

OFFICE OF THE CITIZENS' REPRESENTATIVE

**REPORT OF THE CITIZENS' REPRESENTATIVE
CONCERNING COMPLAINT # 67-84CF10**

**ISSUED IN ACCORDANCE WITH SECTIONS 37 AND 39 OF
THE *CITIZENS' REPRESENTATIVE ACT***

6 September, 2010

Complainants: Title Searchers – Registry of Deeds and
Companies (17 Complainants)

Respondent: Department of Government Services –
Commercial Registration Division

Introduction

The complainants are concerned about the fairness of new archival rules (“the rules”) put in place at the Registry of Deeds and Companies in St. John’s (“the Registry”). The imposition of the rules coincided with a move to a refurbished building on Elizabeth Avenue.

The Registry

The Registry is a central repository for documents relating to Deeds, Companies, Condominiums, Personal Property, Mechanic’s Liens, Limited Liability Partnerships, Co-operatives, Lobbyists, and Limited Partnerships. It holds over 4000 bound volumes dating back to approximately 1825 and it holds approximately 60,000 corporate records. Deeds from 1825 to 1980 exist in paper format only. For the years 1980-1982 records exist on paper and microfilm. All documents registered from 1982 forward to the present can be viewed online.

The Registry first opened in the Confederation Building in the early 1970s and was moved to its new site in the former Newfoundland Liquor Corporation (“NLC”) building on Elizabeth Avenue in St. John’s in early March 2010. There are 31 employees at the new site. The building was retrofitted to accommodate the Registry.

The floor plan of the Registry is located at Appendix 1. The areas of specific concern to this report are the research area (referenced as the “reading room” in Appendix 1), and the vault (referenced as the “deeds vault” (Appendix 1). The research area is designed to facilitate the work of persons using the Registry. The vault contains the Registry of Deeds volume collection. Photographs of the research area are at Appendix 2 and photos of the vault are at Appendix 3. Companies records are adjacent to the vault.

Consultant’s Report

As this report refers to a consultant’s report it is important to note that during 2007, while still at the Confederation Building, the government determined it needed a global preservation assessment of both its holdings and the physical plant of the Registry. It hired a Preservation Consultant / Conservator (“the consultant”) to study the Registry and provide her opinion on the overall facility environment, the status of holdings and to indicate any preservation concerns she had. The consultant found the facility environment was seriously deficient and that the holdings were in a fair state of condition. One observation was:

Many policies and procedures, such as duplication, reading room protocol, research use, and hours of operation for example are written and in effect, while others such as preservation reformatting, handling of records by researchers, routine monitoring, and marking of records are in effect on an ad hoc basis but have not yet been written. Problems in areas such as food and drink restrictions, document returns, and vandalism are recurring despite existing policies and procedural guidelines and are of concern to the staff of (the Registry) in light of the absence of backup copies of the deeds information.

The consultant's recommendations were broken into headings of "high priority" and "medium priority."

High priority items were:

- (1) Policies and procedures should be developed with regards to all activities in the Registry, particularly policies surrounding handling, use (duplication in particular), research room protocol (restricting pens/markers, food/drink) and security (researcher supervision, banning bags/briefcases, etc.) Those already in practice require a written form to ensure consistency and continuity in practice. Additionally, strict enforcement of these policies and procedures with punitive consequences would be required in order to ensure compliance.
- (2) A disaster preparedness plan.
- (3) "It must be ensured that environmental conditions (temperature, relative humidity, light) in the vaults and corporate record rooms are maintained within the recommended ranges year round..."
- (4) "Materials stored under or in proximity to potential leaks...should be provided with preventative measures to offset damage due to accidents."

Medium priority items included attending to the issue of heavy dust, proper enclosures for bound volumes, improved storage of documents in acid free folders and the removal of "all harmful and inappropriate fasteners," and "regular and scheduled housekeeping practices."

The first high priority issue, the rules (Appendix 4), precipitated a complaint to this Office and this investigation.

The Complainants

The complainants are 17 professional title searchers who provide services to members of the public, most often members of the legal profession. Their primary job is searching and documenting chains of ownership of real property, however there are a number of other functions they perform in areas of personal property searches, corporate searches and the like. In the title search sphere, the searchers answer three key questions:

- (1) does the owner have a saleable interest in the property?
- (2) what kind of restrictions or allowances pertain to the use of the land? And,
- (3) do any liens exist that may have to be paid out at the closing of the land transfer process.

These specialized services have been offered to the legal profession and the general public for approximately forty years, and they now form an essential part of the residential and commercial real estate trade in the province.

Early in March 2010, the complainants began registering forms with the Office of the Citizens' Representative outlining their dissatisfaction with the rules that were put in place on or about March 9th, when the Registry moved to the new site.

While mostly satisfied with the physical attributes of the new Registry, the searchers were upset by the new rules. They believe the rules are unreasonable and show little appreciation or understanding for the work they do. They assert that while the Registry contains some materials worthy of "archival" designation, the Registry is in effect a "working library." Its holdings are, by necessity, meant to be accessed, handled, referenced and often copied.

Many stated that if the Registry holdings are indeed worthy of deposit in an archive, they should be copied and the originals sent to an archive.

Of particular concern were:

1. **Food and drink:** Searchers noted that while they are unable to bring food or liquid into the building, government employees are, and have been seen with liquids at their desks. They state that in the previous Registry, searchers were permitted to bring in cups with lids and did so without any spillage.

Some suggested that searchers be allowed to eat at a single table in the research area during a pre-determined time in the day. Many find it unfair that while they are eating outside in their vehicles, hot food has been seen delivered to government employees.

2. **Use of Ink:** With new rules stating that “only pencils are permitted in the research and vault areas...ink in any form is prohibited” the searchers claim that the permanency of the records they produce in pencil is not the same and they are many times forced to duplicate their work with ink afterwards, away from the Registry building. The searchers state they are not marking originals, only copies.

They claim for liability purposes, the records produced by searchers need to be in ink because pencil markings fade over time. Pencil markings are not able to be faxed reliably and easily smudge.

The group found a 100% erasable pen (Appendix 5) that they feel is no more damaging than erasing pencil marks. They state this pen was prohibited, contrary to the opinion of the Conservator at The Rooms. No coloured pencils allowed means that searchers can no longer colour code different chains of title on one document. Meanwhile, they claim there are no restrictions on staff using pens.

3. The **prohibited use of office supplies** such as tape, post-it notes and paper clips makes their work more frustrating.
4. **Access to loose deeds** is limited to thirty minutes daily and access should be as-needed. Only four searchers are allowed into the loose deeds area at a time.
5. Searchers also reported **limited consultation on the imposition of the new rules**. As primary users, none of them were interviewed by the government's consultant when the 2007 study of the old Registry was performed. While a small number had meetings with senior officials and the Minister, most searchers complained that they attended one meeting which contained a simple message: “This is not a consultation, these are the rules.”
6. Some complained about the **temperature** in the vault area.
7. Their **inability to store municipal maps** on the premises as they had previously at Confederation Building.
8. **Little or no maintenance of holdings, delays in the repair of volumes and delays incurred** when volumes are sent out of the Registry for repair. Many searchers pointed out that the system of spot-repair of holdings was once a daily occurrence but is now sporadic. The group now feels that reporting damage they discover is counterproductive as the books become unavailable when damaged.

9. The new **fire protection system** in the vault is said to be highly effective, but dangerous in that it quickly reduces the oxygen supply in the vault. Searchers claim they have never been advised what the system does or what to do if it engages.
10. **Parking** spaces can be hard to find and one searcher claimed 75% of spaces are allocated for staff.
11. There is **no access to the condominium index or the records of dissolved companies** which makes corporate histories hard to trace for their clients.
12. **Cell phone coverage** is poor and searchers have to send and receive phone calls near windows in order to properly conduct business.
13. Closed Circuit Television (**CCTV**) surveillance makes searchers feel uncomfortable and shows how little they are trusted.

Searchers claim that there is no one more concerned about the preservation of documents than they are, and point out they have a vested financial interest in the well being of the holdings. However, they feel a more reasoned and sensible approach would have made the transition to the new Registry easier.

While searchers realize they are not provided with an "office space" in the strict sense of the term, they maintain that they need to enter the Registry daily with the necessary tools to perform their jobs. As a response to the rules, some searchers have had to move their offices closer to the Registry.

The searchers claim that the net result of these concerns are lower productivity and a negative atmosphere between themselves and some government employees that has been further deteriorated by an "us and them" environment that several searchers described as "mean" and "toxic."

The Respondent

The Respondent is a division of the Department of Government Services. The Commercial Registrations Division is responsible for maintaining nine different legal registries for the province. The Director of Commercial Registrations ("the Director") is charged with its day to day operation. The Director is appointed by the Cabinet under Section 4 of the *Registration of Deeds Act* ("the Act") and his responsibilities are set out in the Act and more particularly, a six page Position Description.

The Respondent asserts that the rules were implemented in the primary interest of protecting documents that have historical value and in many cases, are irreplaceable. It has taken its advice from the consultant, the Office of the Chief Information Officer, and a Conservator employed by the Rooms Corporation. The Respondent's position is outlined in the same order as above:

1. **Food and drink.** The rules state that "the consumption of food and drink by clients and staff, including all types of candy and gum is strictly prohibited in the research and vault areas." This limitation does not apply to the main office, which is physically separate from the reading room and vault areas and includes a lunch room (see Appendix 1) for use by government employees. No food product is permitted at the workstations of government employees. The department states that it allows liquids with appropriate lids to be consumed at employee workstations in the main office and that historical volumes are now rarely found in the individual workstations of government employees.

There have been sporadic instances of members of the general public entering the Registry with liquids (most often coffee) and the department claims that employees will intercept the citizen to advise of the policy. The department states it has softened its position on liquids in the research area by installing a water cooler outside the research area and permitting liquid on compassionate grounds to at least two searchers who required liquid on hand at all times. It has restricted the storage of food in lockers to avoid infestation and spillage.

2. **Use of Ink.** The department maintains that it is the prerogative of the Director, under law, to restrict the use of certain types of writing instruments. The use of this prerogative was reinforced by the consultant who stated "...a preliminary step in the preventive conservation of materials...would include the prohibition of pens and other ink implements, restricting writing and labeling to pencil only..." Staff members in the research area have been watching for pen use and in a non-intrusive manner have been advising of the policy and providing pencils free of charge.
3. **Prohibited use of office supplies** such as tape, post-it notes and paper clips. The department wishes to eliminate the future possibility of adhesives being added to records, and relies on the consultant's opinion that:

As a preliminary step to providing suitable enclosures, the removal of harmful metal attachments, such as staples and paperclips, from records should be conducted, as these can lead to indentations, and/or staining/deterioration of the paper through corrosion of the

metal pieces...most commercial tapes are also detrimental to records as, over time, the adhesive used in commercial tapes can become tacking and staining, resulting in yellow stains, or may become dry and brittle. Tapes that become dry and brittle result in their failure in securing inserted items, such as the maps and plans in the Registry indexes.

4. **Access to loose deeds.** Departmental officials state that at Confederation Building there was a unique security risk in that non-government employees were working in close proximity to government offices on a daily basis. This insecure office environment was taken into account during the design phase of the new site. To allow for continued access to loose deeds, which are documents that are in the administrative process of being registered, the Registry affixed a thirty minute viewing window from 2:00-2:30 p.m. for searchers to enter the main office and view loose deeds. The division states that the thirty minute window is "not carved in stone" and if the need arose they would extend the window to sixty minutes when required. Officials note that there have rarely been more than two days' worth of loose deeds to be processed, and that they would schedule overtime if necessary to process backlogged loose deeds. The division has not received any feedback from law firms regarding the thirty minute viewing window.
5. **Consultation on the imposition of the new rules.** The division asserts that searchers were not caught off-guard by the imposition of the new rules; they were advised that new rules were coming into effect and this implementation was delayed while searchers met with senior departmental officials, even the Minister of Government Services, to outline their concerns.
6. **Temperature** in the vault area. The temperature in the vault area is monitored electronically and both temperatures and relative humidity have to remain constant and within an accepted range for document preservation.
7. **Maps.** Since moving to the new Registry the issue of map storage has not been raised, however lockers are provided at no cost and are capable of storing a variety of materials.
8. **Maintenance of holdings, delays in the repair of volumes and delays incurred** when volumes are sent out of the Registry for repair. The division states that minor repairs are performed within the Registry by a designated staff member in the research area. Intricate repairs are performed by Office of the Queen's Printer and are given priority by that Office and returned to service as soon as practicable. Books that

are currently away for repair are listed in the research area for all to see.

9. **New fire protection system.** The Department procured a state of the art fire suppression system that is optimal for paper collections. (See Appendix 6). It is a "dry" fire suppression system that is oxygen depleting and gas based. It is the responsibility of the staff members in the research area, and the designated fire marshals for the division to clear the vault and the larger building envelope in the event of fire. The division claims there is no 1-2-3 step process of what to do: people in the vault should leave the vault immediately when the fire alarm goes off and the suppression system activates. Staff will be on hand immediately to facilitate evacuation.
10. **Parking.** 21 parking spaces are allocated to 31 staff and tickets are issued for parking violations. There are 16 client spaces and three wheelchair spaces.
11. **There is no access to the condominium index or the records of dissolved companies.** All documents registered under each condominium corporation are publicly available. These registered documents are located in the mobile shelving system in the "Companies vault" – where files for the Registries of Companies, Co-operatives and Limited Partnerships are also stored. There is no restricted access to this information as the vaults are publicly accessible and adjacent to the research area where the public can review these registrations. All index information on every corporation in the Registry of Companies is searchable online through the CADO system (through public terminals located at the Registry or online through the Internet).

All active corporations and virtually all dissolved corporate files are publicly accessible at the Registry. Exceptions to this are several filing cabinets of older dissolved corporate files as well as dissolved corporate files that are on microfiche media.

The division's strategy for corporate records has been multi-phased given the quantity of files to transition. Phase 1 ensured that the first day at the new site contained all active corporations as well as all recently dissolved corporations – this accounted for the majority of the companies registry holdings. Phase 2 has been completed which entailed moving the bulk of the older dissolved files to the publicly accessible mobile shelving units at the new site. The last phase involves moving old dissolved files that are contained on microfiche media as well as the remaining legacy files (approximately 7 file cabinets). The Registry's current microfiche reader is near the end of

its life. The Division is planning on converting the carrier on one of its microfilm reader/printers from microfilm to microfiche. When this is complete the microfiche will be moved down to the new site.

These remaining files are located in storage at the Confederation Building. Should a request be made to access one of these records, division staff will go to the Building and either bring down the applicable file or make a copy from the microfiche (although copy quality from this old machine is not ideal). The turnaround time for providing this service is within 24 hours. In urgent circumstances the division will obtain materials within a couple of hours. Experience shows that there is less than one request a month for any of these files.

12. **Cell phone coverage.** The division has received several complaints regarding cell phone coverage strength in the building. While cell phone coverage is obtainable throughout the building some user phones have difficulty with reception strength unless they move close to an exterior window. Since this issue was first reported to the Director back in March, the Director and managers have made multiple requests to Transportation and Works to seek a cost estimate from Aliant to have wireless repeaters installed. As both the building management and telecommunication services are handled through Transportation and Works the division is obliged (to take) this route. This has been a frustrating point for the division as well and it will continue to seek to have this item addressed. The Director has periodically communicated status back to those who have raised the issue of cell phone reception.
13. **CCTV.** Increased monitoring of activities in the Registry were recommended by the consultant and confirmed by a 2010 Royal Newfoundland Constabulary robbery prevention assessment. The CCTV cameras are designed to monitor the collection and provide surveillance inside the building after hours.

The division claims that it has made some concessions to improve conditions under the new rules: it has constructed the research area to allow for use of laptop computers, it has allowed liquids in bottles in select cases on compassionate grounds, it has installed a water cooler and it is flexible in relation to loose deed viewing. It claims the rules have been working their way through the system for years and should not have come as a surprise. Access to senior officials, including the Minister, Deputy Minister and Assistant Deputy Minister has been granted on the subject and the division feels that it has given searchers and/or their representatives ample opportunity to state their case.

The Investigation

After a preliminary interview with one searcher and some background research and fact finding, this investigation commenced on March 4th 2010 by way of a statutory letter of intent to the Deputy Minister under Section 26 of the *Citizens' Representative Act*. The Deputy Minister and responsible Assistant Deputy Minister met with the Assistant Citizens' Representative and I on March 9th. On March 11th I wrote to request all materials associated with the decision to implement new user rules at the Registry. These materials arrived in bound format on April 23rd and were analyzed. From June 8th – June 15th a total of 15 title searchers were interviewed (two others did not respond to calls from our Office). The Assistant Citizens' Representative and a staff Investigator interviewed the Director and his Deputy, with the Department's Director of Policy and Planning in attendance, on July 7th. The following day the Registry was photographed, temperature readings were taken and cell phone calls were placed to our switchboard from the washroom corridor. Follow up visits for temperature readings and parking space assessments were made on August 2nd.

On July 19th, during a routine cross-check of documents submitted by both sides of the complaint it was discovered that some documentary evidence dated April 9th, submitted by a complainant, that ought to have been in the possession and control of the Department was not in the Department's disclosure. I wrote the Deputy Minister to express my concern on July 19th and received a reply on July 22nd. The Department stated that it provided disclosure on April 23rd after receiving the document package from the Division on or about April 1st. The Department claimed that the April 9th document, an e-mail, had been generated after the package left the Division and that the matter was "an oversight and not in any way intentional." This incident led to further scrutiny of the documents submitted by both sides and 4 other documents were identified that had not been disclosed. Three of the documents pre-dated our initial document request of March 11th and the fourth had been produced prior to the date of transfer between the Division and the Department on or about April 1st. I regarded these four letters, as being relevant to the investigation in that they contained contrary opinions by members of the legal community on the subject of the new rules. I reiterated my request via mail on July 26th and received 16 additional documents, including additional dissenting opinions from lawyers, on August 24th, 2010.

Issue

Are the new rules fair when viewed through the lens of Section 37 of the *Citizens' Representative Act*?

Test

Section 37 of the *Citizens' Representative Act* sets out the test to be applied to all investigations undertaken by this Office. Section 37 states:

37. (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion
- (a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be
 - (i) contrary to law,
 - (ii) unreasonable,
 - (iii) unjust,
 - (iv) oppressive,
 - (v) improperly discriminatory,
 - (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,
 - (vii) based wholly or partly on a mistake of law or fact, or
 - (viii) wrong;
 - (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
 - (i) for an improper purpose,
 - (ii) on irrelevant grounds, or
 - (iii) on the taking into account of irrelevant considerations; or
 - (c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to

the appropriate minister and to the department or agency of the government concerned.

(2) In making a report under subsection (1), the Citizens' Representative may recommend

(a) that a matter should be referred to the appropriate authority for further consideration;

(b) that an omission should be rectified;

(c) that a decision should be cancelled or varied;

(d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;

(e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;

(f) that reasons should be given for a decision, recommendation, act or omission; or

(g) that other steps should be taken.

Discussion

For most citizens, the purchase of a parcel of land or a home represents the largest financial and legal transaction of their lifetime. For commercial interests, the ease and cost of identifying and acquiring suitable properties, and remaining in good stead with the Registry of Companies is important to their ability to compete in the marketplace. The purchase, sale and refinancing of real and personal property is a significant component of the provincial economy.

This requires, at a minimum, a well-run Registry of Deeds and Companies. While the province has aimed to put its deeds online, it still maintains an antiquated paper-based system (one of only two remaining in Canadian provinces – PEI being the other) which requires in-person searching of any document registered before 1982. Newfoundland and Labrador is at least three years from having its deeds online. In the interim, professional searchers and members of the public will frequent the Registry as much (or more given the buoyant state of the economy) than they ever did.

The complainants have filed a complaint about the imposition of the new rules. I will address each allegation as previously delineated.

1. **Food and drink.** No one relishes the idea of having to leave a building to eat a frozen sandwich in their car during the winter, and a warm lunch with the car windows open in the summer. While I cannot support the proliferation or consumption of food and beverage in the vault or research areas (volumes will always be found in the research area during operating hours) I believe a fair approach would be that searchers be allowed to bring capped beverages and foodstuffs in proper containers in from the outside for storage purposes in their lockers, and the Registry can reserve the right to dispose of any food or beverage at the close of business on Friday. I note that locker agreements are in place and that in at least one case already the agreement has been altered to permit the storage of specific food items in a searcher's locker. The Director points out that "this individual has been appreciative of this accommodation and has not taken these items from the locker into the research area and removes these items at the end of the day." There is still water available inside for those who require a drink.

The Division should therefore, upon request by a user (or "client" as stated in the agreement), amend its locker agreement to allow capped beverages and foodstuffs in proper containers to be stored in lockers and removed at the end of each day, and all lockers will be emptied of food and beverage by the Division at the close of business on Friday. Non-compliance by any client should result in revocation of this privilege. I believe this is a non-intrusive way of accommodating frequent users and allowing the users the decency of preserving their food, even if it cannot be consumed in the research area or vault.

The Library and Archives of Canada allows food and liquid to be stored in lockers in accordance with a user agreement (see Terms and Conditions Section 7, line 2, at Appendix 9). I note that Prince Edward Island (Charlottetown) does not allow food or beverage in its search area, however capped beverages are permitted in the building. The province of Nova Scotia offers walk-in search service of its electronic vaults at eighteen locations; a departmental directive states there is no food or drink permitted in search areas.

2. **Use of Ink.** Prince Edward Island allows ink in all areas of their registry. However, they report having no history of records defaced by ink whatsoever. Advice was sought by the Director on the use of pencils versus ink in the context of protection of the Registry holdings, in response to the proposed use of a particular erasable gel pen made by Pilot Corporation. On March 18th, 2010 the Director contacted The Rooms. Citing his authority under Section 37(9) of the *Registration of Deeds Act* regarding the interdiction of "pens or writing or marking instruments except a soft black-lead pencil the

marks of which may be readily erased," he asked the professional opinion of the Government Records Archivist, and the Director/Provincial Archivist.

The Records Archivist passed the inquiry on to the Provincial Archives Conservator at The Rooms (the "Conservator"). The Records Archivist referred to the Conservator as having "the technical expertise for this inquiry." The Conservator answered the Director's inquiry on March 18th, stating:

Re: the use of ink on archival documents. This is a no-brainer. Stick to the policy of pencils only. Do not allow the use of pens of any kind anywhere near your documents. Do not make any exceptions. It would be less harmful for them to take a picture or photocopy of the document. You definitely do not want people to be using erasers – they could erase some of the document and certainly they will damage the paper surface, which is already degraded. People are not being restricted by this measure. Documents are being preserved...

Sometime after March 18th a title searcher visited The Rooms and met with the Conservator. He outlined the position held by many professional searchers with respect to the difficulty of practicing their trade in a pencil-only environment. He had an erasable pen with him and demonstrated it to the Conservator.

In an e-mail to the Director, (copied to the title searcher), dated April 9 2010, the Conservator states she was approached by the title searcher about the rules:

(The searcher) pointed out that the majority of your records are not strictly 'archival,' in the sense that they are still being added to/changed by notations (in ink for permanence) when necessary by your staff. Of course, this does not make the documents any less valuable or vulnerable, especially if they are the sole and original copies. However (Davis) explained (his) group of professional researchers are very familiar with, and respectful of, these documents and do not mark the original copies. They make changes and notations on copies taken from the originals, to illustrate legal points to their clients. If the area in which this work is done, is separate from where the records are stored, I don't see a problem with allowing different types of pens and markers in this location.

The change in regulations, to making notes for abstracts, from the originals, in pencil rather than pen, seems to be causing some difficulty for office staff in transcribing the notes, pen/ink being more legible. This is where the researchers would like to be able to use the erasable gel pens. Other than making exceptions for 'registered researchers' (as opposed to private individuals verifying family property registrations), of your office can or is now, providing scanned copies of these documents, researchers could make their notes from prints of those copies – marking them in whatever way necessary, without changing the original in any way.

If digital downloading is not yet available, you might make this exception for your regular researchers with the proviso that they use markers other than pencil only in the work areas set aside for them, not in the stacks or storage areas. As a further security measure I suggest that all users register by signing in and out, with time, date and contact information, and further with the which documents they examined. A small amount of additional work perhaps, but which provides a lot more documentation in case of tampering, loss, or damages to your records. I see no need to changing the 'pencils only' requirement for the general public, on your public notices and posted regulations.

Later that day, at 5:05 p.m., the Director replied to the Conservator via e-mail, pointing out that the materials contained in the vault area could be removed to the research area, and therefore be proximate to ink. He stated that he would be further restricting the work of users of the Registry by requiring that materials remain in the vault. He did not believe that creating a separate class of users for searchers and waiving certain aspects of the policy was practical. He stated that as custodian of the records he was obliged to put reasonable measures in place for the protection and preservation of the records, and he did not believe that making notes in pencil would prohibit users from completing their work.

The Conservator replied at 5:27 p.m., thanking the Director for the clarification and conveying her belief that laptop computers would be the "obvious answer to pencil (il)legibility." She suggested that staff should move the most fragile and at-risk documents to the photocopy area and perform the photocopying themselves. The Director felt this would also inhibit the work of searchers and take up staff time.

I note that the title searcher was not copied on the 5:05 and 5:27 exchanges and this perpetuated the misunderstanding that the Conservator was siding with the searchers on the subject of proximity of ink to the holdings.

I note that according to Pilot Corporation of America, erasable pens are not recommended for use on legal or official documents.

While ballpoint pens were viewed in staff areas of the research area (Appendix 7) (these may have been confiscated items), I am not prepared to recommend that pens or ink be allowed for use in the research or vault areas; not because the searchers are particularly suspect (they exercise a high duty of care and exhibit an understanding of the importance of the records), but there is no way to practically introduce a two-tier use of ink policy for searchers versus members of the general public, whose numbers (according to the 15 searchers interviewed) vary between 10 and 50 on any given day. Being more careful with a pen is not certifiable skill, and would lead to misunderstandings and inevitable conflict with members of the general public.

If the general public is responsible for the past damage viewed in some photographs, the ban is justification enough to cease the practice of allowing any ink in proximity to records. I note the Library and Archives of Canada also has a "pencils only in proximity to records policy" (see Section 18, Line 1 at Appendix 9).

While it is an inconvenience, the decision is not an excessive use of authority. Use of ink was important enough to be anticipated by legislative counsel, which drafted the *Registry of Deeds Act*. It is the express legal prerogative of the Director to restrict such use, and this power is not being exercised for an arbitrary or improper purpose and the restriction can be rationally explained. The decision does not violate a basic right, or overburden searchers and there were searchers who expressed as much to our Investigators.

3. **Prohibited use of office supplies** such as tape, post-it notes and paper clips. It is true that tape and post-it notes contain adhesives and paper clips, especially corrugated clips, can damage records. I have no doubt that searchers heightened awareness of this sets them apart from incidental users, however again, a two-tier rule will not work. I note that adhesive labels are also not permitted in the Library and Archives of Canada (Also at Section 18, Appendix 9).
4. **Access to loose deeds.** In the former Registry, the interaction was such that a stranger entering the Registry would not be able to tell who worked for government and who didn't. The two groups intermingled and given the physical layout of the Registry, searchers could move relatively freely into space occupied by government employees. Two searchers admitted that this set-up gave rise to "taking advantage" of unimpeded access to government offices, and searchers frequently entered government offices to speak with officials.

The advent of rigorous privacy and security rules have changed all of this. It is no longer acceptable in our privacy climate that non-government employees be proximate to documents held on government property, and while searchers are more frequent users, for protection of privacy purposes they must be defined as members of the public. The Registry holds personal financial information in the form of bank account and credit card numbers and other personal information which the general public relies on government to treat with utmost care. This in no way impugns the character or motives of the searchers we interviewed, but recognizes that at any time a privacy breach could occur. These concerns gave rise to the need to design the new registry in such a way that public access to office space and to certain information being held by government was limited. With all of this said, it is still necessary to allow searchers inside to view loose deeds to ensure the integrity of the search process. I am relying on the Registry to expand the

thirty minutes to sixty minutes when necessary such that no searcher who needs to view loose deeds should be denied.

5. **Consultation on the imposition of the new rules.** The consultant did not confer with primary users of the service as part of the overall 2007 study, which may have been a mistake, however I find that the issue of new rules in the Registry dates back through two Registrars, and that meetings were held between certain influential members of the search community and the Minister of Government Services, the Deputy Minister and Assistant Deputy Minister and the Director. While these meetings did not achieve the desired result for searchers, they had access, and their points of view were considered (albeit not accepted).
6. **Temperature in the vault area.** Two complainants referenced the cold temperature in the vault area. The consultant recommended in 2007 that paper records and machine-readable materials have a compromised temperature of 18-20 degrees Celsius at all times, with a maximum of 21 degrees Celsius. As part of this investigation, a random temperature reading was taken on the afternoon of July 8th with a recorded reading of 19 degrees in the vault. A second reading was taken on August 3rd which showed 19.5 degrees in the vault. According to the consultant, temperatures higher than 21 degrees "results in acceleration of the chemical reactions, which lead to deterioration." I am satisfied that the temperatures in the vault are within the recommended range for document preservation as recommended.
7. **Maps.** Municipal maps are a non-invasive tool of the trade and I believe that a strategically placed locker in the research area could hold these maps neatly, and as long as the map owners are satisfied to keep them there at their own risk, they could augment their work without posing a particular threat to the collection. Due to their size, they cannot be stored in the lockers located in the foyer.
8. **Maintenance of holdings, delays in the repair of volumes and delays incurred when volumes are sent out of the Registry for repair.** The Act states at Section 30:

30. Bound volumes of documents deposited for registration before July 1, 1984 shall be maintained and repaired.

While some searchers asked why these holdings aren't being scanned faster, the complexity and sheer labour-intensiveness of scanning makes it a painstaking process. Holdings are brittle, folded, glued, taped, tied together with ribbon and some contain maps that are larger than today's average document scanner. A meticulous and exact scan must take place of each of the 2.4 million pages representing the period 1825 to 1980 to ensure its viability as an electronic record. Likewise, deeds have to be cross-referenced

with their indices to ensure that things like a release of mortgage written in margins are taken into account. So it is inevitable that repairs will take time. There is an employee assigned to making simple repairs and the Registry should ensure that these repairs are ongoing, and be seen to be ongoing in order to bring searchers back to reporting the need for repair. They are the most frequent users, and they have been traditionally the first to report such damage.

I believe that posting the volumes out for repair (as seen in Appendix 8) is reasonable, and I would expect, as well as encourage, the Registry to conduct regular follow up with the Queen's Printer to ensure volumes are returned as quickly as practicable.

9. **New fire protection system.** The new system is state of the art and critical for the preservation of records in the event of fire. As in any other building, occupants should leave the building immediately upon hearing an alarm. Prominent signage is posted to this effect (see Appendix 6). I accept the Division's assurance that staff and/or fire marshals will attend immediately in the vault in the event of fire and system activation.

10. **Parking.** Parking spaces at the Registry and the adjacent RBC Bank were observed on August 3rd 2010. RBC is taken into account here because there is an Agreement registered between the previous owner of the registry (the NLC) and the Royal Bank of Canada which provides for joint maintenance and use of the marked parking area surrounding the two buildings, and provides a right of way to RBC. There are a total of 28 marked spaces surrounding the RBC building, 14 of which I note indicate "RBC customers only" on the side facing the Registry. The Registry has a total of 42 marked spaces, including three "blue zone" spaces. Of the 39 available spaces surrounding the Registry, 21, or 54% are allocated for staff as permit only parking. I do not find this parking situation to be untenable given that there are 21 spaces allocated for a stated staff complement of 31. Our Investigators had no difficulty obtaining parking spaces on various trips to the Registry, and in the words of one searcher "it is still closer than when we worked out of the Confederation Building."

11. There is **no access to the condominium index or the records of dissolved companies.** Information on condominiums is readily available for access in the "Companies" side of the vault. I encourage the Division to hasten the movement of all dissolved company information into the new site to facilitate public access.

12. **Cell phone coverage.** While a test conducted by this Office on July 8th 2010 indicated there were no difficulties in placing cell phone calls from a government issued cell phone inside the building, I accept the Division's acknowledgments of problems and its position on improving service via the installation of wireless repeaters. As this infrastructure installation is not the domain of the Division I encourage the Division to keep up its efforts.
13. **CCTV.** The consultant opined that "monitoring of researcher activity must be conducted, and researchers observed and accompanied at all times when handling and researching records...If supervision of researchers and materials is not put into practice, the restriction of large bags and briefcases would be necessary to limit possible theft and vandalism."

I do not accept that the searchers we encountered were prospective thieves or vandals, nor do I believe they are viewed as such by the Division. I believe the consultant was unaware, having found no reference to her interviewing title searchers in connection with her report, of the niche the searchers occupy as frequent users. There was perhaps a misunderstanding by the consultant that the Registry was frequented more often by members of the general public.

I believe that monitoring of activity, however, is important to the extent that it would provide a video record of damage inflicted or theft (for law enforcement purposes), in addition to the system providing after-hours security. I uphold this decision as fair and in keeping with modern security expectations in public buildings.

What we have in the Registry of Deeds and Companies is a public building in custody of a public asset that is currently designed for public access and physical handling. While the province has a duty to protect and preserve the holdings of the registry it has to accept that it is a research facility, a sort of hybrid library and archive. Government recognizes fully that until such time as the records are entirely digitized, these documents are going to be handled and the Division is quite right in saying that they should be handled with care. Every searcher interviewed in this investigation agrees: they hold great respect for the documents, as they have an interest in their preservation for purposes of earning a livelihood.

So where is the balance? The balance is struck where the public has access and the Department's interests are preserved; and there is no other way to do so than to establish ground rules for access. In doing so, the Department must set parameters and in this case it had to look at the nature of the information it is granting access to, and the propensity for it to incur any further damage. This is what has given rise to the debate between "archival rules" and "working library" rules.

Conclusion

Title searchers are basic to all corporate and real estate transactions in the province. They are non-public servants who serve the legal profession while conducting the majority of their work in a public building. According to the consultant, "direct use and handling is an innate factor in (Registry) operations."

As the primary users of Registry holdings they are cognizant of their responsibilities to protect the holdings. The Investigators in this file heard no account of any punitive actions taken recently or historically against professional searchers. However, I agree with the consultant when she states that failure to take appropriate measures to protect the resources of the Registry is a failure to act as a careful steward. There is a significant administrative consequence to establishing a certification or "clearance" regime for professional searchers at a point where forecasts predict a much more complete online system in three years.

I find the current system of rules are a combination of reasonable and unreasonable imposition; however I am unable to recommend that the entire system of rules be overturned or dispensed with.

I do, however, make the following recommendations which I ask the Department of Government Services to consider as it moves toward a complete online system.

Recommendations

1. I note that on several trips to the Registry by our staff, no signage indicating the new rules were posted. The Department should post the rules (or a condensed version thereof), in a conspicuous place so that everyone entering the Registry is aware of the existence of the rules. In this way it is appropriately communicating its expectations to all users, frequent or infrequent.
2. The Department should, as a courtesy to its regular users, install an unlocked, upright map storage locker in the research. Because these municipal maps are large and usually scrolled, they would not fit inside the foyer lockers. I believe this gesture would be non-invasive, reflect the Director's duty to be responsive to the needs of the business community, to be service-oriented and to accommodate users as set out in the Major Challenges Section of the duties of the Director.
3. In the spirit of fairness, the Department should amend its locker agreement to allow capped beverages and foodstuffs in proper containers to be stored in lockers and removed at the end of each day, and all lockers will be emptied of food and beverage by the Division at the close

of business on Friday. Non-compliance by any client should result in revocation of this privilege.

4. The Department should extend loose deeds access to 60 minutes, when necessary.
5. The fifth recommendation would benefit both the searchers and the Department. I believe that the "committee" many spoke about should be resurrected. One issue at the heart of all of these complaints, I believe, is the tense relationship between government employees and persons who spend as much time in a government building as a paid employee would. It would seem there have been various flare-ups and periods of détente between these two groups.

I believe that mutual respect and preservation consciousness are the watchwords in this case. These should form the basis of a self-appointed ad hoc committee of four persons (two government employees and two searchers) to discuss issues of concern on a quarterly, or some other basis. I would recommend the Director be one of the Division's representatives. This will promote dialogue and prevent issues like those posed to this office from simmering for long periods of time.

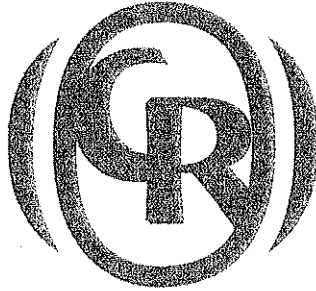
I invite the complainants and the division to submit, in writing, their input on the factual information in this report by September 30th, 2010. I will then issue an addendum to this report.



Barry Fleming, Q.C.
Citizens' Representative



Date



OFFICE OF THE CITIZENS' REPRESENTATIVE

ADDENDUM

**REPORT OF THE CITIZENS' REPRESENTATIVE
CONCERNING COMPLAINT # 67-84CF10**

**ISSUED IN ACCORDANCE WITH SECTIONS 37 AND 39 OF
THE CITIZENS' REPRESENTATIVE ACT**

26 OCTOBER, 2010

Complainants: Title Searchers – Registry of Deeds and
Companies (17 Complainants)

Respondent: Department of Government Services –
Commercial Registration Division

Introduction

In a report dated 6 September 2010 I communicated the results of this Office's investigation into complaints from 17 professional title searchers regarding the imposition of new rules at the Registry of Deeds and Companies in St. John's.

The report concluded that the current system of rules were a combination of reasonable and unreasonable when viewed through the lens of the *Citizens' Representative Act*. While the province has a crucial role as a steward of a public and historic resource, the investigation concluded that title searchers, as primary users, did deserve some minor concessions to make their essential jobs easier to perform.

The report culminated in five recommendations that, in my view, could ameliorate the time remaining before the province has full online access to company and deed records while preserving the Registry holdings. The essence of the recommendations were as follows:

1. **The Department should post the rules** (or a condensed version thereof), in a conspicuous place so that everyone entering the Registry is aware of the existence of the rules. In this way it is appropriately communicating its expectations to all users, frequent or infrequent.
2. **The Department should, as a courtesy to its regular users, install an unlocked, upright map storage locker in the research area.**
3. **The Department should amend its locker agreement to allow capped beverages and foodstuffs in proper containers to be stored in lockers and removed at the end of each day, and all lockers will be emptied of food and beverage by the Division at the close of business on Friday.**
4. The Department should **extend loose deeds access to 60 minutes** when necessary.
5. **Resurrection of a self-appointed ad hoc committee of four persons (two government employees and two title searchers) to discuss issues of concern on a quarterly, or some other basis.**

RESPONSE

I invited the complainants and the Department to submit, in writing, their input on the factual information in my report by September 30th, 2010.

Two submissions were received: one from the Department, through the Deputy Minister, and one from a complainant.

The Departmental response

The Department wished to clarify two items prior to responding formally to the recommendations:

1. On page 2 of the report, the statement "companies records are adjacent to the vault" may lead one to believe that companies records are not stored in a vault, when in fact they are.
2. On page 20 - where reference is made to the consultant's opinion related to "researcher activity" and CCTV – the Deputy Minister wrote "I believe it is important to ensure that these statements are in no way construed as specifically referring to title searchers as that would not be correct."

The Department's response to the recommendations of this Office follows in italics:

1. (RE: Post the Rules): *The Department is already in the process of requesting permanent signage through the Department of Transportation and Works. However, as an interim measure, temporary signs have been created by the Division and posted in a conspicuous places throughout the Registry...The policies and procedures have also been posted in the research area...This document should replace the version contained in your draft report as the final section of the **General Archive Rules**, entitled "**Penalty For Non-Compliance**" is missing from your report;*
2. (RE: Upright map storage locker in the research area): *The Department does not see a need for a map storage locker in the research area. Maps are considered to be personal reference materials that should not be required to be stored within the research areas. Title searchers can scan maps and access them electronically using their laptop computers or they can store the maps at their own office locations and access them there as necessary.*

3. (RE: Amended locker agreement to allow beverages/foodstuffs in proper containers): *The Department has amended the Locker Agreement in exceptional circumstances for compassionate reasons (due to medical needs). We are not in agreement with amending the Locker Agreement as you have proposed. Concerns related to the storage of food or beverages and potential mold and leakage would continue to exist and it is not the responsibility of divisional staff to administer and regularly check lockers for compliance. Additionally, we believe that this could potentially create privacy concerns for title searchers if lockers were to be checked on a weekly basis.*
4. (RE: Extend loose deeds access to 60 minutes when necessary): *Extending access to loose deeds, as is required, is currently the practice. The backlog of loose deeds that existed prior to the move to the new location has been alleviated and the Division has accommodated and will continue to accommodate extended access to loose deeds, when required.*
5. (RE: Joint ad hoc committee of Division and title searchers): *The Department fully agrees with the importance of open communication and ensuring that processes are in place to facilitate the respectful change of ideas, recommendations and solutions to problems. This is mutually beneficial to all parties. Therefore, we are in agreement with reinstating a self-appointed, ad hoc committee and would welcome representatives of the title searchers to contact the Director regarding their interest in re-establishing a committee.*

Title Searcher response

This Office received one response from a title searcher. That individual will be contacted privately by this Office, however the most important points raised in the letter were:

1. (RE: Temperature in the vault). *...The current records date back to 1825. In those 185 years these old records have been subjected to such a variety of temperatures and humidity levels that their current condition is testament to the quality of the documents that were produced in the 1800's. Since the Registry anticipates only a few more years before all documents are digitized, it would seem a small concession for the vault area to be at a temperature comfortable for human beings in their daily work. It is unkind and unnecessary to enforce title searchers to continually go between a research area that is at a comfortable temperature of 21 or 22 degrees and a vault area which is at 18 degrees. The report of the Conservator apparently suggested a range of 18 degrees to 21 degrees maximum for the*

storage of these holdings...If the range is between 18 degrees and 21 degrees, it should be recommended for the health of searchers that the upper end of that scale be used to bring the temperature in the vault area closer to the temperature of the research area. This would help alleviate the freeze/thaw cycle that we are constantly going through in conducting our research.

2. (RE: Consultant's report): *From my own discussions with all of the complainants it is clear that the consultant made no attempt to discuss the workings of the Registry with those who make use of it on a daily basis for their livelihood. To create a new Registry of Deeds without any discussion whatsoever with the Registry searchers that represent 99% of the clientele is tantamount to creating a school with no allowance for students or a hospital with no allowance for patients. I do not know if the lack of consultation with Registry users was a decision made by the consultant or if it was a decision of the consultant not to consult with the users, then I would recommend another consultant and another consultant's report. In the even that the decision to not consult with users of the Registry was made by management then I would recommend new management. In either even the Consultant's Report needs review after consultation with end users of the system. I urge you to give some thought to this as you develop your final Report.*

Discussion

I am pleased that the Department has agreed to adopt three of the five recommendations tendered.

I maintain the view that the immaterial square footage required and the preponderance of surplus capital assets would make implementing the "map storage locker" recommendation not only easy and quick, but it would serve also as a sign of collaboration with, and recognition and facilitation of the role these professional searchers play.

Likewise, with due respect I do not accept that the Division would be overburdened by checking open lockers once per week, nor would it be bothered by leaks or mold problems if it allowed the deposit of capped beverages and foodstuffs in proper containers. There is never an expectation of complete privacy when a person uses a government asset, be that a computer, cell phone or locker in a public facility like a school or sports facility and in my view, this principle could easily be incorporated into a revised locker agreement. The Division has a staff contingent that is sizable enough to handle this light duty.

Despite the rejection of this recommendation, I note that title searchers are still entitled to request amendments to the locker agreement and it is within the discretion of the Director to approve or deny such requests on their merits.

I believe that the only outstanding matter with respect to the recommendations contained in the initial report by this Office is that of the committee. Some complainants spoke of an atmosphere that is "toxic." Public servants and professionals should be able to work above this level and I know this is possible after speaking with the Investigators assigned to interview witnesses in this file, who said without exception all witnesses were frank, truthful, professional and cooperative.

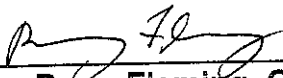
I am therefore directing the complainants to choose, nominate or elect two people to engage the Director for the purpose of re-establishing the committee to open lines of communication, seek areas of common interest and mediate complaints of a minor nature as they arise. This would include, I submit, the issue of regulating the temperature in the vault area by one or two degrees to the satisfaction of title searchers and the Division. I would appreciate any notification, formal or informal, that this committee has met for the first time.

At this time I am not prepared to recommend that a new consultant's report be performed. The previous consultant's report was commissioned to address issues at the old Registry of Deeds in terms of environment, status of holdings and preservation concerns. I would expect however, that any future studies undertaken in the new building would include, at a minimum, the input of the end users.

I continue to encourage the Department to conduct timely repairs (onsite whenever possible), to complete the process of updating the Director's job description, and to look at options for compromise with the primary users of the facility in the future whenever appropriate.

Without express order power, the *Citizens' Representative Act* only provides for a reporting of the rejection of recommendations by Department in the Office's next annual report. Therefore, barring reconsideration by the Department of recommendations 2 and 3 above, this case will be published in the 2010/2011 Citizens' Representative's Digest, with the rejection of the pertinent recommendations by the Department highlighted.

This file is now closed and I thank all who participated in the investigation for their time and patience.



Barry Fleming, Q.C.
Citizens' Representative

Oct 26, 2010
Date