensure that the matrimonial status of the grantor pursuant to a power of attorney is reflected in the abstract of title.⁴

A lawyer should ensure that, in preparing an affidavit of execution for an attorney, it is based on the attorney's personal knowledge and belief.

NOTES:

1. A power of attorney is effective to convey the interest of an incompetent person only if it is a properly executed Enduring Power of Attorney pursuant to the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352, s. 3
2. *Registry Act*, R.S.N.S. 1989, c. 392, s. 24
3. *Land Registration Act*, S.N.S. 2001, c. 6, s. 72
4. *Matrimonial Property Act*, R.S.N.S. 1989, c. 275

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4.2 PROOF OF EXECUTION OF INSTRUMENTS

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

ADDITIONAL RESOURCES:

■ [Registry Act](#), R.S.N.S. 1989, c. 392, ss. 31(a), 32(2)

■ [Land Registration Act](#), S.N.S. 2001, c. 6, ss. 79(2) and 79(3)

Documents not under seal: [Corporations Miscellaneous Provisions Act](#), R.S.N.S. 1989, c. 100, s. 13(1) and [Land Registration Act](#), S.N.S. 2001, c. 6, s. 78

Standard of formality: [Miller v. Prest Bros. Ltd.](#) (1992), 116 N.S.R. (2d) 150, per Saunders J. (N.S.S.C.T.D.)

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4.3 NAME STANDARDS

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To facilitate the consistent use of names in real property and personal property instruments and judgments, lawyers are encouraged to adopt the naming standards prescribed under the *Personal Property Security Act General Regulations*¹ in force from time-to-time when identifying parties in instruments affecting real property interests and judgments. In this Standard, a name adhering to these Regulations is referred to as a “standard name”.

When a lawyer identifies a party by the party’s standard name for the first time in a title, the lawyer must, if the parcel is registered under *Land Registration Act*, link the party’s standard name with the name used to identify the party in the last instrument in the chain of title when applicable², and should, if the parcel is not registered, make the linkage.

NOTES:

1. *Personal Property Security Act General Regulations*, N.S. Reg. 129/97 ss.19-22. See also *Land Registration Act*, S.N.S. 2001, c. 6, ss. 5, 22, 67(1), (4) and (5) and 94(1)(f)
2. *Land Registration Act*, S.N.S. 2001, c.6, s. 22(2)

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4.4 IDENTIFICATION

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

- (a) signs a document in a transaction where the lawyer is responsible for the proper execution of the document;
- (b) executes a document the lawyer witnesses;
- (c) swears an affidavit before the lawyer; or
- (d) gives a solemn declaration to the lawyer.¹

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

NOTE:

1. Yamada v. Mock; Miller et al., Third Parties (1996), 29 O.R. (3d) 731. Supervision of employees: Legal Ethics and Professional Conduct Handbook Commentaries 19.4 (ensuring work done by qualified lawyer), 19.6 (work by legal assistant), 19.7 (supervision and education of legal assistant)

New Standard approved by Council November 24, 2006

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5.1 ZONING AND OCCUPANCY PERMITS

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5.2 Chattels Purchased with Residential Income Property

5.3 Personal Property Security Act

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

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

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

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

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NOTES:

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

ADDITIONAL RESOURCES:

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

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5.2 CHATELS PURCHASED WITH RESIDENTIAL INCOME PROPERTY

If the purchase and sale agreement for residential income property includes a transfer of personal property, a lawyer should search for encumbrances under the *Personal Property Security Act*¹ for either or both the seller's name and for serial numbered goods, as the case requires, and report upon the results of such search.

A lawyer must consider the possibility of other security instruments, statutory liens, or deemed trusts affecting the personal property including the requirement for a clearance certificate under the *Revenue Act Regulations*.² When reporting the results of such searches, the lawyer should heed the caution against certifying title to personal property.³

A lawyer should advise the buyer of personal property other than of nominal value that the buyer may be obliged to remit Harmonized Sales Tax on the personal property.

NOTES:

1. *Personal Property Security Act*, S.N.S. 1995-96, c. 13
2. *Revenue Act Regulations*, N.S. Reg. 63/96, s. 39
3. R. Wright, "Certifying the Uncertifiable - Chattels" (1993) 5 *The Claims Wise Bulletin*, Claims Wise No. 29 at 2

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5.3 PERSONAL PROPERTY SECURITY ACT

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5.3 Personal Property Security Act

When dealing with personal property that may become a fixture, a lawyer should consider the effect of the fixture provisions under the *Personal Property Security Act*¹ which may require registration of notices under the Act and the

1. *Registry Act*;² or
2. *Land Registration Act*.³

whichever applies.

NOTES:

1. *Personal Property Security Act*, S.N.S. 1995-96, c. 13, ss. 3(1) and 50
2. *Registry Act*, R.S.N.S. 1989, c. 392, ss. 1A(1) and 18A
3. *Land Registration Act*, S.N.S. 2001, c. 6, s. 59

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