Solicitors' Responsibilities When Certifying Title Under the *Registry Act* of New Brunswick

1. INTRODUCTION

An examination of solicitors' responsibilities when certifying title under the *Registry Act*[1] of New Brunswick is timely since there have been two recent judgments of the Trial Division of the Court of Queen's Bench of New Brunswick dealing with this subject.

In the first of these cases, *Cartier Developments Ltd. and Tri-Developments Limited* v. *Yeoman, Savoie, LeBlanc & DeWitt*,[2] Mr. Justice Hoyt essentially held that a lawyer is negligent when he does not go back far enough in time in the records of the Registry Office so as to establish a good root of title to real property.

In that case, a lawyer acted in 1975 for Tri-Developments Limited in respect of its acquisition of three parcels of land, from which it intended to create a residential subdivision. The first parcel was allegedly owned by Ligouri LeBlanc, and was the most easterly of the three parcels. The second parcel was to the west of the LeBlanc property, and was allegedly owned by Georgienne Cormier. The third parcel was to the west of the Cormier property, and was allegedly owned by Eva Harris.

Beginning with the last will and testament of Sylvang J. LeBlanc, who died in 1903, the lawyer commenced his search of title to the LeBlanc and Cormier properties. By this will, Sylvang LeBlanc devised his homestead property to his two sons, Jacques S. LeBlanc and Hymphrey S. LeBlanc, share and share alike. All the rest, residue and remainder of his estate was left to his widow, Maggie LeBlanc.

In 1975 the heirs of Humphrey LeBlanc and Jacques LeBlanc divided property on the Chartersville Road. The easterly portion was deeded to Jacque's widow Hilda and the westerly portion was deeded to Georgienne Cormier, the remarried widow of Humphrey. Later in 1975, Hilda conveyed her land to her son Ligouri. The lawyer's error occurred when he assumed that the land being divided in 1975 between the heirs of Jacques LeBlanc and Humphrey LeBlanc was the homestead property left them by their father Sylvang in 1903. However, it was not. Rather, it was part of the residue left to Sylvang's widow, Maggie LeBlanc. It turned out that Jacques LeBlanc and Humphrey LeBlanc were only two of nine children of Sylvang and Maggie LeBlanc. Thus, when Tri-Developments Ltd. bought the LeBlanc and Cormier properties in 1975, it obtained only a 2/9 interest. This fact was confirmed by Mr. Justice Leger in a quieting of title application.[3]

The lawyer commenced his search of title to the Harris property at a deed to Gordon Harris in 1933. This deed described three parcels of land, one of

[1]R.S.N.B. 1973, c. R-6, as am.

[2](unreported), 8 May 1984 (N.B.Q.B.T.D.).

[3]See, *Re Tri-Development Ltd. et al.* (1978), 23 N.B.R. (2d) 439 (S.C.Q.B.D.).

which contained 4 acres. It was this 4 acre parcel which the lawyer correctly thought to be property owned by Eva Harris. The lawyer, however, also relied upon a 1974 plan prepared by a New Brunswick Land Surveyor which was used as the basis of a party line agreement between Eva Harris and the person whom she thought to be her westerly neighbour, John Layden. The party line agreement showed the Harris property to contain 5.85 acres. It turned out that this party line agreement was incorrect, since a Mrs. Logan owned property between the Layden and Harris properties and, therefore, Eva Harris owned only the 4 acre easterly portion of the 5.85 acres. It was Mr. Justice Hoyt's opinion that, had the lawyer taken his search back to 1866, he would have picked up two clear chains of title; one to the 4 acre Harris parcel, and one to the Logan property. The plan of survey, upon which the lawyer had relied, failed to show the Logan property.

Four Moncton lawyers gave evidence that it was common practice for lawyers in Moncton, when searching title, to take the property back a minimum of forty years, and if a suitable root of title was found, the property was brought forward from that point. Mr. Justice Hoyt held, however, that there were indications which should have alerted the lawyer to the fact that there were problems in taking starting points as recent as 1903 and 1933 for his searches.

Having found the solicitor negligent, Mr. Justice Hoyt went on to make the following comment:

> ...I do not have to deal with the general proposition put up by Mr. Gillis, namely, that a solicitor, is not an insurer of title. However, I tend to the view that if a solicitor assures his client that the property has marketable title he comes close to being an insurer and cannot escape the consequences of his errors by saying that he followed an accepted practice if such pracice does not accomplish what the solicitor holds out. A client does not care whether the solicitor searches back four years or forty years or a hundred and forty years. He wants to be able to rely on his solicitor's assurance that he has a marketable title.[4]

In the second of these cases, *LeBlanc* v. *DeWitt et al.*[5], Mr. Justice Meldrum apparently held that a lawyer who certifies title is negligent if he relies only upon superficial knowledge, an unchecked subdivision plan, and a client's representation as to ownership of land.

Ferdinand LeBlanc proposed to give land to his son, Bernard, the plaintiff in that case. Bernard LeBlanc contacted a New Brunswick Land Surveyor and provided him with a copy of his father's deed, dated April 20, 1942. Bernard LeBlanc also showed the surveyor the land he wanted surveyed. Using the deed provided, and measurements taken on the ground, the surveyor produced a plan.

The surveyor's plan was prepared from the following description:

> Second lot Northerly by the Main Highway leading from Memramcook to Memramcook East Easterly by land of Honore Landry Southerly by land of Philias Bourque & Sons & Westerly by land of Clovis W. LeBlanc containing fifteen acres more or less.

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[4] *Supra*, footnote 2, at 8-9.

[5] (unreported), 23 July 1984 (N.B.Q.B.T.D.).

The plan laid out two lots, namely Lots 76-1 and 76-2 and also the entire surrounding lot. The plan showed the boundaries as N.B. Highway on the north, "now or formerly" Landry on the east, "now or formerly" Philias Bourque on the south and "now or formerly" Clovis LeBlanc on the west.

Mr. Justice Meldrum held that the initial mistakes were those of the surveyor because he assumed certain facts and, without checking them, put them on his plan and certified the plan to be correct.

Mr. Justice Meldrum further held, however, that the lawyer had built upon the surveyor's mistakes. He had "made certain wrong assumptions on his own, relied on information given to him by his client, ignored inconsistencies by which he should have been warned, and gave an unconditional certificate of title."[6]

His Lordship awarded judgment against the lawyer and his partners and awarded them contribution (to the extent of 25% of their liability) from the surveyor and his company.

In his reasons for judgment, Mr. Justice Meldrum included the following:

> The client does not ask, 'Do I have paper title to the land?' He asks, "Do I have good title to the land?' That is what DeWitt certified, that, '...Bernard J. LeBlanc and Adrienne LeBlanc have a good, valid and merchantable title to the land and premises described in Mortgage No. 358518...'
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> The statement that someone, 'has good paper title to the land', is meaningless. In this case it would lead the plaintiffs to a very serious misunderstanding of what their solicitor was telling them.[7]

Further, he said:

> *The point is that defendant has unconditionally guaranteed the title.* He is bound by the logical consequences of that fact.[8] (emphasis added)

2. REGISTRATION OF DEEDS VERSUS REGISTRATION OF TITLES

To appreciate a registration of deeds system and a solicitor's responsibilities and liabilities thereunder, a comparison to a registration of title system may be worthwhile. In this regard, the following words of Sir S. Rowton Simpson are relevant:

> ...but so long as the registers remain in essence registers of deeds, not of title, the title will have to be deduced from scrutiny of the relevant deeds instead of resting on the register. What is recorded is merely evidence of title. The evidence may be complete and conclusive, but it needs interpretation; an opinion or judgment must be expressed on the strength of it. Investigation is still required and the deeds register, no matter how well kept, is merely an adjunct of this investigation.
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> A registered title, however, requires no such investigation. The register records not merely evidence but what in effect is a judgment, final, complete and always up to date (subject as ever, of course, to overriding interests). This 'continuous finality' is the factor which really differentiates registration of title from registration of deeds.

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[6] *Ibid.*, at 12.

[7] *Ibid.*, at 18.

[8] *Ibid.*, at 19.

> It can be said that the essential distinctive ingredient of registration of title is that title to interests in land depends on what the register shows, and not on extraneous instruments. Title is by registration and not by deed. Instruments are still needed to provide evidence to the registrar of the intention of an owner to create, transfer or extinguish rights in his land; but, though the instrument may establish a contractual right, it cannot in itself affect or pass any interest in land, because the law which sets up registration of title expressly provides that only the appropriate entry in the register can affect or pass such interest. The registrar is responsible for making sure that the entry is reconcilable with previously registered entries and conforms both with the law and with fact.[9]

It is my understanding that it is the responsibility of a solicitor practicing under the *Registry Act* to attend at the appropriate Registry Office and, after establishing a good root of title (ordinarily by searching back in the grantee indices), to search forward in the grantor indices and to examine instruments encountered in the course of a chronological search.

Certain statements made by Chief Justice Baxter in *Carson* v. *McMahon*[10] are important when considering matters for which a lawyer cannot be held responsible when searching a title under the *Registry Act*. These statements are as follows:

> Both of these cases turn on the use of the means provided by the Registry Act for tracing titles. Until superior authority compels me to do so, I cannot extend their application to instruments which by no conceivable possibility, except that of pure accident, could be found by a person searching a title. There is not even the circumstance that the searcher might be put upon inquiry by the occupation of the land. In this case it was wild land with no visible occupant.
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> The Registry Act provides for the keeping of indexes and I think if a person searching a title uses all the means provided by the Act it would be an unreasonable construction of the section relating to notice to hold that if there were any adventitious entry on the registry he must be held to have notice of it. All that was intended by the section was that if a document was on the registry, which he might have seen in the course of a proper search, he would be fixed with notice of it, whether he actually looked at it or not.[11]

I am aware of circumstances where a lawyer searching a title would have encountered certain instruments only by pure accident. One circumstance is with respect to a judgment taken in the name of two corporate defendants, but indexed under only one. A lawyer searching property owned by the corporate defendant not indexed would only have encountered this judgment by pure accident. Another circumstance stems from the means of expropriation used by a provincial expropriating authority prior to 1973. Since 1973, all the registered owners must be identified in the applicable notices, and any expropriation is indexed under their names as grantors. Prior to 1973, registered owners did not have to be determined prior to an expropriation, and I have been told of one circumstance where an expropriation was indexed under the grantor letter "W" for "to whom it may concern". It is to be noted that federal expropriations may still be registered without naming registered owners.

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[9] S.R. Simpson, *Land Law and Registration Book 1*, (Cambridge: Cambridge University Press, 1976) at 19-20.

[10] [1940] 4 D.L.R. 249 (N.B.C.A.).

[11] *Ibid.*, at 254.

3. ADVERSE POSSESSION

The doctrine of adverse possession which is dealt with in *Carson* v. *McMahon*[12] is also important. Every certificate of title is implicitly subject to the qualification that the lawyer is making no representations on rights, titles or interests which may have been acquired by adverse possession. This is the reason why lawyers often refer to certifying "paper title", *i.e.* title based upon the paper instruments registered in the Registry Office.

In *Maple Leaf Enterprises Limited* v. *MacKay et al.*, the liability of a lawyer with respect to title acquired by possession was put in the following terms:

> It would appear, following investigation by both Mr. Blackwood and the defendant MacKay, that there was a possessory claim being made by the McKays. Such a claim is not a matter which would come to the attention of a solicitor in a search of title under normal circumstances. Therefore, the failure at the time of the initial search to determine that there may have been a possessory claim was not a breach of the defendants' duty to their client.[13]

4. FRAUD

It is a basic principle that instruments based upon fraud cannot support a title. This principle is illustrated in the case of *McGraw* v. *Caissie et al.*,[14], in which the wife, Vitaline Comeau, executed a will devising certain real property to her husband, Lazare Comeau. This will was dated July 12, 1928, and was registered in the Gloucester County Registry Office on April 17, 1951.

The wife executed a further will jointly with her husband on about May 18, 1950, wherein the property was devised to the defendant. This will, which effectively revoked the 1928 will, was filled with the Registrar of Probate of Gloucester County on May 23, 1953, and was registered in the Gloucester County Registry office on March 12, 1954.

The wife died on May 18, 1950, and the husband moved in with one Frenette who was to take care of him until his death in exchange for the property. The husband gave a deed to Frenette which was executed on June 18, 1953 and registered on June 22, 1953. Frenette was unable to care for the husband and, on the same understanding as with Frenette, the husband moved in with the plaintiff. Frenette gave a deed to the plaintiff which was executed and registered on August 3, 1953. Neither Frenette nor the plaintiff had notice of the 1950 joint will, as it was filed in the Probate Office but not registered in the Registry Office at the relevant times of execution and registration of their deeds.

The plaintiff claimed title under the 1928 will and the defendant claimed title under the 1950 joint will. It was proven that Lazare Comeau, while he had both wills in his possession, suppressed the 1950 joint will and registered the 1928 will when he was aware that the 1928 will had been revoked and was a

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[12] *Supra*, Footnote 10.

[13] (1980), 42 N.S.R. (2d) 60, at 73-74 (S.C.T.D.).

[14] (1964), 51 D.L.R. (2d) 152 (N.B.C.A.).

nullity. In dealing with the suppression of the 1950 joint will, Mr. Justice West stated as follows:

> All registered documents are open to attack and if it is established a registered document is based on fraud or is a nullity it cannot support a title. It was not shown the plaintiff knew of the fraud. In my opinion this is not material and Comeau's deed to Frenette gave no title to the latter, who therefore could convey no title to the plaintiff in Lots A, D and E.[15]

A lawyer should not be held liable for certifying title in circumstances similar to those found in the *McGraw* case. In certifying title, a lawyer understandably presumes there is no fraud because, practically speaking, a lawyer would have no way of assuring that every instrument in a chain of title is free of fraud. Of course, these remarks do not apply in circumstances in which a lawyer knows or ought to know of fraud.

5. LEGISLATION

In some cases, legislation has been enacted affecting title to real property, but no notice of such legislation was required to be recorded in the Registry Offices.

As examples, *An Act Respecting the Royal Trust Company and Royal Trust Corporation of Canada*[16] and *An Act Respecting Montreal Trust Company and Montreal Trust Company of Canada*[17], provide for the vesting of title to real property from The Royal Trust Company to Royal Trust Corporation of Canada and from Montreal Trust Company to Montreal Trust Company of Canada, respectively. Under each of these Acts, it was not necessary to register any notice in the Registry Offices.

I am of the view that it is an unreasonable onus to place upon a lawyer to expect that lawyer to be aware of such private legislation, especially in light of the fact that a certificate of title to real property is either explicitly or implicitly based upon the records of a particular Registry Office.

It would seem fundamental that no such legislation should have any force and effect until a certified copy or some notice is registered in the Registry Offices. For example, section 4 of *An Act Respecting Title to Certain Lands in The City of Saint John*[18], provides as follows:

> Sections 1 to 3 shall not have effect unless a copy of this Act is registered in accordance with section 5 and a copy of the plan referred to in Schedule A is filed in the Office of the Register of Deeds in and for the County of Saint John.

6. REBUTTABLE PRESUMPTIONS

A more difficult area concerning solicitors' responsibilities when certifying title under the *Registry Act* is that of rebuttable presumptions. It is a prac-

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[15] *Ibid.*, at 177.

[16] S.N.B. 1978, c. 75.

[17] S.N.B. 1981, c. 86.

[18] S.N.B. 1980, c. 62.

tice of solicitors in New Brunswick to invoke and to rely upon numerous such presumptions.

For example, lawyers in New Brunswick act on the presumption that any grantor in a chain of title was of legal age at the time of the conveyance. However, any such presumption may subsequently be proven false and any such conveyance is voidable. Similarly, lawyers rely upon the presumption that an individual had mental capacity at the time of any conveyance.

Another rebuttable presumption utilized by lawyers is that any corporation in a chain of title existed at the time of a conveyance by it. It may be true that many lawyers check the corporate standing of a grantor corporation in a particular real estate transaction, however, it is doubtful whether any lawyer checks the corporate standing of every relevant corporation encountered in the course of a title search and yet, for instance, a corporation may have forfeited its charter and, therefore, have had no legal capacity to convey real property.

Other rebuttable presumptions relied upon by lawyers are those relating to certain purported facts contained in recitals and solemn or statutory declarations. Any such purported facts may subsequently be proven false. For example, a representation that certain people were all the heirs-at-law of a deceased intestate may not be correct, and outstanding vested title interests may exist.

It should be said that at times these presumptions will be rebutted and proven false. It is a difficult question whether a lawyer would be negligent for relying upon such presumptions.

7. AMERICAN REFERENCE

It is noted that every registration of deeds system is unique, and therefore, that any reference to case law in jurisdictions outside of New Brunswick may be questionable. However, it is felt that reference to some American commentary and case law may be helpful.

The state of American law on certification of title may best be summarized by the following statement:

> It is axiomatic that an attorney employed to examine title is obligated to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity in the community in which the attorney's service is rendered commonly possess and exercise. However, a lawyer is not liable for every mistake or error of judgment, and, without express agreement to the contrary, is not a warrantor or guarantor of the soundness of his opinion.[19]

To support this statement, reference can be made to *Sullivan* v. *Stout*[20]. That case involved an attorney who searched the title to lands at the Office of the Register of Deeds for the County of Hudson, New Jersey. Included in the abstracted chain of title was a tax sale deed. It was subsequently decided by the Court of Errors and Appeals of New Jersey that the tax sale deed was void and

[19] J.T. Bockrath, "Liability of Attorney For Negligence in Connection with Investigation or Certification of Title to Real Estate", 59 ALR (3d) 1176 at 1178.

[20] 118 ALR 211 (1938).

that the purchaser acquired no more than a life estate in the lands. The attorney's abstract of title indicated a fee simple title.

The purchaser sued the attorney. The New Jersey Court of Errors and Appeals decided that the action was barred by the Statute of Limitations. In the course of its decision, the Court considered a claim by the purchaser that the attorney had "certified, represented and warranted that he examined the title to the said lands and that fee simple was vested in"[21] the purchaser. The opinion filed by the court includes the following statements with respect to this claim:

> In the first place, it is settled that a lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions.
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> In the second place, assuming that a certificate of title had been given, in the absence of the production of the paper writing itself, we would have to rely upon plaintiff's version of the contents thereof which is as follows: 'I certify to James A. Sullivan that I have examined the title to Lot F..., and state that the title to Lot F..., is vested fee simple in William Kastenhuber and Dora E. Kastenhuber, his wife...'
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> Certainly it cannot be claimed that this amounts to an express warranty of title, such for example as is found in a warranty deed.
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> The defendant did not claim to be the owner of the premises. He was not engaged to sell same to the plaintiff. He did not engage to defend the title, nor did he expressly guarantee the correctness of his work. The alleged certificate is not the evidence of the obligation of the defendant to the plaintiff, but is merely evidence of the act done by the plaintiff in purported satisfaction of the obligation assumed by him in accepting his employment to search the title to the premises in question. The obligation assumed by the defendant was that created at the time of his acceptance of the employment by the plaintiff, and antedated the making of the certificate. This obligation was, according to plaintiff's own testimony, merely 'To make a complete search of the title of Lot F. in City Block 1865.' There was no obligation assumed to guarantee or warrant the title to the premises in question, nor the correctness of the defendant's work.
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> There was, however, an implied obligation to exercise reasonable care and skill in making the search of the title to the premises in question. That arose out of the oral agreement of employment, and, if broken, it was by the giving of the alleged faulty certificate.[22]

This opinion is of some comfort to lawyers practicing in New Brunswick and other jurisdictions where a registration of deeds system applies. In recent times tax sale deeds have come under closer scrutiny by lawyers searching titles and, in fact, it could be said that where once lawyers relished the thought of finding a tax sale deed on title, now the same lawyers dread the thought.

8. SUMMARY

From the foregoing analysis, it is submitted that certification of title under the *Registry Act* does not constitute an insuring, a guaranteeing, or a warranting of title, and that the expectations of a purchaser or mortgagee client must be considered in light of the limitations of the *Registry Act* system. Furthermore, the very notion of title insurance carries with it the implicit admission that a registration of deeds system is not one of guarantee or warranty.

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[21] *Ibid.*, at 212.

[22] *Ibid.*, at 213-214.

It is very unfair to substitute lawyers in New Brunswick for a title insurance company.

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