REFRESHER COURSE PANEL

DRAFT STANDARD: ROOT OF TITLE

The draft standard for an acceptable root of title is as follows:

> 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**[1] order, a vesting order, an expropriation, or a warranty deed not less 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[2].

The foregoing draft necessarily raises the question of the 40 year search versus the 60 year search. I intend to briefly review the basis for the 60 year search and the question as to whether the **Limitations of Action Act** is sufficient protection for a 40 year search.

In Nova Scotia, the pre-eminent authority on the topic is Charles W. MacIntosh, Q.C. Most, if not all of you, will have read Chapter 3 of Mr. MacIntosh's Nova Scotia Real Property Practice Manual, entitled "Marketable Title". That chapter is based on his article "How Far Back Do You Have to Search, N.S.L.N. (Vol. 14, No. 3, p. 37). Mr. MacIntosh's conclusion, based on the authorities

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[1] Quieting of Titles Act, R.S.N.S. 1989, c. 382

[2] Olsen Estate v. ASC Residential Properties Limited (1990), 102 N.S.R. (2d) 94.

cited in his article, is that one must search back at least 60 years to an acceptable root of title. In Mr. MacIntosh's words:

> "The traditional search period of 60 years was developed to protect against the possibility of double claims of title and to establish a standard, short of a chain continuous from a grant from the sovereign, which would be recognized as one which a purchaser would not be able to reject. The reasons for the 60 year search are as valid today as they were in 1749."

I suspect that Mr. MacIntosh's conclusion sent a collective shiver down the spines of many property practitioners. I think it is fair to say that the standard used by most lawyers was that a minimum 40 year search was sufficient in the case of lands which were granted while a minimum 60 year search was necessary for ungranted lands. The standard was based on the relevant provisions of the **Limitations of Actions Act**, RSNS 1989, c. 258. Mr. Justice Hallett recognized the "standard" in Knox V. Veinote, 54 N.S.R. (2d) 666, where he said, at page 680:

> "Of course, the principal problem with respect to the title was the fact that there was no record at the Registry of Deeds for Lunenburg County of a deed to prove the conveyance of the property by Captain John Schwartz to Angus Tanner. This gap in title would have been disclosed in a normal search of title going back at least forty years as is the practice in Nova Scotia because of the intended limitation period within which persons under disability, such as being outside the province, may bring actions for possession of land (S.19, **Limitation of Actions Act**, R.S.N.S., 1967, c. 168). There was no record in

the Registry of Deeds conveyancing the land to Angus Tanner and, thus, no registered title before 1953. The Veinotes could not show good title for forty years."

In his article, Mr. MacIntosh contends that:

A minimum 40 year search "...is not sufficient to extinguish an earlier claim if there has not been such possession of the property so as to allow the owner to claim advantage of the Statute of Limitations. An objection to the quality of the paper title would force the vendor's solicitor to shift his ground and allege a title by possession".

While I agree that such a concern may still be extant, some comfort can be taken from the decision of Tidman, J. in Nemeskeri V. Nova Scotia (Attorney General) and Meisner, 115 N.S.R. (2d) 271, affirmed on appeal - see 125 N.S.R. (2d) 67.

In that case, Nemeskeri applied to quiet the title to land to which he claimed good title based upon a sixty year chain of unbroken paper title beginning with a Warranty Deed in 1930. The defendant claimed an interest in the land by virtue of Quit Claim Deeds he obtained from some of the heirs of one of the two original grantees from the Crown.

Although he refers to the "...widespread practice in Nova Scotia to search back at least forty years for a good root of title..." and to the view also "...held in Nova Scotia, however, that a search of the title must go back at least 60 years to a good root of title", Justice Tidman said at page 289, that "for the

purposes of this action, it is not necessary to decide whether the 40 or 60 year rule applies in Nova Scotia".

Justice Tidman did find, however, that the defendants' claim was barred by operation of Section 20 of the **Limitation of Actions Act**, in the absence of evidence of possession by the heirs through which the defendants claimed an interest in the land. The 1930 Warranty Deed constituted a constructive displacement against the claim and invoked the operation of the **Limitations of Action Act.** This would seem to counter Mr. MacIntosh's argument that the Vendor of a property with a Warranty Deed root of greater than 40 years cannot rely on the Statute of Limitations but rather must "shift his ground and allege a title by possession".

Justice Tidman also held that even if the defendants' claim was not statute barred, it was barred by the equitable doctrine of estoppel by laches.

It seems to me that this finding gives at least some comfort to those who have in the past followed "the 40 year rule".

One can hardly disagree, however, with Mr. MacIntosh's observation that the ultimate resolution of this conundrum is Marketable Title Legislation, which has put the question to rest in many other jurisdictions. In the meantime, I suspect that many lawyers will continue to follow their own practice - some will accept a root of title based on the 40 year rule and others on the 60 year rule.

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