Western Connecticut
COUNCIL OF GOVERNMENTS

March 9, 2022

Esteemed Chairs Lopes and Williams,
Members of the Housing Committee:

The Western Connecticut Council of Governments (WestCOG) appreciates the opportunity to comment on House Bill 5204 and Senate Bills 295, 292, and 296:

- House Bill 5204, *An Act Concerning a Needs Assessment and Fair Share Plans for Municipalities to Increase Affordable Housing.* WestCOG **opposes** this bill for several reasons:
    - "Fair Share" has only been used in one state (New Jersey), and it has objectively failed there. Since Fair Share went into effect in New Jersey, home prices there have risen approximately 30% *faster* than in Connecticut – significantly worsening affordability[1]. The average home in New Jersey is now over $100,000 more expensive than the average home in Connecticut[2]; and the average apartment monthly rent in New Jersey is nearly $200 more than in Connecticut[3]. The only thing Fair Share in New Jersey has been successful at is creating decades of expensive litigation.
    - "Fair Share" has not reduced the property tax burden – a major component of housing affordability. The property tax bill for the median home is 42% higher (nearly $2,500) in New Jersey than in Connecticut[4]. This is not just a function of higher home prices in New Jersey. The effective property tax rate is approximately 25% higher in New Jersey than in Connecticut[5].
    - "Fair Share" has not integrated New Jersey. Among the eleven Northeastern states, Connecticut and New Jersey are effectively tied, in the middle of the pack, statistically differing by less than one quarter of one percent, in terms of racial integration[6].

    Fair Share's failure to delivery anything but litigation is likely a reason that no other state has emulated the New Jersey model in the last 40 years. Connecticut should not be the first.

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[1] St. Louis Federal Reserve. All-Transactions House Price Index for Connecticut and New Jersey. 2022. https://fred.stlouisfed.org/series/CTSTHPI and https://fred.stlouisfed.org/series/NJSTHPI.
[2] Zillow. ZHVI for all homes, smoothed and seasonally adjusted, for 1/31/2022. https://www.zillow.com/research/data/.
[3] Statista Research. Average monthly apartment rent by state in February 2021. 2022. https://www.statista.com/statistics/1219332/average-apartment-rent-usa-by-state/.
[4] WalletHub. 2022's Property Taxes by State. March 2, 2022. https://wallethub.com/edu/states-with-the-highest-and-lowest-property-taxes/11585
[5] Tax Foundation. How High Are Property Taxes in Your State? July 7, 2021. https://taxfoundation.org/high-state-property-taxes-2021/.
[6] Western Connecticut Council of Governments. Residential Segregation by Race in Connecticut: Residence and Racial Demographic Change, 1970-2010. 2020. https://storymaps.arcgis.com/stories/c11fc08caf7349f0a94eb587ac5aff14.

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While Fair Share may be a dead end, there are numerous other promising avenues to improve the availability and affordability of housing in Connecticut. These include:

- Implementation of municipal and regional affordable housing plans. Municipalities in the state must adopt an affordable housing plan under CGS §8-30j by June 2022 and update these plans at least once every five years. There is strong momentum to put these plans into action once they are adopted.

- On completion of its *Regional Affordable Housing Plan*, WestCOG intends to initiate a *Regional Housing Financing Study*. The study will evaluate how, given limited resources, municipalities can maximize the creation of quality affordable housing units and realize their ambitions under §8-30j plans. WestCOG would be pleased to share the results of this study with interested parties including your Committee.

- Two bills before the General Assembly could, with minor wording changes, substantially reduce closing costs, a major obstacle to homebuying, for homebuyers with public mortgages (CHFA and, potentially, USDA) and energy-efficient homes. These are Senate Bills 202 and 295, respectively.

- Update the Connecticut *State Building Code* (SBC) to permit 'tiny' houses. The growth in home prices over the last 40 years has tracked the growth in home square footage, even as household sizes have declined[7]. (See attachment 1.) While Public Act 21-29 banned minimum home sizes in local zoning, it failed to address barriers presented by the SBC. Connecticut's SBC is based off the 2015 International Residential Code (IRC); the first version to address tiny houses is the 2018 IRC. Governor Lamont's Executive Order 21-3 launches this year an update of the SBC to incorporate the latest IRC[8]. Appendix AQ of the 2021 IRC provides for tiny houses; however, per the IRC the "provisions contained in [the] appendix are not mandatory unless specifically referenced in the adopting ordinance[9]." For tiny houses to be permissible in Connecticut, the state must explicitly adopt appendix AQ.

- Update *Guidelines for Subdivision Streets*. This document, prepared to satisfy §13b-31a, was issued in 1987[10]. The standards the document sets forth may in many cases result streets that overbuilt, creating additional cost for developers (which gets reflected in higher home prices) without corresponding public benefit. (Indeed, overly wide streets can create disbenefits through the environmental impact and municipal maintenance costs of excess asphalt.) Revision of this document to right-size streets could reduce new home prices and result in greener, safer, more affordable neighborhoods. Public

[7] Western Connecticut Council of Governments. 2020-2030 Regional Plan of Conservation and Development. (January 16, 2020)
[8] https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-21-3.pdf
[9] https://codes.iccsafe.org/content/IRC2021P1/appendix-aq-tiny-houses
[10] https://portal.ct.gov/dot/it/-/media/DOT/documents/dpcu/GuidelinesforSubdivisionStreetsJanuary1987pdf.pdf

Act 21-29 calls for the development of "model design guidelines for… context-appropriate streets that municipalities may adopt"; this work is expected to begin soon.

- Support for advanced manufacturing and construction techniques in homebuilding. New materials and methods – including modularization and 3-D printing – can reduce the cost of home construction up to 40%. However, the degree to which these savings can be obtained depends in large part on a) the availability of materials and equipment within a short distance, to minimize transportation costs and b) labor skilled in these construction methods. Economic development policies that prioritize R&D, production, and training in building technology and construction could help Connecticut provide for lower-cost housing and become a leader in this field.

- Extension of "current use value" assessment to below-market-rate housing to support the creation and preservation of affordable housing. Attachment 2 gives information on this concept.

- Property records reform. New Brunswick and Nova Scotia replaced property deeds with electronic registries, eliminating records vaults, title searches, title insurance, and potential for litigation over property claims. The result is faster, less expensive closings – reducing transaction costs that do not build equity – and lower costs for records management. Attachment 3 reviews New Brunswick's and Nova Scotia's transition from a Connecticut-similar property records framework to an electronic registry, which is also used central and western Canada, all of Australia, Ireland, Israel, Malaysia, Philippines, Singapore, Thailand, and other countries.

- Senate Bill 295, *An Act Concerning Tax Credits for Energy-Efficient Homes.* This bill would provide a state income tax credit for the purchase of an energy-efficient primary residence. WestCOG suggests that you also consider that:

    - Income tax credits are only claimable at filing time. Consequently, this bill would not reduce the upfront cost of homebuying. Given that closing costs often are the largest financial challenge to prospective homebuyers, why not recast the income tax credits as an instant rebate, applicable to closing costs at the time of purchase? This would be similar to Connecticut's successful CHEAPR program for electric and hydrogen cars. Reduction in closing costs would have the impact of making housing more affordable without reducing federal funds coming into Connecticut.[11]

    - Energy-efficient homes may qualify for an energy-efficient mortgage (EEM). An EEM accounts for the savings that result from lower utility bills in an energy-efficient home. The value of these savings is used by a lender to provide more favorable terms to a borrower, such as a better debt-to-income qualifying ratio that enables the borrower to qualify for a larger loan amount. EEMs defray the upfront costs of energy efficiency and

[11] A state income tax credit would reduce state income taxes paid and could thus reduce a taxpayer's federal income tax refund; a rebate on a home price would not have that effect.

improve housing affordability. Your Commission may wish to review options to increase the availability and uptake of EEMs in Connecticut.

- Senate Bill 292, *An Act Concerning Heating Efficiency in New Residential Construction and Major Alterations of Residential Buildings.* This bill would "prohibit the use of any electric resistance or fossil fuel combustion system as the primary source of heating, ventilation and air conditioning or water heating in new residential construction or in major alterations of residential buildings."

  While it appears the bill would continue to permit the use of diesel and gasoline generators to provide backup power for HVAC and water heating and heat pumps that fall back to electric resistance heating in extreme cold, WestCOG has questions and comments about the intent and impact of the bill:

  - How is a major alteration defined? Is it a teardown and rebuild, gut renovation, or an addition, new roof, or kitchen? Some major alterations may not involve changes to HVAC systems. Requiring HVAC replacement could add tens of thousands of dollars to the cost of a project, costs that may be beyond the reach of many homeowners or that may not be covered by insurance. In some cases – such as a major alteration that is required for the home's integrity (e.g., replacement of a crumbling foundation or leaking roof) – this could result in homes becoming unlivable. Such an outcome could diminish household equity and housing affordability.

  - Would the bill apply to all new heating systems that burn fossil fuels, or only those where heat is created directly from combustion? Application to all systems that use fossil fuels and not just boilers and furnaces would also affect absorption heat pumps, which have significant environmental benefits and which may be a more functional drop-in retrofit for homes with hot water heating systems[12], but that utilize natural gas or propane. A prohibition on heating systems that use fossil fuels, even those that use fossil fuels indirectly, may limit the deployment of these systems. For information, see: https://www.energy.gov/energysaver/absorption-heat-pumps.

  - Would exceptions for homes without adequate electric service be made? A prohibition on oil could hamper or prevent the building or rehabilitation of homes without at least 200-amp electric service, including off-the-grid homes. In these areas, oil may be the most feasible option for winter heating.

  - Is the bill intended to apply to swimming pool heaters? While pool heaters based on heat pumps are available, their cold weather performance substantially lags those of conventional pool heaters, and they are relatively uncommon in the Northeast.

[12] Air-to-water electric heat pumps typically output water at low temperature (no more than 120° F), which is inadequate to heat most homes built with radiators or baseboard convectors, most of which were designed for high temperature water (180° F). While existing systems may at slightly lower temperature, a reduction of 60° F would require a tripling of the radiation – three times many radiators or baseboard convectors – to maintain equal heating capacity.

    - What steps will be taken to ensure the electrical grid can handle the added load as homes transition to electric heat? In a heating-dominated climate such as that of Connecticut, the energy used for space heating exceeds that used for space cooling. The replacement of oil and gas with electricity will markedly increase the demand put on the electrical grid in the winter and may create winter peaks that exceed those of the summer. The impacts to life and property of a grid failure during a deep freeze could be far more severe than those of summer brownouts.
    - Will support be provided to firms and employees in the HVAC industry to transition a zero-carbon future? Note that much of the equipment used in fossil fuel-based, especially oil and hot water heating systems, is made in the United States and specifically New England and New York.
- Senate Bill 296, *An Act Eliminating the Requirement to Store the Personal Property of Evicted Tenants*. WestCOG **supports** the elimination of this requirement as inconsistent with the function of local government. Municipalities are not in the business of storing personal effects.

Thank you for your consideration.

Francis R. Pickering
Executive Director

Appendix 1: home prices and home and household sizes

Excerpted from the Western Connecticut Regional Plan of Conservation and Development (p. 62).

Figure 15: Average New Single-Family House Size and Sales Price in the United States

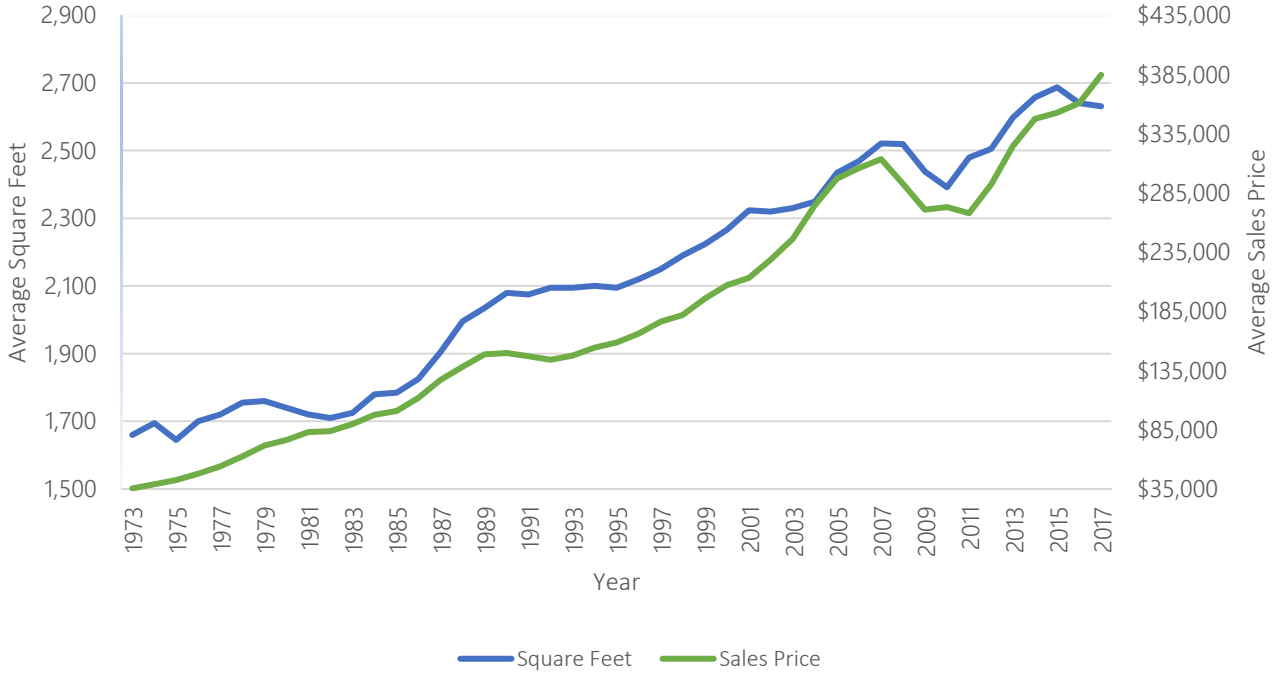
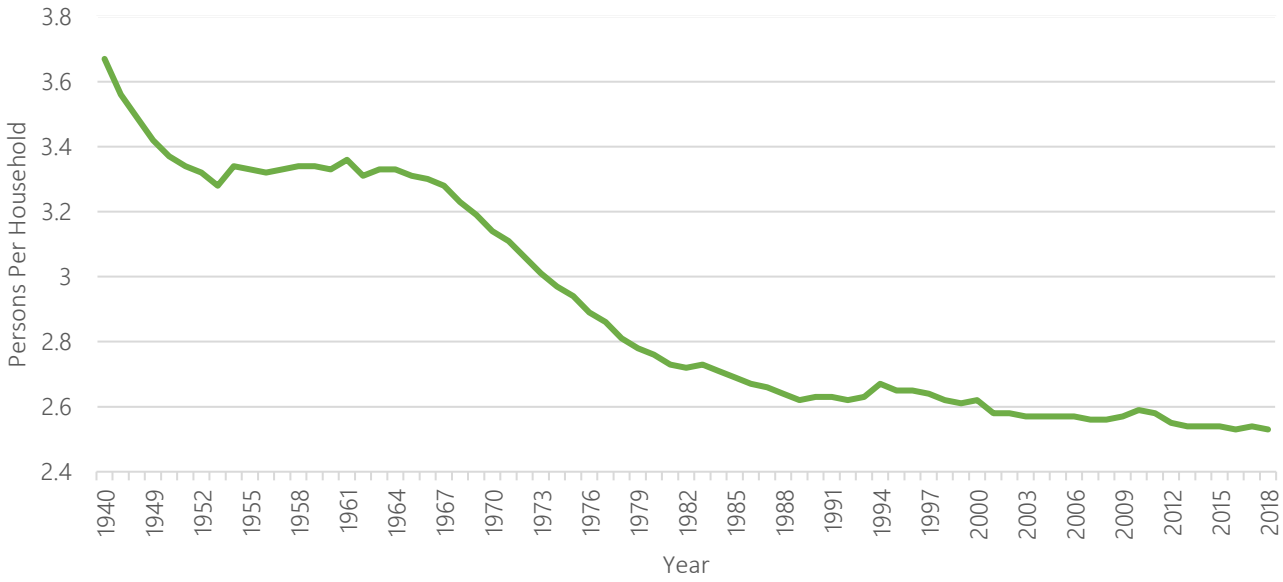


Figure 16: Average Household Size in the United States: 1940-2018



Appendix 2: extending "current use value" to affordable housing

CGS §12-107a et seq (commonly referred to as "PA490") requires municipalities assess farms and forestland on their income-producing capability ("current use") rather than their market value ("highest and best use"), on application by the property owner. This law, which has counterparts in all states, provides a strong and successful incentive for property owners to continue to engage in practices that, while not the most lucrative use of the land, meet societal needs. These include food production, job creation and retention, filtration of air and water, and preservation of habitat. Today, housing finds itself in a situation akin to that of agriculture and silviculture before PA490, when rising costs were putting lower-rent operations out of business. As assessments and property taxes rise, landlords must raise rents. The result is a loss of affordable housing.

Comparison of current use value assessment relief options for private property

Duration	**Permanent**		**Temporary**	
Property type	Action	Assessment impact	Action	Assessment impact
Farm	Deed restriction	Permanent reduction	PA490 status	Temporary reduction
Forestland	Deed restriction	Permanent reduction	PA490 status	Temporary reduction
Open space	Deed restriction	Permanent reduction	PA490 status (local option)	Temporary reduction
Housing	Deed restriction	Permanent reduction	**NONE POSSIBLE**	—

While deed-restricted and public housing may be less affected by assessments, there will never be enough of these units to meet demand, much as community gardens and public forests will never meet the demand for food and wood products. Preservation and expansion of privately-owned, deed-unrestricted rental units is a key to any affordable housing strategy. Voluntary extension of "current use" assessment to homes that are rented out below market rate would achieve this goal, recognizing that the loss in income that the property owner voluntarily takes on in exchange for their contribution to a social need, and incentivizing greater affordability. Below is how such a proposal could work. These conditions parallel the "open space" municipal option under PA490.

- Municipalities could opt into reducing assessments on rental housing units where the owners have committed to rent the unit at a level that is affordable to households earning a fixed AMI (below market rate) for 10 years, in exchange for units in the program counting toward municipal obligations under CGS §8-30g for the same period.
- The assessments would be reduced in the same way as properties with deed restrictions with equivalent effect (i.e., limiting the rental price of the unit to be affordable to households earning the same percent of AMI).
- To participate, a landlord would have to file an application. On approval by the local assessor, the application would bind the landlord to an AMI-tied rent level for 10 years with penalties for early withdrawal or violation of the program. Units that already count toward CGS §8-30g would not be eligible to participate in the program.

- A municipality could opt out at any point, although existing approvals would continue until the end of their 10-year period.

Background information

- Connecticut Department of Agriculture: Public Act 490 – The Basics
- Connecticut Farm Bureau: PA 490 – Connecticut Farm Bureau (cfba.org)
- Connecticut General Statutes: Chapter 203 – Property Tax Assessment (ct.gov)

Appendix 3: Property records reform

See following pages.

[*1] Articles: The Torrens system in Nova Scotia and New Brunswick

2009

Reporter
2009 APLJ LEXIS 1 *

Length: 15436 words

Author: Dr Greg Taylor *

Text

1 Introduction

As recently as 1994 an article appeared in Australia entitled, 'Why Did the Torrens System Succeed in Australia yet Fail in North America?'. [1] While much of what was said in it was quite accurate, its title was unfortunate. In 1994 the Torrens system was about to add two further provinces -- Nova Scotia and ***New Brunswick*** -- to its already large Canadian empire. Today seven of the 10 Canadian provinces and all of the three Canadian federal Territories **[*3]** have the Torrens system. Furthermore, in recent years the Torrens system has been dramatically extended in Ontario and is now the leading system in that province. [2] Ontario's population is about 13 million and the Torrens system now applies to the great majority of its inhabitants' real property.

So far from failing throughout North America, the Torrens system has had a strong presence in Canada since the 1880s, [3] and is now the dominant system of lands titles registration there. The mirror, curtain and insurance principles and familiar Australian case law such as *Gibbs v Messer* [4] are now being cited from the Pacific (British Columbia) to the Atlantic coast of Canada (Nova Scotia and ***New Brunswick***). [5]
[*4]

This article provides information about the extension of the Torrens system to Nova Scotia and ***New Brunswick*** and an analysis of the versions of the Torrens system that were adopted there at the turn of the twenty-first century.

In adapting itself to the needs of those two provinces newly annexed to its empire, the Torrens system faced a number of challenges and difficulties which have so far been successfully met. These challenges arose partly from the sheer age of settlement in the two provinces and partly from Canada's omnipresent problem of American influence. Title insurance companies in particular have attempted to perpetuate the American private system of title

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[1] (1994) 2 *APLJ* 225.

[2] For a sketch, see my *Law of the Land: The Advent of the Torrens System in Canada*, University of Toronto Press, 2008, pp 109-11.

[3] In fact the Torrens system first reached what is now Canada in 1861. I tell the story of the transmission of the Torrens system to Canada in *The Law of the Land*, ibid.

[4] [1891] AC 248.

[5] For example, in *Stolt Sea Farm v Silver Harvest* (2006) 298 NBR (2nd) 218 at 228f (Court in Nova Scotia citing Court in British Columbia citing *Gibbs*).

insurance instead of, or even alongside, the public registration and guarantee of title that is offered by the Torrens system. [6]

2 Background [*5]

a) General

While British settlement in Nova Scotia goes back to the early seventeenth century, the province's modern history may be dated from a series of foundational events in the mid-eighteenth: the founding of Halifax in 1749; the election of the first legislature (present-day Canada's oldest) in 1758; and the first wave of large-scale immigration in the early 1760s. [7] ***New Brunswick*** was formed by separation of the western portion of Nova Scotia in 1784 [8] in consequence of the arrival in a previously unsettled area of numbers of loyalist refugees from the United States of America and the desirability of governing them from a closer place than Halifax. For this purpose, ***New Brunswick***'s capital Fredericton -- present-day Canada's second-smallest provincial capital, with a current population of about 50,000 people -- was founded as the new province's seat of government.
[*6]

Nova Scotia has a population of just under a million, of whom more than 90% have English as a first language. ***New Brunswick***'s population is about three-quarters of a million, of whom about two-thirds speak English and one-third French; it is the only province in all Canada with a fully bilingual administration (including in relation to the Torrens system). In area both provinces are approximately of the same extent as Tasmania. [9] Both Nova Scotia and ***New Brunswick*** front the Atlantic Ocean and are thus situated on the eastern coast of Canada to the east and north-east of the American State of Maine. Economically both provinces are towards the bottom third of Canadian provinces in terms of GDP per capita, and in terms of their population and economic importance it would not be grossly misleading to compare either of them (taken separately) to South Australia's place within Australia. (Prince Edward Island might be said to be Canada's Tasmania.) Rather like South Australia, both Nova Scotia and ***New Brunswick*** have more recently and with some success attempted to exploit various natural advantages, the promise of a less stressful lifestyle and other advantages attributable to their size **[*7]** to begin to replace traditional wealth-generators that have become moribund. Both provinces nevertheless still receive equalisation payments, the federal grants towards poorer provinces designed to keep their services up to the national standard.

In both provinces a deeds-registration system of the old style was established from the very beginning. In Nova Scotia the legal basis for this was a resolution of the Governor-in-Council of 1752; [10] in ***New Brunswick*** the system originated with the provincial statute 26 Geo III c 3 (1786), the third statute passed in the province's history. Both established systems of registration of deeds rather than of title by registration: thus, a deed had to satisfy only formal criteria in order to be registered, and registration conferred upon it no more validity than it had before registration. Registration merely prevented it from being superseded by later registered deeds. It was thus perfectly

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[6] For an analysis of title insurance in Australian Torrens jurisdictions, see P O'Connor, 'Double Indemnity: Title Insurance and the Torrens System' (2003) 3 *QUTLJJ* 141; O'Connor, 'Title Insurance -- Is there a Catch?' (2003) 10 *APLJ*120. See also at <http://www.firsttitle.com.au/>.

[7] See, eg, S Patterson, '1744 -1763: Colonial Wars and Aboriginal Peoples' in P Buckner and J Reid (Eds), *The Atlantic Region to Confederation: A History*, University of Toronto Press, 1994, pp 127, 149, 151.

[8] The separation was effected by an Imperial Order in Council of 18 June 1784 re-printed as App III to the Revised States of ***New Brunswick***, 1973, and also at <http://webhome.idirect.com/cpwalsh/nb/acts/ukoic1784.htm>. Nevertheless no pre-separation statute of Nova Scotia applies in ***New Brunswick***: Interpretation Act, RSNB 1973, c 1-13 s 6 (the original version of which was the sole section of 31 Geo III c 2 (1791) (NB)). The date of reception of English law has been fixed surprisingly early: *Scott v Scott* (1970) 2 NBR (2nd) 849.

[9] Tasmania's area is around 65,000 km<2>; Nova Scotia's is around 55,000 km<2> and that of ***New Brunswick*** approximately 72,500 km<2>.

[10] Confirmed by and annexed to c 2 of the statutes of 1758. The current statute is the Registry Act, RSNS 1989, c 392.

possible for a completely or **[*8]** partially void deed to be registered. Any defects were not cured by registration, but rather concealed and perpetuated by it.

This is the registration-of-deeds system which Torrens himself knew and administered, and which his system was designed to replace. It caused in Nova Scotia and ***New Brunswick*** the same problems of expense and uncertainty of title as it caused elsewhere. Indeed, the depths to which matters might sink are strikingly illustrated by Nova Scotia's current Land Titles Clarification Act. [11] The operative provisions of this Act -- which does not apply at all to Torrens land (s 2A) -- begin:

> 3(1) Where the residents of an area of a municipality are in necessitous circumstances as a result of lack of property development in the area and where there appears to be confusion as to the ownership of land, the Governor in Council may designate the area as a land titles clarification area.

[*9]

The end result of this declaration of a state of land titles emergency may be the issue of a certificate of title to claimants vesting the land concerned in them indefeasibly, much as under the Torrens system (but without any provision for keeping the record of title updated as happens under the Torrens system).

Earlier attempts were made to introduce the Torrens system to the two provinces. [12] In Nova Scotia the Land Titles Act 1904 actually made it to the statute book but was never taken up by the public or the profession. It was not compulsory to register any land under it, and there was 'at the most' [13] one single piece of land registered under it -- there appears to be a dispute about whether zero or one parcels of land were registered under this statute, but either way it was certainly not a success. **[*10]** [14] In ***New Brunswick*** there was some initial interest in the Torrens system in the provincial legislature in 1886, as the Torrens system was being introduced into Canadian provinces further west, but this was not followed up and interest dissipated.

[*11]

There were a number of reasons for these failures. Both provinces shared the difficulty that they were much older areas of settlement than the north-western section of Ontario and the Canadian provinces further west into which the Torrens system was being introduced in the 1880s. The greater age of Nova Scotia and ***New Brunswick*** significantly reduced the number of new Crown grants of land that could be subjected to a requirement to register and thus provide the Torrens system with a growing base; it made determining the true state of title much harder in the many cases in which land had already been alienated from the Crown for some time and a complicated chain of title had developed; and the lack of certainty in that respect made it much harder also for the province to give a guarantee of titles that were registered. In addition, the statutes did not provide for compulsory registration of any property, not even land newly granted by the Crown. There was no incentive for the lawyers to use the system either, and in Nova Scotia at least they were actively opposed to it. In their most recent and successful endeavours to have the Torrens system adopted, the two provinces have designed, **[*12]** as we shall see, innovative and intelligent solutions to the difficulties mentioned.

b) The Land Registration and Information Service

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[11] RSNS 1989, c 250. There is an interesting note on the origin of this Act in A MacKay, 'Equality of Opportunity: Recent Developments in the Field of Human Rights in Nova Scotia' (1967) 17 *UTLJ* 176 at 185.

[12] On these, see *Law of the Land*, above n 2, pp 156-60; J Doig and B Patton, *The LRIS Story: A Legacy for the Maritimes*, Council of Maritime Premiers, Halifax 1994, p 5; R Stein, 'Implementation of Enacted Title-by-Registration Legislation in the Maritimes' (1987) 10(3) *Dalhousie LJ* 125.

[13] C W MacIntosh QC, *Proposal for Implementation: Phase III LRIS Program [me]*, typescript, 1975, p 11; the author adds p 43: 'it has not been possible to determine where this property is'.

[14] The statistic of one registration together with the information that the property was in Annapolis County are also found in Doig and Patton, above n 12, p 5 n 7. Two other sources, the only ones available to me when I wrote *The Law of the Land*, (see p 159), give no credence to these rumours and adopt a figure of no conversions.

An essential background step in the export of the Torrens system to the two provinces at the turn of the twenty-first century occurred in 1973 with the creation of the Land Registration and Information Service (LRIS) under the aegis of the Council of Maritime Premiers and with the support of an agreement between the Federal Government and the council. [15] The council (which includes also the government of Prince Edward Island in addition to those of our two new Torrens provinces) and its child LRIS are somewhat reminiscent of Whitlamesque initiatives of the same era in Australia, both because of the level of federal involvement and funding and because of the experiment in regional delivery of governmental services. The fate of the initiative is also somewhat familiar: the project died a gradual death after federal funding, which covered three-quarters of the costs of the project, was withdrawn in March 1979.
[*13]

The original plan for LRIS had foreseen four phases. The first two -- surveying and mapping -- were intended to fill the gap, not present in the later-settled areas of western Canada in which the Torrens system already applied, in the surveying and mapping of the land. In the west settlement had occurred only after comprehensive surveys, but that was not the case in the older areas of Maritime Canada. The third phase of LRIS was to be the introduction of the Torrens system and the fourth an integrated data base of land-related information.

An economic study by Professor H K Larsen of the University of ***New Brunswick*** in 1972 had strongly supported the change to Torrens and indicated that the Torrens system would result in enormous savings in the two provinces. Professor Larsen also uncovered a considerable degree of support for change and modernisation of lands titles within the legal community. [16] Further legal support, along with a consideration of the legal changes necessary for the introduction of a Torrens system, were provided in 1975 by C W MacIntosh QC, an experienced property lawyer of Halifax, whose report included a suggestion which was to become a crucial feature of the **[*14]** Maritime Torrens systems a quarter of a century later: the idea that solicitors should certify abstracts of title for land being brought under the system. [17] More broadly, support from the legal community, which both these reports evidenced, was obviously a most desirable prerequisite for success, as one of the rocks on which earlier attempts to introduce the Torrens system around the turn of the twentieth century had foundered was the opposition of the legal profession, which had not encouraged any take-up of voluntary Torrens systems. But federal funding for LRIS was peremptorily withdrawn in March 1979 after considerable progress had been made with the first two phases of the project but much less with the latter two, including the introduction of the Torrens system.
[*15]

Before LRIS petered out, however, some essential background events had occurred which were to pave the way for the introduction of the Torrens system in the coming two decades. LRIS not only produced useful maps and surveys; it also unearthed significant legal support for a Torrens system from the Nova Scotia Barristers' Society. (The Nova Scotia Barristers' Society embraces all lawyers within the province, including those in the formally undivided profession working as solicitors) [18] This was a major change from the society's attitude at the turn of the twentieth century when it had led the opposition to Torrens. At the end of the twentieth century, it was to lead the charge *for* Torrens. Nevertheless, there was still considerable scepticism into the 1980s about the need for the

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[15] The following information about LR1S is taken largely from Doig and Patton, above n 12. This publication is available in one library in Australia, that of the Queensland University of Technology.

[16] H K Larsen, *An Economic Analysis of the Atlantic Provinces' Control Survey, Mapping, Land Titles and Data Bank Program[me]*, abridged ed, Department of Surveying Engineering University of ***New Brunswick***, 1972. The author notes pp 73-5 that a few lawyers thought that Ton-ens would reduce their fees, but that there was a consensus that the then-current system was an anachronism and would have to be replaced soon. Similar information about cost savings and evidence of support from the legal profession may also be found in App B to Secretariat to the Council of Maritime Premiers, *Proposal Regarding a Comprehensive Surveying, Mapping, Land Titles Registration and Land Statistics Program[me] for the Maritime Provinces*, The Secretariat, Halifax, 1972.

[17] MacIntosh, above n 13, p 56.

[18] Legal Profession Act, SNS 2004, c 28, s 5 (1).

Torrens system within the Nova Scotian bureaucracy, [19] not least because the provincial civil service feared that it might lose its role as administrators of the local land registration system to a multi-province bureaucracy under the Council of Maritime Premiers. [20]
[*16]

At the end of the LRIS period, ***New Brunswick*** took the even more vital step of introducing new Torrens system legislation (its Land Titles Act of 1981). [21] This Act is still in force today and constituted the basis for a successful if limited trial of Torrens in the province in the mid-1980s, to which I now turn.

3 Torrens' conquest of the two maritimes

a) The trial in Albert County, ***New Brunswick***

Albert County of ***New Brunswick*** is in the south-eastern part of the province and has a population today of approximately 25,000, about two-thirds of whom live in the town of Riverview. Riverview, while fairly small, lies on the opposite side of the Petitcodiac River from the much larger city of Moncton, a transportation, industrial and business hub with a population of approximately 125,000 today. [22] The civil service of ***New*** **[*17]** ***Brunswick*** selected Albert County in the early 1980s as the ideal first testing-ground for the Torrens system in the Maritime provinces: while close to a large centre with all the facilities that that implies, its small population meant that the volume of transactions would be manageable. [23] The trial was co-funded by the other two Maritime provinces given their interest in it [24] and began on 1 July 1984. [25]

The trial was a success. [26] By its end in 2001, the titles of approximately half of the 15 to 16 thousand land parcels in the county had been converted. The trial had revealed that the Torrens system could work in the Maritime environment and **[*18]** had incidentally also kept the Torrens system on the map in the region.

A major issue for the Torrens system in the Maritimes, owing to the age of the provinces, was the system devised for the conversion of properties to the Torrens system with its state-guaranteed title. Little progress was made on coping with this in Albert County, at least compared to the innovative and intelligent solution eventually devised; in particular, no attempt was made to put the process of conversion principally into the hands of the legal profession, as would occur when the whole province came to be converted. It was done in Albert County by civil servants in the provincial lands titles office.

While the provincial lands titles office found the process of conversion cumbersome, once conversion had taken place the system worked very smoothly. As a result of the trial, it was clear that effort and thought were **[*19]**

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[19] Doig and Patton, above n 12, pp 91ff reports that the then Deputy Attorney-General for Nova Scotia (ie, the non-parliamentary civil servant at the head of the Department of Justice) was of the view that technology could rescue the deeds-registration system; see also p 20.

[20] MacIntosh, above n 13, p 77, recommended a supra-provincial agency to be called the Maritime Land Titles Board responsible to the Council of Maritime Premiers.

[21] SNB 1981, c L-1.1. Nova Scotia enacted similar legislation in 1978 (Land Titles Act, c 6), but unlike that of ***New Brunswick*** it never came into force and was not used as the basis of any trials.

[22] The city is also remarkable as the seat of the Universite de Moncton at which the common law is taught in the modem form of its original language, French.

[23] Interview with ***New Brunswick*** sources.

[24] Doig and Patton, above n 12, pp 71, 91.

[25] General Regulation -- Land Titles Act (Reg no 83-130, as amended by no 83-213), reg 3(2.1), as in force at the end of 1983.

[26] Doig and Patton, above n 12, pp 70f. The remaining information in this section was supplied to me by the ***New Brunswick*** sources.

needed in the area of facilitating conversion, but that once this hurdle had been surmounted substantial improvements and savings could be expected from the Torrens system both for the provincial government and for the users of the land registration system.

Over the seventeen-and-a-half years of the trial, vast advances had occurred in technology, which rendered the processing of transactions in Albert County far too labour-intensive by standards applicable at the conclusion of the trial. A further challenge for the Torrens system if it was to be adopted throughout the two provinces, was adapting it to modern technology.

b) Re-awakening of interest in Nova Scotia [27]

Meanwhile in Nova Scotia, as this trial was being watched with interest, work had begun on the statute which was to be enacted in 1995 as the Marketable Titles Act. [28] This statute's aim was to have the old chain-of-title system working more smoothly **[*20]** by providing a cut-off point of 40 years before which the retrospective searches of the chain of title, such as are required under the old system of conveyancing, could be omitted without risk in most cases. The driving force behind this was the Nova Scotia Barristers' Society, or more precisely its property law liaison committee, which had been formed earlier owing to an incident in which the deeds registry had been transferred out of the purview of the Department of Justice into that of the Department of Housing and Municipal Affairs and therefore, the society thought, into inexperienced and possibly unqualified hands.

Once the Marketable Titles Act had been successfully seen on to the statute book, the property law liaison committee decided not to disband, but rather to continue its work and push for the introduction of the Torrens system into the province. This was due to a variety of factors: one was certainly the fact that the greatest source of claims against the insurance company owned by **[*21]** the Barristers' Society was property law. I have pointed out elsewhere [29] that most people promote law reform because it is an area in which they have some sort of interest rather than no interest at all, and this is not something to be ashamed of. But aside from that there was also a realisation that the existing deeds-registry system had long since ceased to serve the needs of the province as well as they could be served. Indeed, the volume of records alone was becoming so large that the most basic task of storing and gaining convenient access to them had become a major impediment, as about two to three new books of records per week were being added to the registry. The system, never ideal, was breaking down under its own weight and becoming simply unworkable. Furthermore, the records had become so unreliable that some purchasers were being advised not to search them at all, but rather just to buy private title insurance. All this was hampering trade and development in Nova Scotia.
[*22]

Finally, it was perceived that a 'now or never' moment had arrived when the decision had to be taken either to bite the bullet and convert to Torrens or to go down the American path of expanded and perhaps private deeds registries coupled with private title insurance. Partly this pass had been reached because the old system was at breaking point; partly this was so because new electronic solutions to old problems would shortly be dominant owing to their far greater efficiency and it was realised that it was necessary to choose which system of lands titles registration would take advantage of the substantial investment of time, effort and money in the introduction of electronic registration and conveyancing.

By this time (the mid-1990s) also, the doubts within the provincial civil service about the viability of the Torrens system had been removed and new officers with a passion for reform in general and the Torrens system in particular had arrived. These included Nancy Vanstone, then of the Department of Housing and Municipal Affairs and now Deputy Minister [30] of the Environment, and Christine McCulloch QC, a director of legal services in the

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[27] Unless otherwise noted, the information in this section was provided by the Nova Scotian sources.

[28] SNS 1995-96 c 9.

[29] *Law of the Land*, above n 2, pp 24, 88ff.

[30] See above n 19.

Department of Justice and now the provincial **[*23]** Chief Electoral Officer, of both of whom my sources spoke very highly. Assistance and advice were also forthcoming from Ontario, which was converting large parts of its jurisdiction to the Torrens system it had been running alongside the deeds-registration system since 1885, and from ***New Brunswick*** and the older Canadian Torrens system jurisdictions to the west of Ontario.

What were described to me as 'visioning meetings' occurred in Nova Scotia in 1997 and 1998. These involved the civil servants, the Banisters' Society, bankers, title searchers, local government, estate agents and various other interest groups, [31] and had two consequences. First, the Barristers' Society recruited volunteers who selflessly gave up a day of their time per week over eight weeks in order to determine how precisely the Torrens system could be operated in the province and what efficiencies might be produced by the Torrens system as it would operate in the province. The case produced by this informal group of volunteers **[*24]** was crucial in convincing the provincial government that the system would be an improvement.

Secondly, a discussion paper was produced by Garth Gordon QC [32] and circulated to a number of interested parties such as banks and lawyers. As a result of this, it was again found that the conviction that change was desirable was widely shared. Thereupon a Legislative Review Committee was formed in May 1999 with representatives from the civil service, the Nova Scotia Banisters' Society and one surveyor. This was co-chaired by a barrister and Nancy Vanstone from the civil service and set itself the task, which it completed by January of the following year, of drafting (on the basis of earlier model all-Maritime draft legislation) a bill for the introduction of ***the Torrens system in Nova Scotia***. [33]
[*25]

c) ***New Brunswick***'s conversion

New Brunswick had also continued to forge ahead in the late 1990s and had in particular conceived two innovations of vital importance to the future success of the project in both provinces: first, it found a solution to the legal problem of carrying out the process of conversion of title efficiently but also reliably in the Maritime provinces in which the considerable age of many titles made this a particularly difficult question; and secondly, it designed a computer system which was suitable for maritime needs. It had thus solved the two principal challenges which the trial in Albert County had revealed.

The details of the computer system lie somewhat outside the area of my expertise, but I can say that the system ultimately adopted for Maritime Torrens was developed by CARIS, a company with its headquarters in Fredericton, ***New Brunswick***, and named LIN (the land information network). After a survey of the available alternatives Nova Scotia decided to adopt CARIS-LIN as its network also, which had the advantage of allowing them to learn from the New Brunswickers' experience. This did not however prevent them from making one or two mistakes of their **[*26]** own: one that was mentioned to me was not ensuring a sufficient degree of liaison between the drafters of the legislation and the designers of the computer system. However, the Registrar-General for Nova Scotia now reports (even if it was at a conference sponsored by CARIS) that CARIS-LIN 'has proven to be adaptable and flexible in meeting Nova Scotia's requirements and the CARIS team has successfully delivered quality products on time and within budget'. [34]

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[31] A full list appears in Registry 2000 Legislative Review Committee, *Discussion Paper on a Land Registration Act for Nova Scotia*, Department of Housing & Municipal Affairs, Halifax, 2000, p 1.

[32] This is unpublished. A copy was supplied to me, however, by the Nova Scotia Barristers' Society. It has the title *Review of Land Titles Legislation for the Nova Scotia Department of Housing and Municipal Affairs* and was issued in January 1999 (Registry 2000 Legislative Review Committee, *Discussion Paper*, p 2).

[33] Registry 2000 Legislative Review Committee, *Discussion Paper* contains the bill (in the appendix) and (pp 2ff) a list of the Legislative Review Committee's membership.

[34] M Coffin and C Pierre, *Land Registration: The Nova Scotia Experience*, paper delivered at the CARIS conference, 2005, p 15.

The solution for the legal problem of converting a province as old as ***New Brunswick*** to Torrens [35] was an extraordinarily well-designed and intelligent response to a difficult problem which had multiple merits: it avoided the mistakes of the past, prevented the imposition of an impossible burden on the provincial civil service and included as many affected interest groups as possible in the system, giving them a stake in its success. **[*27]** At the heart of the failure of earlier attempts at introducing the Torrens system into the Maritimes had been the lack of any requirement to convert any property compulsorily along with opposition from the legal profession. In this new attempt, therefore, conversion became compulsory in many cases -- and principally the responsibility of the legal profession, which conducts the process of investigating the state of the title one final time under the old system in order to certify that it is fit to come under the Torrens system. Coupled with this is a provision for a period of 10 years during which the lawyers conducting conversions remain liable for any negligence caused by errors in converting titles, rather than the province. However, in order to ensure that registrants are not disadvantaged, claims for compensation arising from error, if found valid, are paid immediately from provincial funds; the province then attempts to obtain restitution from the lawyer or the lawyer's insurer.
[*28]

This solution deviated markedly from Torrens's original model of 1858 in two respects: first, under the Act of 1858 the process of conversion was not in private hands, but was overseen by a government board known as the Lands Titles Commissioners. [36] The belief that lawyers were deliberately sabotaging simple systems of lands titles was widespread in mid-nineteenth century Australia, making it impossible to propose a system driven by lawyers then and there. [37] The legal profession had also sabotaged or at least not cooperated with the Torrens system in attempts around 1900 in the Maritime provinces. But events have shown that the Maritime provinces were justified in concluding that their legal professions had become less obscurantist by the start of the twenty-first century, and the conversion of the provinces has worked well precisely because it is in the hands of the legal profession.
[*29]

Secondly, liability to compensate those who lost their land by the operation of the system was imposed by South Australia's Torrens system of 1858 directly upon the Assurance Fund held by the Province of South Australia, as it then called itself, and was to be resorted to only if an action against anyone primarily responsible for the loss failed. [38] In the Maritimes the province takes the loss immediately and seeks reimbursement where it may be found -- a far preferable system from the point of view of the landowner. Further, there is no Assurance Fund set up by the statute in either province, although I was told that in ***New Brunswick*** at least $ C5 from each transaction is allocated to an informal non-statutory claims fund. The reason why no statutory Assurance Fund was set up in the two provinces is that experience has shown, both in Canada and Australia, that Assurance Funds accumulate far more money than is needed to pay such claims as are made.

By pointing out that the Maritime **[*30]** provinces of Canada have adopted different solutions on these points from those of the original Torrens system, I therefore do not mean for a moment to denigrate their choice. They were in a different position and, for the reasons given, each of their solutions was in their circumstances superior to a mindless copying of the original model. Indeed, there are good and rather obvious reasons to think that the idea of making the Assurance Fund liable to pay where loss occurs, and leaving the government rather than a private individual to seek to recover the loss from the person who actually caused it, is not merely suitable for the Maritime

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[35] That the solution about to be explained was conceived first in ***New Brunswick*** is established by the mention of it in Gordon QC, *Review of Land Titles Legislation*, p 39.

[36] Real Property Act [1858] ss 14 et seqq.

[37] This comes across particularly clearly in Victoria: see G Taylor, 'The Torrens System's Migration to Victoria' (2007) 33 *Mon LR* 323 at 363-5.

[38] Real Property Act [1858] ss 35, 96.

provinces of Canada but would be a superior solution across the board to that adopted in 1858 and still found in some jurisdictions in Canada and Australia today. [39]

[*31]

The statutory backing for compulsory conversion in ***New Brunswick*** is now found in s 11(2)(b) of its Land Titles Act, under which an application for registration must be accompanied by a lawyer's certificate, [40] and s 14 of the Act, which permits the Registrar-General to bring land under the Torrens system, if he or she 'is satisfied that any parcel of land should be brought under the operation of this Act'. This provision is used to require conversion when there is a transfer for value or mortgage. As far as the client is concerned, the cost for conversion is as a rule a relatively minor addition to the cost that would be incurred anyway under the old system when any transfer was to be completed or mortgage registered and the chain of title had to be checked. Section 11 alone can be used by voluntary converters.

[*32]

In ***New Brunswick***, the liability of the lawyer participants is contractual: [41] there is an agreement between Service ***New Brunswick***, the provincial Crown corporation responsible for the lands titles system, and the Law Society of ***New Brunswick***, and separate agreements in standard form between Service ***New Brunswick*** and each participating lawyer directly. [42] This agreement provides for liability in cases of negligence (both in converting a title to the Torrens system and in the registration of any further transactions) for 10 years and to a maximum of $ C5 million in any one case; in all cases the statute provides for the wronged person to be compensated immediately by the province, so this provision affects only the province's capacity to claim reimbursement from the lawyer or the lawyer's insurer of the money paid to the wronged person. Needless to say, legal professional indemnity insurance is available to the lawyers in question, but of course repeated or serious acts of negligence may have consequences for the lawyers as would, obviously, deliberate fraud. In the case of fraud, the 10-year limitation does not apply. If there is no fraud, however, it is clearly of benefit to lawyers **[*33]** to have a final date on their liability: under the old system, liability for any negligence that did occur existed until the expiry of the limitations period. This is another illustration of the way in which the system has been designed so that all participants are advantaged by their involvement with it.

I am informed [43] that in ***New Brunswick*** eight claims have been paid to date, none of which had a value of over $ C20,000; as **[*34]** far as can be determined at the moment, therefore, this solution has worked very well. The Maritime registration authorities have been careful, but perhaps also fortunate: a recent minor rash of frauds in Ontario and provinces further west [44] has not occurred in the Maritimes.

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[39] P O'Connor (2003) 3 *QUTLJJ* 141, II B 6; N Siebrasse, *Report on Land Title Conveyancing Practices and Fraud*, unpublished, Fredericton, 2003, p 98 and N Siebrasse, *Title Insurance and the Canadian Land Conveyancing System*, unpublished, Fredericton, 2004, point out that under 1858 solution (also the law of Ontario, Manitoba and Alberta, but not of the two Maritime provinces or Saskatchewan nor the practice of British Columbia) recovery may be so difficult as a matter of practice that private title insurance could be a sensible option for the registered owner.

[40] Rather confusingly for an Australian, this is known as a 'certificate of title' and its content is as prescribed in reg 7 and form 3 of the General Regulation -- Land Titles Act. I do not reproduce the text here as it is available at <http://www.canlii.org/nb/laws/regu/1983r.130/index.html>.

[41] The contracts are authorised by s 76.01 of the Land Titles Act, and ss 75 and 76 require the person indemnified to assign rights to the Registrar-General and the Registrar-General to pursue fraudulent or negligent persons.

[42] I have on file a copy of the former agreement and a sample of the standard form for the latter agreement in a booklet published by Servide ***New Brunswick*** in January 2008 and entitled *Land Titles -- Electronic Submission of Documents: User Information*. For a case arising under the agreement, see *Al Enterprises v Joyce Avenue Apartments* (2002) 246 NBR (2nd) 92.

[43] By my ***New Brunswick*** sources.

[44] And it seems also in England: Matthews, 'Registered Land, Fraud and Human Rights' (2008) 124 *LQR* 351 at 351. 1 mention the recent Ontario frauds and provide further references in *Law of the Land*, above n 2, pp 11f.

It should also be noted that, under reg 13(2) of the General Regulation -- Land Titles Act, [45] the guarantee of title does not extend to a property's boundaries, further minimising the potential for claims. [46] This was a necessary provision in a province in which (despite all the good work of LRIS) there are still large tracts of unsurveyed land and in which the available surveying personnel would certainly not support a mass project of surveying.
[*35]

d) Conversion in Nova Scotia

While the same principles apply in Nova Scotia as in ***New Brunswick*** -- applications for conversions of land to the Torrens system are compulsory in defined circumstances and are primarily managed by solicitors rather than the provincial government -- and those principles were adopted for essentially the same reasons in both provinces, there are some important differences of law and practice between the two provinces. First, solicitors' liability for negligence in the conversion process in Nova Scotia is (under ss 18(4) and 37(11) of the Land Registration Act) statutory rather than contractual. Liability that is unlimited (as to time) for fraudulent acts is to be found in s 89(1) of the Act, which imposes liability on a person whose 'wrongful' act has contributed to loss; this word must be understood so as not to include the more specific provisions for negligence found in s 37(11).

Another matter which in ***New Brunswick*** is the subject of administrative provision is statutory in Nova Scotia: ss 23 and 37(2) and (3) of the latter's Act set out the circumstances in which conversion must occur. These are upon transfer for value, mortgage or the registration **[*36]** of a plan of subdivision. There are certain exceptions, also in the statute: for example, transfers between married persons, and subdivisions into two lots only or for gifts within a family (s 46(1)(b), (3)(a)). As in ***New Brunswick*** the decision to confide the process of conversion to the legal profession expresses itself in a requirement that applications for conversion must be accompanied by a lawyer's certificate about the state of the title and the sources from which it has been deduced. [47] This requirement, as well as ensuring lawyers' involvement in and support for the process, has saved the province an estimated [48] $ 40 million at least over the cost of having conversions done by the provincial civil service.

Voluntary conversion is also permissible. As well as being a good option for **[*37]** anyone who needs a title perfected it may be chosen, as the Registrar-General for the province has pointed out, by some landholders because the availability of adverse possession against registered parcels is restricted. [49]

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[45] NB Reg 83-130.

[46] Initial case law in ***New Brunswick*** also indicates a restrictive approach to rectification of the register in claims not against the government, but between owners resulting from a disputed boundary between them: *McKinney v Tobias* (2006) 306 NBR (2nd) 282. This case and the state of the law have been subjected to criticism, with which I generally agree: Siebrasse, case note (2008) 24(2) *Sol Jo (NB)* 32; N Siebrasse, 'Boundary Law under the ***New Brunswick*** Land Titles Act: The Worst of All Possible Worlds' (2005) 21(3) *Sol Jo (NB)* 7.

The position in Nova Scotia appears to be different, and may be better: not only does *McKinney* not apply there, but the effect of ss 74 and 75 of its Act are that a claim by adverse possession against land that matured before its conversion to the Torrens system must be pursued within 10 years of the conversion or lost. After conversion it is not possible to acquire an interest by adverse possession unless it amounts to 20% or less of the area of the other title, or between tenants-in-common. Tenants-in-common are thus treated so as to permit the interests of a tenant-in-common who may not be able to be located and may be dead to be easily eliminated (Nova Scotia sources).

[47] Section 37(4)(b). This is to be found in reg 10(2) and form 6 of the Land Registration Administration Regulations, and is at <http://www.gov.ns.ca/just/regulations/regs/LRAforms/Form_6.pdf>.

[48] By a Nova Scotian informant.

[49] Coffin and Pierre, above n 34, p 11. On adverse possession under Nova Scotia's Act, see above n 46.

As in ***New Brunswick***, the right to compensation against the province in case an interest is lost by reason of the operation of the Torrens system [50] does not depend on the plaintiff's first suing, or attempting to sue, any other person; rather, the province pays the compensation and then attempts to recover from any person at fault. I am told that one claim of less than $ 4000 has been paid out, and the few others that have arisen were resolved in other ways. There is also no provincial guarantee of boundaries, [51] for the same reason as in ***New Brunswick***. Section 37(7) of the Act requires however that a parcel should be capable of being located 'with reasonable accuracy' in relation to its neighbours, **[*38]** so there is a basic minimum standard that must be met.

It is estimated [52] that approximately 700 solicitors have been certified as entitled to carry on business under ***the Torrens system in Nova Scotia***, [53] of whom about 550 regularly use the system. The effect of the introduction of the system and the consequent need for re-training has been that overall fewer lawyers are doing more work each, and legal charges have also increased somewhat per transaction. This latter development was expected by the Nova Scotia Barristers' Society and results in part from the additional work required to certify a document under the Torrens system: unlike the registration-of-deeds system, the Torrens system does not accept documents merely for whatever they may be worth, but requires them to be rigorously checked as registration may enhance the legal effect of the document. The Banisters' Society thought in addition that lawyers had somewhat undervalued their services as conveyancers **[*39]** under the old system in order to create cash flow and a customer base, and that that should not be permitted to continue. Despite the rise, there have been fewer than 10 complaints from the public about the level of the fees to the Banisters' Society, only one question in the House on the topic (about whether there was any assistance for poorer people to pay the fees -- the answer was no) [54] and no serious difficulties for the government, the bureaucracy or the Banisters' Society.
[*40]

A certain level of discontent with government charges is part of the inescapable background noise accompanying the operation of governmental machinery, and as long as that background noise remains at a minimal level it may safely be assumed that problems are not significant. Nevertheless, concern was expressed to me by a non-legal source in Nova Scotia that the recent restriction of access to electronic conveyancing services to the legal profession (which I shall shortly outline) might cause further rises in costs owing to the professional quasi-monopoly thus introduced. All that can be said about this is that the restriction was introduced for other reasons (primarily the prevention of fraud) which many people will consider to justify such a restriction in the abstract, and that the legal profession alongside other professions already enjoys monopolies, such as that on the practice of the law, [55] in the public interest. Nevertheless, it will be necessary to ensure that the market for conveyancing services works as markets are supposed to work and that competition ensures that this professional monopoly, like others, is not abused.
[*41]

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[50] Sections 85-89.

[51] Sections 16, 21(1), 86(1)(e).

[52] By my Nova Scotian sources. The rest of the information in this paragraph comes from the same source.

[53] The statutory support for a system under which only some solicitors have rights under the Torrens system is found in s 3(1)(q) of the Land Registration Act, which defines 'qualified lawyer' as 'a member of the Nova Scotia Barristers' Society entitled to practise law, but does not include a member who is subject to any limitation or restriction on practice imposed pursuant to the Barristers and Solicitors Act that precludes the member from certifying title to land'. Support is also found in reg 6 of the Land Registration General Regulations, which permits a solicitor who has satisfied educational requirements, has liability insurance and has entered into an agreement with the province to exercise a registrar's powers to create a register for a parcel of land and to register a parcel.

[54] *Hansard*, 18 May 2005, pp 7862ff. The questioner also stated that fees of $ 1000 had been charged, and the Minister's response was that this was a question for the market and that most lawyers would not charge that much.

[55] Legal Profession Act, SNS 2004, c 28, s 16(2).

As the system began its operations, the Registrar-General for Nova Scotia found that up to 40% of applications for conversion were being rejected as lawyers in particular were not used to providing descriptions with the accuracy demanded by the Torrens system. [56] Although I do not have an estimate from the initial phase in ***New Brunswick***, the experience there too has been that a lot of lawyers have found the adjustment difficult. Many lawyers appear to believe that after graduation from law school and their first few years of practice they will never have to put in much further intellectual effort to understand the law, and they resent innovations by the legislature that disappoint that expectation. Moreover, some lawyers in both provinces have succumbed to the temptation to add sweeping but content-free reservations on the title to give the appearance of covering all possible problems, such as 'subject to whatever other interests may exist' -- perhaps this is not surprising, given lawyers' liability in negligence. While such a reservation may work in the deeds registry, it will not pass muster, however, when a title is converted to the Torrens system. But both provinces report a **[*42]** sharp reduction in the rejection rate for documents now that the system is a few years old and lawyers are used to it. This is aided by computer systems which can be designed so that transactions will not be accepted if many sorts of errors are made.

A distinction which is drawn only in the Nova Scotian legislation is that between registered and recorded interests. Under s 17(1), only the fee simple, a life interest and its associated remainders and a Crown interest may be registered; all other interests can be 'recorded' only. Recording gives such interests priority, [57] and indeed the definition section states that 'record' means 'to secure priority of enforcement for an interest by means of entries in a register pursuant to this Act'. [58] The initial intention was that the provincial guarantee should not extend to interests that were only recorded, and in particular to mortgages; in other words, the deeds-registration system would essentially continue with respect to these **[*43]** instruments, except that the register provided certainty about the identity of the true owner who executed the 'deed' of mortgage, lease, etc.

The principles of the Torrens system would suggest that everything that is on the register should be guaranteed and that there should be no need to go behind the register to investigate the validity of what is on it. But it is equally clear that the Torrens system's principles were not handed down by a divine source and each jurisdiction is entitled to adapt them to its needs as it sees them. This is especially so in a jurisdiction that faces a major task of conversion after centuries of the deeds-registration system.

The statute did state until recently in s 85(1), however, that compensation was payable if a person sustained loss for 'a recording or a cancellation of a recording that are not authorised by this Act'. One might imagine under this heading compensation in a case when someone suffered loss because a mortgage was wrongly **[*44]** recorded against his or her property, but what if a bank suffered loss because a recorded mortgage was fraudulently entered into by a person impersonating the property's owner? Would this count as 'not authorised by th[e] Act'? It is very hard to say.

Recent amendments have however removed the words just quoted from s 85(1), which now says that compensation is payable for any omission or error in the parcel register. This would appear to include recorded interests. However, the rider has been added that compensation is not payable if 'a recorded interest in the parcel register has lost validity or changed effect due to matters of fact or law subsequent to the recording of the interest' (s 86(1)(d)). In terms of clarity, this is a slight improvement only. At first sight it seems to suggest that there is a guarantee of a recorded interest that was invalid *ab initio*, such as a forged mortgage, [59] but might such a mortgage not be said to have 'lost validity' if the recording of it is cancelled and its status reverts to the nullity it was before registration? It may safely be predicted that the courts will have their work cut out if this provision ever comes before them. There was **[*45]** disagreement among my Nova Scotian sources about whether there is now a

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[56] Coffin and Pierre, above n 34, p 14.

[57] Section 49; see also s 4.

[58] Section 3(1)(r).

[59] However, in such cases banks regularly find themselves unable to recover some or all of their loss because -- in the words of s 86(2)(a) -- they 'caused [. . .], in whole or in part, the error' by not adequately checking the credentials of the fraudster.

provincial guarantee of merely 'recorded' interests, and it is certainly odd that the opportunity was not taken to introduce a clear rule.

4 Challenges and opportunities

a) Speed of conversion [60]

[*46]

In both provinces my sources expressed concern to me that the speed of conversion to Torrens was not fast enough. ***New Brunswick*** sources added that, as in Nova Scotia, the lodgment of a plan of subdivision should be made a trigger for conversion alongside sale and mortgage. In ***New Brunswick***, this could be done by administrative decree without the need for any legislative amendments.

The estimate provided to me from each province was strikingly similar: about a third or 200,000 of the 520,000 parcels in each of Nova Scotia and ***New Brunswick*** were, I was told, already under the Torrens system. My ***New Brunswick*** sources added that approximately 90% of all land transactions related to properties already under the system, and the figure for Nova Scotia is probably similar. This means, of course, that after the initial burst each Torrens system is now acquiring new properties relatively slowly. This was to be expected given that there will always be a core of properties with very stable ownership, such as houses in the possession of a well-established and happily married couple, in relation to which there is little immediate likelihood of a sale or new mortgage.

There seems no way of overcoming **[*47]** this natural slowdown other than a mass programme of provincially mandated conversions to the Torrens system without any trigger such as sale. This was the procedure adopted in Ontario when it was decided there to make the Torrens system the prevalent means of lands titles registration -- which it had not become after the introduction of a Torrens statute in that province in 1885 until the early twenty-first century when there was substantial progress with the mass conversion programme. However, a substantial investment of resources is required under such a programme (figures in the order of $ 1 billion were mentioned to me as having been made available by Ontario) and given the other spending priorities and the resources available to the smaller provinces of Nova Scotia and ***New Brunswick*** this is not a realistic proposition for them.

While I am told that thought is being given in at least one province to means by which the process of conversion can be speeded up, it may be that original hopes were far too optimistic. I mentioned to my sources in both provinces that South Australia, in which the Torrens system has now been operating for over 150 years, still has a small amount of general-law **[*48]** land, a Registration of Deeds Act 1935 and a General Registry Office to administer it. Hopes of speedily converting a whole province without a very large investment of resources are illusory. In Manitoba, too -- one of Canada's most thoroughly converted provinces, which has had a Torrens system since 1885 [61] -- I was recently shown, on a tour through the Lands Titles Office kindly provided by the Deputy Registrar-General, the portion of his office dedicated to the registration of deeds for land still under the old system.

b) Title insurance

Private title insurance is virtually unknown in Australia. In brief, it is a product which arose in the deeds-registration systems of the United States of America and involves insurance taken out by an owner or mortgagee **[*49]** against possible defects of title arising from the uncertainties of such systems. It can and usually does also include

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[60] In Nova Scotia at least, the process of converting a property to Torrens was often described to me during my visit using the word 'migration'. The term is found in an official notice of a public auction published in the *Chronicle-Herald* (Halifax), 8 August 2008, p C3, in which a notice signed by the High Sheriff in and for the Halifax Regional Municipality states: 'The subject property has been migrated to the Land Registry System . . .'. Another similar notice on the same page signed by the Sheriff in and for Colchester County merely states however that: 'This property is registered pursuant to the Land Registration Act.'

[61] Real Property Act 1885, Statutes of Manitoba 1885, c 28. See *Law of the Land*, above n 2, pp 148-52, where I demonstrate that for all but a few years of its operation the Manitoba Torrens system has been compulsory for newly granted land in that province.

insurance against other property-related risks unrelated to the state of the title such as, for example, the risk that a building will be found to have been erected in violation of a planning requirement. In the United States, some private title insurers have even developed their own registries of title as an adjunct to their businesses, either in competition with or as a substitute for a neglected public register. [62]

The place of private title insurance in Canada is controversial, particularly in relation to the Torrens jurisdictions. In an ideal world, private title insurance would not be required over Torrens land to the extent that it covers title-related risks strictly so called, because the Torrens system includes a state-backed guarantee of title. Nor should there be a competition between a public and a private registry which might dissipate resources **[*50]** and weaken both.

But the world in general and the Torrens system in particular are not ideal; neither, for that matter, is private title insurance. In Nova Scotia and ***New Brunswick***, though, it is of particular relevance that there is no provincial guarantee of boundaries, so insurance might sensibly be purchased against risks related to the physical location of a property. The same applies to other risks against which the Torrens system does not provide coverage. There seems to be much less room for private title insurance against risks surrounding ownership, in relation to which both provinces provide a well-structured system of guarantee which appears to be working so far without noticeable problems or inconvenience to those very few people who have been compelled to rely upon it. [63] It must also be said that in this respect private title insurance appears to be yet another example of possibly unnecessary American influence in Canada. It is not that there is anything wrong per se with American influence, but wholesale copying of an institution from one jurisdiction to another when the circumstances are materially different -- owing to the existence of the Torrens system in one **[*51]** but not the other -- is not something that can be welcomed.

Title insurance companies do not however see things in quite the same light, and their product has also proved attractive to some of the larger banks, which, as mortgagees, can compel borrowers to take out private title insurance as a condition of receiving their loan even if looked at rationally this constitutes a 'belt and braces' approach given the guarantee of ownership offered by the Torrens registry. Oddly enough, the late twentieth century was the time chosen by American private title insurance companies to extend their marketing to what were about to become our two new Torrens jurisdictions of Nova Scotia and ***New Brunswick***. This included marketing to banks and also the setting up of conveyancing services in conjunction with the insurance business (and in competition with solicitors). The question for those provinces' governments and law societies is what if anything they are going to do about this development, which **[*52]** might well be seen as inconsistent with the provincially preferred Torrens title system and its state-run registry and title guarantee. As it turns out, each province has taken a different attitude.

In Nova Scotia the Barristers' Society has taken the view that it has no role in steering the market beyond the offering of its members' own services in the most attractive manner they can manage. Therefore it has taken no steps to attempt to control the offering of private title insurance, and it trusts that the Torrens system will prove attractive enough to render it redundant in relation to the risks which are covered by both schemes. My sources told me that private title insurance is now hardly to be found in Nova Scotia except when mortgages are re-financed.

In ***New Brunswick*** my sources were of the view that private title insurance was more prevalent owing to the power of some (but not all) banks which are said to require it in many cases in order to expedite the granting of the loan, or even as a condition of granting it at all. Peter Adams QC's estimate was that about 10% to 15% of the properties he deals with in his practice are subject to private title insurance. The Law Society **[*53]** of the province has also taken a different attitude from its sister organisation in Nova Scotia, at least according to the judgment in *FCT Insurance v Law Society (**New Brunswick**)*, [64] which I am told is to be appealed against.

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[62] See further the sources cited above n 6.

[63] See in particular above n 39.

[64] (2007) 324 NBR (2nd) 315. In addition to what is stated in the case, it should be noted also that in a question during debate in the Legislature of the province on 20 June 2006 (*Hansard*, p 63), the then Minister stated that the legislative intent was not to exclude title insurance companies from access to the electronic lands titles system.

To that extent therefore the findings of fact must be taken as still open to question. Nevertheless, Riordon J of the Court of Queen's Bench for ***New Brunswick*** held invalid revised standards [65] adopted by the Law Society which required the affidavit of an applicant for conversion of a parcel of land to the Torrens system to be sworn before a notary public. [66] Riordon J found that this rule had been adopted not for the perhaps more obvious purpose **[*54]** of ensuring that identities were properly checked, duress avoided and so on, [67] but rather for the principal purpose of limiting competition from the plaintiff title insurance company and its conveyancing arm. If this conclusion withstands any appeal, it appears therefore that the Law Society of ***New Brunswick*** has taken a somewhat different line from its sister organisation in Nova Scotia and has attempted to steer the market away from its members' competitors, without success so far.

c) Nova Scotia's s 4

An interesting experiment is constituted **[*55]** by Nova Scotia's provision on fraud, which runs as follows:

4 Interpretation

(1) In this Act, the meaning of 'fraud' is subject to this section.

(2) For the purpose of this Act, the equitable doctrines of 'notice' and 'constructive notice' are abolished for the purpose of determining whether conduct is fraudulent.

(3) A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded --

(a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;

(b) may assume without inquiry that the transaction will not prejudice that interest; and

(c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.

(4) A person obtains an interest through fraud if that person, at the time of the transaction,

(a) had actual knowledge of an interest that was not registered or recorded;

(b) had actual **[*56]** knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and

(c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

(5) A person does not obtain an interest through fraud if the interest that was not registered or recorded was not enforceable against the person who transferred the interest.

In other words, under this very carefully thought-out and precisely drafted rule mere knowledge of the existence of another interest can amount to fraud against the holder of a prior interest [68] if the registrant knew or should have

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[65] These are of importance because, as we saw earlier, a lawyer may be liable for negligence in the conversion of a property, and non-compliance with the standards is evidence of negligence.

[66] The Notaries Public Act, RSNB 1973, c N-9 s 1(2) makes all lawyers in the province notaries public, with exceptions for those disbarred etc. Apparently no non-lawyers have been appointed as notaries public although the statute allows for that.

[67] Cf Matthews, above n 44, at 354.

[68] Fraud has the statutory consequence that a recorded interest is, exceptionally, not enforceable with priority over prior interests: s 49(1)(b). The statute does not provide in terms for interests obtained fraudulently to be wholly void: in the usual case, although not always, they will be deprived of effect either because the prior interest was registered or recorded or by operation of equitable and common-law rules giving preference to earlier interests. However, it is possible to imagine a case in which it is argued that an instrument is fraudulent under the statute but should receive priority in equity or at law.

known that the proposed registration would prejudice the interest. This is a departure from the usual Torrens rule, [69] expressed in the following terms in ***New Brunswick***'s legislation:
[*57]

61 Title register knowledge

(1) Notwithstanding any rule of law or equity to the contrary, a person contracting or dealing with or taking or proposing to take a transfer of or interest in registered land from the owner thereof is not, except in the case of fraud by such person,

(a) bound to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof; or

(b) affected by notice direct, implied or constructive, of any unregistered instrument or interest or claim affecting the land.

(2) Knowledge on the part of any such person that any unregistered instrument or interest or claim is in existence shall not of itself be imputed as fraud. . . .

That Nova Scotia has departed from the usual Torrens system rule does not mean that it is wrong. The Torrens system has never been perfect and it is a good thing if thought a willingness to experiment and creativity are applied to its continual improvement. As Dionysius is once supposed to have lamented in another field of human endeavour, it would be a sad day if one could not find **[*58]** anyone for the Torrens system: [70]

The rule adopted in Nova Scotia will be watched with interest to see what improvements, if any, it works in the operation of the system.

Clearly enough, the Nova Scotian provision would cope much more easily with the sort of factual situations that arose in cases such as *Bahr v Nicolay (No 2)*. [71] In such cases injustice can be avoided, outside Nova Scotia, only by a difficult stretch of the words of the statute. This is no doubt why it was introduced and it is certainly true to say that it is a more just rule than the usual one.
[*59]

The danger it brings, however, is that the register may be undermined by s 4. The centrality of the register, which reflects the need for certainty in land ownership, is the reason why such provisions were introduced in the first place. The usual Torrens rule strikes the balance that must so often be struck between certainty and justice somewhat more in favour of the former than Nova Scotia's rule. It is conceivable that this solution might involve a danger to the operation of the Torrens system. To take an extreme example: if matters got out of hand -- if, for example, a title insurer succeeded in setting up a fully functioning private title register in Nova Scotia and the public register were allowed to decay into inaccuracy -- s 4 would provide a most convenient platform for that to occur. One could imagine less extreme cases in smaller communities, for example, in which registration is dispensed with and the centrality of the register undermined because everyone knows of the existence of an interest.

As yet, there has been no litigation under s 4. [72] I suspect that the dangers mentioned in the last paragraph will not eventuate and that s 4 will prove to be a desirable innovation **[*60]** worthy of consideration in other jurisdictions as well in which the Torrens system is longer established. Only time, however, will tell.

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[69] Cf, eg, s 187 of the Real Property Act 1886 (SA).

[70] Aristophanes, *Frogs*, lines 98-102: 'who is creative enough to dare to utter something seriously risky, such as: "Zeus's airy hall", "the foot of time", "a heart that would not swear by all that is sacred" or "a tongue that lost its mind and falsely swore".'

[71] (1988) 164 CLR 604; 78 ALR 1; BC8802595. In this case, however, the Bahrs would have been well advised to attempt to have their interest recorded. See above n 68.

[72] There are no reported cases or cases available online, and the Deputy Registrar-General for the province knew of no cases either.

d) Fraud

The recent rash of frauds in England and Ontario which has been mentioned earlier [73] has so far not extended to the Maritimes. Nevertheless it is beyond doubt that all Torrens systems are vulnerable to it. The very power of registration under the Torrens system -- the system's capacity to confer validity on a document simply because it is registered even if it was utterly void beforehand -- makes fraud a particular challenge for Torrens systems. It is at this point that the conflict between security of tenure and ease of transfer, both aims of the Torrens system, becomes acute.
[*61]

In Saskatchewan a system has recently been devised for sending notice of a change on the property register to affected parties in the expectation that this will deter attempts at fraud and unearth those fraudulent transactions that do occur. [74] This solution appears to be working well; the only difficulty, hardly an insurmountable obstacle, is that an additional volume of enquiries is directed to the Lands Titles Office as a result of the receipt of such notices. [75]

Such solutions are relatively easily adopted in conjunction with electronic conveyancing. In the Maritime context and increasingly in other jurisdictions as well, as electronic conveyancing becomes more prevalent questions around the avoidance of fraud will be posed in a somewhat different shape. Security against fraud will come to mean, in large part, electronic **[*62]** security. At the same time electronic conveyancing, if properly secure from that point of view, offers great opportunities for cutting down on common-or-garden fraud. The innovation in Saskatchewan just referred to is an example, but there is an enormous potential.

In both Maritime jurisdictions, full access to the electronic systems is offered only to lawyers who have completed a training course. [76] In Nova Scotia at least, my sources were quite clear that the province's primary motivation in doing this was the prevention of fraud as well as the general enhancement of efficiency. Given the trust that has thus been reposed in them, lawyers will need to take an active role in preventing frauds by imposture or forgery -- something which in smaller communities in particular they are well equipped to do, but can also do in larger communities by insisting on adequate evidence of identity.
[*63]

Surveyors in Nov Scotia at least, for their part, are unhappy with the legal near-monopoly thus created. [77] Even though boundaries are not guaranteed under the Torrens systems of the Maritimes, we have seen that the registration procedures in Nova Scotia require the solicitor to identify the parcel of land to be registered 'with reasonable accuracy' (s 37(7)) -- indeed, at least some vague indication of the location of registered land is probably an inevitable concomitant of a system of lands titles registration. The balance involved in providing such an indication but also avoiding questions that can be resolved only by a surveyor, while also conveying to the client his personal situation from both the legal and the cadastral point of view, will be a difficult one for lawyers. One also wonders whether the best means of ensuring that surveyors' services are adequately used both from their own point of view and from that of the broader public interest might involve alliances of a greater or lesser degree of formality between surveyors and those solicitors who are registered to conduct lands titles registrations.

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[73] See above n 44. Concern in Victoria on the same topic may be seen in the adjournment debate, *Victorian Parliamentary Debates*, Legislative Assembly, 28 November 2008.

[74] Manitoba Law Reform Commission, *Private Title Insurance*, Manitoba Law Reform Commission, Winnipeg, 2007, pp 54ff.

[75] Siebrasse, *Land Title Conveyancing Practices*, above n 39, p 61.

[76] See above n 53; Land Titles Act (NB) ss 3 sv 'subscriber', 17.1(4), (5). There are various minor qualifications to what is stated in the text: for example, the last-mentioned subsection provides an exception for mortgagees which have entered into agreements with Service ***New Brunswick***.

[77] There is a hint at this in the Debates of the Legislature of Nova Scotia, 27 May 2008, p 4115, as a result of which 1 contacted the Hon Russell MacKinnon, President of the Association of Nova Scotia Land Surveyors who explained his concerns to me.

[*64]

Neither provincial statute provides a clear answer to a question which has been at the forefront both in Australia and, after the recent rash of frauds, in Ontario: should immediate or deferred indefeasibility be adopted? It will be recalled that, under immediate indefeasibility, a registrant, if not personally fraudulent, may rely on a registered instrument even if forged and a nullity at common law, whereas under deferred indefeasibility the interest does not spring into being until it is transferred to a third party who did not deal with the forger. Ontario has recently adopted deferred indefeasibility after a public outcry was caused when immediate indefeasibility was applied after the recent rash of frauds causing hardship to property owners. [78] But Nova Scotia's statute -- otherwise clearly concerned to ensure the transparency of the law by including matters that in ***New Brunswick*** are left to administrative arrangements -- says (s 34) merely that a person may object to a recording (such as of a forged mortgage), and the Registrar-General may correct such a registration or deny the request or direct the applicant first to seek a remedy under the Act. Until recently it was also **[*65]** provided (ss 20(3)(b), (5)(a), 49(1)(b), (3)(a)) that a registered or recorded interest would take priority over earlier interests provided that (as far as relevant) its owner was not fraudulent, suggesting immediate indefeasibility. However, this provision was repealed with respect to registered although not recorded interests recently, suggesting -- if this indeed is the provision of the statute in which the answer to this riddle is to be found -- that a different rule may come to apply to registered transfers of the fee simple and recorded interests such as mortgages. The option of directing an applicant for rectification of the register to seek some other remedy under the Act may also raise the question, which as we have seen is also not easily answered, whether there is a right to compensation for a merely recorded interest.

New Brunswick's statute knows no such complications. However, s 71 contains a different source of uncertainty. It runs as follows:

> The title **[*66]** register shall not be rectified so as to affect detrimentally the title of the registered owner who is in possession unless --
>
> (a) such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his [79] act;
>
> (b) the immediate disposition to him was void, or the disposition to the person through whom he claims otherwise than for valuable consideration was void; or
>
> (c) for any other reason, in any particular case it is considered that it would be unjust not to rectify the register against him.

Paragraph (b) seems to point to a basic decision for deferred indefeasibility in cases of fraud, but the section is drafted very unclearly and it must be questioned whether **[*67]** that will actually be the rule in practice. As well as the multiple negatives contained in this section which make it difficult to understand as a piece of English -- there are no fewer than five negatives applicable to para (c) including words with negative force such as 'unless' and 'against' -- there is, first, the restriction to owners in possession; then it must be noted that the term 'owner' (not being specially defined in the Act) probably includes only holders of fees simple and not mortgagees or lessees, for example. For non-owners and owners not in possession, therefore, the section provides no rule. Finally, there is the residual discretion in para (c), and how that will be used remains to be determined. [80]

5 Conclusion

This article would not be complete if I did not mention the personal impression I had of all the people I spoke to about this topic in both provinces: as well as going out **[*68]** of their way to be helpful to a stranger who was merely

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[78] *Law of the Land*, above n 2, pp 11ff.

[79] This word is given as 'this' in some online versions, but I have checked the original volume of statutes for 1981 in which 'his' is given; that is also clearly called for by the sense. The French text is 'par ses actes'.

[80] Paragraph (c) was one of the provisions applied in a different situation in *McKinney* -- see above n 46.

taking up valuable time on an academic mission, it was very apparent that all concerned had a considerable dedication to their work and more broadly to the welfare of their respective provinces. It was apparent that it was no narrow spirit of self-interest which motivated those responsible for the introduction of the Torrens system in both provinces, even though they were careful to ensure that their system was so designed that many people had an interest in its success. That course was dictated by a desire to ensure its success; and the leaders in the decision to convert the provinces to Torrens, both within the civil service and in the legal profession, impressed both by their concern to improve the legal system as a vehicle for the growth of their provinces and the well-being of their people and also by the degree of effort and thought which they were willing to expend in that cause.

Secondly, I wish to remark again [81] on the extraordinary tribute which is paid to the Torrens system and the insights of its eponymous inventor [82] by the fact that its principles, in the sixteenth decade after they were conceived in the 1850s, **[*69]** are so well designed that even today in the computer age and with electronic conveyancing the Torrens system is superior to all its competitors -- and superior to such an extent that warrants the vast amount of trouble and expense involved in introducing them into Nova Scotia and ***New Brunswick***.

Nevertheless the Torrens system, like all human inventions, is neither perfect in the abstract nor a perfect fit for the needs of Nova Scotia and ***New Brunswick***. Its lack of abstract perfection means that there is always the possibility for improvement; I suspect that Nova Scotia's definition of fraud will prove to be such an improvement, but only time will tell.

Noteworthy in regards to the needs of the two provinces specifically is the idea that the province has guaranteed only a very small number of facts about registered properties and in particular does not guarantee the boundaries. Given that literally centuries **[*70]** of uncertainty were inherited by the designers of the version of the Torrens system now in force in the two provinces and that there is also a severe shortage of surveyors in the two provinces it is hard to see what else could have been done. Even so the problem of uncertainty in the location of property boundaries is not solved or even lessened by this approach. If anything it appears to be slightly worse as owners of Torrens land may hear the good news that their title is guaranteed by the province but tune out the bad news that the guarantee does not apply to their boundaries. In ***New Brunswick***, a recent decision on the rights of adjoining owners inter se (as distinct from the rights of each against the province) has also been recently and in my view justly criticised as less than ideal because it runs the risk of stirring up problems where none existed before, or alternatively leading to injustice if litigation is not speedily commenced. [83]

Finally, why it is that all earlier attempts to introduce **[*71]** the Torrens system into our two provinces failed, whereas this one succeeded? Largely the answers to this question have already been given: nowadays, unlike a hundred or so years ago, there is a realisation that the deeds registry system is no longer viable and a corresponding conviction on the part of all involved, including the leaders of the legal profession, that the Torrens system had to be introduced for the good of the provinces. This conviction has expressed itself in legal rules that were absent in the earlier attempts, and most particularly in the requirement for conversion -- earlier attempts relied upon voluntary conversions, of which there were next to none. In addition, instead of just presenting a Torrens statute to the public and hoping that people will use it, a process for conversion was designed which gave as many interested parties as possible a stake in the system and was also adapted to the particular needs of the provinces as old jurisdictions (by the standards of the new world) with complicated titles.

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[81] *Law of the Land*, above n 2, pp 166ff.

[82] 'Is the Torrens System German?' (2008) 29 *Jo Leg Hist* 253.

[83] See above n 46.