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VOL. 59 PART 3 MAY 2001

- 355 Entre Nous
- 359 On the Front Cover: Allan E. McEachern, C.J.B.C.
By the Hon. Lloyd G. McKenzie, Q.C.
- 367 Legal Education in British Columbia:
Trends and Issues—*By Jamie Cassels*
- 373 Yes M'Lord—No Justice—*By Christopher Harvey, Q.C.*
- 377 The "Whips and Scorns of Time": Delay and Abuse
of Process in *Blenze v. B.C. (Human Rights Commission)*
By E.W. Heidi Hughes
- 389 Electronic Registration in Ontario: Shades of Things
to Come for British Columbia—*By Mitchell E. Kowalski*
- 399 The Enforcement of Foreign Judgments in B.C.—
Ten Years After *Morguard*—*By John Sullivan*
- 423 A.E.M., C.J.B.C.—A Retirement Interview
By the Hon. Sherman Hood
- 429 The Home Run—*By the Hon. T. Mark McEwan*
- 435 An Overview of the National DNA Data Bank
By Thomas E. Burns
- 441 Crowning Around Up North—*By Holly J. Lindsty*
- 445 News from the B.C. Law Institute
- 447 News from the B.C. Courthouse Library Society
- 449 A View from the Centre—*By Peter Grove*
- 453 CLE News
- 455 Announcing the 2001 *Advocate* Short Fiction
Competition
- 457 UBC Law Faculty News
- 459 Nos Disparus
- 467 New Books & Media
- 471 Classified
- 475 Dear Abie
- 479 Letters to the Editor
- 481 Grumbles
- 485 Legal Anecdotes & Miscellanea
- 487 From Our Back Pages
- 493 Bench & Bar
- 499 Case Notes
- 505 Contributors

ON THE FRONT COVER

The retirement of McEachern, C.J.B.C., marks the end of an era, and of a remarkable career both at the bar and on the bench. Read about the Chief and his enduring legacy at p. 359.

ELECTRONIC REGISTRATION IN ONTARIO: SHADES OF THINGS TO COME FOR BRITISH COLUMBIA?

By Mitchell E. Kowalski*

One of the interesting aspects of being a member of both the Law Society of British Columbia and the Law Society of Upper Canada is watching how B.C. and Ontario deal with similar issues in my area of practice: real property. From Ontario, I have been following British Columbia's foray into electronic registration, and I found J.P. Malcolm McAvity's article in the May 2000 issue of the *Advocate*¹ to be most illuminating. That article was the genesis for this one.

Since February 2000, Ontario has been designating certain of its registry divisions to require all² registrations pertaining to land to be in electronic form. Within the next five years, title to real property throughout Ontario will be transferred and encumbered entirely in an electronic format. As such, a comparative review of Ontario's experience with electronic registration may be helpful as British Columbia proceeds toward the implementation of its proposed electronic registration system. The purpose of this paper is not to provide a comprehensive or technical review of Ontario's electronic registration system (hereinafter referred to as "E-Reg").³ Instead, it is designed to give the reader an overview of E-Reg and consider some of the effects it has had to date in Ontario and how the Ontario experience may benefit British Columbia.

E-REG—A VERY SHORT COURSE

In some ways, British Columbia's proposed electronic registration system (hereinafter "E-BC") is similar to Ontario's E-Reg. In other ways, it is different. As is the case with E-BC, E-Reg does not create any substantive changes to the common law with respect to real property, nor does it significantly alter the steps taken by a solicitor in connection with a typical real property transaction. Instead, E-Reg refines the process of the typical transaction and makes registering interests in land cheaper, easier, faster, more accurate and more efficient. Adapting to E-Reg is therefore only a technical exercise for a solicitor.

* The author wishes to thank Maurizio Romanin, Robert C. Vernon and Nick Ianazzo for their discussions and their superb class papers regarding E-Reg during the LL.M. programme in Real Property at Osgoode Hall Law School. These discussions and papers were instrumental in shaping the thoughts and comments in this article. The author also wishes to acknowledge the excellent guidance, suggestions and professorial skills of Brian Bucknall, who coached and guided him and his classmates throughout the E-Reg segment of the LL.M. programme. However, all errors, omissions, inaccuracies and opinions in this paper remain the author's alone. This article does not reflect the opinion of the law firm of Aylesworth Thompson Phelan O'Brien.

Access

Prior to the introduction of E-Reg, as in British Columbia, anyone in Ontario had full access to the land registration system. The Ontario government took the position that universal access to the land registration process was fundamental and that E-Reg could not reduce the current level of accessibility. This is quite different from the British Columbia approach, which at present requires electronic filing to be done by a solicitor or notary in good standing; the public is restricted to using the paper registration system.⁴

In order to make a registration against land in E-Reg, one must either have an account with Teranet Land Information Services Inc. ("Teranet"), Ontario's E-Reg service provider, or bring appropriate identification to the local land registration office and, with the assistance of the land registrar, effect the registration. Teranet places no significant restrictions upon who may open an account. Once an account is opened, the subscriber is given a distinct computer diskette that contains an electronic digital signature or "key". This key, together with the subscriber's password, gives access to the registration process. The diskette is not unlike an ATM card in this regard. The diskette will not allow access unless the correct password is used. Account holders must take appropriate steps, as they do with their ATM cards, to ensure that their diskettes are not lost or stolen and to prevent the disclosure of their passwords.

E-Reg's only restriction relates to the registration of documents that contain statements of law. Statements of law can be made only by a lawyer in good standing, and so documents that require a statement of law cannot be registered without the assistance of a lawyer. Very few documents, however, require statements of law, though court orders and transfers under a mortgage's power of sale provisions do currently require a lawyer's involvement under the paper registration system. Transfers, mortgages and discharges of mortgage do not require statements of law. E-Reg does not, therefore, represent any increased restriction on public access to the registration system.

Under E-Reg, as in E-BC, the registration system supplies or "pre-populates" the electronic document with the legal description of the property concerned and the name of the registered owner. Ontario currently has four registry offices (Middlesex County, Halton Region, Peel Region and Hamilton Wentworth Region) in which electronic registration is mandatory. E-Reg is being instituted elsewhere in Ontario on a rolling basis, one registry office at a time. Once a registry office has been designated for E-Reg, there will be a phase-in period of several months during which both paper and electronic registration will be permitted. At the expiry of the phase-in, E-Reg will become mandatory in that registry office.

This is quite different from E-BC, which is designed to work in tandem with the existing paper registration system and may never be mandatory. It should be noted that in Ontario during the phase-in period the incidence of E-Reg use was much lower than expected. It appears that many solicitors were not interested in using the system and in making the necessary investments of time and money during the optional-use period. A similar situation may arise in British Columbia with an optional E-BC system.⁵

Registration Process

E-Reg transactions take place in a fashion somewhat similar to those under E-BC. Registration documents are prepared in electronic form by the purchaser's solicitor (Solicitor A), who then notifies the vendor's solicitor (Solicitor B) that the documents are complete and ready for review. Unfortunately, E-Reg does not allow for draft documents to be pre-approved in draft form as they can be under E-BC. This matter needs to be remedied in Ontario.⁶ Documents are sent via a separate secure e-mail system in the Teranet "gateway", which must be constantly checked in order to determine whether documents have arrived.⁷ This is similar to British Columbia's newly instituted Private Express system.

Solicitor B reviews the documents in their electronic form and, assuming they are acceptable, electronically confirms the documents' completeness (via "mouse-click approval"). This approval "locks" the documents electronically. Any subsequent change by Solicitor A will unlock the documents and remove Solicitor B's approval. Unlike E-BC, locking a document does not allow it to be registered. Both solicitors must still confirm electronically on the document (again, via mouse click) that the document may be "released" before it may be registered.

As a result, registration of documents under E-Reg is a two-step process in which both solicitors must confirm first that the documents are complete and second that they are ready to be released for registration, failing which they cannot be registered. On the day of closing, all funds and all non-registration documents are exchanged among the solicitors. After both solicitors are satisfied with the documents *and* the appropriate funds have been received, the electronic documents will be released. This is a significant difference from E-BC's procedure.

The payment of land transfer taxes and registration fees is not dissimilar to E-BC's deduction from a subscriber's Altos 2 account. Payment of these matters in Ontario can be arranged by two methods: by pre-authorized debiting of a solicitor's general account or by debiting a solicitor's mixed trust account.⁸ Ontario's Affidavit of the Value of the Consideration (which is equivalent to British Columbia's transfer tax return) is also prepared and executed electronically; it is also delivered to the land registry office at the time of registration with the electronic deed.

As with E-BC, all registration documents are sent electronically to the relevant registration office and instantaneously checked upon receipt to ensure that they comply with all administrative requirements. At this time the digital signatures on the documents are also checked to ensure that the lawyers making any statements of law are in good standing. If a lawyer making a statement of law has been suspended or disbarred, the system will not allow the document to be registered. Once all requirements are met, the document is registered. The entire registration process takes only a matter of seconds. Unlike E-BC, there is no delay between the time documents are filed for registration and confirmation of registration. The traditional "gap" in the registration process, which E-BC greatly reduces,⁹ is eliminated altogether under E-Reg. The system will also, at the time of registration, automatically subsearch title (free of charge) to determine if there have been intervening registrations and "lock" the parcel register so that no

other registrations can be made during the subsearch and registration process. This locking and automatic subsearch feature is not found in E-BC.

As with E-BC, electronic documents in E-Reg are not signed by the parties to them. However, unlike E-BC, E-Reg documents are not capable of being reduced to paper. This represents a significant difference in the philosophy and practice of electronic registration in Ontario and British Columbia. Under E-Reg, one cannot call up a registration document onto a computer screen, complete it and then print it out as is done in E-BC. Instead, the E-Reg document is completed by answering a series of questions and prompts which, when put together, form the "document". The document is actually a series of electronic impulses and arithmetic calculations somewhat similar to what one would see if one attempted to open a multi-media computer file in a word-processing programme; the electronic document cannot be configured in text format. One therefore is not able to actually print an E-Reg document after it is electronically created. There is nothing to print unless one wishes to print each set of questions and prompts. E-Reg documents are therefore truly electronic and perhaps misleadingly described as "documents".¹⁰ Put in another way, it is not the document but rather the electronic impulses or "functions" that create the legal effect that we now associate with paper documents.¹¹

Under E-BC, a true copy of the electronic document is required to be printed out, executed and witnessed. Section 168.3 of the *Land Title Amendment Act* prohibits registration unless the true copy is printed, executed and witnessed. This requirement ensures that the parties consent to and authorize the document, conforming with the execution requirements of Part 5 of the *Land Title Act*. If a registration is made without the paper copy being printed, executed and witnessed, the registering solicitor or notary is liable for criminal penalties under section 168.9 of the *Land Title Amendment Act*, even if no fraud has occurred and no damage has been suffered! Interestingly enough, despite the prohibition, once registered, an electronic deed for which a true copy was *not* executed or witnessed still conveys indefeasible title, subject to fraud and the other exceptions in section 23(2) of the *Land Title Act*. If an electronic deed transfers indefeasible title without the proper execution of a true copy, why create the true copy? Why not leave it to the registering solicitor or notary to determine what protocols to follow to ensure that he or she has proper authority to register? Ontario takes such an approach.

In Ontario, there is a presumption that the E-Reg document has been properly authorized and consented to, a presumption that is rebuttable by the parties to the transaction evidenced by the document. There is no legislative requirement that proof of authority be obtained prior to registering a document. Each solicitor must act prudently to ensure that he or she has proper authorization for registration. To assist in this regard, E-Reg automatically prepares and prints an Acknowledgement and Direction.¹² The Acknowledgement and Direction—which is somewhat like a power of attorney—is executed by the parties to the E-Reg document and authorizes registration. Execution of this document is prudent practice but it is also entirely optional.

It is important to note that E-Reg deals only with registration documents. The other documents that solicitors typically receive on closing (such as undertakings to re-adjust, a bill of sale, direction re: title, statutory declarations, etc.) are not part of E-Reg and will still be exchanged manually. Closing funds will also be exchanged manually. Private Express is currently working on the transfer of funds and so this issue will likely be resolved in British Columbia by the time E-BC is implemented. Due to the fact that solicitors cannot now transfer funds and other closing documents electronically, E-Reg requires the use of an escrow agreement called a Document Registration Agreement ("DRA").

A unique feature of the DRA is that it allows a vendor's solicitor to distribute the sale proceeds that he or she receives on the day of closing upon the earlier of the time he or she is notified of a successful registration or a designated time. The terms of the DRA therefore make the purchaser's solicitor responsible either to register or advise the vendor's solicitor of any title defects in a timely manner, failing which the closing proceeds will be automatically released. Similar to the Canadian Bar Association Standard Undertaking in British Columbia, a party may withdraw from the escrow for any reason at any time prior to registration.

E-BC makes no reference to a specific escrow agreement to be used as part of the registration process; it appears to rely upon the current practice and the use of the Canadian Bar Association Standard Undertaking¹³ to continue. While Ontario's form of DRA is not required *per se* for use in E-Reg transactions, the Lawyers Professional Indemnity Company has approved the DRA form and has advised that a successful claim against an Ontario-insured lawyer based upon his or her use of the DRA will be paid by it without a deductible and without any additional surcharge to premiums. This creates a huge incentive to use the DRA. British Columbia solicitors receive no such benefit.

The fact that neither jurisdiction has mandated a required form of DRA may be problematic. Electronic registration increases the instances of transactions being closed between solicitors in different provinces or countries. E-BC and E-Reg both allow a real estate transaction to be completed from remote locations outside of our provinces with solicitors who may not agree with and feel bound by the "usual" practice in a particular area of British Columbia or Ontario. If an undertaking form is not mandated, there is nothing to require a solicitor in Edmonton, Calgary, Winnipeg or elsewhere to agree to the Canadian Bar Association form, or to any escrow agreement for that matter. For these reasons, E-BC and E-Reg may wish to reconsider this approach.

E-Reg also required the Ontario Real Estate Association to amend its standard form of Agreement of Purchase and Sale to address the electronic registration process. It now specifically requires both vendor and purchaser to acknowledge and agree to an escrow closing via agreement between solicitors. The current British Columbia Real Estate Association and Canadian Bar Association B.C. Branch Form of agreement¹⁴ will also need to be amended to ensure that the escrow proceedings are binding. The current form provides, on its reverse, a *suggested* closing procedure that is *not binding* upon the parties. For the same reasons

that a mandatory escrow agreement is suggested, the terms of this form should also be revised.

FINANCIAL INSTITUTIONS AND E-REG

Ontario financial institutions ("FIs") have expressed major concerns about the security of their mortgages. There is a common misconception that E-Reg makes it easier for a rogue to register fraudulent mortgage discharges. This is untrue. Currently, anyone is able to walk into a registry office in Ontario and register a discharge of a mortgage. The land registrar does not verify the signature of the officer of the FI who purported to execute the discharge, and a copy of the registered discharge is not returned to the FI. There is no way to determine who actually registered the discharge or who executed it.

The technology of E-Reg, as with E-BC, allows this risk to be managed and reduced. Both E-Reg and E-BC produce an audit trail that leads to the owner of the "key" that was used to register the discharge. Each registered document is imprinted with the unique digital signature of the keyholder who made the registration. As such, the land registrar is able immediately to trace back to the keyholder, thereby greatly improving security and deterring fraudsters.

In an effort to take advantage of this new technology and improve E-Reg, some FIs have begun discussions with Teranet to create additional protection. One suggestion is to cause discharges of FI mortgages to be "locked" such that only the appropriate FI key is able to register it. Such a lock would have to be able to be overridden by the land registrar in the case of mortgages given in favour of FIs that no longer exist and for those mortgages for which a court orders a discharge.

Another alternative is for Teranet to provide FIs with audit reports detailing the number of discharges on a monthly or weekly basis. In this way, FIs can review the reports against historical discharge activity to determine whether or not there is unusual discharge activity that might point to fraud.

Perhaps a better method is for FIs to subscribe to a system that would quickly alert an FI to a discharge of a mortgage on a particular land parcel. Since FIs will be preparing their own discharges, this information could be instantaneously cross-referenced against the discharges that were made by a particular FI. In this way, an FI would be able to learn instantaneously of a fraudulent discharge and react appropriately. Such a notification system could also be used to identify other activity on the parcel register such as construction liens and prohibited subsequent encumbrances. Such a system might be of use to owners of large numbers of properties as a way to keep track of matters affecting title to their properties.

When E-Reg was first announced several years ago, it was thought that Ontario FIs might direct solicitors to discharge a mortgage on title upon receipt of the proper funds. This would dispense with the exchange of solicitors' undertakings to obtain and register discharges post-closing and the necessity for solicitors to continually follow up with an FI to obtain the required discharge. However, all FIs contacted by the author have stated that they will not give such a direction.

These FIs have also advised that the advent of E-Reg will not reduce the time it takes to prepare a mortgage discharge.

In practice, FI personnel electronically discharge the mortgage and then issue a letter to the vendor's solicitor indicating that the mortgage has been discharged and provide the registration particulars with respect to it.¹⁵ Solicitors will still have to follow up with FIs as before in order to ensure that the mortgage has been discharged. E-Reg will therefore not provide any noticeable benefit to borrowers or solicitors with respect to mortgage discharges.

The above-described issues with FIs will also surface in British Columbia. The challenge for British Columbia will be to balance the concerns of FIs with the practicalities of completing real estate transactions and otherwise serving the best interests of clients.

CONCLUSION

The proposed British Columbia system has some similarities to Ontario's E-Reg; these include the use of private "keys" for security, the locking of registration documents, the creation of an audit trail and the pre-population of documents with data already on board. As such, the Ontario experience may have some relevance in foreseeing issues and situations that will undoubtedly occur in British Columbia. The Ontario experience suggests that E-BC might be further refined for the benefit of solicitors and clients by:

- (a) adding an automatic subsearching feature and locking the parcel register at the time of registration to prevent other documents from being registered immediately prior to the deed or mortgage;
- (b) inserting a binding E-BC escrow closing provision in all agreements of purchase and sale;
- (c) creating an ability to alert subscribers to activity on designated parcels;
- (d) making electronic filing "mandatory" and doing away with the paper registration system;¹⁶
- (e) creating a mandatory escrow agreement;
- (f) creating a mortgage discharge process that protects FIs and eliminates follow-up by solicitors; and
- (g) linking the E-BC data base with typical off-title searches.

Perhaps we can also take this opportunity to rethink all the requirements and procedures in land registration. The advent of E-BC is a wonderful opportunity to re-evaluate the steps taken, the documents used and the statutes governing real property transactions in British Columbia and seriously question them. For example, do registration documents in this day and age still need to be witnessed and manually signed, particularly where solicitors or notaries are the only persons allowed to register? E-BC has preserved the legal effect of an electronic instrument that is not sealed. Why can't a similar legislative provision do the same for witnesses and manual execution?

The creation and use of an electronic registration system allows solicitors to cast aside many preconceived notions of what documents are, how they are executed, how registration takes place and how transactions are completed. This is an exciting time to be a real property solicitor in British Columbia. Those who embrace this new technology will have a unique opportunity to make the completion of real property transactions better for all involved.

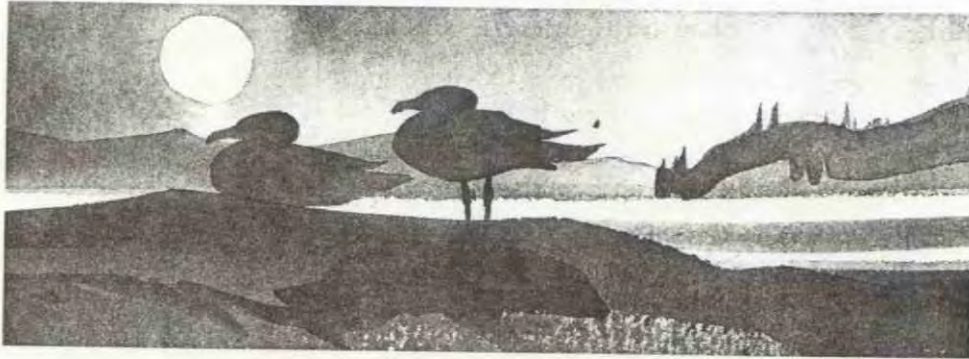
ENDNOTES

1. "Land Title Amendment Act, 1999: An Introduction to Electronic Filing", (2000), 58 *Advocate* 379.
2. With very few exceptions.
3. E-Reg is a registered trademark of Teranet Land Information Services Inc.
4. Some might say that it is unlikely that a member of the general public would want to register electronically and so limiting access to E-BC is not a practical concern, particularly since access to the paper system will remain. Consider, however, a real estate company with many properties or a financial institution, both of which do many registrations in-house; the most obvious examples are discharges of mortgages, assignments of mortgages and notices of leases. The ease and convenience of electronic registration, particularly for properties located far away from the user's office, make electronic registration much more attractive than the current paper system. Therefore, shouldn't these members of the public also have access to E-BC?
5. The author understands that this matter is currently under review by the government of British Columbia.
6. However, the preparation of E-Reg documents via questions and prompts significantly reduces the chances of a document being rendered unregistrable. In fact, a user will be immediately advised upon completion of a document if it is incorrectly created.
7. Some solicitors have started to either fax or call to alert the solicitor for the other party of the impending Teranet e-mail. In many cases a law clerk (*i.e.*, a legal assistant) and not a lawyer will be responsible for preparing the documentation and this person cannot access the lawyer's Teranet e-mail. It is therefore important to ensure that the person responsible for documentation is identified and notified to ensure timely receipt of documents. It is not clear at this stage whether E-BC documents will be transferred to other solicitors by conventional e-mail or by a separate e-mail system.
8. See Rule 5 of the Rules of the Law Society of Upper Canada. Each law firm using E-Reg will have to create its own set of protocols with respect to these accounts to ensure that funds for one transaction are not inadvertently used for another.
9. The delay under E-BC will be a matter of minutes.
10. The trouble with the word "document" is that it immediately conjures up images of paper documents and leads to confusion. Perhaps a better term for an electronic document is "file".
11. This, of course, required legislative reforms. See also November 10, 1997, Canadian Bar Association—Ontario CLE Programme, *The New Practice of Real Estate from Quill Tip to Microchip Part II: Electronic Registration*.
12. This document is automatically generated by E-Reg and requires clients to warrant their identities, acknowledge the accuracy of the information to be inserted into the electronic document, authorize the execution of the Document Registration Agreement, authorize the electronic registration of documents and acknowledge their understanding of the content and the effect of the electronically registered document.
13. October 1999 version.
14. Revised March 1999.
15. This new procedure will no doubt also result in an increase to the discharge fees currently levied by FIs. *Quaere* why a ven-

dor's solicitor could not register a Notice of Mortgage Discharge on title to the property at closing which would automatically discharge the mortgage 60 days after registration unless the FI registered a notice of non-payment within that time period? This or some similar process needs to be created to eliminate

the need for the vendor's solicitor to constantly "chase" an FI for a discharge post-closing.

16. "It takes two to tango" and as such *both* solicitors must be computer-savvy and must desire to complete the transaction electronically; otherwise the transaction will be completed in the standard fashion.



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