COMMENTS ABOUT UNDERLYING CROWN INTERESTS

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1. Introduction

a. This outline comments on both

i. the risks arising from possible underlying Crown interests, and

ii. limits on the exercise of the Crown prerogative.

It includes an attached checklist for considering underlying Crown interests.

2. Summary of conclusions

a. The uncertainty in the law now surrounding the extent of the Crown prerogative preserved under MTA, s.9, and DNR's approach to exercising the Crown's prerogative needs to be settled quickly. The uncertainty can be eliminated in at least two ways:

i. First and most effectively, by amending MTA so it binds the Crown; or

ii. Second by implementing a fair and practical protocol between the Nova Scotia Barristers' Society and DNR regarding timely determination of possible underlying Crown interests in parcels.

If the second approach is taken it must be done in a way that does not materially affect reliance on the 40 year marketable titles and limitations periods regime upon which the Land Registration System is based.

3. Definitions

a. "DNR" means the Nova Scotia Department of Natural Resources;

b. "LAA" means the *Limitations of Actions Act*, as amended;

c. "LRA" means the *Land Registration Act*, as amended; and

d. "MTA" means the *Marketable Titles Act*, as amended.

4. Risks - possible underlying Crown interests in parcels - no certain title against the Crown prerogative.

a. We must be concerned about underlying Crown interests because they pose a significant risk to titles certified by lawyers. The risk arises from the Crown's

prerogative - *nullum tempus occurrit negi* - its right to recover land without time limit apart from limitations of actions legislation and a few common law restrictions. To be safe, a lawyer certifying title to a parcel must determine whether

i. the Crown has an interest in a parcel, and

ii. if the Crown has an interest in the parcel, is that interest enforceable by the Crown.

The annexed "Checklist for considering underlying Crown interests" may help lawyers make this determination.

b. The following factors make this a difficult risk for lawyers to deal with economically:

i. There is no simple or certain way to determine if the Crown has an interest in a parcel without either

(1) searching title back far enough to find an instrument releasing any Crown interest, or

(2) determining that there is sufficient possession adverse to the Crown to extinguish the Crown's interest in the parcel.

ii. Most readily available Crown records cannot reliably be used to determine if the Crown has an interest in a parcel:

(1) DNR officials have clearly stated to this author and others that the Property Online, "POL", "Green Layer" is neither complete nor accurate. The officials have very firmly stated that the Green Layer cannot be relied upon to show all lands in which the Crown has an interest, it may show a Crown interest where the Crown has no interest and that the extent of Crown lands shown in POL is not reliable. Because of these limitations the Green Layer is of little or no use to practitioners because it cannot be relied on. To the credit of DNR, DNR has undertaken a concerted effort to improve the Green Layer.

(2) Crown Grant Sheets in Land Registration Offices only show lands granted to the date of those sheets; the sheets do not show lands granted after the date of the sheets or lands reacquired by the Crown after the date of the sheets - for example, by escheat. This resource does not provide the certainty necessary for a proper title search.

iii. DNR's approach to exercising the Crown prerogative is of particular concern to some lawyers. DNR's recent claim against Frank Georges Island for which the registered owner had a 206 year chain of registered title shows that even parcels with long chains of registered title meeting the former 60 year common law title

search standard are not safe from Crown claims. We understand from lawyers that this claim is representative of DNR's approach generally.

iv. Lawyers report that it can take 18 months or longer to obtain releases of Crown interests under s.37 of the *Crown Lands Act* because DNR has limited resources to deal with these requests. On the other hand, this author has found DNR very responsive to specific questions about Crown lands that have arisen in transactions.

v. DNR has expressed its concern to the Nova Scotia Barristers' Society that some lawyers may not be giving Crown interests proper attention when converting parcels to the Land Registration System. We are on notice that the Crown will carefully scrutinize conversions of parcels in which their records indicate the Crown has an unreleased interest.

vi. MTA, s.9, may preserve Crown interests which override the 40 year search period otherwise established by MTA. By virtue of MTA, s.9, the required search period for titles in Nova Scotia may not be 40 years at all but a period in which all potential Crown interests are determined. This would be a period determined by one of

(1) a search back to an instrument releasing the Crown's interest in the parcel[1],

(2) a search back to an order releasing the Crown's interest in the parcel,

(3) a determination that the Crown's interest in the parcel has been extinguished by at least 40 years of possession adverse to the Crown at some time in the past, or

(4) the operation of either a statute or common law which restricts the Crown prerogative or otherwise releases any Crown interest.

Regrettably none of these periods necessarily "squares with" the stated purposes of LRA and MTA respecting creation of a regime in which determining titles is made more simple or more certain.

5. *Nullum Tempus Occurrit Negi.*

a. The Crown prerogative - *nullum tempus occurrit negi* - and the early English legislative response to it was explained to an Australian jury by Forbes, J, in *R* v *Steele*[2]

1 Refer to the attached Checklist for considering underlying Crown interests.

2 [1834] NSWSupC 111 (18 October 1834), Supreme Court of New South Wales.

> "... By the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the kingdom; and all his subjects are presumed to hold their lands, by original grant from the crown. His Majesty by his prerogatives is enabled to dispose of the lands so vested in the Crown. It is part of the law of England, that the prerogatives, can only be exercised in a certain definite and legal manner. His Majesty can only alienate Crown lands by means of a record - that is by a grant, by letters patent, duly passed under the great seal of the Colony, according to law, and in conformity with his Majesty's instructions to the Governor. It is also a clear case of the same law, that the right of the Crown cannot be taken away, by an adverse possession, under sixty years. The nullum tempus act, as it is called, was expressly passed to limit the remedy for the recovery of lands belonging to the Crown, to sixty years - without the statute, there would have been no limit of time - for it is a maxim of law, that the King cannot be disseized of his possessions; no laches are imputable to him - nullum tempus occurrit negi. Unless therefore the King have been out of possession of the land now claimed, for full sixty years, there is no defence in point of the mere time of adverse possession, to this action."

The English *nullum tempus* Acts of 1628 and 1769 are part of Nova Scotia law although these Acts have been subsumed in our *Limitations of Actions Act* respecting the Crown in right of Nova Scotia[3]. The text of the 1769 Act and a history of that Act are annexed to this paper.

b. In *McGibbon* v. *McGibbon*[4] Graham, J., for the Nova Scotia Court of Appeal, commented on the objects of the *nullum tempus* Acts as follows:

> "30 It is odd that the very object of the first *Nullum Tempus Act* was to prevent grants being made when the land was in the quiet possession of a subject.
>
> 31 Bliss, J., points this out in *Scott v. Henderson*, 2 Thomson, at p. 145: --
>
>> Now from this statute and the commentary (Coke, 4 Institute 188), upon it, we learn most clearly that it had been prevalent to pry into and seek out the ancient titles of the Crown to manor lands, etc., which had been of long time in the quiet possession of the subject, and the title of the Crown being thus unlimited they obtained grants and letters patent of such lands under a pretence that they had been concealed or wrongfully withheld from the Crown, and this was the mischief which the statute professed to remedy. The Crown then was in the constant habit of granting lands which were, so to speak, in the adverse possession of its subjects and these grants were never considered illegal or they would have been checked by a very different kind of statute.
>
> 32 Take the early grants in this province of vast areas of wilderness land with very many grantees in one grant and granted by shares or numbers instead of individual descriptions and very vague descriptions if any. Suppose the officials of the Crown would grant those lands to others now, what hope would the old occupants have if they could not rely upon the 60 years possession? I refer to *Attorney-General v. Love* (1898), A. C. 679. I think this provision would be a very poor statute if it should receive a construction which could be evaded by such officials. Such a construction is always to be avoided."

6. Avoiding a fight with The Crown.

a. There are a number of ways in which the Crown's interest may have been released. These include:

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3 *McGibbon v. McGibbon*, 1913 CarswellNS 78, 46 N.S.R. 552, 9 D.L.R. 308 (C.A.).

4 *ibid.*

i. **Conveyances from the Provincial Crown.** A Crown Grant or deed in the chain of title is obvious provided the Crown did not reacquire an interest. Consider if a deed from a Provincial Crown Agency (being an arm of the Crown) will bind the Crown; these Agencies include:

(1) the Nova Scotia Farm Loan Board (The NSFLB, formerly the Nova Scotia Land Settlement Board, is a Nova Scotia Crown Agency[5] created under the *Agriculture and Rural Credit Act*[6]), and

(2) the Nova Scotia Housing Commission.

ii. ***Crown Lands Act*, s.37 Releases.** One may obtain a release of Crown interests under s.37 of the *Crown Lands Act*. This can be time consuming but is binding on the Crown.

iii. ***Nova Scotia Power Privatization Act***, S.N.S. 1992, c.8, s.25:

> "25 (1) Any instrument within the meaning of the Registry Act heretofore executed purporting to convey to the Corporation, Nova Scotia Light and Power Company, Limited or Eastern Light & Power Company, Limited a fee simple estate is deemed to have vested in the Corporation, Nova Scotia Light and Power Company, Limited or Eastern Light & Power Company, Limited, as the case may be, and their successors and assigns, a full, absolute and indefeasible estate of inheritance in fee simple, subject only to any mortgages, judgments or easement registered on title against such estate.
>
> (2) Any person who claims to have an interest in any of the land referred to in subsection (1) and who has not been compensated for that interest may make a claim for compensation and the provisions of the Expropriation Act, in respect of compensation, apply to that claim as if the vesting of the lands had occurred as a result of the expropriation of those lands by the Corporation, Nova Scotia Light and Power Company, Limited or Eastern Light & Power Company, Limited, as the case may be, resulting in a claim in accordance with the Expropriation Act. 1992, c. 8, s. 25."

This Act (section 3) binds the Crown therefore a deed protected by this statute would preclude a Crown claim.

iv. **Quieting Titles Act orders**. Orders under this Act are binding on the Crown so you may determine title by an application under this Act.

v. ***Veterans Land Act*, s.5(3), deemed grant.** Hamilton, J., in *Carmichael v. Durant*[7] in a *Vendors and Purchasers Act* application determined that s.5(3) of the *Veterans' Land Act* is within the legislative authority of the federal

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5 *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.

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

7 (1995), 143 N.S.R.(2d) 234; 411 A.P.R. 234.

government and that deed from The Director, The *Veterans' Land Act*, has the same force and effect as if it were a Crown Grant. *Carmichael* dealt with the constitutional validity of s.5(3) directly after proper notice was given to the various Attorneys General. *Carmichael* may allay the reservations expressed about the constitutionality of this section but Charles MacIntosh, Q.C., still expresses some reservations about whether a Federal or a provincial Crown Grant is conveyed - *Nova Scotia Real Property Practice Manual,* s.5.1D. In *Carmichael* Justice Hamilton states:

> "[6] Counsel for both parties agreed that my decision on the constitutional validity of s. 5(3) of the Veterans' Land Act will answer the issue between the parties. Section 5(3) provides as follows:
>
> > "5(3) All conveyances from the Director constitute new titles to the land conveyed and have the same and as full effect as grants from the Crown of previously ungranted Crown lands."
>
> [7] I am prepared to grant an order stating that s. 5(3) of the Veterans' Land Act is within the legislative authority of the federal government and that the effect of s. 5(3) of the Veterans' Land Act, in this case, is that the deed from the Director, the Veterans' Land Act, to Eleanor Marie Covey dated September 19, 1989, has the same force and effect as if it were a Crown grant."

7. **Common law restrictions on the Crown prerogative.**

a. There may be grounds to argue that either or both of the common law "benefit and burden"[8] principle or the "necessary implication"[9] principle may limit the exercise of the Crown's prerogative remaining under MTA, s.9, given LRA ss.2, 6, 115, 115A & 116. The possible application of these principles will be worth exploring in depth as one of the few available legal responses to zealous use of the Crown prerogative. LRA ss.115, 115A and 116 amendments to MTA and LAA clearly intend to establish a 40 year marketable titles regime. MTA, s.9, however, may effectively require title searches back to a Crown Grant or to other instruments well beyond a 40 year plus a day root of title thus frustrating the goals of LRA or producing an absurd result. One arm of the Provincial Crown should not enjoy the benefits to the Crown of the *Land Titles Act* System based on 40 year plus a day titles while another arm of the Provincial Crown, at the same time, argues Crown Prerogative to recover lands from citizens when those lands have 40 year plus a day titles.

b. Surely the Crown's duty to the public is not only to protect ownership of Crown lands but to further the purposes of LRA stated in LRA, s.2, *inter alia*, to

(a) provide certainty in ownership of interests in land, and

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8 This principle is thoroughly discussed in *Agricultural Financial Services Corp.* v. *Redmond*, 1999 CarswellAlta 487 (C.A.).

9 *Bombay Province* v. *Bombay Municipal Corp.* [1947] A.C. 58 (P.C.; see also *Kansa General International Insurance Company Ltd, Re* 1999 CarswellQue 636 (C.A.) at paragraph 17 *et seq.*).

(b) simplify proof of ownership of interests in land.

A balanced approach to the exercise of the Crown prerogative is essential.

8. **LAA and the Crown prerogative.**

a. LAA, s.21 expressly binds the Crown; a lawyer may certify title over an underlying Crown interest in land by properly proving 40 years possession adverse to the Crown. Under LRA, s.115A, the 40 year limitation period (and other periods in LAA amended by LRA) are retroactive so the 40 years of possession may have occurred at any time in the past. LAA, s.22 (which extinguishes interests that are statute barred) applies to the Crown[10].

b. The practical problem in proving 40 years adverse possession against the Crown usually arises when the possession was perfected decades ago but there are few, if any, witnesses available now. This situation usually involves a chain of title that is 40 or 60 years or longer; the effectiveness of such a chain of title against Crown claims is not clear in Nova Scotia.

9. **MTA and the Crown prerogative.**

a. MTA, s.9, provides that:

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

b. When MTA was enacted in 1996, section 9 prevented MTA sections 4 and 6 from overriding the then 60 year limitation of actions period against the Crown under LAA. Section 9 also preserved the Crown's prerogative to recover lands against anything enacted under MTA but did not apply to any limitation imposed by other legislation or the common law.

c. LRA, ss.115 and 115A, *inter alia*, reduced the limitation period against the Crown to 40 years and made the reduction retroactive. These amendments matched the Crown limitation period with the MTA 40 year marketable title period. At the same time LRA, s.116, amended MTA, s.4(1), to reduce the 60 year common law title search period to 40 years[11]. Amended s.4(1) states: (amendments emphasised)

> 4(1) A person has a marketable title **<u>at common law or equity or otherwise</u>** 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.

10 *McGibbon* v. *McGibbon*, *supra.*, fn 3.

11 This may have been a legislative response to *Gunning* v. *Trans Canada Credit Corp*, 1998 CarswellNS 187, 169 N.S.R. (2d) 184, 508 A.P.R. 184, [1998] N.S.J. No. 165.

The result is that section 9 may have preserved the 60 year common law title search period with respect to Crown lands from the effect of MTA unless other common law principles - *e.g.* the "benefit/burden" or "necessary implication" principles - subject the Crown to the operation of amended MTA, s.4(1).

d. The result is that MTA, s.9, creates uncertainty about the required search period for parcels generally because of possible underlying Crown interests. There are at least three possibilities:

   i. If MTA, s.4(1) as amended, applies to Crown interests by virtue of common law principles, the search period and the limitation period are the same and a 40 year plus a day MTA search is sufficient for all titles.

   ii. If MTA, s.9, preserves the common law 60 year title search period rule and that rule applies to Crown interests then a 60 year title search plus a day search to a recognized root of title is required for all parcels.

   iii. If the DNR approach is correct and the 60 year common law title search period does not apply to lands in which the Crown claims an interest, then, with some exceptions, no search short of a search back to the Crown is safe. Those exceptions would include:

      (1) a Crown grant or deed,
      (2) an otherwise good title with a Crown release,
      (3) a *Quieting Titles Act* order,
      (4) a proper expropriation followed by a deed to a subject from the Crown in the chain of title,
      (5) a DVLA deed, and
      (6) 40 years possession adverse to the Crown (including possession under colour of title).

e. In summary, if 200 year registered titles are subject to attack by the Crown, we are in a "search to the Crown grant unless you find an exception" regime not a "40 year plus a day" marketable title regime.

f. It is most regrettable that the Nova Scotia Crown challenged a title based on over 200 years of registered title while, at the same time, implementing a modern land registration system intended to rest on forty-year titles. The annexed history states that the *Nullum Tempus Act* of 1769 resulted from public outrage when the Crown reclaimed the "Honor of Penrith" from a subject after a mere 70 years of undisturbed occupation. MTA, s.9, appears to undermine the foundation of the new Land Registration System and make lawyer's responsible for effectively guaranteeing that the Crown will lose no interest in land no matter how old or dormant the Crown's claim.

10. **The Crown may be bound by the common law 60 year title search rule.**

a. It is the duty of the Crown and of every branch of the Executive to abide by and obey the [common] law[12]. The Crown is subject to the general rules of common law and equity except as they are varied or added to by prerogative rules or by statutes[13]. In *Anger and Honsberger Law of Real Property*[14], p.248, the authors state:

> "The legal position of Her Majesty is that she is a person subject to the general common law and equity except as it is varied or added to by prerogative rules or by statutes applying to Her. Other than those variations, Her Majesty has the same capacity under the law as any other person to enter into contracts, to acquire, hold and dispose of real and personal property and to authorize agents to act on Her behalf."

b. The 60 year common law title search rule is independent from statute law. In one recent case, counsel defending a title against a DNR claim, argued that a 60 year chain of title starting with a warranty deed was a good defence against the Crown's alleged underlying interest in a parcel. Counsel based the argument on both the law described in the classic article *How Far Back Do You Have to Search*, by Charles W. MacIntosh, Q.C.,[15] and on Nova Scotia court decisions including *Inter Lake Developments Ltd. v. Slauenwhite*[16], *Dupuis Estate v O'Blenis*[17], *Gunning v. Trans Canada Credit Corp.*[18], and *Nemeskeri v. Nova Scotia (Attorney General) v. Meisner*[19]. These decisions imply that there is a presumption of good title to a parcel when there is 60 years or more registered title based on a warranty deed. These cases hold that a "60 year title" is enforceable on a purchaser. To find that the Crown is not bound by this rule will expose many property owners whose titles are based on this rule to the risk that they may now have to resettle their titles in the face of Crown claims or revised search standards.

c. We understand that the case in which this argument was advanced was settled before trial so this argument was not ruled upon by the Court. It would be well worth advancing this argument again in defence of future DNR claims if required.

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12 *Eastern Trust Co. v. McKenzie, Mann & Co.,* [1915] A.C. 750, 759, (P.C., Can).

13 See the Canadian Encyclopedic Digest, Crown, General Principles, 9 -- The Crown is Subject to Law §14 and cases referred to therein.

14 A.H. Oosterhoff and W.B. Rayner, Second Edition, Volume 2, Canada Law Book Company, 1985.

15 Nova Scotia Law News, Volume 14, No. 3, December 1987, p.37.

16 1988 CarswellNS 91, 49 R.P.R. 13, 86 N.S.R. (2d) 23, 218 A.P.R. 23 (N.S.S.C.T.D.

17 1995 CarswellNS 545, 146 N.S.R. (2d) 76 (N.S.S.C.) (sub-nom. *Landry v. O'Blenis*).

18 *supra.*, fn 6.

19 (1993), 125 N.S.R. (2d) 67 (C.A.).

11. *Nemeskeri* and the effect of old deeds

a. What is the effect of a warranty deed that was recorded in the chain of title before the date on which the *Limitations of Actions Act* limitation period began to run? There is a line of Nova Scotia cases following *Cunard v. Irvine*[20] which holds that a searcher need not necessarily search back to a Crown grant for good title. For example, citing *Cunard v. Irvine* in his trial decision (upheld on appeal), Graham, J., in *Halifax Power Co. v. Christie*[21], states:

> "Before I leave that case, I may mention that it is often relied upon for this doctrine: that a person in proving his title need not trace it back to the Crown, but may trace it back to some one who has been in possession of the land. That has always been a useful thing because, from loss of deeds and neglect to register, and looseness in the descriptions in grants, the land marks having disappeared, a very large proportion of the titles could not be traced back to the Crown.
>
> If there can be no possession of timber lands, because there is no fence nor cultivation, we are in a bad way in this province."

In 1895 the Nova Scotia Supreme Court (*in banco*) held *inter alia*, in *McKay v. McDonald*[22] that the Crown was not affected with notice, under the *Registry Act*, of the recording of a 62 year old deed of the land by a stranger to the title. In 1987 the Federal Court of Appeal in *Canada (Attorney General) v. Acadia Forest Products Ltd.*[23] recognized that a 120 year series old deeds were evidence of continuous acts of ownership consistent with the conduct of a true, lawful and exclusive owner but the Court also bundled the effect of those deeds with acts of possession:

> "15 In my view, the deeds, mortgages and leases in Acadia's chain of title, along with the *viva voce* evidence of several of the witnesses at trial, show continuous acts of ownership consistent with the conduct of a true, lawful and exclusive owner from 1906 until 1983."

The Federal Court of Appeal distinguished *McKay* v. *MacDonald* as follows:

> "The ratio of the McKay case, *supra*, is to the effect that acts of ownership exercised by a party upon land to which he has a good title will not be extended to adjoining land included in his deed but to which he has not title, in the absence of actual occupation of a part of the land claimed. ..."

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20 *Cunard (Lessee of) v. Irvine* (1854), 2 N.S.R. 31 (C.A.), James Reports p. 31.

21 *Halifax Power Co. v. Christie*, 1915 CarswellNS 8, 48 N.S.R. 264, 23 D.L.R. 481 (C.A.). Both trial and appeal decisions are in this report.

22 1895 CarswellNS 36, 28 N.S.R. 99 (C.A.).

23 1987 CarswellNat 231, 47 R.P.R. 100, 79 N.R. 5, 41 D.L.R. (4th) 338, 47 R.P.R. 100, 79 N.R. 5, 41 D.L.R. (4th) 338.

b. In *Nemeskeri v. Nova Scotia (Attorney General)*[24] (affirmed by the Nova Scotia Court of Appeal[25]) Tidman, J., found that the plaintiffs in a *Quieting Titles Act* application held good title to the property based upon a sixty year chain of unbroken paper title beginning with a warranty deed. There was very little evidence of actual possession. His Lordship equated the "true owner" to the "registered owner of the lands". He held that "The presumption that the registered owner of the title is in possession and that the seisin follows the title has not been rebutted by the defendant ..." In the absence of evidence of possession by the heirs through which the defendant claimed Justice Tidman found that these heirs were constructively dispossessed by the warranty deed recorded more than 60 years previously. Consequently, under the provisions of s. 20 of the *Limitation of Actions* Act, the time within which the defendant could to claim an interest in the lands had expired. His Lordship stated that under the *Quieting Titles Act* the burden is upon the plaintiff who seeks to quiet the title to prove good title to the court, but in these circumstances where the plaintiff has shown a good paper title to the property the burden must shift to those who also claim an interest to prove such claim. As the plaintiff had a good root of title going back at least 60 years the issue for the court's determination was whether the claims put forward by the defendant were valid.

c. May a searcher now rely on a 40 year plus a day warranty deed in a chain of title against an underlying Crown interest? *Nemeskeri* can be used to argue that a 40 year plus a day warranty deed commencing the chain of title constructively dispossesses the Crown of its interest in the parcel under LAA (which binds The Crown). It may be argued, also, that the deed provides a presumption of ownership to the owner holding title commencing with that deed under the *Quieting Titles Act*. If *Nemeskeri* applies, then, in a dispute under the *Quieting Titles Act*, the burden of proving that the Crown was not constructively dispossessed of the parcel by the deed shifts to the Crown.

d. It is not clear if the "constructive dispossession" presumed by a 60 year chain of title (perhaps now a 40 year chain) from a good root of title in *Nemeskeri* applies to Crown lands. It should. *Nemeskeri* was the law in Nova Scotia when MTA was enacted. *Nemeskeri*, if it applies, is consistent with the scheme comprising the LAA, MTA and LRA as set out in the preambles in MTA and LRA.

12. **Summary**

a. Whatever the courts may decide about the effect of the above principles and cases on the Crown's prerogative, it is inconceivable that Courts will permit any practice that protects lawyers from a negligence suit while not protecting the client. The Supreme Court of Canada spoke to this issue in *Fire v. Longtin*[26] when dealing with Ontario's

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24 (1992), CarswellNS 425, 115 N.S.R. (2d) 271, 314 A.P.R. 271.

25 *supra*. fn 14.

26 [1995] 4 S.C.R. 3.

marketable title provisions. The Supreme Court of Canada adopted the reasons for judgment delivered by McKinlay, J.A., of the unanimous Ontario Court of Appeal in which she states at page 42 of the Court of Appeal decision: (emphasis added)

> "With respect, I find it difficult to understand how it can be said that a title searcher and the solicitor certifying title can safely rely upon instruments within the 40-year period, and then say that a grantee taking within that period gets no title if his grantor had no title to convey. That is merely saying that a solicitor certifying title is saved from a negligence claim, but that the grantee who relies on the certification gets no title. That is not what the legislation says, and that is not what this court said in the *Tkach* case and in the *Algoma* case. In both of those cases the root of title on which the successful party relied was one where a grantor, as a result of some form of error, purported to convey title which he did not have. Indeed, if the decision of this court in *National Sewer Pipe* is correct - that the grantor under a conveyance which constitutes a root of title must have had a good title to convey - then it follows that the only safe search is one back to the original grant from the Crown."

b. It appears that the present Land Registration System regime mandates title searches to a release of Crown interests because of section 9 of MTA. The result is that neither of the stated purposes of MTA and LRA appear to have been achieved.

13. **Solution required**

a. The uncertainty in the law now surrounding the extent of the Crown prerogative and DNR's approach to exercising the Crown's prerogative needs to be settled quickly. The uncertainty can be eliminated in at least two ways:

   i. First and most effectively, by amending MTA so it binds the Crown; or

   ii. Second by implementing a fair and practical protocol between the Nova Scotia Barristers' Society and DNR regarding timely determination of possible underlying Crown interests in parcels.

If the second approach is taken it must be done in a way that does not materially affect reliance on the 40 year marketable titles and limitations periods regime upon which the Land Registration System is based.

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Checklist for considering underlying Crown interests[27]

Reliance	Effect	Reference
Rely on Crown grant as root of title or release of interest.	Good against Crown and against subjects who do have not established adverse possession against the Crown.	
Rely on *Crown Lands Act*, s.37 release or a NS Crown Agency deed in chain of title.	*Crown Lands Act*, s.37 release is good against the Crown but ensure no superior possessory claims exist. Deeds from provincial Crown Agencies like NSFLB & NSHC may bind the Crown.	*Crown Lands Act*, s.37.
Rely on a DVLA deed.	Deemed Crown grant.	*Veteran's Land Act*, s.5; *Carmichael* v. *Durant*, *supra.*
Rely on expropriation in chain of title.	Expropriation extinguishes previous title; later deed of parcel from Crown releases Crown interest.	Professional Standard 3.16. *Certification Of Title To Expropriated Land*, Arthur A.G.H. Fordham, Q.C., *supra.*
Rely on 40 years possession adverse to the Crown.	Extinguishes Crown interest. Retroactive effect - LRA, s.115A.	LAA, ss.21 & 22; LRA ss.115, 115A. See *McGibbon* v. *McGibbon*, *supra*; consider the effect of *Nemeskeri* v. *Nova Scotia (Attorney General)*.
Rely on a *Quieting Titles Act* order.	Binds the Provincial Crown.	*Quieting Titles Act.* Professional Standard 3.1.
Consider relying on a common law (60 year) chain of title.	**Caution:** This may or may not be binding on the Crown under MTA, s.9, but it represents hundreds of years of practice. It is worth arguing particularly with the *Nemeskeri* decision and LRA, ss. 115 & 115A changes to LAA and s.116 changes to MTA.	Charles MacIntosh, Q.C., *How Far Back Do You Have to Search*. Consider *Nemeskeri* v. *Nova Scotia (Attorney General)*. Refer to *Cunard (Lessee of)* v. *Irvine* (1854), 2 N.S.R. 31 (C.A.), James Reports p. 31.; *Halifax Power* Co v. *Christie*, 1915 CarswellNS 8, 48 N.S.R. 264, 23 D.L.R. 481 (C.A.) - both trial and appeal decisions are in this report.
Consider arguing that the Crown prerogative is limited by the common law "benefit and burden"[28] principle or the "necessary implication"[29] principle.	**Caution.** These principles may or may not limit the Crown prerogative preserved by MTA, s.9. Their possible application may be worth exploring as a counter the Crown prerogative. The LRA ss.115, 115A and 116 amendments to MTA and LAA clearly intend to establish a 40 year marketable titles regime. MTA, s.9, however, may effectively require title searches back to a Crown Grant or to other instruments well beyond a 40 year plus a day root of title either frustrating the goals of the legislation or producing an absurd result. The Crown cannot enjoy the advantages of 40 year plus a day LRA titles and reserve its prerogative to attack ancient registered titles at the same time.	

27 Schedule adapted from Garth C. Gordon, *Comments about Underlying Crown Grants*, unpublished, March 28, 2005.

28 This principle is thoroughly discussed in *Agricultural Financial Services Corp.* v. *Redmond*, 1999 CarswellAlta 487 (C.A.)

29 *Bombay Province* v. *Bombay Municipal Corp.* [1947] A.C. 58 (P.C.). See also *Kansa General International Insurance Company Ltd, Re* 1999 CarswellQue 636 (C.A.) at paragraph 17 *et seq.*

Notes on the *Nullum Tempus Act*, 1769:

1. The following history of the *Nullum Tempus Act* of 1769 comes from Charles Duke Yonge, *The Project Gutenberg EBook of The Constitutional History of England From 1760 to 1860*[30], Chapter II:

> ... The next year a not very creditable job of the ministry led to the enactment of a statute of great importance to all holders of property which had ever belonged to the crown. In the twenty-first year of James I. a bill had been passed giving a secure tenure of their estates to all grantees of crown lands whose possession of them had lasted sixty years. The Houses had desired to make the enactment extend to all future as well as to all previous grants. But to this James had refused to consent; and, telling the Houses that "beggars must not be choosers," he had compelled them to content themselves with a retrospective statute. Since his time, and especially in the reigns of Charles II. and William III., the crown had been more lavish and unscrupulous than at any former period in granting away its lands and estates to favorites. And no one had been so largely enriched by its prodigality as the most grasping of William's Dutch followers, Bentinck, the founder of the English house of Portland. Among the estates which he had obtained from his royal master's favor was one which went by the name of the Honor of Penrith. Subsequent administrations had augmented the dignities and importance of his family. Their Earldom had been exchanged for a Dukedom; but the existing Duke was an opponent of the present ministry, who, to punish him, suggested to Sir James Lowther, a baronet of ancient family, and of large property in the North of England, the idea of applying to the crown for a grant of the forest of Inglewood, and of the manor of Carlisle, which hitherto had been held by Portland as belonging to the Honor of Penrith, but which, not having been expressly mentioned in the original grant by William III., it was now said had been regarded as included in the honor only by mistake. It was not denied that Portland had enjoyed the ownership of these lands for upward of seventy years without dispute; and, had the statute of James been one of continual operation, it would have been impossible to deprive him of them. But, as matters stood, the Lords of the Treasury willingly listened to the application of Sir James Lowther; they even refused permission to the Duke to examine the original deed and the other documents in the office of the surveyor, on which he professed to rely for the establishment of his right; and they granted to Sir James the lands he prayed for at a rent which could only be regarded as nominal. The injustice of the proceeding was so flagrant, that in the beginning of 1768 Sir George Savile brought in a bill to prevent any repetition of such an act by making the statute of James I. perpetual, so that for the future a possession for sixty years should confer an indisputable and indefeasible title. The ministers opposed it with great vehemence, even taking some credit to themselves for their moderation in not requiring from the Duke a repayment of the proceeds of the lands in question for the seventy years during which he had held them. But the case was so bad that they could only defeat Sir George Savile by a side-wind and a scanty majority, carrying an amendment to defer any decision of the matter till the next session. Sir George, however, was not discouraged; he renewed his motion in 1769, when it was carried by a large majority, with an additional clause extending its operation to the Colonies in North America; and thus, in respect of its territorial rights, the crown was placed on the same footing as any private individual, and the same length of tenure which enabled a possessor to hold a property against another subject henceforth equally enabled him to hold it against the crown. ..."

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30 http://www.sakoman.net/pg/html/10807.htm

2. This citation of the "*Nullum Tempus Act*" of 1769, 9 Geo. III. ch. 16, comes from *Hamilton* v. *R.*[31], paragraph 66:

> "Whereas an Act of Parliament was made and passed in the Twenty-first year of the Reign of King James the First, intituled, An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever; and thereby the Right and Title of the King, His Heirs and Successors, in and to all Manors, Lands, Tenements, Tythes, and Hereditaments (except Liberties and Franchises) were limited to Sixty years next before the Beginning of the said Session of Parliament; and other Provisions and Regulations were therein made, for securing to all His Majesty's Subjects the free and quiet enjoyment of all Manors, Lands, and Hereditaments, which they, or those under whom they claimed, respectively had held, or enjoyed, or whereof they had taken the Rents, Revenues, Issues, or Profits, for the Space of Sixty Years next before the Beginning of the said Session of Parliament: And whereas the said Act is now by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretences of Concealment whatsoever: Wherefore be it enacted by the King's Most Excellent Majesty, by and with the Assent and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That the King's Majesty, His Heirs, or Successors, shall not at any Time hereafter, sue, impeach, question, or implead, any Person or Persons, Bodies Politick or Corporate, for or in anywise concerning any Manors, Lands, Tenements, Rents, Tythes, or Herditaments whatsoever (other than Liberties or Franchises) or for or in any wise concerning the Revenues, Issues, or Profits thereof, or make any Title, Claim, Challenge, or Demand, of, in, or to the same, or any of them, by reason of any Right or Title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the Space of Sixty Years next before the filing, issuing, or commencing, of every such Action, Bill, Plaint, Information, Commission, or other Suit or Proceeding, as shall at any Time or Times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; unless His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or some other Person or Persons, Bodies Politick or Corporate, under whom His Majesty, His Heirs, or Successors, any Thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by Force and Virtue of any such Right or Title to the same, the Rents, Issues, or Profits thereof, or the Rents, Issues, or Profits of any Honour, Manor, or other Hereditament, whereof the Premises in Question shall be Part or Parcel, within the said Space of Sixty Years; and that the same have or shall have been duly in charge to His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or have or shall stood insuper of Record within the said Space of Sixty Years."

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31 1917 CarswellNat 46, 54 S.C.R. 331, 35 D.L.R. 226.