RECENT DECISIONS AFFECTING PROPERTY
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Some court decisions in recent months are of interest to real property practitioners:

ROOT OF TITLE

The Marketable Title Act, 1995-96 S.N.S. c.9, when it comes into force on July 1, 1996, will establish a 40 year search period, pursuant to Section 4(1).

Until then, the search period will be 60 years of record title to establish marketable title. This long-standing, but often overlooked and disregarded rule, was confirmed as the law in Nova Scotia in a decision by Mr. Justice Scanlan dated October 17, 1995 in the case of Landry v. O'Blenis (146 NSR(2d)76). In reaching this conclusion the learned judge declined to give effect to Nova Scotia Barristers' Society Standard #2 (40 years) and the decision in Bold v. Berthelot (107 NSR (2d) 198) but referred to the decision in Inter Lake Developments Ltd. v. Slauenwhite (86 NSR (2d) 23) and made reference to an article in v. 14 N.S. Law News 37.

Noting that there was no legislation in Nova Scotia setting a limit for searches (a remark that may have encouraged passage of the Marketable Title Act), Justice Scanlan stated:

> "The Nova Scotia Statute of Limitations is of little assistance as the matter of sufficiency of title is governed by the common law. At common law the period of 60 years continuous chain of title starting from a Warranty Deed was held to be sufficient. This appears to be based on the fact that 60 years would be what is required to obtain possessory title as against the Crown. In addition, 60 years was in earlier years considered to be the lifespan of humans."

BARRISTERS' SOCIETY SEARCH STANDARDS

This has always been a concern by members of a Bar Society Committee charged with the responsibility to draft real property search standards, that the Courts might seize upon the standards as the test of what a reasonable solicitor must do in order to avoid being found negligent. For this reason, some of the standards set requirements that fell short of what legal practitioners actually did.

By setting a 40 year search period as was done in Standard #2, the expectation was that this might become the generally recognized limit, and that lawyers who could not find a 60 years continuous chain would feel free to use their discretion.

On this point, Justice Scanlan said,

> "I quote Justice Davis at p.60 of Inter Lake Development Ltd." according to the authorities in this country, possessory title can only be presumed if there exists paper title for a period of 60 years". I find it difficult to explain why the barristers' standard number two has ignored the comments in this decision."

In a case entitled An Objection to Title under an Agreement for Purchase and Sale of Lands at Martins' Brook in the County of Lunenburg and Province of Nova Scotia between L. Ann Hebb as Vendor and Shirley Edward Woods and Sandra Ruth Woods as Purchaser (S.B.W. No. 3518) the issue was:

> Whether the bar council of the Nova Scotia Barristers Society in passing standards, prohibited solicitors from certifying title based on possession and further, whether, as between vendor and purchaser, this enables the purchaser to withdraw from the transaction.

This case was heard before Justice Carver, who rendered a decision March 6, 1966.

He found that the purchasers' solicitor agreed that statutory declarations on file were sufficient to establish title by possession. The title to the property would otherwise have been certified by the purchasers' solicitor except that on February 16, 1996, the Barristers Society passed a set of standards entitled, "Practice Standards for Real Property Transactions in Nova Scotia". The solicitor took the position that these standards prevent certification of a title by a lawyer unless there is a good root of title and that a good root of title does not include possessory title.

Standard #2 reads:

> 'Standard #2 - Root of Title
> A lawyer certifying a title must be satisfied that a proper root of title has been located. A proper root of title could be a Crown Grant, a ***Quieting of Titles Act***[3] order, a vesting order, an expropriation, or a warranty deed more than 40 years old. Other documents clearly identifying the parcel of land or a parcel of land containing the parcel being searched within its boundaries which demonstrate on their face ownership of the entire title may be acceptable, such as, a will.'

Based upon the fact that he could not find a root of title that met the standard, the Solicitor for the purchasers' objected to the Vendor's title, while acknowledging that the documents presented established a good possessory title.

Justice Carver noted that the standard respecting "root of title" does not expressly refer to or include possessory title. Noting that the common law was that a purchaser is bound to accept a title by possession satisfactorily established pursuant to the relevant statute of Limitations, Justice Carver found the objection to title was not valid.

On the question of what is a good root of title, the case of Quinn v. Pilkington (144 NSR (2d)13) is of help with respect to old deeds. In that case, the deed named as grantors a number of individuals described as "heirs at law of John Boutilier". The court reviewed a number of transactions over the years involving documents signed by the parties in question and concluded that for the purpose of establishing a root of title, the named individuals could be considered to be "all the heirs of John Boutilier".

THE SUPERLIEN

In a brief decision the Supreme Court of Canada has decided that the Income tax lien against a builder is effective even against funds held in trust by an owner pursuant to the Builders Lien Act of Saskatchewan. It had been argued that the Income Tax Act provision contravened provincial rights with respect to property and civil rights. The decision, Her Majesty the Queen v. TransGas Limited reported in [1994] 3 S.C.R. 753 is reproduced below in its entirety:

> LAMER, C.J. - The Court is of the view that this appeal be dismissed, substantially for the reasons given by Tallis J.A. of the Saskatchewan Court of Appeal, with costs to the appellants as between solicitor and client payable out of and limited to the interest on the principal of the fund.
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> The constitutional question is answered as follows:
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> Question: Does the manner in which moneys are obtained pursuant to s.224(1.2) and (1.3) of the *Income Tax Act* [both enacted by S.C. 1987, c.46, s.66; s.224(1.2) amended by S.C. 1990, c.34, s. 1] constitute an infringement of the jurisdiction of the Legislature of Saskatchewan with respect to the regulation of property and civil rights pursuant to s.92(13) of the *Constitution Act, 1867*, or any other provincial power under that Act, so that the manner in which moneys are obtained or any part of it is *ultra vires* the Parliament of Canada?
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> Answer: No.

In Husky Oil Operations Ltd. v. MNR (1995) 188 NRI, the Supreme Court of Canada established that the priority scheme set out in the Bankruptcy Act takes precedence over provincial legislation. This had the effect of moving the Workers Compensation claim from

first to eighth in priority. This decision established six propositions for determining competing legislative priorities. They are:

"(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s.136(1) of the **Bankruptcy Act**;

"(2) while provincial legislation may validly affect priorities in a nonbankruptcy situation, once bankruptcy has occurred s.136(1) of the **Bankruptcy Act** determines the status and priority of the claims specifically dealt with in that section;

"(3) if the provinces could create their own priorities or affect priorities under the **Bankruptcy Act** this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation, and

"(4) the definition of terms such as 'secured creditor', if defined under the **Bankruptcy Act**, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the **Bankruptcy Act.**"

"(5) in determining the relationship between provincial legislation and the **Bankruptcy Act**, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

"(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the **Bankruptcy Act** in order to render the provincial law inapplicable. It is sufficient that the <u>effect</u> of provincial legislation is to do so.

HOW LONG IS ENOUGH?

If a member of a law firm has acted for an individual, no member of that firm may act in an adverse capacity against that individual because of real or apprehended conflict of interest. This applies to members of the firm who had no contact with the client. In Michaluk v. National Bank of Canada (1995) 144 NSR (2d) 321, the Court held the firm in conflict in 1995 because a member of the firm had advised the client in 1983.

How far back do <u>your</u> records go?