REMEMBER WHEN? WHAT HAPPENED TO 60 YEARS OF PAPER TITLE BEING AS GOOD AS GOLD?

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CROWN INTERESTS AND DUE DILIGENCE UNDER THE *LAND REGISTRATION ACT*

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This paper will consider the various legal arguments which can be advanced to establish good and marketable title against lands claimed by the provincial Crown. It does not address claims against the federal Crown, since there are relatively few situations in Nova Scotia where a landowner needs to assert title against lands claimed by the federal Crown. The law with regard to adverse possession against the federal Crown was amended in 1950, and since that time it has no longer been possible to acquire title by adverse possession against the federal Crown except in circumstances where such title by adverse possession has vested by virtue of 60 years adverse possession having occurred prior to the 1950 amendment.

Claims against the provincial Crown, however, are more common. The implementation of the *Land Registration Act* ("LRA"), which was intended to create ease and certainty in determining title to land, has resulted in increased concerns about Crown claims to ownership of various lands in Nova Scotia. The government has established a "green layer" which identifies lands in respect of which government has no record of a Crown grant. These areas include among others lands in Dartmouth and Bedford which have long been considered to be in private ownership. There have also been several highly publicised cases involving Crown claims to ownership of islands off the coast of Nova Scotia. In the case of one of these, Franks George Island, there was a chain of title commencing with a 1798 Warranty Deed and evidence of occupation and use of the island in the nineteenth and twentieth centuries. There were also documents which supported an argument that there had in fact been a Crown grant which included Franks George Island in 1756. The Crown nevertheless refused to grant a Release under Section 39 of the *Crown Lands Act* and contested a *Quieting Titles Act* action until just before the scheduled trial.

There are other properties and islands where there are chains of title 100 or 200 years long in respect of which the Crown has taken the position that it has title because the Crown has no record of a Crown grant. The government did not keep copies of early Crown grants, but only a record thereof which did not always have a copy of the survey of the granted lands attached, and some of these early Crown grants were never recorded at the Registry of Deeds by the original grantees. There are other areas in the province where the Crown has taken the position that land has escheated back to the Crown, notwithstanding the fact that there was an original Crown grant. Many Crown grants were made on the basis that the grantee had to do certain things to improve the lands within a certain period of time, and Commissioners of Escheat may have concluded in the nineteenth century that the improvements had not been made and that the lands accordingly should escheat back to the Crown. However, nothing is normally indexed at the Registry of Deeds to alert a title searcher to the fact that an escheat may have occurred. It is accordingly important to check the Crown grant sheets in respect of every parcel of land one is searching, and if necessary to make inquires at the Crown Lands office in Halifax, to determine the position of the Crown with regard to a particular parcel of land.

When I was admitted to the bar in 1980, the *Statute of Limitations* provided that claims against the Crown based on occupation and user required 60 years adverse possession, and that claims against other persons required 20 years adverse possession except for claims against persons under disability where the period was extended to an outside limit of 40 years. These periods have now been reduced to 40 years adverse possession against the Crown and 25 years adverse possession against persons under disability. The *Statute of Limitations* existed alongside the old

common law rule developed in England, which was that a vendor who could show 60 years of clear paper title commencing with a "good root" of title such as a warranty deed had a *prima facie* good and marketable title which the vendor could force upon an unwilling purchaser. I will discuss the common law rule at greater length below, and its relevance to claims against the Crown.

Because of the difficulty in establishing good and marketable title to many parcels in Nova Scotia, related to a number of factors including poor survey data, tax deeds and many titles passing on intestacies, the province passed the *Marketable Titles Act* (SNS 1996, c. 9). Section 2 of the Act sets out its purpose, which was to remove uncertainties respecting the determination of marketable titles to land in the interest of all present and future landowners, to facilitate the development of the Province, and to remove uncertainties respecting the validity of past and future tax deeds. Section 4 of the Act provides as follows:

> (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.
>
> (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.

The *Marketable Titles Act* was generally viewed as shortening the minimum 60 year period required to establish marketable title at common law to a shorter minimum period of 40 years. However, Section 9 of the Act preserved Crown interests and provided that nothing in the *Marketable Titles Act* affected any interest of Her Majesty in any land. Accordingly, while the *Marketable Titles Act* resolved many title problems and made it possible to certify many titles that were not previously marketable, it did nothing to change the law with regard to lands claimed by the Crown.

What do you do when confronted with a claim by the Crown to a parcel of land owned or being purchased by your client? My partner John Keith will review the various legal procedures you can take to deal with the Crown claim. This paper will explore the legal arguments which you can advance against the Crown.

THE 60 YEAR COMMON LAW RULE

The Province has not repealed the old common law rule that marketable title may be established where a good root of title can be identified which conveys and warrants the title being conveyed and is at least 60 years old. Section 37(9)(a) of the LRA permits a solicitor to certify marketable title to a parcel based on the standard required at common law, as well as pursuant to the

Marketable Titles Act, the *Statute of Limitations*, or any other statute. The 60 year common law rule was set out by Charles W. MacIntosh in his *Nova Scotia Real Property Practice Manual* (1988) which stated at page 11-7 as follows:

> A search shall commence from a Crown grant, Quieting Titles Act order, vesting order, expropriation, or from a warranty deed not less than sixty years old. (emphasis added).

See also Charles W. MacIntosh's article on "How Far Back Do You Have to Search?" published in Vol. 14, No.3, of the Nova Scotia Law News (December 1987) in which he writes as follows:

> As stated in Greenwood's Manual of the Practice of Conveyancing (5th ed., London, 1877) p. 17:
>
> "A person may have a safe holding title from having for twenty years enjoyed property adversely against persons not under a disability; but this would not in equity be considered a marketable title: the general rule of that Court being, before the passing of the *Vendor and Purchaser Act*, that a vendor must deduce a sixty years' title."

The rule that an abstractor must search back 60 years is enunciated in *Law of Vendor and Purchaser* by Di Castri as follows:

> "Apart from agreement or statute, the abstract should commence with the Crown patent or grant, or cover a period of at least 60 years prior to the date of the contract to a point where a good root of title is established."

The 60 year requirement was reaffirmed in *Inter Lake Developments Limited* v. *Slauenwhite* (1988), 49 R.P.R. 13 (N.S.S.C.) where the Court cited with approval the following passage from MacIntosh's aforementioned article on the subject:

> The practice by some solicitors of commencing a search forty years back from the present appears to be founded on an assumption that the Limitation of Actions Act had set this as a standard. This is not the case. The traditional search period of 60 years was developed to protect against the possibility of double claims of title and to establish a standard, short of a chain continuous from a grant from the Sovereign, which would be recognized as one which a purchaser would not be able to reject.

The reasons for the 60 year search are as valid today as they were in 1749.

Similarly, 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 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 life span of humans.

The common law rule was also applied in *Gunning* v. *Trans Canada Credit Corp*. (1998), 169 N.S.R. (2d) 184 (N.S.S.C.), where a proposed purchaser challenged title on the basis that the vendor was only able to establish paper title for less than 40 years. The Court determined that the *Marketable Titles Act* did not apply in the circumstances but that the common law 60 year rule did. As the chain of title did not go back 60 years the objection to the title raised by the proposed purchaser was found to be valid.

This common law is binding on the Crown. In Hogg and Monahan's *Liability of the Crown*, 3rd Edition, the authors confirm that the Crown remains subject to the common law. At p. 274, they state:

> Thus, the common law of property in contract applies to the Crown in much the same way as it applies to a private person. The law of torts was a special case, because the Crown could not be sued in tort; now that the immunity has been abolished, the common law of torts also applies to the Crown.

In Canada the Crown's subjection to the common law was established in *Eastern Trust Co. v. McKenzie, Mann & Co*., [1915] A.C. 750, 759 (P.C., Can.):

> It is the duty of the Crown and of every branch of the Executive to abide by and obey the [common] law.

This proposition is reaffirmed in Peter W. Hogg's *Constitutional Law of Canada*, (loose-leaf edition). At p. 28-30 Hogg notes that the Crown's rights flow from the common law, just as its duties:

> As a legal person, the Crown in right of Canada or the Crown in right of a province has the power to do anything that other legal persons (individuals or corporations) can do. Thus, unless there are legislative or constitutional restrictions applicable to a piece of

> public property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation. The Crown's power to do these things is not a prerogative power, because the power is not unique to the Crown, but is possessed in common with other legal persons.

Halsbury's *The Laws of England*, (1st ed., Vol. 6, 399) outlines the position of the Crown in relation to the law. While the Crown is the source of the law it must at the same time obey the law.

> Hence, in legal contemplation, the King's Majesty is deemed always to be present in court, and he is bound by the terms of the Coronation oath and by the maxims of the common law, as also by the ancient charters and statutes confirming the liberties of the subject, to cause law and justice in mercy to be administered in all judgments.

Accordingly, if the owner is able to establish a good paper title based upon the common law 60 year rule, the owner has a *prima facie* good title. At common law, courts were in effect prepared to apply a presumption of possession by an owner if the owner could show 60 years of paper title. See for example the decision of Mr. Justice Boudreau in *Boland* v. *Berthelot* (1992), 107 N.S.R. (2d) 187 (N.S.S.C.), where he stated at page 191 the following:

> "In my opinion the paper title is *prima facie* evidence of ownership and possession as indicated by the recorded document and I find the affidavits filed confirm the possession of this land by the various owners as indicated on the abstract of title. I therefore have no hesitation in finding the vendors could satisfy the requirements for possessary title in excess of forty (40) years if such an application was made under the appropriate legislation…" (emphasis added)

Mr. Justice Tidman reached a similar conclusion in *Nemeskeri* v. *Nova Scotia (Attorney General) and Meisner (*1992), 115 N.S.R. (2d) 271 (N.S.S.C.). That case dealt with a dispute between Nemeskeri, who claimed title to a parcel under a chain of title commencing with a good root of title 60 years back, and Meisner who claimed an undivided interest in the parcel as tenant in common. If one went back up the chain to the turn of the nineteenth century, it did appear that Nemeskeri's title flowed from a 1930 deed which purported to convey the entire parcel, executed by an owner who may have had only an undivided interest in the property, and that Meisner's claim derived from owners of other undivided interests. Meisner had acquired the interests of several descendants of one of the two original Crown grantees in the early 1990's by several quit claim deeds. It is significant that there was no evidence in the case of any significant occupation or user of the lands so as to constitute adverse possession by Nemeskeri or his predecessors in title; or by Meisner or his predecessors in title. It appears that the parcel comprised unimproved vacant lands. Mr. Justice Tidman stated at page 290 ff as follows:

The evidence of possession of the lands is sketchy as it appears that the title holders made very little use of the lands. It may be argued that constructive dispossession commenced upon the recording of the conveyance from Benia Moland purporting to convey the remaining undivided one-half interest in the lands to Kenneth Moland on June 21, 1924, or at the time of the recording of the warranty deed in which Kenneth Moland and his wife conveyed the lands to the O'Donnaghues on July 14, 1930. If the latter is determined to be the commencement date then the limitation period expired on October 8, 1970, long before any claim was advanced by the heirs of David I through whom Meisner claims an interest.

What is referred to as the doctrine of colour of title does not require the plaintiff to show actual possession. As stated by MacQuarrie, J. in *Ezbeidy* v. *Phalen* (1958), 11 D.L.R. (2d) 660 at pg. 665.

"As to (3) where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute."

In the circumstances here I would equate the true owner to the registered owner of the lands. The presumption that the registered owner of the title is in possession and that the seisin follows the title has not been rebutted by the defendant Meisner. Meisner offers no evidence of possession by the heirs through which he claims. (emphasis added)

In the absence of evidence of possession by the heirs through which Mr. Meisner claims I would find that these heirs were constructively dispossessed at the time the O'Donnaghues recorded their Warranty Deed of the lands on October 8, 1930. Consequently, under the provisions of what is now Section 20 of the *Limitation of Actions Act*, the time within which to claim an interest in the lands expired on October 8, 1970.

The Nova Scotia Court of Appeal upheld the decision of the trial judge. Mr. Justice Freeman, speaking for the Court of Appeal, stated at 125 N.S.R. (2d) 67 as follows:

> The trial judge found that the respondent Nemeskeri had established a good chain of title extending over forty years, and this was sufficient to bar any other claimant under Section 20 of the *Limitation of Actions Act*, R.S.N.S. 1989 c. 168…
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> …
>
> In his opinion any right in the heirs of David Moland to bring an action expired in 1970, forty years after they were dispossessed by the Kenneth Moland deed.
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> …
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> …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…

In effect, the court in *Nemeskeri* held that Nemeskeri as an owner claiming title at common law under a chain of title commencing 60 years ago with a good root of title was presumed to have possessed the lands in question and as a result to have constructively dispossessed Meisner. Meiser's claim to ownership of certain undivided interests in the lands was held to be statute-barred.

Nemeskeri is a significant case because it is based upon the view that at common law a good chain of paper title more than 60 years long, without proof of actual possession or user, will result in a deemed possession by the person claiming under that title sufficient to constructively dispossess another owner. While the Court of Appeal did not give extensive reasons for its decision, *Nemeskeri* suggests that the courts will presume an owner with a paper title for a 60 year period to be in possession of the parcel, even in the absence of any evidence of acts of possession or user by the paper title owner. This deemed possession in turn will be held constructively to dispossess and statute-bar another claimant after the requisite period under the Statute of Limitations, unless that claimant can lead satisfactory evidence of possession by himself and his predecessors in title.

Prior to *Nemeskeri*, one might have thought that in the absence of evidence of adverse possession to determine the issue, the court would go back up the chains of title of two competing claimants to determine their interest based upon the actual registered interests with which their respective chains of paper title commenced. Had this been done, Nemeskeri would have been found to have title to an undivided interest in the property, and Meisner would have been found to have title to some other undivided interest. After *Nemeskeri*, one may presume that a good chain of title for a 60 year period will be deemed to give the holder of such paper title deemed possession sufficient under the *Statute of Limitations* to statute-bar another interest

Nemeskeri was decided before the passage of the LRA, which has reduced the periods required to statute-bar interests by adverse possession, and before the passage of the *Marketable Titles Act*. Under the LRA, the outside period required to establish title by adverse possession against the Crown has been reduced to 40 years, and against everyone else to 20 years except with regard to persons under disability in respect of whom the outside period is 25 years.

Based upon the reasoning in *Nemeskeri*, one can argue that under the *Marketable Titles Act* a chain of title commencing with a good root of title 40 years plus a day back would be such as to put the owner in deemed possession of the parcel so as to statute-bar the Crown under the new 40 year limitation period. One can in any event argue that *Nemeskeri* is clear authority for the proposition that a good chain of title commencing with a warranty deed or other root of title more than 60 years ago (the old common law rule) deems such owner to have a marketable title and to be in possession; and that this possession will be held to have constructively dispossessed and statute-barred the Crown after 40 years unless the Crown can lead positive evidence of its adverse possession so as to oust the deemed possession of the paper title owner.

Of course, you may in fact have evidence of express acts of adverse possession and user against the Crown such that you do not need to rely upon a paper title raising a presumption of constructive possession/dispossession after 40 years under the *Marketable Titles Act* or after 60 years at common law. I now turn to a brief summary of adverse possession under the *Statute of Limitations*.

Section 21 of Nova Scotia's *Statute of Limitations*, also known as the *Limitations of Actions Act*, R.S.N.S. 1989., c. 258, as amended, states:

> No claim for land or rent shall be made by Her Majesty but within forty years after the right of action to recover such land or rent first accrued.

The two basic elements of adverse possession triggering such right of action are:

> (a) physical or possessory component whereby the claimant must establish actual, open and continuous occupation for the full statutory period; and
> (b)an *animus possidendi* or intention of excluding the true owner.

The Nova Scotia courts have generally adopted the definition found in Anger and Honsberger, *Law of Real Property* Vol. II (Aurora: Canada Law Book, 1985) which states at page 1515 as follows:

> The possession that is necessary to extinguish title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known, or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for

the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".

See, for example, *Taylor* v. *Willigar* (1979), 32 N.S.R. (2d) 11 (N.S.C.A.).

When considering the evidence in a case and assessing the possessory or physical element of adverse possession, the following principles apply:

(a)The doctrine of colour of title provides that the registered owner is not required, in the first instance, to demonstrate possession over the entire parcel. Where an individual has a good root (or "colour") of title in respect of the entire parcel, possession over part is deemed to be possession over the entire parcel.

(b)This presumption of possession applies equally in a claim for adverse possession (see *Nemeskeri* v. *Nova Scotia (Attorney General) et al*, *supra*.) Accordingly, acts of actual possession and user in respect of part of the lands may be deemed to be constructive possession over all of the lands described in a person's deed for the purpose of demonstrating adverse possession.

(c)The nature of physical occupation and control required to demonstrate adverse possession is a factual matter which turns on the particular circumstances in each case. Depending on the nature of the land in question, the requirements may be relaxed. Thus, in Anger and Honsberger, *Law of Real Property*, the authors state at page 1513 the following:

> Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another; the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard to his own interests, are factors to be taken into account in determining the sufficiency of possession.

See also *Taylor* v. *Willigar, supra*. at para. 20; *Bowater Mersey Paper Co. Ltd.* v. *Nova Scotia (Attorney General) and Peck* (1988), 83 N.S.R. (2d) 162 (N.S.C.A.).

In order to prove continuous possession, the law in Nova Scotia recognizes that circumstances vary depending on the nature of the land and requirements of the owner. For example, in *Taylor* v. *Willigar, supra*, Cooper, J.A. of the Nova Scotia Court of Appeal stated at paragraph 20:

> … I cannot subscribe to the view that in this Province, where summer cottages abound, possession of them is lost when the snow and ice of winter preclude their use in any practicable sense. The nature of the possession required under the Statute to extinguish the title of the true owner must necessarily vary with the circumstances.

The case cited in *Taylor* v. *Willigar, supra,* for the definition of "continuity" of possession is *Nattress* v. *Goodchild*, [1914] 6 O.W.N. 156. The property at issue in that case was an island that had been used as a fishing station, held a gravel deposit and was suited for a summer residence. The defendants had been in possession of the island for eighteen years and spent their summers there. Justice Middleton stated at page 157:

> The possession, during the winter, of this island was precisely the possession that there would have been by the actual owner. Such personal belongings as it was not desired to remove were left upon the island. The house was closed, and left ready for occupation in the following spring. Reluctantly I am compelled to accept this view. The pedal possession required under some of the earlier cases to be absolutely continuous is, I think, sufficiently shewn by possession such as I have described.

Similar statements are found in the English jurisprudence. In *Batt* v. *Adams*, [2001] 32 E.G. 90 (Chancery Division), the English Court wrote at para 13:

> Although I accept that the onus is on Mr. Adams Snr to demonstrate that there was the necessary continuous period of adverse possession, this does not mean that he had to give a detailed, day by day account of what use was made of the land. The Court must determine whether, upon a balance of probabilities, there was uninterrupted adverse possession throughout the relevant period.

Fences can be evidence of possession. Even if fences were not used to enclose the lands, it may still be significant that previous occupants erected fences over portions of the lands being claimed since this is evidence of their interest in and claim to the lands. See for example *Duggan* v. *Nova Scotia (Attorney General)* (2004), 222 N.S.R. (2d) 229 (N.S.S.C.) at para 106.

Payment of real property taxes, in and of itself, is not determinative of the issue but is a factor which may be taken into account (*Duggan, supra* at para. 105).

Evidence of possession or occupation as recited in deeds should arguably be accepted as *prima facie* true and given proper weight, unless a contrary fact is proven. The *Vendors and Purchasers Act* (R.S.N.S. 1989, c. 487) deals with rules of evidence governing the completion of

an agreement of purchase and sale of land. Note that Section 37(9)(a) of the LRA permits a solicitor to certify marketable title based on the standard required by, inter alia, any enactment. Section 2(a) of the *Vendors and Purchasers Act* provides as follows:

> 2(a) recitals, statements and descriptions of facts, matters and parties contained in statutes, deeds, instruments, conveyances or statutory declarations, any of which are more than twenty years old at the date of the contract, unless and except in so far as they are proved to be inaccurate, shall be sufficient evidence of the truth of such facts, matters and descriptions.

The burden of proof placed upon a party claiming adverse possession is the balance of probabilities. Each case is unique, but a number of cases have dealt with the evidence found to be sufficient to satisfy the burden in cases involving rural lands. In *Burke* v. *Nova Scotia (Attorney General)* (1997), 160 N.S.R. (2d), 233 (N.S.S.C.), the occupation consisted largely of grazing cattle, picking bake apples or blueberries and harvesting wood at various times during the year. The case of *Bellefontaine* v. *Nova Scotia (Attorney General)* (1992), 114 N.S.R. (2d) 202 involved the seasonal use of summer cottages. In *MacNeil* v. *Nova Scotia*, (1998), 80 A.C.W.S. (3d) 676 (N.S.S.C.); aff'd (2000), 183 N.S.R (2d) 119 (N.S.C.A.), possessory title was found based on camping, in-filling a swamp, making paths, building a cabin in one spot and putting a fishing hut in another; all generally recreational uses. On appeal, Cromwell, J.A. confirmed that the *Quieting of Titles Act* should be applied in a "practical way" (at para. 43). In *Newfoundland* v. *Collingwood* (1996), 138 Nfld. & P.E.I.R. 1 (Nfld. C.A.), possessory title was found on the basis of a seasonal camp.

LACHES/ESTOPPEL

It may be possible to argue that the doctrine of laches or estoppel should apply, depending on the evidence. There is some authority to the effect that no laches were imputable to the Crown, but the legislation recognizing claims against the Crown based on adverse possession may have affected this.

Estoppel and laches are both equitable defences to actions. As stated by William G.J. Swybrous, in "What is the Limitation Period for Breach of Trust Actions?" (2001) 8 C.L.R. (3d) 238 at 242:

> Laches is undue, unjustifiable, and prejudicial delay in commencing an action. Under the doctrine the plaintiff must not be under any legal disability, he or she must be aware, or ought reasonably to be aware, of the potential claim or cause of action, there must be an undue and unjustifiable delay in the commencement of the action by the plaintiff, and the delay must prejudice the defendants to such an extent that it is tantamount to an estoppel against the plaintiff or a waiver by the plaintiff of the claim.

The leading Canadian case on the doctrine of laches is *M. (K.)* v. *M. (H.)* 14 C.C.L.T. (2d) 1, 142 N.S.R. 321, 96 D.L.R. (4th) 289. At page 302 of that decision, LaForest J. set out three rationales for determining the time of accrual of a cause of action in a manner consistent with limitations of actions legislation:

> First, there comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations…
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> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim: see *Dundee Harbour Trustees* v. *Dougall* (1852), 1 Macq. 317 (H.L.)…
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> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527…

See also *Nemeskeri* v. *Nova Scotia (Attorney General), supra*.

In *Burke* v. *Nova Scotia (Attorney General), supra*, Scanlan J. wrote (at para. 12) that during the time of the statutory period "… the Crown was aware, could have been aware, or should have been aware that there were people who were occupying those lands." In many cases, it may be possible to prove that the Crown was aware or should have been aware that there were persons in occupation of the parcel in question.

Based upon the decision of the Court of Appeal in *MacDonnell* v. *M&M Developments Limited* [1998] N.S.J. No. 49 (N.S.C.A.), it appears that the period of laches must equal or exceed the time required to statute-bar an interest by adverse possession under the *Statute of Limitations*. In the case of the Crown, this is 40 years and so it would it be necessary to prove that the Crown knew or should have known of the acts of adverse possession in respect of the lands claimed by the Crown for a period of 40 years and that the Crown slept on its rights for at least 40 years.

In some cases, the Crown's delay in asserting its claim may result in a situation where much of the available evidence relates to a time in respect of which evidence is difficult to find. To the extent that persons who could have given evidence of acts of possession in respect of lands claimed by the Crown are no longer living and able to provide testimony, the Crown's sleeping on its rights may have made it difficult for an owner to establish his claim. In cases where evidence of adverse possession in the nineteenth or first part of the twentieth century is needed to support a claim based on adverse possession and is no longer available, one might be

able to argue based upon the doctrine of laches or the law of estoppel that the Crown should be prevented from asserting its claim.

CONCLUSION

In summary, when dealing with a claim by the Crown, one can have recourse to several arguments. The first argument is that the old 60 year common law rule still applies against the Crown, such that a person with a good and marketable paper chain of title commencing more than 60 years ago will be presumed to have a good title even as against the Crown. Based upon *Nemeskeri*, one can argue that the law in Nova Scotia is that a person with a good and marketable paper chain of title more than 60 years long is deemed to be in sufficient possession of the lands constructively to dispossess and statute-bar the Crown, unless the Crown can lead positive evidence of its own possession sufficient to oust the presumed possession of the paper title holder.

Secondly, if one has evidence of actual adverse possession for a period of 40 years or more, one can lead this evidence and the *Statute of Limitations* may bar the Crown from advancing a claim.

Finally, one may be able to argue laches or estoppel where there is evidence that the Crown slept on its rights for forty or more years.

There are many persons with deeds to lands which, according to the Crown, have never been granted or have escheated back to the Crown. Many landowners in Nova Scotia have spent tens of thousands or hundreds of thousands of dollars to acquire and improve their lands and are faced with this problem. The problem has become more acute because of the LRA requirements associated with the conversion of title, and the fact that solicitors are now certifying title to the government in a public parcel register and are liable to government for a period of 10 years after they convert a title. In the pre-LRA days, lawyers were only certifying title to their clients and were able to provide a qualified off-title opinion and in some cases obtain a title insurance policy.

In the past, when Nova Scotia was being settled and the Crown wished to encourage the development of the Province, Crown lands were regularly granted. However, it is no longer possible for a landowner who has invested in property in Nova Scotia to get a confirmatory Crown grant to deal with issues arising out of the lack of a Crown grant, as the Crown generally has a policy of not making any further Crown grants (although it will consider exchanging a Crown grant for the conveyance to the Crown of land of equivalent value, in certain circumstances). Nor is it easy to obtain a certificate of release of the Crown's interest under Section 37 of the *Crown Lands Act*, without overwhelming evidence of 40 years' adverse possession against the Crown. Moreover, the matter appears to have become increasingly politicised, since NIMBYS often wish the province to remain undeveloped and would oppose any further grants of land by the Crown or any releases of interest by the Crown. It is established government policy to maintain the ownership of the Crown of approximately 25% of the province. There is an assumption, which is not open for debate or discussion, that for some

reason the Crown ownership of 25% of the province is a good thing and that any increase of private ownership of land in the Province would be a bad thing, irrespective of whether such private ownership would result in economic growth and reduced unemployment.

For these reasons, issues involving the Crown's claim to lands purchased by many landowners in Nova Scotia will have to be resolved based upon the application of the old common law 60 year rule, or based upon arguments of adverse possession and laches. I am hopeful that we will see some emerging jurisprudence in this area, to provide guidance to lawyers seeking to convert titles to the LRA regime. Although a lawyer can certify title under the LRA based upon the common law or adverse possession, as well as based on the *Marketable Titles Act* standard, few lawyers wish to get caught in the crossfire between the Crown and a landowner claiming title to the same lands unless there is clear jurisprudence to support their title opinion. It would be useful to have a court decision expressly dealing with the applicability of the 60 year common law rule to the Crown, taking the decision in *Nemeskeri* into account. The cloud on the title of hundreds of parcels of land in Nova Scotia which may be subject to Crown claims is not good for the international reputation of the Province or for its economic development. The many persons whose titles are affected by this cloud are often unable to develop, mortgage, or sell their lands until the Crown claim is dealt with by litigation, often at great expense. Security of tenure is a precondition of individual and corporate investment decisions and Nova Scotia will not thrive until security of tenure can be assured.