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Land Titles Office

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RE: CAVEATS

We have recently experienced problems with the review of some caveats submitted for registration at the Land Titles Office. Because the subject matter of caveats is sometimes difficult even for those with legal training, the document examiners require clear guidelines for the review of caveats. We believe a reminder of the purpose of caveats and the setting out of guidelines for review will benefit both those submitting caveats and those reviewing them.

A caveat is merely a notice or warning that the caveator is claiming a specific interest in land. The registration of a caveat results in the registration of the notice of the claim of an interest, not the registration of the interest itself. Registration of a caveat does not validate the interest claimed. Whether or not any particular contract purporting to grant an interest in land is valid and enforceable is not a matter for the Registrar to decide. The Registrar need only determine that the interest claimed is (arguably) an interest in land and that the caveat is in substantial compliance with the requirements of the *Land Titles Act* (the "Act") in order to accept a caveat for registration. Above all else, in order for a claimed interest to be caveatable it must be an interest in land recognized by the rules of real property law or authorized by statute.

With respect to the technical requirements for the registration of a caveat, section 144 of the Act states that a caveat must be in the prescribed form and be verified by affidavit in the prescribed form. Form 20 is the form of caveat (and verification affidavit) prescribed. This Form requires, among other things, that the caveator state the nature of the estate or interest claimed and the grounds upon which the claim is founded.

The "nature" of the interest claimed has been defined as being the essential qualities or properties of the interest. For example, the essential terms of a lease are the identification of the lessor and lessee; the premises to be leased; the commencement and duration of the term; and the rent or other



consideration paid¹. The "grounds" for the claim would be the execution of the lease agreement itself and its terms and conditions.

Although most caveats submitted to this Office do set out the nature of, and the grounds for the interest claimed, not all caveats submitted do so. In the past, we have accepted caveats for registration which stated the type of interest in land being claimed and then referred to a named document attached for further particulars of the nature of the interest and the grounds upon which the claim was made. It appears that over time the contents of the body of some caveats submitted to this Office has deteriorated to the point where we now receive documents whereby the caveator claims an interest pursuant to a named document attached without even stating what the interest is that is being claimed. This requires this Office's document examiners to review the attached document in order to determine what interest might be claimed, rather than the caveator stating in the body of the caveat what interest is being claimed. In other words, the caveator fails to clearly state his claim of an interest in land, leaving it to the document examiners to see if they can find a caveatable interest in the attached document. It may be argued that, if a person claims an interest "pursuant to the Mortgage Agreement attached", it should be obvious that the person is claiming a mortgage interest in the described land. However, this is not determinable without reviewing the attached document itself. The caveator may be a mortgagee, an assignee of the mortgagee, or perhaps a third party guarantor. This is not clear if the caveat simply refers to an attached document. It is not acceptable for the document examiners to have to determine what type of interest is being claimed by reviewing an attached document, this should be stated on the face of the caveat. In fact, failing to set out the nature of the interest in land claimed in the body of the caveat may present a danger to the validity of the registration of the caveator's claim² and may, therefore, affect the priority of the interest claimed.

The statutory requirement is for a caveat to state the nature of, and the grounds for the interest in land claimed. In *McKillop v. Alexander*³, the Supreme Court of Canada stated that if the Registrar can identify the land in which the interest is claimed and if the interest claimed by a caveator is stated with reasonable certainty, the Registrar may register a caveat, even if it is not in strict compliance with the prescribed form. Although the nature of the interest claimed and the grounds for the claim should be set out on the face of the caveat, we recognize that, for whatever reason, some caveators do not fully recite the nature of the interest claimed and the grounds therefore but rather choose to

¹ *Calford Properties Ltd. v. Zeller's (Western) Ltd.*, [1972] 5 W.W.R. 714 (Alta. C.A.).

² See *Calford Properties Ltd. v. Zeller's (Western) Ltd.*, *ibid*; *Ruptash v. Zawick*, [1956] S.C.R. 347; *Carruthers v. Tioga Holdings Ltd.*, [1997] 9 W.W.R. 496 (Alta. Q.B.); *Bank of Nova Scotia v. David (Trustee of)* (1988), 60 Alta. L.R. (2d) 223 (Alta. Q.B.); *Powers v. Walter*, [[1981] 5 W.W.R. 169 (Sask. C.A.).

³ (1912), 45 S.C.R. 551 at 580.

attach the document which gives rise to the claim of an interest in land. From this Office's perspective, it is not necessary to attach to the caveat the document which gives rise to the claim of an interest in land when the required information is inserted in the body of the caveat. Given the *McKillop* decision, we are satisfied with the caveator setting out sufficient details of the interest claimed in the body of the caveat in order for the document examiners to be able to determine what the interest claimed is so that the decision can be made whether the interest is caveatable, i.e. is an interest in land.

Accordingly, documents may continue to be attached to the caveat but, commencing on June 19, 2000, this Office will no longer accept caveats which do not (in addition to the grounds for the claim) at the very least, set out the type of interest in the land which is being claimed by the caveator on the face of the caveat. Specifically, the document examiners will review the body of the caveat to see if it clearly sets out the type of interest claimed by the caveator. For example, it is not sufficient to state that the caveator claims "an interest pursuant to the Mortgage Agreement attached". The caveat should state, for example, that the caveator claims an interest "as mortgagee" or "as assignee of the mortgagee", or that the caveator claims "an equitable mortgage interest". The document examiners must be able to determine from the face of the caveat whether the caveator is claiming an equitable mortgage interest as a mortgagee, as a purchaser or beneficial owner pursuant to an agreement for sale, a leasehold interest pursuant to a lease as a lessee, or some other type of caveatable interest. The document examiners will not refer to any attached document to determine what interest the caveator is claiming.

If the caveator chooses to attach a document to the caveat, the wording used in the body of the caveat referring to the attachment will determine the extent that the document examiners will review the attached document. For example, if there is a reference on the face of the caveat to an attached document, the document examiners will check to see that a document is attached to the caveat but the document itself will not be reviewed in any way. If the caveat refers to an attached Mortgage Amendment Agreement, the document examiners will check that a document entitled a Mortgage Amendment Agreement is attached to the caveat. If the caveat refers to "a lease agreement dated January 1, 2000 between John Smith as lessor and Jane Doe as lessee", the document examiners will check that the attached document is dated January 1, 2000 and that it names the parties mentioned in the body of the caveat. In other words, the document examiners will examine an attachment to see that it accords with the information about the document given in the body of the caveat. Document examiners will not check that the correct type of agreement is attached containing the proper terms and conditions or that the document names the caveator as a party if that information is not recited in the body of the caveat. In any case, the attachment will not be reviewed to determine if it is a valid agreement (e.g. has been properly executed, etc). Since the document examiners should be able to determine that there is a caveatable interest claimed from the body of the caveat, there is no need for them to review any attached document, except to the extent mentioned above.

Where a caveatable interest in land is created by statute (e.g. *Condominium Act, Family Law Act*), the proper and full citation of the statute should be inserted in the body of the caveat, along with the particular section of the statute which authorizes the caveatable interest. For example, to protect a

spouse's right to possession of the family home, the caveator would claim:

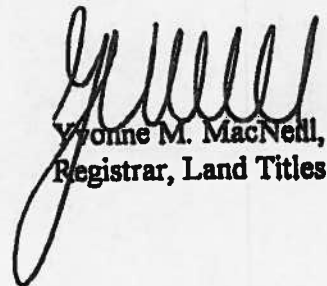
...a right to possession in the land described below, pursuant to s.52 of the *Family Law Act*, S.N.W.T. 1997, c.18.

As the statute may go through several revisions over time, the caveat should indicate which version and section of the statute gave rise to the claim of an interest in the first place.

The foregoing discussion concerns the registrability of a caveat. Caveators should keep in mind that the purpose of a caveat is to give notice of the interest claimed. It is the caveator's responsibility to ensure that the nature of the interest being claimed is sufficiently stated in the caveat. If the interest claimed is not sufficiently identified, the courts may decide that the notice given was not sufficient to protect the priority of the claim to the interest. A caveat must be drafted with care to ensure the claim of interest will be recognized as a valid notice by the courts.

We trust the above will provide greater certainty to submitters of caveats with respect to this Office's requirements for registration and the extent of the review of caveats undertaken by the document examiners. If you have any questions or concerns about this matter, do not hesitate to contact the writer.

Sincerely,



Yvonne M. MacNeill,
Registrar, Land Titles

cc: Tom Hall
Inspector of Titles