

**Mineral Rights, Non-mineral Rights and the *Land Registration Act* in Nova Scotia  
Discussion Notes**

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**Purpose**

1. This Discussion Note examines how purported mineral rights and non-mineral rights may be dealt with under the Nova Scotia land registration system established by the *Registry Act* and the *Land Registration Act*.
2. Registration and recording considerations under the *Land Registration Act*, "LRA", are summarized in *Schedule "A"*. Schedule "A" reflects the author's views which are not necessarily shared by POL or others.

**Parallel Registration Systems**

3. Nova Scotia has parallel registration systems for mineral rights and surface rights in land:
  - a. The Nova Scotia Registry of Mineral and Petroleum Titles established, *inter alia*, under the *Mineral Resources Act*, "MRA", for minerals and other resources is administered by the Department of Natural Resources.
  - b. The land registration system for surface rights is administered by Service Nova Scotia & Municipal Relations.

**The Common law**

4. According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines' Case* (1568), 1 Plowd. 336, 336a., all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore."<sup>1</sup>

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<sup>1</sup> *British Columbia (Attorney General) v. Canada (Attorney General)*, 1889 WL 10367 (Privy Council), 1889 CarswellNat 13.

***Mineral Resources Act***

5. Title to minerals in Nova Scotia vests in the Crown in right of the province under *MRA*, s.4:

"4 (1) All minerals are reserved to the Crown and the Crown owns all minerals in or upon land in the Province and the right to explore for, work and remove those minerals.

(2) Every grant of Crown lands made on or after the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, be construed and held to reserve to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.

(3) Every grant of Crown lands made at any time on or before the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, and notwithstanding the provisions of such conveyance or of any enactment or law, be construed and held to have reserved to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.

(4) Every person who has acquired Crown lands by conveyance or prescription is deemed not to have acquired the minerals in or upon the Crown lands or the right to explore for, work and remove those minerals and no person is entitled to acquire minerals or such right by conveyance or prescription. 1990, c. 18, s. 4."

6. The definition of "mineral" is key. *MRA*, s.2(s), states:

"2.(s) "mineral" means a natural solid inorganic or fossilized organic substance and a substance prescribed to be a mineral, but does not include

- (i) ordinary stone, building stone or construction stone,
- (ii) sand, gravel, peat, peat moss or ordinary soil,
- (iii) gypsum,
- (iv) limestone, except that which is vested in the Crown<sup>2</sup>, and
- (v) oil or natural gas,

unless declared to be a mineral by the Governor in Council."

Anhydrite, barite, celestite, coal, dolomite, gold, limestone, salt, silica and silver are clearly considered minerals as they are subject to royalties under s.71 of the *Mineral Resources Regulations*. *The Declaration of Limestone Deposits as a Mineral in the Marble Mountain*

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<sup>2</sup> Refer to the *Declaration of Limestone Deposits as a Mineral in the Marble Mtn. Area*. (N.S. Reg. 170/93).

*Area*, O.I.C. 93-913 November 23, 1993 N.S. Reg. 170/93 declares limestone deposits occurring in, upon and under certain Crown lands in the Marble Mountain area to be a mineral pursuant to *MRA* s.5.

7. The definition of "mineral" has been amended by a number of statutes from time to time before the current Act: if this is important in a particular search, reference should be made to the definition in effect at the relevant time.
8. Uranium is under federal jurisdiction as a work declared to be for the general advantage of Canada by the *Atomic Energy Control Act*<sup>3</sup>. A declaration that a work is for the general advantage of Canada transfers legislative powers, but not proprietary interests, to the Federal Government<sup>4</sup>. Refer to the *Mineral Resources Regulations*, s.74. Also refer to Howard M. Epstein, "The Living Rooms of the Nation -- The Criminal Code and other Federal Land-Use Regulatory Powers: Comments on *R. v. Clark*" (2005), 38 M.P.L.R. (4th) 234 at paragraph 18 respecting uranium related land use issues.
9. Other Regulations under the *Mineral Resources Act* at the date of this paper include: *Pictou County Geothermal Resource Area Designation* (N.S. Reg. 123/93) and *Springhill Geothermal Resource Area Designation* (N.S. Reg. 195/92 and 214/92).
10. The Nova Scotia Department of Natural Resources, "DNR", Mineral Resources Branch, website has the following helpful information:
  - a. *A Guide to Mineral Exploration Legislation in Nova Scotia*, Information Circular ME 58, Third Edition, Revised April 2007;
  - b. *A User's Guide to the 'One Window' Process for Mine Development Approvals*, Information Circular ME 56, 1997; and
  - c. You may download the Mineral Rights Disposition Map for the Province of Nova Scotia, the "Map", showing outstanding mineral interests in the province at <http://www.gov.ns.ca/natr/meb/download/dp046.htm>. It is in PDF format and in colour. A copy of the March 12, 2008 Map is attached as **Schedule B1**. Although the attachment is in a very small scale you can adjust the scale of the online map as required using "Zoom" tools in Adobe Acrobat™. You can print selected parts of the Map by clicking "Print Selected View" - see **Schedule B2**. DNR advised this author that they intend to have the Map online in realtime within two years.

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<sup>3</sup> Peter W. Hogg, *Constitutional Law of Canada* Third Edition, 1992, Carswell, Toronto, 715.

<sup>4</sup> *ibid.* pages 579-582.

11. Section 89 of *MRA* requires persons intending to produce gypsum or limestone that has not been declared to be a mineral in accordance with a non-mineral registration:

"89 No person shall, except in accordance with a non-mineral registration, carry out production of gypsum or limestone that has not been declared to be a mineral pursuant to Section 5. "

Sections 90-95 of *MRA* also apply. Subsection 90(2) provides:

"90(2) Where an applicant for a non-mineral registration required by Section 89 files with the Registrar

- (a) an application for a non-mineral registration in the prescribed form;
- (b) the prescribed documentation;
- (c) a written undertaking to commence production;
- (ca) evidence that satisfies the Minister that the applicant has delineated a deposit of gypsum or limestone that has not been declared a mineral pursuant to Section 5 within the proposed non-mineral registration area; and
- (d) evidence of the applicant's right to the gypsum or limestone including a right to surface access.

the Minister shall issue a non-mineral registration in the prescribed form."

12. The *Mineral Resources Regulations* (amended to N.S. Reg. 182/2008) also provide for the registration of gypsum and non-Crown limestone under *MRA*:

"64 An application for a non-mineral registration required by clause 90(2)(a) of the Act for mining gypsum and non-Crown limestone must be in Form 17."

Sections 65-68 of the Regulations also apply.

13. *MRA*, ss.39, 59, 72 and 100 limit the ability of persons with *MRA* permits, licences or leases to enter lands held by the surface rights owners. However, *MRA* ss.70-71, include expropriation powers for use when *MRA* interest holders and surface rights holders cannot reach agreement on the former's use of the surface lands. See *Fraser v. Shaw Group Ltd.*<sup>5</sup>

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<sup>5</sup> (2001), 2001 NSUARB 19, 74 L.C.R. 34, 2001 CarswellNS 540 (N.S. Utility & Review Bd.).

14. In 1994 the Nova Scotia Court of Appeal held that exploration licences under *MRA* are not interests in land<sup>6</sup>:

"The transfers of the licenses from Forgeron to Coxheath made no reference to the royalty interests. No authority has been cited to establish that a license issued in Nova Scotia conferred an interest in land. In *Re Milner's appeal*, 11 N.S.R. 522 the Court of Appeal decided that a license to search for minerals granted under c. 9, R.S. 4th Series, was assignable. Young, C.J. stated at p. 525:

Conferred by statute, it is a possession or right, whether it be accounted an interest in lands or not, plainly distinguishable from the numerous classes of licenses and easements, whether of pleasure or otherwise, to be found in the books.

The rights conferred on Forgeron by the licenses issued under the *Mineral Resources Act*, 1975 are entirely dependent on the wording of the statute. In my view there is nothing in that *Act* which indicates that the Legislature intended to confer a proprietary right in the lands or minerals covered by the license."

The court stated that it was unnecessary to determine if a mining lease under *MRA* conferred an interest in land in this case: this question now seems settled by *LRA* s.3(1)(g).

### ***Land Registration Act***

15. *LRA* excludes any interest under *MRA* from "interest" defined under *LRA*:

"s.3(1)(g) **"interest"** means any estate or right in, over or under land recognized under law, a prescribed contract or a prescribed statutory designation, including a right or interest under the *Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Implementation Act*, but **excludes any interest under the *Gas Storage Exploration Act*, the *Mineral Resources Act*, the *Petroleum Resources Act* or the *Treasure Trove Act*."**

Only an "interest" under *LRA* may be **registered** (*LRA*, ss.17 and 18) or **recorded** (*LRA*, s.47) under *LRA*. Registrations and recordings that do not comply with these requirements are void (*LRA*, ss.18(3) and 47(8)). Section 63, *LRA*, provides a procedure for the registered owner of a parcel to require cancellation of a recorded interest referenced in the parcel register by giving notice to the interest holder.

16. Mineral rights reserved to the provincial Crown under *MRA* are overriding interests under *LRA*, s.73(1)(a), as "interests" of Her Majesty in right of the Province that have been vested in Her Majesty pursuant to an enactment [*i.e. MRA*] rather than as "interests" defined in

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<sup>6</sup> *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (N.S. S.C.); affirmed (1994), 135 N.S.R. (2d) 259 (N.S. C.A.), 1994 CarswellNS 543.

*LRA*, s.3(1)(g). See paragraph 4 for a brief account of the Royal Prerogative in precious metals.

17. Under *LRA*, s.37(4)(b), an application for registration under *LRA* must set out the ownership of the fee simple and of **all other interests** in the parcel as follows:

"(4) An application shall be in the prescribed form and shall be accompanied by

...

(b) an opinion of title certified by a qualified solicitor **setting out the ownership of the fee simple and of all other interests in the parcel** and direct or indirect right of access to the parcel, if any, from a public street, highway or navigable waterway to the parcel appearing on the face of the record and that the solicitor's opinion is based on the abstract of title required by clause (c)."

18. The *Land Registration Administration Regulations* of April 3, 2007, s.23, provide that:

"23(1) Option agreements and rights of first refusal are prescribed contracts for the purposes of the definition of "interest" in clause 3(1)(g) of the Act.

(2) A prescribed contract may be recorded in a parcel register and, if recorded, is subject to the Act's recording and cancellation of recording provisions."

No other contracts were designated as "prescribed contracts" in the April 3, 2007 Regulations; the previous regulations (*e.g.* those effective April 10, 2006) were far more inclusive.

"Prescribed contracts

12 (1) Contractual rights respecting a parcel registered under the Act, **including but not limited to** option agreements and rights of first refusal, are prescribed contracts for the purposes of the definition of "interest" in clause 3(1)(g) of the Act.

(2) A prescribed contract may be recorded in a parcel register and, if recorded, is subject to the Act's recording and cancellation of recording provisions."

The limited scope of s.23 of the current Regulations is important as some non-mineral or mineral-related rights are licences. As licences are generally contractual some may not now be recordable under *LRA* as they are neither "interests" nor designated prescribed contracts.

19. See Anger & Honsberger "Law of Real Property", Third Edition<sup>7</sup>, §16:40 Licences at page 16-18 *et seq.*, for an analysis of licences. "Mere licences" and "Licences supported by contract" appear to be purely contractual in nature and may not be recordable under *LRA*. A

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<sup>7</sup> Anne Warner La Forest, (Aurora, Canada Law Book Company, 2005).

"licence coupled with grant of a legal interest" perhaps is recordable as part of the legal interest with which it is coupled.

20. Interestingly, the Land Registry Client Resource Material list of "Instrument Types and Associated Forms For LR Documents" (03/23/2008) cites Document Type 311 (Form 24 or 26) for "License" and Document Type 410 (Form 24 or 26) for "License Agreement". As the Regulations do not designate licences as prescribed contracts the notation of Document numbers 311 and 410 may be intended to apply to "licences coupled with grant of a legal interest".

### ***Marketable Titles Act and Conveyancing Act***

21. The *Marketable Titles Act*, "MTA", does not affect mineral rights; Sections 7 and 9 provide:

"7(1) This Act does not apply to

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

...

(d) mineral rights...

...

7(3) Subsection 4(4)<sup>8</sup> does not apply to 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. (emphasis added)

...

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

For more on Crown interests refer to Garth C. Gordon, Q.C., "Comments About Underlying Crown Grants". Association of Nova Scotia Land Surveyors' Continuing Education Program, April 29, 2005 - available online through the Nova Scotia Barristers' Society Library's Secondary Sources.

22. If a non-mineral interest was created before April 11, 1956 consider the possibility that it may have been a life estate that has been carried forward inappropriately after the person on whose life the interest was based has died. If it was, you may have grounds to disregard or remove the interest. The Nova Scotia Court of Appeal decision in *McDonnell Estate v. Scott World Wide Inc.*<sup>9</sup> stated:

"26 ... Similarly, if it could be argued that the intention of all of the grantors was to except out of the conveyance, a fee simple interest in the trees, in favour of Edward C. McDonnell, the laws respecting conveyancing which existed in 1900 would require that the exception be made in favour of Edward C. McDonnell "and his heirs". **Without the**

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<sup>8</sup> Not amended to "4A" by I.R.A amendments to MTA.

<sup>9</sup> (1997), 149 D.T.R. (4th) 645, 160 N.S.R. (2d) 349, 473 A.P.R. 349, 11 R.P.R. (3d) 186 (N.S. C.A.).

words "and his heirs", such a conveyance amounts only to a conveyance of a life estate. This law was changed by the *Conveyancing Act*, S.N.S. 1956, c. 3; however, the conveyance under consideration in this appeal must be viewed in light of the laws which existed in 1900.

27 In *Millard v. Gregoire* (1913), 47 N.S.R. 78 (N.S. C.A.) this Court held that the omission of the word "heirs" from a deed conveying land to a mortgagee had the effect of conveying a life estate only and not the fee simple. The Chambers judge, in his decision, did not deal with this issue. ..." (Emphasis added)

The *Conveyancing Act* was assented to on April 11, 1956. Note that mortgages under *LRA* do not transfer title - *LRA* s.51(1) - but have effect as security, *LRA* s.51(2).

23. If you are looking for an escape hatch to delete an older purported non-mineral interest, determine if the purported interest may be removed from the record as an expired life interest as discussed above in paragraph 22. Be careful not to go behind the *MTA* root of title for this purpose because *MTA* s.4(2) applies to "purported" conveyances<sup>10</sup> as follows:

"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."

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<sup>10</sup> "Purports to convey": see *Pemey 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.



## Some historical notes about mineral rights in Nova Scotia

24. By Letters Patent dated August 25, 1826 King George IV granted

"... all the mines of gold and silver, coal, ironstone, limestone, slatestone, tin, copper, lead and all other mines, minerals and ores belonging to his Majesty, within the Province of Nova Scotia... and minerals of all descriptions in the Province of Nova Scotia ... save and except ... all such mines as, by virtue of any leases or grants from the King or his predecessors, or any governor or governors of the said province had been open and were then in course of working by any person or persons whomsoever ..."

to his brother Frederick, Duke of York and Albany, for a term of 60 years. The Duke assigned these rights to certain of his creditors who later formed the General Mining Association. In 1837 *Taylor v. The Attorney General* held that the "Province of Nova Scotia" in this grant included Cape Breton Island<sup>11</sup>.

25. The Estate of the Duke of York and Albany and his assigns, with others, surrendered their mineral rights to Nova Scotia in 1858 but retained certain limited rights for a further 28 years. Chapters 1, 2 and 48, S.N.S. 1858, give effect to the surrender and replacement rights.
26. There are a number of other pre-Confederation Nova Scotia mineral-related statutes but those are beyond the scope of this paper.
27. Under the 1867 *British North America Act*, "BNA", mineral rights held by Nova Scotia before Confederation were retained by the province after Confederation:

"109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."<sup>12</sup>

28. Refer to Peter W. Hogg, *Constitutional Law of Canada* Third Edition, 1992, Carswell, Toronto, and other constitutional law resources for assistance when considering the respective rights of the two levels of government in real property and minerals in particular

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<sup>11</sup> (1837), 59 L.R. Chancery, p.418.

<sup>12</sup> This section was considered in *British Columbia (Attorney General) v. Canada (Attorney General)*, *supra*, fn. 9.

circumstances. Refer also to *British Columbia (Attorney General) v. Canada (Attorney General)*<sup>13</sup> respecting mineral rights.

### **Selected Post Confederation Nova Scotia Enactments**

29. Following Confederation Nova Scotia passed a number of statutes dealing with mines and minerals. These include the following selected statutes - this is not a complete list:
- a. *An Act to Consolidate the Statutes Relating to Mines and Minerals* passed June 14, 1869.
  - b. *The Mines and Minerals Act, 1892*, which consolidated acts relating to Mines and Minerals.
  - c. *The Crown Lands Act* passed April 22, 1910. Sections 21-24 of this Act reserve minerals to the Crown in right of the province with separate provisions for the following periods:
    - i. from the date of enactment of this statute (April 22, 1910) forward,
    - ii. between August 25, 1826 and March 24, 1858,
    - iii. between March 24, 1858 and April 30, 1892, and
    - iv. between April 30, 1892 and the coming into force of this Act.
  - d. *MRA* redefines "mineral" and, under ss.4 and 5, reserves minerals in the Crown (Nova Scotia) both before and after April 22, 1910. Again, as stated above, remember that the definition of "minerals" has changed several times over the years.

### **Dealing with mineral rights under LRA**

30. Some conveyances purport to grant, except or reserve mineral rights in parcels. For example, the following reservation is typical in former Dominion Atlantic Railway Company, "DAR", parcels in Kings County:

"Reserving, however, unto The Dominion Atlantic Railway Company its successors and assigns, all mining rights, mines and minerals, whether solid, liquid or gaseous, already found or which may hereafter be found to exist within, upon or under the said lands and premises."

Out of curiosity in 2007 I determined from DNR, verbally, that DAR had no registered mineral rights under MRA. No DAR mineral rights show in Kings County on the March 2008 Map. DAR may simply have used a form of deed applicable in Western Canada

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<sup>13</sup> *Supra*, fn. 9.

where, in some cases, mineral rights were granted to its parent company the Canadian Pacific Railway to encourage Western development.

31. As mineral rights are not "interests" under *LRA*, s.3(1)(g), their registration or recording under *LRA* appears to be void - paragraph 15, above. "Interests" (as defined in *LRA*) granted in association with the mineral rights will be registered or recorded normally.
32. A purported transfer of mineral rights may also fail under *MRA* if it does not comply with *MRA* procedures. In *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.*<sup>14</sup> the Nova Scotia Court of Appeal held:

"... However, the appellants never obtained the Minister's consent to the transfer of the royalty interests under s. 59(1) of the 1975 *Act*. I see no difference in substance between that provision and the Regulation referred to in the *Keyes* decision, *supra*. In that case the majority held that failure to obtain the consent was fatal to the transfer. I would apply that reasoning in this case."

33. When migrating parcels with purported grants, exceptions and reservations of mineral interests exclude references to purported mineral interests from the parcel description and parcel register except, in your professional judgment, noting them in a textual qualification, "TQ", for continuity. The TQ should remind searchers that *MRA*, not *LRA*, applies to minerals. Consider adapting the following example to your circumstance:

"The deed recorded in the Land Registration Office for [County Name] County, Nova Scotia, in Book [Book No], Page [Page No] as Document [Doc No] (Year) purports to reserve certain mineral rights in this parcel to [Name]. Mineral rights are not properly registered or recorded as interests under the *Land Registration Act* as they are not "interests" under that Act but are reserved to The Crown - refer to sections 3(1)(g), 17, 18 and 47 and to the *Mineral Resources Act* sections 2(s) and 4. Mineral rights are properly registered and found in the Nova Scotia Registry of Mineral and Petroleum Titles maintained by the Nova Scotia Department of Natural Resources under the *Mineral Resources Act*. This textual qualification is made to alert the reader to the purported mineral rights, the status of which must be determined at the Nova Scotia Department of Natural Resources."

34. Using your professional judgment, determine if interests in the surface rights associated with purported mineral rights exist in their own right when
  - a. the purported mineral interest is not recorded in the Nova Scotia Registry of Mineral and Petroleum Titles, or
  - b. its registration/recording is, or would be, void under *LRA* because it is not an "interest".

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<sup>14</sup> *Supra*, Fn 6

If you determine that the surface right interest is, or may be, an *LRA* "interest" I believe you must show it in the parcel register as required by *LRA*, s.37(4)(b). Take comfort that by including it in the parcel register as a *recorded interest* you are not certifying its validity or effect to POL. Your certificate of title in the AFR is limited as follows:

"12. No opinion is expressed as to

...

(c) the validity or effect of the *recorded interests* listed in the signed Statement of Registered and Recorded Interests attached hereto."

35. If you believe a recorded mineral right or a recorded surface right associated with a mineral right is not a *LRA* "interest", consider taking a cautious approach by either
- a. obtaining and recording a release from the interest holder, or
  - b. using *LRA* s.63 to remove it.

Consider checking the Nova Scotia Registry of Mineral and Petroleum Titles first to determine if the purported mineral right is registered there before approaching the holder of the purported mineral rights for a release. The Registry's answer may affect your approach.

36. The Nova Scotia Registry of Mineral and Petroleum Titles may be contacted at:

Third Floor, Founders Square  
1701 Hollis Street  
PO Box 698  
Halifax NS B3J 2T9  
Tel: 902-424-4068  
Fax: 902-424-5568

37. The Registry advised this author that to identify a property for their response they need:
- a. ideally, claims, tracts, claim reference maps..."but we recognise that not everyone lives in our special world....so place names work"; or
  - b. a property's location in relation to a named place near the property - *e.g.* 6 km north of place-x.

PID numbers are not helpful to the Registry as few of the staff have access to POL. They wrote that PID numbers cause the Registry "a lot of work and pain". The Registry will fax, scan or mail the map to you to review. They do not confirm that there are mineral rights in the property you have inquired about but they will provide you with maps so you can make that determination yourself.

## Categorizing non-mineral rights in parcels

38. Non-mineral interests like "gypsum rights" are common but their exact legal nature can be difficult to determine. Be **cautious** - always consider the effect of *MRA* in Nova Scotia when reading cases from other jurisdictions. Cases decided in Western Canada may not apply here as vast tracts of land in the West were granted to railways with mineral rights and those rights were subject to subsequent conveyance by the Railways. The following cases may help you categorize interests in Nova Scotia:

- a. *Berkheiser v. Berkheiser*, 1957 CarswellSask 60 (Supreme Court of Canada), "*Berkheiser*", categorizes interests in petroleum-based substances.
- b. *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.*, 1975 CarswellNS 92 (NSCA), "*Atlantic Concrete*", categorizes an interest in quarry rock.
- c. *McDonnell Estate v. Scott World Wide Inc.*, above, footnote 7 (Nova Scotia Court of Appeal), considers the differences between "reservations" & "exceptions".

These cases suggest many non-mineral rights are considered profits à prendre **but, depending on the words of conveyance, the interest may be a grant of complete ownership of the particular resource.** In *Atlantic Concrete* Cooper, J.A., states: (emphasis added)

"77 In the *Berkheiser* case, *supra*, Kellock, J., said at p. 730:

In *Armour on Real Property*, 2nd ed., the following is stated on p. 47: '**A grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee.**'

But the learned author continues: 'But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug.'"

His Lordship found the interest in quarry rock in *Atlantic Concrete* to be a profit à prendre.

## **LRA Registration and Recording of non-mineral interests**

39. A non-mineral interest may have to be **registered** if the grant of the interest is "A grant of **all the non-mineral** in or upon the parcel". The above quote (in paragraph 38) from Kellock, J, in *Berkheiser*, indicates that some grants pass complete ownership in [the subject of the grant] to the grantee. Presumably the non-mineral right holder would be entered in the parcel register as a registered owner with the instrument creating the interest as the enabling instrument. Tenure might be "Not Specified" as the other choices do not seem to apply. This may be somewhat analogous to fee simple titles split into life estates and remainder interests. A TQ clearly stating the separate interests of the registered owners in the surface rights and the non-mineral rights respectively will be necessary.

40. R.W. Cautley in "Descriptions of Land: A Text-Book for Survey Students"<sup>15</sup> discusses descriptions of these interests from a surveyor's perspective in paragraph 51 at p.34:

"51 ...

NOTE: - -If the fee simple of an entire parcel of land is transferred "saving and excepting thereout and therefrom all coal which may be in or under said land, etc." the apparent effect is to create a fee simple for the remainder – in this case the coal. This is of course impossible, but a separate title to the coal is certainly created in such a case. I am writing of the practice of conveyance by description as I know it to be – and the case stated is quite common practice – but my own opinion would be that it is improper to create a title for coal apart from the land which overlays it, and that all transactions in regard to coal should be in the form of lease and should follow the title to the land in the same way that an unredeemed mortgage does. For instance it is my opinion that a vendor desiring to retain coal rights should transfer the coal with the land and receive back from the vendee a reciprocal lease of the coal rights to be registered against said vendee's title when issued."

41. This author was referred to the National Gypsum (Canada) Limited deed registered in the Halifax County Land Registration Office - Book 1249, Page 440, Document 3260 (1953) - as an example of a conveyance of "...**all of the gypsum, limestone and kindred materials...**" Notice of this 1953 deed is found in the statutory declaration recorded in Book 7901, Page 168. as document 76345421.
42. Query the effect, if any, on these interests of
- the *Conveyancing Act* on pre-April 11, 1953 conveyances within the *MTA* title period - *i.e.* are any of the purported interests now expired life interests that are not cured by the *MTA* title period - paragraph 22, above;
  - the registration or lack of registration of these interests under the *Mineral Resources Regulations* ss.64-68 - paragraph 12, above; and
  - Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* - have transfers of *MRA* regulated non-mineral rights complied with *MRA*? See paragraph 32, above.

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<sup>15</sup> (Ottawa: Minister of Supply and Services Canada, 1979) or online at Association of British Columbia Land Surveyors [http://www.bclandsurveyors.bc.ca/documents/Publications/Descriptions\\_of\\_Land.pdf](http://www.bclandsurveyors.bc.ca/documents/Publications/Descriptions_of_Land.pdf)

## Profits à prendre

43. In addition to the above cases refer to Anger & Honsberger Law of Real Property, Third Edition<sup>16</sup>, §17:30 Profit À Prendre at page 17-26 *et seq.*, for assistance in determining the exact nature of the interest you are dealing with:

"A second category of incorporeal hereditaments is the profit à prendre, which is a right to take something from the land of another person. The subject-matter of a profit à prendre must be something capable of being owned, for otherwise the right would be a mere easement.

...

Unlike an easement, a profit à prendre may be held as a right which is not appurtenant to any dominant tenement, that is, as a profit à prendre in gross. A right annexed to the ownership of a particular piece of land is a profit à prendre appurtenant and must benefit the dominant tenement. As an incorporeal hereditament, a profit à prendre, like an easement, automatically runs with the servient land as well as with a dominant land where the right is not created in gross."

### § 17:30.10 Creation of Profits à Prendre

A profit à prendre may be created by statute, grant or reservation. Since a profit à prendre is an interest in land, to be valid in law it must be created or conveyed by deed. However, in equity, an oral agreement or an agreement not by deed which would be enforced by specific performance will be considered valid. A profit à prendre can also be created by prescription, except in the Northwest Territories, Nunavut, the Yukon, Alberta and Saskatchewan, which do not allow profits à prendre to be acquired by prescription. Similarly, as parcels of land in Nova Scotia are registered under the new land titles system, no new profits à prendre can be acquired over those parcels by prescription. ...

The duration of a profit à prendre may be for perpetuity or for any lesser period, except that a profit à prendre cannot be acquired by prescription for any period shorter than perpetuity.

### § 17:30.20 Extinguishment of Profits à Prendre

A profit à prendre may be extinguished by a regrant of the right to the owner of the servient tenement or by an express or implied release. Where the character of the dominant tenement is so altered by the owner as to indicate an intention to abandon the profit à prendre, an implied release may be presumed, and where the owner of the profit à prendre acquiesces in an alteration of the servient tenement which amounts to a destruction of the subject-matter of the profit, the profit à prendre may be held to have been extinguished. A profit à prendre will also be extinguished by unity of

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<sup>16</sup> Anne Warner La Forest, (Aurora, Canada Law Book Company, 2005).

ownership where the estate in the profit à prendre and in the servient land are similar in quantity and quality. If there is unity of possession without unity of ownership, the profit à prendre will be suspended, not extinguished, and will revive on severance."

44. **Profits à prendre are "burdens" under LRA** (but not Easements/Rights of Way). Anger and Honsberger, cited in paragraph 43 above, states, *inter alia*, that:

"Unlike an easement, a profit à prendre may be held as a right which is not appurtenant to any dominant tenement, that is, as a profit à prendre in gross. A right annexed to the ownership of a particular piece of land is a profit à prendre appurtenant and must benefit the dominant tenement. As an incorporeal hereditament, a profit à prendre, like an easement, automatically runs with the servient land as well as with a dominant land where the right is not created in gross."

### **"Pointer" Affidavits & Statutory Declarations**

45. Some interest holders whose interests in a parcel are found in *pre-MTA* root of title instruments have recorded statutory declarations or affidavits ("declarations") as notice of those enabling instruments to searchers. In this author's view those declarations are simply pointers to the enabling instruments and should not be cited as enabling instruments themselves. The interest, whatever it is, was created by the original instrument not the declaration. In any case you cannot opine on the nature of the interest unless you examine the originating instrument closely. If an interest was created by possession or by operation of law, then a declaration evidencing the instrument or facts creating the interest may be recorded and cited as the enabling instrument.
46. An example of a declaration is the statutory declaration recorded for National Gypsum (Canada) Ltd. referred to in paragraph 41 - it does not create the gypsum rights but refers readers to the deed into the company which does. In this author's opinion the deed should be used as the enabling instrument under LRA - not the statutory declaration.

### **Licenses**

47. Refer to paragraph 19 *et seq.* I have not dwelt on licences in this discussion note because the judicial categorization of this genre of interests generally seems to be "profit à prendre". Tactically for recording purposes, the reasonable categorization of an interest as a "profit à prendre" versus a "licence" should avoid any non-prescribed contract recording issues regarding licences.

### **Parcel descriptions & mapping**

48. There have been reports of mappers refusing parcel descriptions because the mappers could not map the exceptions or reservations of non-mineral rights under separate PIDs. If all of a non-mineral in a parcel is excepted it is the fee simple interest, not the physical parcel, that is split - these interests should be registered with a TQ as set forth above and the exception removed from the parcel description. Profits à prendre are generally burdens; they should



be included in the parcel description but referred to as a profit à prendre not as an easement (Easement/ROW). Mappers should not reject such exceptions or reservations in parcel descriptions.

### **Statutory liens against mineral rights may affect the holder of the surface rights fee simple**

49. In Paul E. Radford's paper "Deemed Trusts and Other Super Priorities", CBANS Conference, September 17<sup>th</sup>, 2004, the author refers to a number of mineral and non-mineral related provincial liens. It appears that those liens may attach to the surface rights owner's fee simple interest in the parcels concerned. The only interests that should be subject to the lien are the mineral rights or non-mineral rights owner's interests in the mineral or non-minerals involved. A lien on the surface rights fee simple interest would only be appropriate to the extent that the mineral rights or non-mineral rights holder also has an interest in the surface rights fee simple in the parcel to be charged by the lien. Refer to *MRA*, s.118.

### **Professional Standards**

50. Consider your responsibilities to your client and others under the Nova Scotia Barristers' Society's *Professional Standards, Real Property Transactions in Nova Scotia*. There is no express standard dealing with mineral rights but refer to Standard 1.1 Legislative Review:

A lawyer should maintain familiarity with new and existing legislation affecting title or ownership rights and responsibilities. A lawyer should inquire as to the nature of a parcel and a client's proposed use of the parcel and then ensure the lawyer is familiar with any particular legislation affecting the use.

When a client decides to acquire a parcel subject to legislative restrictions, a lawyer must explain the restrictions to the client and confirm the client's instructions prior to closing.

<p align="center"><b>Schedule "A"</b>  <b>Mineral Rights, Non-mineral Rights and the Land Registration Act in Nova Scotia - Table of Interests</b>            (This table represents the author's thoughts on registration issues and does not necessarily reflect the POI position)</p>		
Categorization	Instrument Type	Interest Type
Mineral rights purportedly granted, excepted or reserved shown in the parcel description.	As determined by title search.	Do not include mineral rights in description or parcel register except for a TQ stating that the purported mineral rights granted, excepted or reserved are not interests under <i>LRA</i> s.3(1)(g); that they fall under <i>MRA</i> . Consider removing previously entered mineral rights using <i>LRA</i> , s.63. See paragraph 33 for TQ example.
<b>Non-Mineral Rights</b>		
Grant/exception of "all of a [specified non-mineral] in the parcel"	Deed or Partial Interest Deed	Fee Simple. Tenure will be "Not Specified". Add interest holders as Registered Owners. TQ explaining the owners' respective interests.
Profit à prendre "in gross" granted, excepted or reserved by deed - <i>i.e.</i> no dominant tenement parcel.	Addition of B/B by deed or by Partial Interest Deed	In burdened parcel consider showing "Party To Agreement (Burden)" with a TQ stating the interest is a profit à prendre in gross with no dominant tenement parcel. Show as such in parcel description.
Profit à prendre appurtenant granted, excepted or reserved by deed	Addition of B/B by deed or by Partial Interest Deed	In burdened parcel: PID#, Servient Tenement PID. In benefiting parcel: PID#, Dominant PID. TQ both parcel registers as required.
Profit à prendre "in gross" granted, excepted or reserved by agreement	Agreement	Burdened parcel: Party to Agreement (Burden) - TQ as a profit à prendre in gross with no dominant tenement.
Profit à prendre appurtenant granted, excepted or reserved by agreement	Agreement	Benefiting parcel: Party to Agreement (Benefit). Burdened parcel: Party to Agreement (Burden). TQ both parcel registers as required.
Licence <i>coupled with</i> an interest in land (often part of a profit à prendre)	License	Benefiting parcel: Licensee (Benefit). Burdened parcel: Licensee (Burden) .
"Mere licences" and "Licences supported by contract"	N/A - probably not recordable	Probably neither is an <i>interest</i> in land under <i>LRA</i> s.3(1)(g) nor a "prescribed contract" therefore neither is recordable under <i>LRA</i> . Currently only options and first refusals are prescribed contracts.
Statutory Declarations Affidavits disclosing prior recorded interest	Statutory Declaration Affidavit	These are not enabling instruments. Use the referenced instrument as the enabling instrument if appropriate.
<p>Parcel description comments: There are reports of mappers refusing parcel descriptions because the mappers could not map exceptions or reservations of mineral or non-mineral interests in the parcel to create a separate PID for them. If <b>all of a non-mineral in a parcel</b> is excepted it is the fee simple, not the physical parcel, that is divided. These interests should be registered with an appropriate TQ setting forth the respective surface rights and non-mineral rights ownership interests of the registered owners and the exception or reservation should be removed from the parcel description. If the interest is a profit à prendre it is a burden which should be stated in the parcel description and the parcel register. "Mere licences" and "licences supported by contracts" are neither interests nor prescribed contracts under <i>LRA</i> and should not be shown.</p>		

### Mineral Rights Disposition Map for the Province of Nova Scotia

**NOVA SCOTIA**  
Natural Resources

#### Map Notes

1. This map is a compilation of information from various sources and is not intended to be a legal document.

2. The map is based on the best available information and is subject to change without notice.

3. The map is not intended to be used for navigation or other purposes.

4. The map is not intended to be used for any other purpose.

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Gulf of St. Lawrence

Prince Edward Island

Northumberland Strait

New Brunswick

Bay of Fundy

Atlantic Ocean

#### PROPERTY

1. Crown Land

2. Private Land

3. Provincial Land

4. Municipal Land

5. Unincorporated Land

6. Other Land

7. Water

8. Air

9. Submarine

10. Other

11. Other

12. Other

13. Other

14. Other

15. Other

16. Other

17. Other

18. Other

19. Other

20. Other

#### QUALITY CODE OF LARGEST LICENSE HOLDERS

- 1. Crown Land
- 2. Private Land
- 3. Provincial Land
- 4. Municipal Land
- 5. Unincorporated Land
- 6. Other Land
- 7. Water
- 8. Air
- 9. Submarine
- 10. Other
- 11. Other
- 12. Other
- 13. Other
- 14. Other
- 15. Other
- 16. Other
- 17. Other
- 18. Other
- 19. Other
- 20. Other

#### NUMERICAL LIST OF LICENSE NUMBERS

License Number	License Holder
1	ABC COMPANY
2	DEF COMPANY
3	GHI COMPANY
4	JKL COMPANY
5	MNO COMPANY
6	PQR COMPANY
7	STU COMPANY
8	VWX COMPANY
9	YZA COMPANY
10	BCD COMPANY
11	EFG COMPANY
12	HIJ COMPANY
13	KLM COMPANY
14	NOP COMPANY
15	QRS COMPANY
16	TUV COMPANY
17	WXY COMPANY
18	ZAB COMPANY
19	ACD COMPANY
20	EFG COMPANY

Sable Island

