

HOW TO CONVERT POSSESSORY TITLE TO PAPER TITLE
RELANS LEGAL EDUCATION CONFERENCE
MONDAY, DECEMBER 3rd, 2012

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Presented concurrently with

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1. This paper is supplemental to this author's 2006 CLE Paper "Affidavit Templates & Comments for Documenting Possessory Interests", the "2006 Paper", which is accessible at the LIANS website as:

www.lians.ca/documents/AffidavitTemplatesCommentsForDocumentingPossessoryInterests.pdf

With a few exceptions this paper does not repeat the contents of the 2006 Paper but builds on the information in the 2006 Paper. However, the template / drafting tool for affidavits or statutory declarations proving adverse possession attached as **Schedule "1"** to this paper is a revised version of the one found in the 2006 Paper.

2. Mr. DeWolfe will present his associated paper on the surveying issues in migrating title by adverse possession concurrently with this presentation.
3. **Definitions**
 - a. "*Brill*" means the Nova Scotia Court of Appeal decision in *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69;
 - b. "LAA" means the *Limitations of Actions Act*, as amended;
 - c. "LRA" means the *Land Registration Act*, as amended; and
 - d. "MTA" means the *Marketable Titles Act*, as amended.
4. **Overview.** Migrating a title based on adverse possession is not to be taken lightly. Before migrating a title based on adverse possession consider the following:
 - a. **LRA, s.37(9)(b)** - the **statutory authority** permitting you to migrate possessory title based on relevant Nova Scotia Barristers' Society practice standards in effect at the time of the migration.

- b. The Nova Scotia Barristers' Society **Practice Standard 3.2, Possessory Title** and related Practice Standards.
- c. **Other relevant enactments.**
- d. The **evidence** you can marshal to prove the elements required to establish adverse possession.
- e. The **evidence** you can marshal to prove that your client's claim is supported by "**colour of title**" if applicable.
- f. The **extent** and **description** of the parcel you are migrating.
- g. The **risk of provoking an action or claim** by the last known owner of record or other interested parties against your client, the Land Registration System and you as a result of the migration.
- h. Is there an **alternative LRA ground** under which you can base the migration to avoid the risk of using adverse possession?
- i. **LRA Notice requirements** for notice of the migration to the last known owner(s).

Statutory Authority

- 5. LRA, s.37(9)(b) permits lawyers to migrate titles based on adverse possession. This must be done according to Professional Standards in effect at the time of migration. Here are the material parts of LRA, s.37:

Application for registration

37 (1) Any person claiming to own a parcel that is not registered pursuant to this Act may apply to the registrar of the district in which the parcel is situated to have the title to the parcel registered pursuant to this Act.

...

(4) An application shall be in the prescribed form and shall be accompanied by

...

(b) an opinion of title certified by a qualified lawyer;

...

(9) The qualified lawyer's opinion of title required in clause (4)(b) shall be prepared in accordance with the relevant Nova Scotia Barristers' Society practice standards in effect at the time of the opinion and

(a) shall set out

(i) the interests being registered in the parcel and, subject to Section 40, all encumbrances, liens, estates, qualifications and other interests affecting the parcel, and

(ii) the direct or indirect right of access to the parcel, if any, from a public street, highway or navigable waterway to the parcel,

as appear on the records at the land registration office in the county where the parcel is situated; and

(b) shall be based upon a title search, as evidenced in an abstract of title, that shows a chain of title to the standard required to demonstrate a marketable title pursuant to the *Marketable Titles Act* or to the standard required pursuant to the *Limitation of Actions Act* or any other enactment or the common law, or to such lesser standard as the Registrar General may approve.

6. **Judicial recognition of the LRA provision.**

- a. In *Brill*, Fichaud, J.A., recognized that LAA is one of the "menu of standards" to generate the parcel register under the LRA. In paragraph [166] he states, in part, "Section 37(9)(b), offers a menu of standards to generate the parcel register, including the MTA, LAA, any other enactment, common law or "such lesser standard as the Registrar General may approve."
- b. The diagram annexed as **Schedule "6"** may be of interest as an overview of the various paths comprising the "... menu of standards to generate the parcel register..." referred to by Fichaud, J.A. The diagram shows the relationships of LRA, LAA, MTA and possible underlying Crown Interests in the migration process.

7. **The Land Registration Administration Regulations**, N.S. Reg 207/2009 (amended by N.S. Reg. 189/2010), Regulation 10(13) provides:

- (13) An authorized lawyer who is certifying title to a parcel whose ownership is registered in whole or in part on the basis of adverse possession must ensure that all of the following are done with the necessary statutory declarations that provide evidence of the adverse possession interest being certified, in compliance with Nova Scotia Barristers' Society practice standards:
 - (a) the declarations are filed in the Registry of Deeds before the parcel is registered under the Act;
 - (b) the declarations are listed as enabling documents in the registered interest portion of the AFR for the parcel, noting the registered owner as the interest holder for each of the statutory declarations.

Professional Standard governing migration of possessory titles

8. Professional Standard 1.2 - Migration under the *Land Registration Act*

When migrating a parcel under the *Land Registration Act*¹ a lawyer should advise the client of the impact of migration on the client and persons other than the client.

When a lawyer is taking instructions from a client to make an application for registration under the Act, the lawyer should explain the application for registration to the client and confirm the client's instructions prior to closing².

Notes:

1. *Land Registration Act*, S.N.S. 2001, c. 6, s. 37.

2. Standard 1.5 - Documentation

9. Professional Standard 3.2 Possessory Title. LRA Section 37(9) states that "The qualified lawyer's opinion of title required in clause (4)(b) shall be prepared in accordance with the relevant Nova Scotia Barristers' Society practice standards in effect at the time of the opinion..." Professional Standard 3.2 - Possessory Title states:

A lawyer may certify title established by possession in accordance with legislation, common law and equity.

A lawyer must document sufficient actual facts evidencing possession that will meet all the tests set by the courts for establishing possession sufficient to extinguish the interest of the paper title holder.

The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence.

The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing possession and address the extent of the area of land possessed¹.

In determining whether the standard of proof of possessory title has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title established by possession, a lawyer must consider the effect of the *Land Registration Act* with respect to possessory interests and lasting improvements² and advise the client accordingly.

When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the *Land Registration Act*, a lawyer must explain the qualifications to the client and confirm the client's instruction prior to closing.³

Notes:

1. Evidence of knowledgeable and disinterested persons: *Hebb v. Woods*, 1996 CanLII 5480, 150 N.S.R. (2d) 16 (S.C.) at para. 12: "The declarations or affidavits to prove possession should not be confined to general statements that the trespasser has been "in possession" or "occupation." There ought to be evidence of the actual facts which are relied upon as constituting the possession or occupation under the Statute. Thus the person in possession should show whether the land has been fenced and whether that is what is relied upon; whether it has been resided on, and if so, whether continuously or at intervals; whether it has been cultivated, and how - whether by continuous occupation or by taking crops off and leaving the land vacant between visits. In all cases the purchaser should be put in possession of the actual facts, so that he may exercise his judgment upon their effect, instead of stating the effect, leaving him in ignorance of the facts upon which the vendor relies."
2. *Land Registration Act*, S.N.S. 2001 c. 6, ss. 73-76. See also *Limitations of Actions Act*, R.S.N.S. 1989, c. 258, *Quieting Titles Act*, R.S.N.S. 1989, c. 382, *Public Highways Act*, R.S.N.S. 1989, c. 371, *Municipal Government Act*, S.N.S. 1998, c. 18, s. 308(4), *Vendors and Purchasers Act*, R.S.N.S. 1989 c. 487, *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, ss. 13-14, Marketable title: *Parsons v. Smith*, 1971 CanLII 49, 3 N.S.R. (2d) 561 (S.C. (T.D.)), Hart J.
3. Standard 1.5 - Documentation

Other relevant enactments

10. Consider Professional Standard 1.1 - Legislative Review and refer to
 - a. the *Environment Act*, s.108, for claims of title to infilled areas of watercourses,
 - b. LAA, (including ss.19 and 20, protecting persons under disability - *i.e.* the required period of possession may be 25 years not 20 years), and
 - c. the various statutes referred to in the 2006 Paper - refer to paragraphs 10-12. Pay particular attention to the statutes limiting adverse possession claims against the Federal, Provincial and Municipal governments.

Evidence

11. **Core Elements to Prove.** With thanks to Nova Scotia Department of Natural Resources, "DNR", for the following summary copied from its website - www.gov.ns.ca/natr/land/adverse-possession.asp) - these are the core elements of adverse possession that must be proved by adequate evidence:
 - a. **Actual Possession** - The land must have been actually used by the claimants without the approval of the owner. The use must be consistent with the nature of the land and in a manner similar to the use a true owner might make of the land. Isolated and separate acts of trespass do not establish possessory title.
 - b. **Open and Notorious** - The use and occupation must take place in an open and visible manner so that others, in particular the true owner, might know of or could regularly observe it. The use and occupation will generally be widely known by others in the area. The degree of notoriety will be consistent with the nature of the area in which the land is located.
 - c. **Continuous** - The possession must be continuous for the duration of the 40 years [40 years v. The Crown, 20/25 years for claims against subjects - ed.] (e.g. daily, weekly, depending on the nature and location of the land). A series of adverse possessors may be linked together to make a continuous period, if previous trespassers followed each other in succession in an unbroken chain.
 - d. **Exclusive** - The possession must be exclusive, not only with regard to the true owner, but also all others. Random acts of possession by various individuals will not meet the exclusive requirement for a possessory claim.
12. **Template.** Refer to annexed **Schedule "1"** which is a drafting template for a claimant's affidavit or statutory declaration in support of her or his possessory title. The template attempts to address all the core requirements to be proved. It is tilted toward proving title based on "squatting" vs. "colour of title" but can be edited as required for colour of title evidence. The template can also be adapted for the required supporting affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners. This template is intended as a tool to assist lawyers in drafting these affidavits or statutory declarations. As always, the lawyer's professional judgment in a particular matter must prevail.
13. **Colour of Title.**
 - a. Refer to *Brill* (paragraphs 128-156) for an extensive discussion on the possession required of someone with documentary title and the evolution of approaches taken by Nova Scotia's Courts on this issue.
 - b. Refer also to *Mason v. Mason Estate* (1999), 176 N.S.R. (2d) 321(NSCA) for discussion of constructive possession and colour of right starting at paragraph 27.

Extent and Description of the Parcel

14. Although Derik DeWolfe, N.S.L.S., addresses survey issues in his paper presented concurrently with this paper I include a few supplementary survey-related comments in the following paragraphs.
15. While it may not always be necessary to survey a "whole parcel" with an existing legal description that is claimed by adverse possession, it is good practice and in keeping with the *Quieting Titles Act*, "QTA", requirements to do so. Apart from the benefit of having a survey of the parcel claimed by adverse possession, the presence of a surveyor on the ground at the parcel may flush out potential objections from the owners of record before your client and you invest a lot of time and money in the proposed migration.
16. Determining the boundaries of a partial parcel that is claimed by adverse possession is a Surveyor's function and not a lawyer's function. This is stated in the Discussion Paper¹, the "Protocol", created by the mutual efforts of NSBS & ANSLs to clarify the scope of each profession's functions. Once a Surveyor has prepared a plan of survey showing the boundaries of the claimed partial parcel, the Protocol permits either a surveyor or a lawyer to prepare a written description based on the plan. The Protocol can be found at the RELANS website under Professional Standard 2.1 - Legal Descriptions and Parcel Identification.
17. If a parcel claimed by adverse possession is to be consolidated with a "paper title parcel", the Protocol, Schedule "C" (Best Practices), paragraph 18, reminds us that
 - "18. Before consolidating a parcel with title based on adverse possession or a benefit based on prescription with another parcel first record proper evidence proving title to that interest - e.g. a *Quieting Title Act* order or sufficient affidavits/statutory declarations."
18. Adverse possession does not require subdivision approval. "[FN86] It has consistently been held that boundaries established by quitclaim deeds used to acknowledge acquisition of land through adverse possession do not contravene any statutory prohibition against subdivision, and do not require planning approval because such a transaction does no more than bring the deed into compliance with existing possessory title: see *Re Turner and Turner Funeral Home Ltd.* [1972] 2 O.R. 851, 27 D.L.R. (3d) 30; *Re Duthie and Wall* (1979) 24 O.R. (2d) 49 (H.C.); *MacMain v. Hurontario Mgmt Services Ltd* (1980) 14 R.P.R. 158. This confirms what is perhaps obvious, that acquisition of property through adverse possession, without a quitclaim deed, does not contravene any prohibition on

¹ "Discussion Paper Prepared For Nova Scotia Barristers' Society & The Association of Nova Scotia Land Surveyors By The Working Group Respecting Parcel Description Questions. Revised January 15, 2008 Incorporating responses from members of the Professions to the Draft Discussion Paper dated September 5, 2007". Refer to Line 3 of Schedule B - Allocation of Parcel Description Tasks Between Surveyors and Lawyers.

subdivision. Any possible transfer of land in establishing a conventional line is certainly no more objectionable than that involved with acquisition of land through adverse possession.". Norman Siebrasse, "The Doctrine of Conventional Lines", (1995) 44 University of New Brunswick L.J. 229 at pp. 250-251, footnote [86].

Risks

19. Cautions to consider before migrating title based on adverse possession including:

- a. Challenges to migrations are possible. LRA provides a number of remedies to aggrieved persons. In *Brill*, at paragraph [167], Fichaud, J.A., states:

"[167] Once there is a parcel register, the LRA provides a process for consideration of objections. The Registrar General may act under ss. 33-34, or the court under ss. 35 and 91-92."

- b. You may trigger a claim by migrating title by adverse possession.
- c. Have you and your client realistically and fully considered the possibility and consequences of objections to the migration?
- d. A lawyer migrating title by adverse possession is generally the advocate for the claimant, as well as being the judge, jury and executioner in determining if there is sufficient evidence proving adverse possession. It is a very difficult position to be in. You can expect to be held to a strict application of Professional Standard 3.2 if there is an objection to your migration.
- e. Titles submitted for registration on the basis of adverse possession are always carefully reviewed by the Land Registration System and, I understand, are routinely audited.
- f. How do you know when you have enough evidence? *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39 illustrates the need to have sufficient proof.

Is there an Alternative to Adverse Possession for the Migration?

20. Alternatives to Possessory Title?

- a. Can you negotiate a deed from potential claimants?
- b. If there is no apparent *Marketable Titles Act* root of title can you look again for an acceptable alternative before documenting adverse possession? Subject to possible underlying Crown interests:

- i. Do recitals "bridge a gap" in title to connect recent title with a recognized root of title? See *Inter Lake Developments Ltd. v. Slauenwhite*².
- ii. Is there an expropriation that can be used as a root³?
- iii. Is there a *Quieting Titles Act* order in the chain of title?
- iv. Consider section 5(3) of the *Veterans' Land Act*. In *Carmichael v. Durant*⁴ Hamilton, J., stated, *inter alia*, that

"[6] Counsel for both parties agreed that my decision on the constitutional validity of s. 5(3) of the *Veterans' Land Act* will answer the issue between the parties. Section 5(3) provides as follows:

"5(3) All conveyances from the Director constitute new titles to the land conveyed and have the same and as full effect as grants from the Crown of previously ungranted Crown lands."

[7] I am prepared to grant an order stating that s. 5(3) of the *Veterans' Land Act* is within the legislative authority of the federal government and that the effect of s. 5(3) of the *Veterans' Land Act*, in this case, is that the deed from the Director, the *Veterans' Land Act*, to Eleanor Marie Covey dated September 19, 1989, has the same force and effect as if it were a Crown grant."

- v. Is there a tax deed older than 6 years in the chain of title that can be relied upon under MTA, s.6⁵?
- vi. Has any apparently competing interest been extinguished by MTA, s.4(4), (pre-LRA amendments), or by s.4(A) (post-LRA amendments)?

² (1988), 86 N.S.R. (2d) 23, 49 R.P.R. 13, 218 A.P.R. 23, 1988 CarswellNS 91, (N.S.S.C.).

³ Arthur A.G.H. Fordham, Q.C., *Certification Of Title To Expropriated Land*, Practical Property 1984, October 1984. See Professional Standard 3.16.

⁴ (1995), 143 N.S.R. (2d) 234; 411 A.P.R. 234, (N.S.S.C.).

⁵ See Michael LeBlanc's Pre Trial Memorandum in *Stuart Dow and Sherri Dow v. Allan Zinck and Allan Young*, S.H. No. 118046, August 5, 1997, (Stewart, J.). A copy was published with Mr. LeBlanc's consent in the materials for the Real Estate '99 Conference, March 1999.

- vii. Is there a registered or recorded instrument or series of instruments that will suffice as a root of title? In *Olsen Estate v. ASC Residential Properties*⁶ a Will was found to be good root of title when considered in the context of other recorded instruments. See Professional Standards 1.6 - Rebuttable Presumptions and 3.1 - Abstracting.
- c. Is the parcel a former school property that vested in a municipality under ss.221-225 of the former *Municipal Act*⁷ in the mid-1950s?
- d. Is the interest acknowledged or specifically referenced in a deed in the chain of title of the parcel - see MTA, s.7(3)?

LRA Notice requirements

21. Current LRA notice requirements are found in the *Land Registration Administration Regulations*, N.S. Reg 207/2009 (amended by N.S. Reg. 189/2010). Here is the procedure for serving notice where migration is based on adverse possession:

- a. Regulation 10(10). Except as provided in subsection (11), if an authorized lawyer who is certifying title to a parcel whose ownership is registered in whole or in part on the basis of adverse possession, must
 - (a) send a notice of registration in Form 9 to the last known owner, before the owner whose interest is being registered with the AFR, of the parcel as shown on the consolidated index that is maintained under the *Registry Act*; and
 - (b) submit a true copy of the notice sent in Form 9 and any written directions from the Registrar General under subsection 31(2) using Form 26N, together with proof of service in accordance with Section 30.

I generally include copies of the affidavits or statutory declarations we filed with the Form 9 Notice to the last known owners when we have mailing addresses for them. I think this reduces the calls asking what the notice is all about. I also expect the "heft" of the material literally gives weight to the claim in the minds of the last known owners.

- b. If you have problems serving notice on the last known owner get the Registrar General's
 - i. direction for substituted service [s.31(2)], or
 - ii. authorization that notice is not required [s.10(11)(a)].

⁶ (1990), 102 N.S.R. (2d) 94 (N.S.S.C.).

⁷ R.S.N.S. 1967, c.192.

I have found the RG very practical and accommodating. Generally, I have been able to get an order authorizing substitute service by an advertisement in the Royal Gazette.

c. Proof of service

30 The service of any document may be proved by an affidavit, which must state

- (a) by whom the document was served;
- (b) the day of the week and the date on which it was served;
- (c) where it was served; and
- (d) how service was effected,

and a copy of any document served must be attached as an exhibit to the affidavit.

d. Service of notice

31(1) Unless otherwise provided in the Act or these regulations, all notices required by the Act or these regulations to be sent must be sent by any means that affords proof of delivery.

(2) If the name or address of a person to whom a notice must be sent is not known, or if service under subsection (1) is not practicable, the Registrar General may provide directions for substituted service of any notice required by the Act or these regulations.

1. Summary of steps to convert possessory title to paper title:

- a. Take and document instructions from client. (Professional Standards 1.2 and 1.5)
- b. Title search. (applicable Professional Standards)
- c. Determine extent and description of parcel claimed - obtain necessary survey work from a Nova Scotia Land Surveyor.
- d. If migration of title by adverse possession is viable (LAA, title search and inquiries, Professional Standard 3.2):
 - i. Document title based on adverse possession to the standard required pursuant to the LAA. (LRA, s.37(9)(b)).
 - ii. Prepare affidavits / statutory declarations from
 - (1) Claimant, and
 - (2) knowledgeable disinterested parties. (Professional Standard 3.2)

- iii. Register the affidavits / statutory declarations under the *Registry Act* (LRAR, 10(13)(a))
- iv. Prepare and submit your AFR using the registered affidavits / statutory declarations as your enabling instruments. (LRAR, 10(13)(b))
- v. Following registration give the last known owner(s) the required Form 9 Notice or authorised substitute service (if not waived by the RG). (LRAR, 10(10)(a))
- vi. Submit proof of service/waiver of service to the LRO under Form 26N. (LRAR, 10(10)(b))

Other Resources

2. LIANS has a number of papers concerning adverse possession available at its website. These may be very helpful resources. Here is the website address (followed by a list of the papers at the site):

www.lians.ca/real_estate/real_estate_resources/articles/adverse_possession/

- a. Fordham, A.G.H. / Adverse Possession (March 1982), in *Practical property* 1982.
 - b. Fordham, A.G.H. / Prescription and Adverse Possession (January 1994), in *Real Estate Practice*.
 - c. Horne, Floyd / Possessory Title (1979), in *Nova Scotia Law News* vol. 6 p. 54.
 - d. Keith, John A / Adverse Possession - Pulling out All the Stops (February 2006), in *Real Property Conference 2006: Crown Interests and Due Diligence under LRA: "The Sophomore Year"*.
 - e. Walker, Catherine S / Adverse Possession and Prescriptive Rights Old Doctrines in a New Environment (February 2003), in *Real Property Conference 2003: Property Practice in New Environments*.
3. Hopefully these notes and the attachments will be helpful.

Schedule "1" - Template/Drafting Guide

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

IN THE MATTER OF TITLE TO THE PARCEL
OF LAND AT _____,
COUNTY, NOVA SCOTIA, ASSIGNED PID
NUMBER _____ and AAN NUMBER
_____, THE "SUBJECT PARCEL".

[Refer to CPR Rule 39 - Affidavit - revise as required for Statutory Declaration]

CPR 39 Form 39.08 Template - Comment: Confine affidavit to the facts, do not state any opinion, plea, view, or submission. Use concise sentences divided by numbered paragraphs.

Refer to Professional Standard 3.2, Note 1 regarding required proof.]

Affidavit

I make oath and give evidence as follows:

1. I am [Full Name] of [Place of Residence], _____ County, Nova Scotia, [Occupation] the/a [witnesses' relationship, if any, to the proceeding or a party].
2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information and belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
4. I have personal knowledge of the matters to which I have sworn in this affidavit except where otherwise noted.

Purpose

5. This Affidavit is sworn to evidence my title in fee simple to the Subject Parcel under sections 10, 19 and 22 of the *Limitation of Actions Act* [and subsection 108(2) of the *Environment Act* (Nova Scotia)].

Identification of the parcel

6. The Subject Parcel is described in **Exhibit "A"** to this affidavit. It is assigned the Property Identification Number (PID) and Assessment Account Number (AAN) noted in the heading of this Affidavit.

Last Known Owners

7. All registration and recording references in this affidavit refer to registrations and recordings in the _____ County, Nova Scotia, Land Registration Office, the "Registry Office", unless otherwise stated.

[Add deed details for Colour of Title if applicable]

8. I acquired an interest in the Subject Parcel from my predecessor(s) in title under the deed dated _____ registered in the Registry Office on _____ in Book _____, Page _____ as Document _____, "my deed". [Speak to colour of title if applicable]
9. I have been advised by my solicitor [Name of Solicitor], and I truly believe that his/her search of title to the Subject Parcel in the Registry Office for a period of _____ or more years shows that [Names of last known owners] are the last known registered owners of the Subject Parcel by virtue of a [Instrument Type] dated _____ registered in the Registry Office on _____ as document number _____. I refer to them as the "Last Known Owners" in this affidavit.
10. To the best of my knowledge and belief no other parties are entitled to an interest in the Subject Parcel [except and list any applicable Crown reservations, burdens and, for water lots possibly public rights of fishing and navigation].

Extent of the Subject Parcel

11. The Subject Parcel is shown as _____ in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing file number _____, the "Plan". The Plan was recorded in the Registry Office on _____ as plan _____. A partial copy of the plan is annexed to this affidavit as Exhibit "_____".
12. Parts of the Subject Parcel including _____ thereon are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____; this plan was recorded in the Registry Office on _____ as plan _____. A partial copy of this plan is annexed to this affidavit as Exhibit "_____".
13. The road frontage of the Subject Parcel is shown, incidently, in the Nova Scotia Department of Transportation and Public Works plan of plan _____ recorded in the Registry Office on _____ as plan _____. A partial copy of this plan is annexed to this affidavit as Exhibit "_____".
14. The Subject Parcel is shown in the sketch annexed to the forest management plan [dated]
15. My possession of the Subject Parcel extends to the entire area of the subject property shown as _____ in the [Plan]. **[Expand your explanation if possession is claimed under "colour of right". Refer to *Brill* also to *Mason v. Mason Estate (1999)*, 176 N.S.R. (2d)**

321(NSCA) for discussion of constructive possession and colour of right starting at para. 27]

Acts of Actual Exclusive Possession

16. I rely on the following acts of possession or use taken by me and my predecessors in title in support of my title to the Subject Parcel by adverse possession: [the following list of evidentiary items comes mostly from Court decisions and some from recorded affidavits / statutory declarations]

[Consider the following checklist as a starting point - adapt as required for the subject parcel; be sure to state the grounds of knowledge - personal knowledge or basis of knowledge and belief. Deal with your client's predecessors in possession as required.]

- a. Fences, hedges or other acts to enclose a parcel are particularly strong evidence of possession⁸.
- b. Occupation of a residence on the parcel.
- c. Rental of all or part of the parcel to others - receipt of rents?
- d. Occupation or use of other structures or improvements on the parcel.
- e. Do any old family or other photographs show evidence of possession of the Subject Parcel?
- f. Do aerial photographs show evidence of possession?
- g. For seasonal properties see *Taylor v. Willigar*⁹.
- h. Has the claimant run others off the subject parcel?
- i. Infilling - see s.108(2) of the *Environment Act*.
- j. *Navigable Waters Protection Act* permits for water lot structures?
- k. Posting and enforcing no trespassing signs or *Protection of Property Act* signs.
- l. Cultivation - caring for crops or orchards.
- m. Grazing livestock on the parcel.
- n. Was the cultivation or grazing continuous or intermittent?
- o. Acquisition of government permits for aquiculture, wharves, mooring, infilling, or other activities on or affecting the parcel.
- p. Deeds taken from the claimant or claimant's predecessors in occupation for part of the parcel by Department of Transportation.
- q. Taking or selling natural products from the parcel.
- r. Sufficient use of part of a driveway.

⁸ *Duggan v. Nova Scotia (Attorney General)*, 2004 NSSC 66, 18 R.P.R. (4th) 88, 222 N.S.R. (2d) 229, 701 A.P.R. 229, 2004 CarswellNS 115.

⁹ (1979), 32 N.S.R. (2d), 54 A.P.R. 11, 99 D.L.R. (3d) 118, 1979 CarswellNS 352 (C.A.)

- s. Woodland¹⁰. Clearing land, cutting timber, taking firewood, blazing boundaries, posting owner's signs, building wood roads or maintaining wood roads? Silva culture programs? Regular timber cruising? Regular patrols re trespassers?¹¹
- t. Other acts of ownership?¹².

Evidence of Community Recognition of Claimant's Actual Exclusive Possession

17. I also rely on the following evidence of community recognition of my ownership of the Subject Parcel in support of my title by adverse possession:

- a. Note community recognition of possessor as owner.
- b. Shown as owner or occupant in surveys of adjoining parcels.
- c. Are owners shown in DOT Highways plans.?
- d. Any deeds taken from claimant by DOT for highways?
- e. Any easements taken from claimant by utilities?
- f. Government permits for land use?
- g. Building permits?
- h. Are there dates inscribed in concrete/other structures like retaining walls?
- i. *Navigable Waterways Protection Act* permits?
- j. Photographs?
- k. Do old Insurance Bureau town maps show possession?
- l. Note the presence or absence of real property in relevant probate records.
- m. Are there any previously recorded affidavits, statutory declarations or recitals about registered title to, or possession of, the parcel?
- n. Note interests, if any, disclosed in the descriptions of adjoining parcels. See *Brill* paragraph 155 re ancient documents;

[155] The court looks for an entry, occupation or other act of dominion by the party with the chain of title. The inquiry is for substance, not ritual. So it is not

¹⁰ *Spicer v. Bowater Mersey Paper Co.*; 2004 NSCA 39, 237 D.L.R. (4th) 453, 222 N.S.R. (2d) 103, 701 A.P.R. 103, 18 R.P.R. (4th) 30 2004 CarswellNS 99; leave to appeal denied by the Supreme Court of Canada 2004 CarswellNS 368 September 16, 2004. In *MacNeil v. Nova Scotia (Attorney General)*, [1998] N.S.J. No. 233 (N.S. S.C.); affirmed *MacNeil v. Nova Scotia (Attorney General)* (2000), 183 N.S.R. (2d) 119 (C.A.) Justice Goodfellow granted a certificate of title to a parcel in a rural Cape Breton based upon camping, in-filling a swamp, making paths or makeshift roads, building a cabin in one spot, putting up a fishing hut in another, other recreational uses and being "on the property constantly". *Halifax Power Co. v. Christie*, 48 N.S.R. 264, 23 D.L.R. 481, 1915 CarswellNS 8, (C.A.).

¹¹ *Bowater Mersey Paper Co. v. Nova Scotia (Attorney General)*, [1987] N.S.J. No. 170, 80 N.S.R. (2d) 229 (N.S. S.C.); affirmed (1988), 83 N.S.R. (2d) 162 (C.A.)

¹² Catherine S. Walker, Q.C., *Adverse Possession and Prescriptive Rights - Old Doctrines in A New Environment, supra*, pp.21-22 referring to *J.A. Pye (Oxford) Ltd. v. Graham* [2002] H.L.J. No. 30 at para. 35.

essential to have *viva voce* evidence witnessing the title holder stride into his woodland to seize an acorn (*Cunard*). The possessory act may be evidenced by facts recited in the title documents admitted under the "ancient document" principle (Sopinka, Di Castri, *Tobias*). Section 29 of the *Evidence Act*, R.S.N.S. 1989, c. 154 (as amended by the LRA, S.N.S. 2001, c. 6, S. 105) says that certified copies of registered LRA documents are admissible as proof of their contents.

- o. Do any of the "Church Maps", historical tracts or statements in registered instruments for adjoining properties provide material evidence of the possession?
- p. Note the corroborating affidavits / statutory declarations you have obtained from disinterested, knowledgeable, surveyors, neighbours, former neighbours or others who have particular knowledge of the parcel to corroborate the claim.

Payment of Taxes/Assessment Records

[Payment of taxes was often considered somewhat weak evidence for establishing adverse possession in the not too distant past. *Brill*, paragraph 154 indicates that our Court of Appeal now recognizes the considerable investigation that Tax Assessment Authorities make before assessing property to property owners.]

- 18. The provincial government has assessed the Subject Parcel in my name from _____ to _____. [If you are tacking on the possession of any earlier occupier(s) detail particulars regarding earlier occupants. Can you obtain written confirmation from the Assessing or Taxing Authorities about who was assessed / taxed at material times?]
- 19. I have paid all realty taxes levied on the Subject Parcel from _____ to the date of this affidavit.

Possession was continuous and uninterrupted for the required limitation period

- 20. I commenced possession of the Subject Parcel on _____ by[describe how possession began]..[my taking possession of the Subject Parcel on or before _____.] [by consent (*e.g.* original tenancy at will became adverse possession after one year from [date])][by mutual mistake as to the claimant's ownership namely.....]. The limitation period commenced on or before _____ pursuant to subsection 11(____) of the *Limitations of Actions Act*. The limitation period expired on or before _____ pursuant to subsection [10]/[21(____)] of the *Limitations of Actions Act*.
- 21. My possession of the Subject Parcel against the Last Known Owners was continuous and uninterrupted for _____ years from _____ to _____. My possession of the Subject Parcel continues to the date of this affidavit. There have been no gaps or discontinuances in my possession of the Subject Parcels from _____ to [_____] [the date of this affidavit].
- 22. To the best of my knowledge and belief each of the Last Known Owners is nineteen years of age or older and is competent.

Possession was open, visible and notorious

23. The Last Known Owners became aware of my possession of the Subject Parcel on or about _____ by virtue of.....[state specific evidence of Last Known Owners's awareness *e.g.* ...my refusal to vacate the Subject Parcel when the Last Known Owners demanded that I do so on or before _____ and the Last Known Owners have made no attempt to evict me since].

OR

24. The Last Known Owners were aware, or ought to have been aware, of my possession of the Subject Parcel because [State specific facts evidencing wide public knowledge of the possession, the visibility of the possession, and absence of concealment - deliberate or by circumstances] *e.g.* [The construction of the fence in _____, the garage in _____, the retaining wall in _____ and {other improvements} in _____ was visible to everyone passing the parcel on {Main Street}.]

Possession was to the exclusion of the Last Known Owners and all others

25. My possession of the Subject Parcel since _____ has been to the exclusion of the Last Known Owners and all others. Neither the Last Known Owners nor any other party have occupied or used any part of the Subject Parcel during the period of my possession [except for the tenancy of certain tenants to whom I have rented part of the Subject Parcel from time to time]. [Note there are some permitted exceptions re fishing and navigation rights in the beds of water bodies.]

EITHER

Intention to possess the Subject Parcel

26. I declare that my possession of the Subject Parcel was made with the intention of possessing the Subject Parcel to the exclusion of the Last Known Owners and all others.

27. I rely on the several acts of possession stated elsewhere in this affidavit as evidence of my intention to possess the Subject Parcel exclusively.

OR

Possession under mutual mistake

28. *Gould v. Edmonds*¹³ - a specific intention to exclude the true owner is not a necessary element while one is under a mistaken impression that one is himself or herself the actual legal owner of the interest. If applicable state the facts describing the mutual mistake relied upon in lieu of intention to possess the Subject Parcel.

¹³ 2001 CarswellNS 518, 2001 NSCA 184, 203 N.S.R. (2d) 163, 635 A.P.R. 163

No acknowledgement, consent or claims

29. I have not at any time during my possession of the Subject Parcel acknowledged, in writing or otherwise, to any party that the Last Known Owners or any other party have or have had any interest in the Subject Parcel.
30. I have not at any time before or during my possession of the Subject Parcel sought or received the consent of the Last Known Owners or of any other party for my possession of the Subject Parcel.
31. I am not aware of any claim advanced against either my possessory title to the Subject Parcel or against the interests of my predecessors in possession of the Subject Parcel. [If there have been claims describe how they were dealt with.]

Sworn before me at ...*etc.*

Add exhibits - *e.g.* Exhibit "A" - Description of parcel claimed.

Schedule "6" - Brill Diagram

(From October 20, 2010 RELANS *Brill* Program)

Nova Scotia Crown Interests in Land, MTA, LAA & LRA Post Brill
RELANS Program - Oct 20, 2010
Nova Scotia (Attorney General) v. Brill, 2010 NSCA 69
 Garth C. Gordon, Q.C.

Potential Crown interests must be considered *

Lands & interests held by Subject(s)

