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THE NEW MARKETABLE TITLES ACT

This issue is a special edition of the Law News devoted entirely to the new Marketable Titles Act which came into effect on July 1, 1996.

Members are requested to advise the Executive Director of pending applications where the Marketable Titles Act will be considered.

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Bill 53 - Marketable Titles Act: A New Beginning

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INTRODUCTION

The *Marketable Titles Act*, which received Royal Assent January 11, 1996, has a twofold purpose:

> "2. The purpose of this Act is to
>
> (a) remove uncertainties respecting the determination of marketable titles to land in the interests of all present and future landowners and facilitate the development of the Province; and
>
> (b) remove uncertainties respecting the validity of past and future tax deeds."

There is an obligation to educate the public on the way in which this legislation affects interests in land, but before we can educate others, we must consider carefully the history of the issues that the legislation seeks to address.

PART I

MARKETABLE TITLE

A History of Marketable Title

Any discussion of marketable title would be incomplete without reference to Di Castri's often quoted definition of "marketable title" in *Law of Vendor and Purchaser*, 1976 (2nd ed), at page 502:

> "...one which at all times and under all circumstances can be forced upon an unwilling purchaser who is not compelled to take title which would expose him to litigation or hazard; ...A purchaser is not required to accept or rely upon parol evidence of title, or information *dehors* the record, or upon the word of the vendor."

The issue as to what constitutes marketable title is an issue between a vendor and purchaser, and deals with the power of the vendor to convey, and the obligation of a purchaser to buy if the vendor can discharge the burden accorded to him with regard to the state of his title.

T.G. Youdan in *The Length of a Title Search in Ontario* (1986), 64 Can. Bar Rev. 507 states at 51:

> "The length of a search provision was directed at the vendor's power to convey the land; by itself, it did not determine whether in fact he would have good title. In particular, outstanding common law claims against the land could still be valid against the vendor and his purchaser even if they arose prior to the (title search) period."

The common law principle is that title to land is based in possession, is relative to the rights of third parties, and is therefore not absolute. Any contract entered into between vendor and purchaser could not affect third party claims, which at common law, were not extinguished or barred.[1]

The vendor in any sale transaction has the obligation to show *prima facie* good title to the purchaser, which at common law in England was established as 60 years of clear paper title, commencing with a "good root", and any questions arising within the 60 year period were to be answered by the vendor. The onus was then reversed to the purchaser, to show that title preceding the 60 years was defective.[2]

While the 60 year common law rule in England was not based on statutory authority, it is likely that the rule was established with consideration of the writs of right, which required a time frame to be set out in the writ in any action brought for the recovery of lands. In 1540, a statute was enacted[3] which set a limitation of 60 years from the time the right arose, to commence an action for the recovery of land.[4]

The Role of Statutes of Limitations

The first *Statute of Limitations* in England was enacted in 1833, reducing the time frame for commencing an action for the recovery of land from 60 years to 40 years. This appears to have triggered a controversy surrounding the way in which the time frames established at common law for determining a title to be marketable (60 years) were affected by the statutory authority establishing the time frames barring the right of an owner to recover land from persons possessing that land (40 years). Courts were prepared to apply a presumption of possession if a vendor could show 60 years paper title, thereby avoiding additional formal proof of physical possession of the lands conveyed.[5] Whether this presumption is sufficiently strong enough to operate *prima facie* to extinguish third party claims of an owner is unclear although there is some case law to suggest that this has found some favour with the courts.

The courts have had various opportunities to consider whether the 40 year period established by the relevant *Statute of Limitations* operated to reduce the title search period. In *Cooper* v. *Emery* (1844), 1 Ph. 388; 41 E.R. 679, Lord Chancellor Lyndhurst concluded that the common law rule was unchanged by the statute. He was of the opinion that the common law rule was based on the duration of a human life, and that the security of title would be affected if a shorter title search period was applied.[6] This principle found favour with Justice Scanlan as recently as October, 1995 in his decision in *Landry* v. *O'Blenis*.[7]

There have been decisions in Nova Scotia supporting the principle that the *Statute of Limitations* operates to shorten the search time frame for the determination of marketable title. Justice Rogers, in *Dooks v. Rhodes* (1982), 52 N.S.R. (2d) 650 in considering whether a deed dated 1941and recorded in 1981 was sufficient to operate as a root of title, cited s. 19 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 168 and held

> "...it is this provision that imposes what is accepted as a 40 year period beyond which a root of title must be found in order to certify marketable title to land in Nova Scotia. Thus is established a chain of title back to 1941, sufficient to bring into play the provisions of section 19 of the *Limitations of Actions Act* and overcome the objections taken in this case that title can only be established to July 31, 1970, and not May 21, 1941."

Justice Hallett, in *Knox v. Veinote* (1982), 54 N.S. R. (2d) 666, considered a paper title of 25 years as inadequate, and held in part:

> "...This gap in title would have been disclosed in a normal search of title going back at least 40 years as is the practice in Nova Scotia because of the extended limitation period within which persons under disability, such as being outside the province, may bring actions for possession of land (s. 19 *Limitation of Actions Act, R.S.N.S. 1967, c.168)*"....

In 1992, Justice Boudreau in *Boland* v. *Berthelot* (1992), 107 N.S.R.(2d) 187 held in part at page 191:

> "In my opinion the paper title is *prima facie* evidence of ***ownership and possession as indicated by the recorded document*** and I find the affidavits filed confirm the possession of this land by the various owners as indicated on the abstract of title. I therefore have no hesitation in finding the Vendors could satisfy the requirements for possessory title in excess of 40 years if such an application was made under the appropriate legislation..." (Emphasis added)

While the *Statute of Limitations* has not been consistently found to apply to shorten the common law rule of 60 years paper title, it does provide an alternative method of establishing marketable title if a vendor can show actual possession for 40 years, despite an incomplete, defective or absent paper title.

The law with respect to possessory title was considered by Justice Hallett. In *Lynch* v. *Lynch* (1985), 71 N.S.R. (2d) 69.[8] Hallett, J. states in part:

> "...The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession."

If a vendor can successfully prove actual possession for the requisite period, then s. 22 of the *Statute of Limitations* operates to extinguish the right and title of the true owners who could have brought an action to recover land. The statutory provisions result in marketable title rather than absolute title to the possessing owner, as the statute is negative in its extinguishment of the true owners' interest. While it may be possible to apply under the statute for a declaration of title if the true owners' right and title is extinguished, a person seeking to establish absolute title based on possession, in the absence of supporting paper title, usually proceeds to a declaration of absolute title by an application under the *Quieting Titles Act.*[9]

Possession can be actual (in deed) or constructive (in law). The rules regarding possession vary for a trespasser and one who occupies under a defective title. A trespasser can only gain possessory title over that portion of land that he actually occupies. A person occupying under a defective title however, is presumed to be in constructive possession of the whole.[10]

The courts have on occasion treated the rule of "constructive possession" to also mean "constructive dispossession" for purposes of barring the right of an owner in an action to recover land. In an application pursuant to the *Quieting Titles Act,* Justice Tidman held that an owner occupying land under a defective paper title will be deemed to have constructively dispossessed the true owner based on the competing chain of title documents, the first of which triggers the commencement of the time frames set out in the *Statute of Limitations.* He found:

> " The evidence of possession of the lands is sketchy, as it appears that the title holders made very little use of the lands...What is referred to as the doctrine of colour of title does not require the plaintiff to show actual possession...In the circumstances here I would equate the true owner to the registered owner of the lands. The presumption that the registered owner of the title is in possession and that the seisin follows the title has not been rebutted by the defendant Meisner. Meisner offers no evidence of possession by the heirs through which he claims."[11]

Justice Tidman's decision was confirmed on appeal. In the appeal court's decision,[12] delivered orally, Justice Freeman stated in part:

> "The trial judge found that the respondent Nemeskari had established a good chain of title extending over 40 years, and this was ***sufficient to bar any other claimant*** under s. 20 of the *Limitation of Actions Act,* R.S.N.S. 1989, c. 168." (emphasis added)

At least then, for purposes of an application for a declaration of "good title" pursuant to the *Quieting Titles Act,* the court was prepared to apply a conclusive presumption of possession of the owner (and conversely dispossession of the true owner) based on paper title without further proof of possession on "the record". This case extends the common law principle of a marketable paper title being *prima facie* evidence of possession, and converts the negative operation of the *Statute of Limitations*barring the rights of the true owner to recover lands, to a conclusive presumption of "good title" in the owner with marketable paper title.

Before departing from a discussion of the origin of these issues in England it is important to note that in England the system of land ownership was private. In the beginning, there was no public depository of documents affecting the transfer of land, and the evidence of ownership was in the hands of the owner, or his solicitor. Once a public recordation system was introduced, legislation followed, shortening the time frames for the search of title.

Eventually, at least in England, statutory authority was enacted overriding the common law rule regarding the length of the title search period. In 1874 the *Vendor and Purchaser Act*[13] reduced the common law rule from 60 years to 40 years. In 1925 the *Law of Property Act*[14] further reduced the time to 30 years, and in 1969[15] to 15 years.[16]

In jurisdictions other than England, alternatives were sought for enabling certainty in the determination of title. In the 1840s the Land Titles system was developed in Australia as the modern system to bringing certainty to land ownership. Under the Land Titles system, title documents were organized in a geographic rather than name based fashion. The government certified title, and only those documents accepted for registration could affect ownership. There is no adverse possession in a Land Titles system, and so the controversy surrounding the way in which possession of the lands affects ownership and title is absent. The documents presented for registration in a land titles system are assessed for their validity in effecting that which they purport to convey. In Canada, the western provinces introduced a Land Titles system in the 1870s. Portions of Ontario, and New Brunswick have also introduced a Land Titles system as a means of achieving order. In 1930, Ontario introduced the *Investigation of Titles Act* S.O. 1929, c. 41[17] and in 1974 Prince Edward Island introduced similar legislation providing statutory authority for limiting a title search to 40 years.[18]

Until enactment of the *Marketable Titles Act*, there was no comparable statutory authority clarifying the issue in Nova Scotia, and the controversy is very much evident in our case law.

The Nova Scotia Experience

Nova Scotia received representative government in 1758, and on October 3 opened its first Legislative Assembly. One of the first enactments of the Nova Scotia Legislative Assembly in 1758 was the *Act For Confirming Titles to Lands and Quieting Possessions.*[19] This Act, and its amendments, formalized the system of public registration of interests in land. With the introduction of a public recordation system, interests in land once recorded were capable of examination by those persons interested in determining the state of the title. As stated by *Anger & Honsberger Real Property:*[20]

> "The basic purpose of any land recordation system...is to give notice of the interests that may exist in any plot of land and to establish a priority system for those interests...A registry system is a system of deeds, not title, recordation. This means that the system attempts to compel the registration of all interests in the land. If an interest is not registered it is liable to be defeated by a subsequent interest."

In 1789 an amendment to the *Act for Confirming Titles to lands and Quieting Possessions*[21] provided:

> "*Whereas by the various and secret ways of conveying lands, tenements, and hereditaments, ill disposed persons frequently have it in their power to commit frauds, by means whereof bona fide purchasers and mortgagees may (by prior secret conveyances and fraudulent incumbrances) be greatly injured; for remedy whereof:*
>
> 1. *Be it enacted, by the Lieutenant-Governor, Council and Assembly,* That all deeds and conveyances of lands, tenements, or hereditaments, made after the first day of June, in this present year of our Lord, one thousand seven hundred and eighty nine, shall immediately on the execution thereof, be registered in the office of the Register, or deputy Register, of the town or district wherein the lands lay, ... and that every deed or conveyance made after the said first day of June next, shall be adjudged fraudulent, and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance shall be registered prior to the subsequent purchase and registry thereof."

This statutory provision affords protection to the familiar "bona fide purchaser for value without notice" and in its present form is reflected by section 18 of the *Registry Act.*[22]

It is clear to practitioners in Nova Scotia that our public recordation system has not fulfilled its declared objective. All deeds and conveyances of land have not been recorded

at the Registry of Deeds. Failure to record an interest does not affect transfer of ownership (as in a land titles system), unless the failure to record results in someone else succeeding in the race-notice priority issue. Ownership of land over time in Nova Scotia has often been treated as personal - a family tradition, and not something that involved or required a formal process to effect a transfer. As a result, ownership of land in Nova Scotia has changed hands through unrecorded wills, unrecorded deeds, intestacy and word of mouth. Many titles to rural land have large registration gaps from the time they were first granted. Often the original chain of title forward from the Crown grant disappears, and a new chain of title springs up commencing for example, with a quit claim deed a century later. Added to this, Nova Scotia is the only jurisdiction in Canada, that by law vests property on the death of an intestate in his or her heirs-at-law, and not the administrator appointed by Probate Court.[23] In the absence of issued Letters of Administration, the heirs cannot be determined by search of any records, in any registry office.

The certainty of determining the marketability of a title depends on the physical and formal registration of every interest affecting the ownership of land. As can be seen, in a registry system, which is really a public depository system, one cannot rely on all of the relevant interests in a piece of land being recorded, nor can one rely on the process as one in which only valid interests are registered.

In the absence of clear direction from the legislators and courts, practitioners resorted to resolving the uncertainty in a practical fashion with the evolution of practice standards. Many became comfortable (at least until C.W. MacIntosh's 1987 article appeared in the *Nova Scotia Law News "How far Back do you Have to Search?"*) with a 40 year title search period. This standard evolved from a belief that if the *Statute of Limitations* established a maximum of 40 years for the right of a true owner under a disability to be dispossessed of his or her title, this should be a sufficient period of time on which to base an opinion as to "marketable title", in particular in urban areas where land was openly possessed and occupied. The cases referred to earlier support this practice standard.

The decision of Justice J.E. Scanlan in *Landry v. O'Blenis* rendered October 4, 1995, aside from being the timely impetus for creating new statutory authority, is the most recent decision in Nova Scotia embodying a discussion of the issues surrounding the determination of marketability.[24]

The applicant Vendor in that case, Marcella Landry, claimed a good chain of title rooted in a warranty deed in 1947 from Blair Andres to her father. Paper title prior to 1947 consisted of a will of John S. Lusby bequeathing the property to Blair Andres.

Prior to the will, there was a warranty deed in 1895 whereby John C. Lusby conveyed his undivided one-quarter interest to John S. Lusby. John C. Lusby, and three others received title by virtue of a 1852 deed. The respondents' solicitor raised an objection to title, citing the outstanding 3/4 interest from the 1852 deed, and relied on the common law rule that his client was not compelled to purchase the land as the vendor had not discharged the burden at common law of proving 60 years unbroken paper title from a good root. There were no statutory declarations on record at the Registry of Deeds, evidencing actual or adverse possession. The issue before the court was whether the objection was valid, which involved the determination of whether the vendor had a "marketable title". The applicants' counsel relied on the 1947 Deed, the application of the *Statute of Limitations*, and made reference to the draft practice Standard of 40 years proposed by the Nova Scotia Barristers' Society. Counsel for the applicant also relied on the decision of Justice Boudreau in *Boland* v. *Berthelot* (1992), 107 N.S.R. (2d) 187.

Justice Scanlan was not prepared to apply the standard followed in *Boland* v. *Berthelot* as it gave "..only a brief explanation for the decision and is of little assistance in the present case". Justice Scanlan dismissed the draft standard of practice of a 40 year search as unfounded and further stated that although there were "many authorities..." that referred to 40 years as being sufficient to establish marketable title, those authorities were for the most part basing their position on the peculiar jurisdictional statutes for that position (i.e. see s. 105 of the *Ontario Registry Act*[25]. Nova Scotia, he pointed out, had no such statutory authority and he therefore felt compelled

> "... to look to each case to ascertain whether there is marketable title. The Nova Scotia ***Statute of Limitations*** is of little assistance as the matter of sufficiency of title is governed by the common law." (p. 4)

Justice Scanlan then cited Justice Davison's decision in *Inter Lake Developments Ltd.* v. *Slauenwhite* (1988), 86

N.S.R. (2d) 23, and Charles MacIntosh's 1987 article *How Far Back Do You Search The Title?* as supportive authority for his decision that the applicant vendor did not have a marketable title as she was unable to show a paper chain of title for the requisite 60 years. In considering the application of the *Statute of Limitations* and claim of possessory title, he concluded by saying:

> "Possessory title cannot be presumed in this case based on the title documents alone. The Court will not order the respondents (purchaser) to complete the transaction". (pp. 5-6)

Justice Scanlan upheld Di Castri's definition that the determination of what is "marketable" must be determined from an examination of the "record".

Many property practitioners disagreed with the *Landry v. O'Blenis* decision. It was felt that the rights of Marcella Landry (a present owner) should take precedence over an outstanding paper interest originating 140 years ago. In particular, given the nature of the location of the property and use of the property, (i.e., a dwelling situate on a lot in the Town of Amherst), lawyers were of the view that the rights of the "true" owner should be statute barred, possession should be presumed, and that if fairness prevailed, Marcella Landry, whose family had owned the property since 1947, should be considered to have a marketable title. While the reasons Justice Scanlan cited for his decision have authority in law, they are impractical given the current trends in our society.

As stated previously, courts were prepared to presume possession if the title was, at common law, marketable. Courts were also prepared to consider 40 years paper title marketable if a conclusion as to possession was available. Therefore, now that the statutory authority exists for a period of 40 years paper title being considered "marketable", the courts may now be in a position to apply the principle of "constructive dispossession" to conclude that a 40 year paper title is conclusive evidence of 40 years of possession for purposes of triggering the time frames set out in the *Statute of Limitations* so that title is both "marketable" as between vendor and purchaser, and "good" barring third parties' rights to assert interests arising pursuant to registrations outside the 40 year, and "marketable title" period.

PART II
MARKETABLE TITLE PROVISIONS UNDER THE NEW ACT

Unlike other jurisdictions' remedial legislation in this area, the provisions of the new Act are declaratory in nature.

Section 4

Section 4(1) of the *Act* declares that:

> "A person has a marketable title to an interest in land if that person has a good and sufficient chain of title during a period greater than 40 years immediately preceding the date marketability is to be determined"

This section reduces a vendor's burden of *prima facie* proof of title from 60 years to a minimum of 40 years plus one day. This is the statutory authority that Justice Scanlan found lacking in *Landry v. O'Blenis.*

Section 4(2) provides:

> "A chain of title commences with the registered instrument, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the 40 years immediately preceding the date the marketability is to be determined."

This defines the starting point for the search. It must be "a registered instrument other than a will". This broadens the familiar common law and standard practice of a requisite warranty deed root of title. The required instrument must either "convey" or "purport to convey" the interest in land. In determining whether a registered instrument will qualify as a root, a lawyer must be satisfied that the grantor has, or purports to have, the interest in land that is being conveyed. For example, a quit claim deed that "releases and quits claim to the Grantee all the interest of the Grantor in the lands described in Schedule "A" attached hereto", is operative to convey the fee simple only if the grantor owns the fee simple. The quit claim may not on its face reveal the interest that the grantor has in the land. However, a quit claim deed wherein the grantor "grants and conveys" the lands, absent any specific limitation, may satisfy the requirement set out for a root in s. 4(2) as it "conveys or purports to convey" the entire interest in land. Whatever the registered instrument relied on as the root, a lawyer must be satisfied as to the nature of the interest "purportedly" conveyed for purposes of the requirements of s. 4(2).

Pursuant to this section, a deed dated 40 years ago even if it is not registered until 1980 can operate as a valid root from its date. This supports the principle set out in *Dooks v. Rhodes* (1982), 52 N.S.R. (2d) 650. An unregistered deed, until it is registered, cannot operate as the commencement point for the chain of title under this section which requires a " registered instrument".

Consider the facts in *Landry* v. *O'Blenis*. Under s. 4(1) Marcella Landry can show title for at least 40 years plus one day (beginning 1947). Pursuant to s. 4(2), the root is the Warranty Deed into Marcella's father in 1947, and so Marcella Landry would, under the new legislation, have a "marketable title".

Section 4(3)

"A chain of title may commence before or after the coming into force of this Act"

This section provides the authority for the chain of title commencing retrospectively, applying to titles before as well as after the coming into force of this Act.

Section 4(4)

This subsection is perhaps easier to understand if there is a discussion of the preamble of the subsection, separate from the time frames set out after the preamble:

> "Notwithstanding the *Intestate Succession Act* and the *Descent of Property Act,* but subject to Section 5, an interest in land, whether arising before or after the coming into force of this Act, that has not vested pursuant to an instrument that is registered is extinguished by a registered instrument, other than a will, that conveys or purports to convey that interest in the land and is executed by a person with a marketable title, upon the expiry of..."

The preamble operates to extinguishes third party claims to interests in land (upon the expiry of the time frames set out in the subsections) which have not vested pursuant to a **registered** instrument. Examples include interests that vest by authority of statute, (e.g. *Intestate Succession Act* and *Descent of Property Act*) and unregistered wills. For the extinguishment to be triggered, there must be an existing, competing registered chain of paper title which is marketable. The extinguishment provisions of the Act **do not operate to extinguish any unregistered interests unless there is a competing (and therefore adverse) registered chain of title.** The unregistered interest is extinguished upon the registration of an instrument that includes a conveyance of that interest, and is executed by a grantor who has a marketable title. The passage of time in itself is insufficient to trigger the extinguishment provisions and unlike the *Statute of Limitations* there is no requirement that the vendor prove actual possession of the lands to which the interest relates.

For the extinguishment to be effective:

a) the interests of a person cannot have vested pursuant to registered instrument;
b) there must exist a competing chain of marketable title; and
c) the registered instrument that extinguishes the interests will be the deed which completes a chain of at least 40 years plus one day and is "executed by a person with a marketable title".

Consider an example. Three of four heirs sign a quit claim deed in 1940 reciting the intestate death of their father in 1939, and confirming that there are only four heirs at law. In 1945, the grantee on the quit claim deed from 1940 gives a warranty deed to B, and the chain of title continues by deeds in 1969, 1986, and 1990. It is now 1996. The position of the fourth heir with regard to the extinguishment components of the preamble would be as follows:

a) the interest of the fourth heir has not vested pursuant to a registered instrument;
b) there is a competing chain which commenced in 1945 by a warranty deed; and
c) the registered instrument that extinguishes the heirs' interest would be the deed in 1986, being the deed which completes the competing "marketable title" time frame of at least 40 years, and which would have been executed by a person with a marketable title.

It should be noted, that had there been no deeds in the chain of title in 1986, or 1990, the interest of the fourth heir would not be "extinguished" by section 4(4) until there is a "**registered** instrument executed by a person with marketable title".

The *Act* determines the time frames that must expire before any extinguishment can take place.

Section 4(4)(a) to (d)

The time frames for extinguishment are:

> " (a) the 20-year period immediately following the vesting of the interest;
>
> (b) the 10-year period immediately following the attainment of the age of majority by the person with the interest;
>
> (c) where the person with the interest is of unsound mind, the 10-year period immediately following the person ceasing to be of unsound mind or the 40 -year period immediately following the vesting of the interest, whichever is earlier; or
>
> (d) the three-year period immediately following the coming into effect of this Act,
>
> ***whichever is latest.***" (Emphasis added)

The unregistered interests referred to in the preamble will only be extinguished by a competing instrument registered after the expiry of the latest of the time frames set out in s. 4(4)(a) through (d).

Section 4(4)(a) states the "rule" of 20 years, which is consistent also with the time frames set out in the *Statute of Limitations* for the dispossession of the true owner. Sections 4(4)(b) and (c) set out the extended time frames for two classes of persons under a disability; minors 4(4)(b) and those persons of unsound mind 4(4)(c). Section 4(4)(d) provides for a three year time frame from coming into force of the Act, or a period ending June 30, 1999. The longest of the time frames listed in (a) through (d) is the time frame that must have expired for the interest in land to be extinguished. After July 1, 1999, only section 4(4)(a) through (c) will need to be applied.

Consider the example of the fourth heir whose interest was outstanding under the 1939 intestacy, and was not dealt with in the 1940 deed. Provided there exists a competing marketable chain of title, the interest of the fourth heir pursuant to the time frames of "the rule" set out in s. 4(4)(a) could have been extinguished by a competing instrument registered at any time after 1959 (20 years from the vesting of the interest), or if that person was of unsound mind, at any time after 1979 as set out in s. 4(4)(c). However, in light of s. 4(4)(d) the interest cannot be extinguished by this Act under this section until after June 30th, 1999 as the periods set out in s. 4(4) (a) through (d) are to operate "whichever is latest". In the example of the interest of the fourth heir, the competing marketable title existed as of 1985, and the registration of the deed in 1986 was "executed by a person with marketable title", and so could operate to be the triggering instrument required by the preamble of s. 4(4), once the time periods set out in s. 4(4)(a) through (d) have expired.

The three year period set out in s. 4(4)(d) essentially operates to extend the triggering of the extinguishment section to July 1, 1999. This initial delay in the effect of the extinguishment section gives consideration to the public policy against the retroactive extinguishment of interests in land. The issue of retroactive extinguishment of interests, and innocent parties losing title to land was considered by the Ontario Court of Appeal in *Fire v. Longtin.* In a unanimous decision, Justice Hilda McKinlay upheld the 40 year title search rule of the Ontario legislation as a "policy decision by the legislature", and indicated that the statutory scheme:

> "...may result from time to time in apparent injustices to persons with claims to real property which are older than 40 years. However the legislature weighed that possibility against the expectations of persons more recently dealing with land. In the final result it has opted for legislation which, although it may appear to favour more recent grantees, still contains many safeguards of the rights of those claiming under more ancient conveyances."[26]

The decision of the Ontario Court of Appeal was confirmed unanimously by the Supreme Court of Canada in its decision handed down in November, 1995.

So, with regard to the fourth heir in the above example, whose interest vested in 1939, is his interest extinguished by this section on July 1, 1999, or can he preserve his interest under the legislation by filing a notice of claim prior to July 1, 1999? The filing of a notice of claim by the fourth heir will prevent the triggering of the extinguishment under s. 4(4), but may not operate to "preserve" or "validate" his interest to the extent that it is otherwise invalid. To conclude otherwise would result in the heirs of the three grantees from the 1852 deed in *Landry v. O'Blenis* being able to file a notice of claim in June 1999, thereby "preserving" their interest notwithstanding the statutory authority for marketable title in s. 4(1) and (2), the law of adverse possession and equitable principles.

Section 4(5)

" (5) Nothing in this Section extinguishes any interest in land except as provided by subsection (4)."

This section is straightforward in providing that s. 4 does not extinguish any interest in land except in accordance with the specific provisions of s. 4(4). However, this does not prevent a common law rule, or other statutory provision from operating to extinguish an interest in land. For example if the courts favour the "constructive dispossession" extension of the common law principle of marketable paper title discussed earlier, this interpretation may operate to bar a third party's interest in the lands notwithstanding the provisions of s. 4(4) of this statute.

Section 5 - The Notice of Claim

Section 5(1)

"(1) A person may preserve an interest in land that, but for this Section could be extinguished by subsection 4(4) by filing a notice of claim."

This subsection confirms that a person's interest which would otherwise be extinguished under s. 4(4), may be preserved by the filing of a notice of claim in accordance with this section. Preservation however, is not to be confused with "validation", as stated earlier. The filing of a **valid** notice of claim prior to the expiry of the latest of the time periods set out in s. 4(4) (a) through (d) can, at best, prevent the triggering of the extinguishment provisions of s. 4(4).

Section 5(2) provides that the form of the Notice of Claim will be as prescribed by the regulations.

Section 5(3)

"(3) A Notice of Claim shall include

(a) the name of the claimant;
(b) the names of the owners of all interests in the land known to the claimant;
(c) the address of the claimant;
(d) a description of the land in which the interest is claimed;
(e) the nature of the interest in the land claimed;
(f) a summary of the basis of the claim, including the recording particulars of every instrument constituting the chain of title on which the claim is based; and
(g) such other information as the regulations prescribe."

The Notice of Claim must include the information set forth in this section. From the Notice of Claim, if from no other registered document at the Registry of Deeds or Probate, a title searcher will be able to determine if the time frames have expired from the vesting of the interest.

An example may be helpful in the consideration of this subsection. If one of four heirs at law is filing a notice, having derived title to an interest in land as a result of their father's intestacy, the information required by s. 5(3) would be as follows:

(a) The name of the heir claiming;
(b) The names of the other heirs at law of the father, (the other three children);
(c) The address of the heir claiming;
(d) The legal description of the land to which the interest relates;
(e) The nature of the interest would be an undivided one-quarter interest;
(f) The basis for the claim is that the heir is a son of John Doe, who, at the time of his death was the owner of the land, and John Doe died intestate on the 4th day of June, 1939. This subsection requires that all of the recording particulars of the documents appearing in the claimants' chain would be set out in this part.

It is anticipated that the nature of the registered instrument by which John Doe received his interest in the property together with the recording particulars of that instrument would be set out in the Notice, and would be the document that would be marked at the Registry of Deeds as having a Notice of Claim indexed against it.

Section 5(4)

"s. 5(4) A notice of claim does not validate or extend an interest that has been extinguished by subsection 4(4) or that has expired or is invalid."

A Notice of Claim, once filed, will not operate to revive an interest that has been extinguished by s. (4), **or that has**

expired, or is invalid. Consider the interest of the fourth heir, whose 20 years from the date the interest vested expired in 1959. Can he preserve his interest by filing a Notice of Claim? Prior to July 1, 1999, s. 4(4) has not extinguished the interest, and, with the filing of a valid Notice of Claim form prior to the latest expiry period, that section is prevented from being triggered to defeat his interest. However, has the interest expired, or is it invalid by operation of common law or the equitable principle of laches?

Justice Tidman, in *Nemeskari v. Nova Scotia (Attorney General) and Meisner* (1992), 115 N.S.R. (2d) 271 held that even if the defendant's claim in that case had not been barred by the limitation period set out in s. 20 of the *Limitation of Actions Act*, he would have applied the equitable principle of estoppel by laches to bar the defendant's claim. In the *Nemeskari* case, the plaintiff's root of title was 1930, and the defendant Meisner, in advancing his claim in 1990 was not considered to have advanced it within a reasonable time. Justice Tidman noted at page 290:

> "Although Meisner's quit claim deeds were on record prior to the plaintiff's purchase of the property, such notice of claim by and in itself does not render the claim valid."

The purpose of section 5 of the *Act,* is to provide a mechanism for those interests which have not expired or are not invalid under any other statute or law, to be preserved from extinguishment under s. 4(4). Further, it allows for notice of those interests to be filed in an orderly fashion so those persons seeking to determine the title of a vendor through an examination of the records at the Registry of Deeds, can ascertain title with certainty by means of the formal registration of every interest in the lands under search. In the case of the fourth heir who filed a Notice of Claim prior to July 1, 1999, s. 22 of the *Statute of Limitations* may extinguish the interest notwithstanding section 5, and it being invalid, the filing of the notice of claim does not preserve or "validate" that interest.

Section 5(5)

> " s. 5(5) A new notice of claim may be registered pursuant to this Act and for that purpose, an earlier notice of claim is the instrument on which the claim is based."

This provision allows for Notice of Claim to be renewed. In light of the time frames under s. 4(1) it is anticipated that renewal will take place every 40 years, as 40 years plus one day is the minimum period for a "marketable title".

Section 5(6)

> "s. 5(6) For greater certainty, lack of knowledge or absence from the Province on the part of any person does not extend the period during which a notice of claim may be registered."

Absence from the Province is a disability under the *Statute of Limitations* (s. 19). For purposes of the extinguishment provisions of this *Act* those absent from the Province will not be considered to be under a disability and the 20-year "rule" as set out in s. 4(4)(a) applies.

Before discussing the exception provisions of this *Act* (s. 7, and 9), it is appropriate to consider the issue of tax deeds - the history of the issue, and the language of s. 6 of the *Act* which is intended to remedy the uncertainties.

PART III

TAX DEEDS

A History of Tax Deeds

Any discussion of tax deeds should begin by reference to the principle of eminent domain. As stated in *Anger & Honsberger Law of Real Property*:[27]

> ".... under the common law tenurial system of land holding absolute ownership of land is vested in the Crown. One holds an interest in the land but does not "own" the land itself."

In 1976, the *Assessment Act*[28] provided that a tax deed:

> "... shall be conclusive evidence that all the provisions of the Act with reference to the sale of land therein described have been fully complied with, and every act and thing necessary for the legal perfection of such sale has been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs, or assigns, in fee simple, free and discharged for all encumbrances whatsoever."

Property practitioners were generally of the view that this provision supported the standard of practice that a tax deed could be considered a good root of title.

Charles MacIntosh in his 1989 article *Tax Deeds Revisited*[29] prepared for CLE cites the statements of E.D. Armour:[30]

> "Inasmuch as taxes are made a charge on the land itself, and not upon the interest of any particular person therein, the effect of a sale of the land is to create a new root of title, and to extinguish all prior interests therein."

The decisions of the courts in Nova Scotia have not provided any consistent comfort to property practitioners relying on a tax deed found in a search of title as a good root of title. For a complete history of this issue reference should be made to C.W. MacIntosh *Nova Scotia Real Property Practice Manual.*[31] For purposes of this article, discussion will be restricted to the issue of invalid assessment as the basis for overturning a tax deed.

Although tax deeds have been upheld despite procedural defects in the tax sale process, a tax deed has been held only to be valid if the taxes were properly assessed. In *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 at p. 431 (S.C.C.) Strong , J. held in part as follows:

> "... the courts are bound to give effect to what the law giver has so enacted, and the gross hardships and flagrant injustice of such a law is no answer to an action invoking its judicial enforcement and application."

In that case the learned judge found that the property had not been properly assessed, and the tax sale was set aside. *Domansky* v. *Fitzgerald* (1912), 62 D.L.R. 524 and *Aulenback* v. *Aulenback,* [1949] 2 D.L.R. 365 also supported the underlying requirement of accurate assessment, for a valid tax deed.

In one case, it was held that a tax sale, based on an assessment to "owner unknown" was valid, as an owner has the responsibility to ensure he or she is properly assessed for taxes.[32] A tax sale based on property assessed to one owner "et al" has been upheld by the courts as a valid assessment.[33] Courts have more recently held however, that an assessment of an owner "et al" is only effective to extinguish the interest of the person named in the assessment.[34]

In *Moore and Armsworthy v. Wheadon* (1993), 126 N.S.R. (2d) 47, Justice Davison compared the language of s.161 of the *Assessment Act* to s.16 of the *Quieting Titles Act.*

He found the wording of the section insufficient to extinguish the interests of persons other than the assessed owner, and said at p. 53:

> If the legislature had intended the purchaser at a tax sale to hold the fee simple solely and to the exclusion of other persons, appropriate wording would have been placed in the statute. The statute must be strictly construed and to exclude the interest of all persons in the property, one would expect to see words similar to those found in s. 16 of the *Quieting Titles Act* R.S.N.S. 1989, c. 382 where the effect of a certificate of title given under the terms of that Act is described as follows:
>
> Effect of registered certificate of title
>
> 16(1) A certificate of title, when it has been issued and registered in the registration district in which the land lies, ***is binding and conclusive upon all persons,*** including the Crown, and whether named in the action or not, and except as is herein otherwise provided, the same is ***not liable to be attacked*** or impeached at law ***by any person whomsoever:*** the title mentioned in the certificate shall be ***deemed absolute and indefeasible*** on and from the date of the certificate ***as regards*** the Crown and ***all persons whomsoever,*** subject only to any charges, encumbrances, reservations, exceptions or qualifications mentioned in the certificate, and is conclusive evidence that every application, notice, publication, proceeding, consent and Act that ought to have been made, given and done before the granting of the certificate has been made, given and done by the proper person." (emphasis added)

As will be seen from a review of the curative language contained in s. 6 of the *Marketable Titles Act* careful consideration was given by the drafters to the guidance

provided by Justice Davison in *Moore and Armsworthy v Wheadon*.

The Tax Deed Provisions of the Marketable Titles Act

Section 6 - Tax Deeds

"s.6(1) In this Section, "tax deed" means

(a) a certificate that has or purports to have the effect of vesting land that was to be sold for non-payment of taxes in a city, town, municipality of a county or district, regional municipality, village commissioners or service commission as defined by the *Municipal Affairs Act*; or

(b) a deed from a city, town, municipality of a county or district, regional municipality, village commissioners or service commission as defined by the *Municipal Affairs Act* to land sold or purportedly sold for non-payment of taxes.

(2) A tax deed may not be set aside for any reason whatsoever except during the six years following registration of the tax deed, and thereafter the tax deed is binding and conclusive upon all persons and is not liable to be attacked or impeached at law by any person, and the tax deed conveys an absolute and indefeasible title in fee simple to the land described in the tax deed and is conclusive evidence, with respect to the purchaser and every person claiming through the purchaser, that every requirement for the proper assessment and sale of the land has been met".

The language emphasized above in the quote from Justice Davison's decision appears almost verbatim in section 6(2). It is hoped that this language will now be considered by the courts to be sufficient for a tax deed to be considered a good root of title as it specifically makes reference to the tax deed being conclusive evidence that "every requirement for the **proper assessment** and sale has been met".

Section 6(3)

"s.6(3) Notwithstanding subsection (2), a court may exclude from a tax deed all or part of the lands described in the tax deed that the court finds were assessed to a person, other than the person to whom the property was assessed when the lands were sold for arrears of taxes, who has an interest in the lands or part thereof and in respect of which taxes were not in arrears for more than one year at the time of the sale."

This section allows land to be excluded or carved out of a tax deed in cases in which the lands were the subject of a double assessment. Before owners of interests in land can be successful in any application to have lands excluded, they must be able to show that the taxes for their portion of the assessed property were not in arrears for more than one year at the time of the sale.

Section 6(4)

"(4) Subsection (2) does not apply where a court finds that the current owner of the land participated in a fraud or breach of trust with respect to the sale."

Notwithstanding s. 6(2), a tax deed may be set aside if a court finds that the ***current owner*** of the land participated in fraud or breach of trust with respect to the sale. It seems reasonable to restrict the exception to a remedy against the "current owner" as to hold otherwise would offend the protection afforded to the bona fide purchaser for value without notice.

Section 6(5) is straightforward in providing:

"(5) Subsection (2) applies whether the tax deed was registered before or after the coming into force of this Act."

As with the retrospective clause in s. 4, this subsection provides for the retroactive application of this section of the Act to tax deeds registered both before as well as after the coming into force of this Act.

Section 6(6)

"(6) Subsection (2) does not deprive any person of any cause of action that person may have for damages for the wrongful sale of land for taxes."

Persons aggrieved by a tax sale process, unless the circumstances warrant an application pursuant to subsection (3) or (4), will be deprived of their property right but will have a cause of action in damages for compensation. This is not unlike other statutory provisions which deprive an owner of a property right. The *Quieting Titles Act* purports to give notice to an owner before their property right is taken away, but if the owner is unknown,

the right may be extinguished without notice. Similarly, the provisions of the *Land Titles Clarification Act*[35] provides compensation for an owner whose interest in land is affected by the issuance of a certificate of title to another, but the property right is lost. The courts should not therefore find the new provisions of the *Marketable Titles Act* to be offensive or unfair because a property right may be extinguished. On the contrary the municipality's right to the payment of taxes, and an orderly and effective means of proceeding in the absence of payment of taxes, seems reasonable, given that the ownership of land is only absolute for the Crown.

The careful language of the exceptions to s. 6(2) for double assessments, and for fraud or breach of trust, should provide comfort to the courts that equitable principles received due consideration by the legislators.

PART IV

THE EXCEPTIONS

The "marketable title" exceptions

Section 7(2) and (3)

The marketable title provisions set out in s. 4(1) and (2) do not apply to land in respect of which a certificate has been issued either under the *Quieting Titles Act*[36] or the *Land Titles Clarification Act.*[37] Sections 4(1) and (2) will also not apply to registered owners who have lost their right of action under the *Limitations of Actions Act.*[38] An owner whose interest in land is extinguished under s.22 of the *Statute of Limitations*, cannot use s. 4(1) and (2) to establish a marketable title, notwithstanding that he or she may meet the requirements of s. 4(1) and (2).

The extinguishment provision of the Act (s.4(4)) does not apply to an adverse interest acknowledged or specifically referenced in "the description of land"(s.7(3)). This is consistent with the principle that all interests in a chain of marketable paper title will be considered and dealt with, and the reference in a legal description will operate to give notice of the adverse interest to those searching within the 40 years.

General Exceptions to the Act

Section 7(1) and Section 9

The exceptions to the Act as a whole are as follows:

1. Interests in land created or preserved by statute (s.7(1)(a));
2. Interests of municipalities in streets, roads, highways or road reserves (s.7(1)(b));
3. Utility or municipal government easements or rights of way(s.7(1)(c));
4. Mineral rights (s.7(1)(d));
5. Easements or rights of way openly used and enjoyed (s.7(1)(e));
6. Any interest of the Crown (s.9)
7. Section 3 of the *Statute of Limitations* does not apply to any time period set out in the Act, but section 3 does not apply under any circumstances to time periods in excess of 10 years, and therefore the section practically only prohibits the application of section 3 to the tax deed time periods which are less than 10 years.

PART V

SUMMARY PRINCIPLES

In summary, there are a few principles that result from this legislation affording us our "new beginning":

1. With regard to "marketable title", there is now statutory authority for reducing the common law 60 year search rule to a 40 year plus one day search rule;

2. Effective July 1, 1999, there is statutory authority for the extinguishment of unregistered interests in the face of a competing and therefore adverse marketable paper title, without proof of possession of the land.

3. Persons seeking to "preserve" their interest in land may file a Notice of Claim at the registry prior to the expiry of the time periods set out in the extinguishment section. However, the filing of a Notice of Claim will only operate to prevent the triggering of the extinguishment section under this Act. It cannot operate to "validate" an interest that is otherwise invalid. Those filing a notice of claim will

still have to defend the validity of their claim of an interest in land, notwithstanding the act of registration of the notice, in the event that there is a competing adverse "marketable title".

4. Now that the time frames for "marketable title" and possessory title coincide, the new Act should reinforce the common law presumption of possession by those persons who can establish a marketable paper title. Although the extinguishment provisions of this Act are restricted to unregistered interests, the provisions of the *Statute of Limitations* are not.

5. Statutory authority now exists for a tax deed that is six years old being considered as a good root of title, **excepting only** circumstances involving fraud or breach of trust by a current owner and double assessment to the extent of the land that is doubly assessed and for which taxes are not in arrears for more than one year.

A Postscript

So at the end of the day, where are we, and how do Nova Scotia lawyers begin to change the way they practice to reflect the provisions of the new *Act*? We could begin with a few cautious first steps:

1. Lawyers advising clients with regard to intestacies should counsel clients with regard to the risks of extinguishment of unregistered interests in the event that there is a competing and therefore adverse "marketable title", unless a notice of claim is filed within the applicable period.

2. Lawyers should also counsel clients as to the importance of recording their interests in land, ensuring their land is properly assessed for taxes, exercising acts of ownership and possession in relation to their land, and ensuring that no other persons are exercising acts of possession with respect to their land.

3. In searching titles, it is advisable to confirm the land was granted, thereby avoiding the application of one of the exceptions to "the rule".

It is hoped that consideration of the history of the issues that this legislation seeks to address will provide a backdrop to the way in which lawyers govern themselves under this "new beginning". The practising real estate bar has worked to overcome the problems inherent in the *Registry Act* system in their support for this kind of legislation for the past number of years. Now that it is at long last a reality, we can only hope that the same concerted effort goes into determining the way in which this legislation can be applied to resolve the past uncertainties, in the clear interest of all present and future landowners in Nova Scotia.

Notes:

1. D. Fromm *The Title Search Period Under The Registry Act* National Real Property Law Review, Vol. 1 at p. 140.

2. A. H. *Marsh, The Period from which the title to Real Estate Must Be Traced by a Vendor Thereof* (1884), 4 Can. Law Times. 97 at p. 102, as cited by Delee A. Fromm in *The Title Search Period Under the Registry Act* National Real Property Law Review, Vol 1, 1992 at p. 139.

3. 32 Henry VIII, c. 2.

4. C.W. MacIntosh, *How Far Back Do You Have To Search?* Nova Scotia Law News, Volume 14 No. 3 at p. 52.

5. Ibid.

6. Ibid.

7. *Landry v. O'Blenis (1995)*, 146 N.S.R. (2d) 76.

8. C.W. MacIntosh, *Real Property Practice Manual*, (Toronoto: Butterworths, 1988) at 7-11.

9. *Quieting Titles Act*, R.S.N.S. 1989, c. 382 and C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* at p. 3-11.

10. A.H. Oosterhoff and W.B. Rayner, Anger & Honsberger *Law of Real Property* (2d), (Aurora: Canada Law Book, 1985) at 8.

11. *Nemeskari v. Nova Scotia (Attorney General) and Meisner (1992), 115 N.S.R. (2d) 271 at pp. 290-291.*

12. 125 N.S.R. (2d) 67.

13. *Vendor and Purchaser Act*, 37 & 38 Vict., c. 78.

14. *Law of Property Act*, 15 &16 Geo. 5, c. 20.

15. *Law of Property Act*, 1969, s. 23.

16. C.W. MacIntosh, *How Far Back Do You Have to Search?* supra at p. 52.

17. Now Part III of the *Registry Act*, R.S.O. 1980, c. 230.

18. *The Investigation of Titles Act*, R.S.P.E.I. 1974, Cap. I-7.

19. Stat. 32nd, Geo. 2d, Cap 2, S.N.S. 1758-1804 Abridgement Title 99.

20. Supra, note 10, pp. 1620-1621.

21. Stat. 29th, Geo. 3d, Cap. 9.

22. *Registry Act*, R.S.N.S. 1989, c. 392.

23. *Intestate Succession Act*, R.S.N.S. 1989, c. 236.

24. *Landry* v. *O'Blenis*, supra.

25. Supra, note 17.

26. *Fire v. Longtin* (1994), 17 O.R. (3d) at 427, (Ont. A.C.).

27. Supra, note 10, at p. 1620.

28. *Assessment Act*, now R.S.N.S. 1989, c.23 s. 161.

29. C.W. MacIntosh, *How Far Back Do You Have To Search?*, Nova Scotia Law News, Volume 14, No. 3.

30. *A Treatise on the Investigation of Titles to Real Property in Ontario*, Canada Law Book Company Ltd., 1925 at p. 175.

31. Supra, note 29, at pp. 5-41 to 5-45.

32. *Horyl v Town of New Waterford* (1980), 44 N.S.R. (2d) 70.

33. *Carnegy* v. *Godin* (1982), 52 N.S.R. (2d) 697; *Hage Enterprises* v. *Loughnan* (1983), 56 N.S.R. (2d) 181.

34. *Moore and Armsworthy* v. *Wheadon* (1993), 126 N.S.R. (2d) 47 at 53, (N.S.S.C.), Davison, J.

35. *Land Titles Clarification Act*, R.S.N.S. 1989, c. 250.

36. Supra, note 9.

37. Supra, note 35.

38. R.S.N.S. 1989, c. 168, s.7(2)(c).