**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Scotia Real Estate Commission v. Lorway MacEachern, 2013 NSSC 291

**Date:** 20131108
**Docket:** Hfx. No. 247204
**Registry:** Halifax

**Between:**

The Nova Scotia Real Estate Commission, a body corporate

Plaintiff

v.

Charles Lorway, Q.C. and Duncan MacEachern, carrying on business as a partnership under the firm name and style of Lorway MacEachern

Defendant

The Nova Scotia Barristers' Society, a body corporate, and The Nova Scotia Association of Realtors

Intervenors

---

# DECISION

---

| | |
|---|---|
| **Judge:** | The Honourable Justice Kevin Coady |
| **Heard:** | June 17 and 18, 2013, in Halifax, Nova Scotia |
| **Written Decision:** | November 8, 2013 |
| **Counsel:** | Alan J. Stern, Q.C. and Jeff Aucoin, for the Plaintiff<br>Tony Mozvik, for the Defendants<br>Raymond F. Larkin, Q.C., for the Intervenor, The Nova Scotia Barrister's Society<br>Kevin A. MacDonald, for the Intervenor, The Nova Scotia Association of Realtors |

**By the Court**:

[1] The Nova Scotia Real Estate Commission (Commission) is the statutory regulator of the Nova Scotia real estate industry. Charles Lorway Q.C. and Duncan MacEachern practiced law at Sydney, Nova Scotia under the firm name Lorway MacEachern. The Commission seeks a permanent injunction against Lorway MacEachern, its partners, associates, and employees, preventing them from trading in real estate without a license as required by the *Real Estate Trading Act*, S.N.S. 1996, c. 28 (*RETA*). In 2006 an interim injunction was sought but refused (2006 NSSC 76).

[2] The Nova Scotia Barrister's Society (NSBS) is an intervenor and generally supports the position of Lorway MacEachern. The Nova Scotia Association of Realtors (NSAR) is an intervenor and supports the position of the Commission. While the intervenors did not participate in this hearing, they filed briefs.

**BACKGROUND:**

[3] This proceeding has its genesis in 2004. In May of that year Douglas Dixon, then Commission Registrar, concluded that Lorway MacEachern was trading in real estate without a licence. In a letter he said in part:

> This letter is to request your immediate response regarding what I consider to be unlicensed trading in real estate being carried out by your firm.
>
> It has been brought to my attention that Lorway MacEachern has initiated the practice of listing and advertising real estate for clients.
>
> I direct you to cease your trading activities immediately until such time as you have obtained a Nova Scotia Real Estate License.

On June 16, 2004 Charles Lorway responded to Mr. Dixon as follows:

> Our firm's position is that our activities in real estate, 'in the course and as part of that person's practice as Barrister or Solicitor' is outside the jurisdiction of the Real Estate Commission by virtue of the exemption set out in section 3(d) of the *Real Estate Trading Act.*

[4] Lorway MacEachern filed the Affidavit of Michael Whalley Q.C., age 84, in support of their position that section 3(d) created a broad exemption to *RETA's* licensing requirements. In his affidavit, he testified as follows at paragraphs 6, 7, 18 and 14;

> 6. THAT from the late 1940's until the late 1950's many individuals in Industrial Cape Breton prior to selling a home would use the services of me and other lawyers in assisting them in the sale of their property;
>
> 7. THAT in the 1940's and 1950's, as a practising lawyer, I sold properties on behalf of clients;
>
> 8. THAT when retained by clients during the 1940's and 1950's, myself and other local lawyers provided the following services in exchange for a commission in the range of up to six (6%) percent:
>
> > (a) The preparation of the Deed of Conveyance; Adjustments and documentation and Affidavits required for the purposes of conveying the property to a purchaser;
> >
> > (b) The preparation of the Agreement of Purchase and Sale, including negotiations with the intended purchaser of the property and preparation of the mortgage in the cases when the vendors took back a mortgage;
> >
> > (c) The advertising of the property which in many cases consisted of no more than spreading of the word to other lawyers, advising them that a property was for sale and that if they knew of any potential purchasers they should have them contact my office;
> >
> > (d) The lawyer representing the purchaser would then be entitled to charge legal fees for certification of title and fees associated with negotiation of the Agreement of Purchase and Sale generally in the vicinity of two (2%);
>
> 14. THAT myself and other lawyers in the Sydney area, in the early 1960's eased out of the sale of property on behalf of clients as a result of other requirements in our practice which included an increase demand in Mortgage work.

[5] Mr. Dixon determined that Lorway MacEachern posted for sale signs on real property and advertised real property for sale in a local newspaper. The Lorway MacEachern website offered to arrange viewings of properties by prospective purchasers and to present offers to vendors. Mr. Dixon obviously concluded that Lorway MacEachern's involvement in the real estate sales business encroached on territory reserved for licensed real estate agents.

[6] This conclusion was supported by the Affidavit of Duncan MacEachern filed at the interim injunction stage. He attached a copy of the agreement his clients enter into when the firm is retained by a vendor. Clause 2 of that agreement provides:

> 2. THAT your retainer with Lorway MacEachern (hereinafter known as L.M.) will include:
>
> (a) Obtaining a land title search of property and conversion of the property to an LRA designation;
>
> (b) Examining the title, and advising the Client(s) on encumbrances, covenants, mortgages, easements and rights-of-way, which may effect (sic) title;
>
> (c) Obtaining an assessment from the relevant Municipal Authority and obtaining an appraisal from a certified land Appraiser;
>
> (d) The preparation, display and distribution of sale particulars;
>
> (e) The placing and removal of a 'for sale' sign;
>
> (f) Newspaper Advertisement
>
> (i) Advertising your property for sale in the Maritime Merchant;
> (ii) Advertisements in the Cape Breton Post will attract additional disbursements and would not be incurred without your prior written consent.
>
> (g) Undertaking reasonable efforts to obtain a sale for the subject property;
>
> (h) Reviewing and providing legal advice on offers of purchase;
>
> (i) Drafting a contract of Purchase and Sale, where appropriate;
>
> (j) Procuring the report of a Certified Building Inspector;

(k) Paying out and discharging any financial encumbrances on title from the proceeds of the sale;

(l) Advising you with respect to all steps in the closing process;

(m) Providing complete legal services involved in representing you on the sale of the property, including preparation of Deeds, Release of Mortgage documents, HST Certificates, Urea Formaldehyde Foam Insulation (UFFI) Certificates, calculating and preparing the Statement of Adjustments at the Closing of the transaction, attending property with prospective purchasers, etc.;

(n) Reporting in full to Clients(s) at the close of the transaction.

[7] There can be no doubt that many of these activities are identical to those of a licensed real estate agent. Other activities fall within the usual services of a lawyer. The critical question is whether lawyers are permitted to perform the non-lawyer activities by virtue of the section 3(d) exemption in the *RETA*.

## AGREED STATEMENT OF FACTS:

[8] Lorway MacEachern and the Commission filed an agreed statement of facts in this application. It states as follows:

1. Charles Lorway and Duncan MacEachern carry on or have carried on a partnership under the firm name of Lorway MacEachern. Mr. Lorway, Mr. MacEachern and the firm Lorway MacEachern will be referred to herein as the "Defendants.

2. Since June 2004, the Defendants and their employees under their control provide, and have provided at all material times, a full range of services to vendors of real property ("Vendors") which include but are not limited to the following:

a. Selling real property on behalf of Clients;

b. Advertising the property for sale by lawn sign, on the Defendant's website, in newspapers and other print media, and other means;

c. Negotiated sale price with potential Purchasers or their Agents;

d. Arranging appraisals and building inspections of properties on behalf of Clients;

e. Attending at potential properties with potential purchasers to show the properties for the purpose of selling them;

f. Holding open houses for potential purchasers to show the properties for the purpose of selling them;

g. Preparation and completion of Purchase and Sale Agreements and negotiating the terms of those Agreements including amendments to the Agreements on behalf of real estate purchasers and vendors;

h. Title Searches;

i. Preparation of Title Documents;

j. Preparation of Conversion Documents;

k. Placement of for sale signs on properties;

3. The Defendants charge, and have all material times charged, a base line fee or a percentage fee to their Vendors for their full range of services noted above in accordance with a legal fee agreement.

4. The Defendants recommend to Vendors that purchases of property should be on an "as is where is basis".

5. Neither the Defendants nor any of their employees are licensed by the Nova Scotia Real Estate Commission to sell or broker real estate in the Province of Nova Scotia and never have been.

[9] Essentially clients were charged a fee based on the value of the property. This fee covered all the activities set forth in the agreed statements of facts. The fee structure represented one stop shopping for the vendor. The total fee was usually less than if the vendor retained both an agent and a lawyer. The value of the property was determined by an appraisal, the cost of which was included in the fee.

[10] The agreed statement of facts again clearly establish that Lorway MacEachern was encroaching on activities traditionally performed by licensed real estate agents. Once again the question is whether those activities are permitted by section 3(d) of the *RETA*.

**THE LEGISLATION:**

[11] The Commission argues that Lorway MacEachern's activities amount to trading in real estate and are not caught by the section 3(d) exemption for lawyers. Lorway MacEachern do not dispute that their conduct amounts to trading in real estate but they argue that section 3(d) permits those activities.

[12] The starting point is section 2(y) of the *RETA* which defines trading as follows:

> (y) 'trade' or 'trading' includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt.

[13] The next relevant section of the *RETA* is section 4 which states:

> 4 (1) No person shall trade in real estate or hold out as being available to trade in real estate unless that person is licensed to do so or is otherwise permitted to do by this Act, the regulations and the by-laws, but only to the extent that the person is permitted to do so by this Act, the regulations and the by-laws or by the license and subject to any restrictions, terms and conditions in the license or under which the license was issued.

[14] Section 3 is the next relevant section. It states as follows:

> 3 This Act does not apply to
>
> (a) any person not ordinarily trading in real estate who acquires real estate or disposes of real estate owned by that person or in which that person has a substantial interest, or an official or employee of any such person engaged in so acquiring or disposing of real estate;
>
> (b) any
>
> (i) assignee, custodian, liquidator, receiver, sheriff, trustee or other person in the course of acting pursuant to a statute or pursuant to a court order,
>
> (ii) administrator of an estate, or

> (iii) executor or trustee selling under the terms of a will, marriage settlement or deed of trust;
>
> (c) any bank, trust, loan or insurance company or credit union and the subject-matter of the trading is real estate owned or pledged to it;
>
> (ca) any person who is licensed by the Public Accountants Board of the Province of Nova Scotia and whose license is in good standing and the trading is in the course and as part of that person's practice as a public accountant;
>
> **(d) any person who is a member in good standing of the Nova Scotia Barristers' Society and the trading is in the course and as part of that person's practice as barrister or solicitor,** or
>
> (e) any person or persons, any activity or activities or any class or classes of a person or class or classes of activity that are excluded from the application of this Act by the regulations.

Lorway MacEachern argues that section 3(d) permits them to trade in real estate as long as they do so "in the course and as part of that person's practice as a barrister or solicitor". The issue for this Court is whether the trading activities of Lorway MacEachern are permitted by this qualifier. It is a matter of statutory interpretation.

## PRINCIPLES OF STATUTORY INTERPRETATION:

[15] In *Bell Express Vu Limited Partnership v. Rex* [2002] 2 S.C.R. 559, Justice Iacobucci set forth the guiding principles of statutory interpretation.

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para 25; *R. v. Araujo,* 2000 SCC 65, at para 26; *R. v. Sharpe*, 2001 SCC 2,

> at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". (Duplicate cites removed)
>
> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings".

[16] In *Sullivan on the Construction of Statutes,* 5th ed., the author states that "ordinary meaning" is the "meaning that spontaneously comes to mind when words are read in their immediate context." Justice LeBel described "ordinary meaning" in *Pharmascience Inc. v. Binet*, 2006 S.C.C. 48, as follows:

> Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at p. 21; Marche v. Halifax Insurance Co., 2005 SCC 6, at para. 59. In Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, at p. 735

It follows that in order to deviate from the ordinary meaning approach there must be another possible intended meaning which is consistent with the purpose of the legislation. Ambiguity must be found in the language.

[17] The issue of ambiguity was discussed in *Bell Express Vu Limited Partnership v. Rex, supra*, as follows:

> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement

> in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids"to which I would add, "including other principles of interpretation".
>
> 30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, supra, at pp. 4-5).

[18] Section 9 of the *Interpretation Act*, R.S.N.S 1989, c. 235 is of assistance and provides as follows:

> Interpretation of words and generally
>
> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

**ISSUE:**

[19] The question for this Court to determine is whether "in the course of and as part of that person's practice as barrister and solicitor" in section 3(d) of the *RETA* attracts a broad or narrow interpretation. There can be no dispute but that Lorway MacEachern were trading in real estate as that term is defined.

**ORDINARY MEANING:**

[20] The first step in interpreting section 3(d) is to consider the qualifying words in their grammatical and ordinary sense. Such an approach leads to the conclusion that lawyers are permitted to trade in real estate as long as it is done in the course of and as part of their practice as barrister and solicitor.

[21] The first legislation regulating the trading of real estate was the *Real Estate Agents Licensing Act,* S.N.S. 1957, c. 6. It contained a definition of "trading" and an exemption for lawyers that was not significantly different than the current section 3(d). The scheme and object of the 1957 and 1996 *Act* is to protect the public when they are involved in a conveyancing of real estate. Both establish standards for, and protections from, real estate traders.

[22] The practice of trading real estate prior to 1957 was conducted primarily by lawyers. In the years post 1957 some lawyers continued this practice. The 1957 and 1996 exemption was designed to preserve the role of lawyers in trading real estate.

[23] The ordinary meaning requires a lawyer trading in real estate to be a member of the NSBS. I conclude that the qualifying words insist that trading lawyers are practicing lawyers. It does not place further restrictions on such lawyers. If the legislature wanted to reel in lawyers from trading then they would have specifically so stated.

[24] Notwithstanding, I have no convincing case law that supports this conclusion. I must accept that there could be ambiguity in the qualifying language. In applying Driedger's principles I must admit that these words are reasonably capable of more than one meaning. This other meaning could reflect

the fact that as of 1957 lawyers were moving away from trading real estate. Both interpretations can be harmonious with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. In light of these conflicting conclusions it is necessary to consider the subject phrase in context.

**LEGISLATIVE HISTORY:**

[25] Assessing context starts with a review of the legislative history of the provision. The 1957 and 1996 *Acts* allow lawyers to trade in real estate. The only limitation was that they be practicing members of the bar. There is nothing in the evidence that suggest legislators had any intent, or interest, in limiting the role they historically occupied. There is evidence that legislators saw the need to regulate individuals entering the real estate field.

[26] The object of *RETA*, and its predecessor legislation, was to regulate the trading of real estate to protect the public. Justice Gruchy discussed the object of the predecessor *Act* in *Cleary v. Nova Scotia* (1990), 100 N.S.R. (2d) 102:

> In reaching this conclusion, I have considered the obvious intent of the legislature in the adoption of the Real Estate Brokers' Licensing Act. The title of the statute is "An Act for the Regulation of Trading in Real Estate and for the Licensing of Real Estate Agents." It was clearly passed for the protection of the public. That protection was, I suggest, from unscrupulous or unqualified persons entering into a field where the public could be seriously financially harmed. That statute sets up a means whereby the public, hopefully, will be afforded a degree of protection. It sets conditions for the licensing of salesman, establishes an advisory board, methods of suspending salesmen and requirements for the bonding of salesmen. In particular, the statute establishes a real estate assurance fund to respond to judgments against agents resulting from fraud or breach of trust.

[27] There is no evidence to suggest that lawyers trading in real estate represented a potential threat to public interest. After all they were educated in the law and were subject to their own regulatory scheme.

[28] There is no evidence that legislators recognized a need to licence a lawyer in order to protect the public. The legislative history dictates that the qualifying phrase be given a broad interpretation. Such an interpretation supports a conclusion that legislators did not intend to limit the role of lawyers in trading real

estate. The only qualifier imposed was that such activities were performed "in the course and as part of that person's practice as a barrister and solicitor." I view these words as meaning nothing more than a lawyer must be a practicing member of the bar.

**DEFINITION OF TRADING:**

[29] The definition of trading also supports a broad interpretation of the qualifying legislation. Justice Hood in the application for an interim injunction recognized that the definition of trading involved much more than conventional land transactions. She concluded that leases, commercial activities, options and rentals were activities suggestive of an expansive approach to trading. She stated at paragraphs 104 and 105:

> 104 The related statutes to the Real Estate Trading Act are the Legal Profession Act and its predecessor, The Barristers and Solicitors Act. I agree with the submission of the Intervenor that both of the latter and the Real Estate Trading Act and its predecessor defined key terms very broadly. As Mr. Larkin pointed out, and as I have said above, "trading" is broad enough to encompass activity defined as part of the practice of law in the Legal Profession Act.
>
> 105 After a consideration of all of the above submissions and the authorities in support, I conclude that the definition "in the course and part of the practice" must be given a broad interpretation. The words standing alone are not entirely clear and, when I look at the entire context within which those words exist, I cannot conclude that they should be interpreted as narrowly as the plaintiff suggests.

I share Justice Hood's conclusion.

***INTERPRETATION ACT* - SECTION 9 (5):**

[30] This legislation directs that every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering a menu of factors. The word *remedial* means supplying a remedy, or intended to correct or improve deficient skills in a specific subject. In this case the *remedial* factor in the *RETA* was the regulation of individuals holding themselves out as real estate agents. The qualifying words in section 3(d) does nothing to change the role of lawyers in trading real estate. This supports a broad interpretation of section 3(d).

**PRESUMPTIONS OF LEGISLATIVE INTENT:**

[31] A presumption exists that a statute creating a professional monopoly must be strictly applied so that anything such a statute does not clearly prohibit may be done by non-members. Justice de Grandpré discussed this principle in *Laporte v. College of Pharmacists of Quebec*, [1976] 1 S.C.R. 101:

> This question must be considered in the light of the principle laid down by this Court in Pauze v. Gauvin [1954] S.C.R. 15. In particular I adopt the following passage from the reasons of Taschereau J., as he then was:
> [TRANSLATION] The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these closed associations.

[32] The *RETA*, and its predecessor legislation, created a professional monopoly for those entering the real estate sales industry. There is no prohibition against lawyers trading in real estate as they had done for years. The only limitation is that they be practicing members of the bar and that the trading be in the course of the lawyer's practice. This principle was adopted in Nova Scotia in *R. v. Nomm* [1983] N.S.J. No. 154. Application of this presumption favours a broad interpretation of section 3(d).

[33] An equally important presumption is that of *consistent expression*. This presumption is explained by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed.*, supra*, as follows:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended.

> The presumption of *consistent expression* applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.
>
> **Same words, same meaning.**
>
> In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."

This interpretation was endorsed by the Nova Scotia Court of Appeal in *Nova Scotia (Minister of Community Services) v. B.L.C.*, 2007 NSCA 45.

[34] The presumption of *consistent expression* is relevant because the language of section 3(d) is the same language used in section 3(ca) which was added to the *RETA* by amendment in 2001. Section 3(ca) provides as follows:

> (ca) any person who is licensed by the Public Accountants Board of the Province of Nova Scotia and whose licence is in good standing and the trading is in the course and part of that person's practice as a public accountant;

By virtue of this presumption the interpretation given to the words "in the course and as part of the person's practice" must make sense in the context of both exemptions. The use of similar language for both lawyers and accountants support the conclusion that the object of the *Act* was to regulate real estate agents in the public interest.

## INTERACTION WITH THE *LEGAL PROFESSION ACT*:

[35] It is well established other legislation that might cast a light on the meaning or effect of a provision is relevant when considering that provisions total context. In *Sullivan on the Construction of Statutes,* 5th ed., *supra*, the author writes at page 411:

> The context of a legislative provision includes not only the immediate context and the rest of the Act in which the provision appears but also any other legislation that may cast light on the meaning or effect of the words. Traditionally, the category of related legislation is said to consist of statutes in *pari materia*, that is, statutes enacted by the same legislature and relating to the same subject. In practice, however, the courts do not limit themselves in this way. They look to the whole of the statute book produced by the enacting legislature and to legislation enacted by

> other jurisdictions as well. They determine on a case-by-case basis what relations exist between the words to be interpreted and the words of other legislative texts, what inferences may be drawn from these relations and what weight should attach to these inferences.

[36] The NSBS argues that the definition of "trading" is broad enough to capture activities that come within the definition of the practice of law as set out in section 16(1) of the *Legal Profession Act*. Given that the definition of trading includes "any act or conduct or negotiation directly or indirectly in furtherance of any disposition, acquisition, transaction, offer or attempt" it will capture more activities performed by a lawyer than those that are ancillary or subsidiary to traditional legal services.

[37] The *Legal Profession Act* like *RETA* has the primary purpose of protection of the public. The Supreme Court of Canada in *Law Society of British Columbia v. Mangat*, 2011 SCC 67, makes the following comments at paragraph 41:

> Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce them, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds. In this context, the bar is entrusted with policing the illegal practice of law both to enforce its monopoly and to protect the public from imposters. This is the purpose behind s. 26 of the Legal Profession Act.

The *RETA* and the *Legal Profession Act* define their key terms very broadly. The definition of trading in the *RETA* is broad enough to capture activity that comes within the definition of the practice of law in section 16(1) of the *Legal Profession Act*.

[38] The two statutes can be read together harmoniously only by a broad reading of the exemption for lawyers in section 3(d) of the *RETA*. When this exemption is given a broad meaning it is possible to interpret the *RETA* in a way that does not conflict with the *Legal Profession Act*. It cannot have been the intention of legislators to clothe real estate agents with authority to perform legal services.

Such an outcome would give licenced real estate agents tasks which require the knowledge and skill of a person trained in the law. In order to avoid such an unwanted result the *RETA* must be interpreted so that the exception for lawyers covers the trading activities of lawyers except when they engage in trading which is unrelated to their law practice and therefore unregulated by the *Legal Profession Act*.

## APPROACH IN OTHER PROVINCES:

[39] Ruth Sullivan in *Sullivan on the Construction of Statutes,* 5th ed.*, supra,* states that it may be helpful for the Court to examine the legislation of other jurisdictions when interpreting its own statutes. She comments at page 419:

> ***Governing principle.*** In interpreting legislation the courts often find it helpful to look at the enactments of other jurisdictions. It is standard practice to consult the legislation of other provinces when interpreting provincial legislation or to refer to provincial Acts when interpreting federal legislation and vice versa. It is also permissible to look to the legislation of other Commonwealth jurisdictions, American States and United States when interpreting Canadian legislation and, in the case of Quebec, to French legislation as well.
>
> Obviously, the statutes of different jurisdictions cannot be regarded as constituting a single enactment. However, along with international law and common law, the statutes of different jurisdictions form part of the legal context in which statutes are enacted and operate. Comparative law has long played an important role in law reform and in recent years it has become an accepted part of Charter analysis. As the world becomes smaller and more interdependent, the legislation of other jurisdictions becomes an increasingly relevant context in which to read domestic legislation. Within the Canadian federation in particular, there are circumstances in which it is appropriate to think of the statutes of different jurisdictions as working together to form a coherent regulatory regime.

[40] Nova Scotia will be the first province to judicially consider the exemption of lawyers in real estate trading legislation. It is not the first province where issues have arisen between real estate bodies and lawyers who are trading in real estate. In 2001 in British Columbia a complaint by the Real Estate Association was filed with the Superintendent of Real Estate regarding the sale of real estate by lawyers. The Law Society of British Columbia took the same position as that of the Nova Scotia Barristers Society in this case. Despite an opinion from the Society's counsel that lawyers were entitled to trade in real estate as long as they performed related legal

services for a client, the Superintendent of Real Estate informed the Law Society that he intended to pursue the issue further. Rather than seeking a court's interpretation of the exemption, he sought a legislative amendment to remove the exemption altogether.

[41] In March of 2003, the Ministry of Finance circulated a discussion document outlining proposed changes to the *Real Estate Act*, SBC 2004, c. 42, with respect to the lawyers' exemption. The document stated:

> Lawyers' exemption: The new Act will clarify that lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice. For example, a lawyer could sell property, without obtaining a real estate licence, where the sale is ancillary to settling an estate, administering a will, or effecting a marriage settlement, but would not be allowed to solicit new listings, or show property outside of these kinds of circumstances.

[42] Not surprisingly, the British Columbia Branch of the Canadian Bar Association and the Law Society of British Columbia responded to the discussion document. They took the position that the exemption should not be narrowed. Ultimately these organizations and the BC Real Estate Association came to an agreement that resolved the issue to the satisfaction of all parties. That agreement is as follows:

> The Law Society and the BC Real Estate Association will put forward to the provincial government a common position that an exemption for lawyers from the licensing provision of the Real Estate Act should remain, but that the licensing exemption should not extend to a lawyer's staff. In furtherance of this understanding, the Benchers have decided in principle to make rule changes to the Professional Conduct Handbook to restrict lawyers who sell real estate from delegating certain activities to their non-lawyer staff.
>
> With Ministry encouragement, the Law Society and BC Real Estate Association have discussed their respective concerns and come to a common understanding. As of February, both organizations have agreed that the licensing exemption for lawyers in the Real Estate Act should not be changed or restricted and that lawyers should require no additional licensing to conduct real estate sales. A lawyer's secretaries, paralegals and other non-lawyer staff members, however, will not be covered by the exemption, and the Real Estate Act should be amended accordingly.

The current *BC Real Estate Act* now contains an exemption at section 3(3)(f) for lawyers "in respect of real estate services provided in the course of the person's practice". Rule 11 of Chapter 12 of the Professional Conduct Handbook now provides that only a lawyer, and not a legal assistant, may show a property.

[43] In Ontario, the Ministry of Consumer and Business Services released *A Consultation Draft of the Real Estate and Business Brokers Act, 2001* and an accompanying document entitled *A Guide to A Consultation Draft Real Estate and Business Brokers Act, 2001*. The lawyers' exemption was addressed at page 6 of the guide:

> With respect to solicitors, the exemption under clause 5(g) currently reads:
>
> (5) Registration shall not be required in respect of any trade in real estate by ...
>
> (g) a person who is practicing as solicitor of the Ontario Court (General Division) [Superior Court of Justice] where the trade is made in the course of and as part of the solicitor's practice;

The Ministry attempted to clarify the intent of the clause. They directed that solicitors can trade in real estate when doing so as a normal part of their solicitor's business. The proposed clarification would make it clear that a solicitor could not advertise that he or she could sell houses on behalf of clients without being registered under the Act, but could represent a client's legal interests in real estate transactions.

[44] The Ontario Bar Association was unable to persuade the Ministry that the exemption should remain unchanged. The successor legislation contained new wording, and that wording remains in the statute today:

> Exemptions
>
> 5. (1) Despite section 4, registration shall not be required in respect of any trade in real estate by,
>
> ...

> (g) a solicitor of the Superior Court of Justice who is providing legal services if the trade in real estate is itself a legal service or is incidental to and directly arising out of legal services.

[45] In Saskatchewan, like British Columbia, the primary stakeholders have managed to avoid resorting to the Court for interpretation of the scope of the lawyer exemption. On December 6, 2005, a Memorandum of Understanding regarding lawyers trading real estate was signed by the Saskatchewan Real Estate Commission, the Saskatchewan Real Estate Association, the Superintendent of Real Estate, and the Law Society of Saskatchewan. This document sets out a number of terms and conditions that lawyers must comply with if they wish to trade in real estate in a manner similar to the lawyers of Lorway MacEachern. For example, legal assistants are not permitted to discuss a prospective seller's needs and interests with the buyer, negotiate terms of offer or purchase, provide legal advice with respect to trades in real estate, or show a property. In addition, the property being sold must be advertised in the name of the owner.

[46] Finally, in New Brunswick, the exemption for lawyers is broader than that of any other province. Section 30 of the *Real Estate Agents Act*, RSNB 2011, c. 215 provides:

> Exemptions from the application of the Act
>
> 30 This Act does not apply to
> ...
>
> (d) a person who is practising as a barrister or solicitor of The Court of Queen's Bench of New Brunswick and is a member in good standing of the Law Society of New Brunswick.

Based on the language of the exemption, it appears that lawyers in New Brunswick have no restrictions on their ability to trade in real estate other than that they must be members in good standing of the Law Society of New Brunswick.

[47] The approaches taken in these other provinces to lawyers trading in real estate are not consistent. However they do demonstrate two things. First, it is obvious that the meaning of the exemption containing the language "trading in the

course of and as part of a lawyer's practice" is unclear, and for that reason, several real estate bodies have been reluctant to pursue interpretation by the court, and other provinces have taken steps to resolve the uncertainty by way of amendment. Second, they demonstrate that regardless of which side of interpretive fence the Court comes down on, Nova Scotia will not be the sole province taking that position.

**CONCLUSION:**

[48] Considering the foregoing, my view is that neither the statute nor the evidence suggest that section 3(d) was intended to be interpreted narrowly. At the time the exemption was first drafted lawyers performed all duties now performed by licenced real estate agents. There is no evidence to suggest that subsequent legislation in any way limited those duties. In the absence of such evidence the Court is left with a broad interpretation of trading that allows lawyers to perform a wide variety of functions. As well this view is supported by the principle that a statute creating a professional monopoly must be strictly applied so that anything a statute does not clearly prohibit may be done by non-members.

[49] This is an application for a permanent injunction. The Commission must establish a *prima facie* case. A *prima facie* case would require a finding that section 3(d) must be interpreted narrowly. The Commission would have to establish that the trading activities of Lorway MacEachern were outside the exemption in section 3(d) of the *RETA*. That result has not been achieved and, as such, this application is dismissed.

Coady J.