BROAD POINTS FOR DISCUSSION AND CONVERSATION ARISING FROM *R.v BRILL*

Have we finally achieved certainty in land ownership?

-Catherine S. Walker, Q.C.

1. **Question before the courts:**

   At Chambers- Did the 60 year common law rule still exist, and if so, did it bind the Crown? The Chambers judge answered that question in the negative- the 60 year rule at common law, Justice Coady said, was gone. But he also said that the 40 year plus a day rule in the MTA applied to all, including the Crown. The Crown appealed the finding of '40 year plus a day rule applies to all'. Brill appealed the finding that the 60 year rule was gone. The impact of the *Land Registration Act*, and the *Limitation of Actions Act*, and the lengthy history of both common law and legislative law, was not considered by the Chambers judge in that hearing.

   On Appeal- The Court dismissed the appeals of both the Crown and Brill. In doing so, Fichaud broadly considered

   - the history of title to land in the Province and England, both in the context of common law and its developments including in particular the early cases of ejectment and trespass in which basic principles were considered and discussed;
   - the principles of Crown prerogative and *Nullum Tempus* legislation-its origins and developments leading to the *Limitation of Actions Act* provisions and possessory title principles;
   - the effect of the *Marketable Titles Act* time frames and amendments to those provisions; and
   - the effect of the *Land Registration Act* and its consequential amendments to other pieces of legislation on all the questions being considered.

2. **The Appeal Decision:** In dismissing the appeal on all grounds, Justice Fichaud confirmed that the 60 year common law rule was shortened for all purposes to 40 years plus a day, and that the consequential amendments to the *Limitation of Actions Act* and *Marketable Titles Act* in the *Land Registration Act*, combined with s. 6 binding the Crown specifically to the *Land Registration Act* meant that the 40 year rule applied to all, including the Crown, subject only to the specific exemptions as set out in the *Land Registration Act.* 'The holder of documentary title need not trace his ostensible title back to an original Crown grant to have colour of title.' [150]

3. **Principles in the decision:** Many agree that Justice Fichaud crafted a landmark decision, and in his detailed and thorough analysis of the matters that were the subject of appeal, he laid out the principles and context for those principles that he felt ought to move us towards the 'certainty'

objects touted broadly and publicly in both recent pieces of legislation- namely the *Marketable Titles Act* and *Land Registration Act*. Those principles are carefully outlined on Garth's flow chart attached, and summarized in large measure in his thorough notes attached, but a few of them that struck me are as follows:

- **What does 'marketable title' mean?** There is marketable title as between vendor and purchaser, there is marketable title that gives rise to a prima facie presumption in defending a challenge to title (by an adverse possessor perhaps), and there is the statutory notion of marketable title as a 'mere' paper chain of title as defined in the *Marketable Titles Act.* Is there one meaning for all purposes? While there may not be a singular meaning for all purposes, a careful review of Justice Fichaud's analysis of what marketable title means will assist us as real estate practitioner in achieving a better understanding to apply in the trenches;

- **LRA is a 'coherent and comprehensive reformation of land law'** (para [102]). Justice Fichaud accepted the Society's argument that the LRA- as a combination of both its new provisions (s.6 in particular in the context of this matter) and its consequential amendments to other legislation (notably to the *Marketable Titles Act* and *Limitation of Actions Act*)- was the overarching legislative regime that assured us that now, under this regime, the same rules apply to all, including the Crown.

- **Extent of title and evidence of occupation is important, and not just in the context of adverse possessory title.** As described by Justice Fichaud, 'possession is basic to title in land at common law'[151]. Possession can be implied, presumed, constructive and/or consist of a series of physical acts of occupation. It is contextual to the nature of the land. As cited by Justice Fichaud, there is a spectrum of principles found in the common law that will be considered- colour of title [144], assessment for taxes [154], and ancient documents [136] to name a few.

- **Responsibility of lawyers in certifying title, and certifying the legal effect of documents under LRA-** The legal standards embodied in the *Land Registration Act* that govern 'the qualified lawyer's opinion of title' are the foundation of the parcel register- s.37(9)(b). Lawyers have a significant role in ascertaining the state of title and all the interests that affect a parcel reflected in a parcel register and with each instrument registered in a parcel that affects title to a parcel of land (s.18);

- **Effect of registration under LRA-** Section 20 of the LRA confirms that a parcel register presumes a complete statement of all interests affecting a parcel,

subject only to specific statutory exceptions, and the ability to appeal or challenge those interests in a parcel register are those as set out in the LRA- to the RG or the courts. As stated by Justice Fichaud 'the parcel register under Nova Scotia's LRA would have *in rem* effect against the world, including the Crown, subject to the exceptions expressly prescribed in the LRA' [165];

- **Adverse Possession-** Justice Fichaud has clarified the evidentiary requirements to establish adverse possession, and provided case law which sets out the guiding principles we should consider (see *Bentley v. Peppard* (1903), 33, S.C.R. 444 (from N.S.) [129]). As stated by Justice Fichaud 'adverse possession under the *Limitation of Actions Act* depends on textured principles that the Nova Scotian courts knitted over 140 years from *Cunard* through *Nemeskeri.* Those principles aren't reducible to a snappy axiom' [145].

4. **Practice application- So, what does this mean in terms of our day to day practices? Well I intend to consider the following questions:**

- ✓ **What is the nature of the title to the land that is the subject of migration?** What is the character of the land? What are the acts of possession of the land by the client? We are not only giving an opinion as to the quality of title, we may also assessing the ability of withstand a future challenge to that title. Title to land is not absolute- rather it is relative to the rights of others. As quoted by Justice Fichaud, citing *Bentley v. Peppard*- 'Vacant' land, or 'abandoned' land is an impossibility- possession must be somewhere . The Court introduced the concept of an 'inferred' grant from long standing possession and the 'doctrine of presumptions' [121];presumption from assessment for taxes [154]; and the quality of possession required for constructive possession will be 'highly contextual'- and the courts may use recitals in ancient documents [135].

- ✓ **Are there any issues of extent of title?** If title is solely based on possession, what is the evidence as to the extent of the title claimed? Is there survey fabric to support the claim? Is there objective evidence available to provide corroboration of the facts that underlie the possession? Or for unregistered undocumented prescriptive rights, what evidence/facts do your clients have as to how the rights claimed first arose and which adjoining lands are/may be affected?

- ✓ **Am I really comfortable in giving the opinion as to all the interests that affect a parcel being migrated?** If I have any reservations, I should carefully examine them and ensure I take the time to both identify them and address them. We are responsible to be satisfied as to the foundation for any title we certify.

- ✓ **Am I really comfortable in certifying the legal effect of the document affecting the interest in a parcel register?** Have I completed my due diligence that the rights of others are not negatively impacted by my actions in providing a certificate of legal effect?

Comments:

The *Brill* decision is one that we need to continue to consider and talk about. The cases and legislation cited by Justice Fichaud are worthy of careful reading and consideration by us all as we work in the new environment of the *Land Registration Act*. What struck me the most in this case, was how relevant the early court cases dealing with ejectment and trespass were to the challenges we have faced in today's environment. As we move forward from this point, it is hoped that the principles described in this decision will provide us with a means to achieve the certainty we have worked so hard to attain for our clients, and our practices. It is also hoped that our strong principles of common sense and fairness will prevail in what we take from this decision for ourselves and our clients.

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)

Parcel Granted/released by Crown?

Yes – The Crown has released or conveyed the parcel to Subject(s).

See *Brill*, [102].

Consider MTA as a defense to pre-MTA root of title claims - *Penney* v. *Hartling*, *Ontario Hydro* v. *Tkach & Fire v Longtin*.

No

Effect of chain of title under LAA – *Brill:* colour of title [144] -, taxes [154], "inferred grants" & "doctrine of presumptions" [121] -, ancient documents [136]-.

Does LAA apply?

Yes – there are 40 years of adverse possession (NS Crown)

No, but there are 20/25 years of adverse possession, *Brill* [99]

MTA - marketable title?

If no MTA chain of title & no possessory title

No

Parcel is Crown Land

Possession is the underpinning of title - *Brill,* [128] - ; consider this when examining titles.

Possessory title by squatting

Higher evidentiary burden

Possessory title under Colour of Title

Lower evidentiary burden

MTA has three discrete sources for marketable title, s.4(1)

Yes

Title must be determined by other means before LRA registration. See LRA, s.37(9)(b).

MTA, s.4(1) Common Law

MTA, s.4(1) Equity

MTA, s.4(1) Otherwise

Marketable title/possessory title determination Is shown above the line; modes of LRA registration are shown below the line. See *Brill* [102], [162] – [168] re LRA registration.

LRA has five discrete sources of title for registration, s.37(9)(b)

Refer to *Brill* [157] - [168] for means to challenge Parcel Registers after migration – LRA ss.33-34 (RG); ss.35, 91-92 (Courts); s.73(1)(a) (reservations); also s.74(2) (possessory interests).

LRA, s.37(9)(b) - RG "lesser standard"

LRA, s.37(9)(b) – "any other enactment"

LRA, s.37(9)(b) - LAA

LRA, s.37(9)(b) - Common law

LRA, s.37(9)(b) – MTA (Overlaps LRA Common Law source)

*** LRA, s.73 (1)(a), preserves interests of The Crown (NS) reserved in or excepted from the original fee simple grant from The Crown, or that have been vested in The Crown pursuant to an enactment.**

Always consider the extent of title. (LRA, ss.21, 75 & 76)

RELANS PROGRAM

OCTOBER 20, 2010

NOTES TO DIAGRAM "NOVA SCOTIA CROWN INTERESTS IN LAND, MTA, LAA & LRA POST *BRILL*"

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G:\GCG\CLE Files\Brill\Post Brill - Notes To Diagram Rev 17 (CLE) Oct 15 2010.wpd printed October 15, 2010 (2:04pm)

PART 1 Excerpts from *Nova Scotia (Attorney General)* v. *Brill*, 2010 NSCA 69

[86] Subject to the effect of the LRA on the MTA, the MTA by itself has no direct effect on the dispute to Bella Island between Mr. Brill and the Crown.

...

[99] More importantly for the Bella Island dispute, nothing in the MTA touches the evidential principles of constructive or presumptive possession from a chain of title, to support a claim under the LAA. The Province's submission assumes that, because the MTA involves a chain of title, every chain of title rule must be governed by the MTA. I disagree with this inverse logic. Claims to marketable title between a vendor and purchaser and possessory title under the LAA are parallel topics, in that the former is triggered by a chain of paper title and the latter may be assisted by a chain of paper title. But the latter is not a subset of the former, and the MTA in no way qualifies the LAA's process for determining possessory title. There is no merit to the Province's suggestion that somehow the MTA jettisons the common law's treatment of constructive or presumed possession, from a chain of title, in an adverse possession claim under the LAA. The Province did not cite an authority that connected the two statutes.

...

[102] **Further, the amended prerequisite (40 years plus a day) that triggers "marketable title" in s.4(1) of the MTA also applies to the Crown, despite s. 9 of the MTA. Section 116(1) of the LRA amended s. 4(1) of the MTA by subjecting the common law to the 40 year standard. Section 116(1) expressly binds the Crown, by s. 6 of the LRA. So the 40 year marketable title standard "at common law" binds the Crown. This is consistent with the LRA s. 115(7)'s amendment to s. 21 of the LAA, reducing from "sixty" to "forty" the period needed for adverse possession against the Crown. In terms of statutory interpretation, these are examples of the principles of coherence and consistency among related statutes (Sullivan and Driedger, p. 323). The amendment to s. 4(1) of the MTA was not in a mere omnibus enactment containing unrelated amendments to various statutes. Rather the LRA was a coherent and comprehensive reformation of land law. All the LRA's provisions, including the amendment of the MTA by s. 116(1), focus on that transformational purpose. So the LRA's amendment to s.4(1) of the MTA (60 to 40 years) binds the Crown because s.6 of the LRA says so.**

...

[105] Marketable title at common law is an in personam incident of the contract between vendor and purchaser. The vendor's remedy against a recalcitrant purchaser was available if he could deliver marketable title.

[106] Mr. Brill and the Crown are neither vendor nor purchaser, have no contract, and there is no contemplated sale of Bella Island. So the common law's concept of marketable does not determine Mr. Brill's dispute with the Crown.

...

[121] Nova Scotia's courts did not rest with these exhortations. They responded substantively to the plight of the landholder holding a chain of title. The courts' utensils were evidential presumptions to (1) infer the existence of a grant itself from longstanding possession and (2) establish possession for a claim under the LAA.

...

[128] Under the LAA, the question was - What possession is required of someone with documentary title? The answer has evolved as Nova Scotia's courts considered several approaches.

...

[144] My view is as follows. I intend this as a summary of the principles from the authorities that I have discussed.

[145] The question is - What is the effect of a chain of title under s. 21 of the LAA? The answer is not as simple as the application of the standard in s. 4(1) of the MTA. Section 4(1) cites a straightforward 40 year chain of title from a root simply defined in s. 4(2). Adverse possession under the LAA depends on textured principles that the Nova Scotian courts knitted over 140 years from *Cunard* through *Nemeskeri*. Those principles aren't reducible to a snappy axiom.

[146] The common law binds the Crown, subject to an exception for a prerogative. One former prerogative was *nullum tempus occurrit regi*. But that was superceded by the Nullum Tempus Acts of the United Kingdom and Nova Scotia, and then by Nova Scotia's LAA, currently s. 21. This conclusion is clear from *McGibbon*. As discussed earlier, I reject the Province's argument in this appeal that the MTA has resurrected the Crown's prerogative. The Crown is bound under s. 21 of the LAA by the same judge made principles that apply to others under the LAA's general provisions for adverse possession claims.

[147] The limitation against the Crown, formerly 60 years, is now 40 years under s.21 of the LAA, as amended by the LRA.

[148] Since *McGibbon*, it is clear that the times of successive possessors may be tacked and that the current s. 21 may be interpreted consistently with the intent of the more fulsomely worded 1837 Nova Scotia *Nullum Tempus Act*.

[149] *McGibbon* ruled that what is now s. 22 of the LAA applies to extinguish a Crown interest after the passage of the limitation in s. 21. Section 6(1) of the QTA has similar effect once the possessory title is quieted. In *Logan* v. *Levy and AGNS* (1975), 20 N.S.R. (2d) 500 (T.D.), ¶ 41, Justice Jones issued "an order declaring that the Crown's title to these lands has been extinguished" under the LAA.

[150] The holder of documentary title need not trace his ostensible title back to an original Crown grant to have colour of title, as discussed in *Cunard*, *Bentley*, *Tobin*, *Ezbeidy*, *Legge*, Anger & Honsberger, and the other authorities above.

[151] The title holder with colour of title who enters into occupancy of any part, however small, of the parcel gains constructive possession of the entire parcel that is described in his title instrument: *Bentley*. *Cunard* acknowledged that constructive possession is triggered by some entry. Possession is basic to title in land at common law: *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, ¶ 149; Megarry and Wade, pp. 1004-1006; Anger & Honsgerger, ¶ 28:50; *R.* v. *Marshall*, 2003 NSCA 105, ¶ 120-121, per Justice Cromwell, appeal allowed without disturbing this general principle [2005] 2 S.C.R. 220. The paper title must be coupled with some act of dominion that signifies possession. In *Nemeskeri*, Justice Tidman said the evidence of possession was "sketchy". I take that to indicate there was some act of possession. I do not read *Nemeskeri* as repudiating the authorities that some – no matter how small – entry, occupation or act of dominion is required by the title holder to initiate constructive possession.

[152] The grant of the estate to one who enters into possession begins the entrant's possessory march under the LAA: *Bentley*. Justice Tidman's comments about constructive dispossession in *Nemeskeri* should be read in this context.

[153] The nature of the required entry into possession, or act of possession, by a paper title holder with colour of title, is an issue of fact that varies with the circumstances of the parcel and the suitable and natural use of the property: ***Halifax Power***, *Kirby*. What would be "discontinuous" or "disjointed" acts for a squatter, someone without paper title, might establish possession for someone with colour of title. That is because the paper title establishes the mental attitude of dominion, and needs only a coupling act, or evidence of it, to exercise the possession: *Ezbeidy*. Vacant land, woodland or what the cases have described as "wild" land, would require significantly less than a developed property: *Cunard, Bentley, Halifax Power, Kirby*.

[154] Mr. Brill says that he and his predecessors have for years paid the property taxes on Bella Island, which he cites as acts of possession. As I will discuss under the third issue, the application of the legal principles to the circumstances of this case is for trial. But I reiterate the view of Justices Hallett and Cromwell from *Bowater* and *MacNeil* (above ¶ 38). In a QTA dispute between only two parties with no other apparent title holder, after proper notices have been given, the practical approach is to quiet title based on the better claim. So a landholder's payment of property taxes, because he is designated "owner" by the Provincial Government's assessment office, in the circumstances might be a meaningful act of possession in a dispute between just the landholder and the Provincial Crown, with no other claimant. (See also *Halifax Power* and *Kirby*.) In this respect, the following provisions of the Assessment Act, R.S.N.S. 1989, c. 23, as amended, are pertinent. Section 5(1)(a) says that Crown land is exempt, but if the land is "occupied" the "occupant" may be assessed. Section 32 says that, except where the Act otherwise provides, "property shall be assessed as property of the owner". Section 15 gives the Province's Director of Assessment responsibility to administer the Act and the duties assigned by the Lieutenant Governor in Council or the provincial Minister of Municipal Affairs. Section 18 directs that the Director "shall ascertain by diligent inquiry and examination the names of all persons liable to be rated ..., their property within the municipality and the extent, amount and nature of the same ...". Section 25(a) says the

Director "shall prepare the assessment roll" to include "the name and address of the owner". Section 38(1) says the property "may be assessed" to the latest owner shown at the Registry of Deeds and s. 38(3) says it "shall be assessed" to the owner in fee simple listed on a parcel register under the LRA.

[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 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.

...

(g) Effect of LRA

[157] I have been discussing the judge made presumptions that follow from a chain of title. The final question, addressed at length in the submissions on this appeal, is how those principles are affected by Nova Scotia's new land title system under the LRA.

[157] **Mr. Brill and the NSBS say** that the LRA has shifted the paradigm. They submit that s. 20 gives in rem effect to the statement of title on the parcel register. The parcel register derives from the solicitor's certificate upon which the Registrar General is entitled to rely by s. 18(3). Section 37(9) states that the certificate of title is based on the current NSBS practice standards, and shall show a chain of title based on the standard in the MTA, LAA, any other enactment, the common law, or to a lesser standard that the Registrar General approves. The NSBS practice standard refers to marketable title and the common law.

[158] **The NSBS and Mr. Brill submit** that the in personam application of the MTA and common law of marketable title, between vendor and purchaser, is now by statute an in rem standard. So a 40 year chain of title, either by s. 4 of the MTA or by the common law of marketable titles as amended by the MTA s. 4(1), without any act of possession, defines title against the world. The world includes the Crown, which by s. 6 of the LRA is bound by the parcel register.

[159] **The NSBS and Mr. Brill** submit that this result makes eminent sense. They describe as inherently irrational the notion that a vendor may force a "marketable title" on a purchaser to land that is still owned by the Crown, because there was no initial Crown grant. Marketable title is to be "free from litigation, palpable defects and grave doubts and couples a certainty of peaceful possession with a certainty that no flaw will appear to disturb its market value" (Di Castri ¶ 339, quoted above ¶ 104). How, Mr. Brill and the NSBS ask figuratively, can there ever be such a marketable title from a 40 year chain if the Crown nonetheless may recover the land, as ungranted centuries before the recorded chain? They point to the following passage from the decision of the Ontario Court of

Appeal, under somewhat differently worded legislation, in *Fire* v. *Longtin* (1994), 112 D.L.R. (4th) 34 (O.C.A.), at p. 42, appeal dismissed for the reasons of the Court of Appeal, [1995] 4 S.C.R. 3:

> With respect, I find it difficult to understand how it can be said that a title searcher and the solicitor certifying title can safely rely upon instruments within the forty-year period, and then say that a grantee taking within that period gets no title if his grantor had no title to convey. That is merely saying that a solicitor certifying title is saved from a negligence claim, but that the grantee who relies on the certification gets no title. That is not what the legislation says, and that is not what this court said in the *Tkach* case and in the *Algoma* case. In both of those cases, the root of title on which the successful party relied was one where a grantor, as a result of some form of error, purported to convey title which he did not have. Indeed, if the decision of this court in *National Sewer Pipe* is correct — that the grantor under a conveyance which constitutes a root of title must have had a good title to convey — then it follows that the only safe search is one back to the original grant from the Crown.

[160] **The NSBS and Mr. Brill refer to** s. 4(2) of the MTA that starts the 40 year chain from a registered instrument that "conveys or purports to convey" title. This, they say, replicates the courts' view under the LAA that a defective instrument may still establish colour of title. They submit that the LRA has incorporated these principles into the architecture of the parcel register that binds the world, including the Crown.

[161] My comments on the submissions of Mr. Brill and the NSBS are these.

[162] **By s. 20, "a parcel register is a complete statement of all interests affecting the parcel". This is subject to the exceptions expressly noted in the LRA, such as overriding interests and challenges to the contents of the parcel register that may be resolved by the Registrar General and the Court. By s. 6, the Crown is bound, as is everyone. Section 73(1)(a) states that an actual reservation or exception in an actual initial Crown grant overrides, but says nothing about a dispute whether there was an initial Crown grant.**

[163] **The LRA involves the mirror, curtain and insurance principles of land title systems. These mean, respectively, that the register should accurately reflect the title, the register is the only source of title information, and there is indemnity to those who suffer a loss because of a flaw in the land registration system. Anger & Honsberger, ¶ 30:40.30. MacIntosh, Nova Scotia Real Property Practice Manual, ¶ 16-2.**

[164] In *C.P.R. and Imperial Oil Ltd.* v. *Turta*, [1954] S.C.R. 427, at p. 443, Justice Estey for the majority adopted this passage from an earlier decision:

> The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud in the part of the person dealing with the registered

> proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against the world.

Justice Estey continued (pp. 443-444):

> The foregoing preamble and quotations, as well as others to similar effect, emphasize that the Torrens system is intended "to give certainty to the title" as it appears in the land titles office.

[165] **I agree that the parcel register under Nova Scotia's LRA would have in rem effect against the world, including the Crown, subject to the exceptions expressly prescribed in the LRA. I agree that there is no such exception, expressed in the LRA, governing a dispute whether there was an initial Crown grant. I also agree that, by s. 37(9), the standards under the MTA or common law, including the common law of marketable title, are among those that may generate the parcel register.**

[166] **But that is as far as I can take the submissions of Mr. Brill and the NSBS on this appeal. Bella Island has not been migrated to the LRA, and has no parcel register. 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". It cannot be predicted now what standard eventually may determine Bella Island's ultimate parcel register.**

[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.**

[168] This is not a proceeding under the LRA to consider the accuracy of a parcel register. So I will not express a view how this court might handle a possible appeal from a future decision of the Supreme Court on a prospective challenge to a hypothetical parcel register. That currently abstract issue will have to await another day when his court has an appeal with a record containing a Supreme Court ruling, possibly a determination by the Registrar General, and an actual parcel register for Bella Island.

PART 2 LRA Provisions Referenced in Brill, Para. [165], and Other LRA Sections.

Location and boundaries

21 (1) The legal description of a parcel in a register is not conclusive as to the location, boundaries or extent of the parcel.

(2) Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel.

(3) A registration may not be rejected only because the location, boundaries or extent of the parcel appear to overlap the location, boundaries or extent of another parcel.

(4) repealed 2004, c. 38, s. 7.

2001, c. 6, s. 21; 2004, c. 38, ss. 7, 26.

Corrections and amendments to register

33 (1) The Registrar General may correct errors and omissions in a parcel register in the circumstances and in the manner prescribed in regulations made by the Minister.

(2) The Registrar General may amend any information in a register to bring a parcel register into conformity with regulations made by the Minister, as amended from time to time. 2008, c. 19, s. 15.

Request for correction

34 (1) A person who objects to and is aggrieved by a registration, a recording or other information contained in a parcel register may submit a request in writing to the Registrar General seeking correction of the registration, recording or information objected to.

(2) The Registrar General shall investigate the facts surrounding the person's request and may, after consideration of written or oral submissions,

(a) correct the registration, recording or information as requested in the circumstances and in the manner prescribed in regulations made by the Minister;

(b) deny the person's request in whole or in part; or

(c) direct the person to pursue a remedy available under this Act, including taking a proceeding under this Act, before continuing with the request. 2008, c. 19, s. 15.

Proceeding to correct registration

35(1) A person who objects to and is aggrieved by a registration in a parcel register may commence a proceeding before the court requesting a declaration as to the rights of the parties, an order for correction of the registration and a determination of entitlement to compensation, if any.

(2) Subject to Section 92A, and unless otherwise ordered by the court, the following are parties to any proceeding pursuant to this Section:

(a) all registered owners of the parcel in question

(i) at the time of the registration objected to, and

(ii) at the time that the proceeding is commenced; and

(b) the person aggrieved.

(3) A person commencing a proceeding pursuant to this Section shall provide written notice, at the time the proceeding is commenced, to all interest holders appearing in the parcel register.

(4) The court shall determine the rights of the parties according to law, subject to the following principles:

(a) the person aggrieved may have the registration corrected;

(b) any correction of the registration shall preserve the right to compensation of a person who obtained a registered interest from a registered owner who registered the interest objected to; and

(c) the court may, where it is just and equitable to do so, confirm the registration.

(5) Where the court corrects the registration objected to, but the correction of the registration cannot fully nullify the effects of the registration, or where the court determines that it is just and equitable to confirm the registration, the court shall determine which of the parties suffered loss by reason of the registration and order

(a) that any party who suffered loss be compensated in accordance with subsection (7) and Sections 85 and 86; or

(b) payment of damages by one party to another.

(6) In determining whether it is just and equitable to confirm the registration objected to, the court shall consider

(a) the nature of the ownership and the use of the parcel by the parties;

(b) the circumstances of the registration;

(c) the special characteristics of the parcel and their significance to the parties;

(d) the willingness of any of the parties to receive compensation in lieu of an interest in the parcel;

(e) the ease with which the amount of compensation for a loss may be determined; and

(f) any other circumstances that, in the opinion of the court, are relevant to its determination.

(7) A registered owner is not entitled to compensation or to retention of any of the benefits of a registration made in error unless that owner

(a) believed that the registration was authorized by law;

(b) had no knowledge of the facts that made the registration unauthorized; and

(c) gave consideration for the registered interest or detrimentally relied upon the registration. 2008, c. 19, s. 15.

Priority of certain interests

73 (1) Notwithstanding anything contained in this Act, the following interests, whether or not recorded or registered, and no other interests, shall be enforced with priority over all other interests according to law:

(a) an interest of Her Majesty in right of the Province that was reserved in or excepted from the original grant of the fee simple absolute from Her Majesty, or that has been vested in Her Majesty pursuant to an enactment;

Adverse possession and prescription

74(2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless

(a) an order of the court confirming the interest;

(b) a certificate of lis pendens certifying that an action has been commenced to confirm the interest;

(c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the *Crown Lands Act*; or

(d) the agreement of the registered owner confirming the interest,

has been registered or recorded before that time.

Limit on land acquired

75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

(1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.

(2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act. 2001, c. 6, s. 75; 2002, c. 19, s. 33.

Lasting improvements

76 (1) In this Section, "person" includes a person and that person's heirs, executors, administrators, successors or assigns.

(2) Where a person makes lasting improvements on land under the belief that it is the person's own, the court may, on the application of either the person making the improvement or the person to whom the land belongs,

(a) require the person making the improvement to remove it or abandon it;

(b) require the person making the improvement to acquire an easement, either limited in time or not, from the person to whom the land belongs, in the amount and on such terms as the court thinks just;

(c) require the person making the improvement to acquire the land on which it was made from the person to whom the land belongs, in the amount and on such terms as the court thinks just; or

(d) require the person to whom the land belongs to compensate the person making the improvement for the amount by which the improvement has enhanced the value of the land to the owner of it, in the amount and on such terms as the court thinks just.

(3) Where it is found that a building on land encroaches on adjoining land the court may, on the application of either the registered owner of the land on which the building is located or the registered owner of the land on which the building encroaches,

(a) require the owner of the building to remove or abandon the encroachment;

(b) require the owner of the building to acquire an easement, either limited in time or not, from the person to whom the land belongs, in the amount and on such terms as the court thinks just;

(c) require the owner of the building to acquire the land on which it was made from the person to whom the land belongs, in the amount and on such terms as the court thinks just.

(4) An acquisition of land pursuant to this Section is not a subdivision within the meaning of the Municipal Government Act.

(5) Any application to the court pursuant to this Section shall include a plan of survey of the lands that are the subject of the application. 2001, c. 6, s. 76.

Application for direction

91(1) The Registrar General may apply to the court for directions with respect to any matter concerning the duties of the Registrar General or of a registrar pursuant to this Act.

(2) On an application pursuant to subsection (1), the court may give any direction and make any order that it thinks just. 2001, c. 6, s. 91.

Court orders

92 (1) Subject to this Act, in any proceeding with respect to a parcel registered pursuant to this Act, the court may order a registrar to

(a) record an interest;

(b) cancel a recording;

(c) revise the priority of recordings;

(d) revise a registration;

(e) take any other action that the court thinks just.

(2) Any order pursuant to subsection (1) shall be recorded in the register of any affected parcel. 2001, c. 6, s. 92; 2008, c. 19, s. 33.

PART 3 Excerpts from notes on MTA, s.4(1) and (2) from my *Marketable Titles Act Working Notes and Annotations*, Continuing Legal Education Society of Nova Scotia/Real Estate Lawyers of Nova Scotia, Real Estate '99 Conference, March 1999.

1. MTA, ss.4(1) and (2)

   a. ***"Good and sufficient chain of title".*** In *Penney v. Hartling (1999),*177 N.S.R.(2d) 378, Justice Carver found that there was marketable title in a "forty year plus a day deed notwithstanding that the Grantor held only a one-third interest in the parcel under an earlier intestacy. "Applying s.4 in this case, there will be marketable title if there is *"good and sufficient chain of title"* extending back for more than 40 years (40 years plus one day)." The grantor was one of three heirs under a pre-1929 intestacy. Another heir, the grantor's sister, quit claimed her 1/3 interest to the third heir, another sister, on May 13, 1953. But "What happened to that two-thirds interest remains a mystery." The grantor "purported to convey" the whole interest in the parcel by warranty deed dated November 24, 1951 to Purchaser 1; the grantor later gave a confirmatory warranty deed to Purchaser 1 on January 6, 1953. Purchaser 1 later conveyed the lands by warranty deed to Purchaser 2 on November 17, 1956. Justice Carver accepted that each of the November 24, 1951, January 6, 1953 and November 17, 1956 deeds purported to convey the whole interest in the parcel. All three deeds were initially registered in the wrong county but were recorded in the correct county in 1999 correcting that problem.

   b. It is no coincidence that the Nova Scotia legislators used the expression "... *a good and sufficient chain of title during a period greater than forty years immediately preceding the [date]..."* in s.4(1) these words are identical to those in then s.105(1) of the Ontario Act considered in *Fire v. Longtin* (1994), 112 D.L.R. (4th) 34 at pp 36, 39 and 42.

2. **Ontario Case law on corresponding sections**

   a. **The omitted exception.**

      i. This problem occurs when a smaller parcel of land was conveyed out of a larger parcel more than forty years before the conflict arose (deed 1) and the remaining parcel was later conveyed, more than forty years before the conflict arose, using the original description without excepting the smaller parcel (deed 2). Deeds 1 and 2 create two roots of title under the *Marketable Titles Act*. If the instruments comprising the subsequent chains of title to both parcels purport to convey the smaller parcel and the original description respectively for forty years plus a day each owner will have have marketable title to the smaller parcel. Which owner wins in a contest between them for title to the smaller parcel when it is unoccupied with no visible indication of the other party's possession? The Ontario Court of Appeal and the Supreme Court of Canada dealing with this issue under the Ontario legislation upon which section 4(1) of the *Marketable Titles Act* is based indicate that the party who defends his or her title will prevail.

ii. In *Ontario Hydro V. Tkach*[1] the Ontario Court of Appeal considered the effect of an omitted "Reserving and Excepting..." paragraph in a deed description. Ontario Hydro had a 1906 deed to a 1.57 acre parcel of land conveyed to its predecessor in title by Tkach's predecessor in title out of a large parcel of farmland. Tkach's predecessor in title failed to except Hydro's 1.57 acre parcel from a 1934 deed of the remaining parcel to Tkach's next predecessors in title. This omission continued in subsequent deeds. Tkach's deed encompassed both his 78 acres and the 1.57 acres conveyed to Hydro's predecessor in title in 1906. In 1989 Hydro commenced action for a declaration that Tkach had no right or title in the 1.57 acre parcel. Hydro lost. The decision deals with then section 105(1) of the Ontario *Registry Act* on which s.4(1) of our *Marketable Titles Act* is based:

> "A person dealing with land shall not be required to show that he is lawfully entitled to the land as owner thereof through ***a good and sufficient chain of title during a period greater than forty years immediately preceding the*** day of such dealing, except in respect of a claim referred to in subsection 106(5)." [The italics show language identical to that in our s.4(1); s.106(5) deals with exceptions corresponding to, but different from, s.7 in our Act.]

iii. **The Ontario Court of Appeal[2] approached this issue from the perspective: "Does Tkach have a defence to the action by virtue of the *Investigation of Titles Act*?" rather than "does Hydro have the right to the declaratory relief it seeks?"** Grange, J.A., at page 20 states "...the essential question is whether the Appellant [Tkach] can claim good title by reason of the 40-year limit on the search of title imposed first by the *Investigation of Titles Act*...incorporated into the *Registry Act*..." At page 21 he states that "...I think one must view the appellant's [Tkach's] title as of the moment it comes under attack." Later on page 21 he states "It is my view that the question is whether a hypothetical purchaser from the appellant [Tkach] at that time could obtain good title." Therefor the *Registry Act* in effect at the time of the challenge was the relevant statute.

iv. Tkach had undisputed possession of the subject property at all material times. A fence that had separated the properties was removed in the 1940s before Tkach was an owner. Although Hydro paid taxes on the subject lands nothing in Tkach's tax bill indicated the properties were separate. Hydro had not exercised any physical rights of possession of the subject lands. When Tkach bought the subject lands it was fenced in as part of Tkach's lands. Tkach had no personal knowledge of Hydro's claim to the land. Before registering Tkach's deed his lawyer obtained actual knowledge of Hydro's 1906 deed from the Registry Office; the lawyer relied on the 1934 deed to Tkach's predecessor in title as a good root of title under the statute.

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1 (1992), 95 D.L.R. (4th) 18

2 at pages 19-21.

v. The Court of Appeal quoted MacKay, J.A., in *Algoma Ore Properties Ltd. v Smith*[3], at p.350 made referring to an earlier Ontario provision:

> "I am of the opinion that the *Investigation of Titles Act* requires a search only to the first root of title prior to the 40-year period. The purchaser is entitled to rely on the form of the instruments registered and is not bound to inquire into their substance and if the instrument on which he relies as a root of title prior to the 40-year period is on its face sufficient to convey the fee, including the mineral rights, he is entitled to rely on it."

Although this passage refers to an earlier version of the Ontario Act the section considered was close to ours in effect thus this statement will assist in understanding the background of our sections 4(1) & 4(2)[4].

vi. The Ontario Court of Appeal concluded that

> **"For all these reasons, I have reached the conclusion that Hydro's claim against Tkach must fail. <u>It therefore becomes unnecessary to consider whether Hydro's title is in any event extinguished</u>."**

Section 105(1) - the search period - provided a successful defence to the action **without reference to s.106(1) of the Ontario Act that extinguished claims in land on the expiration of a "notice period". The conclusion of the court in *Tkach* clearly makes section 105(1), on which our section 4(1) is based, a shield against a competing interest even if it does not extinguish that competing interest. This supports our argument that section 4(1) will have the same effect.**

vii. Subsequent to *Tkach* a different panel of the Ontario Court of Appeal decided *National Sewer Pipe Ltd. v. Azova Investments Limited*[5] which brought *Tkach* into question. The majority decision, Osborne, J.A. dissenting, stated at page 22:

> "...I do not think the *Registry Amendment Act*, 1981, is retroactive to validate titles which were otherwise deficient prior to August 1, 1981. Certainly it cannot have the effect of creating an ownership in land where formerly there was none."

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3 [1953] 3 D.L.R. 343 (Ont. C.A.).

4 *Penney v. Hartling (1999),*177 N.S.R.(2d) 378 at page 381. Carver, J. held that section 4 of the *Marketable Titles Act* means that an instrument comprising the root of title need only purport to convey the interest; underlying good title prior to the statutory root is not required

5 (1993), 105 D.L.R. (4th) 1.

viii. The Supreme Court of Canada decided that *Tkach*, not *National Sewer Pipe Ltd.*, was the correct approach in *Fire v. Longtin*[6] a case appealed from yet another panel of the Ontario Court of Appeal.

ix. *Fire v. Longtin* again dealt with competing interests under the Ontario *Registry Act*'s forty year search period and with s.106(1) that operated to extinguish the Fire's fee simple interest. Although the Appeal Court and the Supreme Court of Canada found that Fire's title in the fee simple was extinguished by s.106(1) of the Ontario *Registry Act*, the Courts focussed most of their attention on the uncertainty of the 40-year search limit after the decision in *National Sewer Pipe Ltd*. At page 42 of the Ontario Appeal Court decision Justice McKinlay stated:

> "Indeed, if the decision of this court in *National Sewer Pipe* is correct - that the grantor under a conveyance which constitutes a root of title must have had a good title to convey - then it follows that the only safe search is one back to the original grant from the Crown."

x. By adopting the reasons of the Ontario Court of Appeal in *Fire v. Longtin* the Supreme Court of Canada confirmed the approach of the Ontario Court of Appeal in *Tkach* effectively overruling *National Sewer Pipe Ltd.* putting an end to the uncertainty that case created.

b. **Conflicting interests found in instruments registered prior to the 40 year search limit.**

i. In *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18, the defending owner's solicitor had actual knowledge of the competing claim but, as that knowledge came from an instrument registered outside the 40 year statutory period, such notice did not defeat his title established within the 40 year period within the Registry Office records. The Ontario Court of accepted this as the correct approach in *Tkach* and in *Fire* as to do so would defeat the intended purpose of the Act. The Supreme Court of Canada confirmed this approach in *Fire*.

ii. As to "Actual notice" see the differences between the majority and dissenting decisions in *National Sewer*, below, on the issue of actual notice. The majority held that one party had "actual notice" by virtue of instruments registered before the required search period. Osborne, J.A., dissenting, reasoned at page 33 that the party had no "actual notice" by reason of instruments registered before the 40-year search period:

> "If the title search period is 40 years, as it manifestly is under Part III of the Act, it must follow that instruments registered outside the 40-year period

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6 [1995] 4 S.C.R. 3

cannot be the source of actual knowledge referred to in Part I of the *Registry Act..."*

In *Fire v. Longtin*, below, at page 42 of the Ontario Court of Appeal decision, it, and by adoption, the Supreme Court of Canada stated, *obiter dicta*, referring to *National Sewer*, that "I agree with the full and compelling dissenting reasons of Osborne, J.A., on this issue..."

iii. At page 42 of the Ontario Appeal Court decision in *Tkach* (adopted in its entirety by the Supreme Court of Canada on *Tkach*), Madame Justice McKinlay stated:

"Indeed, if the decision of this court in *National Sewer Pipe* is correct - that the grantor under a conveyance which constitutes a root of title must have had a good title to convey - then it follows that the only safe search is one back to the original grant from the Crown."

PART 4 Federal Crown Interests in Land

Federal Real Property and Federal Immovables Act, S.C. 1991, c. 50. s.14

From the "Guide to the Federal Real Property Act and Federal Real Property Regulations"

"Section 14 - No Title by Prescription

No title by prescription

14. No person acquires any federal real property by prescription.

Notes

Section 14 states that adverse possession, or "squatters' rights," does not apply to federal real property. This provision is essentially unchanged from the previous legislation.

This section was first enacted in 1950 to bring federal real property in line with provincial real property in several provinces, where title by prescription had been abolished under provincial land titles legislation. There are also other reasons why the section is beneficial. As a matter of policy, federal real property is to be used for the benefit of the people of Canada. Therefore, one person should not be able to gain an interest in federal real property at the expense of all other Canadians without the Crown's knowledge and approval. Also, as a practical matter, the nature of much federal real property would make policing of "squatters" both impractical and expensive.

Title by prescription on federal real property may still be possible if the chain of possession started on or before June 1, 1890 and the prescriptive title was acquired before June 1, 1950. This is because before enacting this section in 1950, a person needed a 60 year period of adverse possession to obtain title by adverse possession against the federal Crown.

Source

Modification of section 5 of the Public Lands Grants Act, which read:

" 5. No right, title or interest in or to public lands is acquired by any person by prescription.""

PART 5 Boundaries & Extent of Title - MTA, LAA & LRA

1. What lands are protected by LRA & MTA?

2. Is the extent of a parcel protected by MTA?

    a. Title-wise MTA only protects marketable title to lands within the extent of the parcel description to which there is marketable title. In *MacNeil* v. *Nova Scotia (Attorney General) et al.* Cromwell, J.A., referring to MTA, s. 6, states at paragraph 22 that:

        "The statute only protects the title of land described in the deed. If, and as the trial judge found, the description does not include the subject lands, the statute does not assist the appellant."

    b. Refer to comments on *Tkach* in Part 3, respecting the operation of the language in MTA, s. 4(1), interpreted by the Ontario Court of Appeal and the Supreme Court of Canada in the "missing exception" situation.

3. Is the extent of a parcel protected by LRA?

    a. Subsections 21(2) and particularly (3) of LRA govern this situation:

        "Location and boundaries

        21

        (1) **The legal description of a parcel in a register is not conclusive as to the location, boundaries or extent of the parcel.**

        (2) **Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel.**

        (3) **A registration may not be rejected only because the location, boundaries or extent of the parcel appear to overlap the location, boundaries or extent of another parcel.**

    b. Migration does not create title nor does it permit unilateral expropriation - there are provisions in LRA which enable aggrieved parties to have parcel registers corrected - see sections 33-35, 91-92 and *Brill* [157]-[168].

MTA, LRA & LAA – Extent of Title
Garth C. Gordon
Sep 25, 2010
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MTA and extent of title:

In *MacNeil* v. *Nova Scotia (Attorney General) et al.*[1], Cromwell, J.A., referring to section 6 of the *Marketable Titles Act* states at paragraph 22 that:

"The statute only protects the title of land described in the deed. If, and as the trial judge found, the description does not include the subject lands, the statute does not assist the appellant."

Clearly his Lordship accepted that MTA protected a tax deed when it included the subject land; in this case the tax deed did not include the Subject land hence was not protected. This comment may apply generally to parcels other than those in tax deeds.

[1]. (2000), 183 N.S.R.(2d) 119; 568 A.P.R. 119 (N.S.C.A.)

LRA and extent of title:

Section 21states:

"Location and boundaries

21 (1) The legal description of a parcel in a register is not conclusive as to the location, boundaries or extent of the parcel.

(2) Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel.

***(3) A registration may not be rejected only because the location, boundaries or extent of the parcel appear to overlap the location, boundaries or extent of another parcel.*"**

Notes:

1) Extent of title is determined by survey not by LAA, LRA or MTA.
2) MTA, s.4, requires a documented chain of title but not proof of extent. MTA does not, generally, extinguish title – *Brill* paragraphs [82]-[83] but MTA may act as a shield when there are competing marketable titles for a parcel or parts thereof – *Ontario Hydro* v *Tkach*, *Fire* v *Longtin*.
3) LAA requires evidence of the extent of the lands claimed by possession.
4) MTA & LAA are separate means to prove title, *Brill*, paragraph [99] states: "... Claims to marketable title between a vendor and purchaser and possessory title under the LAA are parallel topics, in that the former is triggered by a chain of paper title and the latter may be assisted by a chain of paper title. But the latter is not a subset of the former, and the MTA in no way qualifies the LAA's process for determining possessory title."
5) LRA registration does not create title nor does it permit unilateral expropriation; one must prove the chain of title. There are provisions in LRA which enable aggrieved parties to have parcel registers corrected – see *Brill* at paragraph. [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." Consider also LRA, s.74(2). If in issue, extent of title must be proved.