



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin

Date: September 25, 2020

Subject: Professional Standards – Real Estate– Standard 1.3 Opinion of Title and Certificate
of Legal Effect

For: **Approval** **Introduction X** **Information**

DATE September 25, 2020	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is the introduction to Council of a revised standard 1.3 – Opinion of Title and Certificate of Legal Effect - by the Professional Standards (Real Estate) Committee. Following introduction, the standard will be circulated to the membership for review and consultation. The Committee will review any comments received and then present the final form, amended if necessary, to Council for approval.

Executive Summary:

One of the Committee's mandates is to review and update existing standards as appropriate and necessary so that they align with current practice. The Committee determined that the current standard, approved by Council on November 22, 2002, requires updating to align with current practice and legislation. Once Membership comments are received on the substantive changes that serve to align the Standard with current practice, the Committee will review it through an equity lens to determine if any further considerations are required.

Exhibit:

Revised Standard 1.3 Opinion of Title and Certificate of Legal Effect with rationale for the revisions.

Existing Standard	Proposed Standard	Rationale
<p align="center">1.3 OPINION OF TITLE AND CERTIFICATE OF LEGAL EFFECT</p> <p>STANDARD</p> <p><u>Non LRA parcels (not being migrated)</u> For a parcel or an interest in a parcel not registered under the <i>Land Registration Act</i> a lawyer may give an opinion that the title is marketable¹if, 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.</p> <p>A lawyer who provides an opinion of title must explain any qualifications to the opinion to the client and confirm the explanation of the qualifications</p>	<p align="center">1.3 OPINION OF TITLE AND CERTIFICATE OF LEGAL EFFECT</p> <p>STANDARD</p> <p><u>Non LR Parcels not being migrated</u> A lawyer may give an opinion that a parcel or an interest in a parcel which has not been registered under the Land Registration Act is 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.</p> <p>A lawyer who provides an opinion on title must explain any qualifications to the opinion to the client and confirm that explanation and any instructions relating thereto in writing to the client prior to closing².</p> <p><u>Application for Registration on migration</u> A lawyer may give an opinion that a parcel or an interest in a parcel which has not been registered under the Land Registration Act is marketable³ 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.</p> <p>A lawyer must include in the Application for Registration all encumbrances, benefits, liens, estates and other interests which</p>	

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

² Standard 1.5 – Documentation of Advice and Instruction

³ Marketable Titles Act, S.N.S.1995-96, c.9 s.4; Land Registration Act, S.N.S. 2001, c.6, s.37 (9)(b)

<p>with the client prior to closing.² The lawyer must confirm the client's instructions prior to closing.³</p> <p><u>LRA Parcels</u> APPLICATION FOR REGISTRATION</p> <p>For a parcel or an interest in a parcel being registered under the <i>Land Registration Act</i> 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</p> <p>A lawyer who qualifies⁶ an opinion of title to the registrar in a migration of a parcel under the <i>Land Registration Act</i>, must,</p>	<p>affect the parcel and the direct or indirect right of access to the parcel, if any⁴.</p> <p>A lawyer who qualifies an opinion on title on migration must document the qualification as a Textual Qualification⁵ in the parcel register.</p> <p>A lawyer who completes a final Application for Registration of a title under the <i>Land Registration Act</i> must ensure that all documents required under the provisions of the <i>Land Registration Act</i> for the final application are complete and, if required, executed, and must retain copies of the required documents together with copies of all of the documents relied upon by the lawyer to support the opinion on title⁶.</p> <p><u>LR Parcels</u> A lawyer who provides an opinion on title respecting a parcel registered under the Land Registration Act must examine the parcel register, review the documents included in the parcel register, and conduct all necessary searches in order to determine the registered ownership and interests pertaining to the parcel.</p> <p>A lawyer who provides an opinion on title respecting a parcel registered under the Land Registration Act must also be aware that there are Overriding Interests which may affect the parcel⁷.</p>	
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⁴ Land Registration Act, S.N.S. 2001, c.6, s.37(9) (a) but noting s.40(Interests not to be included in parcel register)

⁵ See definition of "Textual Qualification" in the Land Registration Administration Regulations, s.2 (1)

⁶ Land Registration Administration Regulations, s.10 (6); Regulations made pursuant to the Legal Profession Act, S.N.S.2004,c.28 ss.1.1.1 (ma) and ss.4.6.1(k)

⁷ Land Registration Act, S.N.S. 2001, c.6,s.3(1)(k) and s.73

<p>after examining the abstract of title on which the opinion is based and considering the qualifications, document the qualifications in the opinion.⁷</p> <p>A lawyer completes an application for final registration of a title under the <i>Land Registration Act</i>, must ensure that all the documents required under the <i>Act</i> 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 shall compile and maintain all foundation documents which a reasonably competent lawyer</p>	<p>A lawyer who provides an opinion on title must explain any qualifications to the opinion to the client and confirm that explanation and any instructions relating thereto in writing to the client prior to closing⁸.</p> <p>A lawyer who provides a Certificate of Legal Effect⁹ to the Registrar General with respect to a parcel must examine:</p> <ol style="list-style-type: none"> a. the parcel register, b. the enabling documents in the parcel register; c. the judgment roll and d. any document to accompany the Certificate of Legal Effect to ensure that the registration or recording will be effective to change the parcel register as required. <hr/> <p>PRACTICE NOTES</p> <p>The following is a general guide to conducting a review of title to an LR parcel</p> <ol style="list-style-type: none"> 1. Confirm that the “Parcel Access” appears accurate and, if other than public, substantiated by other information in the parcel register. 	
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⁸ Standard 1.5 – Documentation of Advice and Instruction

⁹ The following Forms contain a Certificate of Legal Effect: i.e., require to the lawyer to certify that in the lawyer’s professional opinion “it is appropriate to make the changes to the parcel register(s)” as set out in the Form:
 Form 6A – Request for correction of a previous Certificate of Legal Effect
 Form 15 – Notice to the Registrar to cancel the recording of a security interest
 Form 15A – Notice to the Registrar to cancel a recorded interest or judgment
 Form 21 – Correction of Misspelling of Name
 Form 24 – A change to the Registered Interests, Benefits or Burdens
 Form 26 – Adding a Recorded Interest or a Power of Attorney
 Form 27 – Cancelling a Recorded Interest
 Form 45 – Updating the Parcel Register re access, Benefits and Burdens following subdivision
 Form 49 – Correcting a Form 26 or a Form 27 which contains an error

would rely upon to support the opinion of title.¹³

Parcel Registered Under *Land Registration Act*

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

A lawyer who provides an opinion of title, 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*

2. Review the Instrument(s) filed under "Registered Interest" to ensure that the registered owners are correctly described in the parcel register and the legal description in the Deed(s) reflects all or, where lots have been consolidated, a portion of the lands described in the parcel description. If lands have been consolidated while under current ownership, the lawyer should review the approved Survey Plan, if any, to ensure that all component lots were conveyed to the Registered Owner(s) and are included in the current legal description.
3. (A) Review all "Benefits" and "Burdens" to determine how they apply to the property and to confirm that they have not expired.
(B) for lands other than condominium units, check that all benefits and burdens are accurately reflected in the legal description.
(C) Where appropriate check that the mirror image burden or benefit is recorded against title for the affected neighbouring lands and that there are no problems with priorities.
4. Consider the impact of any textual qualifications and whether they still apply.
5. Review the "Recorded Interests" to ensure that the interest holder is accurately reflected in the parcel register and the provisions of the recorded document(s) do not prevent or compromise the current transaction contemplated.
6. Review notes put on the parcel register by Registry staff.
7. Review the current legal description and any relevant survey information on record for obvious discrepancies.

ADDITIONAL RESOURCES

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

<p>A lawyer who applies to revise a parcel register or to effect a recording in circumstances where it is necessary to establish priority of a registered or recorded interest must examine:</p> <ul style="list-style-type: none"> a. the parcel register; b. the enabling documents in the parcel register;¹⁶ c. the judgment roll;¹⁷ d. Non-LR Documents in Process; e. Plan Index; f. Plans in Process; g. By PID for LR-Documents in Process; h. Power of Attorney Roll (if the document enabling the revision or recording is signed pursuant to a Power of Attorney which is not recorded in the parcel register); and i. 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. 	<p>materials</p> <p>C. Walker, QC, “Certifying Title and Qualifying Title under the <i>Land Registration Act</i>” in Land Registration Act Education Program, <i>LRA</i> Education materials</p> <p>I. MacLean , QC, “Searching Land Registered Parcels”, CBA Professional Development Conference, January 8, 2010</p> <p>I. MacLean, QC, “Title Searching Land Registered Parcels” (April, 2016)</p>	
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FOOTNOTES

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

² Standard 1.5 - Documentation of Advice and Instruction

³ See Footnote #2

⁴ *Land Registration Act*, S.N.S., 2001, c. 6, 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., 2001, c. 6, 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.N.S., 2001, c. 6, ss. 37(4)(ba), (f), (g) and 37(5) and Land Registration Administration Regulations, ss. 10(2)(b) and 10(3)(a)

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

¹⁰ *Land Registration Act*, S.N.S., 2001, c. 6, 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 Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28, ss. 1.1.1 (ma) and 8.2.3.1

¹⁴ See Footnote #2

¹⁵ See Footnote #2

¹⁶ *Land Registration Act*, S.N.S., 2001, c. 6, s.13(3).

¹⁷ Land Registration Administration Regulations, s. 23(1)(h); Standard 3.5 - Judgments; Standard 4.3 - Name Standards.

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. 2001, c. 6, s. 37(9)(a).

Sheriff's Deeds: 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 QC, "Searching Land Registered Parcels", CBA Professional Development Conference, January 8, 2010. Section 13.3 of the Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28, provides for audit of foundation documents by *LRA* Auditors.

Practice Notes

The necessity of searching the Plan Index is explained in a November 19, 2015 email from Janice M. McNenly (Deputy Registrar General):
"One cannot rely on "Property Details" to disclose that there is a plan that may impact the configuration or even PID numbers currently appearing for a lot under search. There is a 5 day turnaround time for the mapper to process a subdivision or consolidation plan so the fact that one does not appear in the "Details" view would not be at all conclusive evidence that a plan has not been filed. In

addition, there are other documents recorded in the plan index including boundary line agreements, development agreements and retracement plans to name but a few that are not held to the 5 day turnaround time to be processed. We have seen situations where a lawyer released a mortgage and only named the "parent PID" when a plan had been recorded that created a number of infants to which the mortgage was appropriately inherited. It is imperative that a search of the plan index as well as "plans in process" be included."