

MARKETABLE TITLES ACT, S.N.S. 1995-96, Chapter 9  
WORKING NOTES & ANNOTATIONS  
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A Bit of History:

"Our oldest date of limitation was the death of Henry I on 1 December 1135; no claim could be founded on a seisin earlier than that day. That limitation was felt to be too long when it passed the century, and so a statute of 1236 fixed a new date - construed as being Henry II's coronation on 19 December 1154 (a period of over eighty years). By 1275 this period had grown to a hundred and twenty years, and so a new date was fixed, the coronation of Richard I on 3 September 1189. Our legislature seems to have felt that, roughly, a century was a suitable limit. As things stood in 1275, therefore, claims rooted only three or four generations back might be barred. Unfortunately, no further changes were made until 1540, when it was noticed that three and a half centuries were a severe tax on the memory, with resulting peril to men's consciences; it was therefore enacted that no seisin could found a claim in a writ of right unless it was within sixty years of the date of the writ. Late in the middle ages and until 1540, therefore, extremely remote claims could be made, but in England the objection to them was based upon difficulty of proof and the unsettling of respectably old titles, rather than upon any conceptions of inheritance as such." *A Concise History of the Common Law*, (Fifth Edition) by Theodore F. T. Plucknett, Butterworth & Co. (Publishers) Ltd., London, 1956, Page 719.

An Act Respecting Marketable Title to Land, Chapter 9, Acts of 1995-96, As Assented to by the Lieutenant Governor, January 11, 1996, Halifax:

Be it Enacted by the Governor and Assembly As Follows:

- 1 This Act may be cited as the *Marketable Titles Act*.**
- 2 The purpose of this Act is to**
  - (a) remove uncertainties respecting the determination of marketable titles to land in the interests of all present and future landowners and facilitate the development of the Province; and**
  - (b) remove uncertainties respecting the validity of past and future tax deeds.**

Notes:

1. The House of Assembly enacted this legislation to cure problems with old tax sale deeds and to resolve the 40 v. 60 year title search controversy.
  - a. When the Act was passed tax deeds in a chain of title would be accepted only with great reservation, if at all. Those circumstances are ably set forth by Michael F. LeBlanc in his brief dated July 23, 1997 in *Dow v. Zinck*, unreported, S.H. 118046. See annotations to s.6 below also.
  - b. The search period to establish marketable title is reduced to 40 years from 60 years. In his much referred to article, *How Far Back Do You Have to Search*, (Nova Scotia Law News, Volume 14, No. 3, December 1987, p.37), Charles MacIntosh, Q.C., after outlining the case for a sixty year search under common law, states, at p.54:

"It would be in the interest of the legal profession to press for consideration of...marketable title legislation here to protect property owners and lawyers from the expense and inconvenience attendant upon the present state of law."
  - c. See *Town of Wolfville v. Bishop-Beckwith Marsh Body and Grand Pre Marsh Body, Bishop-Beckwith Marsh Body et al. v. Wolfville (Town)* (1996), 151 N.S.R. (2d) 333; 440 A.P.R. 333, as to the principals of statutory interpretation - especially as to Legislative intent expressed in the preamble:

"[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.'"
  - d. During the Session in which the Nova Scotia House of Assembly considered and passed this Act the Nova Scotia Supreme Court rendered its decision in *Landry v. O'Blenis* (1995), 146 N.S.R. (2d) 76, and the Supreme Court of Canada rendered its decision in *Fire v. Longtin*, [1995] 4 S.C.R. 3. Both the *Landry* and *Fire* cases were made known to, and discussed with, the legislators by the barristers working for passage of this Act. *Landry* was cited as a compelling example of the necessity for a legislated 40-year search period to establish marketable title. *Fire* is a clear indication that the Supreme Court of Canada will give the intended effect to legislation limiting search periods.

- i. In *Landry*, a *Vendors and Purchasers Act* application, outstanding but apparently dormant interests (no party came forward with a claim under such interests) under an 1852 deed were held to be a valid objection to title of a property purported to be conveyed to the grantors under a 1947 warranty deed. This decision was based on the "60 year common law rule" outlined by Mr. MacIntosh in his article. Unfortunately no affidavits evidencing possessory title of the grantor were registered prior to the application.
- ii. In *Fire* the Supreme Court of Canada dealt with competing interests under the Ontario *Registry Act* R.S.O. 1980, c.445, ss.104-106 (now ss.111-113), providing for a forty year search period. The Court held *inter alia* that 40-year search period was valid - also that a title searcher is entitled to rely on the form of the instruments registered within the statutory search period and is not bound to inquire into the substance of any instrument which, on its face was sufficient to convey the fee even if the grantor in such instrument had no title to convey. The Court adopted the reasons for judgment delivered by McKinlay, J.A., for the unanimous Ontario Court of Appeal in (1994), 112 D.L.R. (4th) 34. Madame Justice McKinlay states 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."

### 3 In this Act,

- (a) **"chain of title" means a chain of title as described in subsection 4(2);**
- e. "4.(2) A **chain of title** commences with the **registered Instrument**, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined."
- (b) **"Instrument" means a conveyance or other document by which the title to land is changed or in any way affected, including a will or other testamentary Instrument, a grant from the Crown, a court order, a certificate of title under the Quieting Titles Act or the Land Titles Clarification Act or a report of commissioners appointed to make partition;**
- f. Caveats. 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."

Some persons will register caveats to record notices of claims they believe they have. Apart from a. registering a Notice of Claim under s.5, or there being "an adverse interest acknowledged or specifically referred to in the description of land in a **deed** forming part of the chain of title to the land" per s.7(3) there is no provision in this Act (or the *Registry Act*) for such notice. "Caveats" should not be used, and if used, struck.

**(c) "registered" means registered or filed in the registry of deeds for the registration district within which the land is situate.**

g. See *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378(Carver, J., N.S.S.C.). Deeds were initially registered in the wrong county but this was corrected by registration in the correct county.

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

- h. **LRA amendment.** The underlined LRA changes to this section are intended to reduce the common law search period from 60 years to 40 years. The effect of s.9 of this Act is to retain the 60 year common law search period for lands in which the Crown may have an interest.
- i. **Exceptions to this section.** See s.7(2) and s.9.
- j. It is no coincidence that the Nova Scotia legislators used the expression "... a good and sufficient **chain of title** during a period greater than forty years immediately preceding the [date]..." in s.4(1) these words are identical to those in then s.105(1) of the Ontario

Act considered in *Fire v. Longtin* (1994), 112 D.L.R. (4th) 34 at pp 36, 39 and 42.  
[Check citation & refer to *Tkach*]

- k. "**Marketable title**" as defined by DiCastrri in *Law of Vendor and Purchaser*, 1976 (2nd ed), at page 502, was cited by Justice Carver in *Penney v. Hartling* (1999) 177 N.S.R.(2d) 378:

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

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

- m. **Actual knowledge of registered interests before and during the 40 year search period.**

- i. **Interests found within the 40 year period.** Title will be subject to a prior competing interests found in the **chain of title**. Under s.4(2), below, the expression "that interest" would include an interest that was subject to exceptions, easements or other reservations set out in the legal descriptions in the chain of title. Interests predating the **chain of title** may be preserved if they are included in a legal description in a **deed** forming part of the chain of title as set out in s.7.(3):

"s.7.(3) Subsection 4(4) does not apply to an adverse interest acknowledged or specifically referred to in the description of land in a **deed** (Ed. Comment: note reference to a "**deed**" not an **instrument**) forming part of the **chain of title** to the land.

n. **Competing Marketable Titles.** There are at least three circumstances under which there will be competing chains of title under the *Marketable Titles Act*. The first two 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**. The third is a **co-owner’s interest not excepted or noted in a deed** that conveys only a partial undivided interest but purports to convey the entire fee simple

i. **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 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 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*<sup>1</sup> 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

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

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<sup>2</sup> approached this issue from the perspective: "Does Tkach have a defence to the action by virtue of the *Investigation of Titles Act*?" rather than "does Hydro have the right to the declaratory relief it seeks?" Grange, J.A., at page 20 states "...the essential question is whether the Appellant [Tkach] can claim good title by reason of the 40-year limit on the search of title imposed first by the *Investigation of Titles Act*...incorporated into the *Registry Act*..." At page 21 he states that "...I think one must view the appellant's [Tkach's] title as of the moment it comes under attack." Later on page 21 he states "It is my view that the question is whether a hypothetical purchaser from the appellant [Tkach] at that time could obtain good title." Therefor the *Registry Act* in effect at the time of the challenge was the relevant statute.
- (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 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*<sup>3</sup>, 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."

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2 at pages 19-21.

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

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)<sup>4</sup>.

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

(7) Subsequent to *Tkach* a different panel of the Ontario Court of Appeal decided *National Sewer Pipe Ltd. v. Azova Investments Limited*<sup>5</sup> 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."

(8) The Supreme Court of Canada decided that *Tkach*, not *National Sewer Pipe Ltd.*, was the correct approach in *Fire v. Longtin*<sup>6</sup> 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. Although the Appeal Court and the Supreme Court of Canada found that Fire's title in the fee simple was extinguished by s.106(1) of the Ontario *Registry Act*, the Courts focussed most of their attention on the uncertainty of the 40-year search limit after

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

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

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



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."

- (10) 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.

ii. **Lack of an underlying Crown Grant.**

- (1) A parcel may have a forty year plus chain of registered title instruments but no underlying Crown grant. If a barrister accepts an apparently marketable 40 year title without confirming there is no competing Crown interest the barrister may become subject to a claim by the Crown for certifying a defective title. Have your searcher routinely check the Crown Grant Sheets in every search to determine if the parcel being searched is granted. If there is an underlying Crown grant you should be able to rely on the forty year plus a day chain of title. If there is no underlying Crown grant you should consider obtaining

- (1) a grant or a deed from the Crown, or
- (2) a release under section 37 of the *Crown Lands Act*<sup>7</sup> stating that the Crown "...asserts no claim in or to..." the parcel.

Alternatively, consider whether you can prove either:

- (1) a common law (60 year) chain of title, or
- (2) establish at least 40 years of adverse possession against the Crown under the *Limitation of Actions Act*, ss. 20 and 21. Consider if you can establish "colour of right"<sup>8</sup> or laches.

iii. **Co-owner's interest not excepted or noted in a deed.** This will occur where a deed conveys only a partial undivided interest but purports to convey the entire

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

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

fee simple - *e.g.* a deed of an undivided one-half interest that purports to convey the fee simple not just the grantor's one-half interest.

- o. **Protecting undeveloped unoccupied lands.** How may owners of undeveloped unoccupied land protect themselves against "omitted exception" and other claims?
- i. **Avoiding problems.** In both *Tkach* and *National Sewer* the unsuccessful parties lost mainly because there was no physical evidence of their ownership or possession of the land in contention. It should take relatively little effort to put third parties on notice of the owner's interest:
- (1) Owners may post signs on their boundaries under section 7 of the *Occupiers' Liability Act* or section 3 of the *Protection of 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.
  - (2) Refer to *Robertson v. McCarron*<sup>9</sup> at paragraph 23 which gives us guidance on steps that may be taken to give such notice:

"[23] Counsel for Mrs. Robertson relies on the case of **Kirby v. Cowderoy**, [1912] A.C. 599, 5 D.L.R. 675. This decision is always trotted out in hopeless causes. I thought its usefulness as an authority that the payment of taxes was sufficient basis to find that a person was in possession had been put to rest in this province by the decision of Ilesley, C.J., in **MacKay v. Meikle**, [1953] 1 D.L.R. 695..." , where he stated at p. 699:

"The question then arises as to whether payment of taxes is itself sufficient evidence of possession. Since the case of **Kirby c. Cowderoy**, 5 D.L.R. 675, [1912] A.C. 599, attempts have from time to time been made to rely on the payment of taxes as sufficient evidence of possession. In the judgment of the Judicial Committee of the Privy Council in that case the following passage appears at p. 678 D.L.R., pp. 602-3 A.C.:

'It appears to be established, in short, that (1) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of

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9 (1985), 71 N.S.R. (2d), 34 (Hallett, J.).

which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the respondent was aware that this was being done by the appellant, and he ... had washed his hands of all connection with the property.'

In the case at bar I am not satisfied that the payment of taxes was the only act of possession of which this woodlot was capable and certainly there is no evidence that the defendant was aware that the taxes were being paid by the plaintiff and his predecessor in title. **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.**

For these reasons I think that the plaintiff has neither traced his title to a person in possession, nor has he proved possession in himself at any material time.'''

- ii. **Curing conflicting chains of title problem.** First, if an owner suspects a problem look at the neighbour's deed to the larger parcel in the Registry Office to see if the owner's land is still included in the neighbour's description. If there are conflicting chains of title you may
  - (1) Obtain and register a correcting instrument (deed or acknowledgement) from the neighbour, or
  - (2) If the neighbour is not co-operative, consider registering an affidavit, a statutory declaration or a Notice of Claim under section 5 of the *Marketable Titles Act*<sup>10</sup> in the Registry Office to evidence the Owner's interest. 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". Any of these devices 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 defence. These devices will, practically, limit the neighbour's ability to deal with his or her property in

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10 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.

the short term and raise a flag in any *LRA* application for registration which should trigger notice to the owner under *LRA*, s.39(2).

These two steps will not turn the owner into a plaintiff whose claim may be defended under s.4(1) and *Tkach*.

Refer to sections 73-76 of *LRA*.

- p. **Constructive Possession.** See *Mason v. Mason Estate* (1999), 176 N.S.R. (2d) 321(NSCA) for discussion of constructive possession and colour of right starting at para. 27. In paras 31 and 32 the judge states:

“[31] In Anger and Honsberger, *Real Property*, 2nd Ed., Oosterhoff and Rayner, 1985, the bases for a claim based on colour of title are correctly set out as follows:

"The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the Statute of Limitations, other requisite of those statutes being complied with.

"The person relying upon the doctrine of constructive possession must enter under a real, bona fide belief of title. While in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title, and, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation. A person who has no title is in possession in law only of that part of which he is in possession in fact.

"A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land as is proved to be in his actual possession and in that of those claiming through him.

"As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending

purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed."

[32] The above principles are derived from well known cases that have enunciated them, such as the decision of the Supreme Court of Canada in *Wood v. LeBlanc* (1904), 34 S.C.R. 627; the decision of the Ontario Court of Appeal in *Harris v. Mudie* (1882), 7 O.A.R. 414; the decision of the New Brunswick Court of Appeal in *Stewart v. Goss* (1933), 6 M.P.R. 72 and the decision of this court in *Rafuse and Rafuse v. Meister* (1979), 32 N.S.R.(2d) 217; 54 A.P.R. 217; 102 D.L.R.(3d) 57."

**4(2) A chain of title commences with the registered Instrument, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined.**

- q. It is no coincidence that the Nova Scotia legislators used the expression "conveys or **purports to convey** that interest..." in s.4(2) of this Act - "**purports to convey**" is the term considered by the Ontario Court of Appeal decision in *Fire v. Longtin* (1994), 112 D.L.R. (4th) 34 at pp 36, 39 and 42. [Check citation]
- r. See s.7(2) for exceptions to this subsection.
- s. "**Purports to convey**" see *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378(Carver, J., N.S.S.C.). An heir (holding a 1/3 interest) purported to convey the whole interest by warranty deed dated November 24, 1951 to Purchaser 1; he later gave a confirmatory warranty deed to Purchaser 1 on January 6, 1953. Purchaser 1 later conveyed the lands by warranty deed to Purchaser 2 on November 17, 1956. Justice Carver accepts the November 24, 1951, January 6, 1953 and November 17, 1956 deeds as purporting to convey the whole interest being conveyed. All three deeds were initially registered in the wrong county but recorded in the correct county in 1999. Justice Carver states, *inter alia*:

"This Deed (referring to the November 24, 1951) is not limited as to its wording. It can clearly be said to "convey or purport to convey" all interest in the land."

...

"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."

...

"Pursuant to s.4(2) of the Act, a Deed dated over 40 years ago, even if not registered until 1999 in the proper registry, can operate as a valid root of title."

See also the Ontario Court of Appeal decision (approved by the Supreme Court of Canada) in *Fire v. Longtin, supra*, at page 42. The term clearly includes those cases in which "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." The expression "purported to mortgage" is used in *Canada Permanent Trust Company v.*

*MacLeod, MacLeod, and Bambury and Walsh* (1980), 39 N.S.R. (2d) 636 (Hallett, J.) to describe a mortgage executed on behalf of an estate by an executor who had previously been removed from his executorship by the Probate Court. *Canada Permanent* was appealed, 39 N.S.R. (2d) 629, but the appeal is unrelated to the use of this expression.

- t. **Conflicting interests found in instruments registered prior to the 40 year search limit.** In *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18, the defending owner's solicitor had actual knowledge of the competing claim but, as that knowledge came from an instrument registered outside the 40 year statutory period, such notice did not defeat his title established within the 40 year period within the Registry Office records. The Ontario Court of accepted this as the correct approach in *Tkach* and in *Fire* as to do so would defeat the intended purpose of the Act. The Supreme Court of Canada confirmed this approach in *Fire*.
- i. As to "Actual notice" see the differences between the majority and dissenting decisions in *National Sewer*, below, on the issue of actual notice. The majority held that one party had "actual notice" by virtue of instruments registered before the required search period. Osborne, J.A., dissenting, reasoned at page 33 that the party had no "actual notice" by reason of instruments registered before the 40-year search period:
- "If the title search period is 40 years, as it manifestly is under Part III of the Act, it must follow that instruments registered outside the 40-year period cannot be the source of actual knowledge referred to in Part I of the *Registry Act*..."
- In *Fire v. Longtin*, below, at page 42 of the Ontario Court of Appeal decision, it, and by adoption, the Supreme Court of Canada stated, *obiter dicta*, referring to *National Sewer*, that "I agree with the full and compelling dissenting reasons of Osborne, J.A., on this issue..."
- ii. At page 42 of the Ontario Appeal Court decision in *Tkach* (adopted in its entirety by the Supreme Court of Canada on *Tkach*), Madame Justice McKinlay stated:
- "Indeed, if the decision of this court in *National Sewer Pipe* is correct - that the grantor under a conveyance which constitutes a root of title must have had a good title to convey - then it follows that the only safe search is one back to the original grant from the Crown."
- u. **What is a root?** When considering **an instrument** as a possible root of title ensure that the instrument purports to convey the fee simple without words of limitation. See *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378, *supra*. 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 (assuming the same are valid). Beware of **Sheriffs' deeds** as they may only convey a partial interest - see *The Marketable Titles Act*, Anthony L. Chapman, below.

- v. **No registered instrument which is at least 40 years old.** See *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited* (1998), 169 N.S.R. (2d) 184, (MacLellan, J.). From the headnote: “The first registered deed to a property in 1973 contained recitals indicating the previous owners and how the grantor owned the property based on an unrecorded deed and will - At issue was whether the 1973 deed satisfied the requirements of a valid chain of title under s. 4 of the *Marketable Titles Act* - It was submitted that the recitals extended the paper title beyond the required 40 year period and therefore provided marketable title under the *Marketable Titles Act* - The Nova Scotia Supreme Court held that the *Marketable Titles Act* did not apply because there was no registered instrument which was at least forty years old - Furthermore, although recitals could fill a previous gap in the chain of paper title, they did not establish a 60 year chain of title as required by common law.”. At paragraph [10] his Lordship states:

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

[11] I further find that while Section 4(2) 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 sixty years as required by the common law. (See *Landry v. O’Blenis* (1995), 146 N.S.R. (2d) 76), because the recitals do not state 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.”

Could the parties have established, alternatively, that vendor had valid possessory title based on the *Limitations of Actions Act* supported by further registered affidavits evidencing use and occupation? See notes to s.7 re possessory title.

- w. **Missing roots?** Consider:
- i. **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.
  - ii. **Railways:** Beware of railway "rights of way" - you will probably 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* (1998), 172 N.S.R.(2d) 89 (N.S.S.C., Carver, J.) as to right to sell. The NSCA unanimously dismissed an appeal on June 3, 1999 ([1999] N.S.J. No. 195 (Q.L.)) then denied leave to appeal to the Supreme

Court of Canada - *Canadian Pacific Ltd. Et al. V. Lowe*, 1999 NSCA 115, Cromwell, J.A., October 5, 1999.

(From headnote of the trial decision) In 1867, the Windsor and Annapolis Railway (WAR) was incorporated - It constructed a railroad on expropriated land - Title to the WAR right of way was registered in 1876 - In 1870, the Western Counties Railway Co. (WCR) was incorporated to build and operate a railroad from Yarmouth to Annapolis - The WCR and the WAR combined to form the Dominion Atlantic Railway (DAR) - The DAR leased its railway to the CPR - Later, the CPR abandoned part of the right of way - Lowe used a portion of the abandoned right of way to construct a private airstrip - The CPR applied for a declaration that Lowe was trespassing, an injunction and damages - **The Nova Scotia Supreme Court held that the DAR/CPR continued to hold the right of way in fee simple** - The court issued an injunction against Lowe and awarded \$100 nominal damages.

See also *Wotherspoon v. Canadian Pacific Ltd. et al. Pope et al. v. Canadian Pacific Ltd. et al.* (1987) 39 D.L.R. (4th) 169, (Supreme Court of Canada) re disposition of railway lands.

- x. **Alternate root? Director, Veterans Land Act deeds.** Hamilton, J., in *Carmichael v. Durant* (1995), 143 N.S.R.(2d) 234; 411 A.P.R. 234 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 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 at paragraphs 6 and 7:

"[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."



- y. **Is a mortgage a good root of title under MTA?** Separate discussions with Charles MacIntosh, Q.C., John Cameron, and Adrian Campbell (February 1999) and a review of chapter 12.1 of Mr. MacIntosh's *Nova Scotia Real Property Practice Manual*, Butterworths 1998, suggest that a mortgage creates a charge in land but may not convey sufficient interest in land to constitute a root of title. In their views it is doubtful that a mortgage is a sufficient root. 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?
- z. **Wills?** In *Olsen Estate v. ASC Residential Properties* (1990), 102 N.S.R. (2d) 94 (Nova Scotia Supreme Court, Hall, J.) a Will was found to be good root; this case may be supplanted by the statutory requirement that a **chain of title** commence with a registered instrument other than a will. In *Boyer v. Throop* (1993), 129 N.S.R.(2d) 60, (Nova Scotia Supreme Court, Stewart, J.) The court held that a will must be probated to prove it is the last will of the deceased and further held that possessory title was not an alternative where good paper title was available or proof thereof would not require unreasonable demands."
- aa. **Deeds are effective from date of execution**, not the date of recording: *Dooks v. Rhodes* (1982), 52 N.S.R. 2d) 650. In *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378, Carver, J. stated: "Pursuant to s.4(2) of the Act, a Deed dated over 40 years ago, even if not registered until 1999 in the proper registry, can operate as a valid root of title."
- bb. **Break in chain of title**. In *Boland v. Berthelot* (1992), 107 N.S.R. (2d) 187 (Boudreau, J.) 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 facie* evidence of title and possession and affidavit evidence confirmed possession of over 40 years claimed by seller. In *Interlake Developments Ltd. v. Slauenwhite* (1988), 86 N.S.R. (2d) 23 (Davidson, J.) a recital in a 1947 deed referring to an unregistered 1914 deed was held to establish paper title of over 60 years.
- cc. **Reliance on recitals - Accounting for "all the heirs"**. *Quinn v. Pilkington*, (1995), 144 N.S.R. (2d) 13 (Goodfellow, J.) - Reliance on 1904 recitals re heirs (did not recite "all the heirs"), extensive transfers and title assertions over an extended period of time - Court concluded that 1904 deed was from "all the heirs".

**4(3) A chain of title may commence before or after the coming into force of this Act.**

**4(4) Nothing in this Section extinguishes any interest in land.**

**4A Notwithstanding the *Descent of Property Act* and the *Intestate Succession Act*, but subject to Section 5, an interest in land, whether arising before or after the coming into force of this Act, that has not vested pursuant to an instrument that is registered pursuant to the *Land Registration Act* or the *Registry Act*, is extinguished by a registered instrument other than a will that conveys or**

**purports to convey that interest in the land and that is executed by a person with a marketable title to that interest, upon the expiry of**

- (a) **the twenty-year period immediately following the vesting of the interest;**
- (b) **the five-year period immediately following the attainment of the age of majority by the person with the interest; or**
- (c) **where the person with the interest is of unsound mind, the five-year period immediately following the person ceasing to be of unsound mind or the twenty-five year period immediately following the vesting of the interest, whichever is earlier.**
- dd. INFANTS: 5 years from the date the infant receiving such interest attains majority - plus up to 19 years (age of majority) for a maximum possible period of 24 years (allow 25 years for infants *en ventre sa mere*).
- ee. INCOMPETENTS: maximum of 25 years from date interest arose.
- ff. Former s.4(4) does not apply to an adverse interest 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 - s.7(3) **[not amended to refer to new 4A]** .
- gg. Under former s.4(4), now s.4A, there must be a competing and adverse registered chain of title to extinguish an interest in land "... that has not vested pursuant to an Instrument that is registered". Interests that may be extinguished unless the holder files a Notice of Claim include interests under:

**an intestacy** (*Descent of Property Act* or *Intestate Succession Act*),  
**an unregistered Will,**  
**an unregistered (e.g. lost) deed, and**  
**an unpaid vendor's lien,**

See *The Marketable Titles Act Revisited*, Catherine S. Walker, Q.C. and John Cameron, RELANS/Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, March 5, 1999 - notes on, and examples of, Notices of Claim. Also *Requisite Elements For Extinguishing Of Interests Section 4*, Appendix "D", *The Marketable Titles Act A New Beginning*, Catherine S. Walker, Q.C., Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 12, 1996. Also *Questions & Answers, Marketable Titles Act*, Catherine S. Walker, Q.C., RELANS/Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 19, 1997.

- hh. New s.4A requires a **“registered instrument other than a Will”** to extinguish a former s.4(4), new s.4A, interest. **To take advantage of this section an owner with marketable title may have to register a deed (a “registered instrument”) from him/herself to him/herself to operate as the extinguishing instrument before a notice of claim is filed.**

ii. Note that filing a s.5 notice of claim does not validate or extend an interest that has been extinguished by subsection 4(4) **[not amended to read 4A]** or that has expired or is invalid - s.5(4). An owner may establish that the interest of a person filing a Notice of Claim "has...expired or is invalid" before the above time periods have elapsed; the following may be starting points:

i. **Adverse possession generally.** Refer to the *Limitation of Actions Act*, R.S.N.S. 1989, c.258. In *Hebb v. Woods* (1996), 150 N.S.R. (2d) 16 (N.S.S.C.), Carver, J., referring to possessory titles and NSBS Practice Standard 2, stated:

“[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.)”

ii. **Adverse Possession - missing heirs.** For an example of how the Courts may apply these principles see *Nemeskeri v. Nova Scotia (Attorney General) v. Meisner* (1993), 125 N.S.R. (2d) 67 (N.S.C.A., Freeman, J.A.):

(1) *Limitations of Actions Act*, paragraphs 5 and 9:

"[5] The trial judge found that the respondent Nemeskeri had established a good chain of title extending over 40 years and this was sufficient to bar any other claimant under s. 20 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 168, which provides as follows:

'No entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, first accrued, was under any of the disabilities mentioned in the next preceding section, or by any person claiming through him, but within forty years next after the time at which such right first accrued although the person under disability at such time has remained under one or more of such disabilities during the whole term of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired.'

...

[9] The second issue relates to title. On that issue there was no evidence to sustain the appellants' claim. As noted by the trial judge any claim by the heirs of David Moland was barred by the limitation period. Indeed there was no evidence that the parties to the quit claim deeds to the appellant

had or claimed any interest in these lands before executing the deeds. In the result the appeal is dismissed with costs, which are fixed at forty per cent of the costs awarded at trial.”

- iii. **Constructive displacement.** Consider the possible application of the “constructive displacement” principle when there are missing heirs. See the trial judgment, (1992), 115 N.S.R. (2d) 271 (Tidman, J.), paragraphs 67-71.
- iv. **Laches.** Consider the application of the “laches” principle when the claims have long been dormant. *MacDonell v. M & M Developments Ltd. et al.* (1997), 164 N.S.R.(2d), 81 (S.C.) *MacDonell v. M & M Developments Ltd. et al.* (1998), 165 N.S.R.(2d) 115 (C.A.):

"[37] Fundamental to any finding that a true owner of land is barred from bringing an action for trespass, is a finding by a court that the true owner has been dispossessed for a period in excess of that period which is permitted by the Limitation of Actions Act for the bringing of the action (ss. 10, 11 and 20 of the Act)."

- v. *Intestate Succession Act, c.236*

- (1) Section 3. This Act applies to deaths on September 1, 1966 and later. The *Decent of Property Act* applied before that date.
- (2) **How wide is the net anyway - are you looking for too many heirs?** Section 8. The benefit of section 8 extends to the living children of an Intestate’s brothers and sisters only - and not to his/her grandnieces and grandnephews by Intestate’s nieces and nephews who predecease Intestate. In *Re Chisholm Estate* (1996), 155 N.S.R. (2d) 36, (MacLellan, J., Probate Court) an intestate died leaving his brothers and sisters as his heirs. Four of the siblings were deceased but had children surviving them. A nephew and a niece were also deceased but had children surviving them. At issue was whether the grand-nieces and grand-nephews were entitled by representation to inherit part of the estate pursuant to s. 8 of the *Intestate Succession Act*. The Court **interpreted s. 8 of the Act to mean that only the children of brothers and sisters could take the share of an estate intended for their parent. Children of predeceased nieces and nephews were not entitled to a share in the estate.**
- (3) **Illegitimate heirs?** Section 15. *Tighe v. McGillivray Estate et al.* (1994), 127 N.S.R.(2d) 313; 355 A.P.R. 313,

"An illegitimate child claimed as an heir to his natural father's estate. The result of ss. 2(b), 4(7) and 16 of the *Intestate Succession Act* was that an illegitimate child could inherit from its natural mother, but not its natural father. The child claimed the Act

violated equality rights under s. 15 of the *Charter of Rights and Freedoms*."

"The Nova Scotia Court of Appeal held that the provisions violated s. 15 of the Charter and were not reasonable limits prescribed by law under s. 1. The court stated that the appropriate remedy under s. 24(1) was to read into s. 16 the words "or father", thereby entitling illegitimate children to claim as heirs to their natural father's estate."

Roberta Clarke, *Update in Practice: Intestate Succession Act*, CLE Materials, Estate Practice Conference, October 8, 1993.

Timothy C. Matthews, *Estate Problems Effecting Title*, CLE Real Estate Materials, October 9, 1992.

- jj. Section 4(4) [4A] provides a means of extinguishing "an interest in land that has not vested pursuant to an **instrument** that is **registered**". In his paper *How To Interpret The Registry Act*, Arthur G. H. Fordham, Q.C., (C.L.E. Continuing Education Program, March 18, 1989) reviews the history and limitations of the *Registry Act*. Mr. Fordham, referring to a 1933 amendment to the *Registry Act* adding what is now s. 25, states at page 11:

"The combined effect, therefore, of the common law and the equitable rules respecting priority of interests in real property and Sections 17 and 25 of the *Registry Act* may be stated as follows:

Legal rights created by a registered instrument **or not created by an instrument** are good against all the world; equitable rights created by a registered instrument are good against all the world; legal rights created by an unregistered instrument are good against all the world except a *bona fide* purchaser and without actual notice claiming for valuable consideration under a subsequent instrument and those claiming under him; equitable rights, whether created by an unregistered instrument or not, are good against all the world except a *bona fide* purchaser and without actual notice claiming for valuable consideration under a registered instrument and those claiming under him."

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

- kk. Each person wishing to preserve a claim under a notice must sign such notice (Regulation 7(1):

"...mere reference in paragraph 7 [of the draft Notice of Claim] by a claimant by a claimant to other owners of interests in the land does not protect those interests. Thus a lawyer searching title may disregard the interests of persons other than the

claimant who signs the Notice in determining whose interest is protected by Section 5.1."

*Marketable Title Legislation Revisited Notices of Claim, Extinguishment Provisions*, Catherine C. Walker, Q.C. and John R. Cameron, RELANS/CLE Real Estate '99 Conference, March 5, 1999. *The Marketable Titles Act*, Anthony L. Chapman, Canadian Bar Association - Nova Scotia, Professional Development Conference, Halifax, Nova Scotia, April 19, 1996 at p.22

- (2) A notice of claim shall be in the form prescribed by the regulations.**
  - (3) A notice of claim shall include**
    - (a) the name of the claimant;**
    - (b) the names of the owners of all interests in the land known to the claimant;**
    - (c) the address of the claimant;**
    - (d) a description of the land in which the interest is claimed;**
    - (e) the nature of the interest in the land claimed;**
    - (f) a summary of the basis of the claim, including the recording particulars of every Instrument constituting the chain of title on which the claim is based; and**
    - (g) such other information as the regulations prescribe.**
  - (4) A notice of claim does not validate or extend an interest that has been extinguished by subsection 4(4) or that has expired or is invalid.**
  - (5) A new notice of claim may be registered pursuant to this Act and, for that purpose, an earlier notice of claim is the Instrument on which the claim is based.**
  - (6) For greater certainty, lack of knowledge or absence from the Province on the part of any person does not extend the period during which a notice of claim may be registered.**
- II. See s.7(3) - interests may be preserved by acknowledgment specifically referred to in the description of land in a *deed* forming part of the chain of title.
- 6 (1) In this Section, "tax deed" means**
- (a) a certificate that has or purports to have the effect of vesting land that was to be sold for non-payment of taxes in a city, town, municipality of a county or district, regional municipality, village commissioners or service commission as defined by the Municipal Affairs Act; or**

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

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

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

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

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

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

mm. TAX DEEDS

- i. 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<sup>11</sup>.

- nn. In *MacNeil v. Nova Scotia (Attorney General) et al.*<sup>12</sup> 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.

- oo. In *James Arnold Desmond v. Municipality of The District of Guysborough*<sup>13</sup>, "*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

"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.*<sup>14</sup> 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

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11 The Continuing Legal Education Society Of Nova Scotia, March 5<sup>th</sup>, 1999.

12 (2000), 183 N.S.R.(2d) 119; 568 A.P.R. 119 (N.S.C.A.)

13 (2000), 186 N.S.R. (2d) 123

14 (1995), 146 N.S.R.(2d) 227; 422 A.P.R. 227, Nathanson, J.



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."

pp. 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.*<sup>15</sup>, 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.'"

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

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15 (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.

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.

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 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.

**7(1) This Act does not apply to**

**(a) any interest in land created or preserved by a statute;**

qq. See *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18 (Ont. C.A.). Hydro's interest in the land in question came through a deed from a private landholder to a predecessor power company. The land was subsequently conveyed by statute to Hydro in 1924 with notice of such transfer registered in 1926 - all these events occurred outside the 40-year search period. Hydro's interest was held to arise from the 1906 deed and was not "...a claim arising under any Act" which would have fallen within their corresponding exception under their *Registry Act*. Sections of the Ontario *Power Corporation Act* prohibiting adverse possession against Hydro was held to have no application to the case at bar.

**(b) the interest of a municipal government in a public street, road, highway or road reserve;**

**(c) a right of way or easement in favour of a public utility or a municipal government;**

**(d) mineral rights; or**

**(e) an easement or right of way that is being *used and enjoyed*.**

**(2) Subsections 4(1) and (2) do not apply to**

**(a) land in respect of which a certificate of title has been issued under the *Quieting Titles Act*;**

**(b) land registered under the *Land Titles Clarification Act* or the *Land Titles Act*; or**

(c) any interest in land that a registered owner may no longer recover by reason of the *Limitation of Actions Act*.

rr. **Adverse Possessory interests** (Squatters' Rights) are protected - holder of "paper title" cannot reestablish rights lost to adverse possession using this Act. See *R.B. Ferguson Construction Ltd. V. Ormiston* (1989), 91 N.S.R. (2d) 226 (N.S.C.A.) At paragraphs 23 to 31 as to how restrictive an approach the Court will take in extending the limitation period from 20 to 40 years by reason of absence from the Province. See *Nemeskeri*, above.

(3) **Subsection 4(4) [not amended to "4A" by LRA] does not apply to an adverse interest acknowledged or specifically referred to in the description of land in a deed [ed. note - not an "Instrument"] forming part of the chain of title to the land.**

ss. Habendum Clauses appear to be caught by common law in addition to adverse interests found in "descriptions of land" under the Act. See *Roman Catholic Episcopal Corp. of Halifax v. Denson and Godsell* (998), 168 N.S.R.(2d) 356, Nova Scotia Supreme Court, Kelly, J., January 23, 1998: The habendum clause in a 1931 deed to a church ended "In trust for the purpose of a church or cemetery, or both" - Purchasers of the property raised an objection to title, asserting that the title was unmarketable and that the church was a trustee unable to convey to a party other than a church or cemetery - The Nova Scotia Supreme Court held that the objection to title was valid - The court opined that the habendum clause explained the uses that the grantor wished for the property and modified or lessened the grant but did not contradict the grant of a fee simple - The court also opined that a valid trust was created respecting the land, limiting the transfer of the land to a church or cemetery.

**7(4) Section 3 of the Limitation of Actions Act does not apply to any time period set out in this Act.**

**8(1) The Governor in Council may make regulations**

- (a) prescribing the form of the notice of claim authorized by this Act;
- (b) prescribing additional information to be included in a notice of claim;
- (c) prescribing a system of indexing notices of claims;
- (d) defining any word or expression used in this Act and not defined in this Act;
- (e) respecting any other matter or thing that the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority in subsection (1) is regulations within the meaning of the Regulations Act.

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

- tt. Section 9
- i prevented the then 60 year adverse possession requirement for claims against the Crown from being reduced to 40 years when the *Marketable Titles Act* came into force in 1996; and
- [ The *Land Registration Act*, s.115 and s.115A, has since reduced the adverse possession period against the Crown under the *Limitations of Actions Act*, s.20, to 40 years. The Crown is bound by LRA (LRA, s.6) and the *Limitations of Actions Act* (McGibbon v. McGibbon<sup>16</sup>).]
- ii appears to maintain the common law 60 year search period for lands in which the Crown may have an interest - *i.e.* section 9 renders the LRA amendments to s.4(1) reducing the common law search period ineffective against the Crown.
- uu. Section 9 does not appear to prevent a barrister from establishing title by either
- i. a common law title search of at least sixty years<sup>17</sup>; or
- ii. adverse possession<sup>18</sup>. In *McGibbon v. McGibbon*, above, the defendant's adverse possession extending over a period of more than 60 years was sufficient against the Crown and anyone claiming under the Crown. See also *Nickerson v. Canada (Attorney General)*<sup>19</sup> and *Hamilton v. R*<sup>20</sup> re the application of limitations legislation to the Crown.

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16 1913 CarswellNS 78, 46 N.S.R. 552, 9 D.L.R. 308 (NSSC).

17 In *Dupuis Estate v. O'Blenis* (1995), 146 N.S.R. (2d) 76 (N.S.S.C.) (sub-nom. *Landry v. O'Blenis*), Scanlan J. wrote: "At common law the period of sixty years continuous chain of title starting from a warranty deed was held to be sufficient. This appears to be based on the fact that sixty years would be what is required to obtain possessory title as against the Crown. In addition sixty years was in earlier years considered to be the life span of humans."

18 LRA, s.115, reduced the adverse possession period against the Crown under s.20 of the *Limitation of Actions Act* to 40 years. Section 115A provides that "The changes to the *Limitation of Actions Act* contained in Section 115 apply to interests that arise before or after the coming into force of this Act except for claims of adverse possession that were determined by a court prior to the coming into force of this Act."

19 2000 CarswellNS 160, 32 R.P.R. (3d) 141, 185 N.S.R. (2d) 36, 575 A.P.R. 36 (NSCA)

20 1917 CarswellNat 46, 54 S.C.R. 331, 35 D.L.R. 226.

## **Amendments:**

1. November 24, 1996 - added reference to *Robertson v. McCarron* - s.4(1), s.4(2).
2. June 20, 1997 - added reference to *R.B. Ferguson* case under s.7(2)(c) - 40 year absence from Nova Scotia
3. February 1, 1998 - added reference to *Dow v. Zinck and Young*, and Michael LeBlanc's Pre-Trial Brief re effect of the Act on tax deeds under s.6 (Tax Deed challenge).
4. May 29, 1998 - added reference to *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited* (1998), 169 N.S.R. (2d) 184 (MacLellan, J). S.4(2) - requirement for registered instrument to start chain of title; 60 year "common law" title search period applied - 56 years of title insufficient.
5. February 21, 1999 - made editorial changes and appended Michael LeBlanc's Pre-trial Brief, (3 above) for the March 5th, 1999 RELANS/CLE Real Estate Conference with his permission.
6. May 10, 1999 - added reference to *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378 (Carver, J., N.S.S.C.) under s.4(1) and 4(2). Also Editorial changes.
7. May 22, 1999 - Editorial changes.
8. October 24, 1999 - added reference to *Mason v. Mason Estate* (1999), 176 N.S.R. (2d) 321 (NSCA) for discussion of constructive possession and colour of right under notes to s.7(2).
9. March 28, 2000 - added reference to *MacNeill v. Chisholm*, 2000 NSCA 31, (February 16, 2000, Cromwell, J.A.) under notes to s.6(2).
10. June 22, 2002 - major editorial changes and incorporation of *LRA* amendments to the Act.

## **References:**

1. *Marketable Title Act Revisited, Notices of Claim, Extinguishment Provisions*, Catherine C. Walker, Q.C. and John R. Cameron, RELANS/CLE Real Estate '99 Conference Materials, March 5, 1999.
2. *Marketable Titles Act*, S.N.S. 1995-96, Chapter 9, Working Notes & Annotations, Revised February 1, 1999, with copies of Ontario cases and Michael LeBlanc's Pre-trial Memorandum on Tax Deeds annexed, Garth C. Gordon, Q.C., RELANS/CLE Real Estate '99 Conference Materials, March 5, 1999.
3. See *Marketable Titles Act Q & A's*, Catherine Walker, Q.C., RELANS/CLE Conference, April 18, 1997.

4. Delivery Notes on *Marketable Titles Act & Notes on Tax Cases*, John R. Cameron, Real Estate, New Marketable Titles Legislation, RELANS/CLE Conference, Kentville, Nova Scotia, May 7, 1996.
5. See *The Marketable Titles Act*, Anthony L. Chapman, Canadian Bar Association - Nova Scotia, Professional Conference, Halifax, Nova Scotia, April 19, 1996.
6. See *The Marketable Titles Act A New Beginning*, Catherine S. Walker, Q.C., Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 12, 1996.
7. *Nova Scotia Real Property Practice Manual*, Charles W. MacIntosh, Q.C., Butterworths, 1988, as updated.

#### **Miscellaneous Requisitions and cases:**

1. **Estates Tail Abolished:** *An Act to amend Chapter 111 of the Revised Statutes, (third series), "of Estates Tail."* S.N.S. 1865, Chapter 2, passed May 2, 1865.

“1. All Estates Tail are abolished, and every estate which hitherto would have been adjudged a Fee Tail, shall hereafter be adjudged a Fee Simple, and may be conveyed and devised or descend as such.”

2. **Oil Burner Contracts.** In *Noerat Ollah Eblaghi and Carriage Homes Incorporated* (1985) unreported, S.H. No. 53733, October 9, 1985, an application was made under the *Vendors and Purchasers Act* to determine the validity of an objection to title concerning a registered oil burner agreement as an encumbrance. It was argued that the oil burner agreement, which purported to give notice that the oil burner remained a chattel and did not form part of the realty, was not a registerable instrument under the *Registry Act* and, instead of being registered at the real property Registry, should have been registered as a chattel at the Chattel Mortgage Registry. Madame Chief Justice Glube accepted this argument and found the objection to title to be invalid.

"IT IS ORDERED that the oil burner agreement dated the 18th day of November 1962 between Donald C. Huntley and Enterprise Stoves Limited which was recorded at the Registry of Deeds, at Halifax, in Book 1862 at page 655 does not constitute a cloud against, or in any way bind or affect title to the property at 37 First Street, Middle Sackville, Nova Scotia and does not constitute a valid objection to title."

MARKETABLE TITLES ACT, S.N.S. 1995-96, Chapter 9  
WORKING NOTES & ANNOTATIONS  
GARTH C. GORDON, Q.C.  
TAYLOR, MacLELLAN & COCHRANE, KENTVILLE, NS

Revised: February 22, 2005  
Printed: June 9, 2009 @ 1417

A Bit of History:

"Our oldest date of limitation was the death of Henry I on 1 December 1135; no claim could be founded on a seisin earlier than that day. That limitation was felt to be too long when it passed the century, and so a statute of 1236 fixed a new date - construed as being Henry II's coronation on 19 December 1154 (a period of over eighty years). By 1275 this period had grown to a hundred and twenty years, and so a new date was fixed, the coronation of Richard I on 3 September 1189. Our legislature seems to have felt that, roughly, a century was a suitable limit. As things stood in 1275, therefore, claims rooted only three or four generations back might be barred. Unfortunately, no further changes were made until 1540, when it was noticed that three and a half centuries were a severe tax on the memory, with resulting peril to men's consciences; it was therefore enacted that no seisin could found a claim in a writ of right unless it was within sixty years of the date of the writ. Late in the middle ages and until 1540, therefore, extremely remote claims could be made, but in England the objection to them was based upon difficulty of proof and the unsettling of respectably old titles, rather than upon any conceptions of inheritance as such." *A Concise History of the Common Law*, (Fifth Edition) by Theodore F. T. Plucknett, Butterworth & Co. (Publishers) Ltd., London, 1956, Page 719.

AN ACT RESPECTING MARKETABLE TITLE TO LAND, CHAPTER 9, ACTS OF 1995-96, AS  
ASSENTED TO BY THE LIEUTENANT GOVERNOR, JANUARY 11, 1996, HALIFAX:

BE IT ENACTED BY THE GOVERNOR AND ASSEMBLY AS FOLLOWS:

- 1 This Act may be cited as the *Marketable Titles Act*.**
- 2 The purpose of this Act is to**
  - (a) remove uncertainties respecting the determination of marketable titles to land in the interests of all present and future landowners and facilitate the development of the Province; and**
  - (b) remove uncertainties respecting the validity of past and future tax deeds.**

Notes:

- a. The House of Assembly enacted this legislation to cure problems with old tax sale deeds and to resolve the *40 v. 60* year title search controversy.

- b. When the Act was passed tax deeds in a chain of title would be accepted only with great reservation, if at all. Those circumstances are ably set forth by Michael F. LeBlanc in his brief dated July 23, 1997 in *Dow v. Zinck*, unreported, S.H. 118046. See annotations to s.6 below also.
- c. The search period to establish marketable title is reduced to 40 years from 60 years. In his much referred to article, *How Far Back Do You Have to Search*, (Nova Scotia Law News, Volume 14, No. 3, December 1987, p.37), Charles MacIntosh, Q.C., after outlining the case for a sixty year search under common law, states, at p.54:

"It would be in the interest of the legal profession to press for consideration of...marketable title legislation here to protect property owners and lawyers from the expense and inconvenience attendant upon the present state of law."

- d. See *Town of Wolfville v. Bishop-Beckwith Marsh Body and Grand Pre Marsh Body, Bishop-Beckwith Marsh Body et al. v. Wolfville (Town)* (1996), 151 N.S.R.(2d) 333; 440 A.P.R. 333, as to the principals of statutory interpretation - especially as to Legislative intent expressed in the preamble:

"[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.'"

- e. During the Session in which the Nova Scotia House of Assembly considered and passed this Act the Nova Scotia Supreme Court rendered its decision in *Landry v. O'Blenis* (1995), 146 N.S.R. (2d) 76, and the Supreme Court of Canada rendered its decision in *Fire v. Longtin*, [1995] 4 S.C.R. 3. Both the *Landry* and *Fire* cases were made known to, and discussed with, the legislators by the barristers working for passage of this Act. *Landry* was cited as a compelling example of the necessity for a legislated 40-year search period to establish marketable title. *Fire* is a clear indication that the Supreme Court of Canada will give the intended effect to legislation limiting search periods.
  - i. In *Landry*, a *Vendors and Purchasers Act* application, outstanding but apparently dormant interests (no party came forward with a claim under such interests) under an 1852 deed were held to be a valid objection to title of a property purported to be conveyed to the grantors under a 1947 warranty deed. This decision was based on the



"60 year common law rule" outlined by Mr. MacIntosh in his article. Unfortunately no affidavits evidencing possessory title of the grantor were registered prior to the application.

- ii. In *Fire* the Supreme Court of Canada dealt with competing interests under the Ontario *Registry Act* R.S.O. 1980, c.445, ss.104-106 (now ss.111-113), providing for a forty year search period. The Court held *inter alia* that 40-year search period was valid - also that a title searcher is entitled to rely on the form of the instruments registered within the statutory search period and is not bound to inquire into the substance of any instrument which, on its face was sufficient to convey the fee even if the grantor in such instrument had no title to convey. The Court adopted the reasons for judgment delivered by McKinlay, J.A., for the unanimous Ontario Court of Appeal in (1994), 112 D.L.R. (4th) 34. Madame Justice McKinlay states 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."

### 3 In this Act,

(a) **"chain of title" means a chain of title as described in subsection 4(2);**

- f. "4.(2) A **chain of title** commences with the **registered Instrument**, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined."

(b) **"Instrument" means a conveyance or other document by which the title to land is changed or in any way affected, including a will or other testamentary Instrument, a grant from the Crown, a court order, a certificate of title under the Quieting Titles Act or the Land Titles Clarification Act or a report of commissioners appointed to make partition;**

- g. Caveats. 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."

Some persons will register caveats to record notices of claims they believe they have. Apart from a. registering a Notice of Claim under s.5, or there being "an adverse interest acknowledged or specifically referred to in the description of land in a **deed** forming part of the chain of title to the land" per s.7(3) there is no provision in this Act (or the *Registry Act*) for such notice. "Caveats" should not be used, and if used, struck.

**(c) "registered" means registered or filed in the registry of deeds for the registration district within which the land is situate.**

- h. See *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378(Carver, J., N.S.S.C.). Deeds were initially registered in the wrong county but this was corrected by registration in the correct county.

**4(1) A person has a marketable title *at common law*<sup>21</sup> or equity or otherwise 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. [\*LRA amendment to be proclaimed - this will kill the so-called "60 year common law search period".]**

- i. **Exceptions to this section.** See s.7(2).
- j. It is no coincidence that the Nova Scotia legislators used the expression "... a good and sufficient **chain of title** during a period greater than forty years immediately preceding the [date]..." in s.4(1) these words are identical to those in then s.105(1) of the Ontario Act

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21 A possessory title is good marketable title at common law but seldom will meet the 40-year chain of title test of this Act. In *Hebb v. Woods* (1996), 150 N.S.R. (2d) 16 (N.S.S.C.), Carver, J., referring to possessory titles and NSBS Practice Standard 2, stated:

"[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.)."

considered in *Fire v. Longtin* (1994), 112 D.L.R. (4th) 34 at pp 36, 39 and 42. [Check citation & refer to *Tkach*]

- k. "**Marketable title**" as defined by DiCastrri in *Law of Vendor and Purchaser*, 1976 (2nd ed), at page 502, was cited by Justice Carver in *Penney v. Hartling* (1999) 177 N.S.R.(2d) 378:

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

- l. "**Good and sufficient chain of title**". In *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378, Justice Carver found that there was marketable title in a "forty year plus a day deed notwithstanding that the Grantor held only a one-third interest in the parcel under an earlier intestacy. "Applying s.4 in this case, there will be marketable title if there is "*good and sufficient chain of title*" extending back for more than 40 years (40 years plus one day)." The grantor was one of three heirs under a pre-1929 intestacy. Another heir, the grantor's sister, quit claimed her 1/3 interest to the third heir, another sister, on May 13, 1953. But "What happened to that two-thirds interest remains a mystery." The grantor "purported to convey" the whole interest in the parcel by warranty deed dated November 24, 1951 to Purchaser 1; the grantor later gave a confirmatory warranty deed to Purchaser 1 on January 6, 1953. Purchaser 1 later conveyed the lands by warranty deed to Purchaser 2 on November 17, 1956. Justice Carver accepted that each of the November 24, 1951, January 6, 1953 and November 17, 1956 deeds purported to convey the whole interest in the parcel. All three deeds were initially registered in the wrong county but were recorded in the correct county in 1999 correcting that problem.
- m. **Actual knowledge of registered interests before and during the 40 year search period.**
- i. **Interests found within the 40 year period.** Title will be subject to a prior competing interests found in the **chain of title**. Under s.4(2), below, the expression "that interest" would include an interest that was subject to exceptions, easements or other reservations set out in the legal descriptions in the chain of title. Interests predating the **chain of title** may be preserved if they are included in a legal description in a **deed** forming part of the chain of title as set out in s.7.(3):
- "s.7.(3) Subsection 4(4) does not apply to an adverse interest acknowledged or specifically referred to in the description of land in a **deed** (Ed. Comment: note reference to a "**deed**" not an **instrument**) forming part of the **chain of title** to the land.
- n. **Competing Marketable Titles.** There are at least three circumstances under which there will be competing chains of title under the *Marketable Titles Act*. The first two 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**. The third is a **co-owner's**

**interest not excepted or noted in a deed** that conveys only a partial undivided interest but purports to convey the entire fee simple

i. **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 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 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*<sup>22</sup> 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.]

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22 (1992), 95 D.L.R. (4th) 18

- (3) The Ontario Court of Appeal<sup>23</sup> approached this issue from the perspective: "Does Tkach have a defence to the action by virtue of the *Investigation of Titles Act*?" rather than "does Hydro have the right to the declaratory relief it seeks?" Grange, J.A., at page 20 states "...the essential question is whether the Appellant [Tkach] can claim good title by reason of the 40-year limit on the search of title imposed first by the *Investigation of Titles Act*...incorporated into the *Registry Act*..." At page 21 he states that "...I think one must view the appellant's [Tkach's] title as of the moment it comes under attack." Later on page 21 he states "It is my view that the question is whether a hypothetical purchaser from the appellant [Tkach] at that time could obtain good title." Therefore 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 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*<sup>24</sup>, 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."

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23 at pages 19-21.

24 [1953] 3 D.L.R. 343 (Ont. C.A.).

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)<sup>25</sup>.

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

- (7) Subsequent to *Tkach* a different panel of the Ontario Court of Appeal decided *National Sewer Pipe Ltd. v. Azova Investments Limited*<sup>26</sup> 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."

- (8) The Supreme Court of Canada decided that *Tkach*, not *National Sewer Pipe Ltd.*, was the correct approach in *Fire v. Longtin*<sup>27</sup> 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. Although the Appeal Court and the Supreme Court of Canada found that Fire's title in the fee simple was extinguished by s.106(1) of the Ontario *Registry Act*, the Courts focussed most of their attention on the uncertainty of the 40-year search limit after the decision in *National Sewer Pipe Ltd.* At page 42 of the Ontario Appeal Court decision Justice McKinlay stated:

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25 *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

26 (1993), 105 D.L.R. (4th) 1.

27 [1995] 4 S.C.R. 3

"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."

- (10) 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.

ii. **Lack of an underlying Crown Grant.**

- (1) A barrister practising 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*<sup>28</sup> and *Tkach*<sup>29</sup> (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<sup>30</sup>.

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

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

29 *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.

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

- a. a grant or a deed from the Crown, or
  - b. a certificate under section 37 of the *Crown Lands Act*<sup>31</sup> stating that the Crown "...asserts no claim in or to..." the land.
- iii. **Co-owner's interest not excepted or noted in a deed.** This will occur where a deed conveys only a partial undivided interest but purports to convey the entire fee simple - *e.g.* a deed of an undivided one-half interest that purports to convey the fee simple not just the grantor's one-half interest.
- o. **Protecting undeveloped unoccupied lands.** How may owners of undeveloped unoccupied land protect themselves against "omitted exception" and other claims?
- i. **Avoiding problems.** In both *Tkach* and *National Sewer* the unsuccessful parties lost mainly because there was no physical evidence of their ownership or possession of the land in contention. It should take relatively little effort to put third parties on notice of the owner's interest:
    - (1) Owners may post signs on their boundaries under section 7 of the *Occupiers' Liability Act* or section 3 of the *Protection of 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.
    - (2) Refer to *Robertson v. McCarron*<sup>32</sup> at paragraph 23 which gives us guidance on steps that may be taken to give such notice:

"[23] Counsel for Mrs. Robertson relies on the case of **Kirby v. Cowderoy**, [1912] A.C. 599, 5 D.L.R. 675. This decision is always trotted out in hopeless causes. I thought its usefulness as an authority that the payment of taxes was sufficient basis to find that a person was in possession had been put to rest in this province by the decision of Ilsley, C.J., in **MacKay v. Meikle**, [1953] 1 D.L.R. 695..." , where he stated at p. 699:

"The question then arises as to whether payment of taxes is itself sufficient evidence of possession. Since the case of **Kirby c. Cowderoy**, 5 D.L.R. 675, [1912] A.C. 599, attempts have from time to time been made to rely on the payment of taxes as sufficient evidence of

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

32 (1985), 71 N.S.R. (2d), 34 (Hallett, J.).



possession. In the judgment of the Judicial Committee of the Privy Council in that case the following passage appears at p. 678 D.L.R., pp. 602-3 A.C.:

'It appears to be established, in short, that (1) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the respondent was aware that this was being done by the appellant, and he ... had washed his hands of all connection with the property.'

In the case at bar I am not satisfied that the payment of taxes was the only act of possession of which this woodlot was capable and certainly there is no evidence that the defendant was aware that the taxes were being paid by the plaintiff and his predecessor in title. **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.**

For these reasons I think that the plaintiff has neither traced his title to a person in possession, nor has he proved possession in himself at any material time."

- ii. **Curing conflicting chains of title problem.** First, if an owner suspects a problem look at the neighbour's deed to the larger parcel in the Registry Office to see if the owner's land is still included in the neighbour's description. If there are conflicting chains of title you may
  - (1) Obtain and register a correcting instrument (deed or acknowledgement) from the neighbour, or

- (2) If the neighbour is not co-operative, consider registering an affidavit, a statutory declaration or a Notice of Claim under section 5 of the *Marketable Titles Act*<sup>33</sup> in the Registry Office to evidence the Owner's interest. 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". Any of these devices 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 defence. These devices will, practically, limit the neighbour's ability to deal with his or her property in the short term and raise a flag in any *LRA* application for registration which should trigger notice to the owner under *LRA*, s.39(2).

These two steps will not turn the owner into a plaintiff whose claim may be defended under s.4(1) and *Tkach*.

Refer to sections 73-76 of *LRA*.

- p. **Constructive Possession.** See *Mason v. Mason Estate* (1999), 176 N.S.R. (2d) 321(NSCA) for discussion of constructive possession and colour of right starting at para. 27. In paras 31 and 32 the judge states:

“[31] In *Anger and Honsberger, Real Property, 2nd Ed., Oosterhoff and Rayner, 1985*, the bases for a claim based on colour of title are correctly set out as follows:

"The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the Statute of Limitations, other requisite of those statutes being complied with.

"The person relying upon the doctrine of constructive possession must enter under a real, bona fide belief of title. While in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title, and, in such cases, a jury is warranted in treating the party as in no better

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33 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.

position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation. A person who has no title is in possession in law only of that part of which he is in possession in fact.

"A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land as is proved to be in his actual possession and in that of those claiming through him.

"As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed."

[32] The above principles are derived from well known cases that have enunciated them, such as the decision of the Supreme Court of Canada in *Wood v. LeBlanc* (1904), 34 S.C.R. 627; the decision of the Ontario Court of Appeal in *Harris v. Mudie* (1882), 7 O.A.R. 414; the decision of the New Brunswick Court of Appeal in *Stewart v. Goss* (1933), 6 M.P.R. 72 and the decision of this court in *Rafuse and Rafuse v. Meister* (1979), 32 N.S.R.(2d) 217; 54 A.P.R. 217; 102 D.L.R.(3d) 57."

**(2) A chain of title commences with the registered Instrument, *other than a will*, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined.**

- q. It is no coincidence that the Nova Scotia legislators used the expression "conveys or purports to convey that interest..." in s.4(2) of this Act - "**purports to convey**" is the term considered by the Ontario Court of Appeal decision in *Fire v. Longtin* (1994), 112 D.L.R. (4th) 34 at pp 36, 39 and 42. [Check citation]
- r. See s.7(2) for exceptions to this subsection.
- s. "**Purports to convey**" see *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378(Carver, J., N.S.S.C.). An heir (holding a 1/3 interest) purported to convey the whole interest by warranty deed dated November 24, 1951 to Purchaser 1; he later gave a confirmatory warranty deed to Purchaser 1 on January 6, 1953. Purchaser 1 later conveyed the lands by warranty deed to Purchaser 2 on November 17, 1956. Justice Carver accepts the November 24, 1951, January 6, 1953 and November 17, 1956 deeds as purporting to convey the whole interest being conveyed. All three deeds were initially registered in the wrong county but recorded in the correct county in 1999. Justice Carver states, *inter alia*:

"This Deed (referring to the November 24, 1951) is not limited as to its wording. It can clearly be said to "convey or purport to convey" all interest in the land."

...

“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.”

...

“Pursuant to s.4(2) of the Act, a Deed dated over 40 years ago, even if not registered until 1999 in the proper registry, can operate as a valid root of title.”

See also the Ontario Court of Appeal decision (approved by the Supreme Court of Canada) in *Fire v. Longtin, supra*, at page 42. The term clearly includes those cases in which "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." The expression "purported to mortgage" is used in *Canada Permanent Trust Company v. MacLeod, MacLeod, and Bambury and Walsh* (1980), 39 N.S.R. (2d) 636 (Hallett, J.) to describe a mortgage executed on behalf of an estate by an executor who had previously been removed from his executorship by the Probate Court. *Canada Permanent* was appealed, 39 N.S.R. (2d) 629, but the appeal is unrelated to the use of this expression.

- t. **Conflicting interests found in instruments registered prior to the 40 year search limit.** In *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18, the defending owner's solicitor had actual knowledge of the competing claim but, as that knowledge came from an instrument registered outside the 40 year statutory period, such notice did not defeat his title established within the 40 year period within the Registry Office records. The Ontario Court of accepted this as the correct approach in *Tkach* and in *Fire* as to do so would defeat the intended purpose of the Act. The Supreme Court of Canada confirmed this approach in *Fire*.
- i. As to “Actual notice” see the differences between the majority and dissenting decisions in *National Sewer*, below, on the issue of actual notice. The majority held that one party had "actual notice" by virtue of instruments registered before the required search period. Osborne, J.A., dissenting, reasoned at page 33 that the party had no "actual notice" by reason of instruments registered before the 40-year search period:
- "If the title search period is 40 years, as it manifestly is under Part III of the Act, it must follow that instruments registered outside the 40-year period cannot be the source of actual knowledge referred to in Part I of the *Registry Act*..."
- In *Fire v. Longtin*, below, at page 42 of the Ontario Court of Appeal decision, it, and by adoption, the Supreme Court of Canada stated, *obiter dicta*, referring to *National Sewer*, that "I agree with the full and compelling dissenting reasons of Osborne, J.A., on this issue..."
- ii. At page 42 of the Ontario Appeal Court decision in *Tkach* (adopted in its entirety by the Supreme Court of Canada on *Tkach*), Madame Justice McKinlay stated:
- "Indeed, if the decision of this court in *National Sewer Pipe* is correct - that the grantor under a conveyance which constitutes a root of title must have had a good

title to convey - then it follows that the only safe search is one back to the original grant from the Crown."

- u. **What is a root?** When considering **an instrument** as a possible root of title ensure that the instrument purports to convey the fee simple without words of limitation. See *Penney v. Hartling (1999)*, 177 N.S.R.(2d) 378, *supra*. 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 (assuming the same are valid). Beware of **Sheriffs' deeds** as they may only convey a partial interest - see *The Marketable Titles Act*, Anthony L. Chapman, below.
- v. **No registered instrument which is at least 40 years old.** See *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited (1998)*, 169 N.S.R. (2d) 184, (MacLellan, J.). From the headnote: "The first registered deed to a property in 1973 contained recitals indicating the previous owners and how the grantor owned the property based on an unrecorded deed and will - At issue was whether the 1973 deed satisfied the requirements of a valid chain of title under s. 4 of the *Marketable Titles Act* - It was submitted that the recitals extended the paper title beyond the required 40 year period and therefore provided marketable title under the *Marketable Titles Act* - The Nova Scotia Supreme Court held that the *Marketable Titles Act* did not apply because there was no registered instrument which was at least forty years old - Furthermore, although recitals could fill a previous gap in the chain of paper title, they did not establish a 60 year chain of title as required by common law." At paragraph [10] his Lordship states:

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

[11] I further find that while Section 4(2) 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 sixty years as required by the common law. (See *Landry v. O'Blenis (1995)*, 146 N.S.R. (2d) 76), because the recitals do not state 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. "

Could the parties have established, alternatively, that vendor had valid possessory title based on the *Limitations of Actions Act* supported by further registered affidavits evidencing use and occupation? See notes to s.7 re possessory title.

- w. **Missing roots?** Consider:
- i. **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.
  - ii. **Railways:** Beware of railway "rights of way" - you will probably 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* (1998), 172 N.S.R.(2d) 89 (N.S.S.C., Carver, J.) as to right to sell. The NSCA unanimously dismissed an appeal on June 3, 1999 ([1999] N.S.J. No. 195 (Q.L.)) then denied leave to appeal to the Supreme Court of Canada - *Canadian Pacific Ltd. Et al. V. Lowe*, 1999 NSCA 115, Cromwell, J.A., October 5, 1999.

(From headnote of the trial decision) In 1867, the Windsor and Annapolis Railway (WAR) was incorporated - It constructed a railroad on expropriated land - Title to the WAR right of way was registered in 1876 - In 1870, the Western Counties Railway Co. (WCR) was incorporated to build and operate a railroad from Yarmouth to Annapolis - The WCR and the WAR combined to form the Dominion Atlantic Railway (DAR) - The DAR leased its railway to the CPR - Later, the CPR abandoned part of the right of way - Lowe used a portion of the abandoned right of way to construct a private airstrip - The CPR applied for a declaration that Lowe was trespassing, an injunction and damages - **The Nova Scotia Supreme Court held that the DAR/CPR continued to hold the right of way in fee simple** - The court issued an injunction against Lowe and awarded \$100 nominal damages.

See also *Wotherspoon v. Canadian Pacific Ltd. et al. Pope et al. v. Canadian Pacific Ltd. et al.* (1987) 39 D.L.R. (4th) 169, (Supreme Court of Canada) re disposition of railway lands.

- x. **Alternate root? Director, Veterans Land Act deeds.** Hamilton, J., in *Carmichael v. Durant* (1995), 143 N.S.R.(2d) 234; 411 A.P.R. 234 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 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 at paragraphs 6 and 7:

"[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."

- y. **Is a mortgage a good root of title under MTA?** Separate discussions with Charles MacIntosh, Q.C., John Cameron, and Adrian Campbell (February 1999) and a review of chapter 12.1 of Mr. MacIntosh's *Nova Scotia Real Property Practice Manual*, Butterworths 1998, suggest that a mortgage creates a charge in land but may not convey sufficient interest in land to constitute a root of title. In their views it is doubtful that a mortgage is a sufficient root. 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?
- z. **Wills?** In *Olsen Estate v. ASC Residential Properties* (1990), 102 N.S.R. (2d) 94 (Nova Scotia Supreme Court, Hall, J.) a Will was found to be good root; this case may be supplanted by the statutory requirement that a **chain of title** commence with a registered instrument other than a will. In *Boyer v. Throop* (1993), 129 N.S.R.(2d) 60, (Nova Scotia Supreme Court, Stewart, J.) The court held that a will must be probated to prove it is the last will of the deceased and further held that possessory title was not an alternative where good paper title was available or proof thereof would not require unreasonable demands."
- aa. **Deeds are effective from date of execution**, not the date of recording: *Dooks v. Rhodes* (1982), 52 N.S.R. 2d) 650. In *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378, Carver, J. stated: "Pursuant to s.4(2) of the Act, a Deed dated over 40 years ago, even if not registered until 1999 in the proper registry, can operate as a valid root of title."
- bb. **Break in chain of title**. In *Boland v. Berthelot* (1992), 107 N.S.R. (2d) 187 (Boudreau, J.) 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 facie* evidence of title and possession and affidavit evidence confirmed possession of over 40 years claimed by seller. In *Interlake Developments Ltd. v. Slauenwhite* (1988), 86 N.S.R. (2d) 23 (Davidson, J.) a recital in a 1947 deed referring to an unregistered 1914 deed was held to establish paper title of over 60 years.

- cc. **Reliance on recitals - Accounting for "all the heirs"**. *Quinn v. Pilkington*, (1995), 144 N.S.R. (2d) 13 (Goodfellow, J.) - Reliance on 1904 recitals re heirs (did not recite "all the heirs"), extensive transfers and title assertions over an extended period of time - Court concluded that 1904 deed was from "all the heirs".

**(3) A chain of title may commence before or after the coming into force of this Act.**

~~(4) Notwithstanding the *Intestate Succession Act* and the *Descent of Property Act* but subject to Section 5, an interest in land, whether arising before or after the coming into force of this Act, that has not vested pursuant to an Instrument that is registered is extinguished by a registered Instrument, *other than a will*, that conveys or purports to convey that interest in the land and is executed by a person with a marketable title, upon the expiry of~~

- ~~———— (a) the twenty-year period immediately following the vesting of the interest;~~
- ~~———— (b) the ten-year period immediately following the attainment of the age of majority by the person with the interest;~~
- ~~———— (c) where the person with the interest is of unsound mind, the ten-year period immediately following the person ceasing to be of unsound mind or the forty-year period immediately following the vesting of the interest, whichever is earlier; or~~
- ~~———— (d) the three-year period immediately following the coming into effect of this Act, whichever i~~
- ~~(5) Nothing in this Section extinguishes any interest in land except as provided by subsection (4).~~

4(4) Nothing in this Section extinguishes any interest in land.

**4A Notwithstanding the *Intestate Succession Act* and the *Descent of Property Act* but subject to Section 5, an interest in land, whether arising before or after the coming into force of this Act, that has not vested pursuant to an instrument that is registered pursuant to an instrument that is registered pursuant to the *Land Registration Act* or the *Registry Act*, is extinguished by a registered Instrument other than a will that conveys or purports to convey that interest in the land and that is executed by a person with a marketable title to that interest, upon the expiry of**

- (a) the twenty-year period immediately following the vesting of the interest;**
- (b) the five-year period immediately following the attainment of the age of majority by the person with the interest; or**

- dd. INFANTS: 5 years from the date the infant receiving such interest attains majority - plus up to 19 years (age of majority) for a maximum possible period of 24 years (allow 25 years for infants *en ventre sa mere*).



**(c) where the person with the interest is of unsound mind, the five-year period immediately following the person ceasing to be of unsound mind or the twenty-five year period immediately following the vesting of the interest, whichever is earlier.**

- ee. INCOMPETENTS: maximum of 25 years from date interest arose.
- ff. Former s.4(4) does not apply to an adverse interest 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 - s.7(3) [not amended to refer to new 4A] .
- gg. Under former s.4(4), now s.4A, there must be a competing and adverse registered chain of title to extinguish an interest in land "... that has not vested pursuant to an Instrument that is registered". Interests that may be extinguished unless the holder files a Notice of Claim include interests under:

- an intestacy** (*Descent of Property Act* or *Intestate Succession Act*),
- an unregistered Will,**
- an unregistered (e.g. lost) deed,**
- an unpaid vendor's lien, and**
- dower.**

See *The Marketable Titles Act Revisited*, Catherine S. Walker, Q.C. and John Cameron, RELANS/Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, March 5, 1999 - notes on, and examples of, Notices of Claim. Also *Requisite Elements For Extinguishing Of Interests Section 4, Appendix "D", The Marketable Titles Act A New Beginning*, Catherine S. Walker, Q.C., Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 12, 1996. Also *Questions & Answers, Marketable Titles Act*, Catherine S. Walker, Q.C., RELANS/Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 19, 1997.

- hh. Dower is now abolished by LRA but may already have been answered by any one of the following:
  - i. Joint Tenancy (common law - not solely held),
  - ii. Land held in Trust or "to uses" (common law - not solely held),
  - iii. Partnership lands (common law - not solely held),
  - iv. Unimproved land (*Dower Act*, s.4),
  - v. Uncondoned adultery of wife (*Dower Act*, s.8),
  - vi. Wife elected provisions under husband's will (*Dower Act*, s.1),
  - vii. Wife has released (barred) dower,
  - viii. Wife has died (life interest),
  - ix. Husband was alive on or after October 1, 1980, (*Matrimonial Property Act*, s.33).See: *Anger & Honsberger Real Property*, below, s.707.8, p.184 for exceptions to dower generally.

- ii. New s.4A requires a **“registered instrument other than a Will”** to extinguish a former s.4(4), new s.4A, interest. **To take advantage of this section an owner with marketable title may have to register a deed (a “registered instrument”) from him/herself to him/herself to operate as the extinguishing instrument before a notice of claim is filed.**
  
- jj. Note that filing a s.5 notice of claim does not validate or extend an interest that has been extinguished by subsection 4(4) **[not amended to read 4A] or that has expired or is invalid** - s.5(4). An owner may establish that the interest of a person filing a Notice of Claim "has...expired or is invalid" before the above time periods have elapsed; the following may be starting points:
  - i. **Adverse possession generally.** Refer to the *Limitation of Actions Act*, R.S.N.S. 1989, c.258.
  
  - ii. **Adverse Possession - missing heirs.** For an example of how the Courts may apply these principles see *Nemeskeri v. Nova Scotia (Attorney General) v. Meisner* (1993), 125 N.S.R. (2d) 67 (N.S.C.A., Freeman, J.A.):
    - (1) *Limitations of Actions Act*, paragraphs 5 and 9:

"[5] The trial judge found that the respondent Nemeskeri had established a good chain of title extending over 40 years and this was sufficient to bar any other claimant under s. 20 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 168, which provides as follows:

'No entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, first accrued, was under any of the disabilities mentioned in the next preceding section, or by any person claiming through him, but within forty years next after the time at which such right first accrued although the person under disability at such time has remained under one or more of such disabilities during the whole term of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired.'" [Ed. note: See *R.B. Ferguson Construction Ltd. V. Ormiston* (1989), 91 N.S.R. (2d) 226 (N.S.C.A.) At paragraphs 23 to 31 as to how restrictive an approach the Court of Appeal will take in extending the limitation period from 20 to 40 years by reason of absence from the Province.]

...

[9] The second issue relates to title. On that issue there was no evidence to sustain the appellants' claim. As noted by the trial judge any claim by the heirs of David Moland was barred by the limitation period. Indeed there was no evidence that the parties to the quit claim deeds to the appellant had or claimed any interest in these

lands before executing the deeds. In the result the appeal is dismissed with costs, which are fixed at forty per cent of the costs awarded at trial.”

- iii. **Constructive displacement.** Consider the possible application of the “constructive displacement” principle when there are missing heirs. See the trial judgment, (1992), 115 N.S.R. (2d) 271 (Tidman, J.), paragraphs 67-71.
- iv. **Laches.** Consider the application of the “laches” principle when the claims have long been dormant. *MacDonell v. M & M Developments Ltd. et al.* (1997), 164 N.S.R.(2d), 81 (S.C.) *MacDonell v. M & M Developments Ltd. et al.* (1998), 165 N.S.R.(2d) 115 (C.A.):

"[37] Fundamental to any finding that a true owner of land is barred from bringing an action for trespass, is a finding by a court that the true owner has been dispossessed for a period in excess of that period which is permitted by the Limitation of Actions Act for the bringing of the action (ss. 10, 11 and 20 of the Act)."

- v. *Intestate Succession Act*, c.236
  - (1) Section 3. This Act applies to deaths on September 1, 1966 and later. The *Decent of Property Act* applied before that date.
  - (2) **How wide is the net anyway - are you looking for too many heirs?** Section 8. The benefit of section 8 extends to the living children of an Intestate’s brothers and sisters only - and not to his/her grandnieces and grandnephews by Intestate’s nieces and nephews who predecease Intestate. In *Re Chisholm Estate* (1996), 155 N.S.R. (2d) 36, (MacLellan, J., Probate Court) an intestate died leaving his brothers and sisters as his heirs. Four of the siblings were deceased but had children surviving them. A nephew and a niece were also deceased but had children surviving them. At issue was whether the grand-nieces and grand-nephews were entitled by representation to inherit part of the estate pursuant to s. 8 of the *Intestate Succession Act*. The Court **interpreted s. 8 of the Act to mean that only the children of brothers and sisters could take the share of an estate intended for their parent. Children of predeceased nieces and nephews were not entitled to a share in the estate.**
  - (3) **Illegitimate heirs?** Section 15. *Tighe v. McGillivray Estate et al.* (1994), 127 N.S.R.(2d) 313; 355 A.P.R. 313,

"An illegitimate child claimed as an heir to his natural father's estate. The result of ss. 2(b), 4(7) and 16 of the *Intestate Succession Act* was that an illegitimate child could inherit from its natural mother, but not its natural father. The child claimed the Act violated equality rights under s. 15 of the *Charter of Rights and Freedoms*."

"The Nova Scotia Court of Appeal held that the provisions violated s. 15 of the Charter and were not reasonable limits prescribed by law under s. 1. The court stated that the appropriate remedy under s. 24(1) was to read into s. 16 the words "or father", thereby entitling illegitimate children to claim as heirs to their natural father's estate."

Roberta Clarke, *Update in Practice: Intestate Succession Act*, CLE Materials, Estate Practice Conference, October 8, 1993.

Timothy C. Matthews, *Estate Problems Effecting Title*, CLE Real Estate Materials, October 9, 1992.

- kk. Section 4(4) [4A] provides a means of extinguishing "an interest in land that has not vested pursuant to an **instrument** that is **registered**". In his paper *How To Interpret The Registry Act*, Arthur G. H. Fordham, Q.C., (C.L.E. Continuing Education Program, March 18, 1989) reviews the history and limitations of the *Registry Act*. Mr. Fordham, referring to a 1933 amendment to the *Registry Act* adding what is now s. 25, states at page 11:

"The combined effect, therefore, of the common law and the equitable rules respecting priority of interests in real property and Sections 17 and 25 of the *Registry Act* may be stated as follows:

Legal rights created by a registered instrument **or not created by an instrument** are good against all the world; equitable rights created by a registered instrument are good against all the world; legal rights created by an unregistered instrument are good against all the world except a *bona fide* purchaser and without actual notice claiming for valuable consideration under a subsequent instrument and those claiming under him; equitable rights, whether created by an unregistered instrument or not, are good against all the world except a *bona fide* purchaser and without actual notice claiming for valuable consideration under a registered instrument and those claiming under him."

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

- ll. Each person wishing to preserve a claim under a notice must sign such notice (Regulation 7(1):

"...mere reference in paragraph 7 [of the draft Notice of Claim] by a claimant by a claimant to other owners of interests in the land does not protect those interests. Thus a lawyer searching title may disregard the interests of persons other than the claimant who signs the Notice in determining whose interest is protected by Section 5.1."

*Marketable Title Legislation Revisited Notices of Claim, Extinguishment Provisions*, Catherine C. Walker, Q.C. and John R. Cameron, RELANS/CLE Real Estate '99 Conference

, March 5, 1999. *The Marketable Titles Act*, Anthony L. Chapman, Canadian Bar Association - Nova Scotia, Professional Development Conference, Halifax, Nova Scotia, April 19, 1996 at p.22

- (2) A notice of claim shall be in the form prescribed by the regulations.**
- (3) A notice of claim shall include**
  - (a) the name of the claimant;**
  - (b) the names of the owners of all interests in the land known to the claimant;**
  - (c) the address of the claimant;**
  - (d) a description of the land in which the interest is claimed;**
  - (e) the nature of the interest in the land claimed;**
  - (f) a summary of the basis of the claim, including the recording particulars of every Instrument constituting the chain of title on which the claim is based; and**
  - (g) such other information as the regulations prescribe.**
- (4) A notice of claim does not validate or extend an interest that has been extinguished by subsection 4(4) or that has expired or is invalid.**
- (5) A new notice of claim may be registered pursuant to this Act and, for that purpose, an earlier notice of claim is the Instrument on which the claim is based.**
- (6) For greater certainty, lack of knowledge or absence from the Province on the part of any person does not extend the period during which a notice of claim may be registered.**

mm. See s.7(3) - interests may be preserved by acknowledgment specifically referred to in the description of land in a *deed* forming part of the chain of title.

- 6 (1) In this Section, "tax deed" means**
- (a) a certificate that has or purports to have the effect of vesting land that was to be sold for non-payment of taxes in a city, town, municipality of a county or district, regional municipality, village commissioners or service commission as defined by the Municipal Affairs Act; or**
  - (b) a deed from a city, town, municipality of a county or district, regional municipality, village commissioners or service commission as defined by the Municipal Affairs Act to land sold or purportedly sold for non-payment of taxes.**

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

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

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

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

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

nn. TAX DEEDS

- i. 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<sup>34</sup>.

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34 The Continuing Legal Education Society Of Nova Scotia, March 5<sup>th</sup>, 1999.

- oo. In *MacNeil v. Nova Scotia (Attorney General) et al.*<sup>35</sup> 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.

- pp. In *James Arnold Desmond v. Municipality of The District of Guysborough*<sup>36</sup>, "*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

"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.*<sup>37</sup> 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

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35 (2000), 183 N.S.R.(2d) 119; 568 A.P.R. 119 (N.S.C.A.)

36 (2000), 186 N.S.R. (2d) 123

37 (1995), 146 N.S.R.(2d) 227; 422 A.P.R. 227, Nathanson, J.

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."

- qq. 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.*<sup>38</sup>, 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."

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.

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38 (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.



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 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.

**7 (1) This Act does not apply to**

**(a) any interest in land created or preserved by a statute;**

rr. See *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18 (Ont. C.A.). Hydro's interest in the land in question came through a deed from a private landholder to a predecessor power company. The land was subsequently conveyed by statute to Hydro in 1924 with notice of such transfer registered in 1926 - all these events occurred outside the 40-year search period. Hydro's interest was held to arise from the 1906 deed and was not "...a claim arising under any Act" which would have fallen within their corresponding exception under their *Registry Act*. Sections of the *Ontario Power Corporation Act* prohibiting adverse possession against Hydro was held to have no application to the case at bar.

ss. Is an interest protected by the *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 against a protected parcel.

**(b) the interest of a municipal government in a public street, road, highway or road reserve;**

**(c) a right of way or easement in favour of a public utility or a municipal government;**

- (d) **mineral rights; or**
  - (e) **an easement or right of way that is being *used and enjoyed*.**
- (2) **Subsections 4(1) and (2) do not apply to**
- (a) **land in respect of which a certificate of title has been issued under the *Quieting Titles Act*;**
  - (b) **land registered under the *Land Titles Clarification Act* or the *Land Titles Act*; or**
  - (c) **any interest in land that a registered owner may no longer recover by reason of the *Limitation of Actions Act*.**
- tt. Adverse Possessory interests (Squatters' Rights) are protected - holder of "paper title" cannot reestablish rights lost to adverse possession using this Act. See *R.B. Ferguson Construction Ltd. V. Ormiston* (1989), 91 N.S.R. (2d) 226 (N.S.C.A.) At paragraphs 23 to 31 as to how restrictive an approach the Court will take in extending the limitation period from 20 to 40 years by reason of absence from the Province. See *Nemeskeri*, above.
- (3) **Subsection 4(4) [not amended to "4A" by LRA] does not apply to an adverse interest acknowledged or specifically referred to in the description of land in a deed [ed. note - not an "*Instrument*"] forming part of the chain of title to the land.**
- uu. Habendum Clauses appear to be caught by common law in addition to adverse interests found in "descriptions of land" under the Act. See *Roman Catholic Episcopal Corp. of Halifax v. Denson and Godsell* (998), 168 N.S.R.(2d) 356, Nova Scotia Supreme Court, Kelly, J., January 23, 1998: The habendum clause in a 1931 deed to a church ended "In trust for the purpose of a church or cemetery, or both" - Purchasers of the property raised an objection to title, asserting that the title was unmarketable and that the church was a trustee unable to convey to a party other than a church or cemetery - The Nova Scotia Supreme Court held that the objection to title was valid - The court opined that the habendum clause explained the uses that the grantor wished for the property and modified or lessened the grant but did not contradict the grant of a fee simple - The court also opined that a valid trust was created respecting the land, limiting the transfer of the land to a church or cemetery.
- (4) **Section 3 of the Limitation of Actions Act does not apply to any time period set out in this Act.**
- 8 (1) **The Governor in Council may make regulations**
- (a) **prescribing the form of the notice of claim authorized by this Act;**
  - (b) **prescribing additional information to be included in a notice of claim;**

- (c) **prescribing a system of indexing notices of claims;**
  - (d) **defining any word or expression used in this Act and not defined in this Act;**
  - (e) **respecting any other matter or thing that the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.**
- (2) **The exercise by the Governor in Council of the authority in subsection (1) is regulations within the meaning of the Regulations Act.**
- 9 For greater certainty, nothing in this Act affects any interest of Her Majesty in any land.**
- vv. *Comments About Underlying Crown Grants*, Association of Nova Scotia Land Surveyors' Continuing Education Program, April 29, 2005. Available at NSBS Library Secondary Sources.
- ww. *Affidavit Templates & Comments For Documenting Possessory Interests*, Association of Nova Scotia Land Surveyors' Continuing Education Program, April 29, 2005. Also presented at 2006 Real Property Conference *Crown Interests and Due Diligence Under LRA*, February 2, 2006.
- 10 This Act has effect on and after July 1, 1996.**

**Amendments:**

1. November 24, 1996 - added reference to *Robertson v. McCarron* - s.4(1), s.4(2).
2. June 20, 1997 - added reference to *R.B. Ferguson* case under s.7(2)(c) - 40 year absence from Nova Scotia
3. February 1, 1998 - added reference to *Dow v. Zinck and Young*, and Michael LeBlanc's Pre-Trial Brief re effect of the Act on tax deeds under s.6 (Tax Deed challenge).
4. May 29, 1998 - added reference to *Donald Wayne Gunning v. Trans Canada Credit Corporation Limited* (1998), 169 N.S.R. (2d) 184 (MacLellan, J). S.4(2) - requirement for registered instrument to start chain of title; 60 year "common law" title search period applied - 56 years of title insufficient.
5. February 21, 1999 - made editorial changes and appended Michael LeBlanc's Pre-trial Brief, (3 above) for the March 5th, 1999 RELANS/CLE Real Estate Conference with his permission.
6. May 10, 1999 - added reference to *Penney v. Hartling* (1999), 177 N.S.R.(2d) 378 (Carver, J., N.S.S.C.) under s.4(1) and 4(2). Also Editorial changes.
7. May 22, 1999 - Editorial changes.
8. October 24, 1999 - added reference to *Mason v. Mason Estate* (1999), 176 N.S.R. (2d) 321 (NSCA) for discussion of constructive possession and colour of right under notes to s.7(2).
9. March 28, 2000 - added reference to *MacNeill v. Chisholm*, 2000 NSCA 31, (February 16, 2000, Cromwell, J.A.) under notes to s.6(2).
10. June 22, 2002 - major editorial changes and incorporation of *LRA* amendments to the Act.

**References:**

1. *Marketable Title Act Revisited, Notices of Claim, Extinguishment Provisions*, Catherine C. Walker, Q.C. and John R. Cameron, RELANS/CLE Real Estate '99 Conference Materials, March 5, 1999.
2. *Marketable Titles Act*, S.N.S. 1995-96, Chapter 9, Working Notes & Annotations, Revised February 1, 1999, with copies of Ontario cases and Michael LeBlanc's Pre-trial Memorandum on Tax Deeds annexed, Garth C. Gordon, Q.C., RELANS/CLE Real Estate '99 Conference Materials, March 5, 1999.
3. See *Marketable Titles Act Q & A's*, Catherine Walker, Q.C., RELANS/CLE Conference, April 18, 1997.

4. Delivery Notes on *Marketable Titles Act & Notes on Tax Cases*, John R. Cameron, Real Estate, New Marketable Titles Legislation, RELANS/CLE Conference, Kentville, Nova Scotia, May 7, 1996.
5. See *The Marketable Titles Act*, Anthony L. Chapman, Canadian Bar Association - Nova Scotia, Professional Conference, Halifax, Nova Scotia, April 19, 1996.
6. See *The Marketable Titles Act A New Beginning*, Catherine S. Walker, Q.C., Continuing Legal Education Society of Nova Scotia Property Law Conference Materials, April 12, 1996.
7. *Nova Scotia Real Property Practice Manual*, Charles W. MacIntosh, Q.C., Butterworths, 1988, as updated.

#### Miscellaneous Requisitions and cases:

1. **NSPI Flooding Rights.** The Small Claims Court of Nova Scotia held that certain flooding rights held by Nova Scotia Power Corporation at Murphy Lake, Hants County, Nova Scotia "...did not materially affect the enjoyment of the property nor do those rights affect marketability of the property." *Phillip and Wanda Ohri v. R. Michael MacKenzie and Alexander, MacKenzie and Proudfoot, a Partnership*, S.C.K. No. 11371, October 9, 2002, James A.D. Armour, Adjudicator.
2. **Oil Burner Contracts.** In *Noerat Ollah Eblaghi and Carriage Homes Incorporated* (1985) unreported, S.H. No. 53733, October 9, 1985, an application was made under the *Vendors and Purchasers Act* to determine the validity of an objection to title concerning a registered oil burner agreement as an encumbrance. It was argued that the oil burner agreement, which purported to give notice that the oil burner remained a chattel and did not form part of the realty, was not a registerable instrument under the *Registry Act* and, instead of being registered a the real property Registry, should have been registered as a chattel at the Chattel Mortgage Registry. Madame Chief Justice Glube accepted this argument and found the objection to title to be invalid.

"IT IS ORDERED that the oil burner agreement dated the 18th day of November 1962 between Donald C. Huntley and Enterprise Stoves Limited which was recorded at the Registry of Deeds, at Halifax, in Book 1862 at page 655 does not constitute a cloud against, or in any way bind or affect title to the property at 37 First Street, Middle Sackville, Nova Scotia and does not constitute a valid objection to title." i)

Now redundant with *LRA*, s.40(3A).