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BUYING OR MORTGAGING A FARM

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1. INTRODUCTION

.1 Having had an earlier career in aviation I was taken aback when asked to write about "buying the farm". In aviation that expression means to crash and die. Hopefully buying or mortgaging a farm will not be so drastic. In this paper we try to identify issues of particular concern in the purchase or mortgaging of farms and rural properties generally. I gratefully acknowledge the advice and comments of my partners John P. Cochrane, Q.C., George R. Lohnes, Q.C., and T. Chris Thomson and of Florence E. Outhouse of our office. Any errors or omissions in this presentation are mine not theirs.

2. FINANCING

.1 As in any business purchase you should include an appropriate "subject to financing" clause in any agreement of purchase and sale you draft for a farm. For a detailed review of farm financing refer to chapter 4 of the text *Agriculture Law In Canada*[1]; this text is an excellent reference to agricultural law generally.

.2 Your clients may finance through a chartered bank; the Nova Scotia Farm Loan Board, "NSFLB"; Farm Credit Corporation, "FCC" or another lender. The NSFLB and FCC are specialty lenders for agricultural borrowers.

.3 The NSFLB (formerly the Nova Scotia Land Settlement Board) is a Nova Scotia Crown Agency[2] created under the *Agriculture and Rural Credit Act*[3]. The NSFLB offers favourable financing terms for farmers. The NSFLB usually provides financing by either taking title to land itself then entering into a long-term agreement of sale with the farmer, or by conventional mortgage financing. Its lending requirements are found, in part, under the *Nova Scotia Farm Loan Board Regulations*[4]

.4 FCC (formerly The Canadian Farm Loan Board) is a federal Crown Corporation under the *Farm Credit Corporation Act*[5] which offers farmers a variety of agriculture-related financial services including mortgages.

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1 Robert S. Fuller and Donald E. Buckingham, (Butterworths, Toronto, 1999)

2 *Braeside Farms Ltd. and Smith v. Farm Loan Board (N.S.) and Dalrymple* (1973), 5 N.S.R.(2d) 685 (C.A.) and *Farm Loan Board (N.S.) v. Ells et al.* (1997), 165 N.S.R.(2d) 341 (C.A.) at paragraph 23.

3 R.S.N.S. 1989, c.7, as amended.

4 Made under Section 8 of the *Agriculture and Rural Credit Act* R.S.N.S. 1989, c. 7, O.I.C. 92-1162 (December 1, 1992), N.S. Reg. 248/92 as amended up to & including O.I.C. 97-254 (Apr. 22, 1997), N.S. Reg. 44/97. See www.gov.ns.ca/just/regulations/regs/ARCloan.htm.

5 *Chapter F-2.2 (1993, c. 14).*

.5 Banks have the ability to take security on farm crops, livestock and equipment without delivery of the collateral under section 427 of the *Bank Act* (Canada)[6]. The banks file a Notice Of Intention To Take Security with the Bank of Canada in the Province where the debtor has its place of business.

3. MISCELLANEOUS

.1 **Right to take existing crops.** If closing will occur in the growing season be sure to allocate who will have the right to growing crops - the Vendor or the Purchaser. If it will be the Vendor provide that the Vendor will have access to tend and harvest the crop; impose the obligation of prudent agricultural practices on the Vendor.

.2 **Unregistered leases.** Inquire whether there are any unregistered leases or arrangements affecting any of the fields. It is common for farmers to permit others to take hay off some fields; some farmers also co-operate with other farmers in crop-rotation arrangements. Be sure you provide for full disclosure of such arrangements. Purchasers should discuss these arrangements with the Vendor and any third parties involved to make arrangements for future co-operation if desirable.

4. TAXES

.1 **Income Tax advice.** Advise your purchaser clients to obtain appropriate tax advice before purchasing a farm. Hopefully you will have the opportunity to do this before they sign an agreement of purchase and sale. If you do not have the expertise refer your clients to a tax expert familiar with agricultural matters. Document your advice; if you do not you may be held liable for unwanted tax consequences.[7]

.2 **Income Tax issues.** Some income tax issues to consider include:

.1 Whether to make an asset or a share purchase of the farm business.[8]

.2 Maximizing the benefit of any available Enhanced Capital Gains Exemptions in determining the price on a farm sale/purchase - optimization of this benefit may enable the Vendor to accept a lower offer from the purchaser while maintaining or increasing the net after-tax proceeds.

.3 The use of a corporation to purchase the farm if your clients are borrowing money for the purchase. A Qualifying Small Business Corporation pays less tax per dollar earned than an individual taxpayer. With more after-tax dollars

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6 Refer to subsections 427(1)(d), (f), (h) & (j).

7 In *Silver v. Morris* (1995), 139 N.S.R.(2d) 18 (C.A.), Pugsley, J.A. stated at page 18: "In the ordinary case, a solicitor retained by a client who acts in the sale of the client's business, should be alert to, and give competent advice, with respect to the tax implications arising on the sale. If not knowledgeable, he should advise his client to seek advice from one who possesses the expertise." While *Silver v. Morris* dealt with advice to a vendor there is little doubt the same admonition applies to advice to purchasers.

8 Raymond F. Bishop Incorporated, *Farm Business Corporations In Nova Scotia*, Canada/Nova Scotia Farm Business Management Initiatives Program, (Her Majesty The Queen In Right Of Canada as represented by the Minister of Agriculture, 1996). The author and publisher have published a companion booklet for partnerships *Farm Business Partnerships In Nova Scotia* for partnerships.

available a company requires fewer earned dollars to repay a loan than an individual borrower[9].

.4 Allocating the purchase price amongst classes of assets in the agreement of purchase and sale to eliminate later arguments between the vendor and purchaser. We often provide for the allocation in our first draft asking our clients and their tax expert to provide us with the appropriate figures. Each side will try to optimize their respective tax consequences so expect discussion on this issue.

.5 Separating the principal residence from the main farm property - particularly corporate owned property - to preserve the principal residence capital gains exemption[10]. This may require subdivision approval. See our caution about the amount of land that may be taken by a spouse under an election to take the "home" on an intestacy under sections 4(3) and 4(4) of the *Intestate Succession Act*; this should be a compelling reason for either or both a Will and the separation of the home parcel from the remaining lands. Some lenders may want to keep the home in the corporate name to maintain security on it or to preserve it as an integral part of the farm if the home is essential to the operation.

.6 Issuing equity growth shares of a purchasing company to the principals' spouses and children or to a family trust *when appropriate* so that future capital gains may be split among several available capital gains exemptions[11].

.3 HST

.1 Include appropriate HST provisions in any farm-related agreement of purchase and sale. The sale of farmland is usually taxable but, depending on the purchaser, may be exempt from HST[12]. Residential (home and tenements) and personal use land included with the farm will be exempt[13]. Many farm related

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9 See Canadian Bar Association - Nova Scotia materials from the Business Law and Taxation Seminar, November 18, 1994, for a detailed case study of tax issues related to purchasing a business. The same principles apply to purchasing a farm. For a clearly written primer on tax issues generally see David M. Sherman, *Tax For Non-Tax Lawyers*, (Carswell, Toronto, Ontario).

10 Separation of the residence will permit a joint tenancy of the home by spouses if that is desired for their matrimonial or estate planning purposes.

11 See Chapter 7, *Keeping It In The Family*, Canadian Bar Association - Nova Scotia, Corporate Gladiators, October 1, 1999, for two papers on this topic. One is by James K. Cruickshank - *The Family Business: The Practitioner*, and the other by Keith D. .MacIntyre, C.A. - *Utilizing Family Trusts In Business and Succession Planning.*

12 *Excise Tax Act,* Schedule V, Part I, s.10 and s.12.

13 *Excise Tax Act,* Schedule V, Part I, s.2 and s.9.

goods are zero-rated[14]. The sale of Quota authorized by a government agency or marketing board in respect of an agricultural product the supply of which is included in section 1 of Part III or in section 1, 2, 3, 4, or 7 of Part IV of Schedule VI is zero rated as a prescribed supply under the Agricultural and Fishing Property Regulations. Refer to GST Memorandum 4.4[15]. This may be a good area in which to get expert advice.

.2 In all likelihood your clients will be either purchasing substantially all of the business assets of a farm or land. If purchasing substantially all the business assets your clients and the Vendor will execute and file a *joint election* under subsection 167 of the *Excise Tax Act* within the prescribed time to avoid paying HST. If your clients are purchasing only land they must either remit HST, or claim input tax credits, directly to or with Canada Customs and Revenue Agency, "CCRA", under subsection 228(4) of the *Excise Tax Act* within the prescribed time when:

.1 the vendor is non-resident[16], and

.2 when the purchaser is a Canadian resident HST registrant[17].

In both these circumstances payment of HST to the vendor is not considered payment to CCRA and the purchaser will still be liable to CCRA for the tax if the vendor defaults[18] .

.4 **Deed Transfer Taxes[19].** Not all municipalities impose a deed transfer tax so your client may be spared the "welcome tax". Check with the taxing authority and advise your purchaser clients about any deed transfer tax early as it may affect their offering price. The only farm property exception is under section 109(3) of the *Municipal Government Act*:

> "(3) A deed from the Nova Scotia Farm Loan Board to a borrower under the *Agriculture and Rural Credit Act* is not subject to deed transfer tax."

.5 **Realty taxes.** These are dealt with and adjusted in the same manner as in an ordinary real estate transaction.

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14 *Excise Tax Act*, Part IV of Schedule VI.

15 http://www.ccra-adrc.gc.ca/E/pub/gm/4-4em/4-4-e.htm

16 *Excise Tax Act,* s.221(2)(a)

17 *Excise Tax Act*, s.221(2)(b)

18 *Franklin Estates Inc. v. R*, [1994] G.S.T.C. 64 (T.C.C.). See *Tax for Non-Tax Lawyers*, above, s.3.7.6

19 *Municipal Government Act*, Part V, ss.101 - 110.

.6 **Realty Taxes and the NSFLB.**

.1 The NSFLB will ask that the Deed Transfer Affidavit of Value be completed so that it is shown as the Grantee but that its mailing address be shown as "c/o the borrower's mailing address". This facilitates the collection of municipal realty taxes from the occupant farmer and reduces administration by the Board.

.2 Under section 5(1) of the *Assessment Act* all property vested in any person for ... Provincial purposes ...occupied by some person in an official capacity is exempt from taxation under the *Assessment Act*. If any such property is occupied by any person otherwise than in an official capacity, *the occupant shall be assessed and rated in respect thereof, but the property itself shall not be liable*. (emphasis added) Under section 116 of the *Municipal Government Act*, " MGA", where property is

(a) vested in Her Majesty or any person for ... Provincial purpose; and

(b) occupied by a person other than in an official capacity,

the occupant shall be taxed in respect of the property, but the property may not be sold for taxes. A farm property vested in the NSFLB, a Crown Agency, but occupied by a farmer is caught by these two sections. While the occupant is subject to real property taxes, the land itself, being owned by a Crown Agency is not subject to the municipal lien for taxes created by section 133(1) of the MGA.

.3 When the NSFLB secures the loan by mortgage rather than an agreement of sale with the farmer, section 13(1) of the *Agriculture and Rural Credit Act* comes into play:

> "s.13(1) Notwithstanding any law, statutory or otherwise, in force in the Province, no person may, except with the consent in writing of the Board, acquire any estate, right, title, interest, lien, charge, claim or demand whatsoever in, on, to or against any property of a borrower in priority to or to the prejudice of any claim of the Board, so long as any part of the sale price or the amount of any advance made by the Board with respect to such property or any interest thereon remains unpaid to the Board."

We found no reported decisions dealing with the competing priorities created under Section 13(1) of the *Agricultural and Rural Credit Act* and section 133(1) and (3) of the MGA or the corresponding section in the former *Municipal Act*. Section 13(1) of the *Agriculture and Rural Credit Act* is the more specific provision so municipal tax liens under MGA, s.133(1) appear to be subject to any outstanding balances owed to NSFLB under its mortgages.

.4 **Other remedies.** A municipality may sue the occupant for all taxes and other sums due to the municipality in an action under MGA, section 119 .

.7 **Change of Use Tax.** Change of Use Tax is imposed on the change of use of resource land (Farming and Forestry) to non-resource use. See the *Municipal Government Act*, sections 76-78. This will not be a concern if your clients are purchasing a farm with the intention of maintaining its resource land as such.

Beware of the seven year "clawback" period for change of use tax exempted on the sale of building lots to certain classes of family members under these sections.

5. CORPORATE & PARTNERSHIP MATTERS

.1 **Special borrowing resolution.** A Nova Scotia *Companies Act* company may still require a shareholders' special borrowing resolution to authorize a mortgage despite the repeal of section 102(2)[20]. Many lenders and the Articles of Association of many older companies still require a special borrowing resolution to authorize a company's mortgages. Check the lender's instructions and the Articles of Association carefully. Consider amending the company's Articles if they still require a special borrowing resolution.

.2 **Special resolution authorizing the sale.** A *Companies Act* company will require a shareholders' special borrowing resolution authorizing the sale of substantially all of its assets under section 26(4)(f) of the Act:

> "(f) with the sanction of a special resolution, sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company;"

.3 **Company assisting the purchase of its own shares.** Review section 110(5) of the *Companies Act* if the purchasing company will be giving a loan, a guarantee, providing security or otherwise using its property to secure the purchase of its own shares; refer to *Financial Assistance and the Companies Act* by Joseph A.F. Macdonald, Q.C.[21], and *Re Summer Fisheries Ltd.*[22]

.4 **Company's Objects.** If you are dealing with an older company you will have to ensure that the company's operations and the proposed loan are *intra vires* the objects stated in its Memorandum of Association.

.5 **NSFLB.** If your clients are financing through the NSFLB, the Board

.1 may require personal guarantees of shareholders[23],

.2 will require[24]

.1 a Certificate from the Registrar of Joint Stock Companies,

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20 The *Business Efficiency (1998) Act*, S.N.S. 1998, c.8, s.20. assented to December 3, 1998 repealed section 102(2) of the Nova Scotia *Companies Act* which required a shareholders' special resolution to sanction mortgages of a company's real and personal property, *inter alia*.

21 Canadian Bar Association - Nova Scotia, Corporate Gladiators Seminar, October 1, 1999.

22 (1996), 40 C.B.R. (2d) 250 (N.S.S.C. In Bankruptcy).

23 *Nova Scotia Farm Loan Board Regulations*, section 11.

24 *Nova Scotia Farm Loan Board Regulations*, section 4(2).

.2 a shareholders' special borrowing resolution authorizing the borrowing, and

.3 a shareholders' agreement except where all shares are held by one shareholder.

.3 will usually require an undertaking from the shareholders and the company that they will not transfer the company's shares without notice to, and the consent of, the NSFLB, and

The Board will ask for a completed "Information Required For A Company Loan" form; it uses information from the form to prepare the shareholders' undertaking.

.6 **Partnerships.**

.1 **Registration.** Under section 2(a) of the *Partnerships and Business Names Registration Act*[25] a partnership whose sole purpose or object is farming is not a partnership under this Act. You will find as a practical matter that lenders will usually insist that farming partnerships be registered under the Act.

.2 **NSFLB.** NSFLB will require a copy of the clients' Partnership Agreement[26]. It will also require a Partnership Interest Restriction Agreement that will state the partners' respective interests in the partnership and their agreement not to alter their interests without the Board's written consent.

.7 **Shareholders' & Partnership Agreements**. Apart from any lender's requirements advise your corporate and partnership clients to consider a shareholders' or partnership agreement. Pay particular attention to death of a shareholder or partner, withdrawal from the business, management and succession issues; this should be done as part of business and estate planning in consultation with the clients' tax advisors.

6. ENVIRONMENTAL ISSUES

.1 In purchasing or mortgaging farm properties you will deal with environmental matters including any or all of water courses, on-site fuel tanks, agricultural chemicals - fertilizers, pesticides and herbicides, animal wastes, vehicle repair and oil-changing sites. Assume nothing. One of our purchaser clients tripped over an almost-buried concrete pad on the farm property she was purchasing during the morning of the closing day, saw a pipe sticking out of it, then called and asked if she should be concerned. The tank was removed by the vendor before closing. In another purchase the property was in the middle of a pristine rural area but a Phase I Environmental Review disclosed that the property had more petroleum residue in its soil than the Athabaska Tar Sands. The owner had used contaminated fill then dumped oil on-site after changing oil in his equipment; that deal fell through.

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25 R.S.N.S. 1989, c.335

26 *Nova Scotia Farm Loan Board Regulations*, section 3.

.2 As with tax advice you should address environmental issues head-on and early with your clients and their lenders. Advise both purchasers and lenders of the necessity of a "due diligence" review of environmental issues relating to the transaction. Both clients and lenders should require

.1 full disclosure of environmental information known to the vendor or mortgagor, and

.2 a satisfactory environmental review

as conditions precedent to closing. If you draft the Agreement of Purchase and Sale include appropriate provisions. The nature of your advice is discussed in the following subparagraphs. Thoroughly document your advice to the clients and their lenders and their respective expectations of you for environmental matters. Be sure you leave no opening for either to make a claim against you based on lack of appropriate advice if toxic stuff hits the fan after closing.

.3 In *Toxic Real Estate Manual*[27] at paragraph III:B the authors state that:

> "Before closing a transaction, whether it be a sale, lease occupancy agreement, or financing arrangement, a reasonably prudent party will complete a "due diligence" review of environmental matters pertaining to the transaction. In the most general terms, environmental due diligence is comprised of three elements:
>
> (i) search of the public records;
>
> (ii) review of private records; and
>
> (iii) physical inspection.
>
> The competent management of these tasks can be greatly facilitated by arranging for a professionally conducted environmental audit.
>
> The option of conducting an environmental audit also has significant impact upon counsel's role in the process. Counsel should be prepared to assist in the determining the scope of the audit, to review the findings of the audit in order to form an opinion as to the potential liability exposures involved in the transaction, and to frame appropriate contractual provisions to address the risks identified. In addition, counsel may be asked to advise on appropriate arrangements to protect the confidentiality of audit findings."

.4 Refer to the recent paper by Anthony L. Chapman, Q.C.,[28] for a current discussion of this issue in Nova Scotia; he suggests that solicitors ensure the following due diligence steps are taken for purchasers of commercial real property:

.1 A written inquiry to the Nova Scotia Department Of Environment ("NSDOE") to see whether it has any records which would indicate environmental problems;

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27 Frederick Cobern and Garth C. Manning, Q.C., (Canada Law Book Inc., Aurora ON, 1994) (Revised September 2000). This manual is an excellent reference source for environmental related law and precedents.

28 *Environmental Issues - The Dirt Is Dirty*, Canadian Bar Association - Nova Scotia, Curing Or Killing the Sick Real Estate Deal: Litigation And Real Estate Strategies, November 10, 2000.

.2 A careful review of the abstract of title for historic uses which may have caused contamination;

.3 A review of the Vendor's own records; and

.4 In cases where commercial or industrial property is being purchased a purchaser should commission a Phase I Environmental Site Assessment. *[Ed. note: we would add farm property]*

.5 In our experience most lenders have done their own environmental questionnaires and, sometimes, physical inspections of the agricultural property to be mortgaged before issuing instructions to us. They have not asked us to have physical inspections done. Nor have lenders asked us to examine a borrower's internal environmental records for potential problems. We routinely make inquiries of NSDOE for orders under section 132(7) of the Act. We frequently ask for additional information from NSDOE . NSDOE has been relatively prompt in replying to our s.132(7) requests but is slower to send further information. I believe the review of the Vendor's or mortgagor's internal records is best done as part of a Phase I Environmental Review. However you handle these environmental inquiries in a farm purchase or mortgage be sure you document your advice to, and your instructions from, your clients and their lenders; the potential liabilities are great.

.6 ***Farm Practices Act.*** Although not an environmental matter of the type contemplated above, be aware of the *Farm Practices Act*[29] which will become effective March 1, 2001. This Act will protect farmers following "normal farm practice" from civil actions in nuisance, negligence or otherwise, for any odour, noise, dust, vibration, light, smoke, or other disturbance resulting from an agricultural operation.[30] It will also provide protection against applications for injunctions or other orders of a court preventing or restricting the carrying on of an agricultural operation because it causes any odour, noise, dust, vibration, light, smoke, or other disturbance.[31]

7. LEGAL DESCRIPTIONS

.1 **Acreage.** Never rely on a statement of acreage in a legal description unless it is based on a boundary survey. Errors in stated acreage in deed descriptions are notorious. See *Aberg v. Rafuse*[32] in which the purchaser had to settle for 58 acres although the size of the property was expressed to be 374 acres in the description.

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29 S.N.S. 2000, chapter 3

30 *Farm Practices Act*, S.N.S., chapter 3, s.10(1)

31 *Ibid.*, s.10(2)

32 (1980),36 N.S.R. (2d) 56 (N.S.S.C., Glube, J.).

See also *Bent v. Nova Scotia Farm Loan Board, Horsnell and Horsnell*[33] for another decision fixing the purchaser with what he had been shown, not the acreage indicated to him. If exact acreage or useable acreage is important specify this in the agreement of purchase and sale; provide for an adjustment of price for any variance. Have your client obtain a survey before closing to determine if the exact acreage is present.

.2 **Boundaries.** Legal descriptions of rural properties can be challenging. Never trust an LRIS or NSPRD diagram of a property for determining its boundaries. The NSPRD/LRIS may refer you to a filed survey; do not rely on that reference until you have seen the survey. It is usually helpful to sketch the parcel as you read its description. Sometimes you need to read the descriptions of adjacent properties to make sense of a description. Be sure you have all the deeds. Sometimes there are unregistered deeds or deeds "in" which are not picked up during the search of "outs". Do the descriptions include the text of, or reference to, all exceptions, rights of way, easements, restrictive covenants, last conveyance, relevant plan? Refer to Practice Standards No. 34 Description, No. 28 Water boundaries, and No. 28 Tidal Waters - Non Tidal Waters.

.3 **NSFLB.** If you are working with the NSFLB you can talk to their field officers who do extensive field work to locate property boundaries before the Board approves a loan. We have found our local (Kings County) field officer to be particularly helpful when questions about the location and boundaries come up. He often has air photos or sketches as well as first-hand information from his inquiries at the site.

.4 **Rationalizing large parcels.** Consider consolidating larger parcels of rural land under section 286(2) of the *Municipal Government Act*. When the resulting parcel will be greater than twenty-five hectares in area no approval is required but you must include the affidavit required by section 268(3) in the deed. We have done this a number of times, combining a number of parcels, to rationalize the parcels and to clarify boundaries. We have usually consolidated parcels when the exterior boundaries of the consolidated parcels are easily identifiable geographic features like roads or watercourses. See section 9 below.

.5 **Country Roads.** Country roads often have several names or have had several names over time, *e.g.* the West Brooklyn Mountain Road in Kings County was formerly called the Hardscrabble Mountain Road. Think "second name" if the road names get confusing. Large parcels described in older description are sometimes subdivided by public roads passing through them - sometimes more than once - without any reference to the road or roads in the description. The LRIS mappers usually assign separate PID numbers to parcels split by public roads. This author's view is that is often best to recognize the subdivisions created by the public highways and create new descriptions to match the separate parcels and their PIDs.

.6 **PID/AAN Account Numbers.** It helps everyone concerned to add a reference to the PID and Assessment Account Numbers in legal descriptions. Refer to Practice Standard No. 38 Parcel Identification. The following format appears to be growing in acceptance. I do not know who the author is but he or she is to be commended for

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33 (1979), 30 N.S.R. (2d) 552 (N.S.C.A.)

a format which is simple and clearly sidesteps the concerns of some barristers about potential liability for a misstated PID number.

REFERENCE INFORMATION *Information contained herein is for reference purposes only.* *In the event of discrepancy, the metes and bounds description shall have precedence.*	
Civic Address: *	*PID:* *
Previous Registry Reference Book: * Page: *	*AAN:* *

8. SURVEY

.1 Refer to, and follow, Practice Standards No. 32 Survey, No. 23 Plans, and No. 33 Encroachments. Document your advice to your clients that they get current survey information.

.2 The NSFLB usually does not require surveys of larger parcels but will sometimes require Surveyors' Location Certificates for key structures.

.3 The *Crown Lands Act*, s.13, requires consent from the Director Of Surveys before one surveys a boundary of Crown Land.

9. SUBDIVISION APPROVAL

.1 Ensure all parcels being purchased or mortgaged are approved or ratified if required.

.2 **Subdivision approval or rectification.**. If not approved when subdivision approval was required, an unapproved subdivision of land was validated if made before April 30, 1987[34].

.3 **Consolidation approval or rectification.** Consolidations were first treated as "subdivisions" starting by the *Planning Act*, S.N.S. 1983, c.9, s.3(r) in force December 31, 1984. Consolidations before that did not require approval. If not approved when subdivision approval was required for consolidations, an unapproved consolidation of land was validated if made before April 30, 1987[35].

.4 **Exemptions from subdivision approval.** Under section 191(q) of the *Municipal Government Act* subdivision includes consolidation. Under section s.268(2) approval is not required for a subdivision: (sections of particular interest for rural properties are in bold type)

Section 268(2)

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34 *Planning Act*, R.S.N.S. 1989, c.346, s.114, affirmed in *Municipal Government Act*, s.291(1).

35 *Planning Act*, R.S.N.S. 1989, c.346, s.114, affirmed in *Municipal Government Act*, s.291(1).

(a) where all lots to be created, including the remainder lot, exceed ten hectares in area;

Be careful when using this section. Recently, in Kings County, a deed subdividing parcels under this section was challenged on two grounds: there was no affidavit attached to the deed as required under section 268(3) of the Act, and a later survey determined that the subdivided parcel was less than10 hectares. The parties settled out of court.

(b) resulting from an expropriation;

(c) resulting from an acquisition or disposition of land by Her Majesty the Queen in right of the Province or in right of Canada or by an agency of Her Majesty;

You may use this exception if necessary when conveying land to the NSFLB, a Crown Agency.

(d) of a cemetery into burial lots;

(e) resulting from an acquisition of land by a municipality for municipal purposes;

(f) resulting from the disposal, by a municipality, of a street or part of a street;

(g) of an abandoned railway right of way;

(h) that is a consolidation of a part of an abandoned railway right of way with adjacent land;

(i) resulting from a lease of land for twenty years or less, including any renewal provisions of the lease;

If you need a right that will last more than twenty-years and do not want to get subdivision approval for a lease consider creating an easement or a licence which are not subject to this limitation. The railways used to get around statutory restrictions limiting their alienation of land by granting licences which are contractual interests, not interests in land.

(j) resulting from a devise of land by will executed on or before January 1, 2000.

.5 **Affidavit required.** If the *Municipal Government Act*, s.268(2), is used in lieu of subdivision approval, subsection 268(3) requires an affidavit of the person making a disposition or encumbrance of land that would create a subdivision. The affidavit must specify the exemption from the requirement for approval and the facts that entitle the subdivision to the exemption. The affidavit is sufficient proof that approval of the subdivision is not required, unless the person to whom the disposition or encumbrance is made has notice to the contrary.

.6 **Instruments of subdivision.** The *Municipal Government Act*, section 289, states that an instrument of subdivision approved pursuant to this Act or the former *Planning Act* may be amended or repealed in the same manner, and with the same effect, as an approved final plan of subdivision. This author has had limited experience with instruments of subdivision and all three have been done by clients; in each case remedial work or work-arounds were required to address problems created by this method. Do everyone a favour and recommend that your clients have surveys done rather than using these "tools of the devil".

10. ROOT OF TITLE

.1 Refer to Practice Standard No. 2 Root of Title.

> "A lawyer certifying a title must be satisfied that a proper root of title has been located. A proper root of title could be a Crown Grant, a *Quieting of Titles Act*[36] order, a vesting order, an expropriation, or a warranty deed more than 40 years old. Other documents clearly identifying the parcel of land or a parcel of land containing the parcel being searched within its boundaries which demonstrate on their face ownership of the entire title may be acceptable, such as, a will[37]."

.2 ***Marketable Titles Act***. Under the *Marketable Titles Act*, section 4(1), 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 forty years immediately preceding the* date the marketability is to be determined.. In *Penney v. Hartling*[38] Carver, J. stated:

> "[15] Applying s. 4 in this case, there will be marketable title if there is a good and sufficient chain of title extending back for more than 40 years (40 years plus one day).
>
> [16] By s. 4(2) the chain of title starts with a registered instrument that conveys or purports to convey that interest in land and is dated most recently before the 40 years immediately preceding the date the marketability is to be determined.
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> [17] In this case, there is a Deed dated November 24, 1951 in the chain of title conveying the property from Lynville Herman to Queens-Cooperative Limited. This Deed is not limited as to its wording. It can clearly be said to "convey or purport to convey" all interest in the land.
> ...
> [20] All three Deeds here are warranted and defended Deeds which is always good to have but are not required under this legislation so long as they convey or purport to convey the whole interest being conveyed.
> ...
> [22] Pursuant to s.4(2) of the Act, a Deed dated over 40 years ago, even if not registered until 1999 [the year of the case - Ed.] in the proper registry, can operate as a valid root of title."

When considering an instrument as a possible root of title ensure that the instrument purports to convey the fee simple without words of limitation. If an instrument merely conveys "the grantor's interest" you will have to search back further to find out what that interest was. If an instrument "excepts and reserves" or is "subject to" an interest "that interest" which is conveyed by the instrument will be subject to the exception or qualification under section 7(3) of the *Marketable Titles Act*. This section deals with adverse interests acknowledged or specifically referred to in the description of land in a *deed* (not an "instrument") forming part of the chain of title to the land. Beware of Sheriffs' deeds as they may only convey a partial interest in a parcel; refer to Practice Standard No. 12 Sheriff's Deeds.

.3 **No registered instrument which is at least 40 years old.** The *Marketable Titles Act* requires a root of title as a starting point. Absent a The *Marketable Titles Act*

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36 *Quieting of Titles Act*, R.S.N.S. 1989, c. 382

37 *Olsen Estate v. ASC Residential Properties Ltd.* (1990), 102 N.S.R. (2d) 94; 279 A.P.R. 94.

38 *Penney v. Hartling (1999),*177 N.S.R.(2d) 378 (Carver, J.) at paragraphs 15-22.

root of title the Act is of no assistance. In *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited*[39] Justice MacLellan stated:

> "[10] Here, I find that there is no registered instrument which is at least forty years old, therefore, the provisions of the *Marketable Titles Act* do not apply to assist the applicant. The first registered instrument in this case was in 1973.

If you have no *Marketable Titles Act* root of title determine if you can establish either a sixty-year root of title or possessory title based on the *Limitations of Actions Act*; In *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited* Justice MacLellan further states[40]:

> "[11] I further find that while s. 2(a) of the *Vendors and Purchasers Act* could, as held by Justice Davidson and Justice Hall, provide relief for a gap in a chain of title, here, that does not provide a chain of title back 60 years as required by the common law. (See *Landry v. O'Blenis* (1995), 146 N.S.R.(2d) 76; 422 A.P.R. 76 (S.C.)), because the recitals do not indicate when the stated conveyances took place. At best, it would appear that the deed into John Pelley by the Intercolonial Coal Company would be around 1947 when the company deeded property to John Pelley's brother as evidenced by the deed referred to in the materials before me. If that conveyance took place at the same time, the applicant's predecessor in title would have a paper title only since then being a period of approximately 56 years."

.4 **Have a possessory title fall-back argument.** Before you make a *Vendors and Purchasers Act* application consider if you should bolster your clients' position by registering appropriate affidavits evidencing your clients' and their predecessors' occupation and use of the parcel in question in case your title falls short of the *Marketable Titles Act* standard. Have a documented altemative possessory title claim available if possible.

.5 **Missing roots?** Consider:

.1 **Old School Properties**: If you cannot find title of an old school property into a municipality you may find that title vested under sections 221-225 of the *Municipal Act*, R.S.N.S. 1967, c.192.

.2 **Railways:** Beware of railway "rights of way" - you will find that the "right of way" is not that at all but that title vested in the particular railway by legislation. Be careful - there is a lot of law and an intricate relationship between federal and provincial laws governing the disposition of railway lands. See: *Canadian Pacific Ltd. et al. v. Lowe*[41] as to right to sell - the Nova Scotia Supreme Court held that the DAR/CPR continued to hold the right of way in

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39 (1998), 169 N.S.R. (2d) 184 at page 187.

40 *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited* (1998), 169 N.S.R. (2d) 184 at page 187.

41 (1998), 172 N.S.R.(2d) 89 (N.S.S.C., Carver, J.).

fee simple. The Court of Appeal unanimously dismissed an appeal[42] then denied leave to appeal to the Supreme Court of Canada[43]. See also *Wotherspoon v. Canadian Pacific Ltd. et al. Pope et al. v. Canadian Pacific Ltd. et al.*[44] re disposition of railway lands; this author was referred to this case by railway counsel as the leading case on the subject.

.3 **Director, Veterans Land Act deeds**. Hamilton, J., in *Carmichael v. Durant*[45] determined that s.5(3) of the *Veterans' Land Act* is within the legislative authority of the federal government and, at paragraph 7, that:

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

Caution: Charles MacIntosh, Q.C., expresses reservations about whether a Federal or a provincial Crown Grant is conveyed - *Nova Scotia Real Property Practice Manual,* s.5.1D. At the least a DVLA deed in the chain of title is a comfort knowing that our Courts have accepted them as Crown Grants.

.4 **Can a mortgage be a good root of title under *MTA*?** Discussions with a number of lawyers and a review of chapter 12.1 of Mr. MacIntosh's *Nova Scotia Real Property Practice Manual*[46], suggest that a mortgage does not convey sufficient interest in land to constitute a root of title. But is the definition of an "instrument" under *MTA* ("...a conveyance or *other document* by which title to land is changed *or in any way affected,...*") broad enough to include a mortgage?

.5 **Other Instruments?** Refer to Practice Standard 2 Root of Title. In *Olsen Estate v. ASC Residential Properties*[47] a Will was found to be good root. Another instrument may be a good root if you do not have a *Marketable Titles Act* root but it may have to be dated over sixty years ago under *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited*, above.

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42 *Canadian Pacific Ltd. et v. Lowe* (1999), 177 N.S.R.(2d) 393; 542 A.P.R. 393.

43 Canadian Pacific Ltd. et al. v. Lowe (1999), 1 80 N.S.R.(2d) 330; 557 A.P.R. 330.

44 (1987) 39 D.L.R. (4th) 169, (Supreme Court of Canada).

45 (1995), 143 N.S.R.(2d) 234; 411 A.P.R. 234.

46 (Butterworths, 1998).

47 (1990), 102 N.S.R. (2d) 94 (Hall, J.).

.6 **Wills.** In *Boyer v. Throop*[48] Madame Justice Stewart held that a Will must be probated to prove it is the last Will of the deceased. She further held that possessory title was not an alternative where good paper title was available or proof thereof would not require unreasonable demands. Consider the effect of the new *Probate Act*, sections 44 -56, regarding the disposition of real property[49]. The new Act will apply to wills executed after it comes into effect; sections 50 to 64 of the present *Probate Act* will continue to apply to Wills dated before the coming into force of the new Act[50]. There will be a significant change of the law under section 46 of the new Act as real property will devolve to the personal representative of the deceased:

> "46 (1) **Notwithstanding any will, on the death of a deceased person, all real property that the deceased person owned immediately before the death of the deceased person for an interest not ceasing on the death and without a right in another person to take by survivorship devolves to and is vested in the personal representative of the deceased person as if it were personal property.** [emphasis added]
>
> (2) For the purpose of this Act, the administrator of the estate of a deceased person is deemed to be administrator as if there has been no interval of time between the death of the deceased person and the grant of administration.
>
> (3) A testator is deemed to have owned, immediately before the testator's death, any real property passing under any gift contained in the testator's will that operates as an appointment under a general power to appoint by will.
>
> (4) The personal representative of a deceased person is the representative of the deceased person with respect to the real property as well as with respect to the deceased person's personal property.
>
> (5) A grant may issue in respect of real property only, although there is no personal property.
>
> (6) Subject to the powers, rights, duties and liabilities mentioned in this Act, the personal representative holds the real property as trustee for the persons by law beneficially entitled to the real property and those persons have the same right to require a transfer of the real property as persons beneficially entitled to personal property have to require a transfer of the personal property.
>
> (7) Where any part of the real property of a deceased person vests in a personal representative under this Act, the personal representative, in the interpretation of any Act of the Legislature or in the construction of any instrument to which the deceased was a party or under which the deceased is interested, shall, while the estate remains in the personal representative, be deemed in law the deceased person's heir in respect of such part, unless a contrary intention appears, but nothing in this Section affects the beneficial right to any property or the construction of words of limitation of any estate in or by any deed, will or other instrument.
>
> (8) The rights and immunities conferred by this Act on personal representatives are in addition to and not in derogation of the power conferred by any other Act or by the will."

.7 **Possessory Title**. In *Hebb v. Woods*[51] Carver, J., held that in passing Practice Standard 2 Root of Title, the Bar Council of the Nova Scotia Barristers' Society did not prohibit solicitors from certifying title based on possession. At paragraph 11 his Lordship states:

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48 (1993), 129 N.S.R.(2d) 60, (Stewart, J.)

49 S.N.S. 2000, c. 31, not proclaimed at this date.

50 *ibid.*, s.44(3).

51 (1996), 150 N.S.R. (2d) 16.

> ""[11] However, if the standard did prohibit a solicitor from certifying title based on possession, then, in my opinion, it has no authority to affect the substantive law of vendor and purchaser and has no jurisdiction to affect the validity of title by possession which has been established by cases in Nova Scotia as possessory title is good marketable title and can be forced on an unwilling purchaser. *Parsons v. Smith* (1971), 3 N.S.R.(2d) 561 (T.D.); *Stevens v. MacKenzie* (1979), 41 N.S.R.(2d) 91; 76 A.P.R. 91 (T.D.), and *Millar et al. v. Briggs and MacNeil* (1991), 101 N.S.R.(2d) 112; 275 A.P.R. 112 (T.D.)."

Possessory titles are not displaced by the *Marketable Titles Act*[52]

.8 **Break in chain of title**. In *Boland v. Berthelot*[53] the purchaser objected to a break in the Vendor's paper title to the property in 1947. The Vendor claimed possessory title based on possession for more than 40 years. The Court held that Vendor's paper title constituted *prima facia* evidence of title and possession and affidavit evidence confirmed possession of over 40 years claimed by seller. In *Interlake Developments Ltd. v. Slauenwhite*[54] a recital in a 1947 deed referring to an unregistered 1914 deed was held to establish paper title of over 60 years.

.9 **Reliance on recitals - Accounting for "all the heirs".** In *Quinn v. Pilkington*[55], the Court concluded that a 1904 deed was from "all the heirs" based on subsequent transfers and title assertions over an extended period of time even though the 1904 recitals did not recite "all the heirs". Refer to Practice Standard No. 10 Rebuttal Presumptions. Make a practice of having Grantors verify the truth of recitals in instruments in the Grantors' Affidavit in deeds you draft - eliminate the twenty year reliance period.

.10 **When all else fails**. If you are really stumped in searching country properties call the neighbours; they can usually provide you with an oral history of the property - and a whole lot more. (My wife says that you don't see much in the country, but what you hear makes up for it!)

11. COMPETING MARKETABLE TITLES.

.1 There are at least two circumstances under which there will be competing chains of title under the *Marketable Titles Act*. Both are most likely to occur with unoccupied rural properties. The first is the "omitted exception" situation; the second is the lack of an underlying Crown Grant.

.2 The omitted exception.

.1 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

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52 Section 7(2)(c).

53 (1992), 107 N.S.R. (2d) 187 (Boudreau, J.).

54 (1988), 86 N.S.R. (2d) 23 (Davidson, J.).

55 (1995), 144 N.S.R. (2d) 13 (Goodfellow, J.)

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.

.2 In *Ontario Hydro V. Tkach*[56] 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.]

.3 The Ontario Court of Appeal[57] approached this issue from the perspective: "Does Tkach have a defense 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.

.4 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

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56 (1992), 95 D.L.R. (4th) 18

57 at pages 19-21.

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.

.5 The Court of Appeal quoted MacKay, J.A., in *Algoma Ore Properties Ltd. v Smith*[58], 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)[59].

.6 The Ontario Court of Appeal concluded that

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

Section 105(1) - the search period - provided a successful defense 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.

.7 Subsequent to *Tkach* a different panel of the Ontario Court of Appeal decided *National Sewer Pipe Ltd. v. Azova Investments Limited*[60] 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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58 [1953] 3 D.L.R. 343 (Ont. C.A.).

59 *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

60 (1993), 105 D.L.R. (4th) 1.

.8 The Supreme Court of Canada decided that *Tkach*, not *National Sewer Pipe Ltd.*, was the correct approach in *Fire v. Longtin*[61] a case appealed from yet another panel of the Ontario Court of Appeal.

.9 *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. The Supreme Court of Canada adopted the reasons for judgment delivered by McKinlay, J.A., for the unanimous Ontario Court of Appeal[62]. Justice McKinlay, in the Ontario Court of Appeal decision states, *inter alia*, at page 43:

> "It is my view that when Part III of the Act was passed in 1981, one of its specific purposes was to clear up title problems of this sort, and support titles on which successive grantees may have relied. As commented by Grange, J.A., in the ***Tkach*** case, the application of Part III 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 has weighed that possibility against the expectations of persons more recently dealing with the 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."

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 focused most of their attention on the effect of the 40-year search limit which had been the subject of uncertainty 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."

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.

.3 **Protecting undeveloped unoccupied lands.** How may owners of undeveloped unoccupied land protect themselves against "omitted exception" claims? This is important as in both *Tkach* and *National Sewer* the unsuccessful parties lost largely because there was no physical evidence of their ownership or possession on the land in contention. Here are two thoughts:

.1 First, if an owner suspects a problem, a look at the neighbour's deed to the larger parcel in the Registry Office will show if the owner's land is still included in the neighbour's description. If the owner's land is still included in the neighbour's deed you have at least two choices.

.1 First, a correcting deed of the land from the neighbour to the owner; or

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61 [1995] 4 S.C.R. 3

62 (1994), 112 D.L.R. (4th) 34.

.2 Second, if the neighbour is not co-operative, consider registering a Notice of Claim under section 5 of the *Marketable Titles Act*[63] in the Registry Office to evidence the Owner's interest. This will limit the neighbour's ability to deal with his or her property in the short term while not turning the owner into a plaintiff whose claim may be defended under s.4(1) and *Tkach*. Because the owner's claim is based on a registered instrument the Notice of Claim will not properly fall under section 5 and may be removed by a Court as a "caveat"[64]. It may, however, be enough to turn the neighbour into the plaintiff whose claim may be defeated by the owner using section 4(1) and *Tkach* as a defense.

.2 Second, it would be prudent for owners of undeveloped unoccupied land to leave physical evidence of their ownership on their properties as a preventive measure. It should take relatively little effort to put third parties on notice of the owner's interest. For example, see *Robertson v. McCarron*[65] at paragraph 23 which gives us some guidance on steps that be taken to give such notice:

> "... I am not prepared to hold that in the absence of evidence that the plaintiff or his predecessor in title ever cut a tree, blazed a line, erected a structure, ***posted a sign***, or cut or maintained a wood road on the property in question, the mere payment of taxes is sufficient evidence of possession. There was nothing on or about the property itself or being done to the defendant's knowledge with reference to the property which indicated that the plaintiff or his father claimed the property." [Emphasis added]

The owner should consider posting signs on the property boundaries under section 7 of the *Occupiers' Liability Act* or section 3 of the *Protection of*

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63 See Catherine S. Walker, Q.C. and John R. Cameron, Q.C., *The Marketable Titles Act Revisited*, Real Estate '99 Conference, March 5, 1999, The Continuing Legal Education Society of Nova Scotia.

64 A Caveat is not an instrument, a notice of claim nor an interest in land; *Church v. Forbes and Church* (1983), 60 N.S.R. (2d) 211 (Hall, J.). See also *Blades and Quinlan v. Atwood* (1990), 95 N.S.R. (2d) 348 (Freeman, L.J.S.C.) at paragraphs 31 and 32:

> "31. A document in the nature of a caveat therefore is a registered statutory declaration in which the declarant goes beyond a mere recitation of facts and gives notice of an action respecting real property rights, actually begun or merely contemplated, or of a claim, for the purpose of warning off potential purchasers of land by fixing them with notice of the action or claim. If permitted to stand as notice relevant to a purchaser under s. 17 of the *Registry Act*, the statutory declaration would have the practical effect of an injunction or an attachment order, interfering with the rights of property owners without the safeguards of the proper procedures. It would be available unilaterally and might remain in effect indefinitely. Despite its outward resemblance to a proper statutory declaration, it is not an instrument changing or affecting title to land, or a recordable document within the purview of the *Registry Act.*
>
> 32. Because such documents are held to be without force and effect, and may be liable to be struck from the records of the Registry of Deeds, it follows that they are not notice of any facts they might contain."

65 (1985), 71 N.S.R. (2d), 34 (Hallett, J.).

Property Act. These could be "No Trespassing", "No Hunting" or "Private Property - Enter At Your Own Risk" signs showing the owner's name *e.g.* "by order of [Name], Owner". Signs are much quicker, cheaper and easier to use than blazing, cutting, fencing, or constructing structures or roads. Signs under the *Occupiers Liability Act* could also reduce the potential liability of the owner to persons entering the property.

.4 **Lack of an underlying Crown Grant.** A barrister practicing in rural Nova Scotia identified this issue to the author. The barrister had searched title to a large tract of woodland which had a 100 year plus chain of registered title instruments but no underlying Crown Grant. The parcel appears to meet the 40 year *Marketable Title Act* chain of title requirement but, section 9 of the *Marketable Titles Act* exempts the Crown from the operation of the Act:

> "9. For greater certainty, nothing in this Act affects any interest of Her Majesty in any land."

The problem for barristers in this circumstance is whether to accept the apparent marketable title to such parcels in reliance on section 4, *Penney v. Hartling*[66] and *Tkach*[67] (and be subject to a possible Crown claim to the lands) or to determine if there is an underlying Crown Grant (which effectively "guts" section 4 of the *Marketable Titles Act*).

If there is either a sixty year chain of title or sixty years of possession a barrister may be able to establish possessory title against the Crown. Fortunately instruments comprising a sixty year chain of title should provide a "colour of right" claim for possession of the whole of the claimed land not just the area occupied[68].

Without confirming there is a Crown Grant underlying title in every search a barrister may be exposed to a claim for certifying a defective title. This issue should be resolved by the Legislature. If you are faced with this situation in the meantime you may try to obtain

a. a grant or a deed from the Crown, or

b. a certificate under section 37 of the *Crown Lands Act*[69] stating that the Crown "...asserts no claim in or to..." the land.

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66 Penney v. Hartling (1999),177 N.S.R.(2d) 378 (Carver, J.)

67 Supra. 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 client's title established within the 40 year statutory period in the Registry Office records.

68 *Mason v. Mason Estate et al.* (1999), 176 N.S.R. (2d) 321(C.A.) at page 327, paragraph 27 *et seq.*

69 R.S.N.S. 1989, c.114

12. TAX DEEDS

.1 Refer to Practice Standard No. 13 Tax Deeds.

.2 Section 6(2)of the *Municipal Government Act* states

> "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".

.3 In *Stuart Dow and Sherri Dow v. Allan Zinck and Allan Young*, (S.H. No. 118046, August 5, 1997, Stewart, J.) the Defendants blocked the Plaintiffs' access to the Plaintiffs' property. Plaintiffs held title to their property under a tax deed registered more than six years before the action arose. The Defendants, *inter alia*, challenged the validity of the tax deed. The parties settled the matter filing a consent order in which the Defendants dropped their challenge. Michael LeBlanc, the Plaintiff's solicitor, told the author that the turning point came in a pre-trial conference when the presiding Judge made it clear that he agreed with Mr. LeBlanc's argument that section 6 the *Municipal Government Act* Act defeated the Defendants' challenge. Mr. LeBlanc's Pre Trial Memorandum in this case most ably states the history of tax deeds and the arguments in support of section 6; a copy was published, with his permission, in the materials for the Real Estate '99 Conference[70].

.4 In *MacNeil v. Nova Scotia (Attorney General) et al.*[71] Cromwell, J.A., referring to section 6 of the *Municipal Government 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 the Act protected a tax deed when it included the subject land; in this case the tax deed did not include the land under contention.

.5 In *James Arnold Desmond v. Municipality of The District of Guysborough*[72], *"Desmond"*, MacLellan, J. set aside a vesting order made under a 1969 tax sale. The vesting order was set aside because proper procedures at the time of the tax sale in 1969 were not followed. The defendant argued that the *Marketable Titles Act* barred the plaintiff's action but MacLellan, J., found that:

> "I am not able to conclude that the *Marketable Titles Act* was intended to apply retroactively therefore the ***Act*** does not apply to bar this action."

This decision appears to fly in the face of the express intent and language of the Act. Subsection 6(5) of the Act states, about subsection 6(2), that

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70 The Continuing Legal Education Society Of Nova Scotia, March 5th, 1999.

71 (2000), 183 N.S.R.(2d) 119; 568 A.P.R. 119 (N.S.C.A.)

72 (2000), 186 N.S.R. (2d) 123

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

In *Shibley v. Nova Scotia (Attorney General) et al.*[73] as to retroactivity of the words *"whether made before or after the coming into force of this Section, is final and binding"*, held that

> "[3] Section 52A(2) is the relevant provision for the purposes of the present action. The words "whether made before or after the coming into force of this Section" are the focus of the competing arguments of the plaintiff and the defendant. The plaintiff concedes that s. 52A(2) bars any action similar to the present one which was commenced subsequent to Royal Assent on June 30, 1994, the date on which the statutory provision came into force. The question of law to be determined is whether the enactment of s. 52A(2) applies retroactively or retrospectively so that it bars the plaintiff's action, which was commenced before this statutory provision came into force, from proceeding further.
> ...
> [22] Existing proceedings do not appear to be a special class of cases to which legislation must refer, expressly or by necessary implication, when enacting retroactive legislation. Rather, whether existing proceedings are affected or completely prohibited by legislation later enacted is simply a matter for the general rules governing retroactivity.
>
> [23] In the present case, the words of the statutory provision are sufficiently broad as to clearly apply to pending court actions. The statutory provision bars the plaintiff's action from proceeding."

.6 Section 2(b) of the *Marketable Titles Act* states that its purpose, *inter alia*, is to remove uncertainties respecting the validity of past and future tax deeds. In *Town of Wolfville v. Bishop-Beckwith Marsh Body et al.*[74], the Nova Scotia Court of Appeal stated:

> "[16] The most direct evidence of legislative purpose is to be found in formal statements of purpose embodied in the legislation in question (Driedger, 3rd Ed.), p. 51).
>
> [17] The Supreme Court of Canada in R. v. V.T., [1992] 1 S.C.R. 749; 134 N.R. 289; 7 B.C.A.C. 81; 15 W.A.C. 81,at p. 765 [S.C.R.], in discussing a purpose statement in the *Young Offenders Act*, rejected the argument that statements of purpose were merely preamble. Justice L'Heureux-Dubé, for the Court, stated:
>
> > "I am unable to accede to the submission of the appellant that s. 3(1) is merely a 'preamble' and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act.""

.7 Subsection 5(6) of the *Marketable Titles Act* states that subsection 5(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. In *Desmond* his Lordship could have maintained the integrity of the Act by affirming the tax deed. He would not have prejudiced the plaintiff's right to recover damages from the Municipality. As the Municipality still held title to the lands at the time of trial it was in a position to transfer title to the plaintiff if necessary to settle the claim.

.8 Because *Desmond* turns on the retroactive effect of the statute on an action commenced before the Act came into effect, its application it must be distinguished

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73 (1995), 146 N.S.R.(2d) 227; 422 A.P.R. 227, Nathanson, J.

74 (1996), 151 N.S.R.(2d) 333; 440 A.P.R. 333; leave to appeal to the Supreme Court of Canada denied (1997), 156 N.S.R. (2d) 320.

from actions commenced after the Act came into effect. *Desmond* should, therefore, be of no application in claims under the Act commenced after July 1, 1996 the date the Act came into effect.

13. **ACCESS**

.1 Access to the property is almost of equal importance to ownership. Ensure there is access to the property by or from Public Highway - refer to Practice Standard No. 22 Access - Street and Roads. If access is by a private right of way be sure there is good title to such right of way[75]. You will also want to determine if the right of way is an exclusive one, useable for all purposes, i.e. vehicular traffic, open all year round (if that is a concern), who maintains the right of way, if the right of way requires payment of an annual fee and whether or not the fee is paid. If your client intends to develop the property or subdivide it, ensure that the right of way is of sufficient width and that your client has the right to develop the land under local by-laws. You should make every effort to obtain an express grant of right of way for your client as many rights of way in rural parts are not expressly granted. Problems can arise if hard feelings develop between the purchaser and the neighbour over whose land the right of way passes. Access may also be secured under the *Private Ways Act* for commercial purposes (Part I) or private purposes (Part II).

.2 Access may be by public highway. If it is, be aware of sections 10, 14 and 16 of the *Public Highways Act* which detail what constitutes a public highway and denies possessory title to highway lands by adverse possession. Other presenters are dealing with highways and rights of way at this CLE session. Refer to their papers.

.3 A surprising number of properties in our area are "caught" by the deemed width of public highways (formerly sixty-six feet):

> 15 (1) Every common and public highway shall, until the contrary is shown, be deemed to be at least 20.1168 metres in width[76].

Many rural homes and buildings were built very close to the apparent limit of the highways; upon survey it is not uncommon for the "deemed" road limit of the highway to go through the front porch, the living room or other parts of the structure. This should be a matter of great concern to the lawyer and is another compelling reason for the client to obtain a survey. For an example of the effect of these sections see *Ewing v. Publicover* [77] in which a purchaser had an Agreement of Purchase and Sale put aside because part of the property to be conveyed was within the statutory highway width and was not the vendor's to sell.

.4 You can obtain "letters of comfort" from the Department of Transportation and Public Works or the municipality involved. The Department's letters merely indicate

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75 *Keirstead v. Piggott et al.* (1999), 177 N.S.R.(2d) 1 (S.C.). The Nova Scotia Supreme Court held that the solicitor was negligent in failing to ensure that a legal right-of-way existed.

76 *Public Highways Act* R.S., c. 371, as amended, section 15(1).

77 (1976), 13 N.S.R. (2d)346 (N.S.S.C., MacIntosh, J.).

forebearance for the time being. The *Municipal Government Act*, section 314, is more useful for municipal roads, it provides:

> "314 (1) Where any part of a street, other than the travelled way, has been built upon and it is determined that the encroachment was made in error, the engineer may permit, in accordance with any by-law made pursuant to subsection (2), the encroachment to continue until such time as the building or structure encroaching upon the street is taken down or destroyed.
>
> (2) A council may, by by-law, regulate encroachments upon, under or over streets, including stipulating the period of time an encroachment may remain and the entering into of agreements, including terms and conditions, for particular encroachments."

.5 The *Municipal Government Act*, section 156(3) continues former *Assessment Act*, s.44(3) providing that an easement is not terminated or extinguished by a tax sale:

> "156 (3) Notwithstanding subsection (1), where a dominant tenement is sold for taxes, an easement or right-of-way appurtenant to it passes to the purchaser and where a servient tenement is sold for taxes, the sale does not terminate or affect an easement or right-of-way to which it is subject."

.6 The *Marketable Titles Act* does not apply to either the interest of a municipal government in a public street, road, highway or road reserve; a right of way or easement in favour of a public utility or a municipal government; or an easement or right of way that is being *used and enjoyed*[78].

14. LAND USE

.1 Farm lands may be subject to a number of land use, zoning and building code[79] requirements. It is important to address these issues in any agreement of sale you draft for a purchaser. It is also important to have clear instructions from both your clients and their lenders on these issues before you start work. Practice Standards No. 20 Zoning and Occupancy Permits and No. 40 Restrictive Covenants do not expressly address these issues for farm properties but are a good reference. You should address these issues in a farm purchase or mortgage as part of your due diligence inquiries. Subject to your express instructions from your clients and their lenders make inquiries to determine if

.1 the intended uses of the farm comply with zoning and land use by-laws,

.2 there are any by-law infractions known to the municipal authorities,

.3 there are appropriate Occupancy Permits, if required, and

.4 subject to the qualifications in Practice Standard No. 40, Restrictive Covenants, confirm that covenants, if any, are in good standing.

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78 Section 7(1).

79 The *Building Code Act* incorporates the *National Farm Building Code of Canada 1995*.

.2 Note the *Public Highways Act* limits property use near highways under ss. 22, 23, 42, 45, 46, 47, 48; also refer to the *Municipal Government Act, Part 12*.

15. FORECLOSURE

.1 Be aware of the *Farm Debt Mediation Act*, Chapter F-2.27 (1997, c. 21). Section 21 of this Act requires a secured creditor who intends to

(a) enforce any remedy against the property of a farmer, or

(b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer

to serve a farmer with a Notice of Intent to Realize on Security before undertaking any action to recover debts. At least fifteen business days notice must be given to the farmer in the prescribed manner. The Farm Debt Mediation Service of Agriculture and Agri-Food Canada provides insolvent farmers and their creditors with mediation services under the Act and Regulations to help them arrive at a mutually satisfactory arrangement. Where this is not successful, the parties still have recourse to the courts. Under the FDMA, farmers can apply for either of two application processes:

a. Stay of Proceedings, Review and Mediation (Paragraph 5(1)(a)), or

b. Review and Mediation without a Stay (Paragraph 5(1)(b)).

16. OVERRIDING INTERESTS

.1 Your due diligence inquiries should include the:

.1 *Bank Act*, section 427,

.2 *Environment Act*, s.132(7),

.3 *Labour Standards Code*, and

.4 *Workers' Compensation Act*, s.147.

.2 CCRA does not provide clearances or comfort letters respecting the various statutory liens it enjoys. Consider a requirement in any agreement of purchase and sale you draft requiring that the Vendor provide its most recent statements receipted as to payment for HST, CPP, EI, employee remittances and tax installments.

.3 We have not gone into detail about the relative priorities of "Section 427" security and *Personal Property Security Act* security agreements. These issues are dealt with

in the NSPPSA References identified in section 17 below[80]. When doing due diligence searches for a purchase or mortgage you are identifying security interests that will either be released, assumed, postponed or otherwise dealt with. Our experience in farm financings has been that the Banks and other lenders mutually allocate the assets against which their respective security will be taken. You will need to ensure that prior charges are released or otherwise dealt with, that security documents you prepare properly charge the assets to be secured and that there are no overlapping security charges for which there are no priority agreements among the lenders.

17. PERSONAL PROPERTY & THE *PERSONAL PROPERTY SECURITY ACT*, "PPSA"

.1 You must make appropriate Nova Scotia *Personal Property Act*, "NSPPSA" searches for both farm purchases and farm mortgages.

.2 NSPPSA References:

.1 Conference Materials, The Continuing Legal Education Society of Nova Scotia, *Personal Property Security Act Update* Conference, January 9, 1998.

.2 Conference Materials, *Nova Scotia Personal Property Act Seminar*, Canadian Bar Association - Nova Scotia, November 1, 1996.

.3 Catherine Walsh, *An Introduction To The New Brunswick Personal Property Security Act*, The New Brunswick Geographic Information Corporation, 1995. As the Nova Scotia Act is almost identical to the New Brunswick Act this work is most helpful in understanding the background and operation of the Nova Scotia PPSA.

.3 Fixtures

.1 Fixtures are not defined in the *Act* other than as not including building materials so the common law applies[81]. NSPPSA, sections 37 and 50, establish the priority of security agreements dealing with fixtures. Secured parties must register notices of their security interests in the appropriate Registry Office under NSPPSA, s.50, to maintain priority against a subsequent acquirer, without fraud, of an interest in the property to which the goods are affixed - NSPPSA, s.37.

.2 Practice Standard No. 36 - Personal Property Security Act states:

> "When dealing with personal property that may become a fixture a lawyer should consider the effect of the fixture provisions under the *Personal Property Security Act*, Section 2(s), Section 31(1) and Section 50, which may require registration of notices under both the *Personal Property Security Act* and the *Registry Act*."

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80 Also refer to *Agricultural Law In Canada*, above, chapter 4.

81 *Slack v. T. Eaton Co.* (1902), 4 O.L.R. 335 (Div. Ct.) At 338.

.3 Notice in the PPR is not notice of security interests in fixtures or crops under the *Registry Act*[82].

.4 Crops and Animals

.1 Under NSPPSA section 2.(u) "goods" means tangible personal property, fixtures, crops and the unborn young of animals but does not include trees, other than crops, until they are severed.

.2 Under NSPPSA “crops” means crops, whether or not matured, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, and includes trees only if they

(a) are being grown as nursery stock,

(b) are being grown for uses other than for the production of lumber and wood products, or

(c) are intended to be replanted in another location for the purpose of reforestation.

.3 Section 13(1) provides that a security interest in the nature of a floating charge attaches when value is given, the debtor has rights in the collateral and, except for the purpose of enforcing rights as between parties to the security agreement, the security interest becomes enforceable within the meaning of section 11. For the purpose of section 13(1) a debtor has no rights in

.1 crops until they become growing crops.- s.13(4)(a),

.2 the young of animals until they are conceived - s.13(4)(b), and

.3 trees, other than crops, until they are severed - s.13(4)(d).

.4 A security interest does not attach under an after-acquired property clause in a security agreement to after-acquired property that is crops that become growing crops more than one year after the security agreement has been entered into. A security interest in crops that is given in conjunction with a lease, agreement of sale or mortgage of land may attach, if the parties agree, to crops to be grown on the land concerned during the term of the lease, agreement of sale or mortgage. See section 14(2).

.5 Section 35(9) states that

> "A perfected security interest in fowl, cattle, horses, sheep, swine or fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed

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82 *Registry Act*, s.18A: “For greater certainty and subject to Section 50 of the *Personal Property Security Act*, no person contracting or dealing with or taking or proposing to take a transfer of or an interest in land is affected by a registration in the Personal Property Registry, whether or not that person has notice or knowledge of the registration, and such notice or knowledge is not notice within the meaning of Section 18.".

> in the animals or fish has priority over any other security interest in the same collateral or its proceeds given by the same debtor other than a perfected purchase money security interest."

.6 It is possible to obtain a purchase money security interest, a "PMSI" under section 5.(8):

> "A perfected security interest in crops or their proceeds, given for value to enable a debtor to produce the crops and given while the crops are growing crops or during a period of six months immediately before the time the crops become growing crops, has priority over any other security interest in the same collateral given by the same debtor."

.7 Section 38 provides for the priority of security interests in growing crops. Notice of the security interest must be registered in the Registry Office under NSPPSA, section 50, to obtain priority over persons acquiring, without fraud, a subsequent interest in the land upon which the crops are being grown.

.5 Quotas

.1 Many "natural products" in Nova Scotia come under the *Natural Products Marketing Act*[83]. Dairy matters come under the *Dairy Commission Act*[84]. The *Natural Products Marketing Act* permits "commodity boards" to be constituted under a marketing "plan" for particular natural products. Both Acts enable quota regimes for producing certain products. These quota are essential to the farms which produce the regulated products governed by these Acts. Naturally lenders wish to take a security interest in the quota as part of their security package.

.2 In any agreement of purchase and sale make it a condition precedent to closing that the purchaser shall receive any quotas and licenses required for the farm operation. Your purchaser clients should secure approval from the appropriate commodity board for the transfer of the required quota and licenses. This author is advised that some commodity boards have their own forms of transfer; be sure the transfer occurs effective the closing date. You may want to ensure that the form of transfers states that although legal title may change, beneficial ownership of the quota and licenses will be held in trust by the purchaser for the unpaid vendor - if the commodity board and the purchaser's lenders agree.

.3 The present practice of the NSFLB is to take an irrevocable "Assignment and Consent to Withhold Transfer of Quota and Consent to Transfer of Quota" from the borrower. The form authorizes the commodity board involved to

.1 withhold a transfer of quota without facilities until NSFLB consents to the transfer, or

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83 R.S.N.S. 1989, c.308, amended 1994-95, c.13.

84 R.S.N.S. 1989, c.117, amended 1994, c.17. This Act will be repealed by the *Dairy Industry Act*, S.N.S. 2000, when proclaimed.

.2 transfer the quota to the NSFLB or to others if the NSFLB security is foreclosed or NSFLB acquires the right to take possession or to dispose of the quota under its security

subject to the commodity board's regulations. In addition to filing notice of the assignment under NSPPSA, the NSFLB requires that the executed Quota Assignment be lodged with, and acknowledged by, the commodity board involved with confirmation from the commodity board that there are no conflicting registrations. The NSFLB and the commodity boards have a good working relationship in the use of this form of assignment. A copy of the NSFLB form of assignment is annexed as Schedule "2" for your consideration. You may want to pattern quota security for other lenders on this model but, before you do, refer to our caution in subparagraph 17..5.5 and the advice of Ms. Babe in subparagraph 17..6.

.4 The FCC currently takes a security agreement on "quota/proceeds from the sale of quota". Its form contains additional covenants for the borrower.

.5 Be very careful how you express your opinion on the lender's charge on the borrower's quota. Unfortunately there are two streams of case law dealing with quota under *Personal Property Security Acts* in Canada. Case law in Saskatchewan recognizes quota as property which may be charged under its PPSA[85]; Ontario case law does not. The Nova Scotia Act is almost identical to the New Brunswick PPSA which is based on the "Western Model" like Saskatchewan's PPSA[86]. I found no reported cases on point under either the Nova Scotia or New Brunswick Acts however the Nova Scotia Supreme Court found that fluid milk quota was "property" in *Ackerman v. Nova Scotia Dairy Commission*[87]; Chief Justice Glube cited the Court of Appeal in *Re Langille (H. & L.) Enterprises (Bankrupt)*[88] in reaching her decision. The Legislature amended the *Dairy Commission Act* after *Ackermann* so caution is advised before you rely on that case. Our Court of Appeal later demonstrated a practical commercial approach to the transfer of fishing licenses in *Theriault et al. v. Corkum et al*[89]. Hopefully our Nova Scotia courts will continue their own previous common-sense practical approach and follow the Saskatchewan case law when dealing with quota under our Act.

.6 You may be called upon to draft a security agreement charging quota. Below I include both a commentary by Professor Catherine Walsh and an article by Jennifer Babe which discuss quota-related issues. After analyzing the Ontario case law, Ms. Babe gives advice to solicitors in Ontario. You should consider

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85 *Saskatoon Auction Mart Ltd. v. Finesse Holsteins*, [1993] 1 W.W.R. 265, 4 P.P.S.A.C. (2d) 67 (Sask. Q.B.)

86 Catherine Walsh, *An Introduction To The New Brunswick Personal Property Security Act* (The New Brunswick Geographic Information Corporation, 1995) at pp.xxiii - xxiv.

87 (1988), 82 N.S.R. (2d) 238 (Glube, C.J.T.D. as she then was).

88 (1986), 72 N.S.R. (2d) 418 (C.A.).

89 (1993), 121 N.S.R. (2d) 99.

her advice when placing NSPPSA security on quota and licences in Nova Scotia until either our courts have ruled on the issue or our legislature clarifies the Act.

.7 In her text Professor Walsh comments on the Ontario case law as follows:[90]

> 'In general, the courts have taken a liberal and functional approach to the determination of what constitutes personal property for the purposes of determining whether a security interest in it can be taken under the PPSA.[91] Means have been found, for instance, to enable medical and dental records to be used by health professionals as collateral consistently with their duty to respect patient confidentiality.[92]
>
> However, a line of cases has emerged from the Ontario courts holding that agricultural production quotas, because of the contingent and discretionary nature of their transferability, do not constitute personal property in the form of intangibles so as to trigger the application of the OPPSA to security interests taken in them.[93] As the Court itself acknowledged, its approach places too much emphasis on traditional definitions of personal property and does not give sufficient consideration to the realities of commercial transactions.[94] More to the point, the Ontario case law is out of step with the American jurisprudence,[95] with the

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90 Catherine Walsh, *An Introduction To The New Brunswick Personal Property Security Act*, The New Brunswick Geographic Information Corporation, 1995, p. 32.

91 "Personal property" is defined in s. 1 to mean "goods, a document of title, chattel paper, a security, an instrument, money or an intangible". "Intangible" is a residual category, defined by exclusion from the other six categories. Most of the cases disputing whether something qualifies as personal property which may be used as collateral have therefore turned on whether it qualifies as an "intangible".

92 *Re Axelrod* (1994), 8 P.P.S.A.C. (2d) 1, 20 O.R. (3d) 133 (C.A.). See also *Re Foster* (1992), 8 O.R. (3d) 514, 89 D.L.R. (4th) 555 (Gen. Div.) [taxicab owner's licence issued by a municipality]; *Royal Bank* v. *Cenaiko* (1992), 3 P.P.S.A.C. (2d) 294 (Sask. C.A.) [payments to farmers under Canada-Saskatchewan crop assistance program]. On nursing home licenses compare *Genelcan Realty Ltd. v. Wiseman* (1986), 59 C.B.R. (N.S.) 197 (Ont. H.C.J.) [leave to appeal refused 59 C.B.R. (N.S.) 284] and *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 8 P.P.S.A.C. 135 (Ont. H.C.J.).

93 In *National Trust Co. v. Bouckhuyt* (1987), 43 D.L.R. (4th) 543, the Ontario Court of Appeal ruled that an interest in a tobacco quota is not intangible personal property under the OPPSA. In a later decision, the Court suggested in *obiter* that it might reconsider its ruling: *Canadian Imperial Bank of Commerce v. Hallahan* (1990), 69 D.L.R. (4th) 449 (Ont. C.A.) [leave to appeal to S.C.C. refused (1991) 74 D.L.R. (4th) viii]. But in *Bank of Montreal v. Bale* (1992), 4 P.P.S.A.C. (2d) 114 [affirming (1991), 2 P.P.S.A.C. (2d) 194 (Gen. Div.), leave to appeal to S.C.C. refused] the Court ruled that an interest in a milk quota is not intangible personal property under the OPPSA and refused to overrule *Bouckhuyt*. But see subsequently *Bank of Montreal v. Bale* (1994), 19 O.R. (3d) 187 (Gen. Div.) in which it was held that even though the security agreement did not create a valid security interest in the milk quota under the OPPSA, the agreement still constituted a valid equitable assignment of a chose in action, enforceable *against the debtor* by a declaration that the secured party has a contractual right in the quota and all proceeds derived from any dealing with it and enjoining the debtor from disposing of the quota without the prior consent of the secured party.

94 *Hallahan, ibid.,* at 451-52.

95 See, *e.g.: In re George,* 85 B.R. 133 (Bankr. D. Kan 1988), aff'd, 119 B.R. 800 (D. Kan. 1990) concluding that entitlement payments to farmers qualify as intangibles; *Underground Flint, Inc. v. Viro. Inc.* 80 B.R. 87 (W.D. Mich. 1982): concluding that a liquor licence qualifies as an intangible.

consensus among Canadian commentators[96] and with judicial and legislative policy in other PPSA jurisdictions.[97] For these reasons, the authority of the Ontario cases outside that province is extremely doubtful."

.6 Jennifer Babe wrote the following article about the Ontario line of cases in The Lawyers' Weekly[98]; her advice to Ontario lawyers is in bold print:

"Quotas, licences as non-property issues

A solicitor may be negligent for forgetting the case law that holds certain quotas and licences not to be property of any kind, but mere privileges to do that which otherwise would be unlawful to do.

Mr. Justice Paul Forestell said so from the bench in *Tuboy v. Kaloscai* (unreported, Jan. 13, 1995, Ont. Ct. (Gen. Div.)).

In this case, a solicitor prepared a vendor take-back security to secure the sale price of farm property, including chicken broiler quota. The court held that the security interest in the quota was a nullity as the quota was not personal property.

The *Ontario Farm Products Marketing Act* is the statutory authority in Ontario for the creation of various marketing boards and their regulation of the production and sale of specified agricultural products. Similar statutory authorities exist in the other jurisdictions.

Licence issues arise as well for such matters as nursing home licences (are not personalty, by *209991 Ontario Ltd. v. CIBC* (1988), 8 P.P.S.A.C. 135) and taxi licences (are property by Re Foster).

The debate is whether the quotas issued by these marketing boards and various licences are "intangibles" for purposes of the Ontario and other *Personal Property Security Act* (PPSA) statutes such that a secured creditor can take security over quotas and licences under the PPSA statutes.

Apart from the debated PPSA decisions, there is the commercial reality that quotas and licences are traded, pledged and sold and are frequently the only or the largest asset of the debtor/vendor available as collateral for loans or recouping a lifetime of work upon the sale of the family farm or business.

On its face, a quota or licence should, by a joint reading of the definition of "property" in the *Conveyancing and Law of Property Act* and "intangible" in the *Personal Property Security Act*, be capable of being the subject matter of a security interest.

The trial court in the case of *National Trust. Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 (C.A.), overturning the trial decision at (1987), 59 O.R. (2d) 556 (H.C.), concluded that a tobacco basic

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96 R. McLaren, Annotation (1987), 7 P.P.S.A.C. 273 at 276; G.T. Johnson, "Discretionary Licence as Collateral" (1988-89) 3 B.F.L.R. 63; T. Johnson, "Security Interests in Discretionary Licences Under the Ontario Personal Property Security Act" (1993) 8 B.F.L.R. 123; R. M. Mercier, "Saskatoon Auction Mart: Milk Quotas and Finally Some Commercial Reality" (1993) 22 Can. Bus. L.I. 466.

97 In a 1993 Saskatchewan decision, the court held that it was "quite impossible" to characterize a milk quota as anything other than "personal property" (in the "intangible" category) in light of evidence that both parties to the security transaction regarded the quota as a commercially valuable form of collateral, notwithstanding the existence of restrictions on its transferability: *Saskatoon Auction Mart Ltd. v. Finesse Holsteins* (1993), 4 P.P.S.A.C. (2d) 67 (Sask. Q.B.). And see Mercier, *ibid*. The new Saskatchewan PPSA codifies this policy: s. 2(1)(w) defines "intangible" to include a "licence"; s. 2(1)(z) defines "licence" so as to include a transferable right whether or not the transfer is subject to restriction or requires the consent of the grantor of the licence; and ss. 57(3) and 59(18) address the enforcement of security interests in licences.

98 Vol. 16, No. 44, Friday, April 4, 1997. Ms. Babe is a partner with Miller Thomson in Toronto and is a frequent writer and presenter on matters commercial in Ontario. She is also the author of *Sale of a Business*, Butterworths, Markham, Ontario, now in its third edition (with computer disk). It is an excellent resource.

production quota (BPQ) was personal property falling within the definition of "intangible" in the PPSA.

At trial, Henry, J, stated as follows:

> "... in the Court of commerce, BPQs are "traded"; they are transferred for valuable consideration from one farmer to another as a thing of commercial value. "

If that type of transaction takes place in the market, although the "thing" bought and sold does not fit into the ordinary concept of property (because it appears to be unique), the common law is quite capable of embracing it as a form of property; the categories of property are not perpetually closed.

Unfortunately, the trial decision was overturned by the Court of Appeal, and it is this appeal decision that has caused the difficulty for farmers, vendors and lenders alike.

In delivering the Court of Appeal decision, Mr. Justice Peter Cory reviewed the *Farm Products Marketing Act* and its regulations creating the Tobacco Board.

He concluded that the regulations under that Act controlled each and every aspect of the production, sale and marketing of tobacco in Ontario, and that such control was exercised by the Tobacco Board in its absolute, complete and unfettered discretion.

In considering the nature of "property,"Mr. Justice Cory reviewed the decision of Mr. Justice Holmes in *International News Services v. Associated Press* (1918) 248 U.S. 215, in which Mr. Justice Holmes wrote as follows:

> "Property, a creation of law, does not arise from value, although exchangeable as a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference ...."

Mr. Justice Cory, with the other justices concurring, therefore concluded that as the BPQ for tobacco was totally within the discretion of the Tobacco Board, a BPQ was therefore no more than the manifestation of permission to do that which is otherwise prohibited by statute. It was merely the granting of a privilege, and could not be considered property.

Unfortunately, the *Bouckhuyt* decision has since been followed in a number of cases. This is not the case in some western decisions where quotas have been held to be property.

Given these decisions following *Bouckhuyt* in Ontario, and not wishing to be a solicitor who breaks from the series of Ontario Court of Appeal decisions, **what practically can an Ontario solicitor do when endeavouring to achieve a security interest in an agricultural quota or other licence?**

At the least, one should obtain a security interest by way of assignment of all proceeds payable to the debtor arising from the quota or licence.

In accordance with the *Conveyancing and Law of Property Act*, notice of such assignment should be given to the subject marketing board and any other third party who is expected to make payment to the debtor by reason of the quota or licence.

Such marketing boards and third parties should be directed irrevocably to make payment over to the secured party of all such proceeds and, of course, this general and specific assignment of receivables should be registered in accordance with the PPSA.

In addition, the security agreement taken by the secured party may claim an interest in the specifically described quota, and such security agreement recorded with the appropriate marketing board within their own internal systems.

However, given the *Bouckhuyt*, *Hallahan* and *Bank of Montreal v. Bale* (1991), 1 P.P.S.A.C. (2d) 194 decisions, the solicitor should warn its secured party client that the interest in the quota or licence per se may be unenforceable.

Purchasing clients should obtain their own licences or quotas pre-closing, unless specific consent of the regulator has been obtained for the transfer." [Bold type added - Ed.]

18. DOMESTIC WATER

.1 Your clients will require an adequate supply of potable water for their enjoyment of the property. Again this is a matter for which provisions should be made in the Agreement of Purchase and Sale by appropriate warranties. Bacteriological and other analysis of the water can be made at regional laboratories of the Department of Health.

.2 You should be clear about the source of water to the property. Is it on the property to be conveyed or is the source on a neighbouring property? If it is on a neighbouring property is there an express grant of easement or not? If not, you should make every effort to obtain one. Your urban client moving into the country would also be *well* advised to inquire whether it is a natural or man made supply, whether the well is dug or drilled, and concerning the construction of the well as many old crock wells allow groundwater to seep in.

19. OTHER STATUTES

.1 Your client may also find power line rights of way across the property which may or may not be revealed in the Registry Office. Many Nova Scotia Power Inc deeds include the right to flood adjoining properties. These usually do not affect marketability of title but "city" lawyers and their clients who are not familiar with these rights can become very concerned. Our experience over the years has been the Nova Scotia Power Inc. has been a good corporate citizen and not acted to the detriment of properties which are subject to flooding rights. If your client's property is on one of the artificial lakes formed by a Power Corporation dam, you should explain the Corporation's flooding rights before they complete the transaction. If representing a vendor the rights should be disclosed before the purchaser signs the agreement of purchase and sale.

.2 Your client's right to remove materials from the beach in front of his property may be limited under the *Beaches Act*. Other restrictions on the right to build wharves and protrusions into navigable waters are contained in the *Navigable Waters Protection Act* (Canada), which indicates that no work shall be built or placed in, upon, over, under, through, across any navigable water unless approved by the Minister of Transport. Grants of beach or foreshore properties may be obtained under the *Beaches and Foreshores Act.* You may wish to caution your client against harvesting seaweed before checking the *Fisheries and Coastal Resources Act*.

.3 Use of some farm properties may be affected by the *Common Fields Act*, *Fences and Impounding of Animals Act* and the *Fences and Detention of Stray Livestock Act.* These acts provide for the maintenance of fences, etc.

.4 If your client is buying dykeland, review the *Agricultural Marshland Protection Act* and regulations. Determine if dykeland you are dealing with comes within the purview of a marsh body. One positive note about dykeland is that (at least in Kings County) boundaries are not always clear but boundary disputes are rare - perhaps only a "last ditch" alternative.

.5 The *Conservation Easements Act*, provides for easements over natural areas that the Minister of Natural Resources may designate by order. The *Endangered Species Act.*

prohibits destruction of, or tampering with, habitat of endangered species and permits the designation of core habitat. Designation must be registered in the Registry Office. The *Special Places Protection Act* provides protection for archaeological and ecological sites. Designation under this Act is to be registered in the Registry Office. The *Trails Act* provides for trails across private & public property. Under the *Wilderness Areas Protection Act* the Minister may make agreements or acquire lands, and, with the consent of owners, may designate lands. Consents are binding on subsequent owners.

.6 The *Mineral Resources Act* reserves mineral rights to the Crown. The *Water Resources Protection Act* limits the ability to sell water.

.7 The *Occupiers Liability Act* replaced the common law rules for determining the duty of care that an occupier of premises owes to persons entering the occupier's lands. See the Supreme Court of Canada decision in *Waldick v. Malcolm* [99]; it was decided under the Ontario Act but may be of assistance in interpreting our statute.

.8 The *Private Ways Act* may enable owners to obtain rights of way across neighbouring lands. The *Angling Act* permits persons who are fishing to cross others' lands on foot to fish along the banks of watercourses.

.9 The *Animal Health and Protection Act* and the *Animal Cruelty Prevention Act* protect animals. The *Occupational Health and Safety Act* protects farm and other workers. Your clients may need to have a safety policy under the latter Act.

.10 Finally, you may be shocked to learn that we have a *Lightning Rod Act.*

20. **NON-RESIDENTS**

.1 If the Vendor is a non-resident of Canada, remember to obtain an appropriate clearance under section 116 of the *Income Tax Act.*

.2 If the Purchaser is a non-resident of Nova Scotia, the Purchaser must register his acquisition of a property under the *Land Holdings Disclosure Act*. The forms are simple, straight forward, and may be signed by the solicitor. No fees have been payable under the *Land Holdings Disclosure Act* except penalties for non-compliance.

.3 Section 38 of the *Municipal Law Amendment (2000) Act*, S.N.S. 2000, c.9, will add section 80A to the *Municipal Government Act* enabling municipalities to impose an additional tax on residential and resource properties owned by non-residents. The additional tax will be another "first lien" - section 80A(7).

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99 [1991] 2 S.C.R. 456

21. MATRIMONIAL ISSUES

.1 Be aware of pending changes to several statutes under the *Law Reform (2000) Act*[100]. This Act responds to the decision of the Nova Scotia Court of Appeal in *Walsh v. Bona*[101] holding part of the *Matrimonial Property Act* to be contrary to the *Charter of Rights and Freedoms*. Proposed changes to *Vital Statistics Act*, which deal with "domestic partnerships, will give common law couples, same sex or opposite sex, who "opt in", the status of spouses under certain statutes. Most provisions in this *Act* will not come into effect until June 4, 2001 (just within the year allowed for remedying the Act by the Court of Appeal) subject to the Nova Scotia Department of Justice's appeal of *Walsh v. Bona* to the Supreme Court of Canada.

.2 Refer to Practice Standard No. 27 *Matrimonial Property Act.* Note that no particular form of spousal consent to a disposition is required under the Act; see *Sherwood v. Sherwood, Roynat Inc. and Peat Marwick Limited*[102] at paragraph 13:

> "... I think the joinder of a non-owning spouse in a conveyance or encumbrance may be taken as compelling evidence of an intention either to surrender or subordinate statutory rights. I may note in passing that the statute does not prescribe any mode of signifying consent other than a signing of the instrument;"

.3 Dower

.1 Refer to Practice Standard No 31 Dower

> "In accordance with s. 33 of the *Matrimonial Property Act*[103], Dower is abolished, with the exception of Dower which may have vested in possession prior to October 1, 1980."

.2 Requisitions for dower are rare but may be answered as follows:

.1 Joint Tenancy (common law - not solely held by husband),
.2 Land held in Trust or "to uses" (common law - not solely held by husband),
.3 Partnership lands (common law - not solely held by husband),
.4 Unimproved land (*Dower Act,* s.4),
.5 Uncondoned adultery of wife (*Dower Act,* s.8),
.6 Wife elected provisions under husband's will (*Dower Act,* s.1),
.7 Wife has released (barred) dower,
.8 Husband was alive on or after October 1, 1980, *Matrimonial Property Act,* s.33,
.9 the doweress (widow) is dead, or
.10 Section 4(4) of the *Marketable Titles Act* may extinguish dower unless a notice of claim is properly registered under section 5.

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100 S.N.S. 2000, chapter 29.

101 *Walsh v. Bona* (2000), 183 N.S.R.(2d) 74 (CA); 568 A.P.R. 74

102 (1982), 52 N.S.R. (2d) 631 (N.S.S.C., Burchell, J.)

103 *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 as amended..

22. ESTATES

.1 Refer to Practice Standard No. 17 Estates and *Estate Problems Effecting Title*[104].

.2 **Applicable Act on intestacy.** Remember that Intestacies before September 1, 1966 are governed by the former *Descent of Property Act*. Intestacies on or after September 1, 1966 are governed by the *Intestate Succession Act*. For deaths between September 1, 1966 and January 13, 1975 the first $25,000 goes to the spouse; after January 13, 1975 the first 1st $50,000 goes to the Spouse.

.3 **Spouse's election to take home on intestacy.** Severance of the house parcel from the remaining farm property will limit the extent of land that may be taken by the spouse under the "spouse's election" under sections 4(3) and 4(4) of the *Intestate Succession Act*. This Act does not limit the property to be claimed to the land immediately around the home like other Acts such as the *Matrimonial Property Act*, s.3(2) and the *Social Assistance Act*, s.8. If the home and farm are on the same parcel the spouse's election for the home may well include any part of the farm on the same parcel. This may lead to unexpected results - especially if "domestic partnerships" are proclaimed into effect.

23. WILL REVIEW

.1 Your clients should review their Wills, have enduring powers of Attorney and consider a home designation under section 8 of the *Social Assistance Act*[105] if appropriate. There have been a number of unnecessary and severe problems caused by Intestacies on the death of farmers in our area. Common law relationships and second marriage situations have been particularly troublesome.

.2 Consider the effect of the new *Probate Act* and of the *Law Reform (2000) Act*, if the latter is fully proclaimed.

.3 Common law partners should have Wills and cohabitation agreements in which they clearly spell out their respective property rights and interests in their farms.

.4 Clients in second marriages should have appropriate Wills and matrimonial agreements. Their marriages may have nullified their previous Wills and, with the Wills, their intended disposition of their farms.

24. CONCLUSION

.1 We hope you will find these comments helpful. Good luck with your farm purchases and mortgages.

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104 Timothy C. Matthews, Q.C., CLE Real Estate Materials, October 9, 1992.

105 The *Social Assistance Act*, section 8, provides for the designation of a home to preclude its sale to satisfy claims under the Act.

Schedule 1 Nova Scotia Farm Loan Board Form of Broiler Quota Assignment and Consent To Withhold:

ASSIGNMENT AND CONSENT TO WITHHOLD
Transfer of Quota and Consent to Transfer of Quota

Whereas the Undersigned, has given security to The Nova Scotia Farm Loan Board (hereinafter called the "Secured Lender") by way of a Deed or Mortgage upon its Broiler production facilities to secure the repayment of a loan;

The Undersigned, in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration now paid by the Secured Lender (the receipt of which is hereby acknowledged) to the Undersigned, do hereby assign to the Secured Lender all my right, title and interest in and to my Broiler Quota for _____ kilograms plus any natural increase thereof with the Chicken Farmers of Nova Scotia.

This Assignment is made to secure the assignee against any loss by reason of any and all loans or advances already made or hereafter made to me.

Also, the Undersigned hereby gives to the Chicken Farmers of Nova Scotia (hereinafter called the "Commodity Board") full authority to withhold the transfer without facilities of the Undersigned's Broiler Quota and any part or parts thereof unless the Undersigned has first obtained and filed with the Commodity Board the written consent of the Secured Lender to such transfer;

And, in the event that the security of the Secured Lender is foreclosed or in the event the Secured Lender acquires the right pursuant to the security to take possession of or dispose of the producer's Broiler Quota facilities the Undersigned hereby authorizes and instructs the Commodity Board to transfer the Undersigned's Broiler Quota to the Secured Lender or to such other person who may become the owner of the facilities of the Undersigned subject to Board regulations for which the Broiler Quota was issued.

It is agreed that this consent cannot be revoked by the Undersigned unless and until the Undersigned has first filed with the Commodity Board approval for the revocation of the consent signed by the Secured Lender.

It is further agreed that this consent shall be read with all changes of gender and number required of its context.

It is further agreed that this consent shall enure to the benefit of and be binding upon not only the Undersigned, the Secured Lender and the Commodity Board, but also to their respective heirs, executors, administrators, successors, and assigns.

In witness whereof the Undersigned have executed these presents.

Schedule 2 - *Natural Products Act* (Agriculture and Fisheries) - List of Regulations

Chicken Farmers of Nova Scotia Regulations (amended to N.S. Reg. 61/2000)

Chicken Marketing Plan (amended to N.S. Reg. 71/98)

Egg and Pullet Producers Marketing Board:

- Composition of Marketing Board Regulations (amended to N.S. Reg. 37/86)
- Egg and Pullet Producers Marketing Plan (amended to N.S. Reg. 31/96)
- Egg Regulations and Levies Orders (amended to N.S. Reg. 136/95)
- Pullet Regulations (amended to N.S. Reg. 143/89)

Flue-Cured Tobacco Growers' Marketing Board Regulations (amended to N.S. Reg. 93/91)

Flue-Cured Tobacco Growers' Marketing Plan (amended to N.S. Reg. 90/85)

Grain Marketing Board Regulations (amended to N.S. Reg. 47/85)

Grain Marketing Plan (amended to N.S. Reg. 128/93)

Greenhouse Vegetable Marketing Board Licence Regulations (amended to N.S. Reg. 150/95)

Greenhouse Vegetable Marketing Board Pricing Regulations (N.S. Reg. 217/92)

Greenhouse Vegetable Marketing Plan (N.S. Reg. 177/88)

Pork Marketing Plan (N.S. Reg. 97/90)

Pork Nova Scotia Regulations (N.S. Reg. 147/94)

Potato Marketing Levy Regulations (amended to N.S. Reg. 121/95)

Potato Marketing Licence Regulations (amended to N.S. Reg. 153/95)

Potato Marketing Plan (amended to N.S. Reg. 152/95)

Processing Pea and Bean Growers' Marketing Board Regulations (N.S. Reg. 134/87)

Processing Pea and Bean Marketing Plan (N.S. Reg. 134/87)

Quorum of the Nova Scotia Marketing Board (N.S. Reg. 167/76)

Turkey Producers' Marketing Board Regulations (amended to N.S. Reg. 107/96)

Turkey Marketing Plan (amended to N.S. Reg. 265/92)

Wool Marketing Board Regulations (N.S. Reg. 31/84)

Wool Marketing Plan (N.S. Reg. 237/82)