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# LAND TITLES IN SASKATCHEWAN

VOLUME 1

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# Manual of Law and Procedures, Saskatchewan Land Titles Offices



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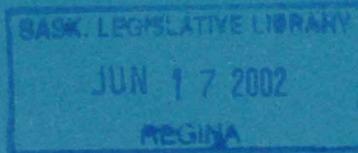
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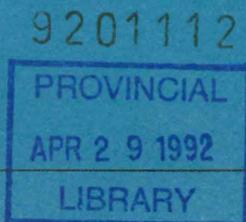
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Prepared by Georgina R. Jackson  
Master of Titles



Saskatchewan Land Titles System, 1887 to 1988.



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MANUAL OF LAW AND PROCEDURES, SASKATCHEWAN LAND TITLES OFFICES

Prepared by Georgina R. Jackson  
Master of Titles

Regina, Saskatchewan, 1988  
Saskatchewan Land Titles System, 1887 to 1988.

THE ASSISTANCE OF AURLIE HODGES  
AND KAREN LOWE IN THE  
PREPARATION OF THIS MANUAL  
IS GRATEFULLY ACKNOWLEDGED  
BY THE AUTHOR.

## PREFACE

There are two main purposes of this Manual: The first main purpose is to assist the staff in the Saskatchewan Land Titles System to perform their professional functions in registering documents and responding to enquiries. The second purpose is to assist the members of the legal profession and persons experienced in dealing with the land titles offices in performing their duties.

Central to any consideration of the Land Titles System is the question of its purpose. The purpose is to record the effect of documents relating to the ownership of land in Saskatchewan and to give to each land owner a certificate which will be good evidence of his or her entitlement to that land, so that when the owner wishes to sell it, mortgage it, or build on it, this may be done without any doubt as to who is the true owner. Similarly, when a person buys land or lends money on the security of land the person knows, by consulting the records of the land titles office, who is the true owner.

The certificate of title is the document which is evidence of ownership, and it is therefore the centerpiece of the Land Titles System. On it is recorded the name of the owner, the description of the land and the mortgages, liens and other encumbrances affecting that land.

The land titles office receives each day a great number of documents which are referred to as "instruments". Most instruments affect land described in a certificate of title and so a memorandum of their effect has to be endorsed on the certificate of title. There are some instruments which relate, not to specific land, but to a particular person (the commonest example is a writ of execution which makes all the land of the person named in the writ liable for payment of the sum of money mentioned). This type of instrument is entered in what is called the General Record, which is an alphabetical list of names indicating encumbrances.

In order to provide evidence of what the records of the land titles office show, the registrar is required to permit the public to make searches of the land titles records. The registrar is also required to issue various kinds of certificates eg. general record certificates.

Much of what is contained in this Manual is derived from the "Manual of Law and Procedures, Saskatchewan Land Titles Offices", by Peter S. Stewart, Q.C., and the second edition of that work by Mr. E.S. Collins and from circular letters to registrars written by R. S. Meldrum, Q.C., Deputy Attorney General, by Clifford J.

Towill, by E. S. Collins, by C. Wilfred Truscott and by myself. Mr. Stewart was Master of Titles and Registrar, Regina Land Registration District, from 1937 to 1958; Mr. Meldrum acted as Master of Titles from 1958 to 1960 along with his other duties; Mr. Towill, after service as Deputy Registrar at Moosomin and Saskatoon, was Registrar, Saskatoon Land Registration District, from 1944 to 1960 and Master of Titles from 1960 to 1963; Mr. Collins, after service as Registrar at Regina, from 1958 to 1963, was Master of Titles from 1963 to 1966; Mr. Truscott, after service as Deputy Registrar at Arcola and Deputy Registrar at Moosomin, from 1957 to 1961, Registrar in Moosomin, from 1957 to 1961, and Swift Current from 1961 to 1966 served as Master of Titles from March of 1966 to May 31, of 1981. I served as Master of Titles from June 1981 to August 1988.

This manual also is based upon the collective wisdom of the present employees of the Land Titles System. Every person who has worked in a land titles office for any time demonstrates a personal love and commitment to the ongoing functioning of the system. All have contributed in varying degrees to the preparation of this Manual.

Georgina R. Jackson

Regina, 1988

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## PART I - HISTORICAL

### Chapter 1. Settlement of the Territories

In 1670, King Charles II granted a charter to The Governor and Company of Adventurers of England Trading into Hudson's Bay (known for short as "Hudson's Bay Company"). This charter granted to the company extensive rights of ownership and government over what was then known as "Rupert's Land". Rupert's Land extended from the wooded country east of Winnipeg to the Rocky Mountains, and so included what is now Saskatchewan. The purpose of the grant of this charter was to enable the company to undertake trading in this area, principally in furs.

On the formation of the Dominion of Canada in 1867, it was important that this territory be incorporated into the Dominion. A surrender was therefore negotiated whereby the company surrendered its entitlement to Rupert's land which was then incorporated into the Dominion of Canada as the North West Territories. The effective date of this incorporation was July 15, 1870.

The Dominion Government then arranged for the new territories to be surveyed. The system of survey which was followed was adapted from the one in the western United States. The lands were laid off in quadrilateral townships, each containing 36 sections of as near one mile square as possible, and leaving land for road allowances between sections. The sections were divided into quarter sections of 160 acres, more or less, and every section was divided into legal subdivisions. This method of survey is referred to in more detail elsewhere in this manual.

It was one of the terms of the agreement between the Dominion of Canada and Hudson's Bay Company on the surrender of Rupert's Land that the company became entitled to a one-twentieth part of the land referred to as being within the "fertile belt" (i.e. generally speaking, that portion of the Territories south of the North Saskatchewan River and west of Lake Winnipeg and Lake of the Woods). The method whereby Hudson's Bay Company acquired the titles to this land was that, as townships were surveyed and the survey confirmed at Ottawa, Hudson's Bay Company was duly notified of such surveys and then the Dominion Lands Act acted as a transfer of the land to which the Hudson's Bay Company was entitled and to vest the same in that company without the issue of a patent for such lands. Usually the lands conveyed to the Hudson's Bay Company were section 8 and three-quarters of section 26 except in each fifth township when the Hudson's Bay Company received all of section 26.

In order to promote settlement of the Territories, it was necessary to encourage the construction of railroads and so certain sections of land were granted by the Crown to railroad companies as a form of subsidy for the construction of mainline railroads. Usually the sections granted were all of the odd numbered sections (except the school sections which were 11 and 29) in a strip running twenty miles on either side of the railway. If the land was not "fit for settlement" other lands were given to the railroad companies in substitution. The sections were granted to the railroad companies not by notification as in the case of Hudson's Bay Company under the Dominion Lands Act but by grant or patent. All land for which a certificate of title now exists was originally granted by the Crown either by notification to Hudson's Bay Company or by grant or patent to a railway company or a settler or other person. It is often necessary to refer to these notifications and grants to see what their terms were, eg. whether they reserved minerals.

## Chapter 2. Land Registration Districts

Prior to the formation of the Provinces of Saskatchewan and Alberta in 1905, the administration of The Land Titles Act was under the control of the Government of Canada, and at that time there were five registration districts, namely, Assiniboia, South Alberta, North Alberta, West Saskatchewan and East Saskatchewan. Broadly speaking the Assiniboia District was composed of the southern half of the present Province of Saskatchewan. The South Alberta District was composed of the southern half of what is now Alberta, and the North Alberta District was composed of what is now northern Alberta, the West Saskatchewan District was what is now the Battleford District, and the East Saskatchewan District was what is now the Prince Albert District. The total area in any of the districts named would not be composed of exactly the same lands as now compose the districts of southern Alberta and northern Alberta, and in what is now the Province of Saskatchewan. There are now eight land registration districts in Saskatchewan as shown on the next page. From the time the Province of Saskatchewan was created until September 8, 1906 there were just three districts in this Province, namely, Assiniboia, West Saskatchewan and East Saskatchewan.

The other land registration districts with the respective dates of creation, and the respective dates of the Saskatchewan Gazette containing the proclamation of the creation of the new districts, are as follows:

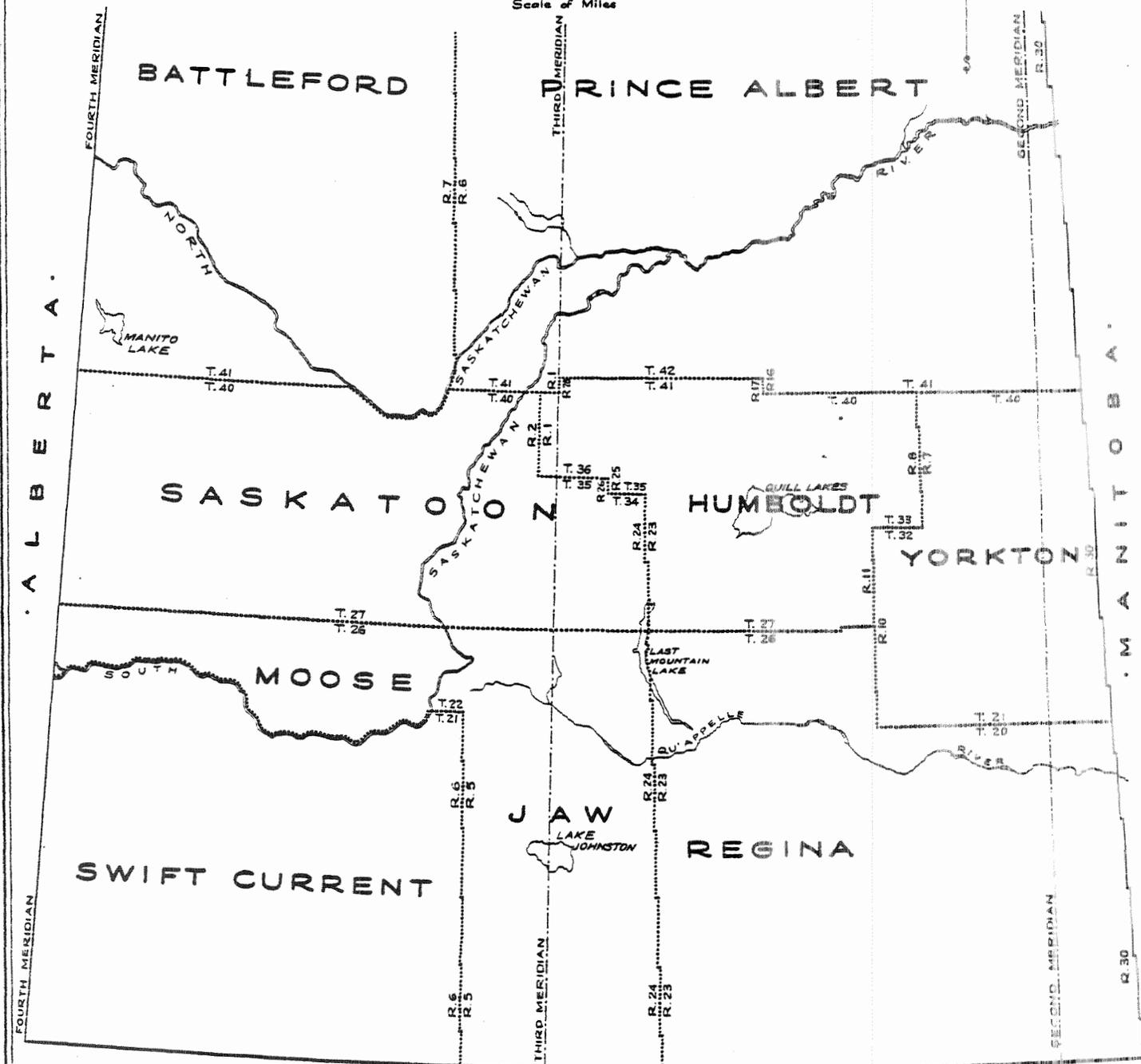
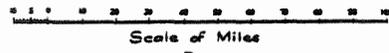
| <u>District</u>                          | <u>Date of Creation</u> | <u>Date of Sask. Gazette</u> |
|--|-------------------------|------------------------------|
| Yorkton                                  | September 1, 1907       | August 31, 1907              |
| Saskatoon                                | August 1, 1908          | August 15, 1908              |
| Moose Jaw                                | March 1, 1910           | March 15, 1910               |
| Cannington (later<br>Arcola, now closed) | May 1, 1911             | June 15, 1911                |
| Moosomin (now closed)                    | November 15, 1913       | January 15, 1914             |
| Humboldt                                 | June 1, 1914            | June 30, 1914                |
| Swift Current                            | June 4, 1915            | December 31, 1914            |

The name of the West Saskatchewan Registration District was changed to Battleford Land Registration District, East Saskatchewan to Prince Albert Land Registration District, and Cannington to Arcola Land Registration District. These changes were effective August 1, 1923, and proclamation was published in the Saskatchewan Gazette on June 15, 1923.

The Moosomin and Arcola Land Registration Districts were amalgamated with that of Regina as follows:

| <u>District</u> | <u>Date of Amalgamation</u> | <u>Date of Sask. Gazette</u> |
|-----------------|-----------------------------|------------------------------|
| Moosomin        | April 1, 1961               | March 30, 1961               |
| Arcola          | May 20, 1961                | March 30, 1961               |

PROVINCE  
OF  
SASKATCHEWAN  
• LAND REGISTRATION •  
• DISTRICTS •



• UNITED STATES •

Survey Branch,  
Land Titles Office,  
Regina, Saskatchewan,  
31<sup>st</sup> November, 1936.  
Revised 1982.

### Chapter 3. Sources of the Law of Real Property

As mentioned above, the effective date of the surrender of Rupert's Land and its incorporation in the Dominion of Canada, was July 15, 1870, and so it was provided by An Act further to Amend the Law respecting the North West Territories, 49 Vic. Ch. 25, section 3 that the laws of England relating to civil and criminal matters as the same existed on July 15, 1870 shall be in force in the Territories in so far as the same are applicable to the Territories. This included the law of real property or land law.

The English land law derives originally from feudal custom in the Middle Ages. From custom and the decisions of judges over the centuries, came "the common law". This has been very much modified, chiefly by "equity" and by statutes. "Equity" was developed by the Court of Chancery as a body of law, based on ideas of fairness and good conscience, to mitigate the harshness of the common law courts, which had become very strict and technical in administering the law. At one time, law and equity were administered by separate courts, but they are now administered by the same courts and if there is any conflict, the rules of equity prevail.

From the earliest times, statutes have been passed to modify the law of real property, usually to bring it into line with contemporary conditions.

The Land Titles Act itself made many amendments to the law and greatly simplified the manner of selling, mortgaging and dealing with land. However, there are many cases when reference has to be made outside The Land Titles Act to the general principles of real property law as they are to be found in these three sources - common law, equity and statute.

## Chapter 4. Methods of Keeping Land Records

From the earliest time, difficulty was experienced in knowing who was the owner of land (real property). In the case of a chattel (personal property), it usually belonged to the person who had possession or control of it, but all kinds of rights might exist in respect of land which would not be apparent to any person inspecting it. For many centuries it had been the custom for the transfer of ownership of land to be evidenced by long complicated documents, which were then kept by the new owner as evidence of ownership. Any person buying land would therefore require the seller to show these documents going back over many years as evidence of title. This was very unsatisfactory and gave rise to fraud in many cases.

A device therefore was adopted, which is still in use in many parts of Canada and the United States, of requiring all deeds to be registered. In order to obtain priority over other deeds, a deed would have to be sent to the registry office. However, the registry office did not give any evidence of title but merely kept the deed or a copy of it and indexed it under the name of the grantor or vendor so that anyone interested in the land could examine the deed in the registry office and be satisfied as to what it contained. This is called the "registry system" and was in force in the North West Territories until January, 1887. Many of the earliest deeds of record in land titles offices were recorded under this system and not under the Land Titles System.

The Land Titles System is derived from the State of South Australia. In 1840, a man called Robert Torrens, arrived in Adelaide, South Australia. He became the Collector of Customs. Principally, customs were collected from ships who, then as now, were required to have a "title" recording ownership and interests that would be of a lesser extent than ownership. Torrens became convinced that if it was possible to have a title for a ship it should be possible to have a title for land. So much property was passing quickly to so many new settlers in the early days of South Australia that the old English conveyancing laws could not cope with the situation.

Torrens was elected as one of the members for Adelaide, and became treasurer. He wrote to the governor, intimating his intention to suggest a Bill for amending the conveyancing laws. This Bill was ultimately passed by parliament. It was called the Real Property Act of 1858. It embodies four main principles. First, a certificate of title is, subject to certain specified exceptions, conclusive evidence of ownership, so that it can be relied upon in all transactions concerning that land. This principle is often called the principle of indefeasibility. Second, the scheme of the Act promotes facility of transfer. Relying on the principle of indefeasibility, prospective purchasers can freely deal with anyone purporting to be the registered owner of land. Third, registration

of documents is compulsory which means that in order to take priority or have any effect over persons who are not parties to the transaction, the transaction or notice of the transaction must be registered or filed in the appropriate land titles office. Fourth, an assurance fund is created to compensate any person who suffers loss or damage through an error in the operation of the Land Titles System or through deprivation in circumstances where the principle of indefeasibility overrides previous common law rights of ownership.

The fundamental change which the system, which is often known as the Torrens System, made to the mechanism of land holding in operation was that the owner of each piece of land was shown conclusively on the certificate of title which relieved land owners, their purchasers and lenders from the necessity of examining a great many long complicated documents each time the land was the subject matter of a legal transaction.

The system was introduced into the North West Territories, which as was indicated earlier, at that time included all of the lands now known as Alberta and Saskatchewan, by The Territories Real Property Act, R.S.C. 1886, c.26 which was repealed and re-enacted by R.S.C. 1886, c.51. This Act was continued later by the federal Land Titles Act, 1894, S.C. 1894, c.28, and subsequently The Land Titles Act S.S. 1906, c.24 of Saskatchewan which came into force on Sept. 8, 1906. This is the system which is now in force in Saskatchewan. The present Land Titles Act is chapter L-5 of the Revised Statutes of Saskatchewan, 1978.

As mentioned in chapter 2, for the purposes of the system, the land in the Province is divided into eight land registration districts. A land titles office, headed by a registrar, serves each district. At Regina are the offices of the chief officials of the system, namely the Master of Titles and the Chief Surveyor. The Master of Titles is also the Director of the Property Registration Branch. The Property Registration Branch is the name given to that branch of the Department of Justice which has responsibility for the Land Titles System.

The Property Registration Branch is under the control of the Minister of Justice.

With this history and these principles in mind, the survey system and the main features of the Saskatchewan Land Titles System may be considered.



## PART II - MAIN FEATURES OF THE LAND TITLES SYSTEM

### Chapter 5. Certificate of Title

#### A. Distinction Between Patented and Unpatented Land

Land is "patented" when a certificate of title is granted for the land. A certificate of title is "granted" upon registration of a grant from the Crown (see section 50 of The Land Titles Act) or upon receipt of a request to issue a certificate of title to the Crown (see section 50.1 which was added by S.S. 1988, c. 28 effective June 21, 1988).

Unpatented Crown land falls into two categories. The main category is land for which a certificate of title has not been granted. Most Crown lands are administered under the provisions of The Provincial Lands Act by either the Department of Agriculture or the Department of Parks, Recreation and Culture. Registrations can be made against unpatented land (see section 127 and subsection 155(2) of The Land Titles Act).

The second category of unpatented land is land for which a certificate of title is not in existence, but which is treated like patented land and is usually referred to as "vested lands". Examples of vested lands are original road allowances and streets and lanes.

Original road allowances are vested lands for which there is no certificate of title. It is possible to "close" a portion of an original road allowance for the purposes of consolidation with the adjacent land (see subsection 116(1) of The Land Titles Act) and page 60 of this manual. Similarly, when a plan of subdivision that includes streets and lanes is registered, no certificate of title is issued for the surface of the streets and lanes. The certificate of title remains "alive" as to mines and minerals, including the mines and minerals under the streets and lanes, if the certificate of title that was cancelled as a result of the registration of mines and minerals included mines and minerals (see page 91 of this manual), but the certificate of title for the surface of the streets and lanes is cancelled, and no new title is issued. Even though no certificate of title exists for the surface, it is possible for the Master of Titles to "close" a portion of a lane and consolidate the portion with an existing title.

No registrations are allowed against unpatented land which is vested eg. an original road allowance or the surface for streets and lanes.

#### B. Certificate of Title Form

As stated previously, the certificate of title is the centerpiece of the Land Titles System. It is the evidence of ownership which the

system is intended to provide. There is a certificate of title for every parcel of land which has been granted by the Crown.

There are three forms of a certificate of title:

- (1) Form A of the second schedule to The Land Titles Act - certificate of title for a fee simple estate;
- (2) Form B of the second schedule to The Land Titles Act - certificate of title for a leasehold estate;
- (3) Form 2 to the Condominium Property Act Regulations - certificate of title for a condominium unit.

At the end of this chapter is a specimen certificate of title for a fee simple estate. From this certificate of title it is seen that at the top appear some items of information for use in the office and by the public, eg. the number of the certificate, the number of the previous certificate, the value of land as shown on the last affidavit of value (on which land titles fees were assessed), and the number of the grant from the Crown from which the certificate of title ultimately is derived.

On a certificate of title for mines and minerals or a mineral that has been dealt with after June 21, 1988 there will appear in the upper left hand corner, the information "M.C. \_\_\_\_\_" with an instrument number appearing in the blank. This refers to the number of the most recent mineral certificate which has issued in respect of the mineral interest described on the title. The Land Titles Amendment Act, S.S. 1988, c.28, effective June 21, 1988, requires that a mineral certificate need only be issued "if no mineral certificate exists with respect to the interest in the mines and minerals that are the subject matter of the disposition", (see subsection 208(3)). This means that a mineral certificate is no longer issued with respect to each disposition. By showing the number of the mineral certificate on the title, the registrar and anyone looking at the title know easily that the mineral interest reflected on the title is guaranteed.

The name of the registered owner is then shown. It is important that this is accurate in every detail and that it is typed out exactly as it appears in the transfer or other instrument from which the certificate of title is prepared.

The next part of the certificate of title is, where appropriate, an indication of the capacity or co-ownership interest of the owner of the land, eg. as such executor, or as such administrator, or as joint tenants, or "as to an undivided...interest each" (in the case of two or more tenants in common who wish that the extent of their interest be specified).

Then comes the description of the land. Particular care has to be taken to ensure that this is correct, otherwise the certificate will relate to the wrong piece of land. In particular, it is necessary

to ensure that numbers are always correct. Where the certificate of title describes a portion of a quarter section or parcel, (eg. commencing at the south west corner of the quarter section, thence northerly along the western boundary of the quarter section 500 metres etc.) it is easy sometimes, in typing the certificate, to miss a portion of the description. Care must be taken to ensure that the description is complete.

A certificate of title is prepared, eg. from various instruments eg. a grant, a transfer, an application for transmission, an application by a surviving joint tenant or sometimes from a judge's order.

On the back of the certificate of title are columns or spaces for brief memoranda affecting the certificate of title. Specimen endorsements follow the sample certificate of title in this chapter. These memoranda are either:

- (1) relating to encumbrances and other interests - these may be endorsed on the certificate of title when it was issued because they relate to a mortgage, lien, caveat etc. which affected the previous certificate of title, and would therefore have to be carried forward on to the new certificate of title, or are endorsed on the certificate of title at any time subsequent to its issue by reason of the registration of a mortgage, caveat, builders' lien or other instrument;
- (2) cancellations - a memorandum of cancellation may be either as to part of the land contained in the certificate of title or as to the whole of the land.

If a cancellation is as to part of the land, it indicates the part which is cancelled, and in determining how much land is covered by the certificate of title the portion cancelled must be taken away from the land described on the front of the title. A total cancellation indicates the certificate of title is no longer alive, and a new certificate of title has been issued in its place.

Normally, any endorsement which appears on the back of the previous title and has not been discharged or withdrawn must be carried forward to the new certificate of title. However, there are exceptions to this rule which are mentioned in this manual.

## C. Renewal, Enlargement or Consolidation

### 1. Renewal

A certificate of title is renewed, at the option of the registrar, for a variety of reasons associated with good management of the system. The most common reason is that there is no space for any new endorsements unless the certificate of title is cancelled and a new one issued omitting any endorsement that had been discharged or cancelled.

The registrar also renews a residual title when time permits to reflect the exception on the front of the title rather than the back. The value shown on the residual title is the old value, as the registrar does not know the value of the remaining portion after a portion is transferred out.

## 2. Enlargement

Land is enlarged out of a certificate of title either at the option of the registered owner, or the registered owner's solicitor, or the registrar. The most common reason for the registrar to enlarge land in a title is to rectify a potential problem with mines and minerals. For example, where a plan of resubdivision is being registered the registrar will raise a certificate of title for the mines and minerals to keep the mines and minerals described according to the larger parcel.

## 3. Consolidation: Section 78 of The Land Titles Act

### (a) Owner or Solicitor May Request

Upon application of the owner or owner's solicitor, and presentation of the duplicate certificates of title, the registrar may cancel the existing certificates of title for two or more parcels and issue a single certificate of title (see subsection 78(1)).

Sometimes a certificate of approval under The Planning and Development Act will be issued "subject to consolidation" with an existing parcel. The approval is taken to be a request to consolidate by the registered owner for which fees are charged.

Except as outlined below, the registrar does not proceed with consolidation, without a written application because a future division will require the owner to apply for planning approval.

### (b) When Registrar can Consolidate Upon Conveyance from the Crown

Subsection 78(1) empowers the registrar to demand consolidation or proceed with consolidation upon a conveyance from the Crown if:

- (1) a boundary is not clearly defined;
- (2) the only access is through another parcel; and
- (3) in the opinion of the registrar, the inclusion of the parcels in one certificate of title is desirable for the clear and accurate definition of the boundaries.

In each case the registrar will require the duplicate certificates of title.

The consolidation pursuant to this subsection is without fee (see subsection 78(2.3)).

All encumbrances affecting the certificate of title prior to the conveyance from the Crown apply to the whole consolidated parcel (see subsection 78(2.1)).

The registrar's power under this subsection is required to be used in two main cases:

- (1) where the Crown grants part of the bed of a body of water (no separate certificate of title should exist for a part of a bed adjacent to an existing body of water because of the current uncertainty regarding accretion);
- (2) where the Crown grants an abandoned railway right of way to an adjacent land owner (the survey evidence monumenting the railway right of way will have been destroyed).

(c) Registrar's General Power to Consolidate

Subsection 78(2.2) is a general power to consolidate. The registrar may include parcels in certificates of title where it "is desirable for the clear and accurate definition of the boundaries thereof or for any other reason".

The duplicate certificates of title are required.

The consolidation pursuant to this section is performed without fee (see subsection 78(2.3)).

D. Substitute Certificate of Title: Section 82 of The Land Titles Act

On a few rare occasions, in spite of the utmost care taken to prevent misfiling of a certificate of title, a certificate of title cannot be found. Section 82 of The Land Titles Act gives the Master of Titles the authority to direct the registrar to issue a new certificate of title based on a print from the microfilm. The Master of Titles requires affidavit evidence from the registrar as to the circumstances of the loss and effort made to locate the title. The certificate of title so issued is required to have marked thereon "Substitute Certificate of Title" (see subsection 82(1)). No duplicate is issued.

A "Substitute Certificate of Title" has the same force and effect as the original certificate of title.

If and when the original certificate is found, it is immediately marked with the Master of Titles' order number replacing it and forwarded to the Master of Titles together with a report on the circumstances under which it was found.

The same procedure is used with respect to a cancelled certificate of title. The offices do not destroy cancelled certificates of title. If a cancelled certificate is lost, it must be replaced.

#### E. Indefeasibility

The salient characteristic of a Land Titles System is that the certificate of title is conclusive evidence of ownership. The section of The Land Titles Act which effects this is section 213.

The essence of the principle of indefeasibility is that a person is entitled to rely on whatever the certificate of title says. Its accuracy must, therefore, be beyond question both as to what is on the face of the certificate and as to memoranda on the back. It is important also that it be not only accurate but free from ambiguity.

The Land Titles Act and other statutes, will, from time to time, prescribe conditions to which a certificate of title is subject. These conditions are called "exceptions to indefeasibility". Because of the need for security of title, the legislature moves cautiously when it expands the list of exceptions.

Sections 69, 70, 70.1 and 116 of The Land Titles Act set out instruments and interests to which a certificate of title is subject without any special mention in the certificate of title.

The most prevalent exception is for all unpaid taxes in clause 69(b). Note that C.M.H.C. v. Calgary, [1987] 5 W.W.R. 91 (Alta. C.A.) is authority for the proposition that utility arrears are not included in the phrase "unpaid taxes" as that phrase is used in the Alberta Land Titles Act.

Another exception to indefeasibility was added by The Land Titles Amendment Act, 1985, S.S. 1984-85-86, c.50. New clause 69(k) means that airport zoning regulations are no longer required to be endorsed on a certificate of title. The reasons for the amendment included the realization that no other form of zoning is shown on a title, and other provinces, which do not have a title system, have no means of drawing the attention of the public through the land system. Zoning regulations under the Aeronautics Act (Canada) are still filed in the land titles office but not endorsed on the title.

Section 70.1 was added by the same amending Act to facilitate the rail line abandonment program. Section 70.1 is a legislative statement saying that SaskPower and SaskTel registered instruments which abut abandoned rail lines are deemed to have the land descriptions amended to include the abandoned portion of land. It ensures that SaskPower and SaskTel do not have to file caveats

charging the abandoned portion of the right of way with prior agreements in order to protect their interests. It also avoids the necessity of numerous Master of Titles' Orders to amend existing plans to encompass the abandoned land.

Section 69 refers to many types of instruments which the registrar is directed to register by other legislation, eg. roadways or public utility easements. In such a case the registrar is required to register the instruments by the other Act and must do so.

Section 70 now includes easements granted pursuant to The Public Utilities Easements Act and the National Energy Board Act (Canada). This means that when a public highway is closed any certificate of title is deemed to be subject to such interests and, in such cases, the amendment effectively overrules Shelf Holding Ltd. v. Husky Oil Operations Ltd., [1987] 4 W.W.R. 558 (Alta. Q.B.).

## F. Duplicate Certificate of Title

### 1. Purpose

Section 48 of The Land Titles Act provides that after the registration of a title, a duplicate certificate of title is also prepared. Today the duplicate certificate of title is prepared at the same time as the title is registered. The purpose of the duplicate certificate of title is as follows:

- (1) it prevents fraudulent dealing with land because it must be produced, subject to certain exceptions contained in section 57, whenever an instrument is registered;
- (2) it may be held by the registered owner, except where the land is mortgaged (see section 128), or subject to a lease (see section 118), as evidence of ownership.

The owner may, however, ask the land titles office to hold a duplicate certificate of title in safe keeping.

### 2. When Duplicate Must be Produced

Section 56 of The Land Titles Act provides that the registrar shall not accept an instrument for filing or registration without the duplicate, unless ordered to do so by the court or the Master of Titles, or unless the instrument is one of those listed in section 57. The list in section 57 is quite extensive. Also, practice dictates that, for certain instruments, not listed in section 57, the duplicate need not be produced. These additional exceptions are referred to, in this manual, when a particular instrument is discussed. Today, as a general rule, the duplicate need only be produced for consensual instruments eg. a transfer, a mortgage, a lease, an easement, etc.

Note that section 20 of The Water Corporation Act provides that a duplicate certificate of title is not required to be produced for a lease granted pursuant to subsection 18(4), a transfer made pursuant to subsection 19(1) or an easement granted pursuant to subsection 19(2) of The Water Corporation Act.

### 3. When Duplicate Retained

Sometimes a first mortgagee will submit a discharge of mortgage and ask for the duplicate certificate of title to be returned. This cannot be done (see section 128 of The Land Titles Act). The practice is to register the discharge, but the duplicate certificate of title is retained, and the mortgagee is advised of the other outstanding mortgage. The duplicate is also impounded upon registration of a lease, unless a certificate of title is granted for the lease (see subsection 118(2) and 119(2) of the Act).

### 4. Lost Duplicate

From time to time, the registered owner of land will lose the duplicate certificate of title. Section 81 of The Land Titles Act provides a means whereby a new duplicate certificate of title can be issued in its place.

The present policy with respect to lost duplicate certificates of title is to require the registered owner and each person who had the duplicate certificate of title in his or her possession to swear an affidavit outlining the facts relating to the loss. The registrar relies on the sworn affidavits to direct that a new duplicate certificate of title should issue, in all cases, except where the registrar is not satisfied with the affidavit or a person swearing an affidavit indicates that the duplicate has been stolen, in which case, the registrar is required to insist on advertising.

Where the registrar has conscientiously made his or her decision, whether the registrar did or did not require advertising, there is clearly no omission, mistake or misfeasance of the registrar so as to render the assurance fund liable. In the case of McInnis v. District Registrar (1952-53), 7 W.W.R. (N.S.) 29 (Man. Q.B.) the trial judge held that where the registrar has a plausible reason for its nonproduction, he could not be held to have committed an omission, mistake or misfeasance so as to render the assurance fund liable. The evidence that the trial judge had was the applicant's sworn statement that the title had not been hypothecated. However, the trial judge went on to give the plaintiff leave to bring her action alleging that she sustained loss or damage by the registration of another person as the owner. Thus, even though the registrar may have required advertising, there is a possibility of liability if by the issuance of the duplicate someone has been deprived of land and not because of any error

on the part of the registrar. Of course, it is possible to argue, and it would be argued if it ever came up, that the unregistered mortgagee by not bringing himself or herself within the system by means of at least a caveat cannot have recourse to the assurance fund. This argument could be made whether or not the applicant advertised, if the registrar reached his or her decision based on the facts in the affidavit.

## 5. Duplicate Wrongfully Retained

### (a) Power of the Registrar

Section 83 of The Land Titles Act gives the registrar the authority to demand production of the duplicate certificate of title. The registrar sends a written demand in Form I. If the person holding the duplicate refuses to produce it, the registrar may apply to a judge for a summons (see section 84). Section 85 sets forth the power of the court to compel production.

Re Toth v. J.I. Case Threshing Machine Co. (1910), 14 W.L.R. 704 at 706 (Sask. S.C.) states that the powers in section 83 are for the convenience of the registrar.

### (b) Power of the Registered Owner

S.S. 1983, c.50 added section 83.1 and a new Form I.1 which allows the registered owner to compel production of the duplicate in the same manner as the registrar.

## G. Specimen Certificate of Title

On the following pages, there is a specimen certificate of title, for a fee simple estate in rural land, which illustrates some of the above points.

Note that in typing or checking a land description, important numbers and measurements are given in figures only. These must be very carefully typed and checked. Separate lines are taken for the section, township, and range; this makes for greater clarity in reading the title. Similar treatment is given to lot, block and plan numbers, in the case of urban property.

## H. Specimen Endorsements

On the subsequent pages are set out some examples of endorsements on the new form of certificate of title. These are not exhaustive, and a form of endorsement will sometimes have to be specially devised to meet particular circumstances. Any abbreviation used in the first column is usually explained in the heading.



# CERTIFICATE OF TITLE

Value \$ 55,000.00

No. 88S11111

Grant No. 614 AB

Ref. 87S11111

THIS IS TO CERTIFY that **WILLIAM JULIUS LUKAS**  
of Saskatoon, Saskatchewan

is now the owner of an estate in fee simple

of and in

the most North Easterly 30 feet in perpendicular width throughout of Lot 19 and  
all of Lot 20  
Block 164  
Saskatoon, Saskatchewan  
Plan 69S05397

MINES AND MINERALS EXCEPTED BY BK 2050

**SUBJECT TO** THE ENCUMBRANCES, LIENS AND INTERESTS NOTIFIED BY MEMORANDUM NOW OR  
HEREAFTER UNDERWRITTEN OR ENDORSED HEREON, OR WHICH ATTACH BY IMPLICATION UNDER THE  
LAND TITLES ACT. ANY REFERENCE TO AREA IS "MORE OR LESS".

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my official seal this

1 day of December 88 A.D. 19

Post Office Address 1801 Bowers Dr.,

Saskatoon, Sask. S7K 1B1

Registrar

Saskatoon Land Registration District

TY Province of Saskatchewan

NOTICE: The Land Titles Act provides that "every owner or mortgagee shall notify the Registrar of any change in his Post Office Address."

**ABBREVIATIONS**

A of EA - Assignment of Easement  
 ASJT - Application by Surviving Joint Tenant  
 BL - Builders' Lien  
 C - Caveat  
 E - Enlargement  
 EA - Easement  
 M - Mortgage  
 MI - Mechanics' Lien  
 M of EA - Mortgage of Easement  
 N - Notice  
 N to L - Notice to Lapse  
 PP - Postponement  
 R - Renewal  
 T - Transfer  
 TL - Tax Lien  
 TR - Transmission  
 WF - Writ of Execution

Show Other Abbreviations Here

C of A - Certificate of Action  
 CCE - Certificate of Chief Engineer  
 JO - Judge's Order  
 MO - Maintenance Order  
 MTO - Master of Titles Order  
 PA - Power of Attorney  
 PWA - Party Wall Agreement  
 S of L - Surrender of Lease  
 T of L - Transfer of Lease  
 T of M - Transfer of Mortgage

**CERTIFICATE OF TITLE**

Name .....

Land .....

**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount            | Particulars   | Signature of Registrar | Discharges and Withdrawals |                      |  |
|----------------------|---------------------|----------------------|-------------------|---|------------------------|----------------------------|----------------------|--|
|                      |                     |                      |                   |   |                        | Registration Number        | Date of Registration | Signature of Registrar   |
| A of EA              |                     |                      |                   | Re: (registration number)<br>Made by:<br>To: (name)   |                        |                            |                      |  |
| Aff of Marriage      |                     |                      |                   | To:<br>Title:   |                        |                            |                      | *note: no need to show in other abbreviations  |
| Annuity M            |                     |                      | as therein stated | Made by:<br>In favour of: (name and address of mortgagee)                                       |                        |                            |                      |  |
| ASJT                 |                     |                      |                   | To:<br>Title:   |                        |                            |                      |  |
| BL                   |                     |                      | \$XXX.--          | Made by: (name and address for service)<br>as to the Estate of (if other than registered owner) |                        |                            |                      |  |
| C                    |                     |                      |                   | Easement<br>Made by: (name and address for service)   |                        |                            |                      | *note: reference to nature means cannot be lapsed                                    |
| C                    |                     |                      |                   | Planning & Development Act (Section 143 or 115)<br>Made by: (name and address for service)      |                        |                            |                      | *note: reference to section means cannot be lapsed                                   |
| C                    |                     |                      |                   | Restrictive Covenant<br>Made by: (name and address for service)                                 |                        |                            |                      |  |
| Certificate or CCE   |                     |                      |                   | Certificate of Chief Engineer under The Water Rights Act  |                        |                            |                      | *note: applies to existing titles under Water Rights Act & any renewals etc. thereof |
| C of A               |                     |                      |                   | Re: Lien (registration number)<br>Between: (Plaintiff)<br>And: (Defendant)                      |                        |                            |                      |  |
| Certificate          |                     |                      |                   | Under The Water Corporation Act   |                        |                            |                      | *note: this is the certificate for Sec. 60   |
| Consent              |                     |                      |                   | Re: Tax Enforcement Act<br>From: Provincial Mediation Board                                     |                        |                            |                      |  |

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Show Other Abbreviations Here

**CERTIFICATE OF TITLE**

Name .....

Land .....

**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount   | Particulars   | Signature of Registrar | Discharges and Withdrawals |                      |  |
|----------------------|---------------------|----------------------|----------|---|------------------------|----------------------------|----------------------|--|
|                      |                     |                      |          |   |                        | Registration Number        | Date of Registration | Signature of Registrar   |
| Consolidation        |                     |                      |          | With: (other title No.(s).)<br>To:<br>Title:  |                        |                            |                      |  |
| E                    |                     |                      |          | As to:<br>To:<br>Title:   |                        |                            |                      |  |
| EA                   |                     |                      |          | Re: (other land)<br>Made by: (Servient Tenement)<br>In favour of: (Dominant Tenement)   |                        |                            |                      | *note: insert on right hand side of particulars column whether Dominant or Servient Tenement   |
| EA                   |                     |                      |          | Re: (other land)<br>Between:<br>And:  |                        |                            |                      | *note: used for mutual easement  |
| EA                   |                     |                      |          | As to: <span style="float:right">Made by:</span><br>In favour of:<br>For:               |                        |                            |                      | *note: intended for all statutory easements or an expropriation. When used for Public Utilities Easement Act, some offices show Made by: |
| Forfeiture           |                     |                      |          | To:<br>Title:   |                        |                            |                      |  |
| 19<br>JO             |                     |                      |          | (Caveat, Builders' Lien, etc. and registration No. and terms of order in brief)         |                        |                            |                      |  |
| JO                   |                     |                      |          | To:<br>Title:   |                        |                            |                      |  |
| Lease                |                     |                      |          | Made by:<br>In favour of:<br>Term of (years) from (date) as stated therein              |                        |                            |                      |  |
| Lis Pendens          |                     |                      |          | Between: (Plaintiff)<br>And: (Defendant)  |                        |                            |                      |  |
| Lost DCT             |                     |                      |          | Statutory Declaration Affidavit of (name)<br>New DCT issued in lieu of one dated (date) |                        |                            |                      |  |
| M                    |                     |                      | \$XXX.-- | Made by:<br>In favour of: (name and address of mortgagee)                               |                        |                            |                      |  |

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**CERTIFICATE OF TITLE**

Name .....

Land .....

**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount                  | Particulars   | Signature of Registrar | Discharges and Withdrawals  |                      |                        |
|----------------------|---------------------|----------------------|-------------------------|---|------------------------|---|----------------------|------------------------|
|                      |                     |                      |                         |   |                        | Registration Number   | Date of Registration | Signature of Registrar |
| MC                   |                     |                      |                         | Mineral Certificate<br>Issued as to (what land and specified interest)  |                        | *note: if as to all mines and minerals, this should be stated       |                      |                        |
| M of EA              |                     |                      | Terms as therein stated | Re: (registration number)<br>Made by:<br>In favour of: (name and address of mortgagee)  |                        |   |                      |                        |
| MO                   |                     |                      | Terms as therein stated | Against:<br>In favour of:   |                        |   |                      |                        |
| MTO                  |                     |                      |                         | (terms)   |                        | *note: amendment to be made on face of title as well                |                      |                        |
| N                    |                     |                      |                         | Authority of (name and address of committee/Public Trustee) as committee of the Estate of (name of mentally disturbed person)                                 |                        |   |                      |                        |
| N                    |                     |                      |                         | Change of Address for Service<br>Re: (Lien or other Inst. No.)<br>To:   |                        |   |                      |                        |
| N                    |                     |                      |                         | Certificate of Change of Name<br>To:<br>Title: (if new title is requested)  |                        | *note: front & back of title is also changed if no new title issued |                      |                        |
| N                    |                     |                      |                         | Under The Water Corporation Act   |                        | *Note: this is the notice for Sec. 59                               |                      |                        |
| N                    |                     |                      |                         | Correction of Name (by Affidavit)<br>To:<br>Title: (if new title is requested)  |                        |   |                      |                        |
| N                    |                     |                      |                         | Certificate of (amendment/amalgamation)<br>To:<br>Title: (if new title is requested)  |                        |   |                      |                        |
| N                    |                     |                      |                         | (Bylaw or Order) designating land (municipal or provincial) heritage property (adapt to particular order or nature)   |                        |   |                      |                        |
| N                    |                     |                      | \$XXX.--                | Under The Personal Property Security Act with a registration life of (infinity or number of years) from (date of registration)<br>Made by: (name and address) |                        |   |                      |                        |

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**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount | Particulars  | Signature of Registrar | Discharges and Withdrawals |                      |                        |
|----------------------|---------------------|----------------------|--------|--|------------------------|----------------------------|----------------------|------------------------|
|                      |                     |                      |        |  |                        | Registration Number        | Date of Registration | Signature of Registrar |
| N                    |                     |                      |        | Warning of Impending Forfeiture of Minerals Under The Mineral Taxation Act   |                        |                            |                      |                        |
| N                    |                     |                      |        | Under The Power Corporation/Saskatchewan Telecommunications Act  |                        |                            |                      |                        |
| N                    |                     |                      |        | Easement (registration number) released except as to ptn. Plan (filed plan number) and rights of access thereto  |                        |                            |                      |                        |
| N to L               |                     |                      |        | (Instrument - (caveat, writ of execution, lease, builders' lien, personal property security notice) and registration No.) will lapse in (number) of days unless continued as therein provided<br>Mailing date: |                        |                            |                      |                        |
| Order                |                     |                      |        | Provincial Mediation Board (terms in brief and expiry date)  |                        |                            |                      |                        |
| PA                   |                     |                      |        | To:<br>Nature: (details in brief)<br>Made by:  |                        |                            |                      |                        |
| Plan                 |                     |                      |        | To:<br>Title:  |                        |                            |                      |                        |
| Plan                 |                     |                      |        | Roadway (number) ha.<br>To: Her Majesty the Queen (Sask.)<br>Title:  |                        |                            |                      |                        |
| Plan                 |                     |                      |        | Act or Authority<br>To:<br>Title:  |                        |                            |                      |                        |
| PP                   |                     |                      |        | (Instrument and registration No.) is postponed in favour of (Instrument and registration No.)  |                        |                            |                      |                        |
| PWA                  |                     |                      |        | (other land if necessary)<br>Between: (registered owner)<br>And: (other party)   |                        |                            |                      |                        |
| R                    |                     |                      |        | To:<br>Title:  |                        |                            |                      |                        |

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Name .....

Land .....

**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount   | Particulars  | Signature of Registrar | Discharges and Withdrawals |                      |   |
|----------------------|---------------------|----------------------|----------|--|------------------------|----------------------------|----------------------|---|
|                      |                     |                      |          |  |                        | Registration Number        | Date of Registration | Signature of Registrar  |
| Replot               |                     |                      |          | To:<br>Title:<br>Plan:   |                        |                            |                      | note: the Plan bears a number ahead of the scheme, but is not endorsed separately |
| Request              |                     |                      |          | Re: (tax lien No.)<br>To:<br>Title:  |                        |                            |                      |   |
| Request              |                     |                      |          | Re: Lease (registration No.)<br>To:<br>Title:  |                        |                            |                      |   |
| Resolution           |                     |                      |          | As to:<br>Made by: (municipality)<br>For replotting scheme under The Planning and Development Act<br>Lease (registration No.) is surrendered |                        |                            |                      | *note: endorsement made on leasehold title only                                   |
| S of L               |                     |                      |          | To:<br>Title:  |                        |                            |                      |   |
| T                    |                     |                      |          | As to:<br>By: (municipality and address)   |                        |                            |                      |   |
| TL                   |                     |                      |          | Re: (registration number)<br>Made by:<br>To: (name and address)  |                        |                            |                      |   |
| T of L               |                     |                      |          | Re:<br>Made by: (name of mortgagee)<br>To: (name and address)  |                        |                            |                      |   |
| T of M               |                     |                      |          | To:<br>Title:  |                        |                            |                      |   |
| TR                   |                     |                      |          |  |                        |                            |                      |   |
| WE                   |                     |                      | \$XXX.-- | Debtor:<br>Creditor:<br>c/o:   |                        |                            |                      |   |
|                      |                     |                      |          |  |                        |                            |                      |   |

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 TR - Transmission  
 WI - Writ of Execution

**CERTIFICATE OF TITLE**

Name .....

Land .....

Show Other Abbreviations Here

1. Total Discharge
2. Partial Discharge
3. Discharge of Builders' Lien by Form I
4. Certificate of Discontinuance
5. Surrender of Lease - on Fee Simple Title

**CHARGES, LIENS AND INTERESTS**

| Nature of Instrument | Registration Number | Date of Registration | Amount   | Particulars  | Signature of Registrar | Discharges and Withdrawals |                      |                        |
|----------------------|---------------------|----------------------|----------|--|------------------------|----------------------------|----------------------|------------------------|
|                      |                     |                      |          |  |                        | Registration Number        | Date of Registration | Signature of Registrar |
| M                    |                     |                      | \$XXX.-- | Made by:<br>In favour of: (name and address of mortgagee)                  |                        | 88R00001                   | 1 Jan 88             |                        |
| C                    |                     |                      |          | Made by: (name and address for service)                                    | as to NE               | 88R00003                   | 1 Jan 88             |                        |
| BL                   |                     |                      | \$XXX.-- | Made by: (name and address for service)                                    |                        | 88R00004                   | 1 Jan 88             |                        |
| C of A               |                     |                      |          | Re: Lien (registration number)<br>Between: (Plaintiff)<br>And: (Defendant) |                        | 88R00005                   | 1 Jan 88             |                        |
| Lease                |                     |                      |          | Made by:<br>In favour of:<br>Term of (years) from (date) as stated therein |                        | 88R00006                   | 1 Jan 88             |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |
|                      |                     |                      |          |  |                        |                            |                      |                        |

## Chapter 6. Instruments

Every land titles office receives every day a great number of "instruments". These are of many different kinds and in Part IV of this manual some analysis is made of those of most common occurrence.

Instruments may be divided into those which are made by agreement between parties, such as, for example, a transfer, a mortgage, and a lease, and those which are registered by one party only without reference to any other party, and often, without the agreement of the registered owner. Examples of these are a caveat, a builders' lien, and a judge's order.

Instruments may also be divided according to whether they contain a land description and therefore, have to be endorsed on a certificate of title, and those which have no land description and are filed against the name of the person concerned in the general record. Examples of instruments affecting certificates of title are transfers, mortgages, leases, easements, caveats, and notices of personal property security interests. Examples of instruments filed in the general record are writs of execution, letters probate, letters of administration, Public Trustee's certificates and assignments and receiving orders in bankruptcy.

The chief duties of the land titles office staff in relation to an instrument are:

- (1) to record accurately its receipt in the office in the instrument register which shows the date of receipt, the serial number given to the instrument (which determines its priority in relation to other instruments affecting the same land), the nature of the instrument, the person from whom it is received, and a brief note of the land affected;
- (2) to process it with dispatch, so that its effect can be shown on the certificate of title or in the general record as quickly as possible after it is received;
- (3) to record its effect accurately which means that all certificates of title affected are endorsed with the appropriate memorandum, that any certificate of title which is only partially affected by an instrument indicates the part which is affected, that all details in the memorandum are correct and that items in the general record are put in their correct alphabetical order;
- (4) when the process of registration is complete, to file it accurately in its proper place and check positioning with adjacent instruments.

## Chapter 7. The General Record: Composition, Searches, Certificate and Liability

### A. Composition

The general record is referred to in section 31 of The Land Titles Act. It is intended to be used for the filing of instruments which relate to a particular person but not to any described land. A brief memorandum is made of the nature and particulars of the instrument on index cards. Each card is indexed under the name of the person concerned.

Most land titles offices divide the general record into the "A", "B" and "C" docket. The "A" docket contains those instruments which a titles researcher must know about in examining any instrument executed by a particular person. Examples of these are a writ of execution, a certificate of change of name of a company, a receiving order or an assignment in bankruptcy and a maintenance order. The "B" docket contains those instruments which mean that someone other than the registered owner may deal with the land. Examples are letters probate, letters of administration, Public Trustee's certificates and powers of attorney. This docket only contains reference cards for these types of instruments which have been filed in the last twenty years.

Often in the "A" docket a partial discharge will be received in relation to particular lands. This practice is authorized for a writ of execution (see section 181 of The Land Titles Act) and for a maintenance order (see section 130 of The Land Titles Act). Upon receipt of a partial withdrawal as to specified lands, the registrar prepares a blue card which is inserted in the docket to prevent the instrument from attaching to the land mentioned at some future date.

The "C" docket contains cards in relation to the same type of instruments as is contained in the "B" docket but which are older than twenty years.

### B. Searches of the General Record

The general record is searched in three instances:

- (1) at the counter to provide a verbal search to a counter customer;
- (2) in the process of registering an instrument like a transfer or mortgage;
- (3) for the purposes of a general record certificate.

1. Search of the General Record at the Counter

Searches at the counter are usually made immediately before an instrument is submitted for registration. The client is asking whether a particular name is clear. There is no legislated authority for this practice but it is a long standing one. The client completes a service request form. Any instrument filed with respect to that name which appears in the "A" docket is noted, in abbreviated form on the service request and initialled by the clerk making the search. Often the client wants any instrument, found in relation to the name searched to be produced. The search fee for one name in the general record includes production of any instrument filed with respect to that name (see clause 22(1)(c) of The Land Titles Fees Regulations). If there is nothing on the docket, for the name being searched, the request form is marked as "Clear" and initialled.

2. Searching the General Record While Examining Instruments for Registration

The general record is searched in relation to the registration of a number of instruments. Subsection 180(5) of The Land Titles Act directs the registrar as follows:

180(5) From and after the receipt by the registrar of the copy, no certificate of title shall be granted and no transfer, mortgage, lease or other instrument executed by the execution debtor of the land shall be effectual, except subject to the rights of the execution creditor under the writ while the same is legally in force.

Similarly, subsection 130(3) provides:

130(3) The registrar, on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the respondent affecting such land, shall by memorandum upon the certificate of title and on the duplicate state that the certificate, transfer, mortgage or other instrument is subject to such rights.

Both of these sections are directing the registrar to check the general record before a certificate of title is issued and before any instrument executed by the registered owner is registered. Questions arise from time to time as to whether or not the general record must be searched in relation to certain instruments which create titles but which are not executed by the registered owner. An example of this type of instrument is a court order like a vesting order, mortgage foreclosure or order following judicial sale, each of which type of instrument

directs the registrar to issue a new certificate of title to a particular person. The answer to this question depends on the interpretation of the word "grants" in each of the two subsections mentioned above. A reading of the Act indicates that the verb "grants" is used in relation to the registrar's power to issue certificates of title. Consequently, it would appear that whenever the registrar issues a certificate of title to a new person, the registrar is required to check the general record. This is problematic in relation to court orders in that in the time lapse between obtaining a general record certificate for the purposes of the Chambers' application and registration of the order in the land titles office, additional writs of execution are sometimes filed. A search of the general record at the time the court order is registered may reveal a writ of execution which had not previously been drawn to the attention of the solicitor for the applicant. Since the court order can only speak from the day of its issue (see In re F.C. Richert Company Limited, [1935] 1 W.W.R. 345 at 349 (Alta. S.C.A.D.)), the registrar is required to refuse to issue any resulting certificate of title free and clear of a writ of execution or maintenance order found between the date of the court order and the day of registration of the order. Although these instruments do not have priority over the mortgage and would be foreclosed on the foreclosure of the mortgagor's equity of redemption, the holders of these interests may have the right to redeem.

An exception is made with respect to titles which issue following the registration of a plan of survey under section 114 of The Land Titles Act and also on a consolidation arising as a result of a roadway abandonment from the Department of Highways.

In the first case, section 114 directs the registrar to issue the certificate of title free and clear of all encumbrances or any interests whatsoever. Unlike with the court order, which can only speak from the day on which the court issues it, the plan of survey will in essence speak from the day that it is registered by virtue of section 114. In the same way, notifications of roadway abandonments under section 116 are required to be treated like a plan under section 114. With respect to roadway abandonments, as a matter of administration, the registrar will be able to check the general record at a later date and it serves the need of the system to achieve the consolidation rather than impeding it with the possibility of a writ of execution falling on the certificate of title.

The general record must be checked when a common law easement or a public utility easement is submitted for registration. Both of these types of instruments are executed by the registered owner of the servient tenement and accordingly fall within the terms of the above mentioned sections. In contrast, a notice of requirement of easement filed pursuant to The Expropriation Procedures Act is not executed by the registered owner and accordingly the general record need not be checked.

The practice has developed to allow a solicitor submitting a transfer to state that the transfer should register only if the title will issue free and clear of encumbrances, or words to like effect. This requires the land titles office to check the general record for writs of execution and maintenance orders that may affect the transferee, as well as the transferor.

### 3. The General Record Certificate

The general record certificate is a certificate issued by a land titles office providing the written results of a search of the general record. It is issued pursuant to the authority of section 22 of The Land Titles Act. A sample follows this chapter.

Effective April 1, 1986, the general record certificate is issued only in relation to the "A" docket unless a specific request to search the "B" docket is received. If a request to search the "B" docket is received after a general record certificate is issued, a further certificate is issued, without charge, for a twenty year period covering the instruments contained in the "B" docket and further than twenty years if the request specifically asks the land titles office to provide a complete search. The majority of clients requesting general record certificates are interested in receiving a certificate with respect to the "A" docket only.

In asking for a search of the general record, it should be noted that if two or more variations are given of a name, each variation is treated as a separate name and fees are charged accordingly.

A request for a general record certificate in relation to a particular company will only show writs of execution, etc. against that corporate name and any amalgamations or name changes in relation to that company. It will not show writs of execution or other instruments in relation to a new corporate name resulting from the amalgamation or the name change. It is the responsibility of the requesting party to order a general record certificate against the name of a corporation and any successor corporation or request another general record certificate on any additional name revealed by the first certificate. With no instructions from the requesting party, it

is impossible for the land titles office to know the extent of the enquiry being made.

Instruments which bear a similar name to the one being searched are shown on general record certificates. This exercise of discretion can lead to inconsistent certificates being provided. To alleviate this problem, it is suggested that a copy of the first certificate be forwarded with an instrument for registration so that the certificate can be taken into consideration by the titles researcher processing the instrument. The problem will not be eliminated entirely as the first certificate may be incorrect but submission of a copy will ensure careful scrutiny of any additional instruments which may be found.

### C. Liability in Relation to the General Record

Section 197 of The Land Titles Act provides that any person sustaining loss or damage through an omission, mistake or misfeasance of the registrar may bring an action against the registrar of the district in which the land is situated for the recovery of damages. Thus, errors in relation to searches at the counter and for the purposes of the registration of other instruments and for general record certificates can result in an action against the registrar. Clause 207(f) of the Act provides that the assurance fund is not liable for loss, damage or deprivation "occasioned by the failure of a registrar to endorse a memorandum of an execution filed in his office on the title to any land owned or acquired by an execution debtor under a name which is different in any way from the name by which he is described in a writ of execution, unless the lands that are subject to the execution are specifically described therein". This clause was added in 1978 and was intended to allow the land titles office to lessen its requirements with respect to similar names. It is hoped that all names which would be found to be similar by a court will have been shown on a general record certificate by the land titles offices. However, in the event that a writ of execution which is not shown on a general record certificate is found by a court to be sufficiently similar to the name being searched, it may be that the assurance fund will deny liability and the execution creditor will still take priority over the claimant purchaser or mortgagee (see Cartlidge v. Grandville Savings and Mortgage Corporation et al., [1987] 2 W.W.R. 673 (Man. C.A.)).

## D. The Similar or Identical Name Problem

### 1. History

It frequently happens that a name in the general record is the same or similar to that of a party to an instrument being registered, but the two persons are not in fact the same. Although this problem can arise with an assignment in bankruptcy or a maintenance order, it is more likely to arise with a writ of execution because of the larger number of writs.

Under The Territories Real Property Act, R.S.C. 1886, c.51, s. 94, a writ against lands had to specify the particular lands which an execution creditor intended to pursue. The Land Titles Act of 1894 eliminated the need to name specific lands in the writ. However, each of The Land Titles Acts since 1894 has provided that upon registration of a writ of execution, it binds and forms a lien and charge on the land of the execution debtor. This charge was not limited to land described by the same name as the execution debtor shown in the writ. Accordingly, the courts quite easily found the assurance fund liable if the registrar failed to endorse a writ of execution against lands held under a name similar to that of the execution creditor (see Sievell v. Haultain (1911), 4 Sask. L.R. 142 (S.C.); Borbridge v. Borland (1915), 8 W.W.R. 1151 (Sask. S.C.); McRoberts v. Registrar of North Alberta Land Registration District, [1923] 2 W.W.R. 306 (Alta. S.C.A.D.)). These cases resulted in the policy of finding an execution debtor's name to be similar if "the two names might be the same". Thom's Canadian Torrens System, (2nd ed.) sums up the law on page 421:

. . . it is submitted that the actual practice of registrars in assuming from a substantial similarity of name or address an identity of parties is more in accordance with a reasonable protection of creditors' interests even if an innocent party as frequently happens may suffer annoyance from being confused with a debtor with a similar name and with having to meet a requisition by the registrar for a declaration of other evidence as to identity.

Since the change to The Land Titles Act in 1894 it has been a question of balancing the interests of innocent third parties and execution creditors. By Statutes of Saskatchewan, 1920, c.30, the equivalent of subsection 180(9) of the present Land Titles Act was added to provide a means whereby a registered owner could require the registrar to notify the execution creditor that the writ of execution will not affect the land of the owner unless a judge's order is obtained within twenty days. Prior to 1920, the only mechanism of relief was to obtain a certificate of identity from the sheriff. In 1961, the equivalent of section 88 of the present Act was added to allow

the registrar to take evidence, under oath or otherwise, to the effect that a writ of execution does not affect certain land. This resulted in the administrative practice of swearing affidavits of identity to prevent a writ of execution from affecting land.

By The Land Titles Amendment Act, S.S. 1978, c.30 (proclaimed in force July 1, 1978) three amendments were introduced to further reduce the number of writs which could affect a particular piece of land. First, section 89.1 was added to require only given names and no initials for a transferee. Second, subsection 180(2) was amended to require only given names and no initials for the execution debtor. Third, clause 207(f) was added to provide that the assurance fund is no longer liable where there is any difference between the names of the execution debtor and the owner of the land. This amendment effectively overruled the Borbridge and McRoberts cases, above.

The consequence of this last amendment is to allow the registrar to reduce the number of writs which are considered similar. For example, it would be rare that the registrar would find a writ of execution to be similar where there is a difference between the last name of an owner and that of an execution debtor.

## 2. Remedies

An innocent third party affected by a writ of execution against someone else has three remedies:

- (1) provide evidence to the registrar under section 88 of The Land Titles Act;

The land titles office provides a form of affidavit which may be used. The staff will help anyone complete and swear the form. No charge is made for this service. The registrar may take any evidence by affidavit or otherwise and should not insist on the land titles office form as the only evidence.

- (2) obtain a certificate of identity from the sheriff;

This remains permanently on the general record and will eliminate the problem indefinitely.

- (3) require the registrar to notify the execution creditor under subsection 180(9) of the Act i.e. the requisition need not be witnessed and attested and is accepted without fee.

When a writ of execution relating to a person of a similar name has been removed by one of the above methods, the registrar issues a new certificate of title by renewal without fee, so that the owner's certificate of title will contain no reference to the writ. Care must be taken to ensure that the writ is not attached on any subsequent transaction. Counsel can assist in this regard by referring to previously sworn affidavits.

By ensuring that the owner's full name appears on the certificate of title, the number of potential writs that could attach are reduced. An initial or nickname could refer to more names i.e. a title in the name of John Campbell is affected by a writ against Peter J. Campbell or John M. Campbell but a title in the name of John Arthur Campbell is not so affected. If a lawyer is acting for a client who has a common name a general record certificate or search should be obtained, and, if an affidavit is required, it should accompany the transfer.

The remedy under section 88 of The Land Titles Act may also be used for:

- (1) liens or charges in favour of Her Majesty the Queen (Saskatchewan) or a municipality;
- (2) assignments for the general benefit of creditors, receiving orders and cautions filed under the Bankruptcy Act;
- (3) notices filed pursuant to any former Lunacy Act; or
- (4) maintenance orders filed pursuant to section 130 of The Land Titles Act.

I hereby certify that there are no instruments in which the land affected thereby is not specifically described entered in the general record of the above office against the name of

Name (Person(s) or Company(ies))

Prior to and including the last registered instrument on the 1 day of June 19 88 and registered as No 88R11121  
Excepting as hereunder set forth:

| Grantor-Debtor, etc.   | Address       | Instrument                              | Registration Number | Registration Date | Amount                                      | Time-Creditor-Grantee, etc.           |
|------------------------|---------------|---|---------------------|-------------------|---|---------------------------------------|
| (Deceased)             | Regina, Sask. | Letters Probate                         | 88R11110            | 1 Jun 88          |   | (Executor(s)) (address)               |
| (Deceased)             | Regina, Sask. | Letters of Administration               | 88R11111            | 1 Jun 88          |   | (Administrator(s)) (address)          |
| (Deceased)             | Regina, Sask. | Public Trustee's Certificate            | 88R11112            | 1 Jun 88          |   |                                       |
| (Grantor)              | Regina, Sask. | Power of Attorney                       | 88R11113            | 1 Jun 88          |   | (Appointee(s)) (address)              |
| * (Respondent)         | Regina, Sask. | Maintenance Order                       | 88R11114            | 1 Jun 88          | show if determinable or "as therein stated" | (Petitioner) (address)                |
| * (Debtor)             | Regina, Sask. | Execution                               | 88R11115            | 1 Jun 88          | \$X,XXX.00                                  | (Creditor) (c/o Solicitors (address)) |
| (Debtor)               | Regina, Sask. | Assignment of Execution<br>Re: 88R11115 | 88R11116            | 1 Jun 88          |   | (Assignee) (c/o Solicitors (address)) |
| (Debtor)               | Regina, Sask. | Substitute Execution<br>Re: 78R11011    | 88R11117            | 1 Jun 88          | \$X,XXX.00                                  | (Creditor) (c/o Solicitors (address)) |
| (Bankrupt)<br>(Debtor) | Regina, Sask. | Bankruptcy                              | 88R11118            | 1 Jun 88          |   | (Trustee) (address)                   |
| (Respondent)           | Regina, Sask. | Liquidation                             | 88R11119            | 1 Jun 88          |   | (Liquidator) (address)                |
| (Old name(s) Company)  | Regina, Sask. | Change of Name                          | 88R11120            | 1 Jun 88          |   | (New name)                            |
| (Old name(s) Company)  | Regina, Sask. | Amalgamation                            | 88R11121            | 1 Jun 88          |   | (Amalgamated name)                    |

Note: This Certificate refers only to instruments filed against the individual mentioned therein except Letters Probate, Letters of Administration, Public Trustee's General Consents, Public Trustee's Certificates or Powers of Attorney. A search for such entries will be made, for a period of 20 years before the 1st day of January of the year that this Certificate was issued or further, free of charge upon request.

Registrar

\* Possibility of reverse judgement exists for Maintenance Order and Execution

Chapter 8. Searches, Certified and Uncertified Copies and Abstracts of Titles and Instruments

A. Purpose and Authority

Since one of the objects of the Land Titles System is to provide evidence of title on which the public can rely in their business dealings, means must be provided for the public to consult the records of the land titles office. Authority for this service is contained in subsection 22(1) of The Land Titles Act which provides as follows:

22(1) Every registrar shall, when required, furnish:

- (a) under seal abstracts of surveyed lands for which no certificate of title has been granted; or
- (b) certified copies under seal or uncertified copies of:
  - (i) certificates of title; or
  - (ii) the whole or a part of any instrument filed or registered in his office;

affecting lands in the registrar's land registration district.  
[This subsection was enacted by S.S. 1988, c.28 effective June 21, 1988.]

A search of titles and instruments may be conducted:

- (1) at the counter;
- (2) through the preparation of certified and uncertified copies; and
- (3) when abstracts of unpatented land are prepared.

B. Conducting a Search at the Counter

A search of a certificate of title or an instrument may be conducted at the counter of a land titles office through the completion of a service request form. Service request forms are provided to all major users of the system and are available at the counter to the general public. There is a fee for the searching of titles and instruments.

Sometimes a client requests all titles and transfers with respect to a list of lands after a certain date. The practice is to pull the current certificates of title and have the client indicate on the service request which transfers are required.

Searches of service requests are not made. If required for court purposes, the registrar can be subpoenaed to produce them.

Titles that are in the registration process but not finally registered may be examined upon request by a solicitor who requires it except where the certificate of title is directly in the hands of a member of the registration team. Depending on the circumstances of each given case, eg. the registrar is concerned that the instrument may be rejected, the registrar may refuse to allow a member of the public to examine a certificate of title that is in the registration process.

Some of the land titles offices will, depending on work load, provide a search of titles and instruments based on a request from deposit account holders received over the telephone. The provision of this service is entirely in the discretion of each individual registrar. Basically, searches of five land descriptions are only allowed per day. The primary information provided is name, address and disposition of the duplicate certificate of title. Actual wording of land descriptions need not be provided. Information as to endorsements is only confirmed. All information provided by telephone is confirmed by uncertified or certified copies of titles or instruments searched. A charge is made automatically to the deposit account.

#### C. The Certified Copy of Any Instrument or Certificate

Each land titles office provides, on request, a certified copy of any certificate of title. If a certified copy of a certificate of title is requested upon the registration of an instrument, the certified copy stamp is referenced, in time, to the completion of the work in the office up to the instrument number being worked on by the person issuing the certified copy. The word "last" is struck from the certification stamp to ensure no one can contend that the certificate referred to is the last instrument registered on that day. If the certified copy is requested over the counter or by mail, the certification stamp is referenced to the date of completion of the work in the office according to the procedure for establishing the currency date in each office i.e. the last instrument on a named date. Certified copies of parts of instruments including plans can be requested.

From time to time, the registrar will be asked to certify a print of a plan or a portion of a plan or a photocopy of an instrument which print or photocopy has been made outside the land titles office. If the registrar is satisfied after due examination that the documents are the same, the registrar may certify the copy prepared outside of the office. The registrar will not mark any print or photocopy as an uncertified photocopy.

#### D. The Uncertified Copy

The Land Titles Fees Regulations, which came into effect August 1, 1983, provide an additional service in the form of an uncertified photocopy. An uncertified photocopy is not signed by a registrar or deputy registrar but does indicate the currency date of the office.

Any person or corporation not asking specifically for a certified photocopy is provided with an uncertified photocopy. Government agencies not requiring a certified photocopy for court purposes are provided with uncertified photocopies only. As with a certified copy, an uncertified photocopy of a part of an instrument including a plan can be made. New subsection 22(1) referred to on page 34 now specifically authorizes the preparation of uncertified copies.

#### E. The Abstract

With the change to the smaller certificate of title form and the introduction of photocopying machines into the land titles offices, it has been the policy to issue abstracts for unpatented surveyed Crown land and, in special cases only, for court purposes. New section 22 of The Land Titles Act, enacted by S.S. 1988, c.28, effective June 21, 1988 confirms the practice that abstracts will be issued for unpatented surveyed Crown land only.

Issuing abstracts for unpatented surveyed land is the only mechanism to provide clients of the Land Titles System with information regarding instruments affecting unpatented Crown land. However, abstracts are not issued for unpatented unsurveyed land as information may be present on several folders due to the lack of precision with respect to the land description. This information must be obtained from the applicable government agency administering the Crown land which will usually be the Department of Agriculture in Regina.

#### F. Searching the Instrument Register

It has long been the practice for solicitors giving opinions with respect to mortgage advances to search the instrument register. This is a service which is provided without fee. Since the decision of First National Mortgage Co. Ltd. v. Realistic Homes Ltd., [1981] 3 W.W.R. 1 (Sask. Q.B.), there should be fewer searches of the instrument register.

First National Mortgage Co. Ltd. v. Realistic Homes Ltd. held that subsection 55(2) of The Land Titles Act provides an instrument is not registered until a memorandum has been entered upon the certificate of title. (See also G.W. Harris Drywall Ltd. v. Registrar of Regina Land Registration District (1981), 17 Sask. R. 149 (Q.B.) and Pasqua Paving Ltd. v. Morguard Trust Company et al. (1981), 10 Sask. R. 62 (Dist. Ct.)).

## Chapter 9. The Assurance Fund

One of the corner stones of a Land Titles System is that the guarantee of title and accuracy is backed by an assurance fund, the funds for which are based on a percentage of all fees collected under The Land Titles Fee Regulations. The fund is administered by the Minister of Finance pursuant to section 236 of The Land Titles Act. Section 197 of the Act establishes a cause of action against the registrar in favour of any person sustaining loss or damage through an error in the execution of the registrar's duties.

Action may be brought or the Minister of Finance may, without the necessity of an action being commenced, pay the amount of a claim against the assurance fund, when authorized to do so by the Attorney General on a report of the registrar and the certificate of the Master of Titles that the claim is just and reasonable (see subsection 205(1) of The Land Titles Act).

Most claims on the assurance fund are paid without the necessity of an action being commenced against the registrar. In Gordon v. Hipwell and the Attorney General for British Columbia (1952), 5 W.W.R. (N.S.) 433 at 446 (B.C.C.A.), the learned judge states that "the assurance fund is not to be regarded as a citadel which no one may be allowed to scale". This statement reflects the government's approach to claims based on land titles' errors.

The procedure to make a claim upon the assurance fund is to write to the Master of Titles stating the facts giving rise to the error causing the loss or damage and indicating the amount that is claimed. The Master of Titles then asks for a report from the registrar as to the registrar's views regarding the facts and the amount of the claim. If the Master of Titles is satisfied that an error has occurred and that the amount of the claim is appropriate, the Master of Titles will issue a certificate stating that the claim is just and reasonable and recommend to the Deputy Minister of Justice that payment be authorized from the assurance fund.

The most usual type of claim is based on missed writs of execution in the general record. For this type of case, the Master of Titles will ask for an assignment of the judgment and all facts which are available relating to the execution debtor to enable the Crown to pursue the debtor after payment has been made from the fund.

Representative cases involving the assurance fund are as follows:

- (1) Canada Life Assurance Company v. Registrar of Assinibolia, [1912] 2 W.W.R. 522 (Sask. S.C.)

A claim against the assurance fund was allowed where the registrar failed to endorse a seed grain lien on the certificate of title before an abstract was given. The

amount of the damages was found to be the amount of the seed grain lien.

- (2) Ficke v. Spence and Olson, [1922] 1 W.W.R. 1271 (Sask. K.B.).

Payment was ordered to be made from the assurance fund with respect to the registrar's failure to show that a registered owner held the land as an executor rather than in his personal capacity. This error caused a mortgagee to loan money which would not otherwise have been loaned. The damages were found to be the amount of the mortgage and the legal costs in defending a previous action.

- (3) Hermanson v. Martin, [1987] 1 W.W.R. 439 (Sask. C.A.).

Payment was directed to be made from the assurance fund in favour of a person deprived of land through the fraudulent actions of her husband in transferring land registered in her name and her husband's name. The amount of the damages was found to be the value of the property at the time of the transfer and prejudgment interest until the decision of the lower court at a rate of interest specified by the trial judge.

In Essery v. Essery; Tatko v. Liefko (No.2), [1947] 2 W.W.R. 1044 (Alta. S.C.A.D.), the assurance fund was found not to be liable for the loss of a homestead (see page 403 of this manual).

It is the object of the staff of the Land Titles System to ensure the utmost confidence in certificates and other documents issued by the land titles offices. To this end, efforts are made constantly to avoid error to ensure that the public confidence in the Land Titles System is not undermined. However, when errors are made, it is ultimately the administration of the assurance fund which evidences the government's support for the Land Titles System.

In considering whether a claim against the assurance fund is appropriate the Master of Titles will consider whether certain practices, even if not legislated, have been followed and relied upon by the Bar (see Sumners (Dawn Construction) et al. v. R. in The Right of British Columbia (1987), 15 B.C.L.R. (2d) 75 (C.A.)).

The Land Titles Amendment Act, S.S. 1988, c.28, which came into force June 21, 1988, repealed subsection 208(1) which placed a limit on the amount recoverable with respect to land titles' errors in the ownership of mines and minerals. The effect of this change is to reduce the need for the public to conduct historical searches to determine the accuracy of the title to mines and minerals. It is now possible to rely on a certificate of title for mines and minerals, in the same way as for the surface, except that a mineral certificate must have issued (see subsections 208(4) and (6) of The Land Titles Act).



## PART III - LAND DESCRIPTIONS

### Chapter 10. Meaning of Land

Clause 2(1)(k) of The Land Titles Act defines land to mean:

. . . lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted.

In National Trust Co. Ltd. v. Western Trust Co. Ltd. et al. (1912), 2 W.W.R. 667 (Sask. S.C.), Newlands, J. quoted from an English case as follows: "Now the ordinary rule of law is, that whoever has got the solum - whoever has got the site - is the owner of everything up to the sky and down to the centre of the earth". What is stated in this quotation is subject to some limitations, but the fact remains that from a legal standpoint, any structure or building on the land belongs to the land and passes with a transfer of the land. Given the law on this point, when a person swears an affidavit of value it would not be strictly necessary to swear the value of the land "together with any improvements thereon", but this is done to ensure that lay people know that the value sworn must include improvements.

The definition of land in The Land Titles Act and the National Trust case, referred to above, is a restatement of the principle that "land" includes everything above and beneath the surface.

A certificate of title containing no exceptions and silent as to mines and minerals will include mines and minerals, subject of course to certain exceptions some of which are set out in this chapter. The cases which are authority for the proposition that a certificate that is silent includes the mines and minerals are: Raymond Land & Invt. Co. v. Knight Sugar Co. (1909), 11 W.L.R. 687 (Alta. T.D.); Wilkinson v. Proud (1843), 11 M. and W. 33; Rowbotham v. Wilson (1860), 8 H.L. Cas. 348; and Schmit v. Montreal Trust Company (1969), 69 W.W.R. 521 (Sask. Q.B.). Sometimes a certificate of title that is silent as to mines and minerals is subject to being corrected as it was issued in error. Some titles that are silent as to mines and minerals do not, by statute, include the mines and minerals, eg. a roadway title or a title to a condominium unit.

Other exceptions to the principle that a certificate of title for land means that the owner owns everything above and below the surface are called exceptions to indefeasibility and are set out in section 69 of The Land Titles Act.

Section 69 provides that the land mentioned in any certificate of title granted under that Act shall by implication and without special mention therein, unless the contrary is expressly declared, be subject to inter alia any subsisting reservations and exceptions contained in the original grant of the land from the Crown. Since many grants reserved mines and minerals, this means that in these cases, mines and minerals are excepted, without such exception being mentioned in the certificate of title. In order to draw attention to the cases where this operates, such certificates of title usually bear the notation "Minerals in the Crown". Where a certificate of title has been issued for part of an original road allowance, the mines and minerals will normally remain vested in the Crown, since they belonged to the Crown in right of Canada prior to the Natural Resources Agreement of 1930 and so could not be transferred by notification by the Provincial Government. Since 1930, The Provincial Lands Act has precluded the transfer of mines and minerals by the Crown in right of the Province. Sections 93 and 94 of The Land Titles Act confirm that the Crown cannot transfer mines and minerals at least after the land has been granted.

A certificate of title may have mines and minerals excepted therefrom by a statute of the province or the federal government but yet the certificate of title, is either silent, or actually states, in error, mines and minerals included. For example, subsection 114(2) of The Land Titles Act states that mines and minerals do not pass to the Crown when a roadway is acquired. However, a title for a roadway is often silent as to mines and minerals. This does not create a problem, because the Crown rarely transfers a public roadway to someone other than the owner of the quarter section or parcel from which the roadway was taken, and land titles staff know that the title does not include mines and minerals.

Another example is section 136 of the Railway Act (Canada) which provides that a transfer to a railway company under that section does not include mines and minerals unless they are expressly mentioned. In Attorney General for Canada v. Canadian Pacific Railway Company and Canadian National Railway (1958), 12 D.L.R. 625 (S.C.C.), the Supreme Court of Canada held it was within the competence of the federal parliament to legislate in this way with regard to railways and it was the duty of registrars of land titles to take note of the provision in registering such transfers.

However, until the late sixties, many certificates of title were issued for railways which are silent or contain a statement that minerals are included. Present titles are prepared with section 136 in mind.

These examples are given to illustrate the principle that although land includes everything above and below the land, there are exceptions, and a certificate of title does not always reflect those exceptions.

## Chapter 11. Survey System in Saskatchewan\*

### A. Quadrilateral System of Survey

The quadrilateral or grid system of survey had its beginnings in 1871 under The Dominion Lands Surveys Act and is confirmed by sections 6 to 8 of the present Land Surveys Act of Saskatchewan. The design of the system adopted reference lines running north and south and are referred to as principal meridians. These lines are spaced at intervals of 4 degrees of longitude and extend from the 49 to 60 degree parallels of latitude.

The first or prime meridian is located just west of Winnipeg which was the edge of settlement when the surveys began. The next principal meridians are located at 102, 106 and 110 degrees of longitude and are referred to respectively as the second, third and fourth meridians (see Figure 1).

Using the principal meridian as a reference line for east and west direction and the 49 degree parallel of latitude for the north and south reference line, the basic grid system took its form. From the principal meridian westward a series of north and south lines at intervals of approximately 6 miles were struck and referred to as range lines. From the 49 degree parallel of latitude a series of east and west lines were established northward at intervals of approximately 6 miles and referred to as township lines. If the land surface was a plane, the system would have the appearance as shown in Figure 2.

The earth, though, is not a plane, but a sphere and as such, the implementation of the grid system posed some problems. The range lines, which are meridional lines (due north and south), converge, as one proceeds northerly and eventually come to a point (North Pole). To minimize the effect of convergence, which decreases the area of the township, the design was modified by applying a correction. The place where this correction occurs is referred to as a correction line. The first correction line is located 2 townships north of Saskatchewan - U.S.A. boundary and then every 4 townships northward (see Figure 3).

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\*This chapter has been prepared largely by Mr. Russel Pankiw, Chief Surveyor of Land Titles Offices.

The area of land enclosed by the intersection of successive range and township lines is referred to as a township. Using this grid pattern a block of land within the province could be easily located. For example, a reference Tp 8 Rge 14W2 would identify a block of land 14 columns west of the second principal meridian and 8 rows north of the international boundary and is located near Weyburn. Figure 4 shows the provincial grid pattern of township and ranges.

## B. Impact of Systems of Survey on Township Design

The township design underwent changes as surveys were being conducted. The changes that occurred are identified and referred to as the first, second, third, etc., systems of survey. In Saskatchewan we have land surveyed under the 4 different systems of survey (see Figure 5 which shows the location of these lands).

The initial design of the township was a block of land 489 chains square i.e. chain equals 66 feet. The interior was divided into 36 units of approximately 80 chains square. Surrounding each section provision was made for a road allowance 1.5 chains wide.

The sections are numbered beginning with 1 in the south east corner of the township and ending with 36 in the north east corner. For ease of describing smaller units of land, the section is further divided into 4 and known as quarter sections or into 16 units known as legal subdivisions. Refer to Figure 6 for the road allowance configuration and to Figure 9 for the numbering of the quarter sections and legal subdivisions.

The second system of survey retained the general configuration of the first system but adopted a different method of accounting for the meridional convergence. Where, under the first system the correction for convergence was left in the bank of quarters along the west boundary of the township, under the second system the correction for convergence was distributed throughout all of the quarter sections.

The third system of survey incorporated the technical changes of the second system and introduced additional changes. The width of the road allowance was reduced from 1.5 chains (99 feet) to 1 chain (66 feet) and every second east to west road allowance was eliminated. These changes had the effect of reducing the township size to 486 chains in the east to west direction and 483 chains in the north to south direction (see Figure 7).

In the period 1919 to 1920 a modified third system of survey was implemented for the benefit of World War 1 veterans. The modified system incorporated an extra east to west road allowance so as to accommodate the proposed land allocation to the veterans. Figure 8 shows the design of a township in this system.

As is seen from Figure 5, most of the province is surveyed under the third system of survey. The areas under the other systems are relatively small. Nonetheless, a person dealing with survey plans, metes and bounds descriptions and other land related matters should be aware of the different systems. The positions and widths of the road allowances may have an effect on the determination of the extent of the title described in a certificate of title.

### C. Subdivision of Land by Plan of Survey

For the more efficient dealing with lots and small parcels of land, provision has been made for the surveying of such land into lots and blocks, and the registration of the plans in the proper land titles office. In view of the importance of plans, detailed provisions have been prescribed, not only in The Land Surveys Acts, but also in the Manual of Instructions for the Survey of Dominion Lands (9th Edition) which is used for all surveys in the province. Great care has been taken to see that these provisions are complied with. There must be the utmost coordination between the land surveyor and the plan the surveyor has prepared, and the registrar, and the certificate of title the registrar issues. With this background the reader will be better able to understand the detailed provisions of The Land Titles Act, and other Acts relating to the subdivision of lands.

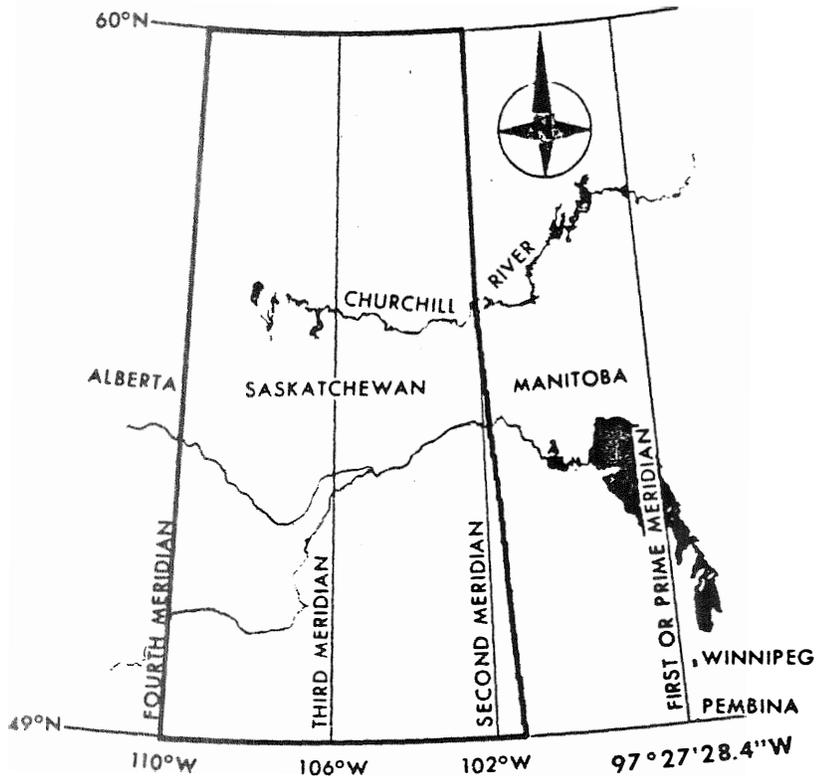


Figure 1: Location of Principal Meridians

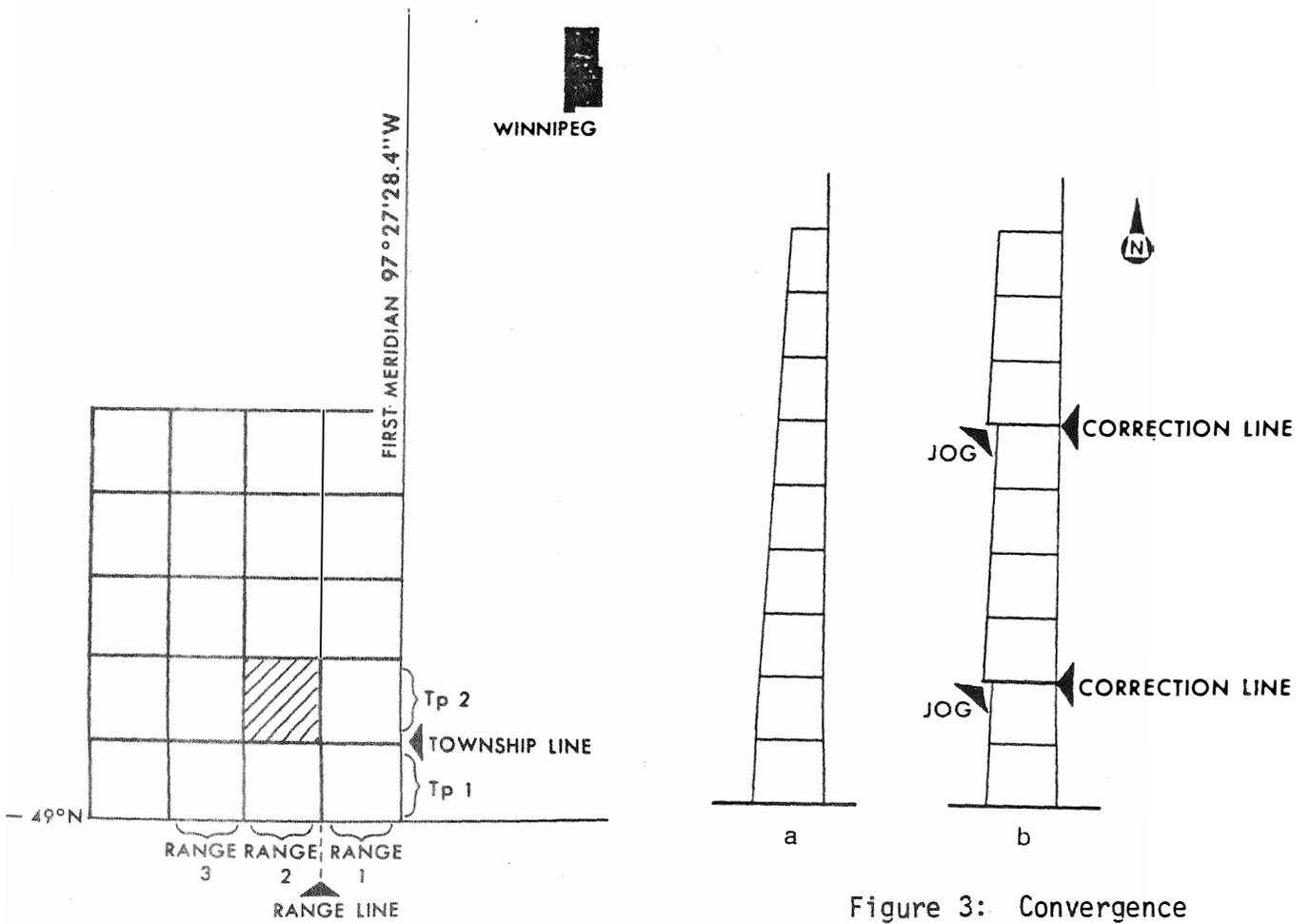


Figure 2: Basic Grid

Figure 3: Convergence

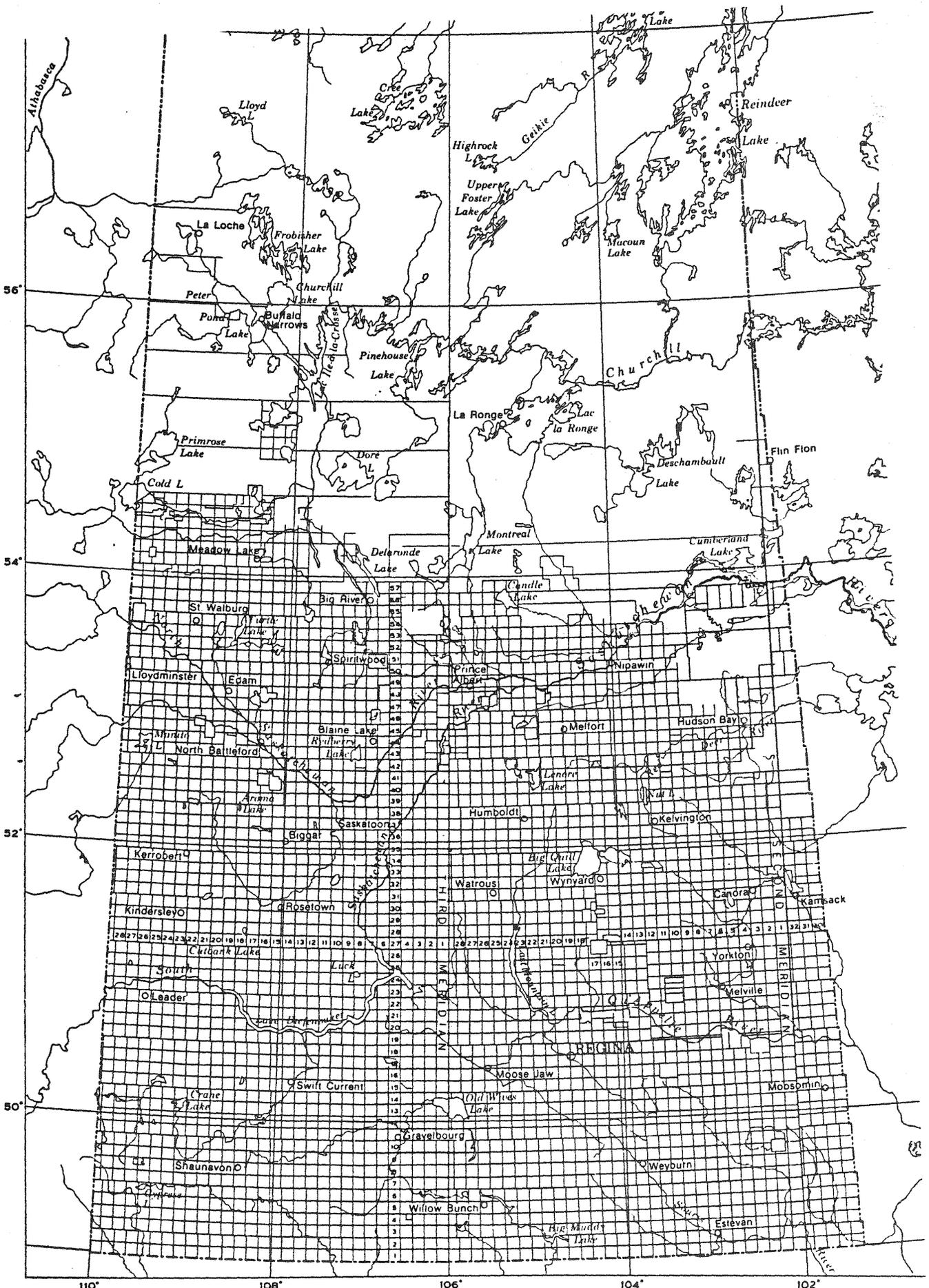
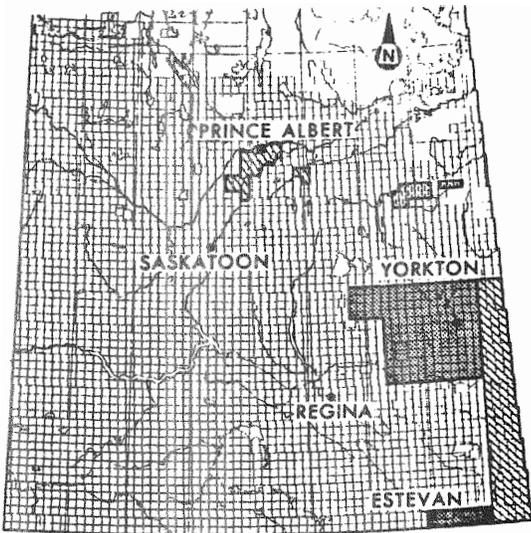


Figure 4: Provincial Grid



-  FIRST SURVEY 1877-1879
-  SECOND SURVEY 1880
-  THIRD SURVEY 1881-PRESENT
-  MODIFIED THIRD SURVEY 1919-1920

Figure 5: Survey Systems

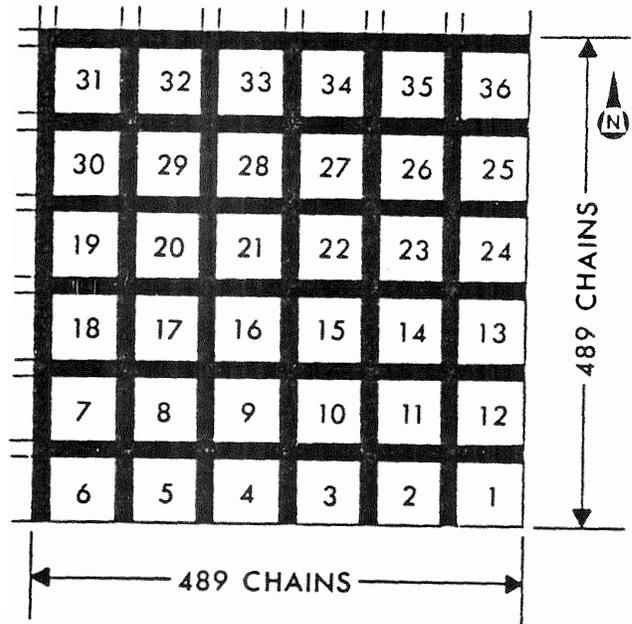


Figure 6: Road Allowances  
1st and 2nd Systems

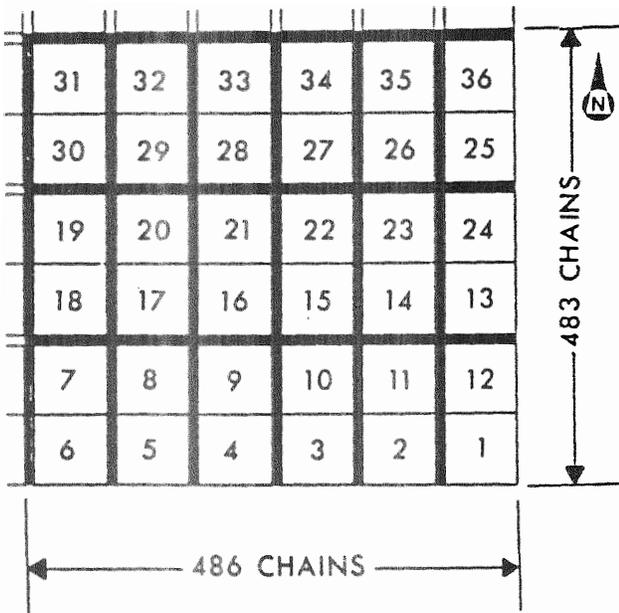


Figure 7: Road Allowances  
3rd System

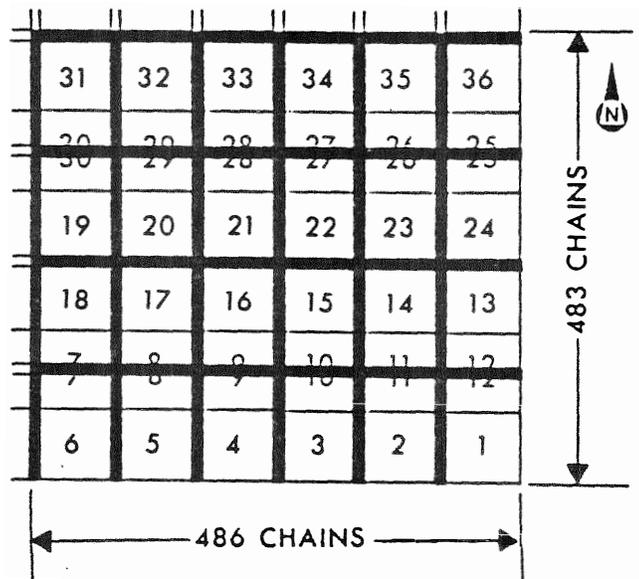


Figure 8: Road Allowances  
Modified 3rd System

**TOWNSHIP      RANGE      WEST OF      MERIDIAN**

|    |    |    |    |    |              |
|----|----|----|----|----|--------------|
|    |    |    |    |    |              |
| 31 | 32 | 33 | 34 | 35 | 36           |
|    |    |    |    |    |              |
| 50 | 29 | 28 | 27 | 26 | 25           |
|    |    |    |    |    |              |
| 19 | 20 | 21 | 22 | 23 | 24           |
|    |    |    |    |    |              |
| 18 | 17 | 16 | 15 | 14 | 13           |
|    |    |    |    |    |              |
| 7  | 8  | 9  | 10 | 11 | 12           |
|    |    |    |    |    |              |
| 6  | 5  | 4  | 3  | 2  | NW ¼    NE ¼ |
|    |    |    |    |    | SW ¼    SE ¼ |

Figure 9: Township Divisions

|    |    |    |    |
|----|----|----|----|
| 13 | 14 | 15 | 16 |
| 12 | 11 | 10 | 9  |
| 5  | 6  | 7  | 8  |
| 4  | 3  | 2  | 1  |

## Chapter 12. Metes and Bounds Descriptions and Plans of Survey

### A. Metes and Bounds Descriptions

#### 1. When Allowed

Where a part only of a parcel of land is to be described for the purposes of an instrument, the description must be acceptable to the registrar. In determining whether a word description is acceptable, the registrar must ensure that the titles of the office remain clear and accurate. The description must be one which can be interpreted easily by a person with little familiarity with land surveys.

As a general rule, the registrar will only allow one word description per parcel when land is being subdivided, and may not allow even one word description if there are survey problems in the area or if the certificate of title is already lengthy.

Word descriptions are subject to error of construction, ambiguities, clerical errors and vary in accuracy inversely to the distance they are away from a fixed surveyed point. Great care should be exercised in describing land and, whether the reference is by plan, or by word description which refers to a plan, the plan should be examined.

Griffiths, C.J. in Overland v. Lenehan (1901), 11 Q.L.J. 59 at 60 states "a certificate of title does not rest on a pinnacle by itself, but is an ordinary written instrument ... it must be construed in accordance with the ordinary rules for the construction of documents of title." It must therefore be apparent that the description in every title must be clear, simple and unambiguous.

#### 2. Types of Metes and Bounds Descriptions

There are two ways to prepare a metes and bounds description and one may be preferred to the other depending on the situation and particular set of circumstances.

The first is the direct or positive description. This type of description describes directly the bounds of the parcel of land being dealt with.

The second, is the remainder description or description by exceptions. In this type of description, one begins by describing a large parcel and then excepting therefrom a smaller portion.

#### 3. Use of "In Perpendicular Width Throughout"

Many titles are issued using the phrase "the most westerly 36 feet". This phrase becomes ambiguous when it pertains to a property whose boundaries are not orientated due north to south or very nearly so.

If a certificate of title is discovered which refers only to "the most westerly 36 feet" without any reference to the measurement being made in perpendicular width, the registrar should examine the plan to determine whether or not the orientation is north-south and east-west. If the registrar is satisfied with respect to this fact, he or she may proceed to correct the certificate of titles affected. However, great care must be exercised and if there is any doubt, no change should be made. Ultimately, it will be for the parties to determine exactly what is owned.

If a transfer is received for "the most westerly 36 feet" of a particular lot or quarter section, the transfer should not be rejected if the registrar is satisfied that the lot is rectangular and the orientation of the boundaries is north-south and east-west. The registrar should accept the transfer and insert the words in the certificate of title, "in perpendicular width throughout".

If the lot is not rectangular, or if there is doubt, the transfer must be rejected for a proper word description to be prepared.

#### 4. No New Titles Created for Half

There are titles which exist for the North 1/2 of a section, quarter section, legal subdivision, parcel or lot, but no new titles can be created using this form of word description.

There is some doubt about what the parties intend when they refer to N 1/2. There are several options:

- (1) N 1/2 by area;
- (2) N 1/2 by quarter sections if a section is referred to or legal subdivisions if a quarter section is referred;
- (3) N 1/2 by what is North from a directional point of view, i.e. in a parcel which is not rectangular this could result in less area than what was intended.

A court application may be required to determine the intention of the parties where the parcel is irregular.

Because of this doubt, the registrar must not change a title which reads, for example, "The West Half of the South West Quarter" to read "Legal Subdivisions 4 and 5". After a full investigation, the Chief Surveyor may be able to advise the registrar that a change may be made.

5. Must Proceed from Common Boundary

If a metes and bounds description is prepared for the most northerly 5 metres in perpendicular width throughout of Lot 10, the residual title reflects Lot 10 except the most northerly 5 metres in perpendicular width throughout. It is not possible for the residual title to read "the most southerly 10 metres in perpendicular width throughout" because the system must avoid the possibility of a gap between the two land descriptions, i.e. Lot 10 may not be precisely 15 metres in width.

6. Use of "Perpendicular to" and "Parallel with"

A word description may be required to be plotted by a surveyor. The manner in which a parcel is described will affect the cost of the survey. For example, a parcel bounded by only one section boundary should be described with sides being perpendicular to and parallel with the section boundary. It is only when conditions exist which require or when the parcel to be described is in the corner of a quarter section that the sides of a parcel may be described as parallel with two original boundaries.

7. Use of a Roadway in a Description

A roadway may be used as a boundary for a metes and bounds description, but if the roadway boundary is not the same as the quarter section boundary or there has been road widening, the roadway and/or the widening will have to be excepted from the description. One method of preparing such a description is to describe the parcel as commencing at the quarter section boundary and then excepting the roadway. Another method would be to describe the area required as "the most northerly metres in perpendicular width....etc." with an exception for the roadway as shown on Plan \_\_\_\_\_. This method cannot be used where the roadway varies in width. Yet, another method would be to describe the strip as "the most northerly \_\_\_\_\_ metres in perpendicular width throughout, of that portion (of the quarter section) adjoining the southerly limit of the roadway as shown on Plan \_\_\_\_\_".

With this, as in all cases where metes and bounds descriptions are prepared, a proper description requires a detailed examination of any plans involved.

8. Use of Limit of a Plan

As a general rule, any plan filed or registered may be used for descriptive purposes. A basic rule is that a cancelled plan may not, unless restored by Master of Titles' order, be used as the basis of a certificate of title. Thus, no description should be prepared using an outer boundary of a cancelled plan without consultation between the Chief Surveyor and the registrar.

A distinction is drawn between a cancelled plan and a plan that has been abandoned by the Department of Highways. A plan that has been abandoned by the Department of Highways is merely abandoned as a roadway, it is not a cancelled plan, and may be used, with the permission of the registrar, as a limit for a metes and bounds description.

## 9. Residual Title

Where the word description is complicated, the residual title should be renewed to show the exception on the front of the title.

## B. Plans of Survey Requiring the Approval of the Chief Surveyor

### 1. General

The Land Surveys Act lays down the general procedures of conducting surveys of land in the province. The Act defines the nature of monuments and where and how they shall be placed. Plans of survey for the most part are prepared in accordance with The Land Titles Act. Other statutes that provide rules with respect to the preparation of plans are:

- (1) The Land Surveys Act eg. original surveys;
- (2) The Municipal Expropriation Act;
- (3) The Planning and Development Act eg. replots and required subdivisions;
- (4) The Condominium Property Act.

The survey is made primarily to establish a boundary marker on the ground, the plan to indicate the relative position of such markers. Section 40 of The Land Surveys Act sums up the relationship between monuments and plans in these words:

The monuments defining a survey made under this Part shall, after registration of the plan of survey, determine the true boundaries of the survey, whether or not upon admeasurement on the ground the monuments agree with the measurements shown on the plan.

The Land Titles Act provides for the filing or registration of plans of survey and for their use in defining title. For some purposes the plan of survey is obligatory before a title will issue, in other cases the registrar may decide whether or not he or she will require a plan for the particular division or description of land or will accept a metes and bounds description.

A plan registered or filed is an instrument under The Land Titles Act. The general rules as to clarity and completeness apply to a plan of survey. However, for some of the special rules as to who signs the plan, the particular sections authorizing the filing of the plan govern. A plan need not have a date of execution.

The registrar decides when a plan of survey is required. The Chief Surveyor determines the type of plan required. All plans which will form the basis of a certificate of title, other than roadway plans, require the approval of the Chief Surveyor (see section 111 of The Land Titles Act).

## 2. Section 103 Plan

### (a) Purpose

Section 103 of The Land Titles Act is the registrar's authority to require a plan as opposed to a metes and bounds description.

It is also used on an anticipatory basis by anyone wishing to subdivide land in the future.

When a section 103 plan is submitted for registration, it has no effect on the titles by registration alone. Its use is dependent on a subsequent instrument referring to the plan.

In understanding the 103 plan, it is useful to know that plans of this type were originally attached to the instrument. In 1913, the section was amended to allow these plans to be registered for future use. Now, when a 103 plan and an instrument are submitted for registration together, each receives a separate number.

### (b) Limits on Use

A section 103 plan cannot be used where public lands are involved or where more than one or two parcels are involved, except in special circumstances.

Once filed it is not possible to deal with part of a parcel within the line of registration of a 103 plan if the result will be to raise a certificate of title for part only of such parcel. It will be necessary for a registered owner dealing with land within the line of registration of a 103 plan to submit all necessary documentation and requests for consolidation to ensure that a title will be raised for the whole of the parcel. The reason for this policy is a certificate of title for all that portion of lot 15 (on a registered plan) contained in Parcel "A" (on a 103 plan)

creates confusion and is an attempt to bypass the subdivision process. This type of description can only be used where the consolidation will occur with a title for the balance of Parcel "A".

Where more than one parcel is created by a 103 plan, it is no longer possible to deal with less than all of the parcels created unless a certificate of title is raised for all of the parcels so created or an order is obtained from the Master of Titles amending the plan to cancel the parcels for which a title is not to issue. To do otherwise is confusing to anyone searching the plan and applicable titles.

A 103 plan must be acted upon by the owner or other person with due dispatch. Plans not acted upon within one year may be cancelled by the Master of Titles on the report of the Chief Surveyor.

(c) Execution

Section 103 refers to "the owner of any land or a person claiming any interest therein". "Owner" is defined by clause 2(1)(p) of the Act to mean a person claiming in futurity. Thus, the registered owner of the land described on the plan is not required to execute the plan. The signature of the owner or other person must be attested.

The policy basis for allowing a person other than the owner to execute the plan is that there can be no disposition of the land without the registered owner's involvement.

3. Section 104 Plan

(a) Purpose

This is a plan of subdivision. When registered, it has the effect of acting as a conveyance of all public lands and dividing the land (see subsections 104(10) and (10.2)). The registrar automatically issues title to the registered owner, i.e. the person who signed the plan (see subsection 104(15)).

It is used whenever there is public land involved or where more than two new divisions are being created.

(b) Must Achieve Common Ownership

When boundary lines are changing, common ownership must be achieved. For example, if A, as owner of Lot 1, and B, as owner of Lot 2, wish to redivide their property by plan of survey to resolve a boundary problem, one of them must

transfer to the other to achieve common ownership. Following registration of the plan of survey, the proper lot will be transferred to its owner.

(c) Time Limited

Subsection 104(14) requires that a 104 plan must be submitted to the registrar within 30 days after approval by the Chief Surveyor. "Submitted" must be read as "registered".

(d) Titles Issued

Since March 1, 1985, a separate title is issued for each lot or parcel. The reason is to keep titles as clear as possible. During the construction of a new subdivision, it is not uncommon to have separate endorsements eg. mortgage, caveat, builders' lien, which affect only one lot.

The exceptions to this rule are:

- (1) if a plan creates several lots accompanied by a transfer of all or most of the lots, the title will follow the transfer;
- (2) all public reserves, buffer strips or walkways can be grouped into one title for each category.

A request to consolidate should be refused in the first instance.

Upon registration of a 104 plan, the area shown on the plan is cancelled from the owner's title. It is important that this cancellation be shown as applying to all the land shown on the plan, not merely to the lots and parcels. Under subsection 104(15), the cancellation does not relate to the mines and minerals in the land which will therefore remain in the old title. The cancellation should read "except mines and minerals". In cases of resubdivision, the mines and minerals are enlarged before registration of the plan, so that the cancellation always reads "except mines and minerals" when the title includes mines and minerals.

No value should be shown on titles issued from a 104 plan.

(e) Effect on Encumbrances

Where land is subdivided or resubdivided, there are usually several endorsements dependent on the old description. These encumbrances are carried forward on to the new titles

either with a brief description of the portion affected or shown to be "as to portion".

(f) Effect on Mines and Minerals

As a general rule, the registrar enlarges all mines and minerals, if present, before a plan of subdivision or resubdivision is registered or before accepting a request for enlargement according to a 103 plan or before accepting a transfer based on a 103 plan. The registrar may decide to cancel the title except as to mines and minerals and issue the new title with mines and minerals excepted. No fee is charged for this service.

In any case where mines and minerals have been included in a certificate of title for a lot, it is the policy to avoid further subdivision, and to gather together the mines and minerals, where possible.

The reason for these rules is to ensure that mines and minerals are left in the larger parcel for clarity and to ensure that the mines and minerals are not overlooked in subdivisions.

Subsection 104(15) provides, on the registration of a subdivision plan, except in the case of a resubdivision, the registrar shall cancel the existing certificate of title except as to mines and minerals.

The words "except in the case of a resubdivision" were added in 1954 and applied to all plans registered prior to 1951. The reason for this was that prior to the amendment the Master of Titles was directed to gather together the mines and minerals on a resubdivision. This proved cumbersome and could move a registered owner out of a producing area. Consequently, it was not always done. The Master of Titles preferred to cancel the title except as to mines and minerals.

Subsection 104(15) should not be interpreted as directing the registrar to carry forward mines and minerals on a plan of resubdivision. It can only apply if the mines and minerals have not already been left behind either by a previous subdivision or by a registrar's enlargement.

The problem of fractionalization of mines and minerals resulted in the passage of The Land Titles Amendment Act, S.S. 1983, c.50 which amended sections 104 and 113 to:

- (1) make permissive the direction to the Master of Titles to gather together the mines and minerals upon the cancellation of a plan of subdivision (see subsection 104(11) and section 113);
- (2) ensure that where a plan of resubdivision, not involving public lands, is registered and the registrar acts to cancel an existing plan, the registrar's cancellation is deemed not to affect any mines and minerals titles that may be dependent upon the cancelled plan (see subsection 104(16));
- (3) give authority to the Master of Titles to cancel a plan except as to mines and minerals (see section 113).

Where a certificate is silent as to mines and minerals, it may not be possible to state conclusively who owns the mines and minerals. In this case, the registrar may decide to cancel the title except as to mines and minerals and issue titles according to the plan mines and minerals excepted.

Whether the mines and minerals are enlarged or the title is cancelled except as to mines and minerals is not determinative of whether a mineral certificate will issue.

Note that the mineral clauses will be the same form in each of the following cases:

- (1) where minerals have already been separated from the surface by a previous reservation bearing 85R07892 as the registration number:

Mines and Minerals Excepted by 85R07892

- (2) where land is being subdivided by Plan 85R07897 and the title includes the mines and minerals:

Mines and Minerals Excepted by 85R07897

- (3) where land is being resubdivided and the mines and minerals have been enlarged by registrar's enlargement 86R09372:

Mines and Minerals Excepted by 86R09372.

Where the mines and minerals have never been granted, the words "Minerals in the Crown" appear on all titles.

Section 113 does not eliminate the need for the registrar, when reviewing a Master of Titles' order, to provide

information as to the ownership of the mines and minerals. There may be cases where it is important for the Master of Titles to resolve the questions of mineral ownership. However, the proviso makes it clear that the Master of Titles has the option, in complex cases, to cancel the plan except as to mines and minerals.

(g) Execution

Although subsection 104(1.1) also refers to owner, the qualifier "owner subdividing land" must mean the legislature intended "registered owner". Subsections 104(4) and (5) requires execution by every registered owner and mortgagee and a certification in Form K to The Land Titles Act by the surveyor who made the survey. Attestation is required for each signature except the signature of the land surveyor.

4. Plans filed under Section 106

Plans under this section are usually for descriptive purposes only as these plans are only required to be monumented on one side (see section 53 of The Land Surveys Act). However, at the present time, titles are raised from section 106 plans, eg. railway rights of way.

There is also no signature requirement on this type of plan. However, if a plan is prepared showing a space for signature or attestation, the registrar will consider the instrument incomplete. The registrar will not reject if there is no affidavit of attestation or reference to a seal.

The Chief Surveyor is also not concerned about proper access for a 106 plan, which makes issuing titles from such a plan problematic.

A 106 plan is like a 103 plan. Filing of the plan does not subdivide the land. Another instrument, which refers to the plan, is required for this purpose.

5. Plans filed under Section 109

This is the section under which the registrar receives plans prepared under the authority of other Acts, such as The Land Surveys Act, The Municipal Expropriation Act, The Planning and Development Act, The Condominium Property Act, The Expropriation Act, the National Energy Board Act, and the Navigable Waters Protection Act.

Some of these plans are not sufficient to issue a title or to base a description for an instrument. The plan may be merely an engineering drawing, eg. under the National Energy Board Act. Only a plan which bears the approval of the Chief Surveyor should be used for the basis of a certificate of title.

## 6. Examination of Plans

The Chief Surveyor is required to examine all plans other than roadway plans prior to registration. Upon receipt of a plan for approval, the Chief Surveyor forwards a copy of the draft plan to the registrar who checks for proper execution, the accommodation of mines and minerals and that all titles affected are recorded on the plan. A water boundary must be drawn to the Chief Surveyor's attention.

It is the registrar's duty, to see that the Chief Surveyor has accurate title information, and that the Chief Surveyor is made aware of any special difficulty or problem which may arise on registration, so that it can be drawn to the attention of the parties submitting the plan. The registrar is not required to comment on the accuracy of the survey (which is the function of the Chief Surveyor) nor on the desirability of the proposed use (which is the function of the planning authority).

Note that if a plan of survey is not registered or filed within 30 days of the date of the Chief Surveyor's approval, the plan will have to be reapproved (see section 111 of The Land Titles Act). Sometimes this means that if a plan is rejected by the registrar, it will have to be reapproved.

### C. Roadway Plans

#### 1. Registration

Section 114 of The Land Titles Act provides for the registration of a plan of a public improvement. A public improvement is defined by The Highways and Transportation Act, S.S. 1983-84, c.H-3, clause 2(m) to mean many types of land use including public highways.

Clause 114(1)(c) of The Land Titles Act requires the registrar to issue a title free from all encumbrances for the public improvement to Her Majesty the Queen (Saskatchewan), forward the duplicate to the Minister of Highways and Transportation and send a notice to the registered owner.

Mines and minerals remain with the registered owner (see subsection 114(2) of The Land Titles Act and section 34 of The Highways and Transportation Act).

Interests granted under federal authority are not dropped from the title (see A-G for Alta. v. A-G for Canada, [1915] A.C. 363 at 368 (P.C.)). This means that a pipeline easement and a mortgage of such an easement granted to TransCanada Pipeline Co. Ltd. or Interprovincial Pipeline Ltd. remain on the title.

When a roadway plan under section 115 of The Land Titles Act affects unpatented land, a note of the number of the plan is

placed on the file folder relating to the land and also in the grant book or the index where these are still being maintained, so that when any grant is received of that quarter section, title will issue subject to the roadway plan. It is also the practice to issue a certificate of title for the land shown on the roadway plan. This is not required as a matter of law, but is very convenient for the Department of Highways.

## 2. Abandonment

Section 116 of The Land Titles Act provides that a notification of the closing of a road may be registered which has the effect of vesting title to the abandoned roadway either in the person named (subsection (1)) or in the owner of the adjoining quarter section (subsection (3)). On receipt of such a notification, a certificate of title is issued to the person named or to the adjoining owner, as the case may be. This certificate is then immediately cancelled and consolidated with the title to the adjoining quarter section. It should be noted that the title which issues for the abandoned portion will be subject to existing registered encumbrances affecting the transferee's adjoining land; the notification of abandonment therefore has the effect of enlarging the area affected by the encumbrances.

The procedure with respect to abandonment of a public improvement to the registered owner is as follows:

- (1) where the roadway to be abandoned is shown by an exception shown on the front of the title:

The notice of abandonment is endorsed on the back of the title. The exception for the roadway on the front of the title is struck out by drawing a line through it. A note is made opposite the exception showing the date upon which it was struck out, the registered number of the notification of abandonment, and the appropriate initials.

The title for the public improvement is cancelled in the usual way, but there is no need to issue a new title for the roadway to the owner of the rest of the land, and no need to consolidate two titles.

- (2) where the roadway which is to be abandoned is shown by an endorsement on the back of the title:

Proceed as above but on an old style title make a note above the endorsement of the cancellation for the roadway showing it to be abandoned and referring to the notification of abandonment. On a new title, the endorsement of the notice to

abandon is made opposite the memo of cancellation of the roadway, as is done for normal cancellations of registered instruments.

- (3) in either case, the registrar sends a notice of the registration of the notification of abandonment to the registered owner.

Where the notification is to someone other than the registered owner of the quarter section, a certificate of title must be prepared for the portion conveyed. The title for the Crown is cancelled in the usual way.

Sometimes the notification of abandonment is accompanied by a new plan of public improvement. Following completion of the procedure with respect to the notification of abandonment, the procedure on page 58 then applies.

If it becomes necessary for the department to abandon a roadway crossing unpatented land, the certificate of title to the roadway is cancelled by the registrar on registering the notification of abandonment. If the unpatented land is administered by the federal government, the Department of Highways petitions for a Master of Titles' order.

Notification of abandonment may also be given in respect of a road allowance. Title then issues to the adjoining owner and is consolidated with the title to the quarter section. See page 90 as to the appropriate mineral designation. Sometimes it is necessary later on to reopen the road allowance as part of a grid road system. In this event, the Department of Highways prepares a notice of expropriation under section 44 of The Highways and Transportation Act, S.S. 1983-84, c.5, and this will be registered, cancelling the owner's title to the road allowance, but no new title will issue to the department since the land then reverts to its status as a road allowance.

#### D. Use of Metric

Section 2 of Sask. Reg. 88/76 requires all plans for surveys performed on or after July 1, 1976 to be drawn with metric measurements. Section 95 of The Land Surveys Act requires the measure of length used in surveys to be as provided in the Weights and Measures Act (Canada), S.C. 1970-71-72, c.36.

A certificate of title based on a metric plan will reflect the area in hectares.

Transfers are expected to follow the unit of measure shown on the title.

There is no program to convert acreage on certificates of title to hectareage.

## Chapter 13. Subdivision Approval

### A. The Planning and Development Act

Effective April 17, 1984, The Planning and Development Act, 1983, The Subdivision Regulations, R.R.S. c.P-13.1 Reg. 1 and The Dedicated Lands Regulations, R.R.S. c.P-13.1 Reg. 2 came into force. The new Act and Regulations apply to all instruments submitted for registration on April 17, 1984 and thereafter. The Planning and Development Act, 1973 and Sask. Reg. 8/77 (Subdivision Regulations) and Sask. Reg. 150/78 (The Public Reserve and Buffer Strip Regulations) and Sask. Reg. 273/76 (The Planned Unit Development Regulations) and all amendments to these regulations are repealed effective April 17, 1984.

#### 1. Application for Approval

Subsection 139(1) of the Act provides that any person may apply to an approving authority for subdivision and shall submit, with the application, a proposed plan of subdivision or other written description in accordance with the Regulations. Subclause 5(a)(i) of The Subdivision Regulations provides that in the case of a proposed subdivision that creates two or more new parcels of land or creates streets, lanes, or other public lands, the application (which is a standard form prescribed by the Regulations), must be accompanied by a plan of proposed subdivision which contains detailed information as required by section 6. Subclause 5(a)(ii) provides that in a case of a proposed subdivision that creates only one new parcel of land and does not affect streets, lanes or other public lands, the application must be accompanied by a metes and bounds description sufficient for land titles purposes and a sketch plan showing certain detailed information as required by section 7.

Subclause 5(a)(iii) provides that in the case of a proposed subdivision that requests the division of a quarter section into legal subdivisions, the application must be accompanied by a sketch plan showing certain detailed information as required by section 8.

The cross-over between land titles requirements and subdivision requirements causes the most difficulty. The instructions printed by the Departments of Urban Affairs and Rural Development specify clearly that approval does not affect the method of registration under The Land Titles Act but that any certificate of approval must accompany plans or documents intended for registration. It is hoped by spelling out the requirements in terms of the needs of the approving authority that confusion will be eliminated. If a person seeking subdivision approval comes first to the land titles office, the

person can be told whether or not a word description or a plan will be required for land titles purposes and that subdivision approval will be required. If the person goes first to the approving authority, the authority can advise the person of their requirements and that the approval does not affect the process in land titles without telling the person to first attend on the land titles office before he or she commences subdivision application. To some extent both systems overlap but the public must be advised that the requirements of each agency must be met.

## 2. Process after Receipt of Application for Approval

Subsection 139(2) of the Act provides that the approving authority shall send a copy of the application to the municipality involved, if the approval is being given by one of the government departments, and such persons as may be specified in the Regulations. Subsection 12(1) of the Regulations provides a list of agencies which may receive a copy of the application for subdivision approval. All agencies other than the council of the municipality or a district planning commission must submit their comments to the approving authority within forty days after the day on which the comments are requested (see subsection 12(3)). A council of a municipality or a district planning commission may request an extension of the forty day period. However, section 13 provides that the application for subdivision approval must be processed within 90 days from the day on which the application is received. Detailed rules are set out in The Subdivision Regulations as to the issues which the approving authority must resolve. There is a fee for the examination of an application and for a certificate of approval.

## 3. The Approving Authority

Clause 2(a) of the Act defines the approving authority to mean the Minister or, where the Minister has delegated the authority, the Director or the Council to which the delegation is made. Most cities in Saskatchewan are their own approving authority.

### B. Registrar Requires Planning Approval Certificate

Subsection 134(2) of The Planning and Development Act directs the registrar not to register a transfer, lease, mortgage, caveat based on an agreement for sale, lease or mortgage of a part only of a parcel of land or discharge, as to a part only of a parcel of land, of a mortgage or caveat based on a mortgage.

A "parcel" of land is to be given a broad meaning, i.e. anything that stands alone on a title and would include a title based on a metes and bounds description (the most westerly 100 metres etc.).

Subsection 134(5) provides that an instrument, other than an instrument mentioned in subsection 134(2) which affects part only of a parcel of land and which part is to be used as:

- (1) a provincial highway;
- (2) a municipal road;
- (3) a right-of-way for a ditch, irrigation canal, pipeline, telephone line, power transmission line or reservoir not used for the treatment or storage of sewage;

must be accompanied by:

- (4) a certificate of approval of the approving authority; or
- (5) an affidavit by one of the parties swearing that the provincial highway, the municipal road or the right-of-way is located outside a distance prescribed by clause 134(5)(a); or
- (6) an affidavit by the person securing the right-of-way swearing that the right-of-way is in respect of a distribution to consumers or users of a sewer, water, natural gas, power or telephone distribution line and not for the purpose of a general transmission line.

Subsections 134(5), (6) and (8) are difficult and are best dealt with together. Subsection 134(5) contains the same policy choice reflected in section 3 of the "Regulations made under The Planning and Development Act, 1973" being Sask. Reg. 8/77. Although this section will principally be administered by the Chief Surveyor under subsection 134(7) it is possible that a metes and bounds description could be developed for some of the uses listed. In addition, since highway plans are not approved by the Chief Surveyor (see section 111 of The Land Titles Act), this is another type of instrument for which the registrars must have either the approval of the planning authority or the affidavit mentioned in subsection 134(6) or 134(8). Subsection 134(5) establishes the other general rule with respect to subdivisions and is considered supplementary to subsection 134(2). Whereas subsection 134(2) is very specific in the kinds of instruments which require subdivision approval i.e. transfer, lease, mortgage, caveat based on an agreement for sale, lease or mortgage or discharge of mortgage or caveat of a part only of a parcel of land, subsection 134(5) applies to "any instrument which affects part only of a parcel of land" if the part is to be used for "a provincial highway, a municipal road, right-of-way for a ditch, irrigation canal, pipeline, telephone line, power transmission line or reservoir not used for the treatment or storage of sewage" and if the part is located within the corporate limits of a city, town, village, northern municipality or a section 129 planning district or within 5 kilometres of a city or northern municipality or 3 kilometres of a town or 2 kilometres of a village.

Subsection 134(6) requires any instrument which affects only part of a parcel of land located 5 kilometres or more from a city, or northern municipality, or 3 kilometres of a town or 2 kilometres of a village to be accompanied by an affidavit by one of the parties to the instrument swearing to the fact that subdivision approval is not required because the part of land created is outside the areas specified. This location affidavit, as it is called, should not be rejected for deviations in the amount of land affected, i.e. if the reference is to N 7 rather than N 1/4 clearly all of the land in question is outside of the area that requires planning approval.

Subsection 134(8) creates an exception to subsection 134(5) for feeder lines to consumers or users of a sewer, water, natural gas, power or telephone line if the instrument is accompanied by an affidavit of the person securing the right-of-way swearing that the easement or agreement for right-of-way is for the purpose of a distribution line to consumers or users of the service and not the purpose of a general transmission line.

If a plan, other than a Department of Highways plan, is involved, the Chief Surveyor ensures that the certificate of approval or one of the above affidavits is obtained and retains such documentation on file in the Office of the Chief Surveyor.

If a Department of Highways plan is involved or the part affected is described by metes and bounds, the registrar must insist on the certificate of approval. The registrar should not ask for a certificate of approval when the Chief Surveyor has approved the plan unless at a later date that plan is used for a purpose other than that for which it was originally submitted.

Since these subsections are so specific it eliminates the need for the registrar to determine the type of instrument which requires approval. For example, a judge's or Master of Titles' order, a builders' lien, a personal property security notice, or an application for title under The Tax Enforcement Act does not require planning approval.

Also a plan which subdivides land which land is encumbered by a prior mortgage no longer contravenes The Planning and Development Act. The registrar does not insist that the prior mortgage be discharged before the plan can be registered. If the approving authority gives its approval to the Chief Surveyor under subsection 134(7), for a plan, then all subdivision issues have been resolved.

Subsection 134(4) forbids the registration of any instrument which purports to divide a quarter section into legal subdivisions, unless accompanied by the approval of the approving authority. Without this subsection, it was possible for the registered owner of a quarter section to ask for the enlargement or transfer of one or more legal subdivisions without a certificate of approval. The registered owner was able to do this because section 19 of

The Land Surveys Act which states that every section shall be taken to be divided into legal subdivisions had always been interpreted as having already created a division of land. Any instrument which dealt with a legal subdivision would not be considered a subdivision because the division had already been created by The Land Surveys Act. Subsection 134(4) changes this.

Subsection 134(4) directs the registrar not to accept any instrument which purports to divide a quarter section into legal subdivisions unless accompanied by approval. Under this section the registrar is only concerned with those instruments, like transfers, transmissions, applications for tax title, requests for enlargement or court orders which are instruments which create titles. Leases, mortgages or other like instruments or caveats based on such instruments do not require approval.

Where the owner has already transferred one or two legal subdivisions, and the certificate of title shows the quarter section except the legal subdivisions, approval is required. The section also applies to a transfer, for example, of a quarter section and one legal subdivision leaving behind three legal subdivisions.

Subsection 134(3) provides that areas separated by a road, a right-of-way or natural boundary are not separate parcels, i.e. if the owner wants to transfer, sell, mortgage or lease all that portion of a particular parcel "which lies to the south of the roadway shown on plan no. \_\_\_\_\_" the transfer, etc., must be accompanied by a certificate of approval from the approving authority.

Subsection 134(9) has been inserted to ensure that the approval of the approving authority does not contain conditions which have nothing to do with the land titles office. From time to time it was not uncommon for an approving authority to issue its approval subject to certain conditions involving land use. The new Planning and Development Act gives specific authority to an approving authority to impose conditions. Subsection 134(9) is intended to ensure that the approving authority must give what would be in essence a final approval which would be the document to be submitted to the land titles office or the Chief Surveyor. Conditions which provide that "this approval is given subject to consolidation in one certificate of title" is an example of a condition which the registrar can administer.

Section 145 gives the approving authority power to revoke an approval of a proposed subdivision where the plan or instrument has not been registered or a certificate of title to the land has not been issued, if the approving authority sends by registered mail notice of the revocation to the applicant and to the appropriate land titles office. The registrar must insist that the revocation refer to the number of the certificate of approval, if the registrar has not yet received the certificate of approval, and that the land

be specifically described on the revocation. Such a revocation would not be assigned an instrument number but a note is placed on the jacket that the certificate of approval and any instrument based on it will be refused.

If a caveat claims an interest under an agreement for sale, mortgage or lease in a part only of a parcel of land in the interest claimed portion but describes a complete parcel in the land description, the registrar is not required to insist on planning approval. The operative effect of the caveat is that by the legal description of the caveat, the whole parcel is charged, and not just the part. The caveator has chosen to claim his interest in the whole and accept the possibility of a claim under section 163 of The Land Titles Act. There may be a contravention of section 133 of The Planning and Development Act but the registrar's obligations are limited to section 134. The requirement for the immediate need for a plan is avoided by this practice. Also, a caveator is allowed to claim an interest in hydrocarbons by this method of land description.

Caveats under The Planning and Development Act are covered in chapter 22 commencing at page 203.

#### C. Paper Consolidation

Some certificates of approval contain the statement that the approval is subject to the condition that the adjacent parcel be consolidated with the part of the parcel being created. One certificate of title is prepared for the two, or more, parcels involved. The jacket to the certificate of title is marked to the effect that the linking of the parcels is pursuant to a certificate of approval. A subsequent transfer or request for enlargement will be refused by the registrar unless the transfer or request is accompanied by a new certificate of approval.

#### D. Access

There are a few cases remaining where the registrar must ensure that a parcel has legal access which means access to a public thoroughfare. Since subsection 134(4) of The Planning and Development Act doesn't prevent the creation of legal subdivisions completely, the registrar must police subdivisions of the "blind" legal subdivisions. However, primary responsibility to ensure access rests with the approving authority under clause 140(1)(c).

#### E. Interaction with Plans: Dedicated Lands

Sections 185 to 206 of The Planning and Development Act affect a significant reworking of the vesting of public lands, which are called, in this Act, dedicated lands. Clause 2(g) defines "dedicated lands" to mean buffer strips, environmental reserve, municipal reserve, public reserve and walkways.

Buffer strips may be owned by the Crown or the municipality. Municipal reserve is a new category of reserve land which must be

owned by a municipality. Environmental reserve is a new category of reserve land which must be owned by the Crown.

#### 1. Granting Title to Dedicated Lands

Subsection 205(1) of The Planning and Development Act directs the registrar to grant a certificate of title and duplicate for any dedicated lands to the Crown or the municipality "according to the designation on the plan as set out in the Regulations". Subsection 3(1) of The Dedicated Lands Regulations specifies how the various categories of reserve land are to be described. The following rules indicate to whom the land will belong:

- (1) all titles for highways continue to be in the name of Her Majesty the Queen (Saskatchewan) (see section 114 of The Land Titles Act);
- (2) all streets and lanes continue to be vested without a certificate of title in the name of Her Majesty the Queen (see subsection 104(10) of The Land Titles Act);
- (3) "Buffer Strip PBl" or "PBl", and so on, means that title is to issue to Her Majesty the Queen (Saskatchewan) (see section 186 of The Planning and Development Act);
- (4) "Buffer Strip MBl" or "MBl", and so on, means that title is to issue to the municipality whose name is indicated on the plan (see section 186 of The Planning and Development Act);
- (5) the designation "Environmental Reserve ER1", and so on, indicates that title is to issue to Her Majesty the Queen (Saskatchewan) (see subsection 192(1) of The Planning and Development Act);
- (6) the designation "Municipal Reserve MR1" or "MR1", and so on, means that title is to issue to the municipality whose name is indicated on the plan (see subsection 193(2) of The Planning and Development Act);
- (7) the designation "Public Reserve PR1" or "PR1" means that title is to issue to Her Majesty the Queen (Saskatchewan) (see subsection 193(2) of The Planning and Development Act);
- (8) the designation "Walkway W1" or "W1" means that title is to issue to the municipality whose name is indicated on the plan (see subsection 203(3) of The Planning and Development Act).

There will be no more utility parcels created as The Subdivision Regulations do not authorize the creation of utility parcels.

Where title for any dedicated lands is to issue to a municipality, the name of the municipality is to be indicated on the plan of subdivision (see subsection 3(2) of The Subdivision Regulations). This is a matter for the Chief Surveyor to monitor. If there is only one name on the plan, title should issue to that municipality. Where there is some doubt, the Chief Surveyor may insist on a special wording on the plan to the effect that the title for municipal dedicated lands is to issue to a named municipality.

Subsection 205(2) provides that "the right and title to all mines and minerals under dedicated lands remains vested in the owner of the mines and minerals and his heirs and assigns". This makes it clear that the title that issues to the Crown or a municipality for dedicated lands does not include mines and minerals.

Subsection 205(3) directs the registrar to issue title for all dedicated lands "free and clear of all encumbrances or caveats". "Encumbrance" here would include a mortgage, lease, builders' lien or a writ of execution. It would not include an easement or most instruments executed by a public authority like a tax lien, a declaration of expropriation, or a public utilities easement.

The Department of Highways continues to be governed by clause 114(1)(d) of The Land Titles Act which directs the registrar to issue highways titles "free from all encumbrances, liens, estates, or interests whatever" which means every kind of endorsement, except those granted under federal authority.

## 2. Dealing with Dedicated Lands

Sections 185 to 205 restrict the dealing with dedicated lands. For example, section 187 allows a municipality to sell buffer strips to which it has title if it has passed a bylaw and has given the requisite notices and it obtains certain consents from the appropriate Minister. None of this concerns the land titles offices except in the following way. Subsection 104(10) of The Land Titles Act provides that there can be no change or alteration in any dedicated lands without the requisite consents.

Effective December 19, 1984, The Land Titles Act was amended retroactive to April 17, 1984 (the day on which The Planning and Development Act came into effect) (see S.S. 1984-85, c.7). The purpose of the amendment is to link the two Acts to ensure that dedicated lands are only changed or altered pursuant to an order of the Master of Titles who monitors the procedure under sections 185 to 205.

**F. Replotting: Sections 161 to 184**

The first document which the registrar receives with respect to a replotting scheme is a certified copy of a resolution passed by the municipality authorizing the preparation of a replotting scheme and a list of all parcels included within the scheme. The registrar is then required to endorse on the certificate of title of each parcel of land a memorandum indicating that the land is subject to the replotting scheme (see section 163).

After the endorsement is placed on the certificate of title, no transfer of land can be registered except with the consent of the council.

All subsequent owners of the fee simple estate or any other interest take subject to the endorsement.

Within two years of the date of the resolution, the council is required to either:

- (1) discontinue the replotting scheme and file with the registrar a certified copy of the resolution of discontinuance in which case the registrar cancels the endorsements made pursuant to subsection 163(1); or
- (2) adopt the replotting scheme and submit the appropriate documents to the land titles office in accordance with clause 172(1)(b); or
- (3) proceed with part of the replotting scheme and discontinue as to the rest.

If the council has not proceeded with any part of the replotting scheme within two years, the registrar must cancel the endorsements made pursuant to subsection 163(1) (see subsection 173(2)).

Subsection 172(1) provides that if the council decides to proceed with the replotting scheme it must submit to the land titles office:

- (1) a certified copy of the resolution adopting the replotting scheme;
- (2) a certified copy of the replotting scheme - the contents of the replotting scheme are established by section 165 (note that mines and minerals which have not been patented prior to the filing of the replotting scheme are deemed to have been previously granted to the Crown - see clause 167(c));
- (3) the plan of subdivision made in accordance with section 104 of The Land Titles Act but signed by the clerk and sealed with the seal of the municipality and accompanied by the approval of the approving authority.

Subsection 172(2) indicates what the registrar does upon receipt of the documents mentioned above. Note that clause 172(2)(e) directs the registrar to endorse easements that appeared on the certificate of title to the former parcel only against those new parcels which would be directly affected by the easement.

## Chapter 14. Minerals

### A. Meaning

#### 1. Definition

Clause 2(1)(k) of The Land Titles Act states that "land" includes, among other things, "mines, minerals or quarries thereon, or thereunder lying or being, unless any such are specially excepted".

To remove any doubt brought about by forfeitures under The Mineral Taxation Act regarding whether a title for mines could exist, The Land Titles Amendment Act, S.S. 1978, c.30, amended the Act to provide a definition of minerals to include mines and for mines to include minerals (see clause 2(1)(m.1) of The Land Titles Act). This definition has been deemed to have always been a part of The Land Titles Act (see subsection 2(2)).

This amendment confirmed the practice and previous interpretation of The Land Titles Act.

#### 2. Judicial Meaning of Mines and Minerals

In Halsbury's Laws of England, 4th ed., Vol. 31, page 11, para. 8 it is said:

'Minerals' admits a variety of meanings, and has no general definition. Whether in a particular case a substance is a mineral or not is primarily a question of fact. The test is what 'minerals' meant at the date of the instrument concerned in the vernacular of the mining world, the commercial world and among landowners, and in case of conflict this meaning must prevail over the purely scientific meaning. Nevertheless 'minerals' is capable of limitation or expansion according to the intention with which it is used, and this intention may be inferred from the document itself or from consideration of the circumstances in which it was made.

See Borys v. C.P.R. et al. (1952-53), 7 W.W.R. (N.S.) 546 at 553 (P.C.) and Crow's Nest Pass Coal Co. v. R., [1961] S.C.R. 750.

In Barnard-Argue-Roth-Stearns Oil & Gas Co. v. Farguharson, [1912] A.C. 874 (P.C.), the Privy Council on an appeal from the Court of Appeal for Ontario held that a reservation of minerals in a certain deed was not to be construed in the widest sense, but by the intention of the parties when the deed was made.

A definition of minerals based on common usage and intention of the parties is discussed in "Exceptions and Reservations as Defects of Title", (1924) 2 Canadian Bar Review 145 at page 155. See also "The Reservation and Exception of Mines and Minerals", N. J. Stewart (1972) 40 Canadian Bar Review 320.

When a transfer purporting to include mines and minerals is submitted for registration, a registrar can only be sure that the substance referred to is a mineral, if it has been declared to be a mineral by the courts, or treated by the courts as a mineral or minerals.

Not all substances are necessarily "minerals" in the sense in which that word has been used in the courts. Some do not occur in a free state in nature and can only be produced by laboratory methods or industrial process, after severance from the land, when they have ceased to be land.

When a transfer is registered, a certificate of title is issued in the name of the transferee for the land transferred. Since a certificate of title is guaranteed, it is essential that the land is described in such a way as to be exclusive of any other property in any other certificate of title. The difficulty about issuing a certificate of title for a particular mineral is that even a mineral which is found in a natural state is usually found in association with some other mineral or substance. If separate titles exist for these minerals, it would be very doubtful as to who would own the compounds or ores from which the mineral is extracted. This is the difficulty which arose in the case of Borys v. C.P.R., above mentioned, where petroleum and natural gas were held in separate titles. Hence, the careful categories for which a certificate of title for a mineral will issue.

## B. Ownership of Mines and Minerals

In Re Registration of a Transfer of Coal Rights (1914-15), 7 W.W.R. 769 (Sask. M.T.), Milligan. M. T. said "At common law, all minerals except gold and silver lying in a direct line between the surface and centre of the earth belong to the owner of the soil, unless there has been a severance of the title to the minerals from that to the surface". So that in the case of a grant from the Crown, if there is no exception or reservation of minerals, they pass to the grantee, and in the case of a transfer from one person to another, if the transferor is the registered owner of the land, and there has been no severance of mines and minerals, the mines and minerals pass to the transferee and are included in the land.

In Re Landowners Mutual Minerals Limited v. Registrar of Land Titles (1951), 6 W.W.R. (N.S.) 230 (Sask. C.A.), Martin C. J. S. said at page 232 "As minerals are an estate or interest in land they may be transferred by one person to another," and at page 234 "That minerals are part and parcel of the land is well established by

authority". At page 234 after referring to the definition of an owner in The Mineral Taxation Act, 1944 the learned judge said "Moreover, sec. 2, para. 6, defines owner as a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface. This definition without doubt contemplates titles for minerals or any mineral separate entirely from the title to the surface", and at page 238 in considering the "fugitive and vagrant" habits of oil and natural gas, he said "so long, however, as oil and gas remain in the earth they are an interest in land and belong to the owner of the surface unless excepted from his title, and he may transfer ownership just as in the case of other minerals". The reservation of minerals necessarily implies the existence of a right of working (see Borys v. C.P.R., referred to above).

### C. Particular Minerals for which a Title will Issue

As has been indicated, the meaning of minerals is dependent on the surrounding circumstance. The same substance has been held to be a mineral in some instances and in others not. For example in Borys v. C.P.R. referred to above, the registered ownership of petroleum was held to include "gas in solution in the liquid as it exists in the earth". The registered owner of the balance of the minerals was presumably the owner of natural gas in the gaseous state.

This lack of clarity in the context of a Land Titles System which guarantees ownership is problematic, and has led to the development of acceptable land descriptions which are as definite as can be under the circumstances. Mineral titles only exist for the following types of minerals:

- (1) gold and/or silver;
- (2) coal [and valuable stone];
- (3) petroleum, natural gas and all hydrocarbons;
- (4) all mines and minerals except coal, petroleum and natural gas (which includes potash and which is the only method of writing a potash title);
- (5) oil and gas rights as that phrase is defined in The Oil and Gas Conservation and Development Act (now The Crown Minerals Act), which is issued to the Crown (Saskatchewan) only.

#### 1. Gold and/or Silver

At common law, gold and silver were considered royal minerals and within the prerogative of the Crown not capable of being transferred without express mention (see Kennedy v. Inman, [1920] 1 W.W.R. 534 (Alta. C.A.), Township of Bucke v. MacRae Mining Co. Ltd., [1927] S.C.R. 403). This means that if a grant

includes a grant of minerals, gold and silver are not conveyed, unless the grant goes on to state "including gold and silver". Titles exist for gold and/or silver, and for mines and minerals, including gold and silver. A title for gold and/or silver may be a valid title for one of two reasons:

- (1) the grant contained express words to convey gold and/or silver; or
- (2) the title was issued to a bona fide purchaser for value from an intervening transfer or transfers from the Crown grant and the intervening title or titles included gold and/or silver (the fact of the bona fide purchaser makes this title valid and beyond the power of the registrar to correct).

In either case the registrar cannot delete the reference to gold or silver.

In all other cases it is not necessary to say "Mines and Minerals Included Except Gold and Silver". The latter words may be deleted.

## 2. Coal [and Valuable Stone]

In Stuart v. Calgary and Edmonton Railway Company et al., [1927] 3 W.W.R. 678 (Alta. S.C.A.D.) at page 681, Hyndman, J.A. said "there is no doubt coal and valuable stone are minerals". "Valuable stone" according to the evidence given before Egbert, J. of the Supreme Court of Alberta in Western Minerals v. Gaumont (1951), 1 W.W.R. (N.S.) 369 (Alta. S.C.), was said to be, in the engineering profession, ordinarily regarded as stone that can be "quarried".

Valuable stone is only shown on a certificate of title in combination with coal. No title for valuable stone is issued on its own. The effectiveness of the phrase is questionable in light of The Sand and Gravel Act.

Since coal is a hydrocarbon, a title for "coal" and a title for "petroleum, natural gas and all other hydrocarbons" creates a duplication of ownership. No title for "coal" can be issued if a title for "petroleum, natural gas and all other hydrocarbons" has already been issued.

## 3. Petroleum and Natural Gas

A title for petroleum and natural gas can issue with the following descriptions:

- (1) petroleum and natural gas;

- (2) petroleum, natural gas, all other hydrocarbons, all other gases whether hydrocarbon or not, and all other minerals and substances occurring in association with any of the foregoing in a fluid state;
- (3) petroleum, natural gas and all other hydrocarbons.

None of the above titles will issue if a title for coal is in existence, without excepting "coal" or "coal [and valuable stone]" depending on the description in the other title.

No reference in a transfer or certificate of title to "related hydrocarbons" is acceptable (see Landowners Mutual Minerals Limited v. Registrar, referred to on page 72). The Court of Appeal expressed themselves not satisfied as to the meaning of the words "related hydrocarbons" and limited their order to a direction for registration of an interest in petroleum and natural gas only.

No title for "petroleum" alone or "natural gas" alone will issue because of the doubt in meaning (see Borys v. C.P.R., referred to on page 71).

There are no doubt other ways of describing petroleum and natural gas. In Re Land Titles Act, Ferguson v. Registrar of Land Titles, [1955] 1 D.L.R. 26 (Sask. C.A.) the court directed the registration of a transfer for "all mineral and oil rights". For other dealings with this land, no other mines and minerals transfers could be accepted. In the absence of a specific court order, the above ways are the only acceptable ways to describe petroleum and natural gas.

#### 4. Describing Potash

The term 'potash' is imprecise, since it may refer to various compounds of potassium. Potassium itself, like many other mineral substances, is not found in a pure state; the Saskatchewan potash deposits are mainly sylvite (KCl). For these reasons, titles are not written for potash or potassium alone. In order to meet the need for a separate title for potash, a title may be written which includes potash as follows:

All mines and minerals except coal [and valuable stone], petroleum, natural gas, etc. (as described in one of the options above).

#### 5. Oil and Gas Rights under The Crown Mineral Rights Act

Subsection 23(2) of The Crown Mineral Rights Act, S.S. 1984-85, c.C-50.2 continues the Crown's ownership of "oil and gas rights acquired by the Crown under section 27 of The Oil and Gas, Conservation, Stabilization and Development Act". The latter Act was first cited as S.S. 1973-74, c.72. It formed part of the revision as R.S.S. 1978, C.0-3, but was repealed by The Crown Minerals Act.

Subsection 27(1) of The Oil and Gas Conservation, Stabilization and Development Act, 1973 defined "oil and gas rights" to mean:

27(1) . . . all petroleum, natural gas, all other hydrocarbons, except coal and valuable stone, all other gases and minerals and substances, whether liquid or solid and whether hydrocarbon or not, occurring in association with any of the foregoing and the spaces or formations occupied or formerly occupied thereby in all producing tracts in Saskatchewan down to and including the producing zones including but not limited to the properties belonging to the corporations whose names are set out in schedule IV to this Act.

[Note this section is number 26 in the 1978 revision.]

Section 30 of the 1973 Act provided for the designation of the oil and gas rights, acquired by the Crown, by order of the Lieutenant Governor in Council. Upon presentation of the order, the registrar was required to make the necessary endorsements to effect the acquisition by the Crown of the oil and gas rights so taken. Most offices cancelled the certificate of title as to the oil and gas rights as defined under section 27 of the Act and issued title to the Crown also by referring to the definition in the Act. As these titles are renewed, for greater clarity, the following designation is used:

All petroleum, natural gas, all other hydrocarbons, except coal and valuable stone, all other gases and minerals and substances, whether liquid or solid and whether hydrocarbon or not, occurring in association with any of the foregoing and the spaces or formations occupied or formerly occupied thereby as defined by section 27 of The Oil and Gas Conservation, Stabilization and Development Act, 1973 in [the particular tract] in [the quarter section].

Although the name of the Act has changed, titles must still refer to The Oil and Gas Conservation, Stabilization and Development Act, 1973 as it is this Act which is the origin of the ownership by the Crown. No reference to the new Act should be made.

Subsection 28(1) of the 1973 Act (subsection 27(1) of the 1978 Act) was a deemed transfer of the land "subject to any lease affecting the same that may exist immediately preceding December 10, 1973, and subject only to such encumbrances as are registered against the relevant title prior to December 10, 1973". Due to the uncertainty of these phrases, i.e. the registrar would not know whether any caveat or lease was existing before December 10, 1973, it was decided that the Crown title should issue subject to all endorsements registered on the title before the registrar granted the new title. Future caveats would also be accepted, and if not valid caveats, would be subject to The Land Titles Act with respect to wrongful registration.

#### D. No other Titles as to Zones

Outside of The Oil and Gas, Conservation, Stabilization and Development Act the registrar does not accept a transfer or lease where the land description is in relation to a tract or zone in the earth so many metres above or below mean sea level.

There is no legislative or case authority for the registrar to grant a certificate of title for mines and minerals described in this way. Section 89 of The Land Titles Act provides that an owner may transfer land and give an accurate description of the land intended to be transferred. As to the type of interest or portion being conveyed the registrar must look to the common law as modified by statute. In Kolodzki v. Detroit and Windsor Subway Company, [1931] S.C.R. 523 at 524 the comment is made that land may have boundaries that are horizontal or vertical as well as curvilinear and rectilinear. In that case the Supreme Court of Canada allowed the expropriation of a part only of the subsoil. This case is not authority for the proposition that the registrar is required to take a transfer of land expressed in terms of so many metres below sea level and grant a title in the name of the transferee for that land so described. As indicated above the progress through the courts to determine the nature or type of mineral interest capable of supporting a title in a Land Titles System has been very cautious. In fact, Di Castri in Registration of Title to Land, para. 612 questions the indefeasibility of a certificate of title granted for mines and minerals, in the absence of a judicial declaration or express statutory authority.

One of the purposes behind a title system is to provide simplicity and certainty with land dealing. A system that allows the subdivision of mineral interests into fractional interests based on geodetic surveys introduces uncertainty and complexity. The purpose of division into fractional interests in minerals is not really to deal with land but to divide up the proceeds of mineral development and is therefore more in the nature of a personal property interest than a real property interest.

#### E. Restriction on Fractional Interests

Section 59 of The Land Titles Act allows the registrar to refuse to accept for registration any instrument transferring, encumbering, charging or otherwise disposing of or reserving an undivided fractional interest in a parcel of land containing mines and minerals, or any mineral, that is less than an undivided one-fourth of the whole interest in mines or minerals, or in any mineral, contained in that parcel of land.

This restriction was first introduced by S.S. 1950, c.27 as a one-twentieth interest, but by S.S. 1954, c.20 it was raised to the present requirement of a one-quarter interest. Reichert v. Registrar for Regina (1965), 53 W.W.R. 382 (Sask. C.A.) held that

the restriction did not catch "disposition by reservation". The section was amended to close this gap by S.S. 1966 c.96. The legislative history discloses a consistent intention to restrict the creation of fractional interests.

The registrar will refuse to register an instrument creating less than a one-fourth interest in all but the most exceptional cases.

In 1961 Towill, M. T. wrote these words in refusing to instruct the registrar to accept an instrument creating less than a one-fourth interest:

I am now advised by the Deputy Attorney General that he is not prepared to approve such transfers for registration. Section 58 [now section 59] of The Land Titles Act was enacted with a definite purpose in mind of preventing the creation of a large number of fractional interests in minerals and the more titles that are issued for any particular piece of land, the more difficulties arise and the more errors are invited. Most any registered owner could advance compelling reasons to be allowed to split up his mineral interests and if such course of action is taken in one instance by splitting up titles, then it is difficult not to follow the precedent that has been made and it would seem that the desirable course to follow is to adhere strictly to the provisions of section 58, [now section 59].

He went on to point out that the curbs against subdivision of land as to surface by the requirement of surveys and the provisions of The Planning and Development Act are accepted quite readily. The only curbs on mineral transfers are that the mineral must have been declared, by the courts or the legislature, to be a mineral and section 59.

Not only do titles of undivided interests create difficulties for the guarantee of title, it also militates against the development of minerals. The danger for the guarantee of title is that certificates can be issued for more than 100%.

It is the practice to refuse to register a transfer of surface and minerals that will create an undivided interest in mines and minerals or any mineral less than one-fourth whether the mines and minerals are separated from the surface or if more than four persons are shown. If the conveyance is to five or more persons, mathematically one or more persons will own less than a one-fourth interest whether or not the extent of the interest is specified.

#### F. The Sand and Gravel Act

This Act provides:

- (1) the owner of the surface is the owner of all sand and gravel (see section 3);

- (2) sand and gravel is not a mine, mineral or valuable stone (see subsection 4(1));
- (3) the owner of mines and minerals is entitled to all ceramic clays and all other clays that have an industrial use except any clay required for the construction of an earthen dam or road grade and all volcanic ash, marl and bentonite (see section 6);
- (4) ceramic clays and any other clays that have an industrial use are deemed to be minerals (see subsection 7(1)).

The registrar does not have a role to play under this Act, other than to refuse a transfer or reservation of sand, gravel, ceramic clays or other substances mentioned in the Act.

## G. Transferring Mines and Minerals

### 1. Mineral Certificate Needed

The Land Titles Amendment Act, 1988, S.S. 1988, c. 28, effective June 21, 1988, makes a number of significant changes to the law and practice with respect to mineral certificates. References in this manual to section 208 of the Act are to section 208, as amended.

Subsection 208(2) provides that any party to a disposition of an interest in mines and minerals executed on or after June 1, 1951 may apply for a mineral certificate. Subsection 208(2.1) provides that if a disposition is an instrument, the submission of the instrument acts as a request. If a request accompanies the instrument, the request is returned. When mines and minerals are being transferred to the Crown, i.e. a government department or agency, no mineral certificate is required (see subsection 208(7)).

Subsection 208(4) provides that no person has an action against the registrar arising out of a disposition of an interest in mines and minerals executed on or after June 1, 1951, for any loss or damage sustained by reason or any error, omission or misdescription in any certificate of title or in any abstract, certificate or certified copy of an instrument, issued by the registrar, relating to the interest in mines and minerals, unless the registrar has issued a mineral certificate in respect of that disposition.

A disposition of the surface of land including mines and minerals that is not accompanied by a mineral certificate may be registered, but no action can be brought in respect of the interest in mines and minerals (see subsection 208(6)).

If the disposition is not an instrument, the request may consist of a letter addressed to the registrar, requesting the issuance of a certificate, describing the property in the disposition and

giving the names of the parties to it. No formality of application is required. It may be executed by any party to the disposition or his or her successor or assigns or a responsible agent. The request must identify the disposition and establish on whose behalf the mineral certificate has been issued, since in some cases the party applying may not want to register the disposition, e.g. where the disposition is not itself a registrable instrument (such as a petroleum and natural gas lease), yet is a basis for the application for the mineral certificate. In all cases, the original disposition must be produced and, for identification, stamped with the date stamp of the office. This is to prevent the substitution of another disposition for the disposition which has been produced and on which the registrar has acted in issuing a mineral certificate.

If no mineral certificate for the disposition being transferred has previously been issued, the necessary searching of past titles and instruments, back to the grant, must be conducted. If it is determined that the current registered owner is in fact the owner, a mineral certificate can be issued. The titles researcher must be satisfied as to the whole situation as to the mines and minerals in the land being dealt with, but the mineral certificate is issued only for the interest being transferred eg. if only coal is being transferred, the mineral certificate is only issued for coal. The mineral certificate bears the same registration number as the transfer and is endorsed on the certificate of title in the upper left hand corner (see page 9). The mineral certificate is filed with the transfer. The back of the residual title is also endorsed as to what interest has been transferred eg. as to an undivided one-fourth interest in coal. Both front and back endorsements remain on the title indefinitely. If an error or duplication of ownership is found, no mineral certificate may be issued. A double title must not be created, or if double titles exist, must not be allowed to be dealt with.

If a mineral certificate has previously been issued, no further certificate can be issued (see subsection 208(3)). Unless the registrar believes that the previous mineral certificate was issued in error, in whole or in part, the registrar has no authority to issue another mineral certificate. The last mineral certificate number is endorsed on the mines and minerals title.

Where a disposition which is not an instrument is submitted eg. an oil and gas lease, the resulting mineral certificate should be endorsed on the back of the certificate of title containing the mines and minerals. When, and if, a registrable instrument is submitted, the number of the mineral certificate can be resurrected at that time.

## 2. No Mineral Tax Affidavit Required

Effective January 1, 1984, The Mineral Taxation Act, 1983, S.S. 1983-84, c.m.17.1 was passed. Since December 31, 1984 no company has been required to pay taxes under The Mineral Taxation Act, 1978 (see section 47 of The Mineral Taxation Act, 1983). Thus, the need for any affidavit, to prove the requirements of section 7 of the 1978 Act, has been eliminated.

The 1983 Act does not impose any affidavit requirements. Subsection 17(1) of the 1983 Act renders a transfer of mineral rights from a corporation to a nontaxable owner ineffective for the purposes of Part III (i.e. in the sense that the transferor remains liable to pay mineral rights tax), but no affidavit is required and no title can be set aside for failure to pay this tax.

## 3. Restrictions on Crown Grants or Transfers of Minerals

### (a) Her Majesty the Queen (Saskatchewan)

Her Majesty the Queen (Saskatchewan) cannot transfer mines and minerals (see subsection 93(1) of The Land Titles Act). This prohibition does not apply to a Crown corporation (see subsection 93(2)).

Subsection 94(1) of The Land Titles Act states no transfer by a Minister, department, board or commission shall include mines and minerals and the Minister, board or commission shall execute a transfer of the mines and minerals in favour of Her Majesty the Queen in right of Saskatchewan. "Board" in the context of this subsection must be taken to mean an unincorporated body which is responsible to a Minister and not an incorporated body or an elected body like a school or hospital board.

A Crown grant or transfer is in standard form and contains a reservation to the Crown of all mines and minerals. This is acceptable:

- (1) where the minerals have never been granted and the title reads "Minerals in the Crown", or
- (2) where the title is silent as to mines and minerals or has a statement "Minerals Included".

Where the title reads "minerals excepted by instrument 85Y00123", the mines and minerals are owned by someone else and the description on the title must be followed.

(b) Veterans' Lands

Section 57 of the Soldier Settlement Act, R.S.C. 1927, c.188 provides:

From all sales and grants of land made by the Board, all mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatever.

This provision was not repealed or consolidated in the revision of the Statutes of Canada in 1952 and is still applicable today (See Re Director of Soldier Settlement (1971), 18 D.L.R. (3d) 94 (Sask. Q.B.)). Section 57 applies whether or not a reservation is made in the transfer, and effect must be given to it.

4. Describing Mines and Minerals in a Transfer

A land description in a transfer must be positive. This means that the registered owner indicates after the statement that he or she is the registered owner of what is being transferred. The tendency is to prepare a mineral transfer stating everything that the registered owner owns and then reserving from it or transferring a fraction of what is owned. This is not acceptable for the surface, or for mines and minerals where there is a fraction of a fraction involved. Where, for example, the registered owner owns all mines and minerals and wishes to transfer coal, the transfer should be prepared saying "I, X, being registered owner in fee simple of all coal in \_\_\_\_\_, do hereby transfer all my estate and interest".

In recent years due to problems in determining the parties' intentions transfers of mines and minerals which might be construed as involving a fraction of a fraction are rejected. The following rules should be noted:

- (1) if "A" is the registered owner of an undivided one-half interest and wishes to transfer one half of all he or she owns to one person, the transfer should be prepared so as to state "A" as the registered owner of an undivided one-fourth interest;
- (2) to show two persons as registered owners or transferees each owning or intending to own an undivided one-fourth interest each of an undivided one-half interest in certain land, the best procedure is to say "with equal interests" to avoid the implication that each owns more than an undivided one-fourth interest;

- (3) if "A" owns an undivided one-half interest in the SW 1/4 Minerals Included and wishes to transfer the surface and an undivided one-fourth interest in mines and minerals, it is preferable to draw the transfer in this way:

Firstly: an undivided one-half interest in the SW 1/4

Except: all mines and minerals

Secondly: an undivided one-fourth interest in all mines and minerals within, upon or under the land.

An undivided specified interest is always expressed as a fraction rather than a percentage. A percentage is less definite than a fraction in that it could be a rounded figure.

To keep back minerals the proper word is "reserve" rather than "except". Excepted usually means that minerals have already been excepted from the transferor's title. A registered owner reserves mines and minerals. The registrar determines whether mines and minerals will be excepted from the title. In a particular case where there is doubt as to the ownership of the mines and minerals the registrar may ask that the transferor except the mines and minerals in a transfer. This is quite often done in transfers from the railway companies.

The strict legal meaning of the words 'exception' and 'reservation' is referred to in the judgment of Coyne, J. A. in Canadian Superior Oil of California Limited and Hiebert v. District Registrar of Land Titles, District of Portage La Prairie (1953), 8 W.W.R. (N.S.) 417 at 440 (Man. C.A.).

Coyne, J. A. says that an 'exception' is not strictly or properly a 'reservation' and quotes from Halsbury as follows: "'Exception' is always part of a thing granted and only a thing in esse can be excepted; a 'reservation' is of a thing not in esse, but newly created or reserved out of land or tenements upon a grant thereof. Upon the grant of land there may be an exception of a specified part, and then this is not included in the grant at all." The phrase 'in esse' means 'in being' or in actual existence. Whatever is excepted is in existence at the time the transfer or other document is signed, but is not included as part of the land that is being transferred.

Whatever is reserved by the Crown may not subsequently be reserved in a transfer (see Re C.P.R. & Reid (1914), 6 W.W.R. 1160 (Sask. M.T.), following MacKenzie and Mann Ltd. and Foley (1909), 10 W.L.R. 668 (Sask. S.C.)).

A reservation can only be made to the grantor. It cannot be reserved to a stranger (see 5 Am. & Eng. Encyc. of Law 456).

## 5. Mines and Minerals Descriptions on Certificate of Title

### (a) Positive Title

The registration number of the first instrument creating the mineral or minerals should be shown on the certificate of title.

The reason for this is that the meaning of such expressions as "mines and minerals" can vary according to the context in which they are used (see the quotation from Halsbury at the beginning of this chapter). By quoting the registration number of the severing transfer, the registrar is directing attention to the context in which the particular expression is to be construed. In following this practice great care must be taken to avoid quoting the wrong number. A wrong number is much worse than none at all.

### (b) The Residual Title

#### (i) Particulars of Endorsement

This should be as clear as possible and indicate that the instrument itself should be referred to in order to see the full description of the interest transferred, eg. "Cancelled as to all petroleum, natural gas and other hydrocarbons and substances as described in transfer No. \_\_\_\_\_." Wherever possible the residual title should be renewed.

#### (ii) On Renewal

As with the positive title, and for the same reason, the registration number of the first instrument severing the mineral or minerals should be shown. Three rules must be followed:

(1) The number must be correct.

(2) Care must also be taken to avoid overloading a certificate of title with references to severing transfers. They should not be allowed to obscure the meaning of a certificate of title. The assistance of the Master of Titles should always be sought in cases of difficulty.

(3) The exception should follow the parcel or quarter section from which the minerals were taken. In Rayfuse v. Mugleston (1954), 11 W.W.R. (N.S.) 555 at 562 (B.C.C.A.) it is stated "Exceptions should be placed directly after the parcels". See also the articles in (1924) 2 Canadian Bar Review 145 at 151, and (1962) 40 Canadian Bar Review 329 previously referred to.

If it is not possible to show a mineral exception right after the parcel i.e. in the case of multiple quarter section titles, the exception must be tied into and identified with the quarter section affected.

Save in the clearest kind of case, it is dangerous to use the phrase "Excepting thereout". It is usually much better to say "Excepting out of the said north west quarter" (or as the case may be). An example of the dangers of the word "thereout" is to be found in the case of Clarke v. Burton (1959), 27 W.W.R. 352 (Alta. S.C.A.D.), where the certificate of title was described at page 357 as follows:

Firstly: the South East quarter of Section Thirty (30), Township Thirty-five (35), Range One (1), West of the Fifth Meridian, in the said province. Containing one Hundred and Sixty (160) acres more or less; and Secondly: the South West quarter of said Section Thirty (30), said Township, and Range, Containing One Hundred and Sixty (160) acres more or less. Excepting thereout Sixty Hundredths (.60) of an acre more or less, of record in the land titles office for this land registration district as Road Plan 1595.L.

"Excepting thereout all Mines and Minerals."

This was taken to mean that no mines and minerals were included in the certificate, whereas the registered owner was, in fact, entitled to mines and minerals in the south east quarter. The difficulty would have been avoided if the exception had read:

"Excepting out of the South West quarter all mines and minerals."

or if the exception immediately followed the quarter section to which it applied, which is the preferred practice.

## 6. Need for Accuracy

The importance of having mineral exceptions accurately recorded is illustrated by the case of Fuller v. Garneau, [1921] 1 W.W.R. 857 (S.C.C.), which went to the Supreme Court of Canada on appeal from the Supreme Court of Alberta. The question was as to the interpretation of an exception of minerals. When the Crown issued the grant or patent, there was inserted the reservation of 'all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same'. When the land was sold afterwards there was a simple reservation of mines and minerals without reference to the right to work. It was held that the original reservation reserved wider rights than a simple reservation of 'all mines and minerals', as under the latter there is no right to work in such a way as to let down the surface, while under the former, there is implied a right to let down the surface if it is established that the mines cannot be worked or the minerals extracted without entailing such consequences; and a purchaser under an agreement of sale containing the simple form of reservation was held to have a possible ground of objection to the vendor's title which was subject to the more elaborate reservation in the Crown grant.

This case shows the difficulties in the interpretation of 'exceptions' or 'reservations', and the difficulties are emphasized by the fact that of the five Justices who heard the case, two of them dissented from the decision of the court. It might be stated here that mere reservation of 'mines and minerals' implies the right to get and take away the minerals, but such rights are not as wide as the rights included in the foregoing quotation. By seeing the registered number of the transfer anyone searching the title can obtain production of the transfer and thereby learn exactly what the exception or reservation is. In Ball v. Gutschenritter, [1925] S.C.R. 58 at 75, Duff, J. said "Knowledge must also be ascribed to both parties of the fact that in the ordinary course the precise character of such reservations can be ascertained by inspection of the documents in the land registry". In Jaegle et al. v. Feuerborn (1925-26), 20 Sask. L.R. 241 (Sask. C.A.) the judgment of the court was delivered by McKay, J. A. At page 245, the foregoing statement in the Gutschenritter case was quoted with approval, and in applying the law, McKay, J. A. said at 246, "The precise character of such reservation could be ascertained by inspection of the patent in the land titles office".

The best known case on the subject of errors in the certificate of title is Turta v. Canadian Pacific Railway Company (1954), 12 W.W.R. (N.S.) 97 (S.C.C.). In that case, the Canadian Pacific

Railway Company sold land to a purchaser and excepted and reserved certain minerals (that is, kept those minerals for itself). The land titles office failed to show in the new certificate of title that these minerals were excepted, and failed also to indicate on the back of the Canadian Pacific Railway Company's certificate of title that the cancellation did not extend to these minerals. The land later came into the hands of a person who was not aware of the reservation. It was held that the purchaser was entitled to these minerals because the purchaser had bought the land on the faith of a certificate of title which purported to include them with the result that the Canadian Pacific Railway Company lost the minerals to which it would otherwise have been entitled.

#### H. Mines and Minerals under Railway Rights of Way

Section 140 of the Railway Act, R.S.C. 1985, c.R-3 provides as follows:

140(1) The company is not, unless the same have been expressly purchased, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

(2) All such mines and minerals, except as provided in subsection (1), shall be deemed to be excepted from the conveyance of such lands to the company, unless they have been expressly named therein and conveyed thereby.

This section was interpreted by the Supreme Court of Canada in A. G. Can. v. C.P.R., [1958] S.C.R. 285. The court held that:

- (1) section 198 (now section 140) of the Railway Act is valid and as to this particular subject matter overrides section 92 of The Land Titles Act and that unless the transfer of the right of way to the railway company expressly included the minerals, minerals did not pass to the railway company;
- (2) as to the C.P.R. Company section 198 was binding from February 1, 1904, being the date the section first came into force;
- (3) as to the C.N.R., the constituent companies now forming the Canadian National Railways were bound by the section from February 1, 1904 to June 6, 1919, but the Court refused to express an opinion as to the rights of that Company after that date;

- (4) the same principles apply to lands acquired by expropriation proceedings;
- (5) the question of minerals in town sites purchased by the companies with mines and minerals included was not dealt with by the Court and whether such town sites can be lands required for the construction, maintenance and operation of the railway is a question that has not been decided;
- (6) under any transfer which expressly included the mines and minerals, the companies obtain good title under The Land Titles Act to such mines and minerals.

Rand, J., in his judgment at page 291 said:

If that instrument does not expressly convey minerals, a certificate of title issuing on it should except them. If this entry were omitted by the registration officer and the minerals were subsequently sold by the company to an innocent purchaser, it might be that the original owner would be bound by that error in the certificate; that is a question to be decided when it arises; but so long as the minerals remain in the apparent ownership of the railway company and assuming that they were not expressly purchased, the certificate remains subject to correction at the instance of the vendor or his transferee: as between these parties the statute is conclusive subject to any right of reformation of the conveyance that may exist or in the event of sale to any trust that may arise.

The above section and case have been interpreted and applied in Re Moir (1961), 36 W.W.R. 83 (Man. Q.B.); Re Panther Resources Ltd., [1984] 2 W.W.R. 247 (Alta. Q.B.) and Re Registrar's Caveat 75031464, [1988] 1 W.W.R. 344 (Alta. C.A.). Each of these cases held that the transferor to the railway company, and not the current owner of the quarter, is the owner of the mines and minerals, unless, of course, the transferor expressly conveyed the mines and minerals under the right of way to the railway company or to a subsequent transferee.

Section 140 applies to "land purchased by [a railway company], or taken by [a railway company] under any compulsory powers given [a railway company] under the Railway Act". It may be that the Act does not apply to any lands acquired by a railway company as a grant by way of subsidy or for purposes other than a railway right of way.

The registrar clearly has the power to correct an error between the transferor and the transferee where no new third party rights have arisen in good faith and for value. However, the consent of the railway company must be obtained before any correction can be made. The consent of the railway company is essential because of the uncertainty associated with the section.

When the railway company's title is corrected, the title for the transferor to the company should also be revived.

The memorandum of cancellation should be amended "except as to minerals under the right of way" and the title should be renewed as a mines and minerals title.

All amendments should be initialled and dated and all material microfilmed in the usual manner.

If a railway company wishes to transfer a right of way, this question should be addressed. If the case is not clear so as to allow the registrar to correct, the transfer should except the mines and minerals.

#### I. Mines and Minerals under Original Road Allowances

Under the Dominion Lands Surveys Act governing the original township surveys, road allowances shown on a township plan were in a special category. The road allowances were not a part of the surveyed lands intended for homesteading or other disposal. However, it appears that the province owns all mines and minerals under original road allowances.

By the Saskatchewan and Alberta Roads Act, S.C. 1906, c.45, roads including road allowances were vested in the province. Section 8 of that Act contained a proviso that nothing therein contained should be construed to vest in the province any mines or minerals under any part of any road or trail so vested.

Although in section 7 of this Act, "road allowances" are dealt with separately from "roads and trails" or "new roads", section 8 is better read in connection with subsections 4(2) and 6(1) and section 5. Section 8, in referring to "any road [not road allowance] or trail upon or through Dominion Lands" can be seen as being directed at the creation of new roads and providing that such action does not transfer the mines and minerals underlying them to the provincial Crown. This was a reasonable provision, allowing for the provincial administration of highways within the province but not the creation of "window tracts" of provincial mineral ownership in the midst of federally owned mineral rights, which would have proven very troublesome in mining (especially in relation to coal, the most valuable mineral substance of the day in Western Canada). Note that the Saskatchewan and Alberta Roads Act, R.S.C. 1927, c.180 re-enacted the 1906 Act.

The position was then that although the province owned the roadway it did not own the mines and minerals but such mines and minerals continued to be owned by the dominion until 1930 when the unalienated resources of which these minerals would form a part passed to the province under the transfer of the natural resources.

The result is that prior to 1930, Saskatchewan did not own the mines and minerals and a transfer from the province could not operate to transfer anything which the province did not own. After 1930, the provisions of The Provincial Lands Act became effective and the minerals could not be transferred by the province.

Where a certificate of title for the private ownership of an original road allowance exists, the title can only be amended to reflect provincial ownership of the mines and minerals if there has not been an intervening transfer.

If an abandonment for an original road allowance is received for registration under section 116 of The Land Titles Act, all mines and minerals should be excepted from the portion being abandoned.

The Road Allowances Crown Oil Act, first passed as S.S. 1959, c.53, section 3 provides that "in every producing oil reservoir one and eighty-eight one-hundredths per cent of the recoverable oil shall be deemed to be within, upon or under road allowances and shall be the property of the Crown". This is a clear expression of the intention of the legislature as to the ownership of mines and minerals under road allowances.

The exception to the rule that the provincial Crown owns all mines and minerals under the original road allowances may be where the federal Crown has expropriated lands for airfields and other purposes. The perimeter of the expropriation plan in many cases includes original road allowances. Canada has the right to expropriate. Unless the plan and description excludes the minerals then the minerals in such original road allowances so included in the plan would vest in Canada.

#### J. Mines and Minerals under Streets and Lanes

The ownership of mines and minerals under streets and lanes remains with the owner of the quarter section or parcel from which the subdivision was created (see subsection 104(11) of The Land Titles Act). Today, when a certificate of title, that includes mines and minerals, is cancelled as a result of the registration of a plan of subdivision, which includes streets and lanes, the certificate of title is cancelled, except as to the mines and minerals. This was not always the case. Many such titles were totally cancelled.

A title for such mines and minerals can be revived and renewed, on request, and is filed under the quarter section or parcel with, if necessary, a cross-reference in the town site folders.

Where no title for the mines and minerals exists, it is necessary to trace the title to mines and minerals from the grant of the quarter section to the point where the plan is registered. At that point it will usually be found that the certificate of title was cancelled by the plan, new certificates of title were issued for the lots and blocks, but no title issued for the mines and minerals under the

streets, lanes and public reserves. These mines and minerals therefore still belong to the person named in the certificate of title which was cancelled by the plan of subdivision.

The first step the registrar takes in creating a title to mines and minerals is to add to the memorandum of cancellation by the plan of subdivision the words "except as to mines and minerals under streets and lanes and public lands".

Then the registrar determines whether any of these mines and minerals have at any time been dealt with by Master of Titles' Order or a resubdivision. In many cases a Master of Titles' Order may have been made cancelling part of a plan, putting the land back into the quarter section, or creating a larger parcel. The effect of such an Order is to take the mines and minerals under the streets and lanes in the cancelled portion of the plan and put them into another certificate of title. In order not to have a double title to these mines and minerals in this type of case, it is necessary to put a further memorandum of cancellation on the certificate of title, i.e. as to the mines and minerals under the streets and lanes dealt with by the Master of Titles' Order.

In either case the result is a certificate of title which has been revived as to mines and minerals under the streets and lanes which are the subject matter of the request. It is usual for this certificate of title to be totally cancelled and to resume its place in the system of cancelled titles so that the chain of titles to the remainder of the land is unbroken, and to write a new certificate of title as to all mines and minerals within, upon or under that portion of the (quarter section) shown as streets and lanes in plan No. \_\_\_\_\_ (as amended by Master of Titles' Order No. \_\_\_\_\_). Any appropriate encumbrance should be carried forward onto the new certificate of title if the encumbrance is still alive. The new certificate of title is filed as part of the quarter section, but a file folder is placed at the beginning of the file folders for the plan mentioned, bearing a cross-reference to the quarter section.

It is not, of course, possible to have the duplicate certificate of title, which was cancelled as mentioned above, since that will have been destroyed long ago. A duplicate is issued of the new certificate of title and kept in the file folder until the registered owner requests it.

The points to remember are that:

- (1) double titles to any part of the mines and minerals must not be created;
- (2) any title to mines and minerals under streets and lanes can easily be found by correct filing and cross-reference;

- (3) no certificate of title is revived as to which there is a defect in the chain of title (eg. minerals were previously reserved by a former owner).

In addition to reviving a certificate of title for mines and minerals under streets and lanes on request, it sometimes is necessary to do so to allow the mines and minerals to be forfeited under The Mineral Taxation Act.

## PART IV - REGISTRATION OF INSTRUMENTS

### Chapter 15. Compulsory Registration

Subsection 67(1) provides as follows:

67(1) After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render the land liable as security for the payment of money except as against the person making the same.

This subsection is stating the fundamental Torrens System principle that legal interests in land are created by the government through registration. It is registration which gives operation and effect to instruments. Of course, to say that this applies to all instruments dealing with land is not accurate. Even subsection 67(1) makes reference to a leasehold interest not exceeding three years where there is actual occupation of the land. The Land Titles Act makes further reference to exceptions to the need to register in section 69 by stating that the land mentioned in any certificate of title is by implication subject to a wide variety of interests which are created through written instruments.

It is also clear by the closing words of subsection 67(1) that interests may be created outside of the Land Titles System and still be valid as between the parties to the transaction. Notwithstanding this statement, the basic principle remains that if The Land Titles Act or any other Act requires the registration of an instrument, if the instrument is not registered, it will not be valid as against third parties and, if the party who holds the interest conveys or charges the interest to a third party who registers the interest first, the third party will be successful in any action except in a case of fraud.

The closing words "except as against the person making the same" have been interpreted by the Supreme Court of Canada in Balzer v. Moosomin Land Registrar, [1955] S.C.R. 82 at 91 wherein Estey, J. stated that "these words have no reference to the effect of an instrument when registered but rather to its effect as against a party making same quite apart from registration".

## Chapter 16. Effect of Registration

Subsection 67(2) provides:

67(2) Every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

These words have been the subject matter of a great deal of litigation interpreting or attempting to decide whether or not the registration of an instrument can confer rights which are not allowed by the Land Titles System. The courts are divided.

The following cases have indicated that the registrar may be able to, by means of registration, make a transaction effective which is, in essence, contrary to law:

1. Elford v. Elford, [1921] 1 W.W.R. 341 (Sask. K.B.), Taylor J. said at page 346 that certain transfers were never validly executed and should never have been accepted by the registrar of land titles, but that as the registrar accepted the documents and registered them, they became operative according to the tenor and intent thereof when registered and thereupon transferred the lands therein mentioned, not by virtue of the instrument, but as directed by the statute.
2. Devenish v. Connacher, [1930] 2 W.W.R. 254 (Alta. S.C.A.D.), Clarke J.A., said at page 262 "the registrar must be treated as having decided that it was a registrable document and having placed it on the register it only remains to give it operation according to the tenor and intent thereof."
3. Nicholas v. Ruf, [1936] 3 W.W.R. 647 (Sask. C.A.), Martin J.A., said at page 651 that one of the cardinal principles of the system in the determination of rights between parties is registration and that instruments such as transfers can pass no interest until registered. He also said that a person who claims an equity through the medium of an instrument runs the risk of being defeated by someone else who gets his instrument on the register first.
4. Re Mutual Investments Ltd., [1924] 4 D.L.R. 1070 (Ont. S.C.), Riddell J. stated at page 1071-72 "but it is said that the Master of Titles is a mere administrative officer, that he must register even a document which is a plain violation of the law and leave the person or company registering to take the consequences. I decline to accede to that argument: in view of the very great effect of registering such documents, I think that he may and, where

necessary should pass upon the legality of any document submitted to him".

5. Ex Parte Bond, [1880] V.L.R. 458, Stawell C.J. said at page 462 "The judicial duty is imposed on him of examining into the validity of instruments presented to him for registration. He is to investigate them and all the facts presented to him, and say whether such instruments are valid or not."
6. Re Spokane and Eastern Trust's Mortgage (1910), 15 W.L.R. 637 (Alta. T.D.) wherein the court directed the registrar to refuse to register a mortgage not executed on the prescribed form and purporting to operate as a conveyance of the entire estate of the mortgagor rather than as a charge in that the registration would have a validating effect.
7. Re North-West Telephone Co. Limited (1909-10), 12 W.L.R. 300, 2 Sask. L.R. 379 (S.C.) wherein Chief Justice Wetmore held that a mortgage that includes land that may be acquired in the future is bad and should not be accepted and in the same case Newlands J. said "the system of land registration in force in this province is a statutory one, the provisions of which are set forth in The Land Titles Act. No instrument can therefore be registered in a land titles office unless it is one of the instruments whose registration is provided for, and in form and execution, conforms with the requirements of that Act."

On the other hand, there are cases wherein the court has had no difficulty saying that registration confers no effect on unlawful clauses:

1. In re Ridgeway and Smith's Contract, [1930] V.L.R. 111 (Vict. S.C.), wherein the court held that the contractual rights of the licensee did not constitute an interest in land under the general law and did not become an interest in land through registration.
2. Hoar v. Mills, [1935] 1 W.W.R. 433 (Sask. C.A.), which dealt with a mortgage containing a provision granting the mortgagee an option to purchase the mortgaged property for a specified price at any time until the mortgage was discharged with was held by the court to be a void option and an unenforceable clog on the mortgagor's equity of redemption under the general law and was therefore not validated by registration.
3. Smith v. National Trust Company, [1912] 1 W.W.R. 1122 (S.C.C.) wherein the court dealt with a mortgage granting a mortgagee the power to sell the mortgaged property if the

mortgagor defaulted on his secured obligations which power was held, according to The Real Property Act of Manitoba, to be void and not validated by registration.

4. Re Lehrer and The Real Property Act, [1961] S.R. (N.S.W.) 365, wherein the registrar refused to register a lease on the grounds that it was void because the term was uncertain and the court ordered the lease to be registered on the basis that the registrar general could not by registration create a form of leasehold estate which is not known to the law.

Subsection 67(2) of The Land Titles Act states that instruments become operative when registered. In other sections of the Act, the legislature has been consistent in conveying the impression that registration could confer validity upon an otherwise invalid instrument. An example of this is section 126. Section 126 is a clear statement that a mortgage affecting land by way of a charge, lien or encumbrance given to secure the payment of the purchase price of chattels and executed before the expiration of six months after the delivery to the purchaser of the chattels is null and void. Subsection 126(5) states that if by fraud, inadvertence or otherwise, any such mortgage of other instrument or a caveat founded thereon is registered, the registration shall be absolutely null and void. If registration cannot convey or confer validity upon an otherwise invalid instrument, subsection 126(5) would not be needed.

Notwithstanding these strong legislative words, the view of the legal community is that registration cannot render operative terms which would be illegal under the general law. The strongest proponent of this argument is Mr. Thomas W. Mapp, who in his authoritative text, Torrens' Elusive Title, discusses these issues at some length in chapter five and concludes at page 89 that the registrar has the power to confer ownership by registration only of a legal interest in land recognized by the general law of the jurisdiction. This is the view taken by the Land Titles System as evidenced by the decision to accept debenture mortgages (see chapter 20 of this manual at pages 146 and 147).

Thus it falls to the registrar to attempt to reconcile the legislation, the cases and the literature to produce a result which will be sufficiently flexible to facilitate the transfer of land but also sufficiently certain to keep the system as simple and predictable as possible. The registrar's powers under this head are discussed in the next chapter. The registrar must be able to determine the effect of what is registered so as to ensure that the parties in future dealings need not go to court to determine their rights.

## Chapter 17. Registrar's Authority to Reject an Instrument

### A. Statutory Authority

Subsection 26(2) states as follows:

26(2) The instrument shall then be examined and, if found to be complete and in proper form and fit for filing or registration, shall be signed by the registrar and a record of the acceptance of the instrument shall be entered in the instrument register. If the instrument is found not to be complete and in proper form or appears to be unfit for filing or registration the registrar shall reject and return it and enter a record of the rejection in the instrument register.

This simple rule gives the registrar broad discretion to control the registration of instruments. Fundamentally, the registrar can only register instruments which deal with or have a legal effect in relation to land or which the legislature has determined shall be registered, notwithstanding that a particular instrument does not deal, at common law, with the real property interest, eg. The Personal Property Security Act.

Once it is determined that an instrument is of a kind that may be registered, thereafter, the registrar's authority relates to a broad series of categories of rejection which include the rules that the registrar must be able to determine the effect of what is registered and that it complies in a prima facie way with a prescribed form and is complete on its face.

Sometimes an instrument will be rejected, and the reason for rejection will relate not to statutory or case authority but according to long standing practice. In Re Transfer Knudson and Knudson to Senft, Sept. 18, 1945 Sask. M.T., (unreported), Stewart, M.T. dealt with a transfer which purported to transfer two parcels of land from two different registered owners. Stewart, M.T. acknowledged the long-standing practice to insist on two transfers in this instance, and then stated "In my view a practice involving an important principle and continued over many years should not be changed except by legislation". There have been many instances where long standing practices are changed as a result of new research or philosophy, but generally, the certainty that the system requires often dictates that a long-standing practice, unsupported by specific legislation, will be upheld by the Master of Titles.

### B. Not All Documents May be Registered

From time to time, the legislature determines that certain types of instruments may not be registered. An example of this is a lease for three years or less. In the case of In re The Land Titles Act, [1921] 2 W.W.R. 841 (Sask. M.T.), the Master of Titles concluded

that the registrar was correct in refusing to register a lease which was for a term of two years with an option to renew for two years. Similarly, there are sections in The Land Titles Act and other Acts where the legislature states certain types of instruments may not be registered i.e. mortgages of land securing the purchase price of chattels wherein the chattels have been in the possession of the mortgagor for longer than six months (see section 126 of The Land Titles Act).

The question of which documents may be registered was considered in the case of M. Rumely Co. v. The Registrar of the Saskatoon Land Registration District (1911), 4 Sask. L.R. 466 (S.C.), Lamont J., said at page 474:

It is not the intention of The Land Titles Act to provide for the registration of all agreements or arrangements which a man may enter into in respect of his land, but only for those instruments specifically mentioned in the Act. If a man executes an agreement in respect of his land the registration of which is not provided for in the Act, the document may be enforceable as against the owner, but it is not registrable in the land titles office. The system is not intended to restrain a man's dealings with his own land, but it limits the class of documents which can be registered to those specified in the Act, and a man cannot obtain registration of a non-registrable form if the effect is to vary the legal consequence of the latter. The result of such taking is to prevent the registration of that instrument which would otherwise be registrable.

On the other hand, the Master of Titles must be careful to ensure that the Land Titles System is not administered so rigidly as to prevent the creation of new legal interests in land through registration. One of the principal objectives of a Land Titles System is to ensure public disclosure of interests in land and the guaranty of those interests. If the Master of Titles and the Registrar's refusal to register new interests leads to the creation of caveated interests showing long chains of title, one can ask the question whether or not the need of the public for disclosure and the guaranty of interests is being met.

### C. Prima Facie Compliance With Forms

Clause 17(7) of The Interpretation Act provides that "where a form is prescribed, deviations therefrom not affecting the substance nor calculated to mislead, do not invalidate the form used". The Land Titles Act prescribes a large number of forms which contain only minimal information. If this minimal information is not provided, the registrar must reject in order to comply with the legislation.

In addition to clause 17(7) of The Interpretation Act, many sections in the legislation will state that an instrument must be in a particular form or a form "to the like effect".

The expression "to the like effect", referred to above, was considered in the case of M. Rumely Co. v. The Registrar of the Saskatoon Land Registration District (1911), 4 Sask. L.R. 466 (S.C.). At page 472, in delivering the judgment of the court, Lamont J. adopted the view of Lord Justice Bowen in an English appeal case and from which Lamont J. quoted as follows:

A divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect.

In the Rumely case at page 473 Lamont J. further said:

The object of the Legislature in providing the forms of The Land Titles Act was twofold: first, to enable those using them to know without difficulty the nature and effect of the instruments they were executing, and secondly, to enable registrars also without difficulty to determine whether or not documents presented to them for registration were in the statutory form.

Lamont J. further states that The Land Titles Act gives a registrar power to decide whether any instrument presented for registration is substantially in conformity with the form and to reject any instrument the registrar may decide to be unfit for registration, but the document must be in substance the same as the form prescribed. It is not the same in substance when the divergence in form gives to one or more of the parties rights or remedies, or imposes upon them duties or obligations, which would not result from the use of the prescribed form.

It is not possible to say what divergence from the wording of a form would be material so as to render the instrument unregistrable. Opinions by writers on the Torrens System may be of value. Kerr (Principles of the Australian Torrens System at page 63) says, in speaking of forms, that for the purpose of facilitating the carrying out of the scheme of the Torrens System, forms of instruments were given in the schedules to the Act, but the Act nowhere said that these forms should be used precisely as given. "Forms of this sort, like forms for use in judicial proceedings, are good servants but bad masters." Kerr also said, "The object of the Act was to facilitate and not to hamper dealings with land." In making these statements, Kerr had in mind the Australian case of Perpetual Executors v. Hosken (1912), 14 C.L.R. 286 (H.C. of Aus.). In this case, the registrar rejected registration of a mortgage on the ground that there was added to it a covenant by persons not parties to the mortgage guaranteeing payment of the mortgage money. The registrar took the view that this addition altered the form. The

Australian court, however, held that the most that could be said was that the condition was irrelevant and that being so could not affect the character of the instrument as a mortgage. (Incidentally many mortgages have been registered in Saskatchewan containing a covenant by a person not a party to the mortgage guaranteeing the payment of the mortgage money. This is discussed in chapter 20 at page 149.)

It may often prove a difficult matter to determine just where the line should be drawn, and it is suggested that if there is any hesitation on the part of the person examining the document, the matter should be referred to the registrar.

The form of transfer and several other forms prescribed by The Land Titles Act contain the words, "being registered owner of an estate in fee simple". Care should be taken to see that these words are in the transfer or other form. Hogg, in Australian Torrens System, says at page 944, any statement amounting to a representation that a person is a registered proprietor is to be treated as a covenant that such person has a good title as a proprietor under the system. If the form is a printed one, a check of the printed words should be made, while a wholly typewritten form or a form written by hand throughout, should be examined carefully.

An estate in fee simple and a leasehold estate are the only estates for which a certificate of title is issued. Theoretically, at least, the Crown has an interest in all land and consequently the registered owner as a matter of law, has only an estate or interest in the land. The greatest estate a person can have in land is an estate in fee simple, which means that while the person is the registered owner, the interest the owner has is in the owner, or if the owner dies intestate, in his or her heirs. The owner of an estate in fee simple may sell or otherwise dispose of the property in the owner's lifetime, or give it or devise it by will, or if a natural person dies intestate, the property goes to the owner's spouse and family or whoever may be entitled under The Intestate Succession Act.

The words "estate" and "interest" are often used interchangeably and taken to mean the same thing, although there is a difference. Under English law, the Crown has an overriding estate. There was another estate in England known as the estate tail which is a lesser estate than an estate in fee simple, but in Saskatchewan, the estate tail was abolished (see section 243 of The Land Titles Act). An interest in land refers to a lesser right than an estate in land.

#### D. Instrument Must Relate to Parties and to Land

In preparing any document for registration, the existing certificate of title must be reviewed. If there is a divergence between the names of the registered owners and the names of the parties executing the instrument, the document may be rejected unless appropriate affidavit evidence is provided indicating an error in the name and providing proof of identity, or requesting that the name be changed to correspond to documentation contained either at the Corporations Branch of the Department of Consumer and Commercial Affairs or at the office of the Director of Vital Statistics in the Department of Health and providing certified copies of such documentation.

The land descriptions must be the same. On this point, a frequent reason for rejection relates to the lack of knowledge that an exception shown on the back of the certificate of title must be shown as an exception to the land description on the front of the title when the instrument is prepared for registration. For example, where a roadway has been taken out of a quarter section, the registrar under the authority contained in subsection 114(1) of The Land Titles Act, will cancel the area required for the improvement from the certificate of title by means of an endorsement only. When the land is subsequently dealt with, the registered owner of the quarter section is no longer the owner of the roadway and, accordingly, the roadway must be shown as an exception in any instrument executed by the registered owner. Exceptions are made to this rule, but generally, an exception on the back of the certificate of title must be shown as an exception to the land description on the front of the title when an instrument is prepared for registration.

#### E. Instrument Must be Complete

Many rejections result solely from the omission to complete a blank present on the form. This is most true in the attestation portion of a document especially in the jurat. The registrar exercises discretion with respect to omissions but it is to the advantage of the system and to the parties for the registrar to reject an instrument which is incomplete. It can be a difficult call for the registrar to make. The clients of the registry must keep in mind, when criticizing the registrar for rejecting an instrument because of an omission, that it is that very strictness which will ensure that an error made by a solicitor or a submitting party is rectified before registration and before full fees have been paid, perhaps in error.

#### F. Instrument Must be Original

The land titles offices are primarily offices of original registration. By insisting on the original, the registrar reduces the possibility of adverse interests created by the hypothecation or other use of the original (see Di Castri, para. 229).

There are exceptions to the rule requiring only the original instrument. Section 62 of The Land Titles Act allows the registrar to accept for registration, in lieu of the original, a document purporting to be a copy of a document of record in any land titles office in the province certified to be a true copy under the hand and seal of the registrar.

Clause 7(c) of The Saskatchewan Evidence Act provides that evidence of any documents issued by the Lieutenant Governor or Lieutenant Governor in Council of this or any other of the provinces or territories of Canada or by the Chief Executive Officer may be given in a variety of ways. Most often, evidence of such an instrument is given by the production of a copy or extract certified to be a true copy by the clerk or assistant clerk or acting clerk of the Executive Council. The same rule is provided in section 5 of The Saskatchewan Evidence Act and in sections 21 and 22 of the Canada Evidence Act, R.S.C. 1985, c.C-5 with respect to federal instruments.

As a general rule, the registrar will accept a copy of a document certified to be true by the custodial government officer, eg. the registrar appointed under The Business Corporations Act or the director under The Vital Statistics Act. Documents certified to be true copies by solicitors or notaries public are not acceptable. An exception is made for letters probate or letters of administration.

## G. Alterations or Erasures

### 1. Initialling Alterations

An instrument submitted for registration which contains an alteration raises the question of whether the alteration has been made after execution. An alteration made to a document before execution does not affect its validity. However, an alteration made after execution, but without the consent of the parties liable under the instrument, may be of no affect and, may render the instrument void. The question of an alteration in a document submitted for registration was referred to a former Master of Titles who gave his decision on September 21, 1914. The case arose in the Yorkton Land Registration District with respect to a certain transfer from one Annie R. Baker to Charles E. Baker. The following is a quotation from the Master's decision: "Dealing first with the transfer, the only reason I can see for the rejection of this transfer is that a material alteration in the transfer, by the elimination of the words 'undivided one-third share or interest in an' has been made without this correction being initialled, unless the hieroglyphic which appears opposite this correction is intended for the initials of the subscribing witness, George D. Kelly, as that certainly would not appear to be the initials of the transferor, Annie R. Baker. I have no opportunity of knowing

how Mr. Kelly signs his initials, and it may be that this hieroglyphic is intended for a combination of the letters 'G.D.K.' but if so, it should be apparent to the registrar as evidence to him that the correction in the transfer was made before the execution of the instrument. I think it preferable in such cases that such material alterations should be initialled by the person executing, or if made by the witness, that there should be a statement in the affidavit of attestation that the correction was made before the execution of the instrument."

When the registrar is presented with an instrument which has been altered, the registrar does not know whether the instrument was altered before or after execution. Thus, there has developed the practice of insisting on the proper initials to appear opposite the correction. If the initials are not identifiable, a full signature may be required. The degree of significance of the alteration will determine who can initial and whatever formality will be required. For alterations of an immaterial nature, the registrar may accept the initials of the witness as proof that the alteration was made before execution. Alterations which appear to be only corrections to minor typographical errors do not have to be questioned.

For an alteration of a more material nature the registrar may ask for the initials of the person executing the instrument to show consent to the alteration. An example of a material alteration would be in the case of a transfer, for instance, including more land than what was originally in the transfer or altering the names of the people or changing the addresses or changing the consideration. Naming these items is not to be taken as being the only matters in connection with which a material alteration may be questioned. In Shillette (Executrix of Stahn Estates) and Stahn v. Plitt et al. and Registrar of Land Titles (1955), 16 W.W.R. 55 (Alta. S.C.), Egbert, J. stated at p. 69: ". . . the mere fact that one part of an instrument is typed and another part written does not demonstrate or even create an inference that there was an alteration." An example of an immaterial alteration would be filling in the date of the document.

An instrument will be rejected if it contains a number of alterations which make it difficult to determine which ones have been authorized or if the alterations will not be clear on a future photocopy or microfilm.

If the alteration appears in the affidavit, Rule 328 of the Queen's Bench Rules of Court requires, for court purposes, that the alteration, interlineation or erasure be authenticated by the initials of the officer signing.

## 2. Use of Correcting Fluid and Correctable Typewriters

Merely by correcting an error over white out or using a correctable typewriter ribbon may not be sufficient to eliminate the need for the alteration to be authenticated. It may also result in the instrument being rejected because the fluid which is used may deteriorate and expose what is written beneath the fluid causing doubt as to the original intention. The same is true with respect to corrections made in the material part of the form with a correctable typewriter of questionable quality.

## H. Use of Initials instead of Given Names

Although a special rule exists with respect to transfers, it is a general rule that initials are not acceptable in instruments instead of given names. The rule is relaxed with respect to affidavits where an affidavit will be accepted if only one given name plus an initial are provided. The reason for the rule is for greater certainty of identity.

## I. Appealing the Decision of the Registrar

When a person is dissatisfied with the decision of the registrar there are four main ways to obtain either a decision of the Master of Titles or the Court of Queen's Bench.

Section 192 of The Land Titles Act provides that any person who is dissatisfied with an act, omission, refusal, decision, direction or order of a registrar may require the registrar to set forth in writing the reasons for the decision and may then apply to the Master of Titles by petition setting forth the grounds of the dissatisfaction. There is no form of petition to the Master of Titles in The Land Titles Act but Stewart, M.T. laid down the rule that a petition should be in connection with specific property and a specific rejection by the registrar. The decision of the Master of Titles is appealable to the Court of Appeal (see subsection 231(1) of The Land Titles Act).

If a decision from the Court of Queen's Bench is desired in the first instance, section 194 provides that the person who is dissatisfied with the decision of the registrar may, after having the registrar set forth the reasons for the registrar's decision, serve notice on the Master of Titles that he or she intends to apply to a judge of the Court of Queen's Bench at Regina by petition setting forth the grounds of the dissatisfaction. After the expiry of 20 days from the date of service on the Master of Titles and, if the Master of Titles has not removed the grounds for dissatisfaction, application may be made to the Court of Queen's Bench.

Whether or not mandamus will lie instead of using the mechanisms in sections 192 and 194 will depend upon whether or not the court considers sections 192 and 194 as providing an alternative remedy as opposed to an alternative procedure. If the court determines that sections 192 and 194 provide an alternative remedy, mandamus will not lie. In obiter, in the decision of Coe v. Jones (1970), 73 W.W.R. 311 (Sask. Q.B.), Disbery J. decided that section 194 provided an alternative remedy excluding mandamus. In the particular application before him he chose to convert the application for a mandamus into a petition under section 194. This is to be contrasted with the case of Canadian Pacific Railway Company v. District Registrar of Dauphin Land Titles Office (1956), 18 W.W.R. 241 (Man. Q.B.) which held that The Land Titles Act of Manitoba provided an alternative procedure not an alternative remedy, and accordingly mandamus was available.

The fourth method of appealing the decision of the registrar is to the Master of Titles on an informal basis. This is the most common method. In certain cases, the Master of Titles may refer questions to a judge for a decision (see section 195 of The Land Titles Act). This power is only used in exceptional cases where the decision would have precedent value for the system.

## Chapter 18. Execution and Attestation

### A. Meaning

Every instrument registered in a land titles office must be executed by the signature or mark of the appropriate individual. According to Wharton's Law Lexicon, 10th ed. (1902), page 239 execution in this context consists of three things: signing, sealing and delivery. As a result of the Societe Belge d'Enterprises Industrielle et Immeublieres v. Webster, [1927] 3 W.W.R. 817 (Alta. S.C.A.D.), section 257 of The Land Titles Act was necessary to ensure that every transfer, mortgage or lease may be duly made by an instrument not under seal.

Most instruments are also required to be attested, which means a natural person must witness the signature and subscribe the instrument as a witness, and complete an affidavit proclaiming certain facts, to prove the execution. Exceptions to this rule appear in section 63 of The Land Titles Act, including corporate execution under seal.

Special rules pertain both to execution and attestation.

### B. Execution

#### 1. Affidavits of Identity

There are a number of exceptions to the rule that whoever owns the real property interest, as reflected in the records of the land titles office, must execute the instrument dealing with the interest. Some of the exceptions to this rule are:

1. if a power of attorney has been filed in the general record;
2. if a corporate name change or amalgamation is filed;
3. when satisfactory proof of change of name is provided;
4. where there is an affidavit of identity linking the name and signature of the person signing to the particular record of the land titles office which is being changed.

Each of these special cases is dealt with under separate headings in this manual except for the practice with respect to affidavits of identity, which is discussed here and also at page 101.

It is the registrar's responsibility to ensure that the correct party deals with the real property interest. Sometimes, where there is a discrepancy between names the registrar will ask for proof that the correct party is involved. One form of proof is by means of an affidavit of identity usually executed by the person executing the instrument submitted for registration. There is no form prescribed for the affidavit of identity. It must contain a statement that the executing party and the party named in the land titles record, proposed to be changed or affected, are one and the same.

## 2. Name and Signature Different

It sometimes happens that an instrument is drawn showing the name of the person dealing with the interest exactly as in the certificate of title but the actual signature is different from the name as set out at the beginning of the document. In considering whether to reject the instrument, the registrar is guided by these considerations:

1. if the signature is illegible but might conceivably be that of the required party, the document should normally be accepted, in reliance upon the witness' statement in clause 1 of the affidavit of execution as long as the affidavit refers to the name of the person signing and is otherwise properly completed;
2. if the signature is legible and is evidently that of someone other than the named party, the instrument should, of course, be rejected;
3. if the signature is legible but the spelling of the name shows some variation from the named party, the registrar should consider whether or not this throws doubt on the identity of the named party:
  - (a) if it does throw doubt, the registrar should ask for such affidavit evidence (with, if necessary, an application to amend the certificate of title) as is necessary, eg. an affidavit certifying that the signature as appears on the document is the true signature of the person who owns the interest affected;
  - (b) if it does not throw any doubt on the identity of the party (eg. it arises from a slip of the pen) the document should be accepted, if otherwise in order, but when searching the general record for writs of execution the variations in spelling created by the discrepancy must be considered.

### 3. Signing as Mrs. Alf Weightman

From time to time, a woman will execute an instrument by signing her husband's given and surnames with the insertion of the word "Mrs." at the beginning.

In re The Land Titles Act (Weightman's Case), [1919] 1 W.W.R. 44 (Sask. M.T.), a paragraph in the headnote reads as follows: "A transfer wherein the transferee is described by her husband's name with the addition of the word "Mrs." is defective and should not be accepted by the registrar. Milligan, M.T. in this case held that "the practice of centuries has determined, that for precision a married woman's name is not Mrs. Alf Weightman but her own Christian name with surname of her husband coupled, if necessary, for more perfect identity, with her description as the wife of Alfred Weightman." The Master of Titles explained that to accept a transfer to Mrs. Alf Weightman makes it impossible to determine later on the sufficiency of any dealing with this land by the proposed transferee, and quotes Thom in his Canadian Torrens System (1st Edition) at pages 110 and 111, to the effect that the registrar is not only dealing with the present instrument before him, but may look ahead and take into consideration that he is creating interests which must subsequently be dealt with.

Milligan, M.T.'s decision may be too harsh with respect to the signature of a married woman transferring or mortgaging an interest in land. A woman does not acquire her husband's first name on marriage, but the registrar may be able to rely on the affidavit of attestation if it refers to the name of the woman signing.

This issue will also arise in the context of a spouse's signature on a declaration under The Homesteads Act and may be resolved in the same way if proof exists elsewhere as to the identity of the person signing.

### 4. Signing Where Interest held in two or more Capacities

Where a person holds land in two different capacities, eg. in a personal capacity and also as an executor, it is preferable for the person to sign twice. However, the registrar may accept the instrument if the instrument or affidavit of witness or other proof of identity make it clear that there is only one person involved.

## C. Proof of Execution: Attestation

### 1. When Required

Section 63 of The Land Titles Act provides that every instrument executed within Saskatchewan shall be witnessed by one person who shall sign as a witness and who shall appear before certain named persons, and make an affidavit in Form G.

The legislated exceptions to this rule are:

- (a) instruments under the seal of a corporation;
- (b) caveats;
- (c) builders' liens;
- (d) orders of court or judge, the Master of Titles or registrar;
- (e) documents issued by officials of the Crown under statutory authority;
- (f) executions or certificates of judicial proceedings attested as such;
- (g) applications to bring land under the operation of the Act;
- (h) applications for transmission;
- (i) applications for tax title;
- (j) requests to send notice to execution creditors;
- (k) certificates issued pursuant to The Mentally Disordered Persons Act;
- (l) certificates under section 19 of The Creditor's Relief Act;
- (m) assignments or receiving orders under the Bankruptcy Act (Canada).

Section 64 provides that every instrument executed outside Saskatchewan must also be witnessed as above except for the following instruments:

- (a) grants from the Crown;
- (b) Orders-in-Council;

- (c) instruments under the seal of a corporation;
- (d) caveats;
- (e) builders' liens;
- (f) applications to bring land under the operation of the Act;
- (g) applications for transmission;
- (h) applications for tax title;
- (i) requests to send notice of execution creditors;
- (j) assignments or receiving orders under the Bankruptcy Act (Canada).

Section 66 provides that if the proof of execution of any instrument is defective, a judge, may, upon being satisfied of the due execution of the instrument, direct the registration of the instrument.

## 2. Attestation: Individual Executing Instrument

### (a) Witness must not be Party to Instrument

A witness cannot be any person who is a party to the instrument. In Hogg's Australian Torrens System, page 915 it is stated, "It is important to remember the rule of law by which a party to an instrument which requires attestation cannot attest it." Hogg refers to In re Parrot, [1891] 2 Q.B. 151 as authority for this statement, also Seal v. Claridge (1881), 7 Q.B.D. 516 (C.A.). In a footnote to paragraph 1331, Halsbury's Laws of England, Vol. 12, 9th Ed., the subject of attestation, states "The witness must be some person who is not a party to the deed."

Recent case law confirms this point of view. In Hebb v. Registrar of Titles, [1983] 3 W.W.R. 48 (N.W.T.S.C.) the Supreme Court judge found at page 56:

...the word "person" in section 141 (our section 63) must generally imply someone other than a party to the transaction to which the instrument relates, or named as a party in the instrument, or having any immediate estate, interest, right or benefit (proprietary or otherwise) under the instrument. There may be exceptions to this rule, but these remain to be established. Attorneys attesting the execution of the instrument under which they are empowered as such are not among those to be excepted. (The reference to attorney is to an attorney acting under a power of attorney.)

This rule has been applied to reject a partial discharge of a caveat witnessed by one of two caveators.

An exception has been made to the general rule with respect to signing officers of companies. The signing officer of a company cannot be considered a party to the instrument. In the case of The Bank of Victoria v. McMichael (1882), 8 V.L.R. (L.) 11 (S.C. of Vic.) a mortgage was attested by the local bank manager which advanced the mortgage loan. The court held that the manager was not the mortgagee.

A spouse can be a subscribing witness if he or she is not also a party to the instrument. The fact of marriage does not make one "interested" in the transaction within the meaning of the prohibition.

(b) One Witness: Two Parties

One witness to two signatures need not sign opposite both signatures which are being attested. The affidavit of attestation will remedy any incompleteness on the instrument by stating that the witness is a witness to both signatures.

Both signing dates do not need to be shown in the execution clause. The affidavit of attestation will state that the witness saw the two parties sign and that is the main consideration. The document in this type of case is complete on its face. Furthermore, there is no requirement that the affidavit of attestation show the date that the signature of the transferor was made: see Form G. [Note that prior to the repeal of subsection 215(2) of The Land Titles Act, the affidavit of attestation was required to state the date of execution, but this is no longer required.]

However, if an old affidavit form is used which allows the registrar to know that the two transferors signed on two different days, there will be a contradiction between the transfer, which states in the execution clause only one signing date, and the affidavit which will state that it was executed on two different days. The transfer should be returned for clarification.

(c) Omissions in the Affidavit of Attestation

The witness to an instrument must complete an affidavit of witness in Form G called "affidavit of attestation of an instrument". The name, address and occupation of the witness should be inserted. The signature of a witness may be the usual signature of the witness, that is, the witness may sign by using the initials of the given names, if that

is the customary method of signing, but at the beginning of the affidavit, at least one full given name should be inserted to ensure future identification.

There must be compliance with the form. The affidavit of attestation is an important document for the land titles system. It is one of the means by which the system prevents fraud by having a disinterested person take the affidavit of the witness who can attest to the due execution of the instrument and the identity of the person signing. On this basis, few omissions in the affidavit or the jurat are allowed. Unlike the affidavit of verification which accompanies a caveat or a builders' lien, which are mere claims of interests, the affidavit of attestation accompanies instruments which will result in the raising of a certificate of title or other registration of an instrument.

Three possible omissions to the affidavit of attestation about which there have been questions are:

- (1) "personally known to me";
- (2) "for the purposes named therein";
- (3) "sworn before me".

Some provinces allow a person to be a subscribing witness even though the witness does not know the individual signing. In Saskatchewan, the form still requires personal knowledge. If the witness is prepared to act without this personal knowledge, a good practice to follow is to ask to see the identification and record the identification number for future reference. The witness must satisfy himself by whatever means necessary as to the identity of the person signing.

With respect to the phrase "for the purposes named therein", years ago there must have been some difficulty in connection with this phrase inasmuch as at a conference of registrars held on May 9 and 10, 1928, it was set out in the minutes that no departure should be allowed from the affidavit of attestation as shown in The Land Titles Act and that the phrase "for the purposes named therein" must always be included in the affidavit.

The jurat of the affidavit begins with the words "sworn before me" and particular attention must be given to the words "before me". The commissioner for oaths or whoever officiates at the swearing of the affidavit has to say that it was sworn before him or her. The case of The Queen v. The Inhabitants of Bloxham (1844), 6 Q.B. 528, was a case

where the words "before me" were omitted from the jurat and the affidavit was held to be defective. This case is referred to in R. v. Phillips (1908-9), 9 W.L.R. 634 at 639 (B.C. Co. Ct.). In Archibald v. Hubley (1890), 18 S.C.R. 116 the words "before me" were omitted from the jurat of an affidavit accompanying a bill of sale. It was held that this was an invalidating defect. It is submitted this would apply to affidavits under The Land Titles Act. See also R. v. Chow, [1978] 3 W.W.R. 767 (Sask. C.A.) as to the propriety of taking an affidavit of attestation out of the presence of the witness. These words are linked to the phrase "personally present" in the body of the affidavit.

There is also a statement that the party signing is eighteen years of age or more. A phrase which allows the reader to conclude the person is eighteen or older is acceptable, eg. use of old forms which use the age of twenty-one. When the affidavit is used to attest to the signatures of two or more parties, we do not reject if the affidavit states "both are eighteen years of age or more" even though the more appropriate phrase would be "each is".

Sometimes the jurat will state that the instrument was executed at "the home of an individual". The place where the affidavit has been sworn must be shown. Rule 321 of the Queen's Bench Rules of Court states that "every person administering oaths shall express the time when, and the place where he shall take any affidavit, otherwise the same shall not be held authentic nor be admitted to be filed without the leave of the court". Although this is referring to affidavits prepared for court purposes, the same would be true with respect to affidavits filed in the land titles offices. The home of an individual cannot be considered a "place" as this word is legally used. It must be either a hamlet, village, town or city or near to such place or a description by quarter section.

(d) Signing by Mark

If the party signing an instrument is illiterate and has to sign by mark, then the witness to the signature, in the proper place and opposite the signature of the party signing by mark, should, over his or her signature, make a statement somewhat as follows: "Signed by the said . . . , I having first truly and audibly read over to him (or her) the contents of the above (transfer or mortgage, or as the case may be) (or if read by a third party, the contents of the above transfer, mortgage, or as the case may be having been truly and audibly read over to the person) when he (or she) appeared perfectly to understand the same and made his (or her) mark thereto in my presence."

|                             |   |              |
|-----------------------------|---|--------------|
| (signature of witness above | ) | his (or her) |
| mentioned)                  | ) | A. X B.      |
|                             | ) | mark         |

See O'Brien's Conveyancer (3rd Edition) at 780, also Hogg's Registration of Title to Land Throughout the Empire, page 229.

Words to the same effect as appear over the signature of the witness to the person signing by mark can be added to the affidavit of execution. The indication that the document was read to the person signing by a mark is usually included in the jurat but it is acceptable to include it in the affidavit of the witness. The instrument is acceptable if these words appear opposite the signature or in the affidavit.

This same issue may arise with respect to the spouse signing the relinquishment clause for the purposes of The Homesteads Act by a mark. A similar statement as mentioned above must be made by modifying the certificate of the examining person or by a separate affidavit or by an explanation opposite the spouse's signature.

The responsibility of the witness, in this and all cases of attestation, is an important one. In Parker v. McAra Bros. et al. (1930), 6 Sask. L.R. 30 (S.C.), some duplicate titles were stolen and the name of the owner forged to a mortgage. The forger/mortgagor signed by mark. The witness took the usual affidavit which stated that the mortgage was signed after the contents had been read over and explained to the mortgagor. At page 34 Mr. Justice Brown said, respecting the affidavit of the witness, Mr. Wallace, "He, (Wallace) by witnessing the documents and more especially by making the affidavit of execution of the mortgage and by forwarding the documents to the solicitors, undertook and warranted to the plaintiff that the person executing the documents was John Bogoyer, the owner of the land in question."

(e) Affirmation

If a witness has conscientious scruples about taking an oath, the person may affirm, in which case the jurat in the affidavit will be changed to read "affirmed before me" instead of "sworn before me". Clause 21(1) 18 of The Interpretation Act states that in an Act or regulation the words "oath" or "affidavit" in the case of persons for the time being allowed or required by law to affirm or declare instead of swearing includes affirmation and declaration and "swear" in the like case includes "affirm" and "declare".

(f) Who can take an Affidavit in Saskatchewan?

Subsection 63(1) provides that the witness, in Saskatchewan, in making the Form G affidavit, must appear before the Master of Titles, the registrar or a deputy registrar where the land is situated, or before a judge, notary public, commissioner for oaths or justice of the peace in and for Saskatchewan.

Commissioners for oaths are appointed by the government under the provisions of The Commissioners for Oaths Act. Commissioners are appointed to administer oaths and take and receive affidavits, declarations and affirmations within Saskatchewan. Each person so appointed is required to write or stamp below his or her signature the words "A Commissioner for Oaths in and for Saskatchewan", and write or stamp the date on which the commissioner's appointment expires. Every Saskatchewan solicitor holding a subsisting annual certificate to practice law is a commissioner for oaths and underneath his or her signature the solicitor will write the words "A Commissioner for Oaths in and for Saskatchewan being a Solicitor."

There are Acts which make certain government officials commissioners for oaths or justices of the peace. An affidavit sworn before such an official should not be accepted in a land titles office, as the jurisdiction of such an official is with respect to the functions of the official under the particular statute. It was held by Bigelow, J. in R. v. Webb, [1943] 2 W.W.R. 239 (Sask. K.B.) that an Indian agent appointed under the Indian Act R.S.C. 1985, c.I-6 only had jurisdiction as a justice of the peace ex officio if he were dealing with an Indian. By analogy, it is submitted that the authority of an official who is an ex officio commissioner for oaths or justice of the peace, will not extend to the taking of an affidavit under The Land Titles Act.

In completing the jurat, certain fundamental rules apply. The registrar must be able to determine the name, and status of the person who took the affidavit. An indecipherable signature is only acceptable if the registrar is satisfied who the person is and makes note of the person's name. The registrar will hesitate to reject when a signature is indecipherable, but it is not uncommon for the registrar to ask for an affidavit stating that the signature shown is the signature of a named person. In Vinski et al. v. Lack et al. (1988), 61 O.R. (2d) 379 (S.C.M.C.) an application was dismissed because the affidavit in support of the motion was sworn before a person whose signature was indecipherable and there was no other evidence as to the identity of the commissioner.

A notary public is not required to affix the seal for affidavits taken in Saskatchewan.

The registrar does not need to check or require proof that a person signing is a commissioner within or without Saskatchewan, or a solicitor or holder of any other position where the occupant is authorized to take an affidavit, as long as the person's name is given or known, as things being done by public officials are presumed to have been rightly and properly performed.

(g) Affidavits Taken Outside Saskatchewan

Sections 64 and 65 of The Land Titles Act list those persons competent to take affidavits outside Saskatchewan for use in Saskatchewan. Most questions arise in connection with the list which appears in clause 64(1)(a) which establishes who can take affidavits if made in any province in Canada:

- (1) a judge of a court of record;
- (2) a commissioner authorized to take affidavits in such province for use in any court of record in Saskatchewan;
- (3) a notary public under his official seal.

If an affidavit purports to be sworn outside Saskatchewan before a judge of a court of record, the registrar does not ask for proof that the court is a court of record. It is assumed that all courts in Canada are courts of record.

A commissioner authorized to take affidavits in another province for use in a court of record in Saskatchewan is governed by clause 51(1)(a) of The Saskatchewan Evidence Act, which accepts for court purposes affidavits made outside the province before "a commissioner for oaths without Saskatchewan appointed as such under The Commissioners for Oaths Act." Persons residing outside of Saskatchewan may be appointed commissioners by the government to take affidavits, declarations and affirmations outside Saskatchewan for use in Saskatchewan. For instance, a person residing in any other province or in Great Britain (or in any other country) may be appointed, by Saskatchewan, a commissioner to administer affidavits, declarations and affirmations for use in Saskatchewan, but below his or her signature he or she will write or stamp the words "a commissioner for oaths without Saskatchewan."

Affidavits may also be made outside Saskatchewan before "a notary public under his official seal". One question is whether this allows a notary public appointed in Saskatchewan to take affidavits outside of Saskatchewan or whether, in the context of section 64 of The Land Titles Act, it is intended to refer to a notary public acting within the territorial limits of the appointment as a notary public.

Section 3 of The Notaries Public Act provides as follows:

3. Every notary public shall during pleasure have, use and exercise the power of drawing, passing, keeping and issuing all deeds and contracts, charter-parties and other mercantile documents in Saskatchewan, and also of attesting all commercial instruments that may be brought before him for public protestation and otherwise acting as usual in the office of notary, and may demand, receive and have all the rights, profits and emoluments rightfully appertaining and belonging to the calling of notary public.

Neither clause 64(1)(a) of The Land Titles Act or clause 51(1)(p) of The Saskatchewan Evidence Act make reference to territorial limits. However, at common law, a notary public can only act as a notary in a jurisdiction which itself has granted the authority or power. This common law limitation is taken as having been imported into Saskatchewan by the phrase "as usual in the office of notary". Di Castri in Registration of Title to Land, at paragraph 295 takes a similar view. The authority given for his position is the British Columbia Evidence Act, which limits the territorial powers of a notary, and an Ontario land titles practice directive, which provides that if an appointment is limited territorially, the jurat must so state.

A province can only legislate extraterritorially, if it will not fundamentally affect contract or other rights.

Instruments sworn before a notary public outside of Saskatchewan including homestead certificates will always need a seal because section 64 of The Land Titles Act requires the official seal of the notary to be affixed. Section 3 of The Homesteads Act is linked to section 64 of The Land Titles Act for instruments executed outside of the province.

Notaries as public officers, have existed from a remote period of antiquity and by a comity or understanding among the nations of the world the signatures of notaries, when their official seals are attached, are as stated above, recognized everywhere. (See Brooke on Notary, page 1 and following pages; also see Volume 16 Am. & Eng. Encyc. of Law, page 753 and following pages.)

The seal of the notary public must have the appearance of a seal. It must be enclosed and state the name of the notary and the province or state of appointment. It need not be embossed. It may be a stamp, but the stamp often used by a notary public indicating the expiry date of the appointment, is not, according to practice, considered to be an official seal.

Affidavits taken by a commissioner for oaths appointed outside Saskatchewan by a foreign jurisdiction are not acceptable in Saskatchewan except in the case of a commissioner for oaths appointed as such in Great Britain by the British Government (see clause 64(1)(d) of The Land Titles Act and clause 51(1)(b) of The Saskatchewan Evidence Act).

The registrar does not reject an affidavit executed outside of Saskatchewan for the reason only that the expiry date of the person taking the affidavit is not shown. Expiry dates for notary public appointments on affidavits do not go to the validity of an affidavit. Since the need for an expiry date in Saskatchewan is known, the registrar will reject an affidavit executed in Saskatchewan that did not meet the requirement. In most cases for affidavits executed outside of Saskatchewan the registrar assumes a missing expiry date is an indication the appointment of the person taking the affidavit does not expire.

(h) Saskatchewan Barrister and Solicitor Witnessing Execution

The Land Titles Amendment Act, S.S. 1988, c. 28, which came into force June 21, 1988, increases the authority of Saskatchewan lawyers. If a lawyer chooses to act as a witness, the lawyer's signature is deemed to be proof of execution as if the lawyer had completed an affidavit of attestation. The lawyer's signature is proof of all matters which would be required in such an affidavit. Subsection 63.2 provides:

63.2(1) Notwithstanding section 63, where the signature of a person executing an instrument within Saskatchewan is witnessed by a barrister and solicitor who holds a valid and subsisting annual certificate

issued pursuant to The Legal Profession Act, the execution of the instrument is proved by the signature of the barrister and solicitor as witness made in accordance with this section and no further or other formality shall be required as a condition of the acceptance of that instrument for registration or filing.

Subsection 63.2(2) requires the instrument to provide clearly the following information: the name of the lawyer, the status of the lawyer as a barrister and solicitor of Saskatchewan and the address of the lawyer under the lawyer's signature. The act of the lawyer in authenticating the signature of the person signing, in the way provided by section 63.2, is deemed to be an attestation that the person executing the instrument:

- (1) is personally known to the barrister and solicitor;
- (2) is the person named in the instrument and whose name is subscribed to it;
- (3) was personally in the presence of the barrister and solicitor when the person duly signed and executed the instrument;
- (4) is 18 years of age or more; and
- (5) in the case of a corporation, has the authority to sign the instrument on behalf of the corporation.

If the lawyer chooses to authenticate the document in this way, for a corporation or an individual, no further affidavit or attestation by seal is necessary. A lawyer need not authenticate an instrument in this way (see subsection 63.2(4)).

### 3. Corporate Attestation

Instruments under the seal of a corporation do not have to be witnessed (see section 63 of The Land Titles Act).

Many corporate seals are not legible. The registrar must be satisfied that the seal of the company has been affixed in which case at least part of it must be readable to allow that determination to be made.

Failure to show the position of a person signing under seal on behalf of a body corporate is no longer considered to be a valid reason for rejection of an instrument. It is not the designation of the position that shows the person has the authority. Although certain executive positions in a company are more likely to have signing authority than others, what determines who has such authority is the resolution of a company designating signing officers. To reject instruments that do not show the position of the person signing under seal without a policy of having the signing resolution of the company accompany the instrument appears meaningless. The registrar does not police signing authorities on behalf of companies executing under seal unless signing authority is brought into issue by statute, eg. the Veteran Lands Act (Canada). Section 18 of The Business Corporations Act, R.S.S. 1978, c.B-10 makes it clear that unless the person dealing with the agent for the company knew or ought to have known to the contrary, the company cannot deny the authority of a person held out by the company to have the authority to enter into contracts. Finally, the assurance fund is not liable (see clause 207(d) of The Land Titles Act).

The Business Corporations Act was proclaimed in force on October 1, 1977. Section 23 of this Act provides that "an instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation is not invalid merely because a corporate seal is not affixed thereto". The same provision appears in The Non-profit Corporations Act, S.S. 1979, c.N-4.1, section 23, The Co-operatives Act, S.S. 1983, c.C-37.1, subsection 20(2) and in The Credit Union Act, 1985, S.S. 1984-85-86, c. 45.1, section 17.

Prior to the passage of these Acts, a company could only execute a document under its corporate seal. This rule would be stipulated in its bylaws or articles of incorporation. Furthermore, the articles of association would provide that only certain persons could affix the seal. In order to overcome these corporate disabilities, the registrar insisted on the use of the seal and clause 207(d) of The Land Titles Act made it clear that the assurance fund was not liable when a seal is improperly used. Clause 207(d) appears to extend to any disability existing in a corporation with respect to the want of capacity to execute a document.

Since the passage of the above mentioned Acts, no corporation can bind or limit itself by providing that a document not executed under seal is invalid. Thus, the land titles office no longer insists on the affixation of a corporate seal on an instrument executed by corporations created under these statutes. As to whether the assurance fund should further be protected remains a moot point.

The fact that certain corporations need no longer affix a seal does not preclude a corporation from doing so. In the absence of the seal, section 63 continues to apply so as to require a

witness and an affidavit of attestation. To ensure that the registrar has the appropriate signing officer, there must appear in the affidavit of attestation, the position of the person signing and that the person signing has the authority to execute the instrument. The position of the person signing need not appear in the execution clause but it must appear in the affidavit.

Although section 23 of The Business Corporations Act gives an agent power to execute instruments on behalf of a corporation, there is no interpretation of the word "agent". While there are some Acts which allow an agent to execute an instrument, eg. The Builders' Lien Act, the usual rule is that an agent cannot execute an instrument for registration in a land titles office unless the execution is pursuant to a power of attorney filed in the land titles office.

The above rules with respect to using an affidavit of attestation do not apply to bodies corporate incorporated under an Act of the legislature. For example, sections 59 and 60 of The Water Corporation Act, S.S. 1983-84, c.W-4.1 require the "corporation" to submit certain notices to a land titles office. The only way a corporation created under its own legislation may act is through its seal, unless the legislation specifically provides otherwise. Accordingly, section 63 of The Land Titles Act applies to such corporations and there must be proof of attestation.

#### 4. Execution and Attestation for the Provincial Government

Land which is under the administration and control of Her Majesty the Queen (Saskatchewan) is transferred or otherwise dealt with by the execution of an instrument by the deputy minister on behalf of the minister in charge of the department. The authority of the deputy minister to execute instruments is extrapolated from subsection 16(3) of The Interpretation Act.

Many statutes creating government departments prescribe special rules as to who can execute instruments. For example, subsection 62(2) of The Highways and Transportation Act, S.S. 1983-84, c.5 provides that land may be sold, leased or otherwise disposed of under the hand of the minister or deputy minister or by an officer of the department authorized to do so by the minister.

Subsection 63(1) of The Land Titles Act provides that "every instrument executed within Saskatchewan, except . . . documents issued by an official of the Crown under statutory authority shall be witnessed by one person who shall . . . make an affidavit (Form G)". The issue is whether an instrument executed by a government department (deputy minister, minister or other signing officer) is a document issued by an official of the Crown under statutory authority.

Until The Land Titles Amendment Act, S.S. 1988, c.28, which was in force June 21, 1988, it was the position of the Master of Titles that subsection 63(1) required instruments executed by government officials to be attested. The word "documents" was given a different meaning than that given to "instrument". For many years, many government departments obtained seals to avoid the necessity of proving execution with an affidavit.

Section 63.1 enacted by The Land Titles Amendment Act, S.S. 1988, c.28 provides that an instrument executed by a minister, deputy minister or other signing officer authorized by law of a department or agency need not be witnessed or sealed. This means that if the signature is one that is authorized, eg. deputy minister of a government department or chairman of the applicable board, no further proof of attestation is necessary. The Government Organization Act, S.S. 1986-87, c.G-5.1 gives the Lieutenant Governor in Council the authority to transfer the authority, in whole or in part, absolutely or limited for any period, any power, duty or authority for particular Acts of the legislature. O.C. 599/88 published in the Saskatchewan Gazette July 29, 1988 assigns joint responsibility to the Ministers of Agriculture and Rural Development for certain Acts, including The Provincial Lands Act. The powers in The Government Organization Act make it important for the responsibility for the execution of instruments to rest with the particular government department or agency.

It should be noted that subsection 63(2) of The Land Titles Act makes special provisions for the Provincial Mediation Board. All documents purporting to be issued by the Provincial Mediation Board or by any member of that Board are required to be witnessed by one person who shall sign his name as a witness, but no further or other formality is required as a condition of the acceptance of such documents for registration or filing.

## 5. Execution and Attestation by a Municipal Corporation

### (a) Urban Municipalities

#### (i) Generally

A municipal corporation, as a creature of statute, is governed by the statute which authorizes its existence. A municipal corporation is also a body corporate. Cities, towns and villages are governed by The Urban Municipalities Act, S.S. 1983-84, c.U-11, s.77, proclaimed in force November 1, 1984. Section

76 of that Act provides that each urban municipality is required to have a seal to be kept in the custody of the clerk and affixed as required by law or by order of the council. Section 77 provides that "unless a council otherwise directs, the mayor or the clerk, or a designated alternate of the mayor or clerk shall sign every order, agreement or document executed on behalf of the urban municipality."

Section 77 means that only one signature is required and it may be the signature of the mayor or clerk. If it is not the mayor or clerk, further proof of the proper signing officer by the mayor or clerk or by council will be required.

As a corporation, a municipal corporation must execute under seal. Section 76 authorizes the creation and use of a seal. See also section 327 of The Urban Municipalities Act which authenticates documents certified by the clerk under seal.

(ii) The Tax Enforcement Act

Sections 10 and 19 of The Tax Enforcement Act require the signature of the treasurer on a tax lien or the withdrawal of the tax lien.

(iii) The Municipal Expropriation Act

Section 16 of The Municipal Expropriation Act provides that a plan of survey mentioned in that Act is required to be signed by the mayor, overseer, or reeve and the clerk or secretary-treasurer and sealed with the seal of the municipality. Thus, two signatures are required on this instrument. This Act applies to both urban and rural municipalities.

(b) Rural Municipalities

Hamlets and rural municipalities are governed by The Rural Municipalities Act.

There is no section in The Rural Municipalities Act which speaks to the question of signatures. Section 48 of The Rural Municipalities Act provides that every council may make rules and regulations not contrary to law for governing its proceedings and generally for the transaction of its business. It may be assumed that a rural municipality will make rules determining who can sign.

On the question of a seal, subsection 12(2) of The Rural Municipalities Act contemplates that a municipality will have a seal. Section 63 of The Land Titles Act will also require the corporation to have a seal. The only way in which a non-business corporation can act is through its seal, unless the legislation which creates the corporation provides otherwise. Accordingly, a rural municipality must execute instruments under seal.

Since there is no legislative requirement that a rural municipality have two signatures, the registrar will not insist on more than one signature except where an Act, like The Municipal Expropriation Act supra, specifically requires two signatures. However, the registrar will require the signature of an official of the corporation.

#### 6. Execution and Attestation by a Credit Union

Effective January 1, 1986, The Credit Union Act, 1985, S.S. 1984-85-86, c-45.1 was passed. Under this legislation there is no mandatory requirement for a seal or for the affixation of the seal by two officers. Instead, section 17 of The Credit Union Act provides that the board may by resolution adopt a seal for the credit union which seal shall contain the full name of the credit union in legible characters but that no contract entered into by the credit union is invalid by reason only that the credit union seal is not affixed to it. This means that credit unions are now like business corporations and non-profit corporations, in that a credit union need not have a seal. The requirements for proof of execution will be the same as for business corporations and non-profit corporations. In order to avoid execution of an additional document, eg. the affidavit of attestation, most credit unions will still use a seal.

## Chapter 19. Transfer

### A. Definition

Clause 2(1)(u) of The Land Titles Act defines transfer to mean the instrument by which one person conveys to another an estate or interest in land and includes a grant from the Crown. A transfer, however, is not an "instrument transferring land" until it is registered (see Trusts and Guarantee Company Limited v. Monk et al., [1925] 1 W.W.R. 5 (Alta. S.C.A.D.)). It has already been stated that it is registration that makes the document operative.

This chapter covers transfers of the fee simple estate where a certificate of title has been granted. For transfers of mortgages, see page 162, and of leases see pages 175 and 177.

### B. Form of Transfer

#### 1. Form J

Section 89 of The Land Titles Act provides that when the fee simple estate is transferred "the owner shall execute a transfer (Form J)". Form J is a simple form and, as the cornerstone of indefeasible ownership, it is unlikely deviations or additions will be accepted.

Sometimes a variation like "I do hereby pursuant to my duty as such executrix transfer ...", appears in the transfer. The reference to duty is superfluous. It does not change the legal status of the transfer or resulting title, but such variations should be avoided because of the confusion that can creep into the practice.

A transfer which is in loose pages and numbered, eg. sheet 1 of 2 and sheet 2 of 2, should be numbered throughout. Unless the registrar is otherwise satisfied that all pages are present the registrar may reject a transfer in loose pages and not numbered throughout. The goal of completeness is to eliminate negligence or fraud which may cause loss.

#### 2. Transfer cannot be Conditional

A transfer which states it is not to take effect until the death of the transferor is not registrable. In the case of In re Pfrimmer, [1936] 1 W.W.R. 609 at 614 (Man. C.A.), Truemann, J. A. of the Manitoba Court of Appeal states: "It is the rule that the instrument even though in the form of a deed which is not to become operative until the maker's death is testamentary in its character, and its operation depends upon its execution complying with the Manitoba Wills Act." This principle was affirmed in Dong Sing v. Bryant (Administrator of Sealey Estate), [1946] 3 W.W.R. 106 (B.C.S.C.). See also Foundling Hospital v. Crane, [1911] 2 K.B. 367 (C.A.).

3. Transfer cannot be for Security

In a transfer submitted to one of the land titles offices for registration there was written the following words "This transfer is merely given as security". In the opinion of Milligan, M.T. (July 4, 1913) this clause would have the legal effect of turning the transfer into a mortgage and make it unfit for registration. There is no provision in the Act for registering a mortgage except in the form provided.

4. Quitclaim Deed cannot be Registered as a Transfer

Inasmuch as a mortgage under The Land Titles Act is a charge only and does not constitute a transfer to the mortgagee, if the mortgagor wishes to transfer all of the mortgagor's estate or interest in the land, it must be done by way of transfer and not by quitclaim deed.

5. Warranty Deed cannot be Registered as a Transfer

In Re Ancey's Case, [1922] 3 W.W.R. 506 (Sask. M.T.), Milligan, M.T. was dealing with what is known in the United States as a warranty deed. These deeds are widely used in the United States and one of them was submitted for registration in Saskatchewan. The Master of Titles decided that a warranty deed in the form which he quotes at page 506 should be refused registration as it was not in the Saskatchewan statutory form of transfer.

6. Acceptable Encumbrances not to be Included in Transfer

A transfer which makes the transfer subject to encumbrances, caveats or other endorsements may be misleading and should be rejected. Subsection 90(1) of The Land Titles Act states that no words of limitation are necessary in a transfer of land in order to transfer all or any title therein and insofar as exceptions for certain instruments endorsed on the title are made, these could be considered limitations to the effect of the transfer. Conditional registration, i.e. the accompanying letter states that the transfer should only register subject to certain encumbrances, is allowed.

7. Duplicate Transfers

In 1926 at a Registrars' Conference it was decided a transfer should not be marked in duplicate. Milligan, M.T. stated "when a transfer is received in duplicate, the duplicate copy should be destroyed or pinned to the original transfer and kept on file". The reason for this strictness was to prevent confusion. Now with photocopiers duplicate originals are easily made such that Milligan's strictness only prevents the registrar from marking the transfer as a duplicate, but it is returned to the submitting party. This also applies to duplicate applications for transmission. There is no commercial necessity for the duplicate copy to be marked.

## C. The Transferor

### 1. Concurrence with the Title

Concurrence between the name of the registered owner on the title and the name of the transferor is discussed at page 101 of this manual. Since The Land Titles Amendment Act, S.S. 1978, c.30, s.37 which requires one full given name of the transferee, it would be a rare occasion to find a title issued subsequent to that Act describing the registered owner by initials only. However, for a title that has issued with initials only as to the given names followed by the surname, the registrar should insist that evidence by affidavit be produced identifying the transferor with the party mentioned in the certificate of title. Too much reliance should not be placed in the matter of identification by reason of the address of the registered owner being the same as the address of the transferor. In Sievell v. Haultain (1911), 4 Sask. L.R. 142 (S.C.), W. A. Matheson of Denver, Colorado turned out to be the same party as William Angus Matheson of Westiew, Saskatchewan.

### 2. Two Transferors of Different Land

In Re Land Titles Act and Transfer, Ralph to Thompson and McAllister (1913), 4 W.W.R. 857 (Sask. M.T.), Milligan, M. T. held that a transfer is not registrable in which two transferees are mentioned where each takes a different portion of the land transferred. In Re Transfer, Knudson and Knudson to Senft, September 18, 1945, (unreported), Stuart, M.T. concluded that two or more transferors each owning different land couldn't transfer their interest in the same transfer. Stewart, M.T. mentioned the rule had been a long standing one and was defensible on the basis that neither the Act nor the form made provision for the repetition of the allegation of separate owners being registered owners of separate properties. He concluded that although commercial financing may dictate the need for two or more mortgagors owning different land to join in the same mortgage, there was no similar justification for transferors.

### 3. Where Transferor Deceased

Subsection 215(1) of The Land Titles Act provides that an instrument is not rendered invalid by reason of the death of a person executing the instrument and the instrument may be registered. Prior to The Land Titles Amendment Act, S.S. 1983, c.50 certain affidavits were required for succession duty purposes. These affidavits are no longer required.

#### D. Nature of Estate Transferred: No Life Estate

Only a transfer creating a fee simple estate is acceptable for registration. A life estate cannot be created. The Land Titles Act was amended by S.S. 1949, c.34 to remove any doubt on this point. Prior to this amendment, the Act and the form made reference to the transfer of a lesser estate than the fee simple which could have been the life estate.

Where a testator, by will, leaves a life interest to someone, it is not appropriate to transfer the land to the person (see Hodges v. Goodnough et al. (1916), 10 W.W.R. 170 (Sask. S.C.), Re Mika Estate, [1918] 1 W.W.R. 888 (Sask. K.B.) and Bremmer et al. v. Trust & Guarantee Company, [1928] 3 W.W.R. 415 (Alta. S.C.)). A mortgage of the fee simple estate cannot also include a mortgage of the life estate. A mortgage of the life estate can only be registered by way of caveat.

To give written public record of a life estate either an annuity mortgage, a lease or a caveat may be registered.

The creation of a leasehold interest as an estate in land is discussed elsewhere in chapter 21.

#### E. Land Descriptions

##### 1. Must Include Exceptions

Land descriptions are discussed in detail in Part III. Although section 89 of The Land Titles Act states that the transfer may "for description of the land intended to be dealt with, refer to the certificate of title or give such description as is necessary to identify the land, and shall contain an accurate description of the land intended to be transferred", practice emphasizes the latter portion of this section.

As a general rule the land description in the transfer must agree with the description in the certificate of title and reflect any exceptions endorsed on the certificate of title. If exceptions are not shown, it gives the appearance that the transferor is transferring more land than is owned. This rule ensures that the parties to the instrument and their solicitors know the extent of the land being conveyed.

##### 2. Transfer of a Part of a Parcel

Where part only of a parcel of land is being transferred, the registrar must determine whether a plan of survey is required (see section 103 of The Land Titles Act). If a division by metes and bounds description is approved by the registrar, the wording of the description must also be acceptable to the registrar who may require the applicant to obtain the wording from the Chief Surveyor. The method of registration, either by plan of survey or by metes and bounds description, is the

prerogative of the registrar. In either case the approval of the appropriate approving authority must be obtained pursuant to section 134 of The Planning and Development Act.

### 3. The Residual Title

Since March 1, 1985 as a result of a policy decision of the Master of Titles, when a portion of a lot or a quarter section is transferred by metes and bounds description, every effort is made to immediately cancel the residual certificate of title and raise a new certificate of title showing the exception. When the portion being transferred must be endorsed on the back of the residual certificate of title, the portion is accurately described in abbreviated form. The registrar does not allow the endorsement to be expressed "as to portion".

### 4. Consolidation

If a metes and bounds title has issued and both that title and the title to the balance of the quarter section are being transferred (in one transfer) to the same party but only one value is set forth, the transfer will be rejected and the registrar will ask for clarification as to whether or not the two parcels are to be consolidated in one title. The title should not be issued as firstly (the quarter section except the metes and bounds description) and secondly (the metes and bounds description). If a written request for consolidation is not submitted with the transfer when it is resubmitted, two values must be obtained and two separate titles issued. If a written request for consolidation is received, one certificate of title will issue. When one certificate of title issues, a further approval will be required for the same division at a future time. Where this issue arises with respect to the transfer of legal subdivisions, the transfer will register and the title will show a firstly and a secondly.

When the quarter section and a portion described by a plan are intended to be transferred together, two separate titles will issue unless the registered owner petitions the Master of Titles to cancel the plan and requests the registrar to consolidate the two portions. An exception to this rule is made when a quarter section and an abandoned railway right of way are being transferred. In this type of case, the registrar will independently consolidate the two certificates of title and advise the Chief Surveyor to petition the Master of Titles to cancel the plan.

## F. Consideration

### 1. No Need for Money Consideration

Form J contains the phrase "do hereby in consideration of the sum of \_\_\_\_\_ dollars paid to me by E.F. the receipt of which sum

I do hereby acknowledge". In Re Registration of Transfer of Mortgage (1915), 9 W.W.R. 491 (Sask. M.T.), Milligan, M. T. states "There is nothing in the law, common or statutory, which compels a statement of the true consideration to be expressed in a transfer of land or transfer of mortgage any more than there was for the statement of such consideration in the common law indenture of deed; and a registrar cannot refuse registration to an instrument on the ground that no consideration is stated therein." Based on this decision it is now long established practice to accept the transferor's reference to consideration regardless as to the nature of the consideration shown. The consideration may be "gift", "\$1.00 and other valuable consideration", "natural love and affection" and "pursuant to the terms of the will", etc. All of these require modifications to the transfer which are acceptable to the registrar. For the sake of completeness, the blank must be completed in some way. It might be explained here that, in law, consideration is divided into two classes: (1) good, (2) valuable. Good consideration is that of blood relationship or the natural love and affection which a person has for his or her children or relatives. Valuable consideration is, as the name implies, something having a value, in money, or in covenants to do or refrain from doing something. In any contest in court as to the validity of contracts only valuable consideration is considered as supporting the contract.

Valuable consideration must be shown when an agent is transferring land under a power of attorney, unless the power of attorney document specifically allows the transfer to be for nominal consideration or by way of gift.

## 2. Significance to the Parties

To the parties to the transfer, consideration is of greater concern. For example, a person who acquires an interest in land by way of gift, is considered in law to be a volunteer. A volunteer acquires the interest subject to any errors resulting in the registration of the interest (see Mapp Torrens' Elusive Title, page 121). Subsection 77(1) of The Land Titles Act confirms the power of the registrar, and accordingly, the court, to correct any certificate of title, "so far as practicable without prejudicing rights obtained in good faith for value". A statement in the transfer as to the nature of the consideration will be persuasive. Where the true consideration is not stated, the party wishing to establish that the true consideration was other than that stated in the deed, bears the onus of proving the contrary. Lamont, J. in Swan v. Wheeler (1909), 2 Sask. L.R. 269 at 272 (S.C.), quotes from an English case as follows: "The presence of a receipt endorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance." In Snider v. Webster (1911), 18 W.L.R. 48 (Man. C.A.), Perdue, J. A., said "A statement in the body of a deed declaring that the purchase money has been received operates at law as an estoppel by deed, and binds the

parties, although equity will grant relief on proof that the money was not paid".

As to what constitutes a right obtained for value will be a matter for the court. Reference may be made to Coventry v. Annable (1911), 1 W.W.R. 148 (Sask. S.C.). In this case Wetmore, C. J. said that the consideration stated in a transfer, the subject matter of the action, was only \$1.00 and that certainly \$1.00 could not be called valuable consideration for the land in question.

### 3. Need to Acknowledge Receipt

Sometimes a transfer is submitted which states that the consideration has not been received. This is acceptable. The purpose of the acknowledgement of receipt of consideration is to avoid the need for a separate receipt (see DiCastrì Registration of Title to Land, para. 239). If the consideration has not been paid the transfer may so state.

### 4. No Need for Affidavit of True Consideration

Since The Land Titles Amendment Act, S.S. 1984-85-86, an affidavit of true consideration is not required. It was repealed as an incident of the Gift Tax Act and to reduce the work load.

### G. The Transferee

#### 1. Must be a Natural Person or Body Corporate

Clause 2(1)(p) of The Land Titles Act defines owner to mean a person or body corporate. Section 89 of the Act requires the execution of a transfer by an owner. In addition, the need for certainty requires that only a natural person or a body corporate hold land. In re The Land Titles Act (Weightman's Case), [1919] 1 W.W.R. 44 (Sask. M.T.), Milligan, M. T. quotes from pages 110 and 111 of Thom's Canadian Torrens System (1st Edition) as follows: "The registrar is not only dealing with the present instrument before him, but may look ahead and take into consideration that he is creating interests which he may subsequently have to deal with, and he may require precision with that end in view; thus it is submitted that a registrar would be justified in refusing to register a transfer or a mortgage to a transferee or mortgagee where initials only are given, or where an address and description is omitted, or he may refuse to register an instrument in favour of a partnership, as it is no part of his subsequent business to inquire as to whether all members of the partnership have executed any subsequent instruments."

Similarly an Indian Band or Band Council is not a natural person or a body corporate and cannot hold land as a band. Although clause 64(d) of the Indian Act R.S.C. 1985, c.I-6 provides that

a Band Council may purchase land for use by the Band as a reserve, title to all reserve land must be vested in Her Majesty the Queen (Canada). Land purchased for other than reserve purposes must be in the name of a natural person or body corporate.

## 2. Transfer to Oneself

Clause 2(1)(u) of The Land Titles Act defines transfer to mean the instrument by which "one person conveys to another". Based on this definition, the registrar will reject a transfer where the transferor and the transferee appear to be the same person. In addition to compliance with the statute, the registrar is also concerned about whether a valid contract has been made.

The registrar will accept such a transfer if the capacity of the parties is changing eg. personal representative to absolute owner, or if the extent of the interest is changing eg. one registered owner transfers to himself or herself and another.

Some jurisdictions specifically allow the registration of a transfer from one person to himself or herself (see DiCatri, Registration of Title to Land, para. 270). Saskatchewan allows this with respect to easements (see subsection 95(3) of The Land Titles Act).

## 3. Two Transferees of Different Lands

A transfer in which two or more transferees are mentioned where each takes a different portion of the land transferred must be rejected. In Re Land Titles Act and Transfer, Ralph to Thompson and McAllister (1913), 4 W.W.R. 857 (Sask. M.T.), the Master of Titles said there was no provision in the Act nor in the form of transfer for registration of two transfers of different pieces of land to different transferees in the one transfer. The Master added that if a transfer of two different pieces of land to two different transferees is permitted in a transfer, he could see no reason why 20 or 200 pieces of land to 20 or 200 different transferees should not be permitted in the same transfer, and that to hold that two separate transfers of different pieces of land to two different transferees may be incorporated in the same transfer would, it seemed to him, lead to confusion which would make the system of registration of land unworkable. He adds that it is a species of conveyancing which he could not believe was ever contemplated by The Land Titles Act.

## 4. Transfer to a Deceased Person

There appears no reason why land cannot be transferred to a deceased person, DiCatri, Registration of Title to Land, para. 241. The personal representative may apply to deal with the land. However, if the registrar knows the transferee is deceased, the letters probate or of administration must be filed

at the time of the registration of the instrument into the deceased's name.

#### 5. Difference Between Payor of Consideration and Transferee

The payor of the consideration and the transferee can be two different persons. Form J contemplates that the money can be paid by "E.F." and that another person can be the transferee. Many legal transactions are structured in this way. However, sometimes, there is a similarity between the two names which indicates a spelling error making it impossible to know which is the correct name i.e. Gary Brown in the "paid to" clause and Garry Brown in the "transferee" clause. The transfer should be returned for correction. However, if the transfer is accompanied by a mortgage which states the registered owner of the property to be Garry Brown the registrar can be confident that Garry Brown is the correct name and could accordingly accept both instruments for registration.

#### 6. Use of Initials

The Land Titles Amendment Act, S.S. 1978, c.30 enacted section 89.1 which prevents the registration of a transfer "unless it contains the surname and the full Christian name or names of the transferee". (This should be a reference to "given" rather than "Christian"). Section 89.1 means that the full name must be given. No initials are allowed. The registrar will not reject if only one given name is shown unless there is evidence elsewhere in the document of more than one given name.

Section 89.1 serves two purposes. It lends certainty of identity, and on this point is supported by Borbridge v. Borland (1915), 8 W.W.R. 1151 (Sask. S.C.) wherein McKay, J., in considering the use of initials in referring to parties said, "The practice of using initials instead of full Christian names in legal documents or documents of title is not a commendable one, and should be discouraged".

The enactment of section 89.1 is also linked with an amendment to subsection 180(2) of The Land Titles Act, enacted at the same time, which requires a writ of execution to set forth in full the Christian name or names as well as the surname of the debtor. These two amendments (section 89.1 and amended subsection 180(2)) reduce the number of similar matches in checking the general record.

#### 7. Address and Occupation

Section 89.1 of The Land Titles Act requires a transfer to provide "a complete postal address to which notices required under this Act may be delivered". This is in some conflict with subsection 252(1) of the Act which also requires the owner to deliver a "memorandum in writing of a post office address" but which also states "provided that the registrar may proceed

without such memorandum of address". The two sections can be read together by applying subsection 252(1) to a change of address by the owner or mortgagee.

Although Form J requires the insertion of the occupation of the transferee, the transfer will not be rejected if no occupation is provided. Sometimes in a corporate transfer the "paid to" clause indicates the addresses and specified interests of the transferees. The transferee clause is the more significant clause. It must indicate the manner of holding, but the address can be covered by the use of the word "said".

#### H. Conclusion of Form of Transfer

The principal and effective part of the transfer is the statement that the transferor transfers to the transferee "all my estate and interest in the said piece of land". No transfer should be accepted which does not use these words.

Form J makes provision for the date of the transfer to be filled in.

#### I. Signatures

It will be noticed that the word used in the testimonium in Form J is "subscribed". The word 'subscribe' indicates a necessity for the name to be at the foot of the transfer or other document, as for example, in the case of a transfer it would be at the foot of Form J (see Street's Foundations of Legal Liabilities, Volume 2, footnote at page 181).

Other rules relating to legibility of a signature and concurrence with name of registered owner are discussed in chapters 17 and 18 of this manual.

#### J. Implied Covenants

Subsection 75(2) of The Land Titles Act states that in every transfer which is registered subject to a mortgage there shall be implied a covenant by the transferee with the transferor, that the transferee will pay the mortgage money and interest thereon. This is referred to here because of the provisions of subsection 76(1) of the Act, as implied covenants may be negatived (or modified) by express declaration or statement in the transfer. This is a case where something may be added to the transfer. Various words may be used to negative the implied covenant. One phrase might read as follows: "It is understood and agreed that the implied covenant by the transferee with the transferor contained in section .....of The Land Titles Act be and the same is hereby negatived". There are a number of cases in which the matter of implied covenants has been considered including, for instance, the case of Devenish v.

Connacher, [1930] 2 W.W.R. 254 (Alta. S.C.A.D.). If, at the time of the registration of a transfer, there is a mortgage or other encumbrance on the title, and there is a provision in the transfer negating the implied covenant Milligan, M. T. on the 4th of July, 1913 established this practice: "I would direct the registrars, wherever there is a mortgage or encumbrance on the title, to enter a memorandum on the title of the negating of the implied covenant....whereby such covenant is negated in the transfer". This memorandum is necessary so that in the case of any proceedings with respect to the mortgage, the mortgagor, who is now not the owner of the property, may get notice of the proceedings.

## K. Transfers Involving the Crown

### 1. Transfers Between Federal and Provincial Governments

#### (a) Order-in-Council Proper Form

Very often it is necessary for the Dominion Government to 'transfer' land to the Saskatchewan Government, or vice versa. Land stated to be owned by the Federal Government is really owned by Her Majesty the Queen, and titles are written in the name of Her Majesty the Queen (Canada). Similarly, land said to be owned by a provincial government is owned by Her Majesty the Queen, and titles are written in the name of Her Majesty the Queen (Saskatchewan). To make a proper transfer of lands, there must be two separate parties, and it is obvious, therefore, that where Her Majesty the Queen, the owner of lands, whether in the Right of Canada or in the Right of Saskatchewan, desires to 'transfer' from one government to another, the ordinary form of transfer is not the proper document to be used. In Attorney General of Canada v. Higbie et al. and Attorney General for British Columbia, [1945] S.C.R. 385, it was said, "Certain Orders-in-Council may be upheld as valid because both governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one government to another is not appropriately effected by ordinary conveyance. His Majesty the King does not convey to himself". As to that proposition, Rinfret, C. J. mentions certain authorities following his statement just quoted. These authorities include Saskatchewan Natural Resources Reference, [1931] S.C.R. 263, affirmed [1932] A.C. 28 (P.C.). In this case, it was pointed out it was not by grant between parties that Crown lands are passed from one branch to another of the King's Government; but that one of the methods of transfer from one government to another is by Order-in-Council and when public land is described as the 'property of' or as 'belonging to' the Dominion or a province, these expressions merely import

that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province as the case may be, the land itself being vested in the Crown. This practice is confirmed by section 92 of The Land Titles Act, which was enacted in 1974 in response to the Higbie case.

(b) Need for Consent

It has been the practice for the Crown receiving the land to issue an accepting Order in Council or to indicate consent to receipt in some way.

2. Transfers Between Provincial Government Departments

Land owned by Her Majesty the Queen (Saskatchewan) is under the prima facie administration and control of the government department whose address is shown on the certificate of title. Administration and control is transferred, for land titles purposes, by submission of a letter from the present or proposed department. When this is received the address portion of the certificate of title is changed and the notification of change of address is dealt with in the same way as from any other registered owner. No fee is charged.

Although the practice of showing the Minister who represents the Crown on the certificate of title received statutory recognition in The Land Utilization Act, R.S.S. 1953, c.204, that practice has been discontinued for the shorter practice described above.

The above remarks do not apply to transfers between government departments and Crown Corporations. The Crown Corporation, though often an agent of the Crown, is a separate entity and land should be transferred by transfer in Form J. If the work is done at the request of the Crown Corporation, the usual fees must be charged (see section 7 of The Land Titles Fees Regulations as amended by Sask. Reg. 37/85).

3. Transfers to Her Majesty the Queen: Need Consent

Since 1922 the practice has been to require either:

- (1) the written consent of an appropriate government official on a transfer to a department of the Crown; or
- (2) the transfer must be submitted for registration by the department.

Ordinarily the registrar does not require consent of the transferee, but because the obligation of the Crown departments can extend further than the mere presentation of a transfer, the registrar insists on some form of consent. For example, it has

been suggested that a transfer may be made in an attempt to avoid mineral taxes.

## L. Where Transferor Requires Consent Before Sale

### 1. General

Legislation creating a special body corporate often places a restriction on the corporation's ability to sell or otherwise deal with land. This occurs most often with a quasi-government body or a private corporation created by a special Act of the legislature. Land titles practice requires that the consent be reflected on or accompany the instrument for registration. The examples discussed in this part are representative and not exhaustive.

### 2. The Liquor Board

The Liquor Act provides in section 11 that the Board may purchase, lease or sell any land, subject to the approval of the Lieutenant Governor in Council. Section 14 constitutes the Board as a body corporate with a common seal. Section 7 allows any document, in the absence of the Chairman, to be signed by any member of the Board. Based on these sections, a registrar will accept a transfer or lease of land registered in the name of the Liquor Board (or the Chairman of the Board which, although improper, does appear on some titles), executed by the Chairman or a member of the Board accompanied by a certified true copy of an Order in Council approving the sale (see clause 11(h) of The Liquor Act). Clause 11(g) also requires an Order in Council when the Liquor Board is the transferee. No new titles are issued in the name of the Chairman of the Board.

### 3. Regional Parks

Section 18 of The Regional Parks Act, 1979, S.S. 1979, c.R-9.1 provides that no land acquired by a regional park authority under a lease or purchase agreement shall be withdrawn from the area designated as a regional park without the consent of the Minister and the municipalities that are represented on the regional park authority. When land registered in the name of a regional park authority is to be transferred, either the necessary consents must be provided or an affidavit to prove the land was not acquired under a lease or purchase agreement. If the registrar is uncertain as to which municipalities must give their consent, the registrar may ask for affidavit or other evidence.

### 4. School Sites

The approval of the Minister of Education is required for the sale, lease or disposal of land vested in the Board of Education as a result of section 117 of The Education Act, R.S.S. 1978,

c.E-0.1 (Supp.). Similarly, subsection 350(2) of The Education Act, R.S.S. 1978, c.E-0.1 (Supp.) as amended by S.S. 1984-85-86, c.30 states that a Board of Education may, with the prior approval of the Minister of Education, sell or lease land which has been previously used for the instruction or accommodation of pupils or, where a school division is located in the Northern Saskatchewan Administration District, as a teacher's residence. If there are situations which do not require the approval of the Minister, an affidavit setting forth the necessary facts executed by an appropriate official in the Department of Education or of the Board will be required. Dispositions under The Education Act are discussed in more detail in chapter 53 of this manual.

## 5. Hospitals

Land, as a general rule, cannot be acquired or disposed of by a hospital without the consent of the Minister, or in certain cases, the Cabinet. Hospitals are created under The Union Hospital Act, The Public Health Act or a special Act of the legislature. Each Act must be examined for the special rules pertaining to a particular hospital.

Section 65 of The Hospital Standards Regulations, 1980, Sask. Reg. 331/79 appearing in the Dec. 7, 1979 Gazette, is of general application to all hospitals. It states that "Land shall not be acquired or used as a site for a hospital until approved by the Minister".

Most hospitals in the province are created under The Union Hospital Act. Subsection 40(1) provides that land shall not be purchased or otherwise acquired for a hospital until approved for the purpose by the Minister. The board may, with the approval of the Minister, sell or dispose of land (see section 46 of The Union Hospital Act).

Hospitals created under their own legislation include the University Hospital, the South Saskatchewan Hospital Centre, and the Wascana Rehabilitation Centre. The General Hospital in Regina was created by Order-in-Council under The Public Health Act.

## 6. Canadian Legion

S.S. 1976-77, c.106 amended S.S. 1949, c.133 to provide that no branch of the Royal Canadian Legion Saskatchewan Command may, without the consent in writing of the Command, mortgage, lease, sell, convey or otherwise dispose of its property except in the ordinary and usual course of its activities. Where a written consent does not accompany an instrument, an affidavit of an officer of the Command or Branch, stating that the transaction is one made in its usual and ordinary activities, must be provided.

**M. Transfer by a Sheriff under Process of Law**

**1. Must be accompanied by Court Order**

Subsection 185(1) of The Land Titles Act requires a sale under process of law, of land for which a certificate has been granted, or a lease or mortgage, of such land, to be confirmed by the court.

As to what is a sale under 'process of law' see the case of Canadian Pacific Railway Company v. Mang (1908), 1 Sask. L.R. 219; 8 W.L.R. 774 (S.C.). In this case, Wetmore, C. J. stated that a sale 'under process of law' means a sale under and by virtue of an execution or other writ of a similar character; and that it does not apply to a sale by virtue of a decree of the court. A writ of execution, while it is a judicial command, does not direct the sheriff to sell any particular land, but it does direct the sheriff to realize the moneys out of the debtor's goods and lands. Provision is made in The Executions Act for the sale by the sheriff of lands of an execution debtor.

**2. Registration Procedure**

**(a) Must be Submitted within Two Months of Order**

Section 187 of The Land Titles Act states that a transfer of land sold under process of law (or a transfer of a mortgage sold under a process of law) shall not be registered after a period of two months from the date of the order of confirmation unless the period is extended by order of the court or a judge filed with the registrar. It is important to remember that after the transfer from a sheriff is presented for registraion it must be held for a period of four weeks unregistered (see subsection 185(2)), and further that the registrar shall not register the transfer after a period of two months after the date of the confirmation order unless this latter period is extended. This means that the order must be submitted within one month of the order to accommodate the four week period when the order must remain unregistered. If it is not, it should be rejected at this point. The registrar must not wait until processing the transfer to reject it for this reason.

**(b) Form**

The transfer must be in Form GG and, unlike a transfer submitted by a registered owner, must indicate the encumbrances to which the new title will be subject.

The sheriff, in conducting a sale, can only sell the interest of the owner in the property being sold. Other interests in the same property, which are owned by other owners, cannot be sold by the sheriff. Therefore, applying this principle to a sale of land, the sheriff cannot sell land clear of registered encumbrances which precede the claim of the person in whose favour the action has been decided.

If Form GG does not refer to the encumbrances on the title, it should be returned advising of the encumbrances unless the order confirming the sale, which is required to be attached to Form GG, states the transfer is to be registered and a new title issued clear of encumbrances or naming the encumbrances to which the title will be subject.

The transfer must be executed by the sheriff or "other officer". It is unclear who "other officer" could be. It will include a deputy official.

The transfer is usually presented by the solicitor for the purchaser who pays the fees in the normal manner based on an affidavit of value of land. If it is submitted by the sheriff, the sheriff ensures that fees have been paid. No fees are charged to the sheriff.

(c) Processing the Transfer

The court order is entered in the instrument register but the transfer is merely date stamped. Although the transfer is not being registered both it and the order should be examined particularly with respect to encumbrances and compliance with the time periods and rejected if found not to be in order. Note that there must be an affidavit of value upon which to base the transfer fees. If the transfer is submitted by the sheriff, no fees are paid to the land titles office, but the solicitor pays the sheriff. Strictly speaking, when the transfer comes from the sheriff, no affidavit of value is needed, but if it is provided, the value sworn will be shown on the resulting title.

The memorandum on the title should indicate "Judge's Order confirming sale of within land. Transfer effective (show four weeks from day of registration order assuming that date is not a holiday)". When the transfer and order are submitted by someone other than the sheriff, the charge for the order will be the flat fee. The transfer should be diarized and should be kept in the registrar's office.

At the expiry of four weeks, the transfer should again be date stamped, assigned an instrument number and entered into the instrument register, and processed as follows:

- (1) determine which encumbrances will be carried forward;
- (2) cancel the court order by the transfer number;
- (3) cancel encumbrances not to be carried forward by the judge's order;
- (4) enter cancellation memo on the old title in the usual manner and issue a new certificate of title.

If encumbrances are registered within the four week period, the sheriff must either amend the transfer to accept the encumbrances or there must be a further court order providing directions to the registrar with respect to the additional encumbrances.

#### N. Checklist for a Transfer

##### 1. General

This checklist is intended to gather together in one short list the points to remember in examining or preparing a transfer. Specific authority and discussion must be found elsewhere in the manual.

##### 2. For a Transfer by an Individual

The following points must be noted:

- (1) production of duplicate;
- (2) general record - checked;
- (3) letter of instruction clear - can registrar comply with it?
- (4) name and address of transferor against title:
  - (i) affidavit of identity if required;
- (5) must state that transferor is the registered owner in fee simple of the land being transferred;
- (6) compare description of land with title and particularly note minerals and any exceptions on the back of the title;
- (7) any instrument on title or in general record that prevents registration;

- (8) full given name or names and address of transferee and tenure of holding (joint tenants, etc.);
- (9) signature of transferor and signature of witness;
- (10) affidavit of witness, see section 63 of The Land Titles Act to see if witness required:
  - (i) Is witness qualified? Is there a statement that the witness personally knows the transferor and was present when transferor signed the transfer?
  - (ii) Does affidavit indicate that transferor is 18 years or over?
  - (iii) Affidavit properly sworn? Must show the authority of the person taking the affidavit, eg. commissioner for oaths, notary, etc.
- (11) have homesteads requirements been met?
- (12) affidavit of value i.e. decrease in value explained;
- (13) appropriate fees provided.

3. Checklist of Additional Requirements for Special Transfers:

- (1) corporate transfers under The Business Corporations Act, The Non-Profit Corporations Act, The Co-operatives Act, 1983, or similar Acts can either be under seal or proper affidavit of attestation provided - no homesteads requirements unless corporation is acting in capacity of executor or administrator;
- (2) by incorporated company under private or special Act must be under seal - no homesteads requirements unless company is acting in capacity of executor or administrator;
- (3) infants - executed by court appointed guardian and consented to by the Public Trustee or executed by the Public Trustee or accompanied by an order of the court;
- (4) bankrupts - by trustee - consent of inspectors or summary administration or order of registrar in bankruptcy or court dispensing with consent of inspectors;
- (5) estates - proper compliance with section 172 of The Land Titles Act;
- (6) religious bodies - special Act requirements met or special resolution with two-thirds majority under The Religious Societies Land Act;

- (7) United Church - affidavit of minister of applicable church re: trustees and consent of presbytery;
- (8) under power of attorney - power of attorney checked;
- (9) joint tenants - consent of other joint tenants and homestead re: consenting parties;
- (10) by sheriff - court order if in pursuance of a writ of execution and section 185 of The Land Titles Act followed;
- (11) by Crown - consent of Minister or requirements of incorporating legislation met;
- (12) by or to hospitals - approved by Minister of Health;
- (13) by a school board - approval of Minister.

## Chapter 20. Mortgage

### A. Definition

Clause 2(1)(n) of The Land Titles Act defines mortgage to mean a charge on land created for securing payment of money, and includes an hypothecation of such charge and a charge for securing payment of an annuity, rent charge or sum of money other than a debt or loan.

Under subsection 125(1) of the Act, it is provided that when land for which a title has been granted is intended to be made security for a debt or loan, or security in respect of a future or contingent liability, the owner shall execute a mortgage in Form Q or to the like effect, and that when the land is intended to be made security for payment of an annuity, rent charge or sum of money other than a debt or loan or future or contingent liability, the owner shall execute a mortgage in Form R or to the like effect.

In the earliest land titles Acts the document to secure a debt or loan was termed a mortgage, but for securing other charges the document was called an "encumbrance". Now, any registrable document to secure money is called a mortgage, but if the money secured is for a debt or loan or a future or contingent liability, the mortgage will be in Form Q, but to secure the other items such as an annuity, the mortgage is in Form R.

Form Q is worded to suit the case of a mortgage to secure a loan. Therefore, in the case of a mortgage to secure a debt (other than a loan) or to secure a future or contingent liability, the words of Form Q must be amended to suit the case. Subsection 125(3) requires that in the case of a mortgage to secure a future or contingent liability, the nature and extent of the liability and the conditions or contingencies upon which it is to accrue should be set out.

What then, is the difference between a debt, a loan, a future liability, a contingent liability?

The following short definitions may help:

- (1) a debt - a sum of money owing for any reason;
- (2) a loan - a sum of money lent, to be returned with or without interest;
- (3) a future liability - an obligation to pay a sum of money at a stated time in the future;
- (4) a contingent liability - an obligation to pay a sum of money in the future if certain events happen.

Form R is necessary to secure an annuity or rent charge. These are defined as follows:

- (1) annuity - a sum payable in respect of each year, usually a life annuity, ceasing on the happening of a specified event or the death of the annuitant (see section 138 of The Land Titles Act);
- (2) rent charge - a charge on land to secure periodical payments to a person not the owner.

#### B. The Debenture Mortgage

Commercial need for flexibility in financing resulted in a June, 1980 decision by Truscott, M.T. to accept debenture mortgages and charge fees for debenture mortgages based on an affidavit of value of the land, in any case where the value of the land was less than the amount secured. A debenture mortgage accepted for registration was stamped with the phrase "This is accepted in the land titles office as a mortgage, and only as a mortgage, and only against the land specifically described herein."

Prior to the decision of Truscott, M.T. to accept debenture mortgages for registration, the Land Titles System was having difficulty in determining whether a mortgage was in substantial compliance with Form Q. The large variances in format and the number of different formats made this decision difficult. With the decision to accept debenture mortgages, and with the break given in fees for debenture mortgages, a definition of debenture mortgage compounded this task.

The term "debenture" is a name applied to a document evidencing an indebtedness which is normally, but not necessarily, secured by a charge over property. A Land Titles System is only interested in a debenture which charges specifically described real property. However, every Form Q mortgage could be considered a debenture in that it is a document evidencing an indebtedness and it secures a charge on real property. Clearly, the term debenture is not confined to corporate securities. An individual can execute a debenture. See Gower, The Principles of Modern Company Law (3rd ed.) at page 347.

These two problems: (1) determining when a mortgage is in Form Q; and (2) developing a definition of debenture mortgage, resulted in a decision in November of 1982 to establish a list of essential elements of Form Q which must be present in all mortgages securing a debt or loan or future or contingent liability and to remove the distinction between debenture and other mortgages with respect to the collection of fees.

The decision to accept debenture mortgages requires a consideration of the effect of clauses which charge future or after acquired property or personal property of the mortgagor.

Early in the history of the province Chief Justice Wetmore in the case of Re North-West Telephone Co. Limited (1909-10), 12 W.L.R. 300, 2 Sask. L.R. 379 (S.C.) held that a mortgage that includes land that may be acquired in the future is bad and should not be accepted. In the case of Canadian Imperial Bank of Commerce v. Wicijowski et aux. (1980), 1 Sask. R. 63 (Q.B.), Mr. Justice Hughes indicated that he agreed with the decision of Chief Justice Wetmore but found the case to be inapplicable to the case at bar. Given the policy decision made to accept a debenture mortgage which in many cases includes after-acquired property, Mr. Justice Hughes' comments must be considered obiter and that the decision of Chief Justice Wetmore would not be followed in a case to be heard to-day. A recent decision from Alberta which supports the registration of a debenture containing an after-acquired property clause is Coopers & Lybrand Ltd. and Royal Bank of Canada v. Superstrong Aluminum Products (1978) Ltd. (1980), 13 Alta. L.R. 307 (Q.B.).

The registrar, especially with respect to mortgages, cannot be called upon to determine which clauses may ultimately be bad in law. Form Q explicitly allows the addition of covenants which may be invalid not only between the parties but as against third parties. Although subsection 67(2) of the Act provides that upon registration every instrument shall become operative according to the tenor and intent thereof, this must be implicitly qualified by the words "according to the general law". Registration cannot validate a right or interest which is contrary to the general law. For example, many mortgages contain a clause giving the mortgagee a power of sale. Clearly this is invalid. In the case of Smith v. National Trust Company, [1912] 1 W.W.R. 1122 (S.C.C.), the Supreme Court of Canada held that registration does not validate a void power of sale. Similarly in Hoar v. Mills, [1935] 1 W.W.R. 433 the Saskatchewan Court of Appeal held that registration does not validate a void and unenforceable clog on the mortgagor's right to redeem the property. In Re Lehrer and The Real Property Act, [1961] S.R. (N.S.W.) 365 at 376 the following comment is made:

. . . by virtue of s.35 of the Real Property Act 1900-1956, a lease is deemed to be registered so soon as a memorial thereof as described in the Act has been entered in the register book upon the folium constituted by the existing certificate of title of such land. By s.36(4) upon registration every instrument drawn in accordance with the Act is deemed to be embodied in the register book. To that extent the Registrar-General certifies the title of the lessee, and the lessee has the protection of those provisions of the Act which confer indefeasibility of title. However, when the Registrar-General registers a lease it is only the title which the parties by their words have themselves described which is thus registered and to which the Registrar-General thus gives a certificate. The Registrar-General by the registration cannot create a form of leasehold estate which is not known to the law . . . The registration does not interfere with the ordinary effect of the

instrument at law or inequity . . . it follows, therefore, that, if the Registrar-General registers a lease which is void for uncertainty of the term purported to be stated therein, no greater interest is conferred upon the lessee by the registration than he would have had apart from the registration.

Thus, if a document is accepted for registration and it contains clauses which are invalid, registration does not cure these defects. An after-acquired property clause is valid between the mortgagor and the mortgagee, and because the land is not specifically charged, it is invalid as against third parties. Registration of a mortgage containing such a clause does not change this. Accordingly, a mortgage should not be rejected simply because it contains such a clause. The same is true with respect to a mortgage which purports to charge personal property. Registration in a land titles office does not constitute valid registration with respect to personal property. There must be a further registration in the Personal Property Registry. This does not mean that any document purporting to be a mortgage may be registered. Quite the contrary is true. The document must be a mortgage containing the elements outlined above. It cannot be an agreement to give a mortgage or be a gift or purport to be any other registrable document like a power of attorney etc. It must charge specifically described real property with the repayment of money or money's worth and that is the essence of a mortgage.

All mortgages which charge, in addition to specifically described lands, land to be acquired in the future or personal property are stamped as mentioned on page 145 to indicate, to the registrant and anyone reviewing the mortgage, that the registrar has found the document to be a mortgage only against the land specifically described in the document. The use of the stamp is essentially alerting users of the system of the view the registrar takes of the mortgage.

This type of interpretation where the registrar looks to the elements of the instrument is confined to mortgages only. All other instruments must comply with the form and format where same is prescribed. In the case of mortgages it was felt that the statutory form must be adaptable to meet the needs of changing economic conditions.

### C. Elements of Form Q Mortgage

#### 1. Checklist for Form Q

Every mortgage purporting to be registered as a Form Q Mortgage must contain the following elements:

- (1) the name of the mortgagor (must correspond to the certificate of title or proper evidence provided to the contrary);
- (2) the name and address of the mortgagee(s);

- (3) a statement that the mortgagor is the registered owner of the land to be mortgaged;
- (4) a statement of the nature of the interest which the mortgagor holds being either a fee simple estate or a leasehold estate;
- (5) the description of the land to be mortgaged which description shall refer to the certificate of title under which the estate or interest is held or give such other description as will identify it - this description must reflect the exceptions out of the certificate of title and may be contained in a schedule to the mortgage;
- (6) the consideration for the mortgage;
- (7) interest - if there is a blank, it must be complete but it can be nil, a percentage or lump sum - the mortgage will not be rejected if the mortgage appears complete and no interest is shown;
- (8) the principal sum secured - this means the principal sum secured exclusive of interest and of all charges contained in the mortgage to enable the fees to be assessed - the mortgage may secure an amount not exceeding a particular amount;
- (9) the promise to repay the money for which the mortgage is secured;
- (10) the charging clause which must state that the mortgagor mortgages all of the mortgagor's estate and interest in the land described;
- (11) the date the mortgagor signed the mortgage;
- (12) the mortgage must be witnessed and accompanied by an affidavit of execution or the corporate seal must be present on the mortgage;
- (13) compliance with The Homesteads Act where same is required;
- (14) if the mortgage is given as security against a future or contingent liability the mortgage must set forth the nature and extent of the liability and the conditions or contingencies upon which it is to accrue.

## 2. The Mortgagor

### (a) Compliance with the Form

The name of the mortgagor must be consistent with the name on the certificate of title. An affidavit of identity taken by the mortgagor may be accepted. The affidavit is not engrossed on the certificate of title unless there is a request for the title to be changed. The affidavit merely becomes part of the mortgage. There is no fee charged for an affidavit of identity that forms part of the mortgage when there is no request for the title to be changed. If the title is not changed, future instruments must be accompanied by further affidavits of identity.

The form also requires the address and occupation of the owner but unlike the other requirements of the form, neither the address nor the occupation of the mortgagor are considered essential identifiers. Notices are not sent to the mortgagor. The owner of land must provide an address when the land is acquired and, by section 252 of the Act, the owner is required to notify the registrar of any change in address, but if the address on the mortgage form is different from the address on the certificate of title it does not give the registrar the authority to change the address on the certificate of title. Nor would it be sufficient to reject the mortgage. Similarly, the occupation of the registered owner could change. Accordingly, the registrar does not reject a mortgage if the address and occupation of the mortgagor are not provided.

### (b) Co-covenantors/Guarantors

Many of the remarks made in chapter 19 regarding transferors apply equally to mortgagors. However, in the case of a mortgage, it is sometimes necessary that a person other than the registered owner of the land join in the mortgage. He or she may do so either as co-covenantor or as guarantor. Whether a third party is a co-covenantor or guarantor may be material between the parties, but makes little difference to the land titles office. The essential difference between a co-covenantor and a guarantor is that a co-covenantor is liable equally with the mortgagor, whereas a guarantor is liable only if the mortgagor defaults. An example of each type of clause may be seen in (1965), 30 Saskatchewan Bar Review, p. 82.

Where a co-covenantor or a guarantor is not also a mortgagor there is no need for the signature to be witnessed and attested or for reference to such a co-covenantor or guarantor to be endorsed on the certificate of title. If a co-covenantor or guarantor is

referred to in the mortgage and has not signed in the signature portion of the mortgage designated, the mortgage may be returned if a name is typed under the signature line because the document appears not to be complete.

Where a co-covenantor or guarantor is not also a mortgagor, the claim which the mortgagee has against the person is a personal one. If the mortgagor defaults on the mortgage, the mortgagee may sue the co-covenantor or guarantor, obtain judgment and file a writ of execution in the land titles office. The mortgagee cannot pursue the land of the co-covenantor or guarantor directly unless the co-covenantor or guarantor is a mortgagor. Hence, the decision to no longer show guarantors or co-covenantors on the certificate of title. The land titles office is not a registry for personal claims. By not endorsing a reference to a co-covenantor or guarantor on the title, the registrar avoids reasons for rejection related to proper attestation and witnesses for what amounts to a personal claim only.

Very often two or more mortgagors each owning different property may enter into a joint mortgage, so that each property is security for the whole mortgage debt. Again, an example can be seen in (1965), 30 Saskatchewan Bar Review, p.82. Each is then co-covenantor in relation to the other's property, and should be so shown on the certificate of title.

Where a co-covenantor or guarantor is also a mortgagor, there of course must be a witness and proper attestation because the co-covenantor or guarantor is executing as a mortgagor.

As of 1984, the rule that co-covenantors or guarantors who are not also mortgagors are not endorsed on the certificate of title applies to co-covenantors or guarantors who are mortgagors of land in another district. The registrar does not know whether or not these are true mortgagors of land which is actually owned in another land registration district.

(c) As Joint Tenants

A mortgage which states that the owners hold as joint tenants when the certificate of title is silent should be rejected. A mistake may have been made in the preparation of the transfer.

On the other hand, if the owners hold as joint tenants and the mortgage is silent, the registrar would not reject the mortgage. The mortgage cannot change the manner of holding the fee simple estate.

More detail on joint tenants and tenants in common granting mortgages is provided in chapter 44 of this manual.

(d) Mortgage by Single Owner

One standard form mortgage in circulation provides space for two mortgagors and the instructions:

If only one mortgagor or if mortgagors are not joint owners, strike out words "as joint tenants and not as tenants in common".

Sometimes the instruction is not followed. If there is only one registered owner, no one can be deceived by this error and the registrar should not reject the mortgage.

3. Nature of Estate held by the Mortgagor

The possible estates in land which exist in Saskatchewan are the fee simple estate or the leasehold estate. Since the owner of the fee simple estate holds all rights in the land it is customary for the mortgagor to state that he or she is the registered owner of particular land and being the registered owner is assumed, naturally, that he or she is the holder of the fee. However, if there is in existence a leasehold estate for the same land or if for any other reason it is unclear as to the nature of the interest charged it is open to the registrar to reject for the reason that the nature of the interest is not stated. If the mortgage describes the land by reference to the certificate of title, the registrar has some discretion in this area.

4. Land Description

(a) Exceptions

Section 125 of the Act provides for the description of the land one must refer to the certificate of title or give such other description as will identify the land. The important thing is that the mortgagor can only purport to mortgage land of which the mortgagor is the registered owner. Thus, if land has been excepted out of the certificate of title this should be acknowledged. The registrar must be capable of identifying the land which is to be charged.

(b) Planning Approval

As with transfers, subsection 134(2) of The Planning and Development Act requires approval for a mortgage of a part only of a parcel of land. Similarly the registrar must approve the metes and bounds description and may require a plan.

(c) Land in More Than One District

The general rule is that an instrument can only refer to land in one district. An exception is made for mortgages. On March 31, 1910 Milligan, M.T. decided that a mortgage may refer to land in more than one district; see decision of Milligan, M.T. March 31, 1910 on a reference from the registrar of the East Saskatchewan Land Registration District, (since renamed the Prince Albert Land Registration District), in connection with a mortgage by one R. Wright to the Manufacturers Life Insurance Co. The registration stamp on the mortgage and duplicate should qualify the certificate of registration to show that the instrument has only been registered so far as that portion of the land which is in the registrar's own district is concerned. The payment of fees and Master of Titles' orders are dealt with elsewhere in this chapter.

5. Consideration

As with transfers the consideration can be past indebtedness, forbearance to sue, a nominal amount of money or a statement of "good and other valuable consideration". This is a part of the form for land titles purposes which is not as important as others.

6. Interest

The second covenant in Form Q reads as follows:

"Secondly. - That I will pay interest on the said sum at the rate of \_\_\_\_\_ on the dollar, in the year, by equal payments on the \_\_\_\_\_ day of \_\_\_\_\_ in every year."

Until June 1, 1984, the existence of this covenant led the registrar to require an interest rate and to endorse the rate on the title. However, there are many mortgages which are payable on demand for which no interest is stated to be payable under the terms of the mortgage. These mortgages are valid between the parties and as against third parties. To reject this type of mortgage and ask for "nil interest" to be stated did not seem to be proper. Furthermore, the presence or absence of interest can never affect the validity of the mortgage as a mortgage.

Since June 1, 1984, the registrar does not look for interest in a mortgage. If there is a space for interest and it is blank, the document is returned to ensure that the instrument is complete and as a courtesy to the mortgagee.

With respect to the certificate of title, the registrar no longer makes reference to interest or "interest as therein stated". There is currently no specific space for interest

on the certificate of title.

7. The Mortgagee

(a) Name of Individual Mortgagee

There is no requirement that an individual mortgagee be shown with a full given name or names. Section 89.1 of The Land Titles Act only applies to transferees.

(b) Trustees holding for the Mortgagee

Subsection 73(2) of The Land Titles Act provides that the registrar shall treat any instrument containing notice of a trust as if there was no trust. The trustees named shall be deemed to be the owners. From time to time a mortgage will be submitted which describes the mortgagee as the trustees for a particular organization without naming the particular trustees. Although some jurisdictions give special status to such an entity, Saskatchewan does not as yet. If such an instrument registers, when the obligation under the mortgage is satisfied, it will have to be discharged by court order as the registrar will be uncertain as to who can execute the mortgage. If the trustees are named, the registrar would consider the named individuals as holding the interest absolutely, and allow any instrument dealing with the mortgage to be executed by the named trustees in their personal capacity.

(c) Alberta Treasury Branches

The Treasury Branches Act, R.S.A. 1980, c.T-7 authorizes the creation of Province of Alberta Treasury Branches to act as a financial institution in the investing and loaning of money. The Provincial Treasurer is given the authority to loan money from the Treasury Branch Deposits Fund (see section 6 of the Treasury Branches Act). The Superintendent of Treasury Branches acts for the Provincial Treasurer in the loaning of money. The name of the mortgagee on any mortgage under this Act will be the particular branch of the treasury operating in a centre in Alberta. A discharge or other instrument dealing with the mortgage will have to be executed by the Superintendent of Treasury Branches or an agent of the Superintendent acting under a power of attorney of record in the land titles office.

## 8. The Promise to Repay

There cannot be a mortgage of land under the Torrens system which does not charge the land with repayment of the mortgage money (see Covelli v. Keilback, [1947] 2 W.W.R. 492 at 507 (Man. K.B.)).

There must be an end point to the mortgage. If there is no reference to a repayment clause, a person searching would not know when the mortgage was at an end which would be a serious detriment to the system and to the mortgagor.

Sometimes the consideration shown is different from the amount shown in the repayment clause. No one can be misled as to the amount which is secured by the mortgage, nor is the registrar obliged to inquire as to what other consideration supports the mortgage. The endorsement on the back of the certificate of title should reflect the amount for which the land is charged which will be, in most cases, the lower amount.

## 9. The Principal Sum Secured

### (a) Statement in the Mortgage

This is the amount which is secured by the mortgage exclusive of interest and default charges. If an affidavit of value is not attached, the fees will be assessed on the principal sum secured.

The authority to ask for the principal sum secured is derived from the fee tariff.

How the principal sum is expressed will depend upon whether the mortgage is to secure a debt, a loan, a future liability, a contingent liability, an annuity or a rent charge.

If a definite amount cannot be stated then the maximum amount may be shown by the words "not exceeding dollars."

### (b) Foreign Currency

Caution is necessary where sums are expressed otherwise than in Canadian currency. At common law, any contract for the payment of monies could stipulate for payment in foreign currencies (see Simms v. Chernenkoff, [1922] 1 W.W.R. 967 (Sask. K.B.)). In that case the mortgagor was obliged to pay a large premium on American funds.

This led to the passage of section 39 of The Limitation of Civil Rights Act (first passed S.S. 1939, c. 93 and proclaimed April 1, 1939). Section 39 provides that notwithstanding any agreement to the contrary, all money paid under a mortgage or other agreement may be paid in Canadian money.

The section applies to all agreements executed after April 1, 1939 with respect to debts secured on land in Saskatchewan, executed wholly or in part in Saskatchewan, where the money is expressly or impliedly made payable, otherwise than in lawful money of Canada. It does not apply to:

- (1) a mortgage executed outside of Saskatchewan on Saskatchewan lands;
- (2) mortgages registered pursuant to a Master of Titles' order issued under section 61;
- (3) a mortgage executed by a company that waives the provisions of The Limitation of Civil Rights Act (this provision was added by S.S. 1959, c.35 effective March 26, 1959).

Other than above, a land mortgage tendered for registration providing for payment of the monies other than in Canadian money should be rejected. If the stipulation to pay in a foreign currency is "null, void and of no effect", then it could hardly be the intention of the Legislature to retain for the mortgagor the right to pay off the mortgage in a foreign currency in the event it was advantageous to do so, and at the same time to provide for payment in Canadian funds if that was found the advantageous thing to do. It would seem to be unfair to the foreign investor to permit registration of such a mortgage contract and leave the mortgagee to discover that by statute the mortgage monies can only be recovered in Canadian currency. However, if the mortgagee acknowledges payment will be in Canadian currency and indicates the mortgage should register, the registrar should accept the mortgage for registration.

Where the principal sum is expressed in foreign currency and is accepted for registration, it must be accompanied by a current letter of a lending institution or an affidavit by the solicitor or other knowledgeable person as to the rate of exchange. This is for the purposes of the fees.

The endorsement of the amount is to be in foreign funds eg. \$100,000 US funds.

## 10. The Charging Clause

Section 129 of The Land Titles Act states that a mortgage shall have effect as security but shall not operate as a transfer of the land thereby charged. At common law and in most jurisdictions not using the Torrens system of land registrations, a mortgage is a transfer or conveyance of the land, that is, after the mortgage is given, the land as a matter of law belongs to the mortgagee with the right of the mortgagor to have a reconveyance to himself or herself upon payment of the mortgage debt. In Saskatchewan and some other jurisdictions using the Torrens system, a mortgage is only a charge on the land and after the mortgage is given the mortgagor is still the owner of the land. British Columbia has a Torrens system which, however, differs from that in use in Saskatchewan and most other Torrens system countries in as much as a mortgage in British Columbia may be a conveyance of the legal estate.

Form Q uses the words "hereby mortgage". The words "hereby charge" convey the same meaning. Mortgages prepared by or on behalf of Eastern clients will contain the words "transfer, set over, assign all of my right, title and interest to the mortgagee". It is noted that section 129 of the Act provides that a mortgage shall have effect as security but shall not operate as a transfer of the land charged. Thus it can be argued that if words of transfer appear on a mortgage to be registered section 129 ensures that the mortgage operates as a charge only. The better view is that the mortgage is not in "Form Q or to like effect" and, to ensure that the mortgagor and mortgagee and searching parties appreciate the nature of the transaction, a mortgage not using the charging language of Form Q should be rejected.

## 11. Future or Contingent Liability

Subsection 125(3) of The Land Titles Act provides that when a mortgage is given as security against a future or contingent liability, it shall set forth by recital or otherwise the nature and extent of the liability and the conditions or contingencies upon which it is to accrue. Some discussion of this is to be found in Re Tocher (1985), 34 R.P.R. 254 (Man. Q.B.).

## 12. Address of Mortgagee

Subsection 252(1.1) of The Land Titles Act enacted by S.S. 1984-85-86, c.50 gives the registrar the authority "to refuse to register or file any instrument which does not contain a complete postal address of any person who will, after the registration or filing of the instrument, hold or claim any interest in land". The registrar is instructed to insist on the address of the mortgagee to be present in the mortgage. On an

exception basis the registrar will accept the address from the solicitor in the accompanying letter.

13. Elements to be in one Document

The registrar will not register as a mortgage an instrument which purports to have its terms in two documents. An example of this would be a first supplemental debenture with a debenture attached where terms essential to the Form Q mortgage are located in both documents. This can only be registered if it charges land within and without Saskatchewan and under the order of the Master of Titles under section 61 of The Land Titles Act. A debenture may be annexed to a mortgage, but all the essential elements must be present in the mortgage.

14. Promissory Note Referred to but not Attached

When a mortgage makes reference to a promissory note being attached the mortgage should be rejected if the promissory note is not present. Its absence goes to the completeness of the instrument. A question could subsequently be raised as to whether the land titles office has lost the note.

15. Special Clauses

(a) Mortgage Securing Revolving Credit

The following clause has appeared in mortgages accepted for registration:

AND IT IS FURTHER UNDERSTOOD AND AGREED that this charge secures a current or running account and shall stand as a continuing security to the Bank for the payment of the indebtedness and all interest, damages, costs, charges and expenses which may become due or payable to the Bank or which may be paid or incurred by the Bank upon or in respect of the indebtedness or any portion thereof notwithstanding any fluctuation or change in the amount, nature or form of the indebtedness or in the bills, notes or other obligations now or hereafter representing the same or any portion thereof or in the names of the parties to the said bills, notes or obligations or any of them.

In order for a mortgage containing such a clause to be accepted for registration it must contain a specific principal sum which is expressed to include all money intended to be loaned.

(b) Variable Interest Rate

The following is an example of a variable interest rate clause:

"Interest rate" means a variable monthly rate of interest which, for any one interest period, is equal to one-twelfth (1/12th) of the key rate in effect on the interest determination date next preceding the first day of that interest period.

The registrar does not check interest clauses or rates, but this is a common clause appearing in debenture mortgages.

#### D. Letter of Instruction

The letter of instruction may specify as to which encumbrances registration may proceed subject to. Sometimes a list of permitted encumbrances may be contained in the mortgage but is inconsistent with the accompanying letter. The letter should be followed. It reflects the most current review by the mortgagee or the solicitor for the mortgagee as to the status of the title. The registrar does not review permitted encumbrances in the mortgage.

#### E. Duplicate Copy of Mortgage

If more than one copy of the mortgage is presented, the registrar marks the additional copies as being duplicate but not examined. Registration details are provided in this manner. A fee is charged for each mortgage in addition to the first duplicate mortgage so stamped. If a copy of the certificate of title is also requested, the duplicate mortgages need not be submitted. As of July 1, 1983 a certificate of charge is no longer provided (see S.S. 1983, c.50, s.23).

#### F. Ordering of Title between a Mortgage and Writs Against Transferee

A set of facts which gives rise to this issue is as follows:

A is the owner of Black Acre which he mortgaged in 1966 for \$1,000.00 and his title was properly endorsed with a memorandum showing the mortgage. A transfers Black Acre to B in 1967. Upon registering the transfer from A to B the land titles office finds an execution was filed against the name of B in 1964.

The mortgage should be shown on the title as the first charge and the execution, although it has a prior number and was filed prior to the mortgage, must be shown second to the mortgage. It would obviously destroy the security of title if a mortgagee could lose rights under the mortgage by the mortgagor transferring the land to someone who was subject to an execution.

If A transfers his land to B and along with the transfer submits a mortgage by B of the same land for registration then executions on file against B would be shown before the mortgage since the executions attached to the land immediately upon registration of the transfer.

When writs of execution are filed both against the name of a transferor and the transferee the writs of execution against the transferor should be endorsed against the certificate of title before the writs of execution against the transferee are endorsed regardless of whether or not the writs of execution against the transferee have a lower serial number than the writs against the transferor.

The origin of this rule may be the rules which exist for determining priority among writs of execution. Although the general rule is that writs of execution share equally pro rata, there is an exception. When writs of execution are separated by an intervening mortgage, a writ of execution registered prior to the mortgage takes full priority over the mortgage in non-bankruptcy situations, and are paid out before the mortgage, then the mortgage and then the next writ of execution. On this point see In re Alva A. Riggs (In Bankruptcy) (1937-38), 19 C.B.R. 222 (Ont. S.C.). However, the practice of listing the writs against the transferor before the writs against the transferee applies whether there is an intervening mortgage or not. On this point see also Beaver Lumber Co. Ltd. v. Quebec Bank et al., [1918] 2 W.W.R. 1052 (Sask. C.A.).

#### G. Master of Titles' Orders: Section 61

Section 61 of The Land Titles Act provides:

Where an instrument in accordance with the forms in use or sufficient to pass an estate or interest in land under a system of land registration other than that created by this Act, deals with land outside Saskatchewan and also with land in Saskatchewan, the Master of Titles may, in his discretion, direct the registrar to register it under this Act against land in the instrument specifically described, and, when so registered, it shall have the same effect as to the operative parts thereof as an instrument of a like nature under this Act, and shall by implication be held to contain all such covenants as are implied in such an instrument.

This provision was enacted by The Statute Law Amendment Act, 1917, S.S. 1917, c.34. It concerns the registration of instruments covering property both inside and outside of Saskatchewan, and is used chiefly in the case of mortgages executed by companies in favour of trust companies who hold the mortgage as trustees for the bond holders, that is, the parties who bought bonds or debentures of the companies. The mortgage is security for such bonds or debentures. These bonds or mortgages usually secure large sums of money and, to distinguish them from the ordinary type of mortgage, are commonly called "bond mortgages". Prior to April 1, 1917, a mortgage of this type could not be registered at all (see Re North-West Telephone Co. Limited (1909-10), 12 W.L.R. 300, 2 Sask. L.R. 379 (S.C.)).

The Master of Titles will issue an order under this section if:

- (1) the mortgage does not contain the elements of Form Q, i.e. the charging clause contains the words transfer, set over, assign; and
- (2) the mortgage contains lands both within and without Saskatchewan.

A mortgage which contains land outside Saskatchewan but is in Form Q does not need a Master of Titles' order.

To obtain an order under section 61 the following must be submitted to the Master of Titles:

- (1) all mortgages to be registered which will be stamped with the Master's stamp;
- (2) a copy of the mortgage to be registered which will be retained by the Master's office;
- (3) a letter indicating where the fees will be paid.

The Master of Titles fee is paid to the office where the general fees are to be paid or if the fees are to be paid in each office the Master will name an office. It takes a short time to obtain an order. Section 61 may occasionally be used in the case of other instruments, eg. leases, affecting land both within and without the Province.

#### H. Change of Address by Mortgagee

Subsections 252(1) and (3) of The Land Titles Act require the mortgagee to keep the registrar informed of a current address but also make it clear that the registrar may proceed without such address. The mortgagee is sent important notices under the Act.

No form is provided for a change of address for mortgagee. Changes of address for a mortgagee may be requested by a solicitor. The change of address is assigned an instrument number for which the flat fee of \$5 per title is charged. No affidavit of execution is required. The instrument is microfilmed.

#### I. Variations in a Registered Mortgage

##### 1. Mortgage Amending Agreements

As early as 1972 the Master of Titles received a request to amend The Land Titles Act to provide for registration of mortgage amending agreements. These agreements would, among other changes, either change the due date, renew the mortgage, increase the principal sum or vary the interest rate. His Honour Judge Friesen who was at that time an employee of the

Attorney General's Department made this comment:

I always thought that once a mortgage was registered against the mortgaged lands it continued to encumber the title to the land until it was discharged or foreclosed. Also that if after the time for payment of the mortgage money and interest had expired and payment has not been made the mortgagee and mortgagor could enter into a new supplementary agreement fixing the amount owing and extending the time for payment thereof according to the terms set out in such supplementary agreement without in any way affecting the original registration.

The request has not yet been acted upon on the basis that the law continues to evolve in this area. Although the law in Alberta has developed differently (see Sterk, Alberta Conveyancing Law and Practice), in Saskatchewan the courts may take a different approach. In Sherwood Credit Union Ltd. v. Ward, Sask. Q.B., J.C. Regina, MacLean J., July 11, 1983 (unreported), the prior mortgage contained a clause entitling the mortgagee to charge interest on a renewal agreement. Before renewal, a second mortgage was registered. The first mortgage was renewed at a higher interest rate. MacLean, J. held that the first mortgagee was entitled to the interest as provided in the renewal agreement. This decision was applied in McDonald v. Royal Trust Corp. of Canada, [1988] 2 W.W.R. 377 (Alta. Q.B.) and previous Alberta authorities were distinguished or not followed.

The conclusions to be drawn from MacLean, J.'s decision are that no notice need be given on a certificate of title of a renewal of a mortgage or a change in interest. The same statement can probably be made about minor errors. This leaves the problematic question of the effect of an increase in the amount of the mortgage.

It should be noted that section 105.1 of the Manitoba Real Property Act, R.S.M. c. R30 added by S.M. 1974, c.44, provides for the registration of a "Memorandum of Agreement to Extend, or Amend Mortgage" where the period for repayment or the unpaid balance owing under the mortgage is to be extended on revised terms or to correct an error made prior to execution other than an error in the principal amount. The witnessed consent of all affected persons is required. Priority upon proper registration of the memorandum dates from the date of registration of the mortgage in respect of the balance and interest that is unpaid at the date of the agreement and that is repayable according to the revised terms.

The Manitoba section does not state what the consequence is if the parties renew or change the interest without filing the agreement. The law may actually be the same in Manitoba as reflected in the decision of MacLean, J. notwithstanding the legislative change. However, a clear consequence of the

Manitoba decision is to increase costs and fuel concerns about priority as a result of error in Manitoba mortgages.

## 2. Caveats Supported by Mortgage Amending Agreements

### (a) Form

A caveat supported by a mortgage amending agreement will be accepted for filing if the agreement is correcting errors in the mortgage, amending a term, increasing the amount, varying the interest or renewing the mortgage. The caveat must reflect a claim of interest as a mortgagee under the agreement and should state the substance of the amendment. A caveat adding land to a registered mortgage will not be accepted for registration. The effect of the filing of such a caveat is too uncertain.

### (b) Fees where Amount Increases

The caveat, supported by a mortgage amending agreement that is increasing the principal sum, should reflect the amount of the increase. Mortgage fees will be charged on the increase only as though a new mortgage were being registered for the new amount.

## J. Transfer of Mortgage

### 1. Total Transfer

A total transfer of a mortgage may be in Form U of The Land Titles Act (see section 142). Subsection 142(3) provides that transfers shall have priority according to the time of registration. This must refer to priority among transferees.

Sometimes an assignor wishes to insert additional clauses. Form U does not provide for additional covenants. In the interests of simplicity, this practice has been discouraged. Some of the clauses proposed to be included could potentially mislead a third party or cause uncertainty about the effect of the transfer of mortgage.

A transfer is limited to land in one land registration district.

### 2. Partial Transfer

Section 144 of The Land Titles Act provides for the registration of a partial transfer of mortgage in Form V "and the part so transferred shall continue to be secured by the mortgage and may by the transfer be given priority over the remaining part or be deferred or continue to rank equally with such part under the security of the original mortgage".

Subsection 144(2) directs the registrar to "enter on the certificate of title and duplicate a memorandum of the amount of the mortgage money so transferred, the name of the transferee and how such sum is to rank, and shall notify the mortgagor of the facts".

The registrar must be informed on a partial transfer of mortgage as to the proposed ranking.

#### K. Seizure of Mortgage

Subsection 11(1) of The Executions Act provides as follows:

A sheriff charged with the execution of a writ of execution against goods may seize thereunder any registered mortgage against real property or any registered security interest against personal property in favour of the execution debtor by delivering a notice in writing of the seizure to the proper officer in the office where the mortgage or security interest is registered, but no such mortgage or security interest shall be affected or charged by a writ of execution until delivery of the notice.

Subsection 11(2) provides that upon receipt of a notice of seizure, the proper office is entitled to a fee of \$.50.

Section 21 of The Executions Act provides:

If a mortgage of land, seized by the sheriff under a writ of execution against goods, is not paid or satisfied, nor the writ satisfied or withdrawn, within one year from the day on which the writ was delivered to him, the sheriff may, during the currency of the writ, sell the mortgage in the same manner as he sells lands under a writ of execution against lands, and sections 22 and 25 shall, so far as applicable and with the necessary modifications, apply to the sale.

The interest that is being seized is that of the mortgagee. The registrar may receive a notice of seizure with respect to a writ of execution which is not filed in the land titles office as the interest that is being seized is considered at law to be a personal property interest i.e. a writ of execution does not need to be filed in the land titles office to seize a personal property interest (see section 186 of The Land Titles Act for confirmation of this principle).

When notice of a seizure of a mortgage is delivered to the land titles office, the registrar enters on all affected certificates of title and duplicates thereof a memorandum of the seizure. The memorandum recites the pertinent facts of the seizure (referring to the mortgage). All further dealings with the mortgage are subject to the seizure.

After registration of the notice of seizure, the mortgagee cannot deal with the mortgage. The registrar cannot accept any instrument executed by the mortgagee in relation to that mortgage including a transfer, postponement or discharge. The sheriff stands in the place of the mortgagee with respect to the execution of such instruments. If the registrar is required to send notice of registration of a caveat or a builders' lien, the notice goes to the sheriff.

Sections 181 to 184 of The Land Titles Act provide for several mechanisms to withdraw or discharge a seizure of mortgage:

- (1) upon expiry of the writ the registrar is instructed to discharge independently (see subsection 181(2));
- (2) upon presentation of judge's order showing satisfaction or withdrawal (see subsection 181(2));
- (3) upon presentation of a sheriff's certificate showing the writ has been satisfied, lapsed, or been withdrawn (see section 182);
- (4) upon receipt of a discharge of the mortgage executed by the sheriff (see section 184).

If the writ expires or the notice of seizure is withdrawn, the mortgage still remains in effect and on the certificate of title. Only if the mortgage is discharged i.e. pursuant to section 184, is there an affect on the mortgagor's obligation under the mortgage.

Section 186 of The Land Titles Act allows the sheriff to transfer the mortgage to the execution creditor by executing and registering Form HH. Unlike a transfer of mortgage sold under process of law, this form need not be accompanied by a court order confirming the sale. Section 186 makes no reference to the procedures required by sections 185 and 187 which refer to a transfer under process of law.

## L. Discharge of Mortgage

### 1. Form

No form of discharge is prescribed (see section 137 of The Land Titles Act) but the usual form contains the following points:

- (1) a statement that the person signing the discharge is the mortgagee or the mortgagee's agent under power of attorney;
- (2) a sufficient description of the mortgage to be discharged identified as a mortgage and providing the date of the mortgage and registration number;

- (3) an acknowledgment of receipt of all payments due under the mortgage - if this is true;
- (4) a statement that the mortgage has been assigned - optional;
- (5) a declaration that the mortgage is discharged - some forms say wholly discharged but this is not strictly necessary.

Where a printed form is used which contains a reference to "and declare that the said mortgage has \_\_\_\_\_ been assigned or transferred," it is important that the word "not" be inserted in the blank.

If a discharge is received with respect to a mortgage which has been transferred, no reference to the intervening transfers need be made as long as there is no reference on the form to the fact of a transfer and the name of the party discharging the mortgage is the same as the name of the party currently holding the mortgage as shown on the certificate of title. The discharge form need not state that "the said mortgage has not been further assigned or transferred". However, most forms do make reference to the assignment and there cannot be conflicting clauses in the transfer form. Since the mortgage has been transferred the person discharging the mortgage cannot say that the mortgage has not been transferred. A reference to the fact of the intervening assignments or an explanation of the discrepancy between the certificate of title and the discharge by someone other than the mortgagee, must be made if the form states that "the said mortgage has not been further assigned or transferred".

Sometimes there will be a discrepancy in the mortgagor's name on the discharge of mortgage. As long as the mortgage is sufficiently identified minor discrepancies can be overlooked.

## 2. Discharge as to Terms

A discharge of mortgage may be registered where only the land itself is freed and discharged from the mortgage, but the covenant to pay remains. On registration of such a discharge, if the land discharged is all the land included in the mortgage so far as the land titles office is concerned the mortgage is discharged "and the mortgagee has under the mortgage left simply the covenants for payment of the balance of the mortgage debt," (see decision of Milligan, M.T. Re Land Titles Act, [1918] 2 W.W.R. 937 (Sask. M.T.)).

After setting out the details of the mortgage, such a discharge should state that the mortgage has not been assigned or transferred, that the mortgagee is entitled by law to receive

the money secured by the mortgage and by the document discharges the mortgage insofar as the land comprised therein, to wit, (here describe the land) only is concerned. As it would be very important from the standpoint of the mortgagee that there should be no ambiguity or uncertainty in connection with the discharge, some discharges have set out an additional clause as follows: "For greater certainty it is expressly declared that nothing herein contained shall in anyway release the mortgagor or those claiming through or under him of or from the payment of the moneys secured by the said mortgage". Another method might be to add after the discharge clause the following "the mortgage otherwise to remain and continue in full force and effect as to the balance of the terms and conditions". Whatever method is used it would be useful if the operative words were underlined to draw it to the attention of the registrar that this is an acceptable deviation from the normal form. It is, of course, not necessary that this exact wording be used, but it is set out so as to convey to the minds of the titles researchers of the documents the effect of the discharge.

This type of discharge is treated as a total discharge by the registrar.

### 3. Discharge as to Part

#### (a) Authority

A mortgage may be discharged with respect to "the whole or part of a mortgage, or the whole or part of the land therein comprised" either by a memorandum of discharge or a certificate signed by a judge that payment of the whole or a part of the moneys due under the mortgage has been proven (see subsection 137(1) of the Act).

The certificate need not be directed to the registrar. It will be clear from its face that it will be intended for the registrar. The judge's authority under this section is to be construed liberally. Payment includes a mortgage the enforcement of which is statute barred (see In re Tone Mortgage (1954), 11 W.W.R. (N.S.) 646 (Sask. Q.B.)).

#### (b) Discharge as to Part of the Land

Where the discharge is intended to discharge part of the land only, the part to be discharged must be clearly described by a description acceptable to the registrar. It is important that as regards this land the mortgage should be expressed to be fully discharged and not merely partially discharged.

(c) Discharge by One Mortgagee

It is possible for one of two mortgagees holding as tenants in common to discharge the interest held by the withdrawing mortgagee but the mortgage remains fully alive as to the amount and land secured in favour of the remaining mortgagee.

4. No Merger

If a person holding a mortgage on land becomes the registered owner of the land, and the mortgage at the time of transfer was still registered against the land, a registrar should not merge the mortgage, that is, the registrar should not think that because the mortgagee is now the owner of the property that the mortgage is of no further use or should be removed. Merger is always a question of intention, and there are certain ways in which this intention may be expressed. A registrar has neither the information or authority to make any decision about intention as that is a matter for the courts, and, therefore, the registrar should not in any way interfere with the registration of the mortgage (see Reeves v. Konschur [1909], 2 Sask. L.R. 125 (S.C.); Ethier v. Nolle, [1924] 1 W.W.R. 1133 at 1136 (Sask. C.A.); Isman v. Sinnott, [1919] 3 W.W.R. 719 at 724 (Sask. C.A.); Baalman Commentaries on the Torrens System of New South Wales at pages 222, 223 and 224). It is not within the jurisdiction of a registrar to hear any evidence, or decide that the mortgage should be merged even though the registered owner asks for the mortgage to be merged. If the mortgage is to be removed, it should be by discharge of mortgage signed by the mortgagee unless, of course, there is a court order directing the registrar to do otherwise.

5. No Discharge Necessary on Consolidation or Registration of a Plan

Sometimes a certificate of approval from an approving authority under The Planning and Development Act will approve a subdivision subject to the certificate of title for the portion being consolidated with the adjacent title in the name of the same owner. There may be a mortgage on both or either parts. Although the mortgagee may wish to discharge the mortgage, there is no need to do so. The registrar will show the mortgage as to an identifiable lot or parcel or as to portion.

Similarly, a plan may cover a parcel plus a portion eg. plan covers Lot 1 plus 15 metres in perpendicular width throughout of Lot 2, with a mortgage on Lot 1 only. The mortgage need not be re-registered to include the additional 15 metres but since the identifier for the land has changed, the mortgagee may wish to discharge and re-register the mortgage.

If the mortgagee does discharge and re-register to encompass the additional land, it also will eliminate any possible future problems under The Planning and Development Act, i.e. a future foreclosure could cause practical problems for the mortgagee. Subsection 15(5) of The Land Titles Fees Regulations significantly reduces the fees if the mortgagee chooses to discharge and re-register its mortgage.

#### M. Mortgage Granted by a Co-operative

Section 226 of The Co-operatives Act allows a co-operative to grant a mortgage "for payment of a securities issue and of further advances under a mortgage". Subsection 226(2) requires the Co-operative Securities Board to approve a further advance. Mortgage money of this type is raised by the sale of debentures by the co-operative to its members or to the public. The mortgage is granted to an agent, who acts for and on behalf of the debenture holders, to hold and enforce payment of the monies secured by the mortgage. The forerunner of this section was section 132 of The Co-operative Associations Act, S.S. 1960, c.74.

In endorsing registration of such a mortgage, it is important to show the mortgage as securing further advances as approved by the Co-operative Securities Board. This will alert searching parties to the special nature of this mortgage. The usual fees are charged.

Subsection 226(4) requires the approval of a further advance by the Co-operative Securities Board to be registered in the land titles office. Registration fees will be charged according to the amount of the advance.

A discharge of the mortgage will remove the mortgage and any notice of approval.

#### N. Annuity Mortgage

##### 1. Form R

Subsection 125(1) of The Land Titles Act provides that when land for which a certificate of title has been granted is intended to be made security for payment of an annuity, rent charge or sum of money other than a debt, loan, future or contingent liability, the owner shall execute a mortgage in Form R or to the like effect.

Form R requires the mortgagor to state:

- (1) "the sum of money, annuity . . .";
- (2) "the times appointed for the payment of the sum, annuity . . ."; and

- (3) "the events in which sum, annuity or rent charge shall become and cease to be payable".

There must be a promise to pay some sum or goods like grain in order to charge the land. A payment clause showing a one-third crop share will be provided each year is sufficient.

## 2. Termination

Subsection 138(1) of The Land Titles Act reads as follows:

138. (1) Upon:

(a) proof of the death of the annuitant, or of the happening of the event upon which, by the terms of a mortgage in form R, the annuity or money thereby secured ceased to be payable, and that all arrears of the annuity and interest or other money have been satisfied; or

(b) production of a judge's order declaring or directing the discharge of the mortgage;

the registrar shall make a memorandum on the certificate of title and duplicate that the mortgage is discharged.

The subsection requires proof of death or other event of discharge or a judge's order in order to remove an annuity mortgage from the title.

Often, the annuitant (who is legally the mortgagee) will execute a discharge form which is submitted for registration. This is clearly not allowed by subsection 138(1), unless the annuity mortgage specifies the "event" mentioned in the subsection to be the execution of a discharge by the annuitant.

The annuitant can execute a discharge and provide proof of the happening of the event eg. payment of specified sum, passage of time, and that "all arrears of the annuity and interest or other money have been satisfied". In such a case, it is not the discharge form which results in the registrar making the memorandum of discharge but the proof of the happening of the event.

Proof of the event of discharge may be problematic. Each case will depend on its facts. Even if an event is specified upon which the mortgage will terminate, if the registrar is concerned that the annuitant has been coerced into giving up rights, the registrar may want a letter from the annuitant's solicitor indicating that the annuitant has been advised as to his or her rights. In a case of serious doubt, the registrar may ask for a judge's order.

If no event is specified in the mortgage or the event contemplated is the death of the annuitant, the registrar cannot accept a discharge of mortgage. Only proof of the annuitant's death or a judge's order will be accepted by the registrar to discharge an annuity mortgage in these cases.

#### O. Mortgage Caveat

Caveats are dealt with in detail in chapter 22 commencing at page 185. Royal Bank v. Donsdale Dev. Ltd. (1986), 48 Alta. L.R. (2d) 289 (Q.B.) is authority for the proposition that an equitable mortgage registered by caveat is capable of being enforced as a mortgage.

Section 154.1 of The Land Titles Act requires the mortgagee to state the amount of the mortgage in the caveat or attach the mortgage to the caveat, which mortgage must show the amount, unless the fees are based on the value of the land.

In any case where the mortgage does not itself state clearly the principal sum upon which the fees are to be charged, then of course, the registrar must exercise discretion in selecting the appropriate amount upon which the fee will be charged.

#### P. Advances to Purchase Seed Grain

The Seed Grain Advances Act provides that a mortgagee may make advances of money to the owner of the mortgaged land to enable the owner to purchase seed grain. These advances become part of the money secured and have the same priority and interest rate as the mortgage. This priority is conferred without registration in a land titles office, and is a right conferred primarily on the first mortgagee (see section 5 of The Seed Grain Advances Act).

## Chapter 21. Lease and Leasehold Title

### A. Meaning

A lease is an instrument granting sole possession of land to another person for a specified period of time which is called the term and is usually at a rent which is normally a money payment or a crop share. The person granting the lease is the lessor or landlord, the person to whom the lease is granted is called the lessee or the tenant. The interest which is granted is called the leasehold estate.

### B. Types of Registrable Leases

For the purposes of The Land Titles Act, leases fall into three categories:

1. leases less than or equal to three years;
2. leases for a life or lives or for a term certain of more than three years;
3. a lease for a term certain of more than ten years.

### C. A Lease for a Term of Less Than or Equal to Three Years

Subsection 118(1) of The Land Titles Act provides that where land is intended to be leased...for a term of more than three years, the owner shall execute a lease in Form M. Similarly, clause 69(d) of the Act provides that land mentioned in any certificate of title is subject to "any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation of the land under the same".

In the case of In Re The Land Titles Act, [1921] 2 W.W.R. 841 (Sask. M.T.), the Master of Titles dealt with an appeal from a refusal of the registrar of Prince Albert to register a lease covering a certain portion of a building which lease was for a term of two years with an option to renew for two years. At page 841 Milligan, M.T. states as follows:

I cannot agree with Mr. Branion's contention that any lease even for a term of less than three years is registrable under The Land Titles Act. The only provision in the Act for the registration of a lease is contained in section 92, [our present section 118] which only concerns itself with a lease "for a life or lives or for a term of more than three years" and this is borne out by section 60 [our present section 69] of The Land Titles Act.

The argument was raised that even if this lease is held to be only a lease for two years, it is registrable because while section 118 provides for a lease for a term of more than three years to be executed in Form M and provides for its registration there is nothing in the Act stating that a lease of less than three years may not be registered. The learned Master dealt with this argument by stating that The Land Titles Act provides for the registration of instruments in certain form and to serve certain purposes. If the Act does not provide that such an instrument may be registered than it cannot be registered. The Master of Titles pointed out that a lease for a term of three years or less should not be registered because section 118 provides that upon registration of a lease of more than three years the registrar is required to retain the duplicate certificate of title and therefore can prevent the owner from dealing with his or her land. However, the Act states that such an impounding of the duplicate certificate of title shall take place only in a situation where a lease is for a term of more than three years and makes no provision for such an impounding in a situation where a lease is for a term of three years or less.

A question which is often raised is whether a caveat may be submitted for registration based on a lease for a term of less than or equal to three years. Although clause 69(d) of The Land Titles Act provides that every certificate of title is subject to "any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation of the land", the land titles offices do accept such a caveat for whatever purpose registration may serve. A tenant under a three year lease may not be in actual occupation of the land such that there can be no claim asserted by virtue of clause 69(d). If the registrar did not accept a caveat for a term less than three years, this type of right could be lost.

Osborne, J. in Barber v. Harnett (1985), 38 Sask. R. 284 (Q.B.) held that a tenant under an ordinary farm lease for a term not exceeding three years had no interest in land, sufficient to support a caveat, as contemplated by section 150 of the Act. Notwithstanding the Barber decision the land titles offices continue to accept such caveats. The Barber case may yet be distinguished on its facts. For a discussion of the Barber decision see "Can a Tenant under a Lease not exceeding Three Years file a Caveat? A Comment on Barber v. Harnett" (1985-86), 50 Sask. Law Rev. 271.

#### D. A Lease for a Life or Lives or for More Than Three Years

Subsection 118(1) of The Land Titles Act provides that when land is leased for a life or lives or for a term of more than three years, the registrar shall retain possession of the duplicate certificate of title and shall if desired, furnish, either to the lessor or lessee or to both a certificate of the registration of the lease in Form N (see subsection 118(2)). In a certificate of lease no reference to a land description is to appear.

Subsection 118(4) provides that no lease of mortgaged land shall be valid as against the mortgagee unless the mortgagee has consented in writing to the lease prior to registration or subsequently adopts the same. Since the subsection specifically allows the mortgagee to subsequently adopt the lease, the land titles office does not insist on a consent of the mortgagee being present before or at any time in relation to the lease.

Subsection 142(1) of The Land Titles Act provides that "leases of land for which a certificate of title has been granted may be transferred by a transfer executed in Form U". In this subsection, the reference to "land for which a certificate of title has been granted" is not referring to the leasehold estate but to the fee simple estate.

It is also possible to transfer a part of a lease as long as it is expressed as a fraction of the whole lease and not as a percentage. The reason for allowing registration of a transfer of a part of the lease, is that one must be able to transfer any interest in land. For an example of this type of transaction see instrument 87RO5547. To prohibit transfer of a part of a lease would appear to have been of administrative convenience only.

**E. A Lease for a Term Certain of More Than Ten Years (Creating a Leasehold Title)**

In 1966, The Land Titles Act was amended to allow an owner of any estate leased for a term certain of more than ten years to apply to the registrar for a certificate of title to be issued for the leasehold estate created by the lease. This amendment was prompted by the need to allow a land owner instead of selling property to give to a developing company a long term lease for which the developing company required the ability to register a mortgage. Before the amendment, a lease could be registered on the lessor's title but a mortgage of that lease was not possible otherwise than through the mechanism of registering a caveat. The earliest Land Titles Acts in the territories and the new province provided for the issuance of a leasehold title but this provision was repealed in Statutes of Saskatchewan, 1908-9, c. 9, s.5 (see also In re Olson Lease [1920] 1 W.W.R. 739 (Sask. M.T.)).

The application may only be made in relation to a lease for a term certain of more than ten years. However, the application may be made at any time after registration and, it has been decided, to allow the issuance of a leasehold title even if the balance of the term remaining is less than or equal to ten years if the original term was for more than ten years. There is no form for the application for leasehold title. Accordingly, the form necessary will be one which applies for a leasehold title pursuant to the subsection and is executed by the lessee or proper officer or solicitor for the lessee, identified as such. The request need not be witnessed and attested, but the request is endorsed on the title.

Subsection 119(2) of The Land Titles Act directs the registrar, upon receipt of an application for a leasehold title, to issue a certificate of title in duplicate in Form B subject to any endorsement affecting the lease which at the time of the issue of the certificate of title for the leasehold estate appears on the certificate of title of the owner of the reversion. The registrar is then required to release to the owner of the reversion, any duplicate certificate of title retained by virtue only of the registration of the lease in the first instance. Subsection 119(3) removes the registrar's authority to issue a certificate of registration of lease in respect to a lease for which a certificate of title has been issued.

As indicated, the lease may be registered either before or at the same time as the request for issue of a leasehold title. If registered before, the new certificate of title will not be issued until the request for issue of a leasehold title is registered. If registered at the same time as the request for issue of a leasehold title, a memorandum of the lease is entered on the lessor's title immediately before the request.

The certificate of title for the leasehold interest is placed in a file folder and kept with the certificate of title to the fee simple estate. The file folder for the fee simple estate is clearly marked to show that there is a leasehold title. The general rules pertaining to a certificate of title for the fee simple estate apply to a certificate of title for the leasehold estate.

Clause 9(b) of The Land Titles Fees Regulations provides that the fee payable for each certificate of title issued pursuant to a request made under section 119 of The Land Titles Act must be charged based on the value of the land according to the amounts set out in that section. Subsection 234(3) of The Land Titles Act provides that where it is necessary for the purposes of the calculation of fees to determine the value of a lease, the value "shall be either the value of the portion of the term of the lease unexpired at the date of issue of the certificate of title...or, in the event that it is not possible to determine the value of the unexpired portion of the lease, the value shall be the value of the fee simple estate plus the value of the leasehold improvements".

The calculation of the value can be difficult. From time to time, affidavits of value have been sworn for the value of the lease based on the value of the leasehold payments to the end of the term. This is perhaps the best way of expressing the value of the unexpired portion. An affidavit of value must accompany the request for a leasehold title and it must indicate the value of the leasehold interest being created. In most instances, the value will be very little different from the value of the fee simple title.

## F. Dealing with the Leasehold Title

As indicated, the application for the leasehold title is shown on the title for the fee simple estate. When a transfer or renewal of the fee simple estate is registered, the application for the leasehold title is carried forward. However, the converse is not true. If a lease or a part of a lease is transferred, the transfer is not endorsed on the title for the fee simple estate, but rather is shown on the certificate of title for the leasehold estate only. The only endorsements shown on the certificate of title for the fee simple estate, that pertain to the lease, are an endorsement for the lease and an application for a leasehold title.

It is possible for a lessee to ask for an enlargement or consolidation of the lessee's interest. For example, if the fee simple estate is expressed in terms of four lots, the lessee can have one leasehold title or four leasehold titles. Similarly, a lessee may separate ownership into undivided specified interests with separate titles being issued for separate undivided interests all expressed as a fraction of the whole.

A mortgage by the owner of the leasehold estate will describe the lessee as being registered owner of a leasehold estate for a term of \_\_\_\_\_ from the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ of record in the land titles office for the \_\_\_\_\_ Land Registration District as instrument \_\_\_\_\_. Encumbrances which are not executed by registered owners eg. caveats and tax liens, are placed against both the fee simple and the leasehold titles unless the land description indicates that only one of the two is affected.

As with a lease which is less than or equal to ten years, a lease for a term certain greater than ten years may be transferred pursuant to section 142 of The Land Titles Act. The old certificate of title for the lease is cancelled and a new certificate of title issued in the same way as with a transfer of the fee simple estate.

In the case of a plan of subdivision, the registered owner of both the leasehold and fee simple estates are required to sign the plan.

Clause 119(2)(a) of The Land Titles Act requires all endorsements affecting the lease to be carried forward onto the leasehold title. This does not necessitate the memorandum of the lease itself being carried forward onto the leasehold title.

Lease is defined by clause 2(1)(1) of The Land Titles Act to include a sublease. This means that a lessee, holding a certificate of title for the leasehold estate, may grant a lease to another party. The sublessee may apply for a certificate of title to be issued for the sublease.

The application for a sublease title must meet all of the requirements for the head lease, eg. greater than 10 years, but must not exceed the remainder of the term of the head lease. The

sublease will usually encompass the same land as the head lease but need not do so, in which case, a plan of survey will usually be required. The application for title to issue for a sublease is endorsed on the title for the head lease, only.

When registering a request for the issue of a title pursuant to section 119 of The Land Titles Act and before issuing a certificate of title for the leasehold estate, the docket must be searched, and a writ of execution registered against the name of the lessor must be entered on the title of the lessor and carried forward to the new leasehold title. See subsection 180(5) of the Act. An execution against the lessee must not be entered on the lessor's title but must be endorsed on the lessee's title when it is issued or subsequently dealt with.

The requirements of section 3 of The Homesteads Act must be met in all cases where the registered owner deals with the land by way of lease (see page 406 of this manual).

#### G. The Form for a Lease

Section 119 of The Land Titles Act states that when land for which a certificate of title has been granted is intended to be leased "the owner shall execute a lease in Form M".

The main requirements to register a lease are as follows:

- (1) the lease must be for a term certain i.e. there is no lease in perpetuity and the date and expiry date must be shown;
- (2) the lessor must state the lessor is the registered owner of the land and the name must be the same as that of the registered owner, or an affidavit of identity, identifying the lessor as being the same person as the registered owner, must be provided;
- (3) the land description must be clearly set forth;
- (4) the rent must be set out;
- (5) the lessor must sign the lease in the presence of a witness and the witness must complete an affidavit of attestation if the lease is not under the seal of a corporation;
- (6) the lessee must indicate that the lessee accepts the terms of the lease by signing it before a witness;
- (7) the duplicate certificate of title (either fee simple or leasehold depending on whether it is a lease or sub-lease being registered) is required upon presentation of the lease for registration (see section 57 of The Land Titles Act).

The statement that the lessor is the registered owner helps to identify the lessor as being the same party as the registered owner, but also, as stated in Hogg, Australian Torrens System, page 944, any statement amounting to a representation that someone is the registered owner is treated as a covenant that such person has a good title as an owner under the Land Titles System.

There is no limit to the number of years for which a lease may be granted (see Klinck v. Greer (1910), 14 W.L.R. 282 (Sask. S.C.)). It is essential to the validity of a lease that there be a certain beginning and a certain ending (see Mitchell v. Mortgage Company of Canada (1917-18), 11 Sask. L.R. 447 at 451 (C.A.)).

There is no such thing as a lease in perpetuity, since a lease in perpetuity would not have a certain end and would be void (see Hutchings v. Mosses (1951), 3 W.W.R. (N.S.) 446 (B.C.S.C.)).

The rent must be certain as well and must be set out in the lease so that the lessor and the lessee and a transferee may know or may be able to determine, by reference to the lease itself, before any payment of rent is due what the amount of that payment is to be. This is implicit in the nature of rent and the remedies of distress for forfeiture for nonpayment (see Treseder-Griffin v. Co-operative Insurance Society Ltd., [1957] 2 Q.B. 127 at 149, (C.A.)).

As long as the document displays the main requirements to register a lease, as set out above, on page 176, it must not be rejected on account of any small divergence from Form M.

It should be observed that Form M envisages that rights of way and other easements may be leased along with the land.

#### H. Lease of a Part of a Parcel

In 1983, The Planning and Development Act was amended to make it clear that a lease of a part only of a parcel is required to be accompanied by a certificate from the appropriate approving authority pursuant to section 134 of The Planning and Development Act.

#### I. Transfer of a Lease

A lease may be transferred by a transfer executed in Form U (see section 142 of The Land Titles Act). No partial transfer of lease, other than as is outlined on page 175 of this manual is contemplated by the Act.

## J. Termination of a Lease by Surrender

When a lease has expired according to its term, the registrar has no authority under the Act to remove a memorandum of lease from the fee simple title or to cancel the leasehold title. The reason for this is that the lease may contain a covenant for renewal at the option of the lessee or may have been amended to include such a term. An option can be exercised at any time after the lease expires so long as the lessee remains in possession with the sanction of the lessor (see Guardian Realty Company of Canada v. John Stark and Company (1922), 64 S.C.R. 207). One method to vacate an expired lease is to register a surrender executed by the owner of the lease accompanied by the duplicate leasehold title, if any.

Where a lease for which a certificate of title has not been issued is to be surrendered, the registrar is directed upon the production of a surrender in Form P to make a memorandum of the surrender on the certificate of title of the owner of the reversion and upon the duplicate (see subsection 124(1) of The Land Titles Act).

Where a certificate of title has been issued in respect of the leasehold estate, the registrar shall upon registration of a surrender in Form P cancel the certificate of title and duplicate thereof and enter a memorandum of the surrender on the certificate of title of the owner of the reversion and the duplicate (see subsection 124(2) of The Land Titles Act).

In either case, no lease can be surrendered without the consent of all persons appearing by the records of the land titles office to have any mortgage or lien upon, or estate, right or interest in or to, the leasehold estate created by the lease (see subsection 124(3) of The Land Titles Act).

When a leasehold title is cancelled, the registrar also cancels the encumbrances set out on the back of the title by the same registration number as the surrender, marks these encumbrances as discharged by the registration number of the surrender and files them in the discharged documents file. The Land Titles Act does not state that the effect of the consent to the surrender is to discharge the instrument for which the consent is received, but when the lease is cancelled there is nothing for the instrument to encumber. Therefore, such an instrument is deemed to be discharged.

The question has been raised as to whether or not the instrument of surrender is actually registered on the certificate of title for the lease in that there is no registration of the lease on that title. If no instrument is being discharged by the surrender, it is appropriate to simply endorse the surrender on the certificate of title for the fee simple estate opposite the memorandum of the lease and the request for a leasehold title and stamp the certificate of title for the leasehold estate as being cancelled by the instrument number of the surrender.

The name of the person to whom the surrender is made must be the same as the person entitled to the reversion i.e. the registered owner at the time of the registration of the surrender.

The surrender may be registered at any time even though the full term of the lease has not expired. If the lease is a valuable one, the registered owner may be paying a substantial sum as consideration for the surrender. At one time the question was raised as to whether or not a surrender could be registered after the lease had expired in that the lessee would have no authority to execute the surrender. However, that view has been discounted. To hold that a lessee had nothing to surrender after the expiry of the lease would render meaningless subsection 124(4) of The Land Titles Act which provides that when the memorandum of surrender has been made the estate or interest of the lessee vests in the lessor or other person entitled to the land. In any event, a surrender executed by the present registered owner of the lease effectively operates by way of estoppel to bar any future action under the lease or under any further term therein provided. A surrender of the lease, no matter when executed, is therefore registrable and vacates the registered lease.

#### K. Termination by Lawful Re-entry by a Legal Proceeding

Subsection 122(1) of The Land Titles Act provides that upon proof to the registrar's satisfaction of lawful re-entry and recovery of possession of leased land by a lessor or his or her transferee, by a legal proceeding, the registrar shall make a memorandum of the same upon the certificate of title of the lessor or the transferee and upon the duplicate when presented to the registrar for the purpose. The estate of the lessee in the land thereupon determines without releasing the lessee from liability in respect to the breach of any covenant previously committed. The subsection goes on to direct the registrar, where a certificate of title has been issued in respect of the leasehold estate, to also cancel such certificate of title and duplicate.

The registrar can only act when the rights of the parties have been determined by an action or legal proceeding in court. In Re Tucker and Armour (1906), 4 W.L.R. 394 (N.W.T.S.C.), Armour leased certain property to Tucker. Tucker's rent was in arrears. Armour entered upon and took possession of the land. Armour applied to the registrar to cancel the registered memorandum on the title. The registrar accepted Armour's application. Tucker appealed the registrar's decision to the Supreme Court of the Northwest Territories who referred the matter to the full court of the Northwest Territories. The Appeal Court decided the registrar was in error in cancelling the lease. When the lessor simply entered the premises and took possession consequent upon the default of the payment of rent it was not, legally speaking, "a legal proceeding". In delivering the judgment of the full court, Harvey J. stated he had no doubt the section intended to give the registrar authority to

cancel a lease only when the rights of the parties are determined by an action being commenced or other legal proceeding. The decision in Tucker v. Armour was approved in Gulutzan v. McColl-Frontenac Oil Co. Ltd. (1961), 35 W.W.R. 337 at 366 (Sask. C.A.).

The most common form of legal proceeding for which the registrar may entertain an application pursuant to subsection 122(1) of The Land Titles Act is where a writ of possession has been issued pursuant to an order of the court under The Landlord and Tenant Act. Upon presentation of the order, the registrar may ask for an affidavit of the lessor to the effect the tenant is no longer in possession.

#### L. Termination of Lease by Notice to Lapse

In 1978, The Land Titles Act was amended to provide a notice to lapse procedure to remove a lease from a certificate of title.

Subsection 124.2(1) of the Act gives a lessor the authority to require the registrar to notify the lessee in Form MM that the memorandum of the lease shall lapse at the expiration of thirty days from the mailing of the notice, by registered mail, to the address shown in the lease or in any change of address, unless, in the meantime, the lessee files with the registrar a notice in Form NN indicating the lessee still has an interest in the land. The procedure used is the same as with respect to the lapsing of a caveat or a builders' lien. Provisions exist in subsection 124.2 dealing with mentally disordered persons, the registrar's authority in the event that the lessee is dead and has no legal representative or where the lessee is a corporation that has been struck off the register of corporations. Subsection 124.2(7) directs the registrar to mail copies of the notices for information only to all persons who appear from the certificate of title to the land described in the lease to have an interest in that land. Form MM is endorsed on both the title to the fee simple and leasehold estates to provide notice to all persons dealing with either title.

Subsection 124.2(3) provides that the lease shall determine upon the expiration of the thirty day period if the Form NN is not registered by the lessee. The registrar marks the lease as lapsed. If a certificate of title for the lease has been registered, it is also cancelled.

If Form NN is registered, no further Form MM can be requested. This rule is not specified in The Land Titles Act, but it is consistent with practice with respect to builders' liens and caveats. It also would be irregular to allow a lessor to use the procedure once the lessee claims the lease still exists. If the lessor wishes the lease to be removed from the certificate of title, a surrender will have to be obtained from the lessee or a court order will have to be sought.

The intention behind this amendment is to provide for the situation where land is encumbered by a memorandum of lease which was registered many years ago, its term has expired, the lessee is not in possession and is not available to give a proper surrender. However, the subsection is not limited by this fact situation. The Land Titles Amendment Act S.S. 1988, c. 28, which came into force June 21, 1988, adds subsection 124.2(1.1) which ensures that a request to lapse a lease may not be registered if a mortgage is registered, either directly, or, by means of a caveat.

#### M. Termination of Lease by Order of the Court

Clause 87(b) of The Land Titles Act gives a judge of the Court of Queen's Bench the authority to direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument or any memorandum or entry relating thereto in such manner as the judge deems necessary or proper.

Thus the court has the authority to make an order directing the registrar to cancel a lease and/or leasehold certificate of title. It is unlikely the court will exercise this authority, except in exceptional circumstances, given the amendment in 1978 providing for a notice to lapse to issue.

#### N. No Termination of Lease by Merger

If there is a lease registered against a title and the lessee later becomes the registered owner of the land, the registrar should not merge the lease by dropping it or leaving it off the lessee's title obtained on registration of a transfer. Merger is a question of intention and in Ethier v. Nolle, [1924] 1 W.W.R. 1133 at 1136 (Sask. C.A.) the following quotation was taken from an English case:

The principle applicable to the merger of charges in equity applies also to the merger of leases. The court is guided by the intention; and, in the absence of express intention, either in the instrument or by parole, the court looks to the benefit of the person in whom the two estate become vested.

Obviously, the registrar has no authority to delve into the question of intention, or to come to any judicial decision as to whether or not there has been a merger of the fee simple and leasehold estates.

#### O. Oil and Gas Lease is Not a Lease Under the Act

It is settled by the judgment of the Supreme Court of Canada, Berkheiser v. Berkheiser, [1957] S.C.R. 387 that an instrument in the terms of what is usually called a 'Petroleum and Natural Gas Lease' is neither a lease nor a contract for the sale of property but that it is what is known in law as a profit a prendre. See Re Thomas Estate (1958), 24 W.W.R. (N.S.) 125 (Sask. C.A.). It might

be stated that a profit a prendre is a right to enter upon the land of another and take some profit of the soil, such as minerals or oil. A profit a prendre has some of the characteristics of an easement, but whereas an easement is merely a right to use the land, a profit a prendre goes further and permits the party to take away something such as minerals or oil. A profit a prendre is an interest in land. It cannot be registered as it is not one of the instruments for which registration is provided by the Act, but it may be protected by a caveat (see McCull-Fontenac Oil Company Limited v. Hamilton (1952), 5 W.W.R. (N.S.) 1 at 6 (Alta. S.C.A.D.)).

#### P. Lease of Part of a Building

The question of registration of a lease of a particular area in a building was considered by Milligan, M.T. in In re Northern Crown Bank, [1918] 1 W.W.R. 421 (Sask. M.T.), as follows:

The first question asked by the registrar is whether he can register a lease of a special area, such as basement, ground floor, second or third story, garret or attic and my answer is that he can, if such special area is sufficiently defined in the lease as part of the land of the lessor, but as the registrar has no means of determining whether the building referred to, a portion of which is sought to be leased, is actually on the land of which he has a description, I think there should always be a certificate from a Saskatchewan surveyor that the premises to be demised are actually a part of a lot. With this condition, I see nothing in The Land Titles Act to prevent a lease for any part of the land owned by the lessor being registered, and in the lease the area to be leased should be described as part of the land, whether it is the basement or a room in the top story. For example, I see nothing to prevent a lease of a room on the third floor of a ten story building being registered, but it should be described as that part of lot No \_\_\_\_\_ in block No \_\_\_\_\_ in the town of \_\_\_\_\_, according to registered plan No \_\_\_\_\_ known as room 310 in the third story of the building erected on said lot.

With the 1966 amendments to The Land Titles Act allowing a leasehold title to be raised for leases in excess of ten years, the instructions have been to require a plan of survey in all cases where a part of a building is involved. There have been few leases of parts of buildings registered in Saskatchewan. However, a good example is contained in the Saskatoon Midtown Plaza.

Although Milligan, M.T. does not refer to the case of Iredale v. Loudon, [1908] S.C.R. 313, this case came to the same conclusion as to the common law position of the possible ownership of a part of a building. There are many English and Australian cases holding the same way. Some of these are gathered together in Re Lehrer and The Real Property Act, [1961] S.R. (N.S.W.) 365 and Thom's Torrens System (2nd ed.) at pages 115 to 125.

In 1968, Saskatchewan passed The Condominium Property Act. This Act deals only with the division of buildings (ss. 3(1), 7(1)(d), 8(1)(a)). It does not allow for "bare ground" condominiums. This is to be contrasted with the position in British Columbia which expressly provides for bare land strata plans (see The Condominium Property Act, R.S.B.C. 1979, c.61, s. 4(a)). The advantages of a condominium over a lease of a part of a building is that the Act itself provides the necessary easements with respect to access and egress.

#### Q. A Lease in a Shopping Centre

At one time, it was possible in the practice in the land titles offices to register a lease of a shopping centre retail outlet directly. However, with the changes in 1966, it is now necessary to either file a caveat supported by a lease or file a plan of survey.

Some question has been raised as to whether or not planning approval is required with respect to a lease of a part only of a shopping centre complex. If a plan of survey is prepared for the purposes of the lease, planning approval will be required. However, if the lease merely supports a caveat which is registered against the whole of the parcel, no planning approval is required.

The easements of access, parking, etc. contained in a lease of a shopping centre retail outlet are part of the leased premises and will disappear on surrender of the lease. An easement of this type is not to be dealt with in the same way as an easement with respect to the fee simple estate but is dealt with as part of the lease.

#### R. Checklist for a Lease

Every lease, to be registered in a land titles office, must be in Form M and provide the following:

- (1) a letter of instruction that the registrar can comply with i.e. if a writ of execution will attach, the proper affidavit must be provided;
- (2) a statement that the lessor is the registered owner of the land (an affidavit of identity can cover discrepancies in the name);
- (3) a land description that is the same as on the certificate of title, but the lessor may lease a parcel of land as shown on a plan filed under section 103 of The Land Titles Act;
- (4) subdivision approval if the lease is for a part only of a parcel of land;
- (5) the term of lease with a certain beginning and ending and which is more than three years;

- (6) the amount of the rental;
- (7) a statement that the lessee accepts the lease;
- (8) the date of execution;
- (9) proper execution and attestation by the registered owner (if execution is pursuant to a power of attorney, the power of attorney document must be on file);
- (10) compliance with The Homesteads Act for all male lessors;
- (11) the duplicate certificate (this will be impounded as with a mortgage unless there is an application for a leasehold title).

If an application for a leasehold title is made, the following should be noted:

- (1) the term of the lease must be for more than 10 years;
- (2) there is no special form for the application but it must be signed by the lessee or proper officer or solicitor for the lessee, and no proof of attestation is required;
- (3) an affidavit of value is required (see subsection 234(3) of The Land Titles Act);
- (4) the application for the leasehold title may be made at any time;
- (5) granting of the leasehold title releases the duplicate of the fee simple title if it is not mortgaged.

#### S. Requirements for a Surrender of Lease

A surrender of a lease must be in Form P and provide the following:

- (1) execution and attestation by the lessee;
- (2) the consent of all persons who have a mortgage, lien, estate, right or interest in the leasehold estate created by the lease;
- (3) proper attestation for each consent.

## Chapter 22. Caveats

### A. Meaning and Purpose

The Land Titles Act sets out the type of documents that may be registered in a land titles office. There are other kinds of documents, which refer to or deal with lands in which parties may acquire an interest, but which cannot be registered. In Re International Harvester Co. of America and Ebbing (1909), 11 W.L.R. 29 (Sask. S.C.), Prendergast, J. states in part at page 32, "Certain documents, although valid in the sense of securing substantial interests in land, cannot be registered simply on account of their not being in compliance with the forms prescribed by the Act. These are properly the subject of a caveat".

Caveats are registered by parties who have acquired some interest in land under some document that cannot be registered, or parties who claim that they have acquired an interest in land, but in connection with whose claim there may be some dispute which will have to be resolved by the Court.

The word 'caveat' comes from the Latin verb 'caveo' meaning to beware, to be on one's guard. Any person, therefore, searching a title and finding a caveat registered against the title should be on guard before purchasing, to the extent that he or her should find out all about the caveat, what claim is made and so forth, before completing the purchase. A reading of the form of caveat (Form AA) shows that the caveator forbids the registration of any transfer or other instrument affecting the land or the granting of a certificate of title thereto except subject to the caveator's claim. A caveat does not prevent the registration of any instrument, but it makes a subsequent instrument subject to the claim of the caveator, providing, of course, that the caveator can substantiate the claim if called upon to do so.

In T. M. Ball Lumber Company Limited v. Zirtz (1961), 34 W.W.R. 625 (S.C.C.), the Supreme Court of Canada reaffirmed the dicta in Alexander v. McKillop and Benjafield (1912), 1 W.W.R. 871 (S.C.C.). At page 634 in the T. M. Ball case Martland J. quotes with approval the statement of Duff J. in the Alexander case which reads:

The fundamental principle of the system of conveyancing, established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions inter partes. The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the courts in respect of such rights and, furthermore, makes provision - by the machinery of the caveat - for protecting such rights without resort to the courts. This machinery, however, was designed for the protection of rights and not for the creation of rights. A

caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits.

In Canadian Pacific Railway Company v. District Registrar of Dauphin Land Titles Office (1956), 18 W.W.R. 241 at 244 (Man. Q.B.), it is stated:

It is trite law that caveats are to be used for the protection of alleged as well as of proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any.

No longer can it be maintained that the caveat procedure is not open even where the claim raised is in the nature of an instrument which in itself could be registered under the Act. In Rystephaniuk v. Prosken (1951), 3 W.W.R. (N.S.) 76 (Man. K.B.), it was held that an easement over the servient tenement could be registered by way of caveat. In Imperial Elevator Company v. Olive (1914), 6 W.W.R. 1562 (Sask. S.C.), and in other later cases, it has been held that an unregistered mortgage can be protected by way of caveat. It may be that the holder of a registrable mortgage would be ill-advised to register a mortgage by way of caveat, but that is not a point for a registrar to decide. The caveat ought to be registered and leave the effect of the caveat for the courts to determine.

#### B. Effect of Registration of a Caveat

Registration of a caveat does not change the relationship between the registered owner and the caveator. The caveat does not give rights. However, as between the caveator and third parties, registration preserves priorities. As against unregistered interests created prior in time, it now appears clear that registration of a caveat will give priority (see Re Royal Bank of Canada and La Banque d'Hochelaga; Muller v. Schwalke (1914), 7 W.W.R. 817 (Alta. S.C.A.D.)). Some concerns still remain as a result of Alexander v. McKillop and Benjafield, [1912] 1 W.W.R. 871 (S.C.C.) but it is submitted that the law and practice is as stated by the Royal Bank, case. To further remove doubt as to the rules which govern priority of caveats and unregistered and other interests, the definition of instrument in The Land Titles Act was amended to include a caveat and is deemed to have always included a caveat (see S.S. 1986, c.9, which effectively overrules Paulette v. The Queen, [1971] 1 W.W.R. 321 (S.C.C.)). See also Purich "The Caveat: An uncertain Instrument in an Exact System" (1982-83) 47 Sask. L. Rev. 353).

#### C. Form AA

##### 1. Compliance with Form

The form of caveat is set out as Form AA in the schedule to The Land Titles Act.

In Alexander v. McKillop and Benjafield (supra) at 879 it is stated:

If a caveat enables the registrar to identify the land in respect of which it is lodged and if the interest claimed is stated with reasonable certainty, he properly receives it and, when duly lodged, it has the effect contemplated by the statute although in some particular it should not be in strict compliance with the prescribed form.

However, other provinces prescribe forms of caveat which involve some substantial departure from the Saskatchewan form and these should not be accepted.

Section 154 of The Land Titles Act requires each caveat to have an address for service within Saskatchewan. If the address on a caveat is a Saskatchewan address, it is not necessary to set out a separate address for service. Form AA only requires an address in Saskatchewan.

In 1969, Truscott, M. T. authorized the registration of caveats which give, as an address for service, a box number. The purpose was to avoid the problem where a firm has changed its address rendering the address for service on a caveat incorrect. If a caveator gives both a street address and a box number both are shown on the title and used on any notice to lapse, even though this may be confusing if the street address is subsequently changed. The registrar follows the instructions of the caveator.

A caveat claiming an interest under two different agreements is not acceptable for registration. Two caveats would have to be registered. This does not prevent the registration of a caveat for one agreement which encompasses more than one interest.

This question is not to be confused with those types of cases where there are many different claims arising out of the same agreement or where a series of agreements are referred to as ultimately giving the caveator the right to claim his or her one interest, i.e. caveats based on oil and gas interests where the same interest is referred to but it comes to the caveator via a number of assignments. These types of caveats would be acceptable for registration.

## 2. Caveat must Claim an Interest in Land

### (a) General Principles

In Re The Land Titles Act; The Holland Canada Mortgage Company, Limited's Case, [1918] 3 W.W.R. 345 (Sask. M.T.), Milligan, M.T. stated:

....and the form of a caveat shows that the matter of the estate or interest claimed and the grounds upon which such claim is founded must be stated in the caveat. While it is true, therefore, that a registrar is justified in refusing to file a caveat, which on its face shows that the caveator can have no interest in this land, I think his duty goes no further than this, and, if the claim of the caveator to an interest in the land is prima facie good, the caveat should be registered. In other words, the registrar is not called upon to determine the claim but merely to determine whether under the facts stated in the caveat there is possibly an interest in the land accrued to the caveator.

The registrar is not to place himself or herself in the position of judging whether the claim made is good or bad, but only whether it raises a prima facie interest in land. Niceties of description are not a reason for rejection of caveats and the descriptions set forth in the caveat do not require the same preciseness as in a transfer, mortgage or lease of land.

On the other hand, caveats are tendered for registration where the claims made therein do not raise an interest in land at all. A claim for a debt is not in itself an interest in land. If the caveator claimed he or she had loaned John Doe, the registered owner, \$1,000.00, that would not raise an interest in land. However, if the caveator claimed he or she loaned John Doe, the registered owner, \$1,000.00 under an agreement that the loan would be secured by a mortgage on the land, then prima facie, the claim for a debt is changed into a claim on the land. The claim may be good or bad, but that is for the courts to determine and not a question for the registrar.

It is these two principles that govern the registrar:

- (1) it is not for the registrar to determine whether the claim is good because the registrar, without all the facts may, by rejecting, cause someone to lose his or her claim;
- (2) the registrar must determine whether there is a prima facie interest in land, and any reasonable doubt is to be resolved in favour of the caveator.

(b) Acceptable Interests for Caveats

The following is a list of interests in land:

- (1) as equitable mortgagee pursuant to an unregistered mortgage or debenture (mortgage fees to be charged);

- (2) equitable mortgagee pursuant to a hypothecation agreement or lodgement of duplicate certificate of title (mortgage fees to be charged);
- (3) charge for real estate commission pursuant to a listing agreement that expressly charges land and a copy of which is attached;

A mere claim for commission on the sale of land is not an interest in land sufficient to support a caveat (see Lewis F. Button Limited v. Fuglerud, [1941] 3 W.W.R. 812 (Sask. Dist. Ct.)). However, if the vendor agrees to charge the land with the payment of the commission, this is the same as an unregistered mortgage (see Osborne Bros. Land & Property Ltd. v. Hamid et al. (1982), 23 R.P.R. 149 (Alta. Q.B.M.C.) (appeal to Alta. Q.B. dismissed)). Mortgage fees will be charged which means the caveat must show an amount.

- (4) as mortgagee for security under section 177 of the Bank Act R.S.C. 1985, c.B-1 (mortgage fees to be charged);
- (5) as equitable mortgagee pursuant to a mortgage of a mortgage - The Land Titles Fees Regulations do not require mortgage fees to be paid in this instance;
- (6) as purchaser under an agreement for sale, or as an assignee of the purchaser;
- (7) as vendor under an agreement for sale claiming an unpaid vendor's lien (no mortgage fees to be paid);
- (8) as beneficial owner under an agreement of sale;
- (9) as beneficial owner or beneficiary pursuant to a will, settlement trust or trust deed;

Since the repeal of The Succession Duty Act effective December 31, 1976, there is no need to show whether a caveat has been filed as "Beneficiary under a Trust". Prior to the repeal of that Act, the consent of the Minister of National Revenue had to accompany a transfer where the certificate of title was endorsed with a memorandum of a caveat by a deceased person claiming an interest as beneficial owner under a trust. Since December 31, 1976 this is no longer required.

The rule provided by subsection 73(1) of The Land Titles Act again applies to preclude any entry of any notice of a trust.

- (10) as executor or administrator of a deceased person having an interest in the will (letters will have to be filed at the time of withdrawal);
- (11) as holder of a right to purchase the property pursuant to an option to purchase;
- (12) as holder of an accepted offer under a right of first refusal;

In Powers v. Walter, [1981] 5 W.W.R. 169 (Sask. C.A.) the court considered a lease which gave a right of first refusal in the event that the lessor received an acceptable offer to purchase the land. Woods, J. A. (Brownridge J. A. concurring) states at page 173:

It is clear that the right of first refusal is contractual only and does not by itself create an interest in land. However, when an offer to purchase is made, if it is within the contract or, in this case, one which the grantor of the option was prepared to accept, then an option arises, in this case a 30 day one. This option to purchase then becomes an equitable interest in the land. Such a right is capable of being protected by caveat.

This seems to say that until the event i.e. acceptable offer, the right is not caveatable. At page 182, Bayda, J. A. (as he then was) says that the holder of a convertible right i.e. the holder of a contractual right that is capable of being converted into an interest in land, is a "person claiming to be interested in land" within the meaning of section 150 of The Land Titles Act.

Since Powers, the Saskatchewan Court of Appeal has considered this issue again in Kopec v. Pyret et al., [1987] 3 W.W.R. 449. Vancise, J. A. speaking for the court states conclusively at page 457 "the right of first refusal is at its inception a personal right which does not create an interest in land and cannot be protected by caveat by reason of the operation of s. 150 of The Land Titles Act". In this case the caveator's right of first refusal was converted into an interest in land which was caveated by claiming an option to purchase. The court found this to be acceptable.

The case of Elfenbaum v. Elfenbaum, [1984] 3 W.W.R. 413 (Sask. Q.B.) also holds that a right of first refusal, simpliciter, is not caveatable.

Notwithstanding the above authorities the registrar will not know whether a right of first refusal has been converted to an option to purchase. This is a good example of where the registrar accepts a caveat on the basis that it may be a good claim and the benefit of the doubt is given to the caveator.

- (13) as lessee under an unregistered lease regardless of length i.e. could be three years or less;

In Barber v. Harnett (1985), 38 Sask. R. 284 (Q.B.) Osborne, J. held that a lease for a term not exceeding three years is not caveatable. However, this case may yet be distinguished on its facts. The registrar continues to accept caveats based on unregistered leases regardless of length.

The registrar does not insist on knowing the term of a lease which supports a caveat.

- (14) as assignee or transferee of a lease or mortgage (see T.D. Bank v. Block Bros. Construction Ltd. (1980), 118 D.L.R. (3d) 311 (Alta. Q.B.) which supports this principle);
- (15) as holder of the dominant tenement under an easement agreement - must describe the land to be benefitted in order to know who can withdraw the interest;
- (16) as holder of rights granted under a utility right of way, party wall agreement or restrictive covenant;
- (17) as assignee or transferee of a registered interest;
- (18) as holder of rights granted under an amending agreement in respect of a registered or caveated interest (see also chapter 22 at page 162);
- (19) as holder of rights granted in a postponement agreement;
- (20) as holder under a profit a prendre e.g. the right to take soil, gravel, timber, etc. from the land (see Siewert v. Seward, [1975] 3 W.W.R. 584 (Alta. C.A.));

The case of Berkheiser v. Berkheiser, [1957] S.C.R. 387, settled that a petroleum and natural gas lease is a profit a prendre and not a lease or contract for the sale of land. Such an interest is caveatable (see Can. Superior Oil of Calif. Ltd. v. Cugnet (1954), 12 W.W.R. 174 (Sask. Q.B.)). An assignee is entitled to rely on the priority secured by the assignor's caveat

(see Gas Exploration Co. of Alta. Ltd. v. Cugnet (1954), 12 W.W.R. 177 (Sask. Q.B.)).

- (21) as judgment creditor under a writ of execution against lands in excess of \$100, a copy of which is attached or writ in general record (see T.D. Bank v. J. A. Poppleton & Sons Farms Ltd., [1982] 3 W.W.R. 477 (Sask. Q.B.));
- (22) as solicitor holding a lien pursuant to an order of the court where the solicitor has been instrumental in recovering property for his or her client (see Bloomaert v. Dunlop, [1930] 1 W.W.R. 270 (Sask. C.A.) applied in Wellman v. Jerome (1967), 63 D.L.R. (2d) 530 (Sask. Q.B.));
- (23) as holder of a special lien created by section 36 of The Mineral Taxation Act;
- (24) as an association under section 37 of The Water Users Act for a sum owing by a member;
- (25) as the grantee of a right granted by an owner of the land, described in the Third Schedule to The Land Titles Act, to sever and remove fixtures from the described land or use fixtures attached to the described land;

At common law, this right may be considered a license only, and would not be an interest in land. To remove any doubt and to accommodate financing for the heavy oil upgrader operated near Regina, The Land Titles Amendment Act, 1987, S.S. 1986-87-88, c.11 declared this right to be an interest in the land described in the Third Schedule. Subsection 244.1(6) makes it clear that the general law of real property is not affected by this change. A caveat claiming this interest would not normally be acceptable for registration.

- (26) as a purchaser under an offer to purchase which has been accepted and is unconditional.

Caveats by a registered owner against the registered owner's land are allowed in certain circumstances:

- (1) as an unpaid vendor;
- (2) as an owner who has signed a transfer under some mistake;

- (3) as grantor of a restrictive covenant (including a building or use restriction) or easement in relation to one parcel of land owned by the grantor for the benefit of another parcel also owned by the grantor (see subsection 93(3) of The Land Titles Act).

This list is not intended to be exhaustive. Other common law liens or interests in land may exist. Other special statutory interests are also discussed further in this chapter and elsewhere in this manual.

(c) Unacceptable Interests for Caveats

The following list represents some interests or claims which are not caveatable:

- (1) for a personal debt or promissory note;
- (2) for a builders' lien - no lien exists unless The Builders' Lien Act is complied with;
- (3) as mortgagee of a fixture - no registrable interest exists unless The Personal Property Security Act is complied with;
- (4) for a solicitor's lien unless the land is mortgaged or charged by an agreement (see Re Registration of a Caveat (1915), 8 W.W.R. 866 (Sask. M.T.)) where Milligan, M. T. held that a solicitor's lien for professional services rendered and disbursements incurred in foreclosing a mortgage was not an interest in land on which a caveat could be based;
- (5) based on an interest in chattels (see section 151 of The Land Titles Act);
- (6) as guarantor of a mortgage (unless the guarantor has paid the mortgage debt) (see Badger v. Megson (1981), 17 R.P.R. 206 (Alta. Q.B.M.C.));
- (7) as a purchaser under an offer to purchase unless the caveat states that the offer has been accepted and is unconditional;
- (8) for a charge for unpaid condominium fees, unless an agreement to create a mortgage to secure the unpaid fees is filed with the caveat;
- (9) based on zoning by-laws unless the municipality can bring itself within section 197 of The Planning and Development Act;

Some municipalities try to file caveats as "enforcing authority" under certain zoning by-laws. This is not an interest in land.

- (10) based on an order of demolition under subsection 124(3) of The Urban Municipality Act;

At one time an amendment was considered to allow for the registration of a caveat based on a demolition order, but it was thought that the better method was to amend section 124 to require the municipality to give notice to "all persons who appear by the records of the Land Titles Office" to have an interest in land.

- (11) under a caveat based on the same grounds and against the same land as a caveat already registered and lapsed (see subsection 162(2) of The Land Titles Act);

- (12) based on a letter of comfort unless the interest of a mortgagee is claimed and mortgage fees are paid.

(d) Nature and Grounds

The form of the caveat, in Form AA as set forth in the Act, gives instructions to the caveator as follows:

Here state with particulars the nature of the estate or interest claimed and grounds upon which such claim is founded.

This requires two parts to be completed. It is not sufficient to simply say "as grantee under an agreement dated, etc." The registrar must know the nature of the interest if for no other reason than to determine whether it is the kind of caveat for which a notice to lapse may be accepted. The registrar may exercise some discretion if it were obvious from either statement what the nature or the grounds were i.e. as purchaser under an agreement, etc.

These are not altogether idle words in the form so prescribed. The way in which the interest is expressed in the caveat may be very important to the parties. In Ruptach v. Zawich, [1956] S.C.R. 347, the caveator did not fully set out in the caveat the nature of the interest, and he was held to have lost priority in respect of that portion of the interest which he had failed to claim. Similarly in Powers v. Walter, [1981] 5 W.W.R. 169 (Sask. C.A.) the agreement between the parties was a lease with a right of first refusal. The caveat only reflected the interest as lessee. The court held that this was insufficient as against a purchaser of the land.

It seems only reasonable that the caveator should state the claim with some degree of certainty. On the other hand, it is not necessary that the claim be couched in legal language, and a registrar must pursue a middle course between being too strict, and not caring at all, as to how the claim is stated. A caveat claiming an interest such as "purchaser", "lessee" or "optionee" without more particulars should be rejected. Such a claim indicates the nature of the claim but gives no particulars of the grounds on which the claim is made. Anyone dealing with the land is entitled to know from the caveat itself just what the claim is and how it arose. But again, if the registrar is too strict and rejects the caveat, then the caveator may lose the interest in land claimed by the registration of another instrument.

The late D.J. Thom, Q.C. in The Canadian Torrens System (1st Edition) p. 372 states in regard to the nature of the estate claimed, that it is not necessary for the caveator to give the technical name in legal language, that is, the caveator need not say that the caveator is claiming an estate in fee simple or an equitable interest or some such expression. Thom quotes from an unreported decision of Mr. Justice Newlands (Re Ranney Caveat) as follows:

Now the caveator has not stated that he claims an estate in fee simple, or an equitable interest, or any other particular estate or interest, but he does say that he claims as purchaser under an agreement of sale made between himself and George Sterrett, giving the date of same, the description of the lands and the consideration. This, it seems to me, complies with the provisions of the Act, as it shows both the nature of the interest and the ground upon which it is founded.

If a purchaser under an agreement for sale stated somewhat as follows: "under an agreement of sale dated the day of \_\_\_\_\_ 19\_\_\_\_\_ and made between A.B. as vendor and myself as purchaser in (here describe land)", this, or words to the same effect, would meet the requirements of the Act.

A caveat may be founded on a verbal or oral agreement (see McDougall v. MacKay (1922), 64 S.C.R. 1). At page 4, Duff J. said that while the agreement with which he was dealing was an oral one it was long ago established that the effect of the Statute of Frauds was only to prescribe the kind of evidence required for proving a contract for the sale of land and not to lay down a statutory condition of the valid constitution of such a contract. Therefore, if a caveat is based on a verbal or oral agreement it should be accepted, if, of course, like all other caveats, it is otherwise in

order. Whether the caveator can maintain the claim is a matter for the courts.

A caveat which refers to "a form of lease and grant attached hereto and forming part hereof and marked Schedule "A" to this caveat" which form contains blanks is registrable as long as the nature and grounds are otherwise complete.

### 3. The Land Description

#### (a) General

Accuracy in the description of land is extremely important (see Martin v. Morden (1894), 9 Man. R. 565 (Man. Q.B.)).

Two issues arise, most frequently, with respect to legal descriptions for caveats:

- (1) can roadways be omitted from the legal description on a caveat?; and
- (2) can the mines and minerals disposition present on the certificate of title be omitted from a caveat?

As a general rule a caveat which does not contain a reference to a roadways exception can be accepted for registration, especially if reference is made to the certificate of title number. In this regard caveats and builders' liens are alike. In mineral producing areas, reference to the roadway should be omitted in a caveat which claims an interest in mines and minerals.

With respect to the second question, two possible situations are:

- (1) minerals in the Crown, caveat is silent as to the mines and minerals;
- (2) minerals in another title, caveat is silent as to mines and minerals.

In the first situation the interest of the Crown would not likely be affected by the caveat and therefore it could be accepted for registration.

For the second situation it could be the intention of the caveator to charge the minerals and, if the registrar does not act on the request, the registrar could cause loss or damage. Therefore, this type of caveat should be rejected for clarification.

As a practical matter, in urban areas, minerals may be of little value. But again, this is not true in all areas, and therefore, the registrar has discretion to reject.

The most important point is that rejection appears far less serious than the potential liability of charging the wrong title or failing to charge a title which the caveator intended to charge.

(b) Against Unpatented Land

In Re International Harvester Co. of America and Ebbing (1909), 11 W.L.R. 29 (Sask. S.C.), it was held that a mortgage caveat could not be registered against unpatented land. This prohibition was changed by the enactment of what is now subsection 155(2) of The Land Titles Act which provides as follows:

155(2) A caveat may be filed against land for which no transfer or grant from the Crown has issued, and in such case the registrar shall, on receipt of the caveat, enter the same in the instrument register, and endorse upon the certificate of title, when one is granted, a memorandum of the caveat.

In each land registration district there are many cases where land has been granted subject to a reservation of mines and minerals to the Crown. The certificate of title to the surface is endorsed "Minerals in the Crown" but no certificate of title is issued for the mines and minerals. The Department of Energy and Mines, from time to time, grants oil and gas leases affecting these mines and minerals. Many lessees wish to register a caveat protecting the lease in the land titles office. The practice has varied from office to office as to how such a caveat should be recorded. One office maintained the former index for unpatented interests as well as marking the folder to the title to the surface with all endorsements affecting mines and minerals. As of 1988, the first time a caveat or encumbrance is submitted affecting unpatented mines and minerals, the registrar marks the title folder for the surface to show that a title folder has been prepared for the unpatented mines and minerals. All endorsements affecting the minerals are then typed on the back of a title which is secured to the unpatented folder.

(c) Mines and Minerals

(i) Hydrocarbons

The Bank Act (Canada) since S.C. 1953-54 authorizes a bank to lend money and make advances on the security of hydrocarbons, whether in place or in storage and

such interest is held by "rights, licenses or permits" and is either "entire or partial".

Hydrocarbons are defined to mean "solid, liquid and gaseous hydrocarbons and any natural gas whether consisting of a single element or of two or more elements in chemical combination or uncombined and, without restricting the generality of the foregoing, includes oil bearing shale, tar sands, crude oil, petroleum, helium and hydrogen sulphide," see section 2 of the Bank Act, R.S.C. 1985, c.B-1.

The bank is required to register its interest in such hydrocarbons in order to take priority over other interests (see sections 177 and 179 of the Bank Act). The means to register such interest in Saskatchewan is by way of caveat. The reference to hydrocarbons must appear in the statement of the interest claimed, but not in the land description. The registrar cannot give effect to the registration of an interest in hydrocarbons only. The registrar can only give effect to a claim of interest in the hydrocarbons in a particular parcel of land which is defined according to the registrar's records. A caveat of this type can be in the following form:

"Take notice that \_\_\_\_\_, a chartered bank of Canada, claiming an interest by virtue of an agreement in writing dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ with \_\_\_\_\_ (name) \_\_\_\_\_, of \_\_\_\_\_ in the Province of Saskatchewan, \_\_\_\_\_ (occupation) \_\_\_\_\_ to secure all loans and advances made or to be made by said bank under section 177 of the Bank Act with regard to hydrocarbons as defined in the Bank Act as the said hydrocarbons are included in the following described land:

as set forth and described in certificate of title No. \_\_\_\_\_"

The caveat is engrossed on the certificate of title as an ordinary caveat by the bank without mention of hydrocarbons.

(ii) Interest in a Particular Mineral Formation

As with hydrocarbons, a claim of interest in mines and minerals in a particular geological formation eg. down to the top of the Mission Canyon Formation, can only appear in the claim of interest portion of the caveat. The land description must be referable to a particular parcel for which the registrar has a certificate of title. Overclaiming is endemic to this type of interest. It is quite common for phrases like the following to appear in the claim of interest portion "all naturally occurring fluids of hydrocarbons including natural gas down to and including the Souris Valley beds of Mississippian age".

(iii) As to an Undivided Specified Interest

A caveat submitted for registration against an undivided specified interest (eg. one sixth interest), should indicate the name of the registered owner it is to affect in the land description as part of the land description. If it is not shown, the caveat should be rejected. Upon registration, the caveat should be endorsed as to the mines and minerals involved as to the particular undivided specified interest. This rule has been in existence since 1984.

If the undivided specified interest is transferred, the new certificate of title should show the caveat as affecting the undivided specified interest of the transferee.

If a caveat has been accepted which does not disclose which of undivided interests were affected and a withdrawal is submitted which names only one of the registered owners, the withdrawal should be rejected to have the name removed. The registrar may, based on the information before the registrar, decide that it was the caveator's intention to encumber the fractional interest only and, accordingly, discharge the caveat totally. It would be bad practice to withdraw the caveat as to the undivided specified interest of only one of the owners and then continue the caveat forward on subsequent titles as encumbering the whole.

4. Affidavit of Verification

The affidavit of verification can be viewed differently from the affidavit of execution. The affidavit of execution accompanies instruments which will create indefeasible titles or interests. The affidavit of execution is a significant way of protecting

fraud. The purpose of the affidavit of verification is to protect the registered owner from spurious claims or claims founded on the purchase of chattels. The registered owner always has the remedy of notice to lapse or commencing a law suit. Thus, more discretion can be exercised with the affidavit of verification. The affidavit of verification is a less significant instrument.

However, the affidavit of verification is still a required part of the form, and its terms, in substance, must be present. For example, the first clause of the affidavit must of course be present with the phrase "true in substance and in fact, to the best of my knowledge, information and belief" being the most important.

With respect to signatures, it is noted that the preamble of Form AA contains the statement "I, the above named A. B. (or C.C., agent for the above A.B.)". The first issue that can arise is whether the statement of president or vice-president is sufficient to connote agent or must there be a statement that such person is an agent. If the registrar is satisfied that the office stated is one for which the person has the capacity to act as agent of the company than the statement of the office is sufficient. Clearly the offices of president and vice-president are such positions.

The second issue is whether the statement "C.D., agent for A.B." can appear in the caveat but not be repeated in the affidavit of verification. Again if the registrar is satisfied that the person signing the caveat and the person swearing the affidavit of verification are one and the same, this is acceptable.

The third issue is whether the caveator can sign the caveat and an agent execute the affidavit of verification. The resolution of this issue is not as clear as the previous two issues. The form contemplates signatures by the same person. It is not a practice to be encouraged but it is acceptable.

The fourth issue is whether one agent can sign the caveat and another swear the affidavit of verification. This is not acceptable. It is very difficult to see how this situation can arise, and therefore, it gives the appearance of being an improper document. It is just that much further along from the third issue which is in itself doubtful.

## 5. Notice to the Registered Owner

Subsection 155(1) of The Land Titles Act provides that upon registration of a caveat the registrar "shall forthwith send a notice of the caveat through the post office or otherwise to the person against whose title it has been registered". No such direction exists with respect to unpatented land (compare subsection 155(1) with subsection 155(2)), but since 1964, it has been departmental policy for the registrar to notify the Department of Agriculture with respect to unpatented surface land and the Department of Energy and Mines with respect to unpatented mines and minerals. The particular land titles notice refers to "unpatented land" rather than quoting a certificate of title number.

### D. Particular Types of Caveats

#### 1. Homestead Caveat

This caveat is provided for by The Homesteads Act and should follow Form D of that Act and not Form Z of The Land Titles Act. A homestead caveat may be filed by the wife and, under subsection 8(1) of The Homesteads Act, no fees are payable for the registration of the caveat, but fees are payable for the withdrawal or postponement of a homesteads caveat.

A registrar ought not to interpret the law by saying that the caveat covered more land than could be legally included therein as being the homestead of the husband. The registrar's duty in such cases is to register the caveat and leave that question to the courts for decision. A homestead caveat is not open to attack by notice to lapse (see subsection 159(2) of The Land Titles Act), and can only be removed by:

- (1) a voluntary withdrawal (see Re Land Titles Act, [1918] 2 W.W.R. 940 (Sask. M.T.));
- (2) an order of the court;
- (3) a subsequent dealing accompanied by the declaration of the wife in Form A and certificate in Form B (see subsection 8(6) of The Homesteads Act); or
- (4) proof that the caveator-wife has died (see subsection 8(5) of The Homesteads Act).

Because of these special provisions, the memorandum of the caveat on the certificate of title should, therefore, indicate that it is a homestead caveat.

Subsection 8(6) provides as follows:

8(6) If a caveat has been heretofore or is hereafter filed under this section and a transfer of the land signed by the caveator and accompanied by a declaration (form A) and a certificate (form B) is filed in the land titles office or an agreement for sale of the land has been signed by the caveator and the documents mentioned in clauses (a), (b) and (c) of section 6 are so filed, the registrar shall remove the caveat before issuing certificate of title.

This appears to require that the caveator also sign the instrument in the same way as sections 3 and 4 of The Homesteads Act require the signature of the wife to the instrument or declaration if the declaration is not annexed to the instrument. It has happened that a wife relinquishes her rights and is examined on an agreement for sale but subsequent to her examination she files a homestead caveat. The position of the Master of Titles is that once the wife relinquishes her rights she cannot subsequently insist upon them. Assuming subsection 8(6) is complied with, the registrar will cancel the caveat by means of the transfer.

Although divorce ends homestead rights (see Re Caveat 74Y06300, [1983] 1 W.W.R. 670 (Sask. Q.B.)), as yet there is no mechanism for the registrar to remove a homestead caveat upon proof of divorce. The court, at the time of the divorce, or, on a subsequent application, must give the registrar directions with respect to the caveat.

## 2. Municipal Seed Grain and Supplies Caveat

Section 17 of The Municipalities Seed Grain and Supplies Act provides for the registration of a caveat to protect any sum owing to a municipality upon a promissory note given in payment of an advance under that Act. The fees for such a caveat were set by Order-in-Council 653/1935 which provides that "all registrations, annotations, memoranda, entries or other work performed by a registrar of land titles: shall be done without charge. This Order-in-Council remains in effect, and applies to withdrawals and postponements as well.

Subsection 17(5) provides that it is not necessary for the registrar to send the notice required by subsection 155 of The Land Titles Act. Subsection 159(2) of The Land Titles Act provides that this type of caveat is not subject to lapse which means that the memorandum should indicate that it is a seed grain and supply caveat.

It has been the practice to accept withdrawals of seed grain and supply caveats executed by the secretary under the seal of the municipality in same manner as tax liens.

### 3. Caveats under The Planning and Development Act

The Planning and Development Act provides for the registration of four types of caveats:

- (1) section 82 allows a council to enter into an agreement to rezone land to accommodate a specific proposal and to file a caveat (see subsections 82(3) and (5)) to give effect to the agreement;
- (2) section 142 is used for subdivision approval where the approving authority considers the land to be potentially hazardous or unstable;
- (3) section 143 is used where the municipality requires an applicant for subdivision approval to enter into a servicing agreement and the agreement accompanied by a caveat may be registered (see subsection 143(4));
- (4) section 215 is used where the municipality enters into an agreement for the purposes of carrying out the provisions of the Act or a regulation or by-law made pursuant to the Act.

Caveats filed pursuant to sections 142 and 215 are not subject to lapse and the memorandum on the certificate of title should indicate the section pursuant to which the caveat is filed.

An example of an agreement to which section 215 applies is referenced in Lawson v. Regina (City of) (1986), 48 Sask. R. 127 (Sask. C.A.) where the court expressly acknowledged that section 215 can be relied upon to enter into an agreement whereby the developer agrees that the use for which certain parking facilities are to be provided will not exist beyond three years unless certain conditions can be satisfied. This agreement was found to be for the purpose of carrying out the provisions of the municipal zoning by-law.

### 4. Building Restriction Caveat

#### (a) Meaning

Caveats are sometimes registered to protect what are commonly called restrictive covenants, that is a covenant where one person binds himself or herself, for instance, to refrain from doing certain things with his or her own land. An instance of this occurred in Regina. All the owners in a block on one side of Scarth Street, Regina,

agreed, in order to widen the street, not to build closer to the street line than four feet. The agreement bound every owner who signed it. One of the owners, to protect his own interest and the interest of all the other parties to the agreement, registered a caveat against all the lots included in the agreement. The agreement gave not only the caveator, but every other owner who signed the agreement, an interest in all of the other lots. By this agreement each owner restricted his own rights which he would otherwise have had.

Restrictive covenants may relate not only to street widening lines, as in this case, but to many other matters, such as the use of land, the style and size of buildings erected on land, etc.

A restrictive covenant made by one party constitutes an interest in that party's land for the benefit of the other party, and that other party may file a caveat to protect his or her interest, since the restrictive covenant cannot itself be registered. In Wanek v. Thols et al., [1928] 1 W.W.R. 903 (Alta. S.C.A.D.) Beck, J. stated at page 906 that the right to the fulfillment of the obligations created by such a restrictive covenant is an 'interest' in the land in respect of which the obligations are imposed and is an interest capable of being protected by caveat.

A restrictive covenant is a covenant negative in nature between two parties whereby the covenantor, for valuable consideration, agrees to refrain from certain uses on the covenantor's land for the benefit of the land owned by the covenantee. To constitute a valid restrictive covenant, the following elements must be present:

- (1) the covenant must directly affect the land of the covenantor by controlling its users;
- (2) the observance of the covenant must directly benefit the land of the covenantee; and
- (3) the original contracting parties must have intended that the covenant run with the land (see Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co. Ltd., [1980] 5 W.W.R. 367 (Sask. C.A.) and Miller v. Shell Canada Limited, [1985] 6 W.W.R. 631 (Sask. Q.B.)).

An owner may place a building restriction caveat against two parcels of land of which he or she is the registered owner (see subsections 95(3) and (4) of The Land Titles Act). This is usually done in one of two ways:

- (1) Where the registered owner sells part of his or her land and agrees with the purchaser that certain building restrictions apply to the remainder of the land he or she owns. In this case the caveat will refer to the agreement for sale which will be annexed to the caveat to be filed at the appropriate land titles office.
- (2) Before the registered owner sells any of his or her land he or she may place a building restriction caveat on the land by a statement of intention that the land shall be bound by such building restrictions which will be annexed to the caveat to be filed at the appropriate land titles office.

(b) Withdrawal

Subsection 160(1) of The Land Titles Act provides that any owner or other person claiming an interest in land against which a caveat has been registered for the protection of a building restriction affecting such land or the use thereof, howsoever created, may apply to a judge, who, after such notice and hearing as he or she may deem proper, and upon such terms and conditions as he or she may fix, may vary, cancel or substitute in whole or in part, such building restriction and discharge or vary the caveat.

It is the position of the Land Titles System that, as a general rule, The Land Titles Act requires a judge's order to remove a building restriction caveat. This conclusion is reached by an analysis of section 160 and 161. The broader authority, section 161, is prefaced by the words "subject to sections 98 and 160" which takes building restriction caveats out of the general authority of a caveator to withdraw an instrument. Furthermore subsection 160(2) exempts certain kinds of land use caveats, eg. those filed pursuant to section 215 of The Planning and Development Act from the need to obtain a court order.

The policy reason for not allowing a caveator to withdraw a building restriction caveat is that the caveator may no longer be the owner of the dominant tenement. Also, there may be third parties of whom the registrar has no knowledge who are relying on the continued registration of the caveat. Finally, when the Act specifically sets out, as it does, in section 160 how a caveat protecting a restrictive covenant may be wholly or partially discharged, then the procedure set out in that section should be followed in order to obtain a discharge. Where an Act gives a specific remedy the specific remedy should be followed, and not the general provision dealing with discharges or withdrawals of

caveats (see Boulter-Waugh and Company, Limited v. Union Bank of Canada, [1919] 1 W.W.R. 1046 at 1051 (S.C.C.)). It is submitted that the court, and not the registrar, is the best arbiter of this kind of decision.

The registrar's authority to accept withdrawals of building restriction caveats executed by the caveator, has been expanded by the recent decision of Gulf Canada Limited v. Master of Titles (1987), 50 Sask. R. 118 (C.A.).

In this particular case, the document attached to the caveat indicated that the rights under it expired by the effluxion of time and there was no renewal clause. The basis of the Court of Appeal's reasoning, at least in obiter, was that sections 158 and 159 did not give rights to caveators and since the same wording is used in section 160 there may be no authority for a caveator to apply to a court for the removal of the building restriction caveat. From this it would seem that the Court of Appeal was indicating that a caveator may be able to withdraw caveats under section 161. In the context of sections 158 and 159 it would seem contrary to conclude that a caveator has no rights particularly to request a notice to lapse under section 159. It is quite common for a caveator claiming under an agreement for sale to request a notice to lapse with respect to another caveat on the certificate of title. Since the Gulf Canada case the Queen's Bench in McBain v. Kindersley District Credit Union Ltd. and Schmaus (1987), 52 Sask. R. 246 rendered a decision which, in effect, confirmed the authority of a caveator claiming under an agreement for sale to contest the claim of another caveator. Also in the context of section 160 if a caveator does not have the authority to apply for an order to remove its caveat, the power still remains in the owner of the servient tenement, eg. the registered owner of the land upon which the caveat is placed, to apply for an order. It would seem that the registered owner would be the appropriate person to apply in any event.

Nonetheless, the decision in Gulf Canada Limited v. Master of Titles has enriched the land titles law in the area. The registrar now has greater authority to eliminate the need for a court order in cases where the registrar has determined that the caveat can have no effect. It remains to be seen whether or not the registrar has the authority to make this decision on any evidence other than that which appears in the records of the land titles office.

It should be noted that Di Castri at page 10-344 postulates that the registrar could accept a withdrawal from a building restriction caveator if the caveator alone has an interest in the land affected.

The registrar does not accept a notice to lapse a building restriction caveat because an interest other than the interest of the caveator may be protected (see subsection 159(10) of The Land Titles Act). Accordingly, the memorandum on the certificate of title should indicate that it is a building restriction caveat.

5. Easement or Party Wall Agreement Caveat

Instead of registering the easement or party wall agreement, a caveat claiming an interest under the easement or party wall agreement may be registered.

Since June 1, 1984 the practice, with respect to easement or party wall agreement caveats where it is not apparent which land is the dominant tenement, is to reject the caveat with the request to show the dominant tenement in order to avoid the requirement of a court order to discharge the caveat.

Section 98 of The Land Titles Act provides that an easement or a caveat based on an easement may be released or discharged in whole or in part by the owners of lands having rights or privileges through or under the easement and by all persons who have rights subsequent to the easement or easement caveat. Thus, the section requires the holder of the dominant tenement to execute the discharge. The reasoning, of course, is that, if the present owners agree the easement or party wall is no longer necessary, they are the proper persons to agree the easement or party wall agreement or the caveat based thereon is no longer required. The problem with a caveat, that was registered prior to the change in practice, is determining who holds the dominant tenement. The caveator usually only makes reference to the legal description of the servient tenement.

If the dominant tenement is not described on the caveat, there may be no alternative but to insist on a court order discharging the caveat. The registrar may, if completely satisfied as to who the holder of the dominant tenement is, proceed to accept a withdrawal executed by that person. However, great caution must be exercised because the possibility of error is great. There may be more than one dominant tenement. In cases of serious doubt, a court order will be the only solution.

Encumbrancees having an interest in land affected by the easement or party wall agreement caveat must consent to the withdrawal thereof.

These caveats are not open to attack by notice to lapse (see under subsection 159(2) of The Land Titles Act).

## 6. Registrar's Caveat

### (a) When a Correction can be Made

Errors occur from time to time in certificates of title, and questions arise as to what can be done when the error is discovered. The certificate of title can be corrected by the registrar only where it is quite clear that it can be done without prejudicing rights obtained in good faith for value. If there is any element of doubt or difficulty in the matter, no attempt should be made to make any correction. The registrar's power to correct is limited to cases of clerical error, where rights acquired for value have not intervened (see section 77; Re Land Titles Act (1952), 7 W.W.R. (N.S.) 21 (Sask. C.A.); Re s. 70 Land Titles Act (1953), 10 W.W.R. (N.S.) 68 (Sask. C.A.); Re Canadian Gulf Oil Co. (1954), 14 W.W.R. 130 (Sask. C.A.); Re Certain Mineral Rights (1956), 19 W.W.R. 646 (Sask. Q.B.); Turta v. Canadian Pacific Railway Company (1954), 12 W.W.R. (N.S.) 97 (S.C.C.)). Other cases dealing with registrar's power to correct are Shorb v. Public Trustee (1954), 11 W.W.R. 132 (Alta. S.C.A.D.) where registrar said to be able to correct against a volunteer; Kaup v. Imperial Oil Ltd. (1962), 37 W.W.R. 193 (S.C.C.) where reservation to Crown in error said to be mere surplusage; Public Trustee v. Pylypow, [1973] 6 W.W.R. 673 (Alta. S.C.A.D.) where alterations by unauthorized land titles official held to be of no effect; Edwards v. Duborg, [1982] 6 W.W.R. 128 (Alta. Q.B.) where registrar permitted to correct because of misdescription and no discussion of effect on a good faith purchaser for value; Re Panther Resources Ltd., [1984] 2 W.W.R. 247 (Alta. Q.B.) where court held that both the court and the registrar have the authority to correct a title between the original transferor and the transferee.

Where a correction is made subsection 77(2) of The Land Titles Act requires the registrar to not erase or make illegible the words and the registrar must date and initial the correction.

### (b) When a Caveat Must be Filed

Section 153 of The Land Titles Act provides for the filing of a caveat in three instances:

#### (i) To Protect Some Right or Interest of the Crown or Some Person Under Disability

An example of this would be a case where a certificate of title which should be marked "Minerals in the Crown" is marked in error "Minerals Included", and it is not clear whether or not the registered owner or some other person has acquired some interest in the

minerals as a result of this error. This is the course which the registrar pursued in the case of Prudential Trust Company Limited v. Registrar, Humboldt Land Registration District, [1957] S.C.R. 658. The Supreme Court of Canada eventually decided in favour of the owner.

- (ii) Where an Error has been Detected, to Prevent Further Harm being Done

The registrar's caveat does not correct the error, nor does it nullify any rights acquired under the error before the caveat is registered, but it prevents any further rights being acquired under the error after the date of registration of the caveat. It sometimes happens that a double title is discovered, and it is not clear which of the two owners is rightfully entitled. A registrar's caveat should be registered against both titles in such circumstances. An example of this is to be found in Hudson's Bay Company v. Shivak (1965), 52 W.W.R. 695 (Sask. C.A.), where the registrar discovered two certificates of title to the same minerals and placed a registrar's caveat on both titles. The parties thus having had the matter drawn to their attention, sought a declaration from the Court as to who was really entitled to them.

There may also be cases where there is not a double title, but a certificate of title contains an error and there is doubt and complication about the legal position. In such a case, the registrar is not empowered to correct the error, but should register a caveat to keep matters as they are until a court decision can be obtained. In Re Section 70 Land Titles Act (1953-54), 10 W.W.R. (N.S.) 68 (Sask. C.A.), the registrar made an alteration respecting minerals in a title. With reference to the minerals, the title read 'included' and the registrar altered this to read 'excepted'. The court held that the registrar had no authority to make this change, but the comments of Gordon, J.A. as to what the registrar should have done when the error was brought to his attention, are interesting. "I am of the opinion that the present registrar of the land titles office, when this matter came to his attention, should have immediately filed a caveat on both titles."

A recent case discussing the registrar's authority under this heading is Don-Del Investments Ltd. v. Registrar of North Alberta Land Registration District (1975), 15 Alta. L.R. 51 (Alta. T.D.) approved by Krautt v. Paine, [1980] 6 W.W.R. 717 at 732 (Alta. C.A.). Both cases say that the registrar may file a

caveat in any case where an error has been made or for the prevention of fraud or improper dealing.

This will not be of very frequent occurrence and is a matter which should be referred to the Master of Titles if circumstances arise which seem to warrant it.

Affidavit or other evidence may have to be taken. It may be that the registrar will insist on a court order instead of filing a registrar's caveat.

(c) Effect of Registrar's Caveat

Regardless of the purpose for which a registrar's caveat is filed, the effect is to prohibit the dealing with land. This is why the registrar will be reluctant to file such a caveat if there are other avenues available eg. when mines and minerals are involved, the registrar may choose to require a party conveying surface and mines and minerals to except the mines and minerals. A registrar's caveat can then be filed on the mines and minerals at a later date.

If possible the registrar will try to narrow the application of the caveat, eg. register against the particular type of mineral for which the error has been made rather than all mines and minerals so that the balance of the land can be transferred or mortgaged.

(d) Form

Subsection 153(3) of The Land Titles Act provides that a registrar's caveat may be in Form AA modified to meet the circumstances but no affidavit with respect to chattels is required. The caveat should show for which of the three purposes it is being filed. Sample grounds could be as follows:

The grounds upon which this caveat is filed are that Canadian Pacific Railway Company is not entitled to the said mines and minerals by virtue of certificate of title 28VN since they were not expressly conveyed to the said Railway Company as required by the Railway Act and that Landowners Mutual Minerals Limited is not entitled to the said mines and minerals by virtue of certificate of title 116SI since transfer No. BE4615 in favour of Landowners Mutual Minerals Limited excepted the said right of way.

It must forbid the registration of any instrument affecting the land. Notices should be sent in the same way as for ordinary caveats.

Subsection 153(3) was added by The Land Titles Amendment Act, 1983 S.S. 1983, c.50.

(e) Withdrawal

The registrar may withdraw a registrar's caveat when the grounds of the dissatisfaction no longer exist.

**E. Notice of Change of Address on a Caveat**

Section 156 of The Land Titles Act authorizes the filing of a notice of change of address for service in Saskatchewan, by the caveator only. The new address is noted on the certificate of title as a notice. When the title is renewed, consolidated or enlarged and the caveat is carried forward, the new title indicates the new address, only, in the particulars pertaining to the caveat. No reference to the instrument number making the change of address appears on the new title.

The standard rule with respect to changes of address is to accept ten per instrument in the offices other than Regina or Saskatoon. In Regina and Saskatoon, each of the registrars should be contacted to determine what current work load will bear. For large numbers of changes of address, it is expected that the registrar will be allowed to process only a portion each day so as to not affect the processing of instruments for other users.

Although Form BB has a space for a witness, a notice of change of address is not usually accompanied by an affidavit of execution.

In Arrow Plumbing & Heating 1978 Ltd. v. Regina Registrar, (Sask. Q.B.) Judicial Centre of Regina, April 29, 1982, Q.B. No. 1159/81, (unreported), Malone, J. considered the effect of:

- (a) a notice of change of address card which firms send out to clients when they change location;
- (b) an oral agreement to keep track of a law firm's change of address.

The former was found to be insufficient because it did not in anyway indicate anything with respect to the mechanics' lien in question eg. no land description, registration number of affected instrument or indication that land titles officials should check to see if any instruments would be affected by such notice. Malone, J. held that the registrar was not required to take any legal notice of the change of address card. The Act provides the procedure in section 156 which binds the registrar if an error is made.

A change of address card is used only to change the deposit account address.

## F. Notice to Lapse

### 1. When Available

The Act having provided for the unilateral filing of a caveat, it is reasonable that the Act should provide a means for the owner or other person interested in the land to object to the caveat. Hence, the procedure of notice to the caveator by the registrar under subsection 159(2) of the Act. "The owner or other person claiming an interest in land" may require the registrar to serve a notice upon the caveator. If within thirty days of the mailing date, the caveator does not register an order of the court extending this period of thirty days, the caveat will lapse at the expiration of the thirty day period.

There are, as noted above, several classes of caveat which are not subject to this procedure. It is for this reason that upon registration of a caveat, if the caveat is not open to attack through notice to lapse then the caveat should be specially engrossed upon the title by noting in the endorsement, in brackets, the appropriate information; viz: (Homestead), (Building Restriction), (Seed Grain & Supplies), (Easement), (Party Wall Agreement) (s.142 The Planning and Development Act), (s. 215 The Planning and Development Act) or as the case may be, and this information would signify that a notice to lapse could not be issued nor could a building restriction caveat, an easement caveat, a party wall agreement caveat or caveat under The Planning and Development Act be foreclosed under the provisions of The Tax Enforcement Act.

### 2. Who may Request

A co-caveator who becomes the registered owner by the death of his or her joint tenant, may, upon proof that letters of administration or of probate have not issued, request that a notice to lapse be served on himself or herself in his or her capacity as caveator and upon the official administrator or, on request, the heirs of the deceased.

From time to time, two or more people will acquire an interest in land as purchasers under an agreement for sale. The interest will be caveated and at some future time the fee simple title is acquired in joint tenancy but the caveators do not withdraw the caveat. One joint tenant dies and the other becomes the owner of the fee simple title. Invariably, the property is the only asset in the estate and letters are not taken for the deceased caveator/joint tenant. In the past the response has been, if there has been no possibility of the intervention of a third party i.e. a transferee who can request a notice to lapse, that the estate of the deceased caveator must be probated to enable the deceased caveator's interest to be withdrawn by his or her personal representative. However, this is expensive and cumbersome.

The registrar should be satisfied that the deceased caveator is not represented and it would seem appropriate to request a letter or certificate from the surrogate registrar to the effect that no letters have issued. Proof of death will already be on file with the application by the surviving joint tenant. An affidavit of identity may be required in any case where there is a discrepancy between the name of the caveator and the name shown in the documentation from the surrogate registrar. The \$10.00 fee referred to in subsection 159(5) can be made payable to the registrar and then the registrar may make the cheque payable to the applicable official administrator.

However, the registered owner could request that the notice to lapse be served upon someone other than the official administrator as outlined in subsection 159(6) of The Land Titles Act. This would seem to be an efficient way to cover off the problem which arises when a caveat is not withdrawn at the time the transfer is submitted for registration.

Except in these circumstances, the registrar cannot accept a notice to lapse from one caveator on a fellow caveator on the same caveat. The same reasoning which prevents one of two caveators from discharging his or her interest, applies here. Although there may be two caveators, the caveat is registered to protect the interests of both. If it is intended that each of the caveators is to have a separate interest, the proper procedure would have been to have had each file a separate caveat.

Only an owner or other person claiming an interest may request a notice to lapse. A person claiming under a caveat may request a notice to lapse (see page 206 of this manual).

At one time (between 1936 and 1946) The Land Titles Act provided for a request to serve notice to lapse a caveat to be made by the owner or other person interested in the land or by an agent of such owner or other person. This reference to the agent was taken out in 1946 since it had been found unsatisfactory; the existence of an agency was a matter of some doubt in many cases and it was felt that persons whose authority was doubtful should not be put in a position to involve parties in expensive litigation. Since 1946, therefore, the position has been that the request may not be made by an agent.

Requests by corporations not under seal must be by a senior officer of the company.

### 3. Form of Requisition to Registrar

No form is prescribed for the requisition to the registrar. It should, however, give the full name and address of the person

requiring the notice, brief details of the interest claimed by that person (eg. as registered owner, as lessee under a petroleum and natural gas lease, dated \_\_\_\_\_ made between \_\_\_\_\_ and \_\_\_\_\_ etc.) and a clear indication whether the notice is to be served in respect of all the land comprised in the caveat or only part, and in the latter event, a proper description acceptable to the registrar. It is very important that the person requesting the lapse makes it clear that only part of the land affected by the caveat is to be lapsed. Unless the request limits the lapse to specific land then notices to lapse are sent to the caveator with respect to all land in the caveat.

Sometimes a caveat is registered against a number of lots. The request to lapse will be made by one of the registered owners with respect to all of the land in the caveat. This is clearly a legitimate request. However, if the owner is not familiar with land titles procedure, the registrar, may, if time permits, reject the request to ask for clarification.

The request need not be witnessed or attested. Milligan, Master of Titles, in September of 1913, on a formal reference to him on this point (and the section was then substantially in the same form as the present section) stated "I have reached the conclusion that whether the request in writing from the owner of the land under section 130 (now 159(2)) is an instrument under the Act or not, it is in any event not an instrument required by the Act to be registered and there is nothing in section 130 to indicate that the legislature intended any formalities with this request in writing excepting that it should be made by the owner or other person claiming an interest".

The question has sometimes been raised whether a request by an executor or administrator to serve notice to lapse a caveat is an 'instrument' requiring a consent or other evidence under section 172 of The Land Titles Act. The consequence follows from the words of Milligan, M. T. above quoted that such a request does not fall within section 172, and so a Public Trustee's consent or other evidence under that section is not required.

It is, of course, important that the request should be properly made. If the request to serve notice to lapse is not properly made it is doubtful whether the notice served by the registrar would be good and if the registrar then proceeds to lapse the caveat the registrar might be guilty of an error which would expose the assurance fund.

A separate request to serve a notice to lapse is required for each caveat. The court will deal with each caveat potentially in a different way. Record keeping will be difficult unless separate requests are received.

#### 4. Mental Infirmity

Before accepting a request to serve a notice to lapse a caveat, the certificate of title must be examined for a notice under The Public Trustee Act affecting the caveator. If such a notice is found, subsection 159(2) of The Land Titles Act provides that "if the caveator is a person to whom section 33 of The Public Trustee Act applies, this subsection shall not apply, until the expiry of 30 days after notice of intention to make a requisition thereunder to the registrar has been given to the Public Trustee". Although subsection 159(2) does not make reference to The Mentally Disordered Persons Act, section 37 of that Act provides that "no action, suit or proceeding, whether judicial or extrajudicial" shall be taken against a mentally disordered person unless 30 days written notice of intention is given to certain specified individuals. The notice to lapse caveat procedure is considered to be an extrajudicial procedure. Subsection 37(2) of The Mentally Disordered Persons Act gives the person, to whom the 30 days notice would be given, the power to waive the notice. Section 33 of The Public Trustee Act also gives the Public Trustee the power to waive the 30 days written notice required under section 33, but subsection 159(2) does not contemplate a waiver by the Public Trustee.

Upon rejection of the request, the applicant may either:

- (1) serve upon the Public Trustee, committee or other person a 30 day notice of intention to request service of notice to lapse, wait the 30 days, and then accompany the request with a copy of the notice of intention showing proof of service, (the copy of the notice and the proof of service should be carefully examined to ensure that the provisions of The Mentally Disordered Persons Act or The Public Trustee Act have been strictly followed);
- (2) obtain from the committee or other person served a waiver of the 30 days notice, and resubmit the request with this waiver (see subsection 37(2) of The Mentally Disordered Persons Act).

The proof of service or waiver is attached to the request and no further fees are charged for this extra material.

#### 5. Address for Service

If it is decided that the request is in order, then the titles researcher should draw the caveat to make sure the address for service is properly set forth on the certificate of title. This is important in that if the notice is mailed and the caveator does not obtain a court order, then under subsection 159(4) of

The Land Titles Act the caveat is lapsed. In Howe v. Kipp, [1927] 2 W.W.R. 522 (Sask. C.A.), a mortgage was endorsed on the title with the wrong address of the mortgagee. Later, proceedings were taken under The Tax Enforcement Act and the land was foreclosed. The mortgagee never received notice of the tax proceedings, and it was held that the assurance fund was liable for the full amount owing under the mortgage and costs of action. This arose over a simple mistake of showing the wrong address on a memorandum. The principle is the same in lapsing a caveat, in that after the caveat has been lapsed, the interest of the caveator may not be asserted against subsequent encumbrancers. In Boulter-Waugh and Company, Limited v. Union Bank of Canada, [1919] 1 W.W.R. 1046 (S.C.C.) a caveat was lapsed and a mortgage registered by the bank attained priority by registration. At page 1051, referring to priority of claims given by registration, it is stated: "But the steps necessary to secure such benefit must be those contemplated by the Act and not something else". The registrar must follow the procedure in the statute in order to ensure that proper notice is given.

The registrar's obligation is to send the notice to lapse to the address as shown in the caveat or any registered change of address. The statute having required the caveator to state an address in Saskatchewan for service, having further provided for registration of changes of addresses for service, and having provided that notices of intention to lapse the caveat may be sent by registered mail, then if the registrar sends out a proper notice to the address disclosed, the registrar has satisfied the terms of the statute. The registrar cannot require the applicant to prove that the caveator is still alive or that a company has not been dissolved. There may be an onus on the person making the request, if he or she is aware of the facts, to disclose a change of address or other information to the registrar, but the registrar cannot require proof of these facts as a condition precedent to acting on a request to send out a notice to the caveator.

In Nazuruk v. Nazuruk (1970), 71 W.W.R. 136 (Sask. C.A.) the registrar sent a notice to lapse to the address on the caveat even though the request to lapse originated from that address. This was found to be acceptable. The court stated that the registrar must comply strictly with the section and when the registrar has done so, the court cannot find the assurance fund liable.

Section 156 of The Land Titles Act, which provides for a change of address, was added by S.S. 1952, c.42. Since that date, it is rare that a courtesy notice will be sent. An exception is made for Guaranty Trust Company of Canada. It appears that the system has a long standing arrangement with Guaranty Trust Company of Canada whereby the registrar will offer this service. There are a great number of caveats still registered by

Prudential Trust Company Limited (the forerunner of Guaranty Trust) where the address is shown simply as Regina. If a notice to lapse is sent to that address the caveat will be lost. Accordingly, a courtesy notice is sent.

In preparing to serve a notice to lapse, the registrar does not check the general record for changes of name made pursuant to The Business Corporations Act or The Non-profit Corporations Act. Those changes of name are filed only for the purpose of enabling the corporation to deal with land in its new name.

The registrar does send a notice to lapse a caveat in the new name to a company whose name has been changed by legislation and where the legislation specifically says that the interest has been conveyed to the company in the new name. An example of this type of company is the Guaranty Trust Company of Canada. An Act respecting Guaranty Trust Company of Canada and Prudential Trust Company Limited, S.S. 1964 c. 70 came into effect on December 19, 1963. Section 3 of this Act reads in part as follows:

This act shall be and shall in all respects be treated, for the purposes of every land titles office . . . and all transactions therein and of the offices administrating the same, as a legal and valid grant, conveyance, transfer and assignment to Guaranty Trust Company of Canada of any and all lands or interests in lands and any and all mortgages, charges, encumbrances or other documents whatsoever . . . and it shall not be necessary to register or file or issue this Act or any further or other instrument, document of certificate or to make any entry showing the transmission or assignment of title from Prudential Trust Company Limited to Guaranty Trust Company of Canada of any such property, or in the case of lands under The Land Titles Act to have certificates of title issued in, or whatsoever transmitted to, the name of Guaranty Trust Company of Canada . . .

Thus, it can be taken that the name "Prudential Trust Company" has been deleted on those caveats and the name "Guaranty Trust Company of Canada" has been inserted. Accordingly, it is proper to send notices to the Guaranty Trust Company of Canada under that name only.

#### 6. Form of Notice

Where the registrar is required to serve notice in respect of all the land in the caveat, Form CC is used. Where the request relates to specified land only, Form DD is used. Care is taken in checking the names, addresses, land descriptions and other information shown on the required notice, including the correct section number of The Land Titles Act and the notice signed by an official. The request, together with the copy of the notice

mailed and the receipts for the registered letters containing the notice, form the instrument.

Since 1975, by agreement with the Farm Credit Corporation, notices to this body also indicate the registered owner of the land.

#### 7. Deceased Caveator

If the registered letter is returned to the registrar with the notation that the caveator is deceased, or if it otherwise comes to the attention of the registrar that the caveator is deceased, then subsections 159(5), (6) and (7) of The Land Titles Act apply for the reason that a notice to a deceased person is not effective. In such a case it is not the registration of the application that causes the caveat to lapse, but the sending of the notice. When the notice is returned to the registrar with a notation of death, the notice of intention to lapse the caveat on the title should immediately be struck out, and the notation made "Notice nullified by death of caveator", and the notation dated and signed. The person requesting the lapsing of the caveat should be immediately informed of the facts.

In these circumstances, the registrar will need to have the material necessary to effect service in one of the following ways:

- (a) by service on the executor or administrator of the deceased caveator - in this case, the registrar will need to have the grant of representation on file and will often need proof by affidavit of the identity of the deceased named in the grant with the caveator;
- (b) if the deceased caveator has no executor or administrator (this may be proven by the certificate of the surrogate registrar), service may be made on the official administrator for the Judicial Centre nearest to the land affected by the notice, in which case the applicant pays to the registrar the registration fee plus \$10.00 fee for the administrator and the registrar sends the notice by registered mail to the official administrator together with the registrar's cheque for \$10.00;
- (c) the person requesting the notice may ask that service be made on the widow of the deceased or on any named member of the family or both - it is in the registrar's discretion as to whether or not to adopt this method of service, and the registrar should not do so normally unless it is shown that the widow or

other member of the family named is beneficially entitled to whatever interest the caveator had in the land, and that there is no possibility of prejudice to any person's interest by adopting this method of service.

If the caveat shows an address for service in care of a law firm, service must still be on the official administrator.

In the case of difficulty as to service, application may be made to a judge for an order as to service. A caveat may also be discharged by judge's order under section 158 of The Land Titles Act.

#### 8. After Mailing, No Withdrawal

When the notice has been mailed, it sometimes happens that the person making the request wants to withdraw the notice. This is not possible. The machinery has been set in motion and an order of the court received by the registrar within 30 days from the mailing of the notice is the only method of preserving the caveat.

#### 9. Computation of Time

The day of the mailing of the notice is not included in the 30 day period, but the 30 day period begins with the next following day. If the last day of the 30 day period falls on a day on which the office is closed for registrations, then the caveator has all of the next following day during which the office is open for registration to register an order continuing the caveat.

Reference might be made here to the question of an order presented on the last day of the 30 day period, but after office hours. The case of Re Continental Explosives Ltd. (1964), 49 W.W.R. 762 (B.C.S.C.) held that it was lawful for the registrar to accept and register after hours. If an order is received within the required time, and in most cases the order comes in very near the end of the period, it is exceedingly dangerous to reject the order on some technical point of interpretation. If the registrar rejects the court order the caveat is entirely unprotected, and the principle established in Boulter-Waugh v. Union Bank (supra) puts an end to the caveat unless the order can be returned to the registrar within the statutory period.

It is not the date of the notice which is important, but the date the registered letter was mailed, and this date, so inserted on the memorandum of mailing of the notice, should be verified by the registrar before any entry of lapse of the caveat is made on the title under section 162 of the Act.

If, at any time before the caveat is lapsed, it is found there has been an error in the notice, then the proper course is to send out a further notice and the 30 day period will start to run afresh. The person applying for the notice should be advised of the error and that the caveator will have the further period within which to protect the caveat.

#### 10. Court Order

Upon application in chambers to continue the caveat, the court can make a variety of orders:

- (a) directing that the caveat be continued for a certain time to allow the caveator to bring an action, and that if such an action is brought that the caveat be continued until the action is disposed of;

Upon receipt of this type of order the registrar marks the caveat as continued for the period shown. If a certificate of lis pendens is filed within the time period as evidence that the action has been brought, the caveat continues until the action is dealt with in court at which time the court will make an order with respect to the land. If no certificate of lis pendens is filed or it is filed after the time period, the caveat should be marked lapsed. This procedure is discussed in Re Land Titles Act, [1945] 3 W.W.R. 416 (Sask. K.B.). Sometimes, the order will refer specifically to the filing of a certificate of lis pendens. In either case, if the plaintiff or applicant files a certificate of discontinuance, which is discussed in chapter 29 commencing at page 306, it follows that the caveat, the notice to lapse, the court order and the certificate of lis pendens all are removed.

- (b) directing that the caveat be continued until further order or until withdrawn;

In this instance, the order is filed and the caveat continued until such time as a further order of the court is made or until the caveator withdraws the caveat. This is the only kind of case where, after receipt of the court order, the caveator is allowed to withdraw the caveat. If withdrawn, the caveat, notice to lapse and court order all are marked as withdrawn.

There is no necessity for a certificate of lis pendens to be filed when the order is drawn in this way. This procedure is discussed in Freeholders Oil Co. Ltd. v. Runge (1963), 41 W.W.R. 433 (Sask. Q.B.).

- (c) directing that the caveat be continued for a certain period of days;

This type of order does not contemplate an action being brought. If a certificate of lis pendens is filed, it does not further continue the caveat. Only a further order of the court, if one is filed, will continue the caveat.

After checking the order carefully to make sure that the court has not continued the caveat by means of the lis pendens, the caveat, notice and order may be lapsed. The lis pendens, of course, stays.

Sometimes after its first order the court will direct that the caveat be removed. In this case the caveat, the notice to lapse and the first court order are removed even though the court order may not make reference to the registration numbers of the instruments to be removed.

If a request to serve a notice to lapse pertains to specified land affected by a caveat i.e. a request for Form DD, but the court order refers to the caveat with no mention of specified land, the court order is endorsed only on the certificates of title to the parcels which were affected by the notice to lapse.

The registrar does not accept a voluntary withdrawal of a caveat if there is a notice to lapse on the title and the caveat has been continued by court order unless the order contemplates the filing of a withdrawal by the caveator (see above). The reason for this rule is that once the caveator has commenced an action, the action cannot be discontinued unless the question of costs is resolved. If the caveator is allowed to withdraw the caveat, the registered owner's ability to recover either costs or damages under subsection 163(2) of The Land Titles Act for the wrongful filing of the caveat is impaired. Once the action is commenced, the matter is in the hands of the court.

If no court order or commencement of action is registered within the time period following the mailing of a notice to lapse of a caveat or a builders' lien, care must be taken to ensure that the caveat or builders' lien is shown as having been lapsed before the certificate of title is searched at the counter or a certified copy of the title is prepared. Ideally, a diary system should be maintained.

When a caveat is lapsed, the caveat should be pulled from the files and marked cancelled. This can be done at the time the certificate of title is pulled in order to endorse the lapse.

## G. Withdrawal of Caveat

Caveats remain in force until they are removed. The mechanisms for removal are:

- (1) section 158 allows an owner or person claiming an interest in land to summons a caveator to attend before a judge to show cause why the caveat should not be withdrawn;
- (2) subsection 159(2) allows the owner or other person claiming an interest in land to file a notice to lapse which shall cause the caveat to lapse unless extended by judge's order (subject of course to the exceptions contained in that section);
- (3) subsection 160(1) allows an owner "or other person claiming an interest in land against which a caveat has been registered for the protection of a building restriction affecting the land or the use thereof" to apply to a judge for an order varying or discharging the caveat;
- (4) section 161 allows a caveator or the caveator's personal representative, subject to sections 98 and 160, to withdraw a caveat.

A caveat may not be withdrawn by the caveator's agent unless the agent holds a power of attorney which has been duly filed and which authorizes the agent to execute withdrawals of caveat in the land titles office (see Carson v. Fyfe, [1981] 1 W.W.R. 691 (N.W.T.S.C.)). Where the withdrawal is by a personal representative, the grant of representation must be filed in the land titles office, and the provisions of section 172 as to the Public Trustee's certificate or consent should be complied with.

There are a number of qualifications to the operation of section 161:

- (1) section 161 is subject to the provisions of section 98 as to the discharge of caveats based on easement or party wall agreements which can only be withdrawn by the owners of the dominant tenement;
- (2) where third party rights are protected by the caveat, the registrar may not only refuse to register a voluntary withdrawal but also refuse to issue a notice to lapse the caveat eg. building restriction caveats fall into this category;

- (3) there are cases where a registrar should give careful consideration as to whether he ought to accept a voluntary withdrawal of a caveat for registration in that the caveat has been continued by order of the court until further order:

Suppose a registered owner of minerals executed a petroleum and natural gas lease to A and subsequently executed a similar lease on the same lands to B. Both A and B each file a caveat. A assigns his lease to C, and C files a caveat. B, the second lessee, attacks A's caveat. The court orders that A's caveat should stand in full force and effect until further ordered. In such a case the interest protected by the caveat appears to have been assigned and to be protected by a subsequent caveat. The order of the court continues the caveat until the further order of the court. Where there is no provision in the order for the caveat to be voluntarily withdrawn, then a registrar should neither accept a voluntary withdrawal of the caveat nor issue a further notice to lapse the caveat, even upon the request of any other person interested in the land, but should only act on further order of the court or judge.

Partial withdrawals as to land will be accepted even though section 161 does not expressly allow it. A partial withdrawal of an easement caveat, which is contemplated by section 98 of The Land Titles Act, requires all owners of the land and interest holders to execute the withdrawal.

A withdrawal as to part of the interest claimed or of the interest of one of two or more caveators is not allowed under section 161.

As a general rule withdrawals are limited to ten caveats unless special arrangements are made with the Master of Titles or, with respect to withdrawals in Saskatoon and Regina, with the registrars in those offices. A withdrawal of caveat will be accepted that refers only to the registration number of the caveat to be withdrawn but the caveator runs risk of error and increased rejection unless the date of registration is also shown.

If a caveat is voluntarily withdrawn after the service of a summons or after the mailing of the registrar's notice to lapse, a new caveat in relation to the same matter cannot be registered without the leave of a judge (see section 162). Whether the new caveat relates to the same matter as the old one is, however, not a decision for the registrar to make, but it is for the court to consider on a subsequent application.

#### H. Checklist for a Caveat

A caveat must be in Form AA of The Land Titles Act which requires:

- (1) the name and address of the caveator;

- (2) a statement of the nature of the interest and the grounds on which the claim is based;
- (3) a clear description of the land;
- (4) the signature of the caveator or the caveator's agent;
- (5) an affidavit of verification.

## I. Checklist for a Withdrawal

### 1. Regular Withdrawal

There is no form for a regular withdrawal but the following elements must be present:

- (1) must identify the person withdrawing the caveat as the caveator named in the caveat;
- (2) must identify the caveat being withdrawn;
- (3) if a partial withdrawal only, must clearly describe the land affected;
- (4) must contain a statement that caveat is withdrawn;
- (5) must be properly executed and attested.

### 2. Withdrawal by Personal Representative

If the withdrawal is by an executor or administrator of the caveator:

- (1) letters of probate or administration must be on file;
- (2) a Public Trustee's certificate or consent must be on file.

If the withdrawal is by an agent of the caveator acting under a power of attorney:

- (1) the power of attorney must be on file;
- (2) the power of attorney must give the right to withdraw caveats, or words to that effect.

### 3. Withdrawal of Easement or Party Wall Agreement Caveat

A withdrawal of a caveat based on an easement must be executed by the person who receives the benefit of the easement and by all subsequent persons shown on the certificate of title to be interested in the land.

A withdrawal of a caveat based on a party wall agreement must be executed by both current owners claiming the interest under the agreement and by all subsequent persons shown on the certificate of title to be interested in the land.

J. Checklist for Request to Lapse

A request to serve a notice to lapse must:

- (1) give the name and address of the person making the request;
- (2) show the interest in the land upon which the request is based;
- (3) properly describe the caveat and the land included in the request;
- (4) be signed by the person making the request;
- (5) if the request is made by a company, be signed and sealed by an officer of the company.

A request to serve a notice to lapse need not be attested. The duplicate certificate of title need not be produced.

## Chapter 23. Builders' Lien

### A. The Builders' Lien Act

#### 1. History and Purpose

Effective January 1, 1986 The Mechanics' Lien Act was repealed and replaced with The Builders' Lien Act, S.S. 1984-85-86, c.B-7.1. This Act gives a new name to a concept which has been a part of what is now Saskatchewan since the enactment of The Mechanics' Lien Ordinance, Consolidated Ordinances of the Territories, 1898, c.59. A complete legislative history is contained in "Liens in the Construction Industry: A Report Prepared for the Hon. J. Gary Lane, Q.C., Minister of Justice by the Special Advisory Committee on Builders' Liens".

The purpose of such legislation has often been stated by the courts. Most recently, Mr. Justice Cameron in Hansen et al. v. C.N.R. et al., [1983] 4 W.W.R. 23 (Sask. C.A.) at page 34 indicated the purpose to be:

...the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so. It is intended that those persons enjoy greater protection and better remedies, in relation to moneys coming to them, than the protection and remedies afforded to them, generally, by the law.

A common law lien is a right in one person to retain possession of something belonging to another person, until certain demands of the person in possession are satisfied. A typical case is that of a person expending labour on someone else's goods, thereby enhancing their value. The goods may be retained until reasonable charges are paid. But this right to retain another person's property applied only to personal property. At common law, a mechanic or worker had no lien upon a building for labour done upon it and could not retain possession of real estate, upon which labour had been performed. As stated by Robinson, C. J. in an Ontario case Johnson v. Crew (1836), 5 U.C.Q.B. (O.S.) 200 (C.A.), when a builder attempted to hold real estate until the claim had been paid, "On the house which he has built or repaired". The judge added, "The ground on which it stands is inseparable from the house and such a lien would exclude the owner from his own freehold".

The contractor had the right to hold materials until they were paid for, provided the materials had not been affixed to the land, and the ownership of the materials had not passed to the owner of the land, but once the materials had been affixed or attached to the land, the contractor, in the absence of a statute, had no lien on them, or on the works constructed with them. The materials formed part of the freehold.

It was therefore thought appropriate to alter the law by statute so as to give a lien over land for work done on the land or to a building on the land.

## 2. Considered a Special Remedy

There is a vast body of law called the common law which supplements the statute law in relation to instruments like mortgages, leases and easements. Since a builders' lien did not exist at common law, rights and remedies are governed exclusively by the statute. Thus, it is considered to be a special remedy.

In Galvin Lumber Yards, Limited v. Ensor et al., [1922] 2 W.W.R. 15 (Sask. C.A.) Lamont J. A. said, at page 16:

A mechanics' lien is purely a creature of the statute. The lien being a statutory remedy, a lienholder is entitled to such rights, but only to such rights as the statute gives him. As a right of lien is in derogation of the common law, statutes giving such rights are to be strictly construed so far as they create the right to a lien, but, being remedial in character, they are to be construed liberally so far as they relate to the enforcement of the lien.

## 3. Main Sections of the Act

The sections of the Act, with which the land titles offices must be familiar, are section 2 (definitions of "Crown", "improvement", "materials", "owner", "registered" and "services"), section 22 (lien on land), section 23 (no lien for architects or engineers), section 24 (no lien under \$100), section 25 (no lien for interest), section 26 (liens respecting interest of Crown in land), section 29 (general lien), section 32 (lien on condominium property), section 49 (expiry of liens), section 58 (notice to lapse), section 61 (certificate of action), section 62 (land titles requirements), section 63 (discharge or withdrawal of lien), section 64 (discharge irrevocable), section 100 (substantial compliance).

Subsection 22(1) provides that any person who performs certain work shall by virtue thereof have a lien upon the estate or interest of the owner in the land occupied by the improvement for the unpaid price of the work on the land concerned.

Pursuant to section 50, a lien claimant must register a claim of lien in the land titles office to secure priority over other encumbrances affecting the land. The section specifies in some detail the matters to be set out in the claim of lien. Also, section 29 provides that a claim of lien may include claims against any number of parcels of land owned by the same person. Section 100 provides that a substantial compliance only is required for section 50.

Section 58 provides that certain persons may require the registrar to serve a notice which will have the effect of making the lien lapse, unless an action is commenced to enforce the lien. Later sections of the Act set out the powers of the judge in dealing with actions that come before the court relating to builders' liens.

Forms are prescribed in The Builders' Lien Regulations, C.B-7.1 Reg. 1 appearing in the January 3, 1986 Gazette.

**B. Who can Register a Claim of Lien?**

**1. A Partnership or an Association cannot Register**

Subsection 22(1) provides as follows:

22(1) A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.

In The Mechanics' Lien Act of 1973 "person" was defined to include "partnerships and associations". The Minister of Justice's Special Advisory Committee noted that Saskatchewan, British Columbia and Prince Edward Island were the only Canadian jurisdictions which grant a lien to unincorporated bodies. The Committee made this comment at page 61 of the Report, mentioned above:

The difficulty this creates is that these bodies are not legal entities for the purposes of holding land. When an unincorporated association registers a lien, the only way it can be removed, in most cases, is by activating the notice to lapse procedure or, if this is not appropriate, by court order. The land titles offices cannot know whether the person signing the discharge is the only person who is benefitted by the lien. This creates hardships for owners and lien claimants, alike. The alternative is to require the individuals who formed the association or partnership to claim, and to confine the definition of person to bodies corporate and the Crown.

Based on the Committee's recommendation The Builders' Lien Act contains no definition of person which means that the definition of person in clause 21(1) 19 of The Interpretation Act governs. "Person" is defined in that Act to include "a corporation and the heirs, executors, administrators or other legal

representatives of a person". The consequence of this change is that partnerships, firms and associations cannot claim or register a lien under The Builders' Lien Act. Only natural persons and bodies corporate can register a lien.

2. No Lien for an Architect or Engineer

Section 23 of the Act provides that an architect or engineer, or an employee of an architect or engineer, who provides architectural or engineering services is not entitled to a lien. Arguably, the law under The Mechanics' Lien Act of 1973 may be the same without express statutory exclusion (see De Lint Architects Ltd., [1986] 6 W.W.R. 458 (Sask. C.A.)) and the cases referred to therein.

3. Must provide Services or Materials on or in Respect of Improvement

Subsection 22(1) gives a lien to a person who provides "services or materials on or in respect of an improvement". Clause 2(h) defines "improvement" to mean a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into the land.

The definition goes on to include:

- (a) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
- (b) the demolition or removal of any building, structure or works or part thereof.

This inclusion is the principal change in the definition of improvement from the 1973 and earlier Acts. The definition excludes "a thing that is not affixed to the land or intended to become part of the land".

The definitions of "materials" and "services" are substantially the same as the 1973 Act:

- (a) "materials" means every kind of movable property that becomes or is intended to become, part of the improvement, or that is used to facilitate directly the making of the improvement;
- (b) "services" means any labour done or service performed on or in respect of an improvement and includes the rental of equipment and the wages of any operator provided with the equipment.

The primary difference is that labour or work, which were separately defined in the 1973 Act, are now included in the definition of "services". This change was made as there seemed to be no need for a separate definition.

Subsection 50(2) provides that every claim of lien shall set out "a short description of the services or materials that have been provided".

A registrar ought not to be eager to say that the work or services performed or the material supplied do not give a right of lien under section 22. A procedure is provided in the Act to attack a lien and for adjudication by the court. If, on the other hand, a lien is rejected and cannot be registered within the statutory period and the lien claimant is prejudiced by intervening registrations, the assurance fund may be liable for the loss sustained by the claimant.

The question whether or not a lien exists is often one of difficulty to be resolved only in the court. For example, there is as yet no cases indicating whether the provision of fertilizer and chemicals creates a lien. One analysis could see a valid lien being created on the basis that the seller of the fertilizer or chemicals is a person who provides materials in relation to seed which is added to, dug or drilled on or into land. The only safe course for the registrar is, therefore, to register such a lien, leaving the parties to contest its validity in litigation if necessary. If goods are supplied or installed, a lien can be registered.

One area where the registrar will not accept a builders' lien is from a surveyor with respect to a surveyor's services, i.e. preparation of a plan or placement of boundary markers.

In P.R. Collings & Associates Ltd. v. Jolin Holdings Ltd., [1978] 3 W.W.R. 602 (Sask. Dist. Ct.), His Honour Judge Walker considered the position of a construction consulting company which had conducted a survey for the construction of a shopping mall, done some gravel filling and bored some test holes when it was decided that the shopping mall would not be built. After affirming the position of Ritchie, J. in Clarkson Co. Ltd. v. Ace Lumber Ltd., [1963] S.C.R. 110 at 114 who held that The Mechanics' Lien Act must be given a strict interpretation in determining whether any person is entitled to a lien, Judge Walker concluded that Saskatchewan by its definition of improvement required the construction of some "thing" or participation in specific listed activities: clearing, breaking, etc. By analogy a surveyor is not entitled to a lien.

#### 4. Assignee or Agent can Register

Subsection 50(3) provides that a claim of lien can be executed by the lien claimant, his or her assignee or agent. When an assignee is the lien claimant, only the name of the assignee is shown as the lien claimant. The space for the name of the assignor need not be completed.

A claim of lien which does not indicate the status of the person signing, i.e. as agent or as assignee, should not be rejected. It is a complete claim of lien as far as signatures are concerned if a signature, regardless of the status, appears on the form.

The reason why The Builders' Lien Act and Regulations provide for only one form of affidavit of verification regardless of whether or not the claimant is the assignee or an agent is to ensure that the land titles office need not inquire as to whether an agent or assignee is making the claim. In addition, the claim of lien form under the signature portion in essence does not require an indication of the status of the person signing.

#### C. When can a Claim of Lien be Registered

Section 49 provides for when a lien expires. The main time for registering a lien is increased from 37 days to 40 clear days after certain specified events. Subsection 49(5) provides that a claim of lien may be registered and an action commenced after the expiration of the lien, but the lien does not take priority over certain intervening interests.

#### D. Form E: Claim of Lien

Subsection 50(2) of the Act provides as follows:

50(2) Every claim of lien shall set out:

(a) the name and address of:

- (i) the person claiming the lien;
- (ii) the owner or the person who the claimant or the agent of the claimant believes to be the owner; and
- (iii) the person for whom the materials or services were provided;

- (b) a short description of the services or materials that have been provided;
- (c) the amount claimed in respect of services or materials that have been provided;
- (d) a description, sufficient for registration, or, where the Crown is the owner, sufficient for identification, of the land or the estate or interest affected; and
- (e) the lien claimant's address for service.

Subsection 50(3) requires the claim of lien to be in the form prescribed. "Prescribed" means prescribed in the Regulations. Form E is the form prescribed in the Regulations for the claim of lien. Note that Form A is called "written notice of a lien". This is not the proper form. Form A is the form which is to be used where the lien claimant is not intending to register in the land titles office but is giving notice to the owner or the mortgagee directly.

A major change from the old claim of lien form is that the claim of lien under The Builders' Lien Act does not require the date that the services or materials were provided to be disclosed. The reason for this is that the time for registration is not dependent on when the services or materials were provided. The time for registration begins according to the events specified in section 49.

Every claim of lien is required to set out an address for service. Unlike The Mechanics' Lien Act this can be an address for service outside the province of Saskatchewan. There is no restriction contained in clause 50(2)(e).

Section 24 provides that no lien exists for a claim less than \$100. This is an increase of \$50 from the existing Mechanics' Lien Act.

Whether or not a claim of lien has been executed by the proper officer of the company, claiming a lien, is not an issue under this Act. Subsection 50(3) requires a claim of lien to be executed by "the lien claimant, his assignee or agent and verified by an affidavit of the lien claimant, or an assignee or an agent who has informed himself of the facts set out in the claim". Form E, Part A or B, by deliberate decision, does not require the person signing to indicate whether he or she is the lien claimant, assignee or agent. Thus, if a company is the lien claimant, the only point where it may become important to know the status of the person signing is when the lien is proven for the purposes of a court proceeding.

Section 25 provides that there can be no lien for interest. Form E contains a specific direction to the lien claimant that his or her claim of lien cannot include a claim for interest and that he or she cannot exaggerate his or her claim for interest.

The Builders' Lien Act provides for a general lien. This is a concept which allows a lien claimant to claim against any number of parcels of land in one claim of lien form and which grants certain rights with respect to enforcement (see subsection 50(4)). The procedure to claim a general lien is simply to submit a claim of lien in Form E and describe as many parcels as the lien claimant intends to charge. It is not possible to know, by looking at the claim, whether or not the lien claimant intends to have a general lien. That can only be determined outside the land titles office.

Subsection 50(5) provides that a claim of lien may include claims against any number of parcels of land owned by the same person and any number of persons claiming liens upon the same parcel may join in the claim. It also directs that where there is more than one lien included in a claim each lien shall be verified by affidavit as provided in subsection 50(3).

Clause 50(2)(d) and Form E require the lien claimant to indicate the estate or interest against which the claim is made. This is a significant piece of information when the registered owner and the owner for the purposes of the Act are different, i.e. the registered owner has entered into a lease and the lessee has contracted for improvements. The registrar will show on the certificate of title that the claim is against the estate or interest of a third party. The notice to the registered owner will also indicate this fact.

It is clear that a claim of lien may be registered against a leasehold estate in land (see Galvin Lumber Yards, Limited v. Ensor et al., [1922] 2 W.W.R. 15 (Sask. C.A.)). The definition of owner in section 2 extends to a lessee.

#### E. Affidavit of Verification: Part B, Form E

Subsection 50(3) requires every claim of lien to be "verified by an affidavit of the lien claimant, or an assignee or an agent who has informed himself of the facts set out in the claim and the affidavit of the lien claimant, agent or assignee shall state that he believes those facts to be true". This direction means that every claim of lien must have an affidavit of verification and it must be the same form whether or not the claim of lien is executed by the lien claimant, an agent or assignee. The affidavit of verification is Part B to Form E, the claim of lien form.

## F. Substantial Compliance

Section 100 provides:

100(1) No certificate of substantial performance, written notice of a lien, claim of lien or any other prescribed form is invalidated by reason only of a failure to comply strictly with the prescribed forms or subsection 50(2) unless, in the opinion of the court, a person has been prejudiced thereby and then only to the extent of the prejudice suffered.

(2) Nothing in subsection (1) shall be construed as dispensing with the registration of the claim of lien as required by this Act.

This section gives the court wide curative powers. If the court determines that the lien claimant has a valid lien registered within time, it is unlikely the court will deny a lien claimant because of an improperly completed form unless someone has been prejudiced by the defect in the form.

There are certain essentials that must be supplied in the lien for the proper operation of the Land Titles System eg. the name and address of the claimant so that an effective notice, if required, could be given under section 58 of The Builders' Lien Act. The amount of the lien, a sufficient description of the lands, to enable the registrar to identify the lands to be charged and a properly completed affidavit of verification are also essential. Thereafter, the registrar would be reluctant to reject for an omission or technical defect.

The court will do justice to overcome technical deficiencies. In the case of Monarch Lumber Co. v. Garrison (1911), 18 W.L.R. 686 (Sask. S.C.), the lien was executed "The Monarch Lumber Company Limited per George Sillers, Agent" and an impression of the corporate seal of the company was attached thereto. Wetmore, C.J., in his judgment said, at page 689, "We are of the opinion in view of the material produced by the counsel for the plaintiff and the grounds of appeal taken, that it would be a gross miscarriage of justice if it were forced to decide this appeal as it would have to be decided on the assumption that the claim was not so sealed. We will, therefore, allow proof that as a matter of fact it was sealed."

In Manitoba Bridge and Ironworks Limited v. Gillespie (1914), 6 W.W.R. 1582 (Sask. S.C.), Haultain C.J. at page 1585 said there could be no doubt that there had been a failure to comply with two important requisites of the section which sets out what a claim of lien should contain. Notwithstanding these defects, the court found that no one was prejudiced by the defect in the lien and, therefore, treated the lien as good. In Chick Lumber and Fuel Company v. Moorehead et al., [1933] 3 W.W.R. 465, the Manitoba Court of Appeal decided that although there were defects in connection with the lien, no person had been prejudiced, and the lien was therefore good.

In Scratch v. Anderson, [1917] 1 W.W.R. 1340, the court held that a complainant not having been prejudiced thereby, objections made to the forms of some of the liens could not prevail.

The fact that The Mechanics' Lien Act gives the court authority to overlook defects in a lien where there has been no prejudice is evidently what led Milligan, M.T. in Re Mechanics' Lien, Lot 1, Block 24, Village of Neudorf, to come to a decision on the 8th of February, 1915, to the effect that it is very dangerous to reject mechanics' liens on account of imperfections, and he referred to section 19 of The Mechanics' Lien Act which he was then considering, the curative section of which was similar to section 100 of the present Builders' Lien Act.

Section 100 applies to all forms.

Certain clear areas where the registrar should reject are:

- (1) the amount of the claim is less than \$100 (see section 24);
- (2) the claim includes interest either as part of the total claim or as a separate amount (see section 25), i.e. the inclusion of interest on the claim of lien form will merely protract negotiations;
- (3) the land is registered in the name of the Crown and the claim against the estate or interest of someone is also against the Crown (see section 26);
- (4) where the claim of lien indicates the lien claimant intends to attach a disposition of any minerals or petroleum or natural gas rights held from the Crown (see section 51).

#### G. Registration Against Condominium Property

Section 32 provides that where services or materials are provided in respect of a condominium unit, any lien that arises is with respect to the estate or interest the owner has in that unit and his or her share in the common property. Accordingly any claim of lien accepted for registration with respect to a unit is required to be registered only against the certificate of title for that unit. However, where services or materials are provided in respect to the common property, any lien that arises attaches to the estates or interests of all the owners in all the units and the common property. In such a case, a claim of lien accepted for registration with respect to the common property is required to be registered against the condominium plan. When filing against the plan, the plan is to be described by reference to the condominium plan number.

Whether or not a lien claimant is entitled to register against the common property or the unit is not a matter which need concern the registrar. It is a matter which a lien claimant must sort out whenever a lien claimant is doing work with respect to a condominium. The lien claimant must decide whether or not he or she

is performing services or materials with respect to a unit or with respect to the condominium plan. If a lien claimant is providing services or materials with respect to a unit, he or she describes only the unit in the claim of lien. If the lien claimant is providing services or materials with respect to the condominium plan, he or she simply refers to the condominium plan by condominium plan number.

## H. Registration against Crown Land

### 1. Registration Against the Estate of a Third Party

The Crown is in a special position under builders' lien legislation. Since the ultimate remedy under such legislation is the sale of the land, a special procedure had to be developed to allow a lien claimant to collect money earned that would not involve the sale of public lands. Thus, although subsection 26(1) of the Act declares that "a lien does not attach to and cannot be registered against" land of the Crown, subsection 26(3) ensures that the lien is a charge on the holdback. Section 52 provides a special mechanism allowing service against the Crown with a claim of lien rather than registration against the land.

Subsection 26(2) ensures that where an improvement is made to land in which the Crown has an estate or interest but the Crown is not an owner, the lien may attach to the estate or interest of any other person in that land.

A builders' lien may be registered against the estate or interest of a third party owner in Crown lands under the following circumstances:

- (1) in unpatented Crown land; or
- (2) in patented Crown land belonging either to a provincial "Crown" agency or the federal government;

if Form E specifies that the lien claimant claims a lien upon the estate of a third party owner other than the Crown.

Note that clause 2(1)(o) of the Act defines "registered" to include "filed" when no certificate of title is issued. The act contemplates filing against unpatented land. Clause 2(1)(k) defines owner to mean more than the registered owner:

- 2(1)(k) "owner" includes a person having an estate or interest in land, other than an encumbrance, at whose request, express or implied, and:
- (i) on whose credit;
  - (ii) on whose behalf;
  - (iii) with whose privity and consent; or

(iv) for whose direct benefit;  
an improvement is made to the land.

This definition includes an unregistered owner under an agreement for sale and a lessee under a lease. It also includes a mortgagee.

In Re Mechanics' Liens Act; Shields v. City of Winnipeg (1964), 49 W.W.R. 530 (Man. Q.B.) it was held that a mechanics' lien is not registrable against a public street on the grounds that a sale pursuant to that Act would be contrary to the public interest. This was so notwithstanding that the Manitoba Mechanics' Lien Act made no provision for the prohibition of the registration of a mechanics' lien against a public street. Thus, the estate or interest of the City of Winnipeg in the street was not subject to a mechanics' lien (see also: Peter Wilson Drilling & Blasting Ltd. v. Pitts Engineering Construction, British Columbia Transit and Vancouver, [1984] 5 W.W.R. 600 (B.C. Co. Ct.)). See Prairie Roadbuilders Ltd. v. Stettler 23 et al. (1984), 27 Alta. L.R. (2d) 289 (Q.B.) for a review of the law in respect of the registration of mechanics' liens against municipal land.

## 2. Giving Notice of Lien to Crown

If the lien claimant is claiming directly against the Crown, the lien claimant cannot register in the land titles office. The lien does not come into existence against Crown land (see section 26).

The lien is a charge only, and, in order to attach to money in the Crown's hands, it must be given to the appropriate party as is provided in section 52.

It should be noted that the Crown in the Act includes more than government departments, agencies and corporations. Clause 2(1)(d) defines Crown to mean:

2(1)(d) "Crown" means:

- (i) Her Majesty in right of Saskatchewan;
- (ii) an agency of Her Majesty in right of Saskatchewan, including The Workers' Compensation Board;
- (iii) a board, local authority or municipal corporation that is created by or under:

- (A) The Conservation and Development Act;
- (B) The Drainage Act;
- (C) The Education Act;
- (D) The Irrigation Districts Act;
- (E) The Lloydminster Municipal Amalgamation Act, 1930;

- (F) The Northern Municipalities Act;
- (G) The Rural Municipality Act;
- (H) The Rural Telephone Act;
- (I) The South Saskatchewan Hospital Centre Act;
- (J) The Union Hospital Act;
- (K) The University Hospital Act;
- (L) The University of Regina Act;
- (M) The University of Saskatchewan Act;
- (N) The Urban Municipality Act, 1984;
- (O) The Water Corporation Act;
- (P) The Water Users Act;
- (Q) The Watershed Associations Act.

If a public body is not included in this list, a claim of lien may be registered directly against the land of the public body.

### 3. Filing against Minerals held from Crown

Section 51 provides for filing a claim of lien with the Department of Energy and Mines where the claim of lien is intended to attach a disposition of any minerals or petroleum or natural gas rights held from the Crown. This means that a claim of lien which shows the Crown as owner, the claim to be against a third party but the nature of services or materials to be in relation to minerals, should not be registered in the land titles office. It should be filed with the Records Officer, Department of Energy and Mines at Regina.

### 4. No Registrations against Estate of Crown Canada

No builders' liens may be registered against the estate or interest of Her Majesty the Queen (Canada) or any federal agencies, boards, commissions or corporations (see Decks McBride Ltd. v. Vancouver Association Contractors Ltd. et al. (1955), 14 W.W.R. 509 (B.C.C.A.)). In Burg & Johnson Builders' Supply Ltd. et al. v. Canada Mortgage and Housing Corporation et al., [1982] 6 W.W.R. 278 (B.C. Co. Ct.) the court held that property registered in the name of C.M.H.C. could not be encumbered by a builders' lien.

### I. Builders' Liens and the Authorities

Section 38 of The Wascana Centre Act, section 44 of The Meewasin Valley Authority Act and section 46 of The Wakamow Valley Authority Act, S.S. 1980-81, c.W-1.1, provide that "an instrument relating to public land in the area is invalid unless it is consented to in writing by the authority, and no registrar of land titles shall register any such instrument unless it is accompanied by the consent of the authority". Instrument in each of these Acts has the restricted meaning of "a map, a plan, a transfer, a mortgage or other document in writing relating to or affecting the transfer of

or other dealing with land" (see clause 2(j) of The Wascana Centre Act; clause 2(m) of The Meewasin Valley Authority Act; and clause 2(q) of The Wakamow Valley Authority Act). This has been interpreted as not catching a builders' lien. Accordingly, a builders' lien against the estate of one of the authorities may be registered without the consent of the authority.

It should be noted that none of these authorities come within the definition of Crown in The Builders' Lien Act.

#### J. Special Registration Procedure

When a claim of lien form is reviewed by the documentation clerk for entry into the instrument register, the certificate of title is immediately pulled and examined. If the builders' lien is acceptable for registration, a note is written saying "Builders' lien (number) will attach," and stapled to the jacket. The lien is then re-filed with the work to be done or kept with the title until processed further. The reason for this is that mortgagees are entitled to advance funds based on the certificate of title only. They are not conducting a search of the instrument register (see page 36 of this manual). This is a correct practice according to law for a mortgagee to follow. However, it can have a disastrous effect upon lien claimants. By this procedure, the mortgagee can be alerted to the pending registration of a builders' lien.

A question is raised, from time to time, as to whether a person, searching a title and discovering that a builders' lien will attach, can review the builders' lien. It is a long standing practice not to allow a member of the public to review an unregistered instrument. The instrument may not register or may be withdrawn. The instrument register will disclose who submitted the instrument. A copy may be obtained from the submitting party, if the submitting party wishes the contents of the instrument disclosed.

#### K. Notice to the Registered Owner and Mortgagee

Subsection 50(7) of The Builders' Lien Act provides that the registrar is required to send notice of the registration of a builders' lien by ordinary mail to the registered owner of the land and to any mortgagee whose mortgage is registered against the land prior to the registration of the claim of lien.

In addition, subsection 50(8) provides that where a claim of lien is registered against a condominium plan, the notice need only be sent to the corporation and to any mortgagee whose mortgage is registered against the plan prior to the registration of the claim of lien.

Where the lien is against the estate or interest of some third party, the notice should have typed on the bottom that it is "against the estate of \_\_\_\_\_".

## L. Change of Address for Service

Subsection 50(6) provides as follows:

50(6) The lien claimant may change his address for service by delivering to the registrar notice in writing of the change of address for service which notice refers to the claim of lien and the land affected.

Form F of the Regulations is the appropriate form. This form provides a space for a witness. However, Form BB to The Land Titles Act which is the form to be used for a change of address by a caveator also provides a space for a witness. It has never been the practice to require an affidavit of attestation for a change of address by a caveator. Accordingly, no affidavit of attestation is required for a change of address by a builders' lien claimant.

The new address is noted on the certificate of title as a new notice. When the title is renewed, consolidated or enlarged and the builders' lien is carried forward, the new title indicates the new address, only, in the particulars pertaining to the builders' lien. No reference to the instrument number making the change of address appears on the new title.

In Arrow Plumbing & Heating 1978 Ltd. v. Regina Registrar, (Sask. Q.B.) Judicial Centre of Regina, April 29, 1982, Q.B. No. 1159/81, (unreported), Malone J. considered the effect of:

- (1) a notice of change of address card which firms send out to clients when they change location;
- (2) an oral agreement to keep track of a law firm's change of address.

The former was found to be insufficient because it did not in anyway indicate anything with respect to the mechanics' lien in question, eg. no land description, the registration number of the affected instrument or an indication that land titles officials should check to see if any instruments would be affected by such notice. Malone, J. held that the registrar was not required to take any legal notice of the change of address card.

The Act provides the procedure in section 50 which binds the registrar if an error is made. A change of address card is used to change the deposit account address only.

## M. Assignment of Claim of Lien

Section 66 provides that the rights of a lien claimant may be assigned by an instrument in writing, and, if not assigned, on death, pass to the personal representative. This confirms Re Registration of Assignment of Mechanics' Lien (1913-14), 5 W.W.R. 1191 (Sask. M.T.).

The lien may be registered by the assignee of the claimant (see subsection 50(3)). A lien already registered may be assigned, and the assignment registered. No form of assignment is prescribed. Such an assignment would have to be in writing, executed by the lien claimant specifying the particular lien to be assigned and properly witnessed and attested.

There is no authority for the registration of a general assignment in any of the legislation pertaining to instruments registered in a land titles office. When read with the provisions of The Land Titles Act, section 66 of The Builders' Lien Act should be interpreted as referring to an assignment of a specific builders' lien. If a lien claimant has registered many claims of lien, it may wish to grant a power of attorney to a third party to execute discharges, postponements or assignments.

## N. Notice to Lapse

### 1. When Available

As a protection to a registered owner, the Act provides a means to easily clear the certificate of title of a builders' lien. Subsection 58(1) provides that "any person claiming a mortgage on, or claiming any estate or interest in the land" may by request, in the prescribed form, require the registrar to send a notice to lapse.

Subsection 58(1) states the request may be made:

- (1) at any time after registration of a claim of lien;
- (2) before a certificate of action is registered.

This latter part means that after a certificate of action is registered, the registrar cannot accept a request to lapse regardless whether the claim of lien, in respect of which the subsequent notice is requested, is registered after the certificate of action. The certificate of action "freezes" the certificate of title in respect of all liens and subsequent notices to lapse in that no further requests to lapse will be accepted.

### 2. Who may Request

A "person claiming a mortgage on, or claiming any estate or interest in the land" includes a registered owner, a purchaser under an agreement for sale, a mortgagee or a lessee.

It is doubtful whether one builders' lien claimant could request that a notice to lapse be served on another lien claimant.

In Re Land Titles Act, [1919] 1 W.W.R. 47 (Sask. M.T.), Milligan, M.T. decided that there was nothing in the section, which at that time allowed the person claiming a right, title or interest to make a request, to indicate that the person was claiming a registered interest, and further stated he was of the opinion the registrar is not required to exercise any judicial discretion as to the interest claimed; and that, so long as anyone claiming a right, title or interest in the property in question requires the registrar to serve this notice, the registrar must follow the provisions of the section. The same reasoning would apply today.

A question is sometimes raised whether a request to serve a notice to lapse may be made by a manager or other official of the company. A request may be made in the name of the company and signed under the hand of the president, vice-president or director since the making of the request will be within the general scope of the authority of such officers.

An agent or solicitor is not given the authority to make the request.

If a builders' lien is registered against the title to land held in tenancy in common, one registered owner of an undivided specified or unspecified interest may request a notice to lapse as to his or her interest. Similarly, the lien claimant could discharge his or her interest as to a specified or unspecified interest. This is so because it does not disturb the unity of possession enjoyed in a tenancy in common. A builders' lien remains a claim until such time as the court determines otherwise. Therefore, unity of possession is not disturbed by registration or discharge of the builders' lien against an undivided specified or unspecified interest.

### 3. Form of Request to Registrar: Form G

The form of the request is Form G in the Regulations. It must be executed by the person claiming the right to make the request to the registrar.

Form G requires a witness. At first, it was the position of the land titles offices that the legislature intended that an affidavit of attestation must accompany the request to the registrar. However, no affidavit of attestation is required with respect to a request to lapse a caveat.

Milligan, Master of Titles, in September of 1913, on a formal reference to him on whether a request to lapse a caveat must be witnessed and attested stated "I have reached the conclusion that whether the request in writing from the owner of the land under section 130 (now 159(2) of The Land Titles Act) is an instrument under the Act or not, it is in any event not an

instrument required by the Act to be registered and there is nothing in section 130 to indicate that the legislature intended any formalities with this request in writing excepting that it should be made by the owner or other person claiming an interest".

The practice should be the same for builders' lien, and, accordingly, no affidavit of attestation is required to accompany a request to lapse a builders' lien.

A request may be with respect to the whole or any part of the land covered by a particular instrument and it is possible for a lawyer to make a mistake and have a notice to lapse served with respect to more land than he or she is interested in having the lapse extend to. If the registrar notices that a request is being made by an owner who is only one person affected by a lien but through inadvertence the request is being made with respect to all parcels this should be drawn to the attention of the solicitor. An error may have been made.

The request may refer only to the lien without specifying the land. In this event, the registrar will prepare the notice so as to relate to all the land comprised in that lien. If it is decided that notice is to be served only in respect of part of the land comprised in the lien that part should be described in the request in a manner acceptable to the registrar who will then serve a notice only as to that land.

It is no longer necessary to type on Form G who has made the request. The rules relating to enforcing a lien against a homestead do not exist in The Builders' Lien Act.

Under The Mechanics' Lien Act the request to the registrar was required to be accompanied by an affidavit swearing that the person claiming the interest giving rise to the right to make the request actually held the interest. No such affidavit is required under The Builders' Lien Act.

A separate request for notice to lapse is required for each builders' lien on different titles. This is intended to prevent a registered owner from requesting a notice to lapse with respect to several liens on several certificates of title.

Requests to lapse several liens should not be joined. There should be separate requests and all the procedures kept separate.

#### 4. Mental Infirmity

Before accepting any request to serve a notice to lapse a builders' lien, the certificate of title must be examined for a notice under The Mentally Disordered Persons Act or The Public Trustee Act with respect to the builders' lien claimant. Both

section 37 of The Mentally Disordered Persons Act and section 33 of The Public Trustee Act require 30 days written notice to be given to certain specified individuals of any "action, suit or proceeding, whether judicial or extra-judicial" against a mentally disordered person. Both sections provide for a waiver of the 30 days notice.

If a notice is found on the certificate of title, the request to lapse should be rejected. The applicant may then either:

- (1) serve upon the appropriate party the required 30 days notice and then resubmit the request with a copy of the 30 days' notice showing proof of service;
- (2) obtain from the appropriate party a waiver of the 30 days' notice, and resubmit the request with the waiver.

The 30 days' notice showing proof of service or waiver is attached to the request; no extra fees are charged for this material.

#### 5. Address for Service

If it is decided that the request is in order, then the titles researcher should examine the builders' lien to make sure that the address for service is properly set forth on the certificate of title. This is important in that if the notice is sent out and nothing is done about it, then under subsection 58(3) the builders' lien is lapsed and may not be re-registered.

The registrar sends the notice to lapse to the address shown on the builders' lien or in a formal change of address, only. The statute having required the lien claimant to state an address for service, having further provided for registration of changes of addresses, and having provided that a notice to lapse may be sent by registered mail, then if the registrar sends out a proper notice to the address disclosed on the builders' lien or formal change of address the registrar has complied with the statute. The registrar cannot require the applicant to prove that the lien claimant is still alive or that a company has not been dissolved. There may be an onus on the applicant, if he or she is aware of the facts, to disclose the facts to the registrar, but the registrar cannot require proof of these facts, or their absence, as a condition precedent to acting on a request to send out a notice to the lien claimant.

In Nazuruk v. Nazuruk (1970), 71 W.W.R. 136 (Sask. C.A.) the registrar sent a notice to lapse to the address on the caveat even though the request to lapse originated from that address. This was found to be acceptable. The court stated that the registrar must comply strictly with the section and when the registrar has done so, the court cannot find the assurance fund liable. This would be applicable to builders' liens also.

The registrar does not check the general record for changes of name made pursuant to The Business Corporations Act or The Non-profit Corporations Act. Those changes of name are filed only for the purposes of enabling the corporation to deal with interests in land in its new name.

6. Form of Notice to Lapse: Form H

Subsection 58(2) provides as follows:

58(2) On receipt of a request mentioned in subsection (1), the registrar shall send to the lien claimant at his address for service, by registered mail, notice in the prescribed form.

The registrar's notice to lien claimant is Form H in the Regulations. Although the form does not have a space for the address for service, as a matter of practice it is inserted.

Where the request relates to only part of the land covered by the claim of lien Form H is to be modified to meet the circumstances.

It is no longer necessary to show on the notice the name of the person on whose request the notice is served.

Section 45 of The Mechanics' Lien Act, R.S.S. 1978, c.M-7 required a lien claimant proceeding against a homestead to obtain leave of the court before commencing action. Subsection 45(18) of The Mechanics' Lien Act stated that the special procedure did not apply to an action brought by a lien holder upon whom a notice to lapse had been served at the "request of either the owner or the registered owner". The special procedure for homesteads was not carried forward to The Builders' Lien Act, therefore, it is not necessary to show upon whose request the notice to lapse is served.

When the notice is found to be correct in all particulars, it is sent out by registered mail. A memorandum is made on the certificate of title and the date of mailing is shown as part of the memorandum.

The request, together with the copy of the notice mailed and the receipts for the registered letters containing the notice, form the instrument.

7. Deceased Lien Claimant

If the notice to lapse is returned showing the lien claimant is deceased, the person requesting the lapse has two alternatives. If letters of probate or administration have been filed, and the registrar is satisfied that the lien claimant is the same person

shown to be the deceased in the letters of probate or the letters of administration, the registrar may send the notice to lapse to the personal representative of the lien claimant. In the event that no letters of probate or administration have been filed, the lien must be vacated by a court order.

#### 8. After Mailing, No Withdrawal

When the notice has been mailed out, it sometimes happens that the person making the request wants to withdraw the notice. This is not possible. The machinery has been set in motion and an order of the court or certificate of action in Form O received by the registrar within 30 days from the mailing of the notice is the only method of preserving the builders' lien.

#### 9. Computation of Time

The day of the mailing of the notice is not included in the 30 day period, but the 30 day period begins with the next following day. If the last day of the 30 day period falls on a day on which the office is closed for registrations, then the lien claimant has all of the next following day during which the office is open for registration to register an order or Form O continuing the claim of lien.

If an order is received within the required time, and in most cases the order is submitted near the end of the period, it is dangerous to reject the order on some technical point of interpretation.

Reference might be made here to the question of an order or Form O presented on the last day of the 30 day period, but after office hours. The case of Re Continental Explosives Ltd. (1964), 49 W.W.R. 762 (B.C.S.C.) held that it was lawful for the registrar to accept and register after hours. Registrars should regard themselves as bound strictly by the office hours set out in The Land Titles Act. If any special circumstances arise which a registrar feels would justify a departure from this rule, the registrar should consult the Master of Titles before proceeding. Even if the registrar accepted the lien, it would only form part of the next day's registrations.

From time to time, a Form O will be submitted after the 30 day period but before the registrar has had an opportunity to mark the lien lapsed. The Court of Queen's Bench and the Court of Appeal considered this matter in the unreported decision of In the matter of The Land Titles Act and The Mechanics' Lien Act and the claim of lien by William J. Slowski, registered in Prince Albert as No. 66PA07958 dated December 10, 1970 and June 24, 1971, respectively. Dicta in these cases would seem to indicate that it is open to the registrar to reject the certificate of action even though he has not marked the lien lapsed. If this arises, it should be discussed with the Master of Titles.

It is not the date of the notice which is important, but the date the registered letter was mailed that counts, and this date, so inserted on the memorandum of mailing of the notice, should be verified by the official before any entry of lapse of the claim of lien is made on the title. If, at any time before the claim of lien is lapsed, it is found there has been an error in the notice, then the proper course is to send out a further notice and the 30 day period will start to run afresh. The person applying for the notice should be advised of the error, and that the lien claimant will have the further period within which to protect the claim.

10. Certificate of Action: Form O

Subsection 58(3) requires a certificate of action to be registered within 30 days of the mailing of the notice in order to preserve the lien. Subsection 86(5) gives the local registrar the authority to issue a certificate of action in the prescribed form. The form prescribed is Form O in the Regulations. The certificate of action in Form O identifies the lien claimant as the plaintiff in the action and describes the land and the amount of the plaintiff's lien.

The following rules apply to the registration of a certificate of action:

- (1) a certificate of action can only be registered after a claim of lien has been registered (see section 54);
- (2) where more than one claim of lien is registered, each claim may be the subject of a notice to lapse under section 58 until a Form O relating to one of the liens is registered after which no further requests to lapse can be accepted, i.e. the commencement of action by one lien claimant involves all lien claimants whether registered or not (see section 88);
- (3) after a Form O is registered, any other notices to lapse for which the 30 days has not expired are rendered ineffective and the memorandum of any such notice should be endorsed "Notice rendered ineffective" which prevents any inadvertent lapsing of the lien;
- (4) after a Form O is registered, a notice to lapse cannot be requested with respect to any of the liens (see subsection 58(1) which provides that the Form O in essence "freezes" the title with respect to any requests for lapse);
- (5) any lien which has lapsed before the registration of Form O is not revived by the registration of Form O;

- (6) if no lien claimant registers a Form O, all liens, for which a notice to lapse has been served, can be vacated at the end of the 30 days' notice for each lien (see subsection 58(3)).

In Contract Interiors and Design Ltd. v. Vogel, [1973] 5 W.W.R. 286 (Alta. Dist. Ct.) a lienholder whose lien was registered and subsisting at the time of the registration of the plaintiff's certificate of action did not register a certificate of action. As a result, the lien was removed from the certificate of title by the land titles office. It was held that the lien should not have been removed for failure to register a certificate of action as once an action is brought by one lienholder and a certificate of action is registered, the entire matter is in issue. It is unnecessary for each lienholder to register a certificate of action. In Contract Interiors the certificate of action was registered subsequent to registration of the lien (see also Driden Industries Ltd. v. Sieben and Willeman, [1974] 3 W.W.R. 368 (Alta. S.C.A.D.)).

In Consolidated Concrete Limited v. Bauer et al., [1979] 5 W.W.R. 351 (Alta. Dist. Ct.) a lienholder discharged a certificate of action when there were other lienholders who were parties to the action and whose claims had not been resolved. The court held that the lienholder should not have discharged the certificate of action in these circumstances.

It should be noted that a certificate of action, like a certificate of lis pendens, is not an encumbrance and therefore cannot be postponed under section 146 of The Land Titles Act, (see page 309 of this manual).

## 11. Clearing the Title After Registration of Form O

### (a) Discharge by a Lien Claimant/Agent

Subsection 61(3) provides that where a certificate of action and only one claim of lien are registered, the person who submitted the certificate of action and the person on whose behalf the claim of lien is registered may register a withdrawal of the certificate of action in the prescribed form. This means that if an agent has filed a claim of lien, the agent or the lien claimant may withdraw the certificate of action. Form K is the withdrawal of the certificate of action. A discharge of the claim of lien should not be required. This is a change from the initial procedure under the Act but seems more in line with subsection 61(2).

Although subsection 61(3) uses the word "and" to link the person who submitted and the person on whose behalf the lien is registered, this must be read as an "or". Form K requires only one signature.

If the registrar cannot identify the agent who submitted the certificate of action, it will have to be removed by the lien claimant or, in the usual way, by a certificate of discontinuance or court order.

If a solicitor in a law firm submitted the certificate of action, only that solicitor may execute the withdrawal. If that solicitor is no longer with the firm, the certificate of action will have to be removed as above.

Unlike with a caveat, The Builders' Lien Act expressly provides that a lien claimant may withdraw his or her claim of lien notwithstanding the lien claimant may be the plaintiff in the action (see clause 61(1)(b)).

(b) Certificate of Discontinuance: Form J

Subsection 61(2) provides as follows:

61(2) Where a certificate of action has been registered, a certificate, in the prescribed form, of the local registrar of the court at the judicial centre in which the action is pending:

(a) that the action has been discontinued; or

(b) that the action having proceeded to trial, judgment was given in favour of the defendant, that no appeal has been entered and that the time limited for an appeal has expired;

may be registered, and when registered the certificate has the same effect as a discharge of the claim of lien or an order of the court vacating the registration of the claim of lien.

Form J is the form prescribed in the Regulations. Where more than one lien is registered, this will be the most common method of removing the certificate of action and liens. The other method will be by court order. Form J may also be used where only one claim of lien is filed. Section 62 requires the certificate in Form J to refer to the registration number of every claim of lien and certificate of action affected.

(c) Itemized Rules

The following rules should be followed with respect to clearing the title after a certificate of action is registered:

- (1) one claim of lien and a Form O are registered - the lien claimant or agent who submitted the Form O may register a Form K;

Result: Registrar removes claim of lien, request to lapse and Form O.

- (2) one claim of lien and a Form O are registered - a certificate in Form J referring only to the certificate of action may be registered;

Result: as above.

- (3) one claim of lien and a Form O are registered - a court order is submitted for registration vacating the certificate of action only;

Action: Registrar should reject and ask for the claim of lien number to be referred to (see section 62). The submitting party may return the court order and indicate that it is the intention to remove the certificate of action only. The registrar may then accept the order for registration. The consequence of the removal of the certificate of action is that a request to lapse may be made with respect to any of the liens that remain, or the owner may have to apply to court for an order to remove the liens. This fact situation will arise when the lien claimant who commenced the action wants to withdraw but the court has not yet made an order with respect to the continuation of the action under section 61.

- (4) one claim of lien and a Form O are registered - a court order or lien claimant discharges the claim of lien;

Result: Registrar removes claim of lien, request to lapse and certificate of action (see closing words of clause 61(2)).

- (5) more than one claim of lien and a Form O are registered - a court order or a Form J are submitted for registration referring to the certificate of action only, and either none or only some of the claims of lien;

Action: Registrar should reject and ask for all claim of lien numbers to be referred to (see section 62 and rule (3) above).

- (6) more than one claim of lien and a Form O are registered - a court order or a Form J are registered referring to the certificate of action and all claims of lien;

Result: Registrar should remove all claims of lien, all requests to lapse and the Form O.

- (7) more than one claim of lien and a Form O are registered - a court order is submitted for registration which refers to all claims of lien but not to Form O;

Result: Registrar should accept the order and remove all claims of lien, all requests to lapse and the Form O as the intention of the court is clearly to dispose of the action.

The only cases where the Registrar acts to independently remove a claim of lien after a Form O has been registered, is when only one claim of lien is registered. In other words if there is more than one builders' lien registered, the certificate of action (Form O) cannot be withdrawn except by the court. The reason for this caution is that the commencement of the action gives rights to all lien claimants, at least the right to apply for carriage of the action, and this right is not terminated until the court so directs.

- (d) Where Judgment is Given in Favour of the Plaintiff

When judgment is given in favour of the plaintiff this means that the lien claimants have been successful and the owner is required to pay compensation. If the owner is unable to satisfy the amount of a judgment, the court may order the land to be sold. In either case, the certificate in Form J is not applicable. The lawyers acting for the lien claimant must clear the title as part of the order obtained against the owner.

The Court of Queen's Bench has wide powers of trying all the issues in order to dispose of the action completely, and to adjust the rights and liabilities of all parties concerned. The court may direct sale of the land and the manner thereof, and vest the land in the purchaser.

In a builders' lien action, a judge can make an order vesting the lands in the purchaser and directing what encumbrances should follow in the title. In practice, however, the sheriff executes a transfer and the transfer is accompanied by the judge's order confirming the transfer and further directing what encumbrances should be endorsed

on the title issued to the purchaser under the sheriff's transfer.

In this connection, it should be noted that while sections 185 to 188 of The Land Titles Act dealing with transfers by a sheriff require such transfer to be held in the land titles office for four weeks before a certificate of title issues, this does not affect transfers in pursuance of the order of the court in a builders' lien action. In Canadian Pacific Railway Company v. Mang (1908), 1 Sask. L.R. 219; 8 W.L.R. 774 (S.C.), Wetmore, C.J. held that a sale under the direction of the court was not a sale "under process of law" within the meaning of these sections of The Land Titles Act. He stated that a sale "under process of law" was a sale by the sheriff or other officer under a writ of execution or other writ of a similar nature. He further held that when the land was sold pursuant to the order of the court (as in the case of a builders' lien action), the transfer of the land by the sheriff to the purchaser accompanied by the order of the court or judge confirming the sale operated immediately and did not need to be held by a registrar for a period of four weeks as required by subsection 185(2) in The Land Titles Act (see also Monarch Lumber Co. Ltd. v. Doering, [1923] 2 W.W.R. 393 (Sask. K.B.)).

#### O. Special Procedure for Crown to Vacate Liens

Section 26 states that a lien does not attach to and cannot be registered against the estate or interest in land of the Crown. A claim of lien can be registered against Crown (Saskatchewan) title if the claim is against the estate or interest of some non-Crown third party. However, from time to time the third party against whom a lien is claimed is actually the contractor. In this circumstance, the new Builders' Lien Act gives the Crown a mechanism to easily remove this type of lien. Section 59 allows the Crown to submit a certificate in Form I which states that the person against whose estate or interest the claim of lien is registered has no estate or interest in the land. Where the registrar accepts a certificate in Form I, he is required to vacate the registration of the claim of lien. The certificate must be received within 30 days of the registration of the claim of lien. As a warning to persons submitting claims of lien to the land titles office of the possibility of having a claim of lien vacated, Form E in the Regulations contains a warning with respect to registering against the title in the name of the Crown. When a Form I has been accepted, the documentation clerk makes a photocopy of the Form I and types on it the following phrase:

Pursuant to this request,  
the registrar has vacated  
your lien.

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This is then mailed by ordinary mail to the lien claimant. The claim of lien is endorsed as being vacated.

The Crown may also request a notice to lapse to be served or apply to the court instead of following the above procedure.

#### P. Discharge of Claim of Lien

Section 63 provides that a lien may be discharged either in whole or in part, or as to the whole or any part of the land, by a discharge, in the prescribed form, executed by the lien claimant or his agent authorized under a registered power of attorney. There are three discharge forms provided in the regulations:

- (1) Form L - discharge of lien as it relates to part of the amount;
- (2) Form M - discharge of lien as it relates to part of the land;
- (3) Form H - complete discharge.

Subsection 63(2) requires a discharge to be verified by an affidavit of attesting witness except where the discharge is executed under corporate seal.

An agent cannot execute a discharge unless the agent is acting under a registered power of attorney.

Section 64 states the effect of a registered discharge is to prevent the lien from being revived. However, the registrar will never know whether a claim of lien submitted for registration is with respect to the same services or materials covered by the previous lien. Both liens could relate to particular amounts with respect to a particular project. Even after a builders' lien lapses following service of a notice of lapse the registrar is not able to definitely judge whether a claim is in fact the same claim. Accordingly, section 64 is not enforced by the registrar but it is a tool for the registered owner to be used in court proceedings.

A discharge of claim of lien registered by a partnership under The Mechanics' Lien Act, in the absence of a filed power of attorney, should be signed by each of the partners and duly attested. If the lien as registered does not disclose the identity of the partners, then the discharge should be accompanied by satisfactory evidence as to the identity of the partners entitled to discharge the lien, (usually the certificate of the Registrar of the Corporations Branch, Department of Consumer and Commercial Affairs or the Local Registrar or affidavit evidence acceptable to the registrar of the land titles office showing who were the partners in the firm at the date of discharge).

## Q. Discharge by Court Order

Section 60 gives the court a general power to vacate the registration of a claim of lien or a certificate of action on any terms and conditions that the court may order. This power may be exercised whether or not a notice to lapse has been requested. The court also has the power in specific fact situations to direct the registrar to vacate a claim of lien in sections 56 and 57.

## R. Transitional Provisions

Section 102 provides that any reference in any other Act to The Mechanics' Lien Act is deemed to be a reference to The Builders' Lien Act. Section 103 repeals all of The Mechanics' Lien Act dealing with builders' liens. However, section 105 makes it clear that The Mechanics' Lien Act continues to apply to all contracts entered into before the coming into force of the Act and to all amendments made to a contract entered into before the coming into force of The Builders' Lien Act.

In addition, clauses 23(1)(c) and (e) of The Interpretation Act provide that the repeal of a statute does not affect any right, privilege or obligation or legal proceeding or remedy in respect of any such right, privilege or obligation and the investigation, legal proceeding or remedy may be instituted, continued or enforced as if the statute had not been repealed. Accordingly, The Mechanics' Lien Act is the Act which governs in all cases where there is a conflict between The Mechanics' Lien Act and The Builders' Lien Act with respect to some right or remedy arising prior to January 1, 1986.

With respect to procedure, it is probable that the courts will ultimately decide that The Builders' Lien Act applies. Clause 23(2)(c) of The Interpretation Act states that every proceeding taken under a repealed Act "shall be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be". Accordingly the land titles offices have adopted the following rules:

- (1) if a claim of lien is submitted on a mechanics' lien form it must comply with the procedure under The Mechanics' Lien Act;
- (2) once accepted for registration, a "mechanics' lien" will be described as a "builders' lien" and all procedure with respect to lapsing can be governed by The Builders' Lien Act;
- (3) if the registrar receives a request to lapse which complies with The Mechanics' Lien Act with respect to a pre-1986 claim of lien or with respect to a 1986 or 1987 claim of lien, it will be accepted;

- (4) if the registrar receives a request to lapse which purports to comply with The Mechanics' Lien Act but does not actually comply, the applicant may be advised about the procedure under The Builders' Lien Act.

Claims of lien were accepted on mechanics' lien forms for all of 1986 and 1987 but thereafter are rejected unless the work, services or materials were provided before January 1, 1986 and this information appears on the claim of lien form. All claims of lien regardless of form are described on the certificate of title as builders' liens.

## Chapter 24. The Common Law Easement

### A. General

The easement is a significant instrument, but the law pertaining to its meaning, form and function is largely governed by decisions of the court rather than The Land Titles Act. The case of McClellan v. Powassan Lumber Co. (1908), 17 O.L.R. 32 (C.A.) defines an easement to be a right annexed to land to utilize other land in a particular manner and states that the law of easements is not altered by The Land Titles Act.

An easement, the terms of which are governed by court decisions, is called a common law easement to distinguish it from a statutory easement. A common law easement requires two parcels of land. A statutory easement creates rights in only one parcel.

An easement must be distinguished from a licence which is just a personal right. For example if two cottage owners agree that one can use the other's dock, that is a licence. But if one grants to the other, for the benefit of the other's land in perpetuity or for a term of years absolute the right of access to and use of the dock, that is an easement. An easement is registrable either directly or by way of caveat. A licence is not registrable. For a discussion of the distinction between an easement and a licence see In re Ridgeway and Smith's Contract, [1930] V.L.R. 111 (Vict. S.C.).

A common law easement does not allow the grantee to take any part of the natural produce of the land or any part of the soil. A profit a prendre does allow the grantee to take from the land.

No right of easement can be acquired by prescription (see section 72 of The Land Titles Act).

### B. The Land Titles Act: Section 95

Subsection 95(1) allows the creation and registration of an "easement or incorporeal right". Subsection 95(3) discusses restrictive covenants.

An easement is an incorporeal right which means simply an estate in land less than a fee simple or leasehold estate capable of being granted. Fee simple and leasehold estates are called corporeal rights. A restrictive covenant is a term in an agreement which restricts use or construction.

The Act does not provide a mechanism for discharge of an incorporeal right other than an easement (see section 98 of the Act), or for a restrictive covenant other than for a caveat, (see section 160). Thus the practice is to register incorporeal rights, other than

easements, and restrictive covenants by way of caveat. This chapter discusses easements only.

### C. Characteristics of an Easement

No special form is prescribed for a "common law easement", but there are certain essential characteristics of such an easement and while the document may be in any form, it must nevertheless display all of these characteristics. At common law, these were stated in Re Ellenborough Park, [1956] Ch. 131 (C.A.) to be:

- (1) there must be a dominant and a servient tenement;
- (2) an easement must accommodate the dominant tenement;
- (3) dominant and servient owners must be different persons;
- (4) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant.

The Land Titles Amendment Act, S.S. 1980-81, c. 25 eliminated the third requirement. Subsection 95(3) now provides that an owner may grant an easement "for the benefit of land which he owns and against land which he owns". Subsection 95(4) expressly declares that such an easement is not merged by reason of the common ownership. However, there still must be two parcels.

The right of an owner to grant an easement to himself or herself does not apply to a statutory easement.

#### 1. Must have a Dominant and Servient Tenement

This means that one piece of land (the servient tenement) is made subject to the exercise of certain rights for the benefit of another piece of land (the dominant tenement) i.e. the servient tenement is the land bearing the burden of the easement, and the dominant tenement is the land having the benefit of the easement. Where X, the owner of Lot 1, gives a right of way over Lot 1 to Y, the owner of Lot 2, the dominant tenement is Lot 2, and the servient tenement is Lot 1.

Several consequences follow from this rule:

- (a) on registering an easement, the registrar must endorse a memorandum thereof on both certificates of title, i.e. dominant and servient tenements (see subsection 95(1));

- (b) both dominant and servient tenements must be clearly defined by a proper description acceptable to the registrar, so that the registrar knows exactly which certificates of title must be endorsed;
- (c) while the easement need not refer to them as being registered owners, both the dominant and the servient owners must in fact be the registered owners of their respective tenements, since the benefit or burden of the easement will pass on a transfer of the fee simple estate without the easement being mentioned.

Failure to annex the benefit of an easement to a particular dominant tenement is one of the most common errors to be found in an easement presented for registration. This is to some extent due to faulty precedents in some of the text books and registrars will therefore need to watch for this fault with particular care.

## 2. Must Accommodate the Dominant Tenement

This means that the rights granted must not be purely personal privileges, but must be related to the enjoyment of the dominant tenement. The easement must be calculated to benefit the dominant tenement as a tenement and not merely to confer a personal advantage on the owner of it, (see Re Ellenborough Park, [1956] Ch. 131 (C.A.)). If a person invites a neighbour to come on to his or her land for the purpose of paying a social call, a personal privilege only is conferred. If a person grants a right of way over his or her land to allow the neighbour access, the person is conferring a right to be used for the better use and enjoyment of the neighbour's land and so creates an easement.

The easement must show on the face of it that the rights are granted for the accommodation of the dominant tenement. This may be by a special clause declaring that the rights thereby granted should enure for the benefit of the grantee's land and be for ever annexed thereto, or the easement may imply this without stating so in so many words, eg. it may grant rights to "the grantee and his successors in title, owners for the time being of \_\_\_\_\_".

The precise form of words does not matter, as long as there is indicated a clear intention to annex the benefit of the rights to the dominant tenement and these rights are in fact capable of being so annexed.

If the benefit of the easement is so annexed, then it does not matter that the dominant and servient tenements are not contiguous. There may be a road or stream or even another's land in between; what matters is that the rights over the servient tenement do in fact accommodate the dominant tenement and the benefit thereof is annexed thereto (see Re Ellenborough Park, [1956] Ch. 131 (C.A.); Todrick v. Western National Omnibus Co., [1934] Ch. 561 (C.A.)).

### 3. Must be Capable of Being Granted

This means the right must not be vague or ill-defined. The courts have held that there can be no general right to air (i.e. not in a defined channel). In an old case, the owner of a windmill claimed a right to the access of air to his mill. It was held that this could not be the subject of an easement (see Webb v. Bird (1863), 13 C.B.N.S. 841; 143 E.R. 332). Similarly the courts have held that there can be no right to privacy or a right to a view, or a right to wander about at large anywhere on the servient tenement (as distinct from a right to cross it along a driveway or pathway, or a right to use it as a pleasure garden in connection with a dwelling house).

Also, in Megarry's Manual of The Law of Real Property, (4th edition), at page 421 the proposition is put forward that an easement for the passage of air through a defined channel may exist, but there can be no easement for the general flow of air over land to a windmill or chimney. Similar comments are made at page 523 of Cheshire's Modern Law of Real Property, (12th edition) and Douglas Whelan's The Torrens System in Australia at pages 106 and 107.

A document under which the proprietary rights of the servient owner are either shared or usurped cannot be an easement. For example, in Hrynyk v. Kaprowy (1960), 30 W.W.R. 433 (Man. Q.B.), Williams, C.J., held that the defendant could not claim an easement in respect of his building which encroached on the plaintiff's land, since the encroachment involved the exclusive and unrestricted use by the defendant of the plaintiff's land. The learned judge quoted Gale on Easements (13th ed.) as follows:

There is no easement known to the law which gives exclusive and unrestricted use of a piece of land. A grant of the exclusive or unrestricted use of land beyond all question passes the ownership of that land.....Similarly it seems that there can be no easement which could prevent the owner of the servient tenement from making ordinary use of his land, at least so far as not inconsistent with the proper use of an easement.

In an article by Mr. Albert J. MacLean "The Nature of an Easement", Western Law Review, 1966, page 47 the following comment appears:

That an easement should not amount to a right to occupy the servient tenement, or to a right inconsistent with the proprietorship or possession of the servient owner, is, when properly understood, a common-place of the law of easements. To "explain" this is as difficult as it always is to explain the obvious. It rests, it would seem on the basic assumption that a claim to possession or occupation is a claim to a freehold or a leasehold interest or to a license.

And again at page 51:

As was pointed out earlier, it follows from the general nature of the recognized interests in property that an easement cannot amount to a claim quite at variance with the proprietary rights of the servient owner.

In Woodman's The Law of Real Property, Volume 1, 1980, at page 292 the issue is further discussed:

The extent of user of an easement is a matter for full consideration later, but it is essential to emphasize again when dealing with the characteristics of an easement that the right must not amount to a claim to entire use of the servient tenement. In Copeland v. Greenhalf, [1952] Ch. 488, the right claimed by the defendant was virtually to joint user with the plaintiff of the land and was of too wide and ill-defined a nature to constitute an easement. Also, in Bursill Enterprises Pty. Ltd. v. Berger Bros. Trading Co. Pty. (1971), 124 C.L.R. 73 (Aus. H.C.) the High Court adopted a similar view that what in effect amounted to a transfer of proprietary rights in a column of air space by giving unrestricted rights to the transferee to the exclusion of the transferor did not create an easement. A similar view was taken in Grigsby v. Melville, [1972] 1 W.L.R. 1355; [1974] 1 W.L.R. 80 (C.A.).

It therefore seems that where the main structure of a building encroaches, the proper way to deal with the encroachment is by transfer, not by easement. However, (see Shindelka and Makowecky v. Rostin, [1982] 5 W.W.R. 395 (Sask. Q.B.)) where the court directed the registrar to place a memorandum on title for an encroachment. This case must be confined to its facts and not taken as authority for the proposition that an easement based on an encroaching building unaccompanied by court order is acceptable for registration.

There is no legislative authority to register encroachment agreements between the Department of Highways and an owner.

Where only the eaves or the footings of a building encroach, an easement would be a proper way to resolve the problem, since the servient owner is not thereby entirely deprived of the use and enjoyment of his or her land. An easement for eavesdropping has long been known to the law and Newlands J., in National Trust Co. Ltd. v. Western Trust Co. Ltd. et al. (1912), 2 W.W.R. 667 (Sask. S.C.), seemed to envisage that an easement might be granted under The Land Titles Act where the encroachment was by the footings only of the building.

In certain circumstances, an application may be made to the court under The Improvements under Mistake of Title Act with respect to an encroachment.

#### D. Summary of Examples of Acceptable Easement Grants

The following is a list of some recognized easements:

- (1) right of way for passage by pedestrians or vehicles;
- (2) right of access;
- (3) right to park vehicles;
- (4) right of drainage;
- (5) right to project eaves and gutterings over a property boundary;
- (6) right of light;
- (7) right to support;
- (8) right to maintain and service utilities (usually between owners of duplexes);
- (9) right to commit a nuisance (see British Columbia Forest Products Ltd. v. Nordal and Nordal (1954), 11 W.W.R. (N.S.) 403 (B.C.S.C.)).

This list is not exhaustive. Any new or doubtful easement not on this list should be referred to the registrar.

These are difficult questions and whenever some new kind of right is sought to be created, a good deal of thought and research has to be devoted to determine whether it may properly be the subject of an easement. Fortunately most easements fall

into categories which have already been well defined. The easements submitted to land titles offices are usually rights of ways, rights to lay water or drainage pipes, rights to maintain overhanging projections and rights of support for buildings. These are all well recognized easements.

An easement for a landlocked parcel may very well be implied at common law, but such an easement is registrable to give access, albeit not legal access.

## E. Land Description

### 1. On Part Only

The most problematic question for the registrar is whether a common law easement can be granted for a whole lot or parcel.

In relation to a common law easement for pipes and pipelines it is clear that an easement may be granted in respect of a strip of land crossing the servient tenement but not in respect of the whole lot or quarter section. A common law easement can only describe or affect a portion of the whole parcel. A plan of survey may be required if the registrar does not approve the use of a word description. Gale on Easements (13th Ed.) page 27 provides as follows:

If Blackacre has a right to receive water through a pipe laid under A's field, the right is clearly not repugnant to A's proprietary rights in the field, and if the servient tenement is considered to be the field, there is no difficulty on principle in establishing an easement. A, however, could sell the greater part of the field entirely free from the easement; the servient tenement must, it is thought, consist at most of the space occupied by the pipe and so much of the soil on each or one side as is necessary for access for repair. Of the servient tenement so constituted A is very nearly (and certainly of the space occupied by the pipe) deprived of possession; yet the validity of an easement of this kind is undoubted. On the other hand, a right to make and use on another's land an embankment for the purposes of a railway or tramway cannot, it seems, be an easement, for the proprietary rights of the landowner in the embankment and its site are entirely excluded.

Planning approval is not required for a common law easement (see subsection 134(2) of The Planning and Development Act).

## 2. On Mines and Minerals

A common law easement should not be registered against the title to mines and minerals. One cannot conceive of a case where an easement would be granted in relation to mines and minerals except perhaps in relation to mines. If a title to mines and minerals has endorsed thereon a common law easement it should be examined and perhaps the endorsement of the easement on the title should be marked "Entered in Error".

## 3. On Unpatented Land

An easement can only be registered against unpatented land by way of caveat.

## 4. Full Description

A full land description should be used in all cases.

## F. Co-ownership of an Easement

In Real Property, Anger and Honsberger (2nd ed.) Vol. 1, page 787, co-ownership is defined as two or more owners of any estate or interest in land. (Emphasis is added.)

Although it is usually the fee simple estate that is referred to in discussions on co-ownership, there is no limitation, express or otherwise, to particular kinds of interest or estates which can be owned jointly as tenants in common.

Law dictionaries define property as the subject or object of ownership including corporeal and incorporeal things. An easement is an incorporeal right or hereditament. Co-ownership is defined as persons owning "property", jointly as tenants in common.

Therefore, it would seem given no contrary qualifications, an easement is capable of being owned in fractional interests by co-owners.

However, if two parties each own an undivided one-half interest in a parcel of land, the two parties must execute one easement document encompassing both of their undivided one-half interests. It is conceptually not possible for one tenant in common even if he or she is holding a specified undivided interest, to grant an easement in his or her own right. If this were possible, upon consolidation of the undivided one-half interest titles one could end up with a title with two different easements registered for the same area.

## G. Grant of Easement with Transfer or Grant

At one time it was quite common for the federal government to grant land and include with the grant an easement over other land for the benefit of the parcel being created. This practice is changing. It is more common to receive a grant with an easement plus a common law easement agreement confirming the easement in the grant or a grant alone plus the easement agreement. Regardless of the form used, the easement must be endorsed on the dominant and servient tenements. It should not be shown as part of the land description on the front of the title. In those cases where it has been shown on the front of the title it should be moved to the back of the two titles affected as an endorsement.

The federal government clearly has special rights in relation to the Land Titles System (see In re Interprovincial Pipe Line Company (1951), 1 W.W.R. (N.S.) 479 (Sask. C.A.)).

A transfer with an easement as part of the transfer should be rejected for these reasons:

- (1) difficulty of classification;
- (2) easements are destroyed 10 years after discharge but transfers are never destroyed.

Dual instruments tend to complicate and weaken the registration system. However, this does not mean that the parties cannot create different rights in the same agreement but such agreements are usually registered by way of caveat.

## H. Form and Execution

As stated above, there is no prescribed form of an easement, nor does it matter what the document is called in the heading or on the cover. In Ross v. Hunter (1882), 7 S.C.R. 289, the Supreme Court of Canada held that it is not necessary that the word "grant" be used as long as it is clear from the document that an easement is being conferred. A registrar must ask:

- (1) does the document have the three essential characteristics referred to above?
- (2) is there an evident intention to confer an easement upon the grantee?

A registrar must see that the document is properly executed by the grantor and accompanied by any necessary affidavit of execution. Since the document conveys or transfers an interest in land, The Homesteads Act should be complied with, but a registrar is not concerned with the execution of the document by the grantee. Usually the easement contains covenants by the grantee (eg. to make good damage, to pay a fair share of costs of upkeep and repair) and

must execute the document so as to bind himself or herself to these covenants; but this is not a matter with which the registrar is concerned.

The duplicate certificate of title must be produced for a common law easement (see subsection 95(1) of The Land Titles Act).

### I. Party Wall Agreements

Party wall agreements, like easements, are instruments for which no form is prescribed under The Land Titles Act.

A party wall agreement is not so easily or precisely defined as an easement but usually seeks to effect one or more of the following purposes:

- (1) to declare that the wall is a party wall;

Under a Torrens System, this in itself can make no change in ownership but will usually mean that each owns such portion of the wall as stands on his or her own land, but the fact that it is declared to be a party wall would prevent either owner from taking away or demolishing the portion of the wall on his or her own land (see Alberta Loan Co. v. Beveridge (1913), 24 W.L.R. 736 (Alta. S.C.); St. Leger v. T. Eaton Co. (1904), 4 O.W.R. 205 (Div. Ct.); Watson v. Gray, [1880] 14 Ch. Div. 192; Gale on Easements (13th Edition), page 285).

- (2) to confer rights to use a boundary wall;
- (3) to confer rights to the support afforded by a boundary wall to structures on either side of it;
- (4) to define liabilities for the costs of repair and renewal of the boundary wall.

Where an agreement between adjoining owners affects any such purposes, it should be registered under subsection 95(2) of The Land Titles Act. Since the rights conferred are usually mutual, it should be executed by both parties. Rights such as those indicated as (2) and (3) above are easements and so any party wall agreement which confers such rights should comply with The Homesteads Act, since it will convey and transfer an interest in land within the meaning of section 3 of The Homesteads Act. If the agreement merely declares the ownership of the wall, or defines liability for repair or renewal, no interest in the land passes, and so no compliance with The Homesteads Act is necessary.

Each property affected by the party wall agreement should be clearly defined, and the agreement should be registered against both certificates of title.

The duplicate certificate of title for each parcel affected is required to be produced.

#### J. Mutual Joint Easements

The question is sometimes raised as to whether two or more easements may be included in the same instrument. This may be done, and is the proper practice, where mutual easements have to be granted, both arising out of the same circumstances. A common instance is that of the joint driveway agreement. For a form of a joint driveway agreement see Collins, Sask. Bar Review. A party wall agreement, in essence, can be a mutual joint easement.

#### K. Caveat based on an Easement or Party Wall Agreement

Instead of an easement or party wall agreement, a caveat based on the easement or party wall agreement may be registered. A caveat based on an easement must indicate the dominant tenement to both give validity to the claim that it is an easement and to allow the registrar to comply with section 98 of The Land Titles Act which requires the consent of the dominant tenement holder and other interests on the dominant tenement for the discharge of an easement or easement caveat.

Note that such caveat may not be attacked by notice to lapse under section 159 of The Land Titles Act. In order to be sure that a notice to lapse such a caveat is not sent out inadvertently, it is a wise practice to note on the memorandum of the caveat when it is endorsed on the certificate of title the words, "based on easement" or "based on party wall agreement".

#### L. Releases and Discharges

Care has to be taken in dealing with any release of an easement or party wall agreement or discharge of a caveat based on an easement or party wall agreement to ensure that it is executed by the correct parties. Under section 98 these are:

. . . the owners of lands having rights or privileges through or under the easement or party wall agreement, and by all persons appearing by the records of the land titles office to have any mortgage or lien upon or estate, right or interest in or to the lands subsequent to the easement or party wall agreement or caveat.

The titles researcher should therefore see that the release or discharge is executed by:

- (1) the registered owner of the dominant tenement;

- (2) a person who has a "mortgage or lien upon or estate, right or interest" which appears on the certificate of title to the dominant tenement subsequent to that of the easement, party wall agreement or caveat i.e. a caveator would fall into this category even though a caveat represents only a claim of interest;
- (3) an execution creditor or other encumbrancer whose writ of execution or other encumbrance appears on the general record as having a priority subsequent to that of the easement, party wall agreement or caveat i.e. a search of the docket must therefore be made.

A titles researcher must be on guard against accepting a release or discharge from the original grantee or the original caveator, unless the parties remain unchanged. This is another reason why it is good practice to note "based on easement" or "based on party wall agreement" when a caveat based on an easement or party wall agreement is endorsed on a certificate of title.

In case of difficulty in locating any of these persons, a Master of Titles' Order should be sought (see section 98).

#### M. Postponement to an Easement Only

Section 146 of The Land Titles Act provides that an encumbrance or a caveat may be postponed to (inter alia) an easement, but it does not provide that an easement may itself be postponed.

It will be observed that the instrument which may be postponed is "an encumbrance or a caveat", whereas the instrument in favour of which it may be postponed is a mortgage, other encumbrance, easement or caveat. It seems clear from the fact that an easement is specially mentioned in the second instance and not mentioned in the first instance and from the definition of "encumbrance" in clause 2(1)(d) of The Land Titles Act that an easement is not intended to be included in the word "encumbrance". Postponements of easements should therefore not be accepted.

"Encumbrance" when used in The Land Titles Act is given a legal interpretation. However, when a solicitor instructs that a transfer, etc. should register "free and clear of all encumbrances", the word "encumbrances" is taken to mean "endorsements". If the title will issue subject to an endorsement, the instructions must be amended accordingly.

## Chapter 25. The Statutory Easement

### A. General

In Di Castri's Registration of Title to Land, para. 833 a statutory easement is defined as an easement created by or under the authority of a statute and not requiring a dominant tenement. A statutory easement is also known as an "easement in gross" but this appears to be an antiquated phrase.

There are many different Acts which create statutory easements:

- (1) The Public Utilities Easement Act;
- (2) the National Energy Board Act (Canada);
- (3) The Pipelines Act;
- (4) The Water Corporation Act;
- (5) The Watershed Association Act;
- (6) The Power Corporation Act;
- (7) The Saskatchewan Telecommunications Act.

The validity and effect of a statutory easement is derived entirely from the words of the particular statute, and the statute itself must be read carefully to see whether a particular easement is authorized by it, and, if so, what effect the statute gives it.

In examining a statutory easement, a titles researcher must answer these questions:

- (1) Which statute authorizes me to register this document?  
The statute itself should then be referred to.
- (2) Is the document executed by the registered owner or other person who is authorized by the statute to sign it?
- (3) Are the rights conferred by the document such as are contemplated by the statute?
- (4) Is the company or other body on whom the rights are conferred by the statutory easement one which is authorized by the statute to acquire them?

## B. Rights of Access

The land titles offices have as a matter of practice accepted a general easement for pipelines, i.e. over the whole parcel, which is later limited to land described on a plan of survey with general rights of access and egress, thereto, over the whole parcel. This began as a special accommodation to the pipeline companies under the National Energy Board Act and was extended to pipeline easements generally. This is the only type of company which is allowed to take general rights of access and egress because of the difficulty it creates for future subdivisions. All other easements purporting to take rights of access and egress should be returned to have inserted the clarification that the rights of access are being granted only over the portion of the land taken for the easement. Note that the National Energy Board now approves orders to allow a company under that Act to take only "emergency rights of ingress and egress". The endorsement on the certificate of title continues to read "right of way easement and rights of access". Anyone wishing further details must review the instrument.

## C. Exception to Indefeasibility

A common law easement does not create an exception to indefeasibility of title in Saskatchewan. However, statutory easements are considered to be an exception to indefeasibility. Clauses 69(c) and (h) of The Land Titles Act state:

69(c) any public highway or right of way or other public easement howsoever created upon, over or in respect of the land;

(h) any right of way or other easement granted or acquired under the Irrigation Act (Canada) chapter 104 of the Revised Statutes of Canada, 1927, or any former Irrigation Act of Canada, or The Water Corporation Act, The Water Rights Act as that Act existed on the day before the coming into force of The Water Corporation Act or any former Water Rights Act;

Other express exceptions to indefeasibility for easements exist:

- (1) when roadways are abandoned (see sections 70 and 116 of The Land Titles Act);
- (2) when a railway is transferred to Crown (Canada) or (Saskatchewan) (see section 70.1 of the Act);
- (3) when the registrar consolidates titles (see section 78 of the Act).

The Power Corporation Act contains special provisions which make a title subject to power lines and pipelines (see subsections 30.1(2) and (4), as amended by S.S. 1983-84, c.51). A similar right is granted under The Saskatchewan Telecommunications Act, s. 27.1. Most such instruments are registered.

## D. The Public Utilities Easements Act

### 1. Application

This Act allows a registered owner to grant a public utility easement to certain public bodies and to a railway, telegraph or gas or oil pipeline company or company operating an aircraft, for any of the rights listed in subsection 2(1). Section 24 of The Rural Telephones Act deems a company under that Act to be a public utilities company to come within The Public Utilities Easements Act.

A municipality cannot take land for use as a public roadway under this Act. The Highways Act permits the acquisition of lands for roadways only by procedures set out in that Act which includes the registration of a plan. It overrides The Public Utilities Easements Act. If the registrar allows a municipality to take a roadway by metes and bounds description it also leads to the destruction of survey monuments.

### 2. Land Description

#### (a) Plan may be Required

Section 12 of The Public Utilities Easements Act empowers the registrar to require a plan of the land affected by the easement to be filed. A plan is usually required, unless the easement can be easily described without confusion. The Chief Surveyor requires that a metes and bounds description must define the limits of the easement rights with such accuracy that a surveyor can take the description and readily stake out the precise boundaries of the easement right. If a metes and bounds description does not meet this test, a plan will be required. Any relaxation of the requirement for a surveyed plan might create uncertainties in the registered titles affected, leading to possible litigation and perhaps to actions against the assurance fund.

In no circumstances should a sketch or outline plan be attached to the easement for the purpose of description. The plan must be drawn in accordance with section 106 of The Land Titles Act.

If an easement right is required for a temporary purpose, a surveyed plan could be dispensed with if the parties are willing that rights thereunder be protected by caveat. Such a caveat would, of course, have to be registered as against the entire title, but that should not matter, particularly if the easement agreement spells out the limits of the right granted with reasonable accuracy.

If the easement right is of a permanent right, it is of course desirable that the easement agreement itself be recorded.

It should be noted that where an easement right is being expropriated under The Municipal Expropriation Act, section 14, a plan of survey is required in every case, unless the land affected comprises an entire lot, block or parcel as shown on a registered plan of subdivision, or comprises one or more complete quarter sections.

It is unclear whether a public utilities easement may be granted over the whole of a lot or parcel. If the registered owner is prepared to grant a statutory easement over all the land in a parcel, it appears the land titles office should accept the same.

(b) May be against Unpatented Land

Subsection 11(2) of The Public Utilities Easements Act provides for the filing of an agreement against unpatented land, but it makes it clear that no certificate of title shall be issued for the easement. This subsection was added to overrule In re Interprovincial Pipe Line Company (1951), 1 W.W.R. (N.S.) 479 (Sask. C.A.).

(c) Should not be against Mines and Minerals

When land is subdivided by the issue of a mineral title, the public utilities easement should not be endorsed on the new title.

3. Registration Procedure

Subsection 11(1) of The Public Utilities Easements Act directs the registrar to make a memorandum upon the certificate of title affected thereby when an agreement containing a grant of easement is registered.

The agreement may contain a consent, verified by the affidavit of the attesting witness, by a person, other than the registered owner, who by the records of the land titles office is interested in the land (see section 3 of The Public Utilities Easements Act). In essence, the person is consenting to the amount of compensation.

If the person does not consent, the company or other body concerned can require the matter to go to arbitration. The consent or the arbitrator's award may be registered against the title (see section 10 of the Act). The purpose of this is so that the encumbrance can be bound by the easement. However, the company or other body need not follow this procedure; in most

cases, the authority prefers to use the provisions of section 146 of The Land Titles Act, and register a postponement. If the postponement is to a pipeline easement with rights of access and egress, the person postponing must postpone to the whole land.

A public utilities easement is normally only executed by the grantor. If the grantee intends to be bound by the covenants, the grantee may also execute the agreement, but no easement should be rejected for lack of execution by the grantee. When the grantee does sign no proof of attestation is required.

#### 4. Assignment, Mortgage and Discharge

Section 13 provides for the assignment, mortgage and discharge of an easement. This amendment was added to ensure a mechanism for financing pipeline projects particularly interprovincial pipeline projects. No partial discharge, assignment or mortgage as to land is authorized by the section but practice allows a partial discharge, assignment or mortgage as to lands only.

#### 5. Duplicate Certificate of Title Not Produced

Clause 57(h) provides that the duplicate certificate of title need not be produced for the registration of an easement, assignment, mortgage or discharge under The Public Utilities Easement Act.

#### 6. No Public Trustee's Certificate Required

Section 174 of The Land Titles Act states that no Public Trustee's certificate is required when a personal representative executes an easement under The Public Utilities Easements Act if:

- (1) the land is shown on a plan to be registered, approved by the Board of Transport Commissioners, and the company is a gas or oil pipeline company;
- (2) the easement is accompanied by an affidavit of the right of way or purchasing agent stating the purpose of the easement.

#### E. National Energy Board Act (Canada)

##### 1. General

The National Energy Board Act, R.S.C. 1985, c.N-7 was first passed as S.C. 1959, c.46, and repealed the Pipelines Act. Clause 31(d) of the National Energy Board Act requires a company to deposit "copies of the plan, profile and book of reference so approved, duly certified as such by the Secretary" in the appropriate land titles office, before a company can begin construction of part of a pipeline. Usually an Order of the Board is also filed. The practice is to assign one instrument

number to the plan, profile and book of reference, receiving the plan under section 109 of The Land Titles Act. No reference to the plan, profile or book of reference is made on the certificate of title. The Chief Surveyor does not approve plans deposited under section 31.

Section 43 sets out the duties of the registrar:

43(1) Every registrar of deeds shall receive and preserve in his office all plans, profiles, books of reference, certified copies thereof and other documents, required by this Act to be deposited with the registrar, and shall endorse thereon the day, hour and minute when they were so deposited.

(2) All person may inspect the plans, profiles, books of reference, copies and documents deposited under subsection (1) and may make extracts therefrom and copies thereof as occasion requires.

(3) A registrar of deeds shall, at the request of any person, certify copies of any plan, profile, book of reference, certified copy thereof or other document, deposited in the registrar's office under this Act, or of such portions thereof as may be required, on being paid therefor at the rate of twenty cents for each hundred words copied, and such additional sum for any copy of plan or profile furnished by the registrar as is reasonable and customary in like cases, together with one dollar for each certification given by the registrar.

(4) The certification of the registrar of deeds shall set out that the plan, profile or document referred to in subsection (3), a copy of which, or any portion of which, is certified by the registrar, is deposited in the registrar's office, and shall state the time when it was deposited, that the registrar has carefully compared the copy certified with the document on file and that it is a true copy of the original.

(5) A certified copy referred to in subsection (4) is evidence of the original deposited and is evidence that the original was deposited at the time stated and certified, and that it was signed, certified, attested or otherwise executed by the persons by whom and in the manner in which the original purports to be signed, certified, attested or executed, as shown or appearing by the certified copy, and, in the case of a plan, that the plan is prepared according to a scale and in a manner and form sanctioned by the Board.

It is unlikely that the registrar will be required to make copies of any plan. The land titles office acts as a place where a member of the public can come and view the plans. If requested for a copy, the original would have to be sent to the Chief Surveyor for production of the copy.

Note that section 2 of the National Energy Board Act defines "registrar of deeds" to include the registrar of land titles or other officer with whom title to land is registered.

The acquisition procedure was changed by S.C. 1980-81-82-83, c.80. Section 86 now provides that the company may acquire land by agreement with the owner or pursuant to the Act.

Section 104 provides that the Board may issue an order to a company granting an immediate right of entry. Section 106 provides that the order under section 104 shall be deemed to vest in the company the extent of the interest specified in the order and must be filed in the land titles office. Each order must be examined by the registrar to determine its effect. In most cases the right specified will be an easement which will require an endorsement on the title affected.

## 2. Not to Affect Mines and Minerals

Section 80 states that mines and minerals are excepted from any conveyance to or expropriation by a company unless they have been expressly included and conveyed. No endorsement can be made on or carried forward to any mines and mineral title without an express reference to mines and minerals.

## 3. Correction of Error

Section 41 provides a mechanism to correct an error in a plan, profile or book of reference. The registrant must file a copy of a permit from the National Energy Board certified by the secretary. Upon filing of the permit, the registrar assigns a registration number and a notation of the filing is made on the affected plan, profile or book of reference as the case may be. If the information corrected by the Board does not affect title information nothing further need be done. If the Board permit does affect the information on the certificate of title, the registrar must proceed to correct the title using the authority of the Board permit and section 77 of The Land Titles Act.

Where a plan, profile and book of reference have been merely deposited, but information has been entered on the title, this information should be marked as entered in error. No reference to the plan, profile or book of reference should appear on the title.

4. Mortgage of Pipeline

Clause 111(b) of the National Energy Board Act declares the pipeline to remain the property of the company and also allows the company to create "any lien, mortgage, charge or other security on the pipeline".

5. The Northern Pipeline Act

As a condition precedent to the application of the National Energy Board Act, the Board can issue a certificate under section 52 of the National Energy Board Act if the Board is satisfied that the line is and will be required for the "present and future public convenience and necessity". In 1978 the Northern Pipeline Act was passed. Under subsection 21(1) a certificate of public convenience and necessity was issued for each company in Schedule II, and pursuant to subsection 21(2), this certificate was deemed to be a certificate issued pursuant to section 52 of the National Energy Board Act.

The company with which Saskatchewan is concerned under the Northern Pipeline Act is the Foothills Pipe Lines (Sask.) Ltd.

6. Taking for a Highway: No Effect

Subsection 114(1) of The Land Titles Act directs the registrar to issue a certificate of title, for the area required for an improvement on a plan forwarded pursuant to The Highways and Transportation Act, "free from all encumbrances, liens, estates or interests whatever". Easements granted under federal authority are not included in this list (see Attorney-General for Alberta v. Attorney-General for Canada, [1915] A.C. 363 at 368 (P.C.)). Any roadway certificate of title issued from a parcel of land encumbered by a right of way easement with rights of access under the National Energy Board Act must be endorsed with the easement, and any mortgage of easement. Any easements or mortgages improperly dropped from a certificate of title can be reinstated subject to intervening encumbrances.

## F. The Pipe Lines Act

This Act applies only to matters within the exclusive legislative jurisdiction of the province (see section 4). In essence, pipelines not affecting other provinces are acquired pursuant to the authority under this Act. Part I of the Act authorizes the Minister of Energy and Mines to grant a permit. Upon obtaining a permit, the permittee may appropriate lands from:

- (1) the Crown, other than a public highway, unless the Minister of Highways and Transportation has consented to the appropriation;
- (2) other persons (see section 18).

If the permittee is not able to come to an agreement within 60 days, the permittee must proceed to expropriate. The registrar may be required to register the award on the applicable certificate of title, upon production "of the award and a sworn or notarial copy thereof" (see subsection 19(2)). The registrar should keep the sworn or notarial copy and return the original. The registration of the award constitutes an easement (see subsection 19(3)). Subsection 19(4) states that subsection 11(2) (unpatented land), section 12 (registrar may require plan), and section 13 (mortgage, assignment or discharge) of The Public Utilities Easement Act apply to an easement under The Pipe Lines Act.

Section 20 of The Pipe Lines Act states a permittee is not entitled to mines and minerals.

## G. Pipeline Easements Generally

In 1963 Towill, M.T. established a procedure for the registration and mortgaging of pipeline easements taken under the National Energy Board Act, R.S.C. 1985, c.N-7. However, provision for the creation of a pipeline exists both at the federal and provincial level. By default this procedure has now been extended to all pipeline easements but does not apply to any other type of easement.

The procedure is as follows:

- (1) to take and register a general easement from the registered owner of the land which, under the terms thereof, is to be reduced to the required right of way by the filing of a plan within one year, together with the rights of access over the land described in the agreement;
- (2) to immediately obtain and register postponements of prior encumbrances in favour of the easement;
- (3) to file the right of way plan;

- (4) to release the easement except as to the lands shown on the right of way plan and the rights of access;
- (5) to mortgage the easement as amplified by the plan and as modified by the partial release.

The easement is endorsed on the title as being for the purposes of a pipeline. When the plan of survey is filed and the partial release is registered, the endorsement on the title will be: "Pipeline Easement \_\_\_\_\_ released except as to right of way, Plan \_\_\_\_\_ and rights of access thereto". This partial release should appear on a separate line on the back of the title. "Rights of access" has to include ingress to and egress from the right of way and is the term used on titles for brevity.

The rights of ingress to and egress from the right of way are provided for in all pipeline easements. The agreement in essence creates a primary easement for the right of way and an ancillary easement for access thereto. The companies rely on this latter right, and, it is a right authorized by the statute. Prior to 1963, no emphasis was given to the access right.

If the agreement covers, say, a whole section of land, and the right of way crosses the north half of the section, the right of access still binds the whole section. The title to any portion of the section, if subsequently severed, must be endorsed with the easement because of the rights of access.

When the land is sold, the endorsement should read: Pipeline Easement, Plan \_\_\_\_\_ and rights of access thereto. No attempt should be made to rectify any existing title now shown clear of the pipeline easement where the land has changed owners by now making any endorsements thereon, other than those approved by the Master of Titles.

Duplicate certificate of title need not be produced on the registration of any of these documents.

It will be observed that the order of events set out above ends with the mortgage of easement as modified by the partial release.

In many cases, however, the mortgage has to be registered at an earlier state - usually between (2) and (3), i.e. after the postponement and before registration of the plan. In this event, the terms of the documents have to be carefully considered to determine whether the mortgagee is a necessary party to the partial release or alternatively the mortgagee should give a partial discharge of the mortgage relating to the rights to be released by the partial release of the pipeline easement.

In connection with general easements, intended to be limited later to a filed plan, see South East Railway Company v. Associated Parkland Cement Co., [1910] 1 Ch. 12 (C.A.) per Swinfen Eady, J. and Freeman v. Camden (1918), 41 O.L.R. 179 (S.C.).

H. The Water Corporation Act, S.S. 1983-84, c.W-4.1

This Act came into effect July 1, 1984 and replaces The Water Rights Act and The Drainage Control Act.

Section 58 gives the corporation the authority to issue an approval to "construct, extend or alter works" or to "approve the operation of the works". "Works" is defined to mean "drainage works, sewage works or water works" (see clause 2(r)).

Where the corporation has issued an approval under section 58, the corporation is required, under subsection 59(1), to send to the registrar a notice stating:

- (1) that the approval has been issued;
- (2) the date of the issuance of the approval;
- (3) a legal description of the land on which the works are to be constructed or are situated;
- (4) a statement as to the effect of this section; and
- (5) the place where a copy of the approval may be obtained.

Pursuant to subsection 59(2), the registrar is directed to register the notice, without fee, "against the lands described in the notice". This means that the notice is registered against the land on which the works are to be constructed or are situated.

Subsection 59(3) provides that a notice may be released in whole or in part by a written notice from the corporation to the registrar. A fee is charged for the discharge. No form is prescribed. A standard discharge format referring to the land affected by the notice and the instrument number is acceptable.

Subsection 59(4) states the effect of the section which is that the terms of the approval bind the registered owner.

Section 60 is the functional equivalent of section 47 of the repealed Drainage Control Act and section 39 of the repealed Water Rights Act. Where works will affect any land other than that on which the works are to be constructed, the owner of the other land has granted an easement over his or her land, and all other persons with legal rights in the land affected have consented, the

corporation is required to submit for registration a certificate stating the following:

- (a) the date of the issuance of the approval;
- (b) the name and address of the person securing the approval;
- (c) a legal description of the land on which the works are to be constructed or are situated; and
- (d) the legal description of the land which will be affected by the works.

When this provision was first introduced in The Water Rights Act in 1939 it was intended to compensate for the applicant's inability to describe the land affected by the works for the purposes of an easement without going to the expense of a survey. Under section 60 and its earlier equivalent a legal description in the easement provided to the corporation can be by reference to a section, a quarter section, or a legal subdivision, or, if there is a plan, by reference to such plan. This intention still continues.

Subsection 60(2) directs the registrar to register the certificate against the lands described in the certificate, without fee. No plan of survey is required. There is no distinction made between the land on which the works are to be constructed and the land that will be affected by the works for the purposes of determining on which title the certificate should be endorsed. This means that the certificate is registered against the certificates of title for both types of lands.

Subsection 60(3) states that upon registration of the certificate, the certificate becomes an easement and describes the two types of lands in terms of the dominant and servient tenements. As with notices under The Drainage Control Act and chief engineers' certificates under The Water Rights Act, the endorsement should not attempt to distinguish between the two types of lands. There will be many cases where it will be impossible to determine which lands are servient and which are dominant, for example, in the case where works straddle property lines.

Subsections 60(4) and (5) parallel subsections 95(3) and (4) of The Land Titles Act in directing that the easement created by the registration of the certificate is not affected by the fact that both types of lands are owned by the same person.

Subsection 60(6) provides that a certificate may be released or discharged in whole or in part by a written notice from the corporation to the registrar. Again, no form of the discharge is provided but the registrar looks for the same elements as would be required in the discharge of any other instrument.

## I. The Watershed Associations Act

Subsection 22(2) of this Act allows the board of a watershed association to acquire a statutory easement. The Public Utilities Easements Act applies to such an easement (see subsection 22(3)). Registration will be governed by the latter Act.

## J. The Power Corporation Act

When Sask Power wants to acquire land for power or pipelines, it may do so by transfer under The Land Titles Act or by easement under The Public Utilities Act (see subsection 24(2) of the above Act).

The method used to acquire an easement is to file a notice of requirement of easement (see subsection 26(1)). The notice must be signed by the chairman, president, secretary, general counsel or assistant general counsel of the corporation, and attested in accordance with section 63 of The Land Titles Act (see subsection 26(3)). Upon receipt of the notice, the registrar endorses a memorandum of the easement on the certificate of title to the land (see subsection 26(4)).

Subsection 30(1) provides for the release of the easement by an instrument executed and attested as above.

## K. The Saskatchewan Telecommunications Act

Sections 20, 21, 23 and 27 of this Act are similar to the provisions of The Power Corporation Act and create a statutory easement and provide for its release. Execution is by the chairman, the president or the secretary.

## L. The Homesteads Act

The Homesteads Act does not apply:

- (1) where the land is shown upon a plan, approved by the Board of Transport Commissioners for Canada where the transferee or grantee is a railway company or a gas or oil pipeline company, and the plan is registered (see subsection 17(2) of The Homesteads Act);
- (2) where land is acquired by Sask Power for the purposes of power lines or pipelines (see section 29 of The Power Corporation Act);
- (3) where Sask Tel acquires land for the purposes of telecommunication lines (see section 26 of The Saskatchewan Telecommunications Act);

- (4) where there is provided to the registrar an affidavit by the right of way or purchasing agent testifying "that the lands described in the instrument or agreement are required for the construction, maintenance or operation of a railway or a gas, oil or water pipeline or for the exercise of any of the rights and privileges arising under the agreement granting an easement" (see subsection 17(3) of The Homesteads Act).

## Chapter 26. Writ of Execution

### A. Meaning, Purpose and Authority

When a case comes before the court, the court often decides that one of the parties has to pay a sum of money to the other party. Sometimes this sum of money is not paid, and the question arises as to how the order of the court can be enforced. The usual method is by writ of execution. This is an order addressed by a court official to the sheriff, directing the sheriff to seize certain property of the judgment debtor, and to sell it in order to pay the debt out of the proceeds of the sale.

The property which the sheriff is directed to seize may be either goods or goods and lands. There are restrictions on the power of the sheriff to levy execution on land when there are sufficient goods to satisfy the writ, but this is not an issue for the land titles office.

The writs which are filed in the land titles office are those against land. These do not as a general rule specify any particular land, but affect any land of the debtor within the land registration district. A writ of execution is therefore entered in the general record against the name of the execution debtor.

Section 26 of The Executions Act mirrors subsections 180(1), (3), (7) and (8) of The Land Titles Act. Accordingly, The Land Titles Act will be referred to in this chapter.

Subsection 180(1) directs the sheriff to "forthwith deliver" to the registrar any writ of execution affecting land that has not already been delivered to the registrar.

### B. Effect of Registration of the Writ

Subsections 180(3) and (3.1) of The Land Titles Act state that upon entry of a writ in the instrument register, the writ shall "bind and form a lien and charge on all the lands of which the debtor may be or become registered owner". Lands held under joint tenancy are also charged but the charge is terminated upon the death of the execution debtor (see section 240 of the Act about non-severance of joint tenancy lands).

Subsections 180(5) and (6) direct the registrar to grant no certificate of title or register any instrument executed by the execution debtor except subject to the rights of the execution creditor. Hence, the requirement to check the general record before accepting certain instruments for registration (see pages 26 and 27 of this manual for more detail).

### C. Form of Queen's Bench Writ

The form of the writ is laid down in the Queen's Bench Rules of Court (see Rules 358 to 360 and Form 38). The main points are:

(1) The name of the plaintiff:

The plaintiff may be a partnership. Rule 51 of the Queen's Bench Rules of Court allows for an action by a partnership to be brought in the firm name. Hill v. Baade (1934), 2 W.W.R. 399 (Sask. C.A.) held that in the broad sense "execution" is included in the word "action". Rule 359(1) states that any "party" in whose favour a judgment has been entered can have a writ of execution directed to a sheriff. Thus, a partnership has a legal right to have a writ of execution issued in the firm name.

(2) The full christian name or names of the execution debtor or a statutory declaration setting forth such information or declaring that the debtor has only an initial or initials (see subsection 180(2) of the Act):

If it is not possible to determine what the initial represents, it may be necessary to apply under Rule 344 or the court's inherent jurisdiction to amend the pleadings or judgment.

Sometimes a writ of execution will show alternate names or aliases for the execution debtor. This is acceptable as long as initials are not used in any of the names. The registrar indexes the writ under each of the names of the execution debtor shown.

The Queen's Bench Rules of Court allow actions to be commenced against a partnership (Rule 22(2)(c)), a sole proprietorship (Rule 22(2)(d)) and an unincorporated association (Rule 22(2)(e)). Although a certificate of title will never be raised in the name of a partnership or unincorporated association, a writ of execution may be prepared against it and filed in the land titles office. It is doubtful if the person checking the general record will note such writs when dealing with an instrument in the name of a natural person or body corporate.

When a writ of execution is received which describes the name of an individual operating with a firm name or a partnership name, the writ of execution is only indexed under the name of the individual. A certificate of title is never raised under the name of the firm name or the partnership name. To show the firm or partnership name when it will be of no effect when a title is issued merely clutters up the general record. If, however, a writ of

execution is received against a partnership name or a firm name alone, the writ of execution is indexed under the firm name or partnership name.

- (3) The name and address of the solicitor for the execution creditor at which notices under subsection 180(9) can be served:

A notice of change of solicitors that does not specify the writs of execution affected will not be accepted for registration.

- (4) The writ must be against lands (see subsection 180(1) of The Land Titles Act).
- (5) The writ must be for more than \$100 (see subsection 22(1) of The Executions Act).
- (6) The writ must state the date of the judgment or order on which it is issued (see subsection 180(7) of The Land Titles Act).

Subsection 180(1) of the Act requires the sheriff to certify the writ of execution "under his hand and seal". The certification ensures that the writ is against "goods and lands" to enable it to be registered in a land titles office. If a writ of execution submitted to the registrar is so certified it would be rare that the registrar would reject the writ if the above elements are present. If a document is incomplete on the reverse side, eg. the solicitor has omitted to sign, it is better to register it and draw the error to the sheriff for future attention with respect to other writs. Sometimes the amount to be levied is different than the amount in the command. This could be as a result of a credit having been taken into consideration and the sum to be levied now being lesser than the judgment debt indicated in the command. The registrar is governed by the command only.

Effective July 1, 1981, the Queen's Bench Rules of Court were changed to allow pleadings to be prepared on 8.5" x 11" paper (see Rule 156(1)). This resulted in writs of execution also being prepared on shorter paper. The same amendment directed that dates, sums and numbers should be in numbers not words (see Rule 6(3)).

Note that subsection 771(3) of the Criminal Code R.S.C. 1985, c.C-46 provides for the registration of a writ of fieri facias in Form 34 which deviates slightly from Form 38 of the Queen's Bench Rules of Court. In all other respects this writ is processed in the same manner as any other writ to enforce the process of the Queen's Bench Court.

The life of a Queen's Bench writ of execution is governed by Rule 358 of the Queen's Bench Rules and subsection 180(8) of The Land Titles Act, which provides that the writ shall expire "10 years from

the date shown by the certified copy to be the date of the judgment or order upon which the writ was issued". The date of the judgment or order is found in the body of the writ of execution on the first page.

From time to time the legislature has passed legislation which will extend the life of a writ of execution. One example of such legislation is The Family Farm Protection Act of 1971. It is unlikely that such legislation will be passed again because of the difficulties for debtors and unsecured creditors alike. The preferred approach is that outlined in The Farm Land Security Act which declared in subsection 7(2) that the extension of time under The Limitation of Actions Act only applied to "the enforcement or recovery of any sum of money secured by a mortgage with respect to farm land". It is not intended to apply to unsecured debts.

"Provincial tax writs" are really writs of execution issued by Her Majesty the Queen (Canada), as plaintiff, for the provincial portion of income tax payable. These writs are also issued out of the Court of Queen's Bench and are therefore governed by Rule 358. Her Majesty the Queen (Canada) is the agent for Her Majesty the Queen (Saskatchewan) as agreed in the tax collection agreement between the federal and provincial Crowns and in respect of the collection of income tax amounts payable to the province. For provincial income tax writs respecting the portion of income tax that is payable to the provincial Crown the proper execution creditor is Her Majesty the Queen (Canada) and not Her Majesty the Queen (Saskatchewan). Her Majesty the Queen (Canada) is shown as the execution creditor in land titles records. The date for writs dealing with the provincial portion of income tax payable is also the date of judgment. This may often be a reference to a certificate which was registered in the court on a particular day. When the writ makes reference to a certificate being registered in the court on a particular day that day is shown as being the latest date upon which the judgment could have issued, i.e. the certificate takes the place of the judgment.

#### D. Certificates under The Creditors' Relief Act

The Creditors' Relief Act provides a summary method for an execution creditor to prove his or her claim and share in the proceeds of any levy made by the sheriff. At one time there was some confusion as to whether certificates obtained under section 19 of The Creditors' Relief Act were required or permitted to be registered in the land titles office in the same manner as a writ of execution against goods and lands. An amendment to The Creditors' Relief Act by S.S. 1979-80, c.92 has made it clear that these certificates are required to be registered in order to achieve a priority position over subsequent interests in land. Section 20 states that "the certificate shall bind the land and goods of the debtor in the same manner and to the same extent as an execution". In order for a writ of execution to bind the land of a

debtor it must be registered in the appropriate land titles office. A certificate under The Creditor's Relief Act should be registered in the same manner. A creditors' relief certificate need not be witnessed and attested (see section 63 of The Land Titles Act).

## E. Federal Court Writs

### 1. Authority

Section 101 of the Constitution Act, 1867 provides that the Parliament of Canada may establish courts for the better administration of the laws of Canada. In 1927 there was established the Exchequer Court (see R.S.C. 1927). The name of this court has since been changed to the Federal Court.

Subsection 56(3) of the Federal Court Act, R.S.C. 1985, c.F-7 reads as follows:

56. (3) All writs of execution or other process against property, whether prescribed by the Rules or authorized by subsection (1), shall, unless otherwise provided by the Rules, be executed, with respect to the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed, and the writs or other process issued by the Court shall bind property in the same manner as similar writs or process issued by the provincial superior courts, and the rights of purchasers thereunder are the same as those of purchasers under those similar writs or process.

This section says that federal writs shall bind property in the same manner as provincial writs. In order for a provincial writ to bind land it must be filed in the land titles office (see section 180 of The Land Titles Act).

### 2. Life

Federal Court Rule 2006(1) establishes the life of a federal court writ:

Rule 2006(1) provides:

For the purpose of execution, a writ of execution is valid in the first instance for 5 years beginning with the date of issue.

Thus, the operative date for land title records is the date of issue which is the date above the signature of the court official issuing the writ.

### 3. Removal

Rule 2006(2) provides:

Where a writ has not been wholly executed the Court may by order extend the validity of the writ from time to time for a period of five years at any one time beginning with the day on which the order is made, if an application for extension is made to the court before the writ would otherwise expire.

Note that this section says that the writ is valid for five years from the date of issue and may be extended for further periods if an application for extension is made to the court before the writ would otherwise expire.

If this rule is interpreted as allowing a renewal to be filed at any time, it would mean that a federal court writ could never be removed from the records of the land titles office. It is land titles practice to only maintain a federal court writ for one year past expiry. Even this may not be necessary as section 36 of The Executions Act requires the renewal of provincial writs to be filed before the expiry in order to continue the priority established by the writ of execution. Furthermore, the intent of section 67 of The Land Titles Act is that no instrument is to be operative against third parties unless filed. The year of grace is a practical compromise.

If the year of grace presents a problem for an execution debtor, the person requiring the removal of the writ may produce a statement from Crown (Canada) that no application for renewal was made before the five year time limit expired.

### F. Dealing Promptly with a Writ

As soon as a writ of execution is entered in the instrument register, it is handed to the registration team for entry into the records of the office. This method ensures that the writ will be available for searching when transfers immediately following the writ are registered. Care must be taken to ensure that a writ is not endorsed on a title when the transfer in fact has priority over the writ. New subsection 180(3.1) of the Act was intended to make

it clear that a registrar does not "receive" a writ until it is entered in the instrument register and that it is the serial number which will determine priority.

#### G. Assignment of a Writ

Section 27 of The Executions Act provides that if an execution is assigned, the assignee shall, from the time of registration of the assignment in the proper land titles office, have the same rights as those held at that time by the assignor.

Although the Act does not so state, an assignment of an execution should be sent to the land titles office by the sheriff rather than the assignee, if for no other reason than that the sheriff should know of the assignment.

If the writ that has been assigned has been endorsed on a certificate of title and the title is renewed, both the writ of execution and the assignment are carried forward. This is the same as the practice with a mortgage and a transfer of mortgage.

An assignment of the judgment on which the writ is based may also be registered as an assignment of the writ and should be received from the sheriff.

#### H. Request to Endorse a Writ Against Title

At one time, the registrar accepted requests to endorse writs of execution against certificates of title. Since there is no legislative authority for this practice and since the registered owner is not informed when a writ is so endorsed, the practice was discontinued. The writ of execution may still be registered against the title by the filing of a caveat.

#### I. Transfer of a Writ

Sections 34 and 35 of The Executions Act provide for the transfer of a writ from one judicial centre to another. If the writ has not already been registered in the land titles office the sheriff is required to submit the writ for registration.

In addition to the usual certificate by the sheriff to whom the writ was addressed, a transferred writ bears a second certificate as follows:

I \_\_\_\_\_ Sheriff of the Judicial Centre of \_\_\_\_\_ do hereby certify that the within is a true copy of a certified copy of a writ of execution, goods and lands, together with all endorsements thereon, and with the execution of which writ I am now charged, the same having been transferred to me by the Sheriff for the Judicial Centre of \_\_\_\_\_ and delivered to me at \_\_\_\_\_ on the day of \_\_\_\_\_ 19\_\_\_\_.

(seal)

\_\_\_\_\_  
Sheriff, Judicial Centre of \_\_\_\_\_

Any withdrawal should be executed by the sheriff to whom the writ has been transferred, whether or not evidence of the transfer is shown in the land titles records. The withdrawal could be in the following form:

I \_\_\_\_\_ Sheriff of the Judicial Centre of \_\_\_\_\_ do hereby certify that a writ of execution against the lands of \_\_\_\_\_ at the suit of \_\_\_\_\_ for the sum of \$ \_\_\_\_\_ and received by the Sheriff for the Judicial Centre of \_\_\_\_\_ on the day of \_\_\_\_\_ 19\_\_\_\_, and transferred to me, as sheriff to be charged with the execution thereof, by the said Sheriff for the said Judicial Centre of \_\_\_\_\_ and received by me on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ has been satisfied.

Given under my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

\_\_\_\_\_  
Sheriff, Judicial Centre of \_\_\_\_\_

#### J. Renewal of a Queen's Bench Writ

A writ of execution may be renewed by issuing a new judgment. Section 36 of The Executions Act contemplates the commencement of an action on the judgment or order for the payment of money. Rule 347 of the Queen's Bench Rules of Court provides a summary procedure in chambers to obtain a new judgment.

Subsection 36(3) of The Executions Act requires that a writ of execution contain a special statement to the effect that the writ is issued on a judgment obtained in an action upon a former judgment.

If the new writ is received by the registrar before the expiry of the old writ, the registrar is directed to place a special endorsement on the new writ (see subsection 36(5)). The new writ runs for an additional ten years from the date of the judgment or order, and takes the priority of the old writ.

If the new writ is not received before the expiry of the old writ, it is accepted for registration in the usual manner for a writ of execution. No special endorsements are made. Time begins to run from the date of the judgment or order (see Rule 358), but a new priority position is established.

#### K. Priority of a Writ

Section 27 of The Land Titles Act provides that the priority among "mortgages, transferees and others" is determined by the serial number assigned to the instrument and the date of receipt. However, as far as writs of execution are concerned, this section does not mean what it says.

In contests between unregistered mortgagees or transferees and execution creditors, priority is usually given to the unregistered interest: Jellett v. Wilkie (1895), 26 S.C.R. 282; Schlosser v. Colonial Investment and Loan Co., [1917] 1 W.W.R. 1045 (Sask. S.C.); Weidman v. McClary Manufacturing Co., [1971] 2 W.W.R. 210 (Sask. C.A.); Rogers Lumber Yards v. Stuart, [1917] 3 W.W.R. 1090 (Sask. C.A.); Gregory v. Princeton Collieries, [1918] 1 W.W.R. 265 (B.C.S.C.); Union Bank v. Lumsden Milling Co. (1915), 8 W.W.R. 1167 (Sask. S.C.); Yeulet v. Matthews, [1982] 4 W.W.R. 5 (B.C.C.A.). The reason for the non-application of section 27 is that under the general law an execution creditor could only sell the property of the debtor subject to all such charges, liens and equities to which the property was subject in the hands of the debtor.

Another issue that arises is the priority among writs of execution against a debtor who acquires land which is already subject to a mortgage or other encumbrance. In addition to section 27, subsection 180(3.1) of The Land Titles Act states that "the priority of the execution over other instruments filed or registered shall be determined by the number assigned to it by the registrar". Again, this rule must be taken as addressing priority among creditors and others dealing with the same debtor. When a debtor transfers land to another debtor, writs of execution affecting the second debtor will take subject to the writs and mortgages against the first debtor.

Other priority issues are discussed at pages 158 and 159 of this manual.

## L. Discharge of a Writ

### 1. Withdrawal by Sheriff or Judge's Order

Section 181 of The Land Titles Act allows a sheriff or judge to issue a certificate under seal or order discharging the writ:

- (a) as to part of the lands;
- (b) as to part of the amount;
- (c) as to all of the land.

### 2. Effect of Bankruptcy

The trustee in bankruptcy may apply to be registered owner of all lands of the debtor other than those exempt from seizure (see section 177 of The Land Titles Act). When the trustee transfers land any writs of execution against the debtor do not attach as the trustee is presumed to be dealing with and looking after the interests of those creditors. However, with respect to lands not transmitted to the trustee, the writs remain in effect even after a discharge in bankruptcy has been obtained.

The effect of a discharge in bankruptcy is to remove the basis upon which writs were issued but only for those writs which pertain to claims provable in bankruptcy. Section 178 of the Bankruptcy Act, R.S.C. 1985, c.B-3 sets out those claims from which the bankrupt is not released by the order of discharge and it includes debts or liability for alimony and for goods supplied as necessaries. Thus, not all writs are of no effect following bankruptcy.

The practice is to ask the sheriff to withdraw any writs proved in bankruptcy. To do this the sheriff will require the consent of the execution creditor who placed the writ in the sheriff's hands.

## M. Fees

Effective the registration date of April 1, 1985, the sheriffs do not submit fees with writs of execution, withdrawals, partial discharges, postponements or any other instrument submitted by the sheriff. The sheriffs collect the fees for all of these instruments pursuant to subsection 180(1) of The Land Titles Act in conjunction with a new fee tariff for sheriffs which came into effect April 1, 1985, appearing in the March 8, 1985 Saskatchewan Gazette. The sheriffs fee tariff creates block fees. Thus the fee for registration on the sheriffs' side will include the withdrawal and any partial discharge or postponement. None of the fees collected

are remitted to the Property Registration Branch. These fees are credited to Court Services' revenue. The collection of fees on the sheriffs' side is subject to their free work policy which eliminates the need for the sheriff to collect fees from line departments and other agencies of the Crown. It also eliminates one set of bookkeeping entries with respect to the same revenue.

## Chapter 27. Maintenance Orders

### A. Authority and Effect

Subsection 33(1) of The Enforcement of Maintenance Orders Act, S.S. 1984-85, c.E-9.2 allows a claimant, under any maintenance order enforceable in Saskatchewan, to file the maintenance order in any land titles office. As long as the order remains in force it "binds....the estate and interest....that the respondent has or may acquire in any lands". "Respondent" is defined in clause 2(1)(p) to mean a person who has an obligation to pay a maintenance order. As soon as a maintenance order is filed, it has the same priority as a registered mortgage (see subsection 33(1)).

Like a writ of execution, the registrar is directed by subsection 130(2) of The Land Titles Act to ensure that no certificate of title is granted and no instrument is executed by the respondent except subject to the rights of the claimant under the maintenance order.

The new Act and the new procedure under section 130 of The Land Titles Act:

- (1) apply to all maintenance orders previously or hereafter filed;
- (2) enable the "claimant" to encumbrance any interest in land belonging to the "respondent";
- (3) permit the "Director of Maintenance Enforcement" to act on behalf of the claimant;
- (4) provide for a procedure by which maintenance orders can be discharged (only by court order, by the Director or with the consent of the Director); and
- (5) require that any notices to be given to the claimant must also be sent to the Director.

### B. Registration Procedure

#### 1. Orders

The order submitted for registration will usually be an original or certified copy of an order of the Saskatchewan Court of Queen's Bench or the Unified Family Court. It may also be an order of a court in another jurisdiction, if that order has been filed with a Saskatchewan court. If it is an order of another jurisdiction it must either come under the letter of the Director of Maintenance Enforcement or be an order of a superior court under the Divorce Act.

## 2. Claimant

The order may be filed by or on behalf of the claimant. The Act contemplates registration of the order either against all of the respondent's interest in land or, as an alternative, against specific titles. Sometimes the petitioner may actually be ordered to pay maintenance. Each order must be examined to determine who, in essence, the respondent is. All orders should be entered in the general record under the name of the respondent (the person who is directed to pay) with no expiry date shown. Where the Director is acting on behalf of the claimant, the Director of Maintenance Enforcement will be substituted for the name of the claimant.

If legal descriptions are provided in the order, the order should also be endorsed on the certificates of title registered in the name of the debtor, eg. "order for alimony (or decree nisi for maintenance) in favour of Martha Smith against John Smith".

## 3. Signature of Director

The signature of the Director on any document for the purposes of the Act "may be written, engraved, lithographed or reproduced by a mode of reproducing words in visible form" (see subsection 50(4)).

## 4. Discharges

An order may be discharged by:

- (1) a court order;
- (2) a discharge signed by the Director;
- (3) a discharge by the claimant, but only with the consent of the Director (see subsection 130(4) of The Land Titles Act).

## 5. Notices

Notices that are required to be sent to the claimant must be sent to the Director as well. Such notices do not have to be sent to the claimant if the order was filed by the Director (see subsection 130(7) of The Land Titles Act).

## 6. Application of Act

The Act applies to all orders previously filed pursuant to section 130 of The Land Titles Act, section 16 of The Deserted Spouses' and Children's Maintenance Orders Act and Rule 646D of the Queen's Bench Rules of Court. (Note that Rule 646D is now replaced by Rules 631 and 637.) This means that for the

purpose of notices and discharges, old and new orders will be treated the same.

The debtor is only able to transfer or otherwise deal with his or her land subject to the order. If there is no discharge of the order, the order would have to be carried forward and endorsed on each subsequent certificate of title.

### C. Request to Endorse Against Title

Subsection 33(2) of The Enforcement of Maintenance Orders Act provides that a maintenance order may be registered against the title of any land registered in the name of the respondent, at the request of the claimant. The request may be made at any time. It may be necessary to ask for an affidavit of identity taken by the claimant or Director. If the registrar is satisfied that the debtor and the registered owner are the same, no affidavit of identity is necessary. Where there is a material difference in the name or where the debtor is not the registered owner, it may be necessary for the claimant or Director to register the claim by way of caveat.

The request to register a previously filed maintenance order against a specific title is not given a registration number. The registration number and date of the writ are endorsed on the title. Some reordering among endorsements may also be made. The date the maintenance order is endorsed is shown in the particulars column.

## Chapter 28. Notice of Personal Property Security Interest in Fixtures

### A. History, Meaning and Purpose

In 1957, a new Conditional Sales Act was passed which dealt for the first time in Saskatchewan with the registration in the appropriate land titles office of a notice of a security interest in goods that are or will become fixtures to land. Section 17 of that Act was modelled after similar legislation in British Columbia. No sophisticated priority system was developed at that time but subsection 17(3) stated that upon compliance with the section, the goods "shall remain subject to the rights of the seller as fully as they were before being affixed". The Act applied only to conditional sale agreements. A thirty day grace period for registration was provided but registration could occur at any time, subject to intervening interests.

Effective May 1, 1981, The Personal Property Security Act, S.S. 1979-80, c.P-6.1 was proclaimed. It applies to all security interests regardless of form, and extended the ability to register a notice of a security interest in fixtures to persons loaning money with respect to goods which are or will become fixtures, as well as applying to a seller.

The operative sections of the Act for this purpose are sections 36 and 54. Section 36 of The Personal Property Security Act was designed to effect a change in the common law of fixtures by making it possible to retain or create a chattel interest (security interest) in goods that become or that are affixed to real property without the necessity of taking a real property interest in the real property to which the goods are affixed (see subsection 36(1)). Since the chattel interest is personal property only for the purposes of the creation of a security interest and not for all purposes, it is necessary to regulate the priority rights of the holder of the chattel interest and the rights of holders of interests acquired in the real property to which the goods are affixed. These latter holders acquire interests in the fixtures as real property and not as personal property. Subsection 36(2) provides a set of priority rules and section 54 provides a registration mechanism in the appropriate land titles office for ordering the respective rights of the above noted parties. In effect The Personal Property Security Act requires the holder of a fixture interest to provide notice of interest in the land titles office so that any person who acquires an interest in the real property to which the goods are affixed is able to discover the existence of the personalty interest to which he or she is subject.

## B. When Registration is Made

If a lender or seller takes a security interest in personal property (i.e. goods), the lender or seller must do certain things to obtain protection against third party interests, eg. another buyer or lender. Where the interest is in goods alone, the lender or seller registers in the Personal Property Registry. Where the interest is in goods that are or may become fixtures, the lender or seller must not only be concerned about third party interests in the goods as personal property but also in the goods as fixtures or, in other words as part of the land. It is with respect to this latter point that sections 36 and 54 of The Personal Property Security Act have application. The priority of The Land Titles Act does not apply to regulate disputes between the holder of a real property interest and a personal property interest.

The following example illustrates the priority structure of section 36 of The Personal Property Security Act:

"A" owns a hotel. "A" borrows money from "B" to purchase carpet for the hotel.

"B" takes a security interest in the carpet to ensure that if "A" defaults on his loan "B" will be able to repossess the carpet.

To protect against third parties dealing with "A", "B" will register notice of the security interest in the Personal Property Registry and file a notice in the appropriate land titles office.

If the security interest in the carpet is taken and registration is made in the land titles office before the carpet is laid, "B" will have priority over any person who has an interest in the land. If the registration is made after the carpet is laid, "B" will have priority over any person who acquires an interest in the land after the registration. Thus, if "A" mortgaged the land to "D" after the carpet was laid and before "B" registers in the land titles office, "B" takes his interest in the carpet, subject to "D's" interest in the land which includes the carpet as a fixture.

You will see from this example one reason why no grace period for registration exists under The Personal Property Security Act. It is not necessary in that priority is determined upon registration which can occur at any time. The race is to the fleetest of foot, and the secured party gauges the extent of risk and acts accordingly.

It should be noted that "B" in the example above need not register in the appropriate land titles office if the extent of "B's" concern is in the carpet as personal property (see subsection 54(4) of The Personal Property Security Act). "B" merely registers in the Personal Property Registry.

Similarly if the source of "B's" interest includes a real property interest eg. under a registered lease or easement, where title to the goods remains with the lessee or holder of the easement, "B" need not register under section 54 of The Personal Property Security Act as the priority structure of The Land Titles Act will apply to determine priority between competing real property interests. This issue will most often arise in the context of financing a public utility easement where title to the fixture is retained by the grantee of the easement. No fixture filing need be made where a real property interest is registered.

### C. Effect of a Registration

Unlike under The Builders' Lien Act, the person registering a notice of security interest, who is called a "secured party", is given no rights over the land itself. The secured party is given certain rights of retaking possession of the fixtures, after giving notice of intention to do so in accordance with the Act.

### D. What is a Fixture

"Fixture" is defined by clause 2(p) of The Personal Property Security Act to mean "goods that are installed on or affixed to real property in such a manner or under such circumstances as to result in their becoming in law fixtures to the realty, but does not include building materials". In essence this means that if at common law goods would be considered fixtures, they are fixtures under this Act. The leading case on what constitutes a fixture is Hobson v. Gorringe, [1897] 1 Ch. 189 (C.A.) where the court said you must look to:

- (1) intention of parties;
- (2) degree of the annexation;
- (3) object of the annexation i.e. for the better use of the chattel or the land;

to determine whether goods are fixtures. In recent cases, the courts have tended to focus on the second point.

Broadly speaking, building materials are those materials which are incorporated into the fabric of the building; timber used in building a home would be "building material" for this purpose,

whereas a water heater or furnace which can be easily disconnected would not be a "building material", but would be a fixture.

Land titles staff will not normally have to be concerned with the question whether any chattel is a fixture or not; this would be a matter for the court in any litigation. The question is mentioned here as a matter of interest, only.

#### E. Form 3

The Personal Property Regulations, c.P-6.1 Reg. 1 prescribe the procedures and forms for registering a notice of a security interest in a land titles office. Form 3 to the Regulations requires the following information:

- (1) the name and address of the secured party;
- (2) the full name and address of the debtor;
- (3) a description of the goods by which they may readily and easily be known and distinguished;
- (4) the amount owing with respect to which the security interest is granted or taken in the goods;
- (5) the registration life of the notice in multiples of one year or an infinite number of years;
- (6) a description of the land to which the goods are or will be affixed, sufficient for the purpose of identification in a land titles office; and
- (7) the address within Saskatchewan at which notices may be served;

and any such notice is to be signed by the secured party or the secured party's agent and witnessed.

The duplicate certificate of title need not be produced (see clause 57 (i) of The Land Titles Act).

#### 1. Name and Address of Secured Party

Clause 2(cc) of The Personal Property Security Act defines person to include a partnership or association. This means that a secured party could be a partnership or association. When this can be an issue will be with respect to who is the appropriate signing officer. If the discharge is not executed by an agent for the secured party, the registrar must ask for satisfactory proof of the identity of the owners of the interest. For a partnership, a certificate from the Director of

Corporations should disclose the identity of all partners. For other unincorporated associations, the registrar must ask for affidavit evidence.

If the discharge is signed by an agent and the signature properly attested and verified, no issue will arise.

If the notice is assigned before filing the notice, the notice need not indicate the assignment. The assignee is the secured party.

2. Name and Address of the Debtor

This will normally be the registered owner of the fee simple or leasehold estate.

3. Description of the Goods

As indicated above, whether or not the goods described are or are capable of being fixtures is not a question for the registrar. If a description of goods is provided, the registrar need not question the sufficiency of the description.

4. The Amount

Again, the registrar is only interested in completeness with respect to this part. Some security agreements may be granted for value other than money. A statement as to the extent of the obligation, whatever it may be, is sufficient.

5. Registration Life

The registrar does not set up a diary system to clear the title. A notice of security interest that has expired due to effluxion of time need only be marked to that effect when the title is pulled for the purposes of some other transaction.

6. Description of the Land

(a) Unpatented Land

Unlike under The Conditional Sales Act there is no provision for the filing of a notice against unpatented land.

(b) Mines and Minerals

It is hoped that a secured party will make it clear that the notice is not to affect any title for mines and

minerals. However, the registrar should not endorse this type of interest against mines and minerals.

(c) Part of the Land

The notice may be filed against part of the land as long as the description is acceptable to the registrar. No planning approval is required.

(d) Condominium Property

Subsection 54(1) of The Personal Property Security Act contemplates registration against the condominium or replacement plan. Such a plan need only be described by number for an effective land description.

(e) Federal Crown Land

A notice cannot be registered against Federal Crown land unless the notice makes it clear that it is claiming against the estate or interest of a third party.

7. Address for Service

Note that the address for service must be within Saskatchewan, like caveats and not like builders' liens.

F. Form 4

Subsection 54(2) of The Personal Property Security Act allows a secured party to give notice of a "document renewing, amending, assigning or discharging the security interest to which the original notice related, or of a document subordinating the security interest". Form 4 to the Regulations is prescribed for that purpose. Form 4 would not be accepted for registration if the notice has expired. Subsection 45(2) of the Regulations prescribes certain information with respect to the various transactions on Form 4. Form 4, like Form 3, may be executed by an agent.

1. Renewal

A notice renewing must indicate the registration life in multiples of one year or an infinite number of years. A renewal would not be accepted if the original notice disclosed an infinite number of years as the registration life or if the notice had already expired (see subsections 48(1) and 54(3) of The Personal Property Security Act).

## 2. Amendment

Although this can be used to amend any part of the form, including registration life and name and address of secured party, it would be used most often to show a change of address for service as no specific form is provided for this purpose.

A secured party would not want to use it to change registration life or to change the name of the secured party name and address unless it is truly an "amendment" i.e. to correct a previous error made rather than give notice of a legal change in status. However, the registrar cannot police this. The secured party should choose the appropriate part of the form i.e. renewal to increase registration life rather than amending the registration life.

## 3. Assignment

The disclosure of the full name and address and address for service for the assignee is critical for serving future notices. This information should be endorsed on the title in the same manner as for a transfer of mortgage.

Once a notice of assignment has been filed, then, of course, the discharge will have to be signed by the assignee and any notices to lapse will be addressed to the address for service given in the notice of assignment, or any subsequent notice of change of address for service.

## 4. Discharge

Although section 54 of The Personal Property Security Act does not mention a partial discharge as to land, the Regulations contemplate a partial discharge as to land. The description of the part of the land would have to be acceptable to the registrar.

No partial discharge as to goods is allowed.

Subsection 54(6) contemplates the discharge of any Form 3 or Form 4 notice.

Since partnerships and unincorporated associations can register a notice, special care will have to be taken to ensure that the discharge is executed by the appropriate parties (see pages 299 and 300 of this chapter dealing with name of the secured party). But as the Form may be executed by an agent there should be little problem.

## 5. Subordination

This means the same as a postponement under The Land Titles Act.

No partial subordination as to goods or lands is contemplated. However, as partial postponements as to land are allowed, by practice only, under The Land Titles Act, the same practice is allowed under this Act.

## G. Affidavits of Attestation and Verification

Section 45 of the Regulations allows Forms 3 and 4 to be signed by "the secured party or his agent and witnessed". Form 5 is an affidavit of execution. Subsection 45(4) provides that where a corporation acts under seal, no affidavit of execution is required. Subsection 45(3) requires, in addition to an affidavit of attestation, an affidavit of verification for an agent (Form 6). These rules may be summed up as follows:

- (1) secured party individual signs - Form 5 required;
- (2) secured party corporation:
  - (a) under seal - no affidavit of execution (Form 5) is required;
  - (b) not under seal - affidavit of execution (Form 5) is required with modification to indicate person signing has authority to bind the company;
- (3) secured party partnership or association - must have all individuals sign with affidavit of execution or may be signed by agent with affidavits as above, (note that proof of who are the members of the partnership or association is not required until the notice is to be discharged as outlined earlier in this chapter);
- (4) agent individual signing for secured party - must have affidavit of execution and affidavit verifying notice (Form 6);
- (5) agent corporation signing for secured party:
  - (a) under seal - no affidavit of execution is required but an affidavit of verification (Form 6) is required;
  - (b) not under seal - both the affidavit of execution (Form 5) and the affidavit of verification (Form 6) are required (no power of attorney is needed for this type of agent).

## H. Clearing the Title

### 1. Upon Expiry

Subsection 54(5) of The Personal Property Security Act is the registrar's authority for marking as lapsed by effluxion of time, a notice of security interest when the time indicated on the notice has expired. All notices related thereto are also so marked. This need only be done when the title is pulled for the purposes of some other transaction.

### 2. Upon Discharge

Subsection 54(6) of The Personal Property Security Act allows the discharge of any notice. The form to be used to discharge a notice is Form 4 which allows a total and a partial discharge. The partial discharge cannot relate to the fixtures but to land only. The same affidavits of execution (Form 5) and verification (Form 6), as mentioned above, are required.

### 3. Notice to Lapse

#### (a) Application

Subsection 54(7) of The Personal Property Security Act allows any person who has an interest in the collateral, the registered owner of the land or any other person claiming an interest in the land "to contest the registration of the notice according to the procedure established in The Land Titles Act for contesting the filing of a caveat".

The principal question is whether this section allows the notice to lapse procedure in section 159 of The Land Titles Act to be used to lapse a notice of security interest. Although the side note to section 158 of The Land Titles Act refers to contesting a caveat, section 158 is not the only means to contest a caveat. Section 159, the notice to lapse section, is also an effective means to contest a caveat. Section 48 of The Personal Property Security Act which applies with all necessary modifications to a section 54 notice contemplates the removal of a notice when no judge's order is filed continuing the caveat or upon receipt of a judge's order compelling the discharge. The Personal Property Security Act provides for the notice to lapse procedure with respect to registrations in the Personal Property Registry. The Conditional Sales Act provided for the notice to lapse procedure. It would be peculiar for the legislature to take away this remedy from registered owners without express words. Finally, the Regulations provide for an address for service in the same manner as for builders' liens and caveats, both of which

can be lapsed by a notice to lapse. Although not conclusive as this is a regulatory provision, it is further evidence of intention to allow a notice to lapse to be used with respect to a notice of security interest.

(b) Procedure

So far as practicable the procedure for lapsing a section 54 notice should be the same as for caveats. However, the request should provide enough information to enable the registrar to conclude that the person making the request has authority to make the request eg. person with an interest in the fixtures, the registered owner (either fee simple or leasehold), or any other person claiming an interest in the land.

The registrar is not required to ask for evidence showing that the conditions in subsection 54(7) of The Personal Property Security Act exist i.e. that all the obligations are performed.

I. Application to Conditional Sale Notices

Notices filed pursuant to any previous Conditional Sales Act remain on the title but all procedures under The Personal Property Security Act would apply by virtue of The Interpretation Act dealing with the effect of the repeal of a statute and subsection 71(1) of The Personal Property Security Act.

## Chapter 29. Certificate of Lis Pendens

### A. Certificate of Lis Pendens

Subsection 48(1) of The Queen's Bench Act provides for the issue of a certificate signed by the proper officer of the court and the form of the certificate is set forth in the section. The form requires the names of the plaintiff and defendant to be inserted, and certifies that some title or interest is called in question in the land described in the certificate. Under subsection 48(1), the institution of an action, or the taking of a proceeding in which any title to or interest in land is brought in question, does not affect any person not a party to it until a certificate of lis pendens has been registered in the land titles office. The certificate of lis pendens does not prevent the land from being dealt with in any way but whoever takes it, or any interest in the land, does so subject to the adjudication of the court in the action which has been commenced.

A certificate of lis pendens can be registered against land whether or not a caveat has been filed or a notice to lapse has been sent with respect to a caveat. Any claim on land can be enforced by an action through the Court of Queen's Bench and a certificate of lis pendens registered.

In Fraser River Ventures v. Yewdall (1958), 27 W.W.R. 368 (B.C.S.C.), the effect of a certificate of lis pendens is described. A Saskatchewan case is Closson et al. v. Howson (1963), 41 W.W.R. 275 (Sask. Q.B.). In Boe v. Boe, [1988] 3 W.W.R. 88 (Sask. C.A.) the wife commenced an application for division of property under The Matrimonial Property Act and filed a caveat rather than a certificate of lis pendens against the title to the land. The husband subsequently mortgaged the land. The mortgage was held to take priority over the caveat as the caveat did not give notice that an action was pending to determine ownership of the land.

A certificate of lis pendens can be registered against a part only of a parcel of land if the registrar approves the land description. Subdivision approval is not required.

### B. Certificate of Discontinuance

Section 164 of The Land Titles Act provides for the removal of the certificate of lis pendens by a certificate of the local registrar. This certificate is limited to cases where the local registrar can certify:

- (1) that the action has been discontinued; or

- (2) that the action having proceeded to trial, judgment was given in favour of the defendant and no appeal therefrom has been entered, and the time limited for an appeal has expired.

If the local registrar can certify these facts, then the certificate has the same effect as a judge's order vacating the certificate of lis pendens. Subsection 164(2) requires that the certificate:

- (1) describe the land;
- (2) describe the parties to the action;
- (3) refer to the instrument number of the certificate of lis pendens.

Subsection 164(2) was added by The Land Titles Amendment Act, S.S. 1983, c.50.

The certificate of the local registrar removes the certificate of lis pendens and any caveat by the plaintiff which has been attacked by a notice to lapse and any order of the court continuing the caveat. It does not remove any caveat by the plaintiff which has not been attacked by notice to lapse. A voluntary withdrawal of the caveat removes the caveat but does not remove the certificate of lis pendens. The certificate of lis pendens can only be removed either by the certificate of the local registrar or by an order of the court.

Sometimes the certificate of the local registrar is removed by a judge in chambers. Then the certificate of discontinuance will indicate that judgment was given in favour of the respondent. Unless there is some indication that this is not the registered owner, this is acceptable to withdraw the certificate of lis pendens.

When judgment is given in favour of the plaintiff or applicant, it is the lawyer's responsibility to provide in the order what is to happen to the title and all encumbrances including the certificate of lis pendens. The mechanism provided for in section 164 does not cover the situation where the plaintiff or applicant is successful before the court.

Similarly, where the judgment is appealed to the Court of Appeal, special steps must be taken in the resulting order to deal with the title.

Where an action has been neither discontinued or dismissed, a defendant wishing to have a certificate of lis pendens vacated must obtain a court order. The court's authority for vacating a certificate of lis pendens is found in section 49 of The Queen's Bench Act.

## Chapter 30. Postponement

### A. Instruments which may be Postponed

Section 146 of The Land Titles Act provides for the postponement of "an encumbrance or of a caveat". "Encumbrance" has many meanings. The context determines its meaning. Clause 2(1)(d) of the Act defines "encumbrance" to mean a charge on land created or effected for any purpose inclusive of mortgages, builders' liens and executions.

In common speech the word "encumbrance" is used as equivalent to any endorsement on the back of a title. In C.N.R. v. Paterson (1914), 6 W.W.R. 1194 (Sask. S.C.) Haultain, C.J., refers to the more comprehensive meaning of "encumbrance" as including something which can be put on the title as an endorsement. There are, however, other meanings which are more restricted. Lamont J., in M. Rumely Co. v. The Registrar of the Saskatoon Land Registration District (1911), 4 Sask. L.R. 466 (S.C.), refers to two distinct meanings to be assigned to the word encumbrance. After referring to the definition of "encumbrance" in the Act, Lamont, J. went on to find that in one particular section, although the word "encumbrance" was used, the definition in the Act did not apply to the use of the word in the particular section.

Since clause 2(1)(d) of the Act defines "encumbrance" in terms of a charge, the question is raised as to what is the meaning of the word "charge". The following passage appears in Hogg's Australian Torrens System at page 882 "The word charge is used in the statutes in general senses. In the wide sense it includes all interests in land which are merely securities for payment of money. In the narrower sense it means all such interests except mortgages. In the narrowest sense of all it means a statutory registered instrument for swearing the periodical payment of money out of land excluding mortgages, such sums usually constituting annuities or rent charges". In a Tasmanian case, Re Price ex parte Tinning (1931), 26 Tas. L.R. 158 at 160, Nichelle, C.J. says "the words "charge" and "lien" are often interchangeable. The quality of each is that so far as is necessary it appropriates or sets aside some particular property real or personal, by making a deduction from the absolute ownership of it in favour of someone who is given by law or by agreement, will or otherwise the right to resort to the property to satisfy or discharge some obligation. They add to the right in personam a limited right in rem". In Re Dickenson (1899), 22 Q.B.D. 187 (C.A.) it was said "To charge property you must bind it. Therefore a mere receivership (at the instance of a judgment creditor) of goods or a chose in action does not create a charge".

Thus, in deciding the meaning of "encumbrance", the context must be regarded closely, and as Mr. Justice Lamont indicated in the case

mentioned above, it is possible for the same word to have different meanings in different sections of the same Act in which it is used.

For example, section 146 enumerates the documents which may be postponed as "an encumbrance or a caveat" whereas it also enumerates the documents in favour of which postponement may be made as "the subsequent mortgage or mortgages, other encumbrance or encumbrances, easement or easements, or caveat or caveats". The fact that easements are mentioned in the second instance seems to indicate that it is not intended that they should be included as an encumbrance in the first instance. The rule of interpretation here is indicated in Maxwell on Statutes (5th Edition), page 527, "When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general form is used in a meaning excluding the specific one".

The result therefore, is that a mortgage, builders' lien, execution, or a caveat may be postponed or may have a postponement made in its favour; an easement may not be postponed but may have a postponement made in its favour.

A tax lien is not considered an encumbrance, and cannot be postponed.

#### B. Postponement of more than one Instrument

Section 146 of The Land Titles Act provides that upon filing a Form W postponement "the rights of the mortgagee or transferee of the mortgage, the lien holder, execution creditor, other encumbrancee or caveator shall be postponed to those arising out of the subsequent mortgage or mortgages, other encumbrance or encumbrances, easement or easements or caveat or caveats specified". The fact that the singular is used in the first part to refer to the kind of instrument which is being postponed and that the plural is used to refer to those instruments whose status is being elevated has prompted questions as to whether the legislature intended to limit the postponing party to one instrument in each Form W.

To ask the postponing party to register two postponement agreements to accomplish the same purpose appears to have no logical basis. Accordingly, an instrument should not be rejected because more than one instrument is being postponed. Fees are charged as though separate instruments were being registered.

#### C. Postponement of one of a Mortgagee's Mortgages

It may happen that a mortgagor has obtained financing on more than one occasion on the same land from the same financial institution. At a later date the mortgagee may be unable or unwilling to advance further funds but encourages the mortgagor to seek funding elsewhere to maintain the viability of his operation. In consideration for a second mortgagee loaning money to the mortgagor, the first mortgagee

may agree to postpone one of its instruments to that of the new mortgagee.

Form W requires the first mortgagee to state that it agrees to the "postponement of his rights as mortgagee" without providing specifically for the naming of the mortgage which is postponed. Where there is more than one mortgage that could be postponed, Form W may be modified to refer specifically to the mortgage being postponed.

#### D. Partial Postponements

Neither section 146 or Form W contemplate that a partial postponement as to amount or as to part of the land may be registered, although a partial discharge and transfer of mortgage are specifically mentioned in the Act (see sections 137 and 144). However, with respect to a partial postponement there appears to be a long standing, if unauthorized, practice of registering partial postponements as to land. This practice has been confirmed by the Master of Titles. Partial postponements for a sum are not allowed.

#### E. Postponements by Subsequent Mortgagees

Some mortgages provide for the payment of future advances. If, before the money is loaned, a subsequent mortgage is registered, and the first mortgagee has knowledge of the subsequent interest, the first mortgagee may take subject to the intervening interest. However, the law on this point is far from clear. There is some indication that section 74 of The Land Titles Act is not the only means of determining priority within the Land Titles System where future advances are concerned, but even on this point there would seem to be uncertainty (see: I.W.A. Credit Union v. Johnson (1978), 6 B.C.L.R. 271 (S.C.), Capital City Holding Ltd. v. C & A Mortgage Corporation (1979), 11 B.C.L.R. 167 (C.A.), Spence v. Graham (1978), 9 B.C.L.R. 161 (S.C.), Robinson v. Ford (1914), 7 W.W.R. 747 (Sask. C.A.)). Thus the practice has developed whereby the second mortgagee will postpone its rights to the first, even though, according to section 74, the first mortgagee has the prior interest.

Again, although section 146 does not authorize the registration of a postponement by a subsequent mortgage to a prior mortgage, it has long been the practice to accept such postponements. The reason why such postponements are presented is to confirm an agreement between the first and subsequent mortgagee allowing the first mortgagee to advance funds notwithstanding the knowledge of the intervening interest and to compensate for the uncertainty in the law.

#### F. Postponement to Oneself

Sometimes an instrument holder eg. a mortgagee will submit a postponement of one mortgage to another mortgage held by the same mortgagee. It has been a long standing opinion to interpret section 146 as requiring the existence of two different mortgagees. The

intent of the section is to accommodate an agreement between two parties based on a valid contract with consideration. Since a party cannot contract with himself or herself, if there is only one person attempting to postpone mortgage rights to another mortgage held by the same party the document would not be valid. The purpose of a postponement is to regulate payment upon default. When there is only one mortgagee there is no basis for the registration of the postponement. Even when there are two parties, the postponement document would be valid without registration. It merely represents the existence of a personal agreement between the two parties as to the structuring of payment in the event there are insufficient funds to satisfy both parties. This would be even more the case if only one party was involved.

If the mortgagee could restructure the priorities through the means of a postponement document with himself or herself, the registrar is required upon the registration of a transfer of one of the mortgages to certify the priority of the two mortgages. However, if the mortgagee assigns both mortgages to different mortgagees, then at the time of default, it would be open for the second mortgagee to argue that he or she holds a first mortgage because the document giving a second mortgage should not have been registered as it was invalid. There is then always the possibility that the mortgagee who was shown to be first will have a claim on the assurance fund. In summary, the registrar cannot register a document which is not authorized by the Act and may be invalid.

#### G. Postponements between Registered Instruments Only

A fundamental principle of any Torrens Act is that no instrument has any effect, except as between the immediate parties thereto, until it is registered (see section 67 of the Act). When the instrument is registered it takes its place on the title and under section 74 of the Act, instruments take priority, one over the other, according to the time of registration and not according to the date of execution.

It follows therefore, that to be effective, the priorities must first be established by registration and then under section 146 such priorities can be changed but in no case can priority be given to an unregistered instrument over one which has been registered. The subsequent instrument must first be registered and then followed by the postponement, which when registered becomes operative according to the intent and tenor thereof.

#### H. Form W

Form W states that the second mortgagee agrees to elevate his or her interest "to the rights in and to the said land of the mortgagee". The essence of the postponement agreement is to elevate the rights of one party in a subordinate position with respect to particular land to the status of a prior agreement. Thus the agreement must provide that one party must postpone his or her rights to the rights of the mortgagee or other instrument holder in and to the land

previously described. This can be conveyed by following the form exactly or by the modification suggested above i.e. to the rights of the mortgagee in and to the said land.

Section 146 of the Act does not require a separate postponement agreement for each class of instruments, i.e. mortgages or encumbrances. The "or" between the classes of instruments in section 146 must be read as an "and".

