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&

THE REAL ESTATE LAWYERS ASSOCIATION

PROPERTY PRACTICE IN NEW ENVIRONMENTS

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ADVERSE POSSESSION AND PRESCRIPTIVE RIGHTS

OLD DOCTRINES IN A NEW ENVIRONMENT

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ADVERSE POSSESSION AND PRESCRIPTIVE RIGHTS
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PART I - INTRODUCTION

Possessory title and prescriptive rights describe interests in land which may arise without documentary foundation. Historically, there appears to have been some casualness with which occupiers documented their acts of possession. The way in which these old legal concepts, founded on the English law which recognized that "all title to land is founded on possession"[1] should be reflected in a new land titles system was a challenge for the legislators. As described by Professor Philip Girard, in his analysis carried out for purposes of assisting the legislators' in their policy considerations:

> "Existing doctrines of adverse possession and prescriptive easements pose obvious problems for a new land registry which is going to be based on the idea of the security and reliability of the register. Both are valid legal interests which can arise without any document being created and indeed without the knowledge of the parties involved. Under the present registry of deeds system, both are overriding interests which can be asserted against the holder of a registered deed. At present, it is possible to purchase land from the registered owner "A" only to find that all or part of the parcel is in fact owned by "B" through the effect of adverse possession, or that the parcel is subject to any number of prescriptive easements. The question is whether these doctrines should be abolished, maintained, or modified in the new *Land Registration Act*."[2]

The desire of the legislators to preserve these interests in land, while striving to achieve the new legislation's stated purpose in part, to create a land system which was to "provide certainty of ownership of interests in land"[3] resulted in the balance achieved in the new *Land Registration Act*.

While the legislators struggled with their policy considerations for adverse possession and prescriptive

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[1]Lambden, David W. - "The concept of Adverse Possession: The Land Surveying Perspective (Part One) 32 R.P.R. (2nd) 29 at 32

[2]Girard, Philip "Adverse Possession and the Land Registry Act: Policy Options", January 10, 2001, pg.1

[3]*The Land Registration Act,* S.N.S., 2001, c.6, s.2(a)

rights, the Professional Standards Committee of the Nova Scotia Barristers' Society embarked on a process to assess the manner in which the Standards relating to real property practice should be amended in light of the pending legislative changes and the new electronic environment within which lawyers would be expected to practice. That review, although changing in few respects the substantive aspects of a lawyer's obligations, introduced plain language into the description of those obligations, and reinforced the lawyer's principal obligation in a real estate transaction, namely the exercise of professional judgment. The Professional Standards Committee considered the manner in which resources could be made more easily accessible to the practising bar, to assist in the performance of our obligations to our clients. The new document while designed to arm property lawyers with more modern tools, described in its Preface, property lawyers' historic role in the Nova Scotia land registry system since 1749:

> "Over time, as land was conveyed, lawyers carefully reviewed the state of title and in so doing, became the weavers of the historical fabric preserved in the Registries of Deeds. It is this fabric that is to be enhanced in the new system. We have been the keepers of the old system and are afforded the privilege of having a unique role in the new one to ensure that the quality and integrity of information we have so long worked to improve, is preserved for the future".[4]

The legislators recognized the value of lawyers' historical role and agreed that lawyers should continue to have a role in preserving the integrity of the information for parcels migrating into the new land registration system. As a result, in the *Land Registration Act*, lawyers have been vested with the privilege, and the corresponding professional responsibility, to determine the sufficiency of title both for traditional paper titles and for those titles that incorporate possessory interests and prescriptive rights.

To move towards a working understanding of the way in which we should respond to issues involving possessory title and prescriptive rights in the new environment of the *Land Registration Act*, it may be helpful to understand how these doctrines are reflected in legislation, how they have been upheld by the courts, and how other land title legislation has treated these concepts. After this review the reader

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[4]Preface to the Professional Standards: Real Property Transactions in Nova Scotia, as approved by Bar Council of the Nova Scotia Barristers' Society November 22, 2002

will more readily appreciate the unique role for property lawyers in Nova Scotia as embodied in the new *Land Registration Act* .

What Title are we Certifying?

A lawyer when reviewing an abstract of title is assessing the records for sufficiency of its "marketability", that is, whether the title is:

> "one which at all times and under all circumstances can be forced upon an unwilling purchaser who is not compelled to take title which would expose him to litigation or hazard ... A purchaser is not required to accept or rely upon parol evidence of title, or information *dehors* the record, or upon the word of the vendor"[5].

The issue as to what constitutes marketable title is an issue between a vendor and purchaser, and deals with the power of the vendor to convey, and the obligation of a purchaser to buy if the vendor can discharge the burden accorded to him with regard to the state of title.[6]

In 1996, *The Marketable Titles Act*[7] as introduced included a definition of "marketability", and provided the statutory authority for the 40 year title search standard. Lawyers still had to be concerned however, about the exceptions noted in the statute, which included:

- utility rights of way (s. 7(1)(c));
- easements or rights of way "used and enjoyed" (s. 7(1)(e));
- Crown interests in land (s. 9); and
- interests in land that a registered owner was no longer able to recover by reason of the *Limitation of Actions Act* (s. 7(2)(c)).

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[5]Victor DiCastri, *"The Law of Vendor and Purchaser"*, 2d.ed (Toronto:Carswell, 1976) p.502

[6]T.G. Youdan in "The Length of a Title Search in Ontario" 1986, 64 Can.Bar Rev.at pg. 51

[7]*The Marketable Titles Act*, S.N.S. 1995-1996, c. 9

The standard established by the *Marketable Titles Act*, has been expanded by the consequential amendments of the *Land Registration Act*, S.N.S. 2001, c.6 (s. 116(1)) as follows:

> "s. 4(1) A person has a marketable title at common law, or equity or otherwise to an interest in land if that person has a good and sufficient chain of title during a period greater than forty years immediately preceding the date the marketability is to be determined".

The standard that a lawyer will be required to follow when registering parcels under the new *Land Registration Act* is set out in s. 37(9):

> "s. (9) The solicitor's opinion of title shall be based on an abstract of the title certified showing the chain of ownership of the parcel
>
> (a) to the standard required to demonstrate a marketable title pursuant to the *Marketable Titles Act*, or to the standard required pursuant to the *Limitation of Actions Act* or the common law; or
> (b) to such lesser standard as the Registrar General may approve".

This provision allows for the registration of titles that may not be based solely on a forty year paper chain, and includes those interests established by adverse possession and prescription. So the question for the practitioner is - how are we to govern ourselves in assessing whether this type of interest is sufficiently established to justify the exercise of our professional judgment in certifying title to the Registrar General? This should be of particular concern to us as we gain an understanding that our certificate of title respecting an adversely possessed property may operate to convert the right "in rem" of a conflicting paper title holder, to a right of compensation only.

The new Professional Standards for Real Estate Transactions in Nova Scotia confirm that lawyers "may" certify titles based on adverse possession, and prescription. The standards are not directive, so the determination as to whether title is sufficient for purposes of a certificate of title will be the subject of the individual exercise of professional judgment of a lawyer after reviewing the particulars of the title under

review. It is established at common law that if the evidence of possessory title can be proven on a balance of probabilities, it will be considered "marketable" and can be forced on an unwilling purchaser.[8]

The uniqueness of the lawyer's authority under the new *Land Registration Act* to migrate parcels based on a lawyer's opinion for interests based on adverse possession or prescription without requiring a judicial review or determination before acceptance for registration is, to the best of my knowledge, a unique authority in a land titles environment.

PART II- ADVERSE POSSESSION AND THE ROLE OF LEGISLATION

Historical context:

The common law principle is that title to land is based in possession, is relative to the rights of third parties, and therefore not absolute[9] . The law presumes that the holder of the "true" or paper title is in possession[10]; and conversely, that possession of land is prima facie evidence of "seisin in fee"[11] or title in fee simple.

At common law, the person who is in actual possession of land:

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[8]*Parsons v. Smith* (1971), 3 N.S.R. (2d) 561, *Millar v. Briggs* (1991) 101 N.S.R. (2d) 112, *Keohane v. McNulty* (1989) 92 N.S.R. (2d) 261 and *Stevens v. MacKenzie* (1979) 41 N.S. R. (2d) 91

[9]D. Fromm "The Title Search Period under the Registry Act", National Law Property Law Review, Vol. 1, at pg. 140

[10]*Cunard v. Irvine* (1853-55) 2 N.S.R. 31, *Legg v. Scott Paper Co*. (1972) 3 N.S.R. (2d) 206 at p. 221 as cited in A. Fordham "Prescription and Adverse Possession", C.L.E., Jan. 1994, Real Estate Practice at p. 1 (electronic version)

[11]*Halsbury's* 4th ed., Vol. 28 at para 996

> "Even if he is not the true owner, is given fairly substantial protection and recognition, he has the right to recover possession of the land from any person except the true owner, or some person with a better title"[12]

A possessor of land has the right to maintain an action for ejectment to recover possession if he is put out of possession.[13]

One can understand the underlying policy consideration for the earliest statutory provisions restricting the time frames for an owner to commence an action for the recovery of land from an adverse possessor. In 1540 a statute was enacted[14] which set a limitation period of 60 years from the time the right arose, to commence an action for the recovery of land[15]. The first Statute of Limitations in England was enacted in 1833, reducing the time frame for commencing an action to twenty years, and in 1874 to twelve years.[16] The declared policy considerations of these kinds of statutes are as follows:

1. that long dormant claims have more cruelty than justice in them;
2. that a defendant might have lost the evidence to disprove a stale claim; and
3. persons with a good cause of action should pursue them with reasonable diligence[17].

There evolved a controversy surrounding the way in which the time frames established at common law for determining a title to be marketable were affected by the statutory authority set out in the

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[12]*Allen v. Rivington*, p. 86 E.R. 813 as cited in A. Fordham's "Prescription and Adverse Possession" *supra* at 1

[13]*Allen v. Rivington* 86 E.R. 813 as cited in A. Fordham *supra* p. 1

[14]32 Henry VIII, c. 2

[15]C.W. MacIntosh, "How far back do you have to Search?" (1987) 14:3 *Nova Scotia Law News* at p. 52

[16]P. Girard, "Adverse Possession and the Land Registry Act: Policy Options" *supra* at p. 4

[17]Halsbury's 4th ed. Vol 28, pg. 407 at para. 805

Limitation of Actions Acts establishing time frames barring the right of an owner to commence an action to recover land from persons possessing that land. Courts were prepared to apply a presumption of possession if a vendor could show 60 years paper title, thereby avoiding additional formal proof of physical possession of the land conveyed[18]. This discussion will be relevant when we consider the resulting amendments to the Nova Scotia *Limitation of Actions Act* in the context of claiming adverse possession against the Crown[19] (reduced from 60 years to 40 years *Land Registration Act*, supra s. 115(7) amending s. 21 of the *Limitation of Actions Act).*

Adverse Possession in Nova Scotia:

In Nova Scotia adverse possession is well recognized to be an integral feature of land ownership. Evidence of possession may be documented in part (for example by way of registered statutory declarations or plans of survey) or not at all. A claim of adverse possession may relate to the whole of the interest in a parcel, or more frequently, a partial interest in land, the possessor having received title perhaps from a person who holds a deficient title. In other cases having received title to a parcel of land, a person may occupy land beyond the boundaries of the parcel described in their deed.

A person who claims title through the application of the doctrine of adverse possession may assert their claim in a number of different ways. Four statutes are most relevant to the way in which a claim is advanced: *Vendors and Purchasers Act*[20]*; Limitations of Actions Act*[21]*; An Act to Provide for the Judicial Ascertainment of Rights in Real Property in Nova Scotia*, (or more commonly known as the

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[18]C.W. MacIntosh "How Far Back do you have to Search" *supra* at p. 52

[19] *Land Registration Act*, *supra* s. 115(7) amending s. 21 of the *Limitation of Actions Act*

[20]R.S.N.S. 1989, c. 487

[21]R.S.N.S. 1989, c. 258

Quieting Titles Act[22]*);* and the *Crown Lands Act*[23]*,* to the extent of Crown interests. While all of these statutes have been used as vehicles for advancing claims by an adverse possessor, the *Limitation of Actions Act* is probably the statute which is most frequently resorted to, and although it does not define what constitutes "adverse possession", it does establish the time frame within which an owner will be statute barred from commencing an action to recover land adversely possessed, with the further result that the owner's interest in and title to the land is extinguished.[24]

The legislation in Nova Scotia is derived from the English 1833 statute[25] and its language is difficult to understand. While the time frames in England were reduced from 20 to 12 years in 1874, and in most other Canadian jurisdictions to ten years in the 20th century[26] (see also Appendix D), Nova Scotia is one of the jurisdictions to still have a 20 year time frame. This time frame has not been reduced by the provisions of the *Land Registration Act*, although the definition of disability will no longer include absence from the Province[27] and the maximum time frame for those under a disability is reduced from 40 years to twenty-five (25) years[28] .

As can be seen, the doctrine of adverse possession is a negative doctrine[29] While the *Limitation of Actions Act* serves to extinguish the title of the paper title holder, if the claim advanced is successful there is nothing in the *Act* which vests title in the successful adverse claimant, although the courts have

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[22]S.N.S. 1961, c. 9 as initially enacted, now R.S.N.S. 1989, c. 382

[23]R.S.N.S. 1989, c.114

[24]*Limitation of Actions Act*, R.S.N.S., 1989 c.258 , s. 22

[25]*The Real Property Limitation Act* 1833, *supra*

[26]P. Girard, *supra* at p. 4

[27]*Land Registration Act,* S.N.S., 2001, c.6, s.115(5)(a)

[28]*Land Registration Act,* S.N.S., 2001, c.6, s.115(6)(a)

[29]A. Fordham *supra* at p. 16

treated the successful adverse possessor as the owner for most purposes[30].

> "After the prescribed period has expired the title of the person whose action has been time-barred is extinguished. As the law regards possession of land as evidence of seisin, the effect of barring the true owner's right is to make the possessor's title an absolute one, and such title if proved, can even be forced on a purchaser. Once the true owners title has been barred, no subsequent acknowledgment can revive his right."[31]

The remedy sought under the *Limitations of Actions Act*, is declaratory in nature.[32] The courts have indicated a willingness to deal with a claim based in adverse possession on this basis, as a full trial on the issues is heard before any decision is made as to whether the declaration sought is granted.

A more summary procedure is often pursued when the issue as to the sufficiency of possessory title arises during the course of an agreement of purchase and sale. The remedy sought is *not* a declaration of title, but rather a determination as to whether an objection to title is valid or not. Section 4 of the *Vendors and Purchasers Act*[33] provides the courts' jurisdiction:

> "A vendor or purchaser of an interest in land, or his representative may ... apply in a summary way to a judge of the trial division of the Supreme Court in respect of any requisition or objection or any claim for compensation, or any other requisition arising out of or connected with the contract and the judge may make such order upon the application as appears just, and refer any question to a referee or other officer for inquiry and report".

Therefore, if a buyer's lawyer upon the completion of a title search, is not satisfied with regard to the state of title, an objection is advanced to the seller's lawyer, and if the parties are unable to come to

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[30] *Strickland v. Murray* (1979) 6. R.P.R. 39 at 46 as cited in Fordham *supra* at 16

[31] *Halsbury's* 4th ed., vol 25, p. 481, para 919

[32] *Bowers v. Bowers supra; Kennie v. Ford, supra; McNeil v. Chisholm*, *supra*

[33] *Vendors and Purchasers Act* R.S.N.S. 1989, c. 487

terms as to the validity of the objection they may ask a court to do so. Justice Hart in *Parsons v. Smith*[34] stated at p. 562:

> "There can be no doubt that an objection to title on the ground that it is possessory only is an objection that can properly be determined pursuant to the *Vendors and Purchasers Act*. A title by possession is one that may be enforced upon a purchaser and the evidence necessary to establish such a title is very often a subject of dispute between the parties."

Justice Hart goes on to cite further authority that a possessory title is one which a purchaser can be compelled to accept. He referred to *Armour on Titles* 3rd edition at p. 294 as follows:

> "A title by possession is such a one as a purchaser may be compelled to accept. The point seems to have first arisen under the present *Statutes of Limitations*, in *Scott v. Nixon* 3 Dr. & War 388"

Justice Carver, in *Hebb v. Woods*[35] cited a passage from DiCastri's *Canadian Law of Vendor and Purchaser*, 1968 at p. 208-9 at para 253:

> "Possessory title. A purchaser is bound to accept a title by possession satisfactorily established pursuant to the relevant statute of limitations and is entitled to cross-examine all persons making affidavits in support of such title."

After reviewing the statutory declarations on title provided , Justice Carver found that the objection raised as to the vendor's possessory title invalid, and that the objection was not one which enabled the purchaser to withdraw from the transaction.

The appropriateness of the *Vendors and Purchasers Act* as a vehicle for the determination of

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[34]*Parsons v. Smith* (1971), 3 N.S.R. (2d) 561

[35](1996), 150 N.S.R. (2d) at 16

these kinds of objections to title was upheld by Glube, J. (as she then was) in *Stevens v. Mackenzie*[36] (1979) 41 N.S.R. (2d) p 91) at p. 95 para 12. While there is no definition of what will constitute adverse possession in the *Vendors and Purchasers Act*, Justice Glube cited the test as one in which the seller must establish "open, notorious and uninterrupted possession"[37]. In *Millar et al v. Briggs and McNeil*[38], Justice Tidman, in finding that the objection to the sellers possessory title was invalid, cited three considerations made in arriving at his conclusion - firstly, the sufficiency of the statutory declarations; secondly, he found "there is no evidence of any claims by others against the lot in question" [39], and thirdly, the plans on file relating to the property supported possession of the seller and her predecessors. In finding that the seller had established 40 years possessory title, Justice Tidman went on to deal with the further objection of the purchaser's lawyer that in any event 60 years adverse possession had not been proven so as to extinguish a possible claim of the Crown. His conclusion on this objection [40] was as follows:

> "In any event, the possibility of such a claim by the Crown, as Mr. Chandler suggests, is so remote as to be frivolous and as such is therefore not a valid objection to title".

While the application under the *Vendors and Purchaser's Act* does not result in an affirmative confirmation of possessory title, and is restricted in its application to the parties to the agreement of purchase and sale, it is a process which involves a judicial review of the sufficiency of the evidence to support a possessory title claim and is considered both a viable and financially affordable process.

The third process enabled by legislation to deal with the sufficiency of possessory title is the

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[36](1979), N.S.R. (2d) 91, at p.95, para 12

[37]Ibid at p 96, para 18

[38]*Millar et a. v. Briggs and McNeil* (1991) 101 N.S.R. (2d) 112, at p. 118

[39]Ibid at p 119

[40]Ibid, at pg.119, para 42

Quieting Titles Act[41]. Section 3 sets out the jurisdiction of the court to hear questions relating to a claim, and a successful application brought under this statute results in the issuance of a clear certificate of title to the applicant which is considered not only marketable, but also sufficient as a root of title in itself[42]

The *Quieting Titles Act* was not introduced in Nova Scotia until 1961,[43] (Ontario had one as early as 1837) and when introduced, did not contain what is currently s. 12(2) and (3) of the Act. These provisions[44] provide a statutory threshold for the burden of proof that a successful claimant must discharge, and is unique in that respect from the other two statutes previously discussed. Section 12(2) provides as follows:

> "s. 12(2) Where it appears that the plaintiff or the plaintiff's predecessors in title have been in possession as owners or part-owners for twenty years prior to the commencement of an action and during that time a person, whether or not the persons whereabouts are known, has or may have an interest in the lands forming the subject matter of the action and such person has not received any benefit, paid any expenses or exercised any proprietary rights in respect to said lands, the judge may order subject to subsection (3) that the interest of such person vest in the plaintiff" (emphasis added)

Subsection 12(3) allows the court to determine the value of any interest that it finds a person other than the plaintiff to have, and direct payment into court of that amount.

The language of the statute appears to allow the court to vest title in the plaintiff notwithstanding an outstanding interest in another, if 20 years possession can be proven, and thereby converting any outstanding right in rem to a right of a specific determined value as compensation for the lost property interest. It is interesting to note that these two sections were introduced into the legislature by the

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[41]*Quieting Titles Act*, R.S.N.S. 1989, c. 382

[42]See s. 7(2)(a) of the *Marketable Titles Act*, S.N.S. 1995-96, c.9, whereby an Order under the *Quieting Titles Act* is excepted from the 40 years requirement of s. 4(1))

[43]S.N.S. 1961, c.9

[44]Bill 128, S.N.S. 1962, c. 66

Honourable R.G. Donahoe. The Office of the Legislative Counsel advises that this amendment was the result of a request by a senior member of the Nova Scotia Barristers' Society to address what was seen as a deficiency in the legislation passed one year earlier. The member referred to a specific case as an example of the inequities of such deficiency:

> A predecessor in title of a client of his had died intestate, leaving three children as heirs at law. Two of the children continued to reside in the property and the third had departed prior to the parent's death at an early age for the United States and the whereabouts of the third child was unknown. The two children subsequently devised the property to his client, with a one third deficient interest outstanding.

The member was of the view that at law there was no mechanism available for his client to "clear the title" and to extinguish the interest of the third child. He was not of the view that the fact situation would satisfy the "adverse" requirements held to be applicable to the *Limitation of Actions Act*. While there existed mechanisms such as the tax sale process to clear title, he felt that mechanism was an abuse of the tax sale process, and that there should be a mechanism to address this type of situation. He secured letters of support for his petition from three other senior members of the bar. One such member commented that while he was in support of the amendment, he felt it would result in a complete discretion of the judge and pointed out that the amendment would result in an apparent conflict with the provisions of the *Limitations of Actions Act* (s.20-disability provisions) which should be reconciled. The amendment proceeded, and the result is that there was no reconciliation with the *Limitation of Actions Act*[45].

While the courts have generally considered the provisions of the *Limitation of Actions Act* in matters initiated under the *Quieting Titles Act*, it does not appear that there is any statutory requirement for them to do so, and so the application of what was termed the principle of "constructive dispossession" applied by Justice Tidman[46] to describe the basis for disentitling a long absent partial paper title holder is

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[45]R.S.N.S. 1989, c.258- Thanks is expressed to the Office of the Legislative Counsel for assistance in providing the information in the archived historic file;

[46]*Nemeskeri v. Nova Scotia (Attorney General) and Meisner* (1992), 115 N.S.R. (2d) 271

more understandable in light of the background describing the intent of the legislation.

The presumption of possession may operate in favour of the holder of a mature possessory interest. As Goodridge, J., in *Strickland v. Murray*[47] stated:

> "The presumption of possession by the owner whether in actual possession or not, applies to possessory title, and therefore the successful adverse claimant may discontinue actual physical possession after the statutory period runs, and still retain ownership unless another person commences and continues possession adverse to his title for the statutory period."

Possessory title does not carry with it all of the rights incidental to ownership by express grant, for example the benefits of covenants running with the land, or implied easements of necessity[48].

Some of the other provisions of the *Limitations of Actions Act* [49] relevant to a claim by an adverse claimant are as follows:

(a) the commencement of the limitation period (s. 11);

(b) co-owners may adversely possess the interests of their co-tenants; (s. 15 - see also *Lynch* v. *Lynch* (1985), 71 N.S.R. (2d) 69; *Blair* v. *AGNS, Toole* (2001), 190 N.S.R. (2d) 383);

(c) if a tenant at will, time will commence one year after the tenancy has commenced (s. 11(f));

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[47] *Strickland v. Murray supra* cited in A. Fordham at p. 14

[48] A. Fordham *supra* at p. 14, See also Anger & Honsberger, The Law of Real Property (1985) (2nd) ed, Vol. 2 at p. 1511

[49] R.S.N.S. 1989, c.258; see also the *Marketable Titles Act*, S.N.S. 1995-96 c.9 in particular s.7(4) providing that the extension provisions of s.3 of the *Limitation of Actions Act* does not apply to any time period set out in the *Marketable Titles Act*

(d) if an adverse possessor acknowledges in writing the ownership of another, time will run anew; (s. 17) *R.B. Ferguson Construction Ltd.* v. *AGNS (Ormiston)* (1989), 91 N.S.R. (2d) 226; but not if acknowledgment occurs after the time has expired (*Halsbury's* 4th ed. Vol 28, *supra);*

(e) there may be circumstances in which time periods are extended for those under a disability (s. 19); see also *Land Registration Act* S.N.S. 2001, c. 6, s. 115 amending s. 19, deleting absence from the province as a disability and reducing maximum time frames from 40 years to 25 years;

(f) time periods are lengthened if the claim is against the Crown (s. 21) *Nickerson* v. *Attorney General Canada* (2000) 185 N.S.R., (2nd) 36; - see also the *Land Registration Act*, s. 115(7), reducing the time frame from 60 to 40 years;

(g) equitable remedies, such as laches, estoppel and acquiescence may bar the right of action to any person whose right may not strictly be barred under the Act (s. 31)(see *Nemeskeri* v. *AGNS & Meisner* (1992) 115 N.S.R. (2d) 271 as to laches and estoppel, and the appeal decision in *Ford v. Kennie* (2002)203 N.S.R. (2d) 234 for a full discussion of estoppel);

Adverse Possession and the Common Law:

As we have seen, there is little guidance in the legislation to describe the nature of adverse possession that will be required to uphold a valid and "marketable" possessory title. As described by Professor Philip Girard" "The law itself may be clear, but its application to the facts is often anything but"[50].

[50]P. Girard, *supra*, at p.4

Anger & Honsberger's Law of Property[51] sets out the general threshold which the courts have adopted in many cases as to what should be considered:

> "Whether there has been sufficient possession of the land contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. 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 ... are factors to be taken into account in determining the sufficiency of possession"[52]

Time doesn't start running against an owner when he is no longer in possession - rather:

> "There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not to be protected, to bring the case within the statute".[53]

As to the nature of possession required, consider the following passage from *Ezbeidy* v. *Phalen*[54]

> "Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed".

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[51]A.H. Oosterhoff & W.B. Rayner *"Anger & Honsberger's Law of Real Property"*2d. ed (Canada Law Book, 1985) at p.15

[52]Anger & Honsberger supra at p. 15(3); see also *Ford v. Kennie* [2002] NSCA citing *Partington v. Musial* (1998) 71 NSR (2d) 228; *Taylor v. Willigar* (1979) 32 N.S.R. (2d)11; *Scheinfeldt v. AGNS* (2001) 194 N.S.R. (2d)9

[53]Baron Parke in *Smith v. Lloyd* 9 Ex 562 as cited by A. Fordham supra at pg. 4

[54](1957), 11 D.L.R. (2d) 660 at 665 (as cited by C. MacIntosh in "The Nova Scotia Real Property Practice Manual, *supra* at p.7-8

While we have often read that the nature of possession required is "open, notorious, continuous and exclusive"[55], these are not conclusions of fact, but rather conclusions of law.[56] These words are not properly the subject of statutory declarations, or affidavits:

> "Thus evidence, by affidavit or otherwise to establish this type of possession must set out the facts which give rise to this legal conclusion such as fencing, payment of taxes, or erecting "no trespassing" signs. It is improper for a witness to simply say, by affidavit or otherwise, that a person has been in notorious, open, adverse and continuous possession of land. This is a question for the court."[57]

In *Lynch v. Lynch*, Justice Hallett, in rejecting all of the declarations submitted by the Plaintiffs commented:

> "... there was a sameness to them that would indicate the declarations were, to a certain extent, almost the words of the lawyer who prepared them. All the declarations contained a statement that the plaintiffs and their predecessors had been in open, continuous, and notorious possession for many years; that being in part a legal conclusion based on facts. Such a statement should not be found in any statutory declaration relating to land, particularly where it is reasonable to assume that the deponents had no idea of what those words meant in a legal sense or what the concept of possession at law is all about. "[58](Emphasis added mine)

However, he provided the following practical guidance for property practitioners when either preparing or

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[55]See Glube, J. in *Stevens v. Mackenzie*, 1979 *supra* at p. 96)

[56]A. Fordham, *supra*, at p. 10

[57]A. Fordham supra at p. 10; see also Armour on Titles, *supra*, at p.297 as cited by Justice Hartlin; *Parsons v. Smith* (1971) *supra*, at page 7 (electronic version), and Carver, J. in *Hebb v. Woods* (1996), *supra* at p.4 (electronic version) and Justice Tidman, in *Boyer v. Throop* (1993) 129 N.S.R. (2d) 60 at p.63

[58]*Lynch v. Lynch*, *supra*, at page 6 of the electronic version

assessing the sufficiency of declarations:

1. A statutory declaration using terms which the deponent is not likely to understand, or standard legal wording obviously prepared by the solicitor, is not very convincing;

2. Declarations which contain conclusions as to the legal status of property are not appropriate if made by persons unlikely to understand the sense of their words;

3. Declarations made by persons who are not shown to be experts in the matters deposed to may be regarded as unreliable, while, on the other hand, those prepared by persons, such as land surveyors, might be given considerable weight if properly prepared;

4. Self-serving declarations made by persons as to their own property are not to be given much weight....

The provisions of the *Vendors and Purchasers Act* provides that statutory declarations which are more than twenty years old at the date of the contract, unless and except insofar as they are proved to be inaccurate, shall be sufficient evidence of such facts and matters.

The courts have held that the burden of proof as to the sufficiency of the acts of adverse possession is on the person seeking to extinguish the title of the legal owner,[59] considering the nature of the lands [60], and that the burden is one of a balance of probabilities[61]. As to what evidence will be sufficient to discharge the burden of proof, consider the comments of Cooper, J.A. in *Zinck v. Hatt* [62]:

> "... the possession shown by the defendant was sufficient to establish a possessory title. The enclosed lands as part of the entire estate and the asserting of dominion over them and

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[59]*Bowers v. Bowers*[2002], N.S.S.C. 206, S.B.W. 4457 at pg. 28

[60]*Lynch v. Lynch, supra* at pg. 2 of the electronic version

[61]*Whiting v. MacDonald* [2000] at pg.9

[62](1979), 34 N.S.R. (2d) 12 (N.S.S.C.A.D.) Citing *Gordon Contracting Co. v. Grand Truck R.W. Co.* [1917] O.W.N. at 241

> using them as they were used - cultivating where capable of cultivation, caring for and pruning trees in the ravine, cutting timber for fuel, drawing gravel from a gravel-pit, and other acts deposed to all went to shew that kind of possession which the statute contemplates - an actual, continuous, and exclusive possession. According to the decided cases, it is largely a question of fact in each case, and in each case due regard must be had to the exact nature and situation of the land in question. Here all was done that could be done by the owner residing in the main dwelling-house, who had paper title to the land. All within the main fences was his holding, and he used it in accordance with its fitness for various purposes."

To satisfy the requirement of "continuous" it may be enough that a seasonal dwelling is occupied seasonally[63]. The requirement of "continuous" adverse possession can be met by more than one occupier. Consider the comments of MacDonald, C.C.J. in *Kanary v. Nova Scotia & MacDonald*[64]

> "During the twenty year period required by statute, there may be a series of true owners who have been dispossessed, and conversely, there may be a series of trespassers who, adverse to one another and to the rightful owner, take and keep possession of the land in a succession of various years and thereby the rightful owner is barred from regaining possession, and he loses title ..."

A brief review of a recent House of Lords decision may be helpful in the context of what "adverse" means in the doctrine of "adverse possession". In *J.A. Pye (Oxford) Ltd. v. Graham* the House of Lords reviewed the history of the development of the doctrine of adverse possession, and decided that:

> "Although this label was a convenient shorthand to refer to the principles of limitation of action relating to recovery of land, it had a history which has been confusing the English Courts for decades"[65].

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[63] *Taylor v. Willigar and Skidmore, supra* at 5

[64] (1985), 70 N.S.R. (2d) 1 at pg.3 (as cited in *Bowers v. Bowers* [2002] N.S.S.C. 206 S.B.W. 4457 28 at 34)

[65] *Butterworths All England Legal Opinion* Issue 23, November 2002, at 1

Lord Bingham of Cornhill in his judgment for Graham (the possessor), concluded that since the passage of the *Real Property Limitations Act* of 1833, "the only question was whether the squatter had been in possession in the ordinary sense of the word"[66].

Our *Limitation of Actions Act* contains the same language as the English 1833 statute as noted earlier, and makes reference to the commencement of time running against the paper title holder as being when he has been "dispossessed" or has "discontinued such possession"[67]. In *Pye v. Graham* [68] it was held that:

> "There will be a "dispossession" of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is simple and exclusive. Therefore, if the squatter is in possession the paper owner cannot be."

So it was concluded, if Graham was shown to be in actual possession of the land, without the consent of Pye, Graham's possession will be considered to constitute "dispossession" of the paper title holder. Lord Bingham of Cornhill describes the two elements necessary for legal possession:

1. A sufficient degree of physical custody and control ("factual possession");;
2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess") [69]

and further in the same paragraph states:

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[66] *J.A. Pye (Oxford) Ltd. v. Graham* [2002] H.L.J. No. 30 at para.35

[67] *Limitation of Actions Act* R.S.N.S. 1989 c. 258 at s. 11

[68] *Supra* at para 38

[69] Ibid at para 40

> "... there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deducted from the physical acts themselves".

Lord Bingham of Cornhill concluded by suggesting that although the phrase "adverse" may suggest that an element of "aggression, hostility or subterfuge is required"[70], that was not the case. Rather it was used "as a convenient label only in recognition simply of the fact that the possession is adverse to the interests of the paper owner"[71]. And finally he comments:

> "The general rule, which English law has derived from the Roman law, is that only one person can be in possession at any one time. Exclusivity is of the essence of possession. The same rule applies in cases where two or more persons are entitled to the enjoyment of property simultaneously ... as against everyone else they are in the position of a single owner". [72]

Although land in England may be more densely populated now than in Nova Scotia, the review in this case of the history of legal principles is useful as the language of the Nova Scotia *Limitations of Actions Act* is derived from the English statute. I suggest that this cases' historical review of the development of the doctrine of adverse possession on the eve of the introduction in England of its *Land Registration Act*, 2002, is both timely and appropriate.

How much land can be claimed?

If an adverse possessor occupies property without the aid of any "color of right" the title of the true

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[70]Ibid at para 69

[71]Ibid at para 69

[72]Ibid at para 70

owner will only be extinguished to the extent of the land actually possessed [73]. If however, a person adversely occupies land believing it to be his through good title, he will be presumed to be in possession of all of it. This is the principle of constructive possession.[74]

Constructive possession has also been described as follows:

> "A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property and however incompetent may have been the power of the grantor in such conveyance to pass title to the subject thereof, is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the *Statute of Limitations*, other requisites of those statutes being complied with."[75]

If a claimant has colour of title his burden is lessened as he already has satisfied the requirement of intention to possess[76] .

Constructive Dispossession:

The principle of constructive possession was applied in a different context by Justice Tidman in *Nemeskeri* v. *AGNS & Meisner*[77] .

In that case Tidman found:

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[73]A. Fordham, *supra*, at pg. 10

[74] Ibid

[75]*Whiting v. MacDonald, supra,* citing Anger and Honsberger, supra at 1571- see also *R.B. Ferguson Construction Limited v. Ormiston* (1989), 91 N.S.R. (2d) 226 at p.228; see also *McIsaac v. McDonald* (1905) 38 N.S.R. 163

[76]C. W. MacIntosh, *supra,* citing *Ezbeidy v. Phalen, supra* at p. 7-19(3)

[77](1992) 115 N.S.R. (2d) 271; affirmed on appeal (1993), 125 N.S.R. (2d) 67

> "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* (1957), 11 D.L.R. (2nd) 660 (N.S.T.D.) at 665: "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 ... there is first of all a presumption that the true owner is in possession, that the seisin follows the title"[78] .

Tidman, J. was describing the authority for his view that a presumption of possession may operate for an owner who has paper title, albeit defective, so that time starts running against those whose interests are not covered by the defective title, and it raises a presumption of ownership that must be rebutted. "Constructive dispossession" then, commenced at the time of the discontinuance of possession by the "other heirs".

There was very little evidence of actual possession of the lands in *Nemeskeri v. AGNS & Meisner*[79] , in light of the fact that no buildings ever existed on the land. Notwithstanding the absence of evidence, Justice Tidman found for the plaintiff and in so doing held that the defendant's claim was statute barred. He went further however to confirm that even if the time had not expired under the *Limitation of Actions Act*, he would have had no difficulty applying the equitable remedies of laches and estoppel to bar the defendant's action for recovery, as provided for in s. 31 of the *Limitation of Actions Act*, as any claim of the defendants to the lands should have been brought within a reasonable time[80]. One can easily see how, with the passage of time, the negative doctrine of barring an owner's right to recover land has been seen to be the corollary, recognizing the successful adverse claimant to be the "rightful" owner of the land, possession being accorded priority of right.

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[78]Ibid at page 272

[79](1992), 115 N.S.R. (2d) 36

[80] The Nova Scotia Court of Appeal affirmed Justice Tidman's decision *supra*; with regard to a discussion of the principles of estoppel see the Nova Scotia Appeal Court decision in *Ford v. Kennie, supra*

Let us examine the principles of prescriptive rights as distinguished from those of adverse possession.

PART III- Prescriptive Rights, the *Limitations of Actions Act* and Common Law

Prescriptive rights have characteristics which are in some respects distinctly different from those of adverse possession. The legal doctrine of prescriptive rights is a positive doctrine, and once established prescriptive rights do not operate to extinguish the right, title and interest of the owner's fee simple. Unlike adverse possession, the land over which a prescriptive right crosses must benefit an adjoining parcel - so there must exist a dominant-servient relationship. The prescriptive use need not be exclusive[81], but must be without the owner's consent.

The authorities describe a prescriptive easement as follows:

> "A claim to an easement that has not been acquired by grant, express or implied, must be founded upon prescription, that is to say, a title acquired by possession had during the time and in the manner fixed in law"[82].

Prescriptive Rights in Nova Scotia:

In Nova Scotia there are only two ways of establishing prescriptive rights - by the application of the doctrine of lost modern grant; and by the provisions of the *Limitation of Actions Act*.[83]
With regard to the doctrine of lost modern grant, the law applies a presumption that if actual enjoyment of a prescriptive right can be shown to have existed for a twenty year period, there must have been an original

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[81]C. W. MacIntosh, *supra* at p.7-21

[82]Anger and Honsberger, *supra* at p.935

[83]C. W. MacIntosh, Nova Scotia Real Property Practice Manual, at p. 7-21

grant for that use, which has since been lost.[84] This presumption is however, rebuttable.

The statutory authority for prescriptive rights is set out in s. 32 of the *Limitation of Actions Act*. The requirement is for the establishment of a twenty year use but that right may be defeated. If however it can be shown to have existed for 40 years (as a result of s. 115(9) of the *Land Registration Act* this time frame is shortened to 25 years) then the prescriptive right is "deemed absolute and indefeasible". There are other requirements for the successful claimant. The statute only operates if there is litigation, so to establish a prescriptive right under this section an action must be commenced.[85] Section 34 requires that the period of use must immediately precede the commencement of the action, and also requires that the use be without interruption or obstruction [86]. Once use is established for 40 years, (25 years March 24, 2003 effective with the consequential amendments incorporated in the *Land Registration Act*) non-use, or interruption become irrelevant[87].

Adverse possession and prescriptive rights share the same "burden of proof" for all practical purposes"[88] The burden of proof required for the establishment of prescriptive rights is that the use be "open, continuous & unobstructed, without written permission of the owners from time to time"[89]. As with adverse possession, use may be by successive occupiers. The courts have cautioned parties with regard to the manner of documenting evidence relating to prescriptive rights. As stated by Gruchy, J. in *Keirstead*

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[84]Ibid; and for a discussion on this doctrine see Anger and Honsberger, *The Law of Real Property* 2d. ed. 1985, Vol.2, p.937

[85]Ibid, at 7-22

[86]Ibid

[87]Ibid

[88]A. Fordham, "Easements, Licenses and Rights of Way" April 1987 CLE at p. 12

[89]Roscoe J., in *Publicover v. Publicover* (1991) 101 N.S.R. (2d) 75 as cited in C. MacIntosh *supra* at p.7-23

v. Innocente[90] :

> "In my view the recital that the grantors "always enjoyed and used" a right-of-way ought to have alerted a careful title searcher to a potential problem as it does not contain sufficient factual information to give rise to a conclusion that a prescriptive right existed. The assertion of rights obtained by prescription usually requires evidence of the kind referred to by Mr. Fordham in his paper. The voluntary granting of access by a property owner does not lead to the conclusion of a prescriptive right. Indeed, the act of permitting a right of access is an act of ownership, particularly when accompanied by the acquiescence of the party exercising the access."

The underpinning of the doctrine of prescriptive rights is the equitable principle of acquiescence[91]. The ingredients of acquiescence as described by Fry, J in *Dalton v. Henry Angus & Co; Commissioners of Her Majesty's Works and Public Buildings v. Henry Angus & Co.*[92] :

> "It becomes then of the highest importance to consider of what ingredients acquiescence consists ... I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner:
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> 1. a knowledge of the acts done;
> 2. a power in him to stop the acts or to sue in respect of them; and
> 3. an abstinence on his part from the exercise of such power."

The new Professional Standard for Real Property Transactions in Nova Scotia (3.2) relating to prescriptive rights is not directive, and simply provides that a lawyer "may" certify title to interests acquired by prescription "in accordance with legislation, common law, and equity". A lawyer's objective when exercising professional judgment in favour of certifying prescriptive rights, to either the Registrar General[93]

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[90](1999) N.S.S.C. 136091 at p.12

[91]A. Fordham *supra* at p. 12

[92]6 App Case at p.773-774 as cited in A. Fordham *supra* at p.13

[93]Section 37(a) of the Land Registration Act

or to a client, is to ensure that the facts evidencing the prescriptive rights are documented.

Other provisions of the *Limitation of Actions Act* that may be relevant to the determination of prescriptive rights:

(a) the elimination of prescriptive rights of access and light or air to or for any building in a city or incorporated town unless established prior to April 15, 1931 (s. 33);
(b) the time period must be the period immediately preceding the commencement of the action (s. 34);
(c) a presumption in favour of the establishing of a prescriptive right shall not apply unless the time requirements are met (s. 35)
(d) period of disability shall be excluded from computation of time (s. 36) unless the disability occurs after the prescriptive right is definitively established.

Now let us turn to an examination of these two old doctrines, - adverse possession and prescriptive rights in the new environment of the *Land Registration Act*.

PART IV- Adverse Possession, Prescriptive Rights and *The Land Registration Act*

The declared purpose of the *Land Registration Act*[94] is set out in section 2:

"2. The purpose of this Act is to;

1. provide certainty in ownership of interests in land;
2. simplify proof of ownership of interests in land;
3. facilitate the economic and efficient execution of transactions affecting interests in

[94]S.N.S., 2001, c.6, s.2

land; and

4. provide compensation for persons who sustain loss from a failure of the land registration system established by this Act."

As noted earlier, the principles which accord priority to possession are inconsistent with principles of certainty in a land titles system. The options for the legislators in the development of the legislation included repealing adverse possession and prescriptive rights, maintaining the existing law with regard to these interests, or in some way preserving the established "matured" interests while prohibiting their future development. In choosing the latter, part of the consideration was the recognition that in Nova Scotia these interests have long been considered to be part of the land fabric. Families have handed down properties from one generation to another, without addressing the formalities of documentation. Boundaries of parcels are less certain than in western Provinces, and with the ocean frontage surrounding our coastlines there exist many rights of way and easements that have not been consistently documented.

Other Land Titles Jurisdictions

Examining the way in which other land titles jurisdictions have reflected these interests in legislation may assist our appreciation of the Nova Scotia context. For example, in the UK, where these kinds of interests have long been recognized, the new *Land Registration Act 2002*[95] introduces a specific process for the way in which these interests may be registered. Only those possessory interests which matured prior to the registration of a land parcel are eligible for registration (matured is defined as ten years occupation)[96]. Further, that legislation requires notification to the "paper" title holder of the possessor's application for registration. If there is an objection filed[97], a two year waiting period is triggered, during

[95]United Kingdom Legislation, [2002] c.9, s.97, and Schedule 6

[96]Ibid, Schedule 6, s.1(1)

[97]Ibid, Schedule 6, s.2

which time the paper owner may proceed with an action for recovery of the land from the possessory title holder[98]. At the end of the two year period, if the paper title holder has not proceeded with an action for recovery of land, and provided the possessor is still in possession, the possessory title holder may apply again for registration and be entitled as of right to have the application accepted[99].

Canadian land title jurisdictions vary as to the treatment of these interests. British Columbia[100], Alberta[101] and New Brunswick[102] prohibit the registration of possessory interests unless a prior judicial order has been secured (for example either under limitation statutes or quieting titles legislation). In New Brunswick, the *Quieting of Titles Act*[103] provides for a less expensive and more expedient process than that contemplated in the Nova Scotia statute. A boundary plan is not required for the subject lands and the application does not deal with any possible outstanding interest of the Crown, as all certificates issued under that statute are subject to any interest the Crown may have[104].

In Manitoba once a parcel is registered, adverse possession will not affect the title of the registered owner, but there is also a protection for those interests which matured prior to a parcel's registration if the possessor "continues possession". Ontario has a different statutory framework for these interests[105]. At the time of registration "if it appears that the applicant is entitled.....by virtue of the length of possession of

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[98]Ibid, Schedule 6, s.6

[99]Ibid

[100]*Land Title Act*, R.S.B.C, [1996], c.250, s.171

[101]*Land Titles Act*, R.S.A., 2000 c.L-4, s.74(1)

[102]*Land Titles Act*, S,N.B., 1981, L-1, s.17(1)

[103]S.N.B, 1996, c.Q-4

[104]Ibid, s.8(2)

[105]*Land Titles Act*, R.S.O., 1990, c.L-5

the land" the applicant may be registered as the owner with a designated "possessory" title[106]. After ten years registration the possessory title holder may apply to have the registration changed to an absolute title[107]. Ontario also allows a qualified title to be registered [108]. There does not appear to be any provision similar to Ontario's in British Columbia, Saskatchewan, Alberta or New Brunswick.

The jurisdictions vary as well with regard to the treatment of prescriptive rights. British Columbia[109] and Saskatchewan[110] abolish prescriptive rights outright. In New Brunswick, once a parcel is registered under the *Land Titles Act*[111], unless the prescriptive right is noted at the time of registration[112] any person claiming prescriptive rights "may apply to the court for relief"[113]. Ontario's legislation appears to prohibit both possessory interests and prescriptive rights occurring after the registration of a parcel[114]. In Manitoba, while certain prescriptive rights are abolished [115](- access and use of light to any building), certificates of registered owners by implication unless the contrary is expressly declared are deemed to be subject to "any right of way or other easement howsoever created, upon, over or in respect of land".[116] Most jurisdictions have some exceptions to these general rules for lasting improvements and wandering boundaries (see also

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[106]Ibid, s.36(1)

[107]Ibid, s.47(2)

[108]Ibid, s.37

[109]*Land Title Act*, R.S.B.C. [1996], c.250, s.24

[110]*The Land Titles Act*, S.S., 2000, c.L-5.1, s.150

[111]S.N.B. 1981,c.L-1.1

[112]Ibid, s.17(4)

[113]Ibid, s.17(2)

[114]*Supra*, s. 51(1)

[115]*Supra*, s.29

[116]*Supra*, s.58(1)(c)

Appendix E). With this backdrop let us examine the provisions of the *Land Registration Act* as they relate to the registration of possessory titles and prescriptive rights.

The Nova Scotia Context:

The *Land Registration Act* departs from traditional land titles systems in its treatment of these kinds of interests, and its title is one indication of that departure. (See Appendix "A") Briefly stated, matured possessory interests qualify for registration under the *Land Registration Act* without any requirement for a prior judicial review. The registration of a possessory interest will not trigger any special or qualified guarantee. With some exceptions which will be discussed, possessory interests that are not matured at the time of registration of a parcel will be extinguished in that they will not qualify for future registration as registration stops the clock from running. The Act precludes new possessory interests from arising after registration. The Act allows as well for the registration of mature prescriptive rights, and preserves as overriding interests easements or rights of way "being used and enjoyed "[117] .

The pivotal question to be determined is whether a possessory interest or prescriptive right has "matured" to qualify for registration in the new system. An "authorized" lawyer may exercise his or her professional judgment with regard to the sufficiency of the evidence of the interest, or may seek an order from a court of competent jurisdiction. This authority of a lawyer is unique, as can be seen, and carries with it a substantial responsibility. Lawyers, as they have in the past will exercise their professional judgment with regard to an assessment of the sufficiency of the evidence documenting these kinds of interests. This legislation not only recognizes the long history of these interests in the land fabric, it also recognizes the role that lawyers have had in helping clients understand these interests and documenting these interests over the last 250 years. The agreement entered into between government and the Nova Scotia Barristers' Society pursuant to the *Land Registration Act* embodies that historical role, and ensures that it will continue in the future.

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[117] *Land Registration Act, supra,* s.73(1)(e); see also *The Marketable Titles Act, supra* s. 7

Let us now turn to a consideration of the specific provisions of the *Land Registration Act* relating to these interests:

The Land Registration Act Provisions:

Section 37(9) - What title is registerable?

Section 37 requires that in order for a parcel of land to be accepted for registration, the application must be accompanied by a "solicitor's opinion" as to the title. The threshold for the opinion of title is that ownership must be:

> "s. 37(9)(a) to the standard required to demonstrate a marketable title pursuant to the *Marketable Titles Act*, or to the standard required pursuant to the *Limitation of Actions Act*, or the common law"(emphasis added)

A possessory title has been determined to be marketable by the common law, and by the courts considering the *Limitation of Actions Act*. Further, the definition of "Marketable Title" in the *Marketable Titles Act* was amended by the *Land Registration Act* (s. 116(1)) to add the following:

> "s. 4(1) A person has a marketable title at common law or equity or otherwise (language added by amendment underlined) 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".(amendment underlined)

The time frames under the *Limitation of Actions Act* have been shortened by the *Land Registration Act*. An owner must as of March 24th, 2003 bring an action to recover land within 20 years of being dispossessed. This time frame has not changed, but now if an owner is under a disability the time is only extended five years instead of a further 20 (s. 115(5)) and absence from the Province is no longer considered a disability (s. 115(6)).

It is worthwhile to note that the extinguishment provisions of the *Marketable Titles Act* have been amended as well by the *Land Registration Act*. Section 4(4) has been repealed and replaced with s. 4A (by s. 116(3) of the *Land Registration Act).* The time frame for the extinguishment of an unregistered interest is 25 years, reduced from 40, and the extinguishment is still triggered by the execution and registration of an instrument "that conveys or purports to convey land", other than a will. A person cannot rely on the "marketable title" provisions set out in s. 4(1) and (2) of the *Marketable Titles Act* if that ownership interest is statute barred by the *Limitation of Actions Act* (s. 7(2)(c)). With regard to an adverse interest that is acknowledged or forms part of a deed in a chain of title, the extinguishment provisions (now s. 4A) will not apply to that interest either.

Section 20 - The Guarantee of Ownership

The interests which are registered (s. 17 - fee simple, life interests and remainder interests, and Crown interests) will be guaranteed in the new system. Section 20 sets out the nature of that guarantee:

> "s. 20(1) The registered owner of a registered interest owns the interest defined in the register in respect of the parcel described in the register subject to any discrepancy in the location boundaries or extent of the parcel and subject to overriding interests."

This is the result of the curtain principle of a land titles system. Once registered, the historic title is not subject to a review by a subsequent Purchaser's lawyer. Unlike other jurisdictions there are no different categories of registered interests (no "possessory" or qualified title registration categories as in Ontario, for example). The parcel register will reflect what the state of the registered interest is at the time it is registered. If a lawyer qualifies his or her certificate to the ownership of the fee simple, that qualification will be shown on the face of the parcel register. All interests that are not registerable, are "recorded". Recorded interests are not part of the guarantee of ownership described in s. 20. The overriding interests referenced in s. 20 are set out in s. 73.

S. 73 - Overriding Interests (See Appendix B)

Any government guarantee will be subject to the overriding interests set out in Section 73. These include, among others:

- an interest of the Crown reserved from the original grant of fee simple, or that has been vested in the Crown by statute; (73(1)(a)); and
- an easement or right of way that is being used and enjoyed

Crown Interests - All grants reserve unto the Crown any portion of the land which is the subject of the grant that falls within the limits of a highway right of way. While the Crown is bound by the *Land Registration Act* (s. 6(2)), it is still exempt from the application of the *Marketable Titles Act* (s. 9). The time frame for establishing adverse possession against the Crown, has been reduced by s. 115(7) of the Act (amending s. 21 of the *Limitation of Actions Act*) from 60 years to 40 years. This change is retroactive, and as of March 24th 2003, effective across the Province. As well, as a result of the consequential amendments to s. 108 the *Environment Act* (by s. 103(3) of the *Land Registration Act*), adverse possession may be claimed on land that was once covered by water. Any ungranted land should be noted when determining a possible outstanding Crown interest - this remains unchanged by the new legislation[118].

Now that the time frame for adverse possession has been reduced from 60 years to 40 years, it would seem appropriate that those owners with 40 years paper title, being presumed at common law to be in possession of land, would also be presumed to have occupied their land for a period sufficient to bar the Crown from an action for the recover of any interest in land. Should a lawyer wish to definitively confirm the absence of a Crown interest in land, the two processes available for consideration would be

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[118]Catherine S. Walker, "Bill 53-The Marketable Titles Act-A New Beginning" in *Real Estate 1996 (*C.L.E.S.N.S., April 1996)

a s. 37 application under the *Crown Lands Act*[119] or an application for a certificate of title under the *Quieting Titles Act*[120]. A s. 37 application does not confer title on the applicant. Rather it operates to release any possible interest the Crown may be able to claim to the parcel.

An easement or right of way that is being used and enjoyed

The language of this overriding interest will be familiar as it mirrors the language preserved as overriding in the *Marketable Titles Act* (s. 7(1)(c)).

S. 74 - Adverse Possession & Prescriptive Rights (See Appendix B)

This provision prohibits anyone from obtaining a interest (subject to s. 75) unless that interest matured prior to the registration of a parcel under the Act (s. 74(1)). Those possessory interests which are not matured at the time a parcel is first registered are no longer able to ripen into a matured interest. Time stops running against an adverse possessor at the time a paper title holder registers a parcel under the *Land Registration Act*. If a paper title holder has registered a parcel without acknowledgment of the possessory interest, a claimant will have ten years from the time of the registration to secure a court order confirming their interest (74(2)(a)). After that time has expired, the Act provides that the adverse possessor's interest is "absolutely void" against the registered owner. The exceptions to this are set out in s. 74(2). If an adverse possessory claimant, prior to the expiry of the 10 year period

- secures a court order confirming the interest;
- files a certificate of lis pendens certifying an action has been started to confirm the interest;
- files an affidavit that a claim has been filed under s. 37 of the *Crown Lands Act*; or
- secures the agreement of the registered owner;

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[119]R.S.N.S. 1989, c.114

[120]R.S.N.S. 1989, c.382

the interest will be preserved. Section 74 cannot affect those possessory interests which are matured prior to the registration by a paper title holder of a parcel, if

- there is a marketable title to the interest when the paper title holder first registered the parcel (and the paper title holder was therefore statute barred pursuant to the *Limitations of Actions Act*(see also (s. 7(3) of the *Marketable Titles Act*) or
- the possessory title holder registers their fee simple interest in the parcel first, before the paper title holder.

So, in the event that the paper title holder registers first, unless the adverse interest is noted at the time of the first registration, the adverse claim will be barred after 10 years has expired unless the claimant is able to prove that interest in the manner provided by s. 74(2). If the possessory title holder of a matured interest wins the race to the land registration office for registration, that registration does not require any prior judicial approval, and provided it is accompanied by a solicitor's opinion confirming title is "marketable", registration will operate to bar, or extinguish the property interest of the paper title holder to that parcel. Thereafter, should a paper title holder proceed to advance a claim, it will be a claim of compensation only as the property right will be barred.

The way in which a solicitor exercises his or her professional judgment will determine whether a possessory title qualifies for registration. Once registered, the effect will be that the interest of the paper title holder in the land, if any, is extinguished.

S. 75 - The Wandering Boundary

This section is an exception to the prohibition of adverse possession set out in 74(1). It provides that an adjoining land owner may still accrue and claim adverse possession notwithstanding registration provided the claim does not exceed twenty percent of the area of the parcel against which the claim is made (s. 75(1)). Co-tenants may continue to perfect adverse claims against a co-owner notwithstanding the registration of a parcel (s. 75(1A)). The Act is clear that this provision includes time both before and after

the coming into force of the Act (s. 75(2)).

S. 76 - Lasting Improvements

This section provides a remedy for lasting improvements made to a property on the mistaken belief that the person improving the property owned the lands (s. 76(2)). This provision, modeled after the Saskatchewan legislation[121] is similar to other land titles jurisdictions [122] giving the court discretion, upon application of either party, to:

- require the improvement to be removed or abandoned (76(2)(a));
- require the improver to acquire an easement on terms the court thinks just; (76(2)(b));
- require the improver to acquire the land on which the improvement rests, on such terms the court thinks just; or (76(2)(c))
- require the owner of the lands to compensate the improver on such terms as the court thinks just.

The Act permits a similar application when it is the adjoining land owner that is encroaching, and the court will have the same range of possible orders, except there is no provision for an award of compensation (s. 76(3)). When an application is filed under this provision, it must be accompanied by a plan of survey.

S. 36 - Conflicting Registers

The Act provides rules for the determination of priority of interests in the event that there are two registers set up for a single parcel. Priority is accorded the interest holder in "actual possession of the parcel" (s. 36(1)(a)) and the holder of the interests will be entitled to apply for compensation (s. 85-87).

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[121] *The Improvements under Mistake of Title Act*, R.S.S. 1978, c.I-1, s.2

[122] See the *Property Law Act*, R.S.B.C., 1996, c.377, s.36; *Line Fence Act*, R.S.A. 2000, c.L-13, s.69(1); The *Law of Property Act*, C.C.S.M. c. L90; the *Conveyancing and Law of Property Act*, R.S.O., 1990, c.34, s.37(1)

However, it should be noted that a person will not be considered to have suffered a loss if the parcel is occupied and the occupation is readily apparent (36(3)).

Land Registration Administration Regulations

Section 9 of the *Land Registration Regulations* passed pursuant to the Act sets out the requirements for the application for registration. It provides, in part, that the owner of a parcel will be required to sign a declaration (Form 5) with regard to occupancy (s. 9(5)(a)). A copy of the form is appended to this paper (Appendix H). Clause 3 of the declaration requires the owner to declare whether there is any known adverse occupier of the property, and, if there is, the name of the person if known, the date occupation commenced, and any other relevant details of the occupation.

If a declaration discloses the existence of an adverse interest, the applicant for registration must notify the occupier in writing that an application has been made for registration, and the proof of service must accompany the registration application (Reg. 9(6)). The regulations require that copies of any documents referred to in an abstract of title that are not filed under the *Land Registration Act* or the *Registry Act*[123], must accompany the application for registration (Reg. 9(5)(c)). Declarations as to possession, for example, may either be registered under the *Registry Act*, or a copy filed with an application for registration.

PART V - CONCLUSION

The *Land Registration Act* has created a new environment which not only facilitates the preservation of possessory titles and prescriptive rights, it provides a government guarantee for those interests, backed by a lawyer's opinion of title. Our clients will require the benefit of our knowledge and

[123] R.S.N.S. 1989, c.392

judgment, more so now than ever before. We are in a new world, and we must take the time to become familiar with the landscape so that we can fulfill our client's expectations and the responsibility associated with the exercise of our professional judgment.

In the context of dealing with possessory interests, the revised Professional Standards are particularly relevant. The Standards were reviewed in light of the *Land Registration Act*, and reflect the appreciation for the importance of the lawyer's role in new system. They describe a lawyer's obligation to include:

- a familiarity with legislation affecting title or ownership rights and responsibilities (Leg. Review 1.1);
- advising a client about the impact of registration of land under the *Land Registration Act* on both the client and others (Migration under LRA 1.2); and
- documenting advice to a client, including limitations on the scope of retainer, and limitations on a certificate (Documentation 1.5).

Two new standards referenced earlier specifically provide that a lawyer "may certify" possessory title (3.2) and prescriptive rights (3.3).

At the heart of the Land Registration Act is the lawyer's certificate of title. We will be required to assist clients with the process of moving land parcels from the existing antiquated and outdated Registry System, into the *Land Registration Act* system. The mechanism for doing so is our opinion of title, including titles that are both paper based and possessory. In doing so, we would be well advised to remember as our guiding principle the following standard:

> "Standard 1.3 - A lawyer may certify title as marketable if, after examining the abstract of title, the lawyer is satisfied that title to the parcel is marketable in accordance with legislation, common law and equity...".

We have reviewed the development of the law relating to adverse possession and prescriptive rights in Nova Scotia, and the legislative framework that impacts on those rights. We have examined the courts

assessment of these interests, and the way in which principles of equity continue to affect a result. The courts have commented as to the appropriate manner in which to document these interests. We should not hesitate to follow their guidance.

We may or may not be satisfied as to the marketability of a title after a careful review. That is the privilege afforded to each of us - but our clients deserve any advantage afforded to them and the authority given to a lawyer under the *Land Registration Act* to certify interests based in possession, is just that. Let us work together so that we may all rise to the occasion.

APPENDIX "A"

COMPARISON OF SYSTEMS FOR THE
ORGANIZATION OF LAND INFORMATION

PRINCIPAL FEATURES

Traditional Land Titles System

Origin-Australia - 1800's
In Western Provinces since late 1800's

- land information organized by parcels
- boundaries may be guaranteed (or process) ;
- adverse possession and prescriptive rights abolished
- Registrar assesses validity of all instruments and determines legal effect
- Registration guarantees
  - ownership (fee simple) **and**
  - all interests in land
- transfers only on prescribed forms

MIRROR, CURTAIN, INSURANCE

Mirror: what is shown on the register **is** (as a matter of law) the state of the title

Curtain: there is no requirement to examine behind the register

Insurance: there is government backed compensation fund if the interest is improperly omitted from the parcel register.

Land Registration Act of Nova Scotia

Proclamation date - March 24, 2003

- land organized by parcels as to relative location to others;
- boundaries not guaranteed
- adverse possession (historic) and prescriptive rights preserved - most prospective adverse possession abolished (certain prescriptive rights preserved as overriding)
- Lawyers assess state of title for registration and for transfer
- registration guarantees fee simple interests only
- all other interest recorded
- compensation if interest (fee simple) not reflected

MIRROR, CURTAIN, INSURANCE

Mirror- what is in the parcel register reflects the state of title for the parcel BUT
- government guarantee relates solely to fee simple ownership, life interests and remainder interests;
- all other interests recorded without guarantee - up to users of system to assess effect of recorded interests

Curtain - once parcel brought into the new system curtain drawn on past history

Insurance - Lawyers certificate will back the

government guarantee for 10 years

Appendix "B" - Nova Scotia

Legislation affecting Possessory and Prescriptive Rights

Land Registration Act, S.N.S., 2001, c.6

Adverse Possession and Prescription

s. 74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.

(2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless

(a) an order of the court confirming the interest:

(b) a certificate of *lis pendens* certifying that an action has been commenced to confirm the interest;

(c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the *Crown Lands Act*; or

(d) the agreement of the registered owner confirming the interest,

has been registered or recorded before that time.

(3) Nothing in this Section affects any interest in a parcel acquired by **adverse possession** or prescription, where the required period of adverse possession or prescription was completed before the paper title to the parcel was first registered, if

(a) there is a marketable title to the interest acquired by **adverse possession** or prescription pursuant to the *Marketable Titles Act* when the paper title to the parcel was first registered; or

(b) the interest is a fee simple estate and the holder of the interest registered the

parcel pursuant to this Act prior to

registration by the holder of the paper title.

Wandering boundaries

s. 75 (1) Can acquire interest by prescription or adverse possession after registration if an adjoiner and if area affected does not exceed twenty percent of the land area;

Co-Tenants

s. 75(1A) co-owner of property can even after registration acquire whole interest in parcel.

Prescriptive Rights

Limitation of Actions Act, R.S.N.S. 1989, c. 258

s. 32 - time frame for establishing prescriptive right twenty years - if under disability then extended to 25 years;

s. 33 (1) Prescriptive easement for access and use of light to and for dwelling house or building - 20 years without interruption - right shall be deemed absolute unless same was enjoyed by consent in writing;

Land Registration Act S.N.S. 2001, c. 6

s. 73, Overriding Interests continued - s. 73(1)(3) an easement or right of way that is being used and enjoyed;

Lasting Improvements

s. 76(2) If person makes lasting improvements on land under belief it is theirs, court may, on application:

a) require removal of improvements;
b) order grant of easement;
c) require acquisition of easement area on such terms as court thinks are just; or
d) order owner of land improved to pay compensation;

76(3) if building encroaches court has same authority as 76(2)

Marketable Titles Act

- paper title holder cannot rely on title being marketable under s. (4(1) and (2) if interest statute barred (7.(3))
- if adverse possession interest noted in legal description in search within chain, not existing under 4A

Quieting Titles Act

-s. 12(2)

"Where it appears that the plaintiff or the plaintiff's predecessors in title have been in possession as owners or part-owners for twenty years prior to the commencement of the action and during that time a person whether or not his whereabouts are known has or may have an interest in the lands forming the subject matter of the action and such person has not received any benefit, paid any expenses or exercised any proprietary rights in respect to said lands, the judge may order subject to subsection (3) that the interest of such person vest in the plaintiff."

APPENDIX "C"

CANADIAN LAND TITLES JURISDICTIONS - POSSESSORY TITLE

BRITISH COLUMBIA - Land Title Act, RSBC 1996 c. 250

s. 171 - Any application for AFR (Application for First Registration) founded in whole or in part on adverse possession must not be accepted unless permitted by this Act, and supported by a declaration of title under the *Land Titles Inquiry Act* (B.C. version of *Quieting Titles Act*)

Land Title Inquiry Act, R.S.B.C. 1996, c.251

s.2(1) A person who has an estate or interest in land in British Columbia may apply to the court for the investigation of the person's title and a declaration of its validity.(comparable to our *Quieting Titles Act*)

ALBERTA - Land Titles Act, R.S.A. 2000 c. L-4

s. 74(1) - Any person recovering against a registered owner a judgment declaring that the person recovering the judgment is entitled to the exclusive right to use the land or that the person recovering the judgment be quieted in the exclusive possession of the land pursuant to the *Limitation of Actions Act* R.S.A 1980 c. L-15, may file a certified copy in Land Titles Office

S. 74(2) - Registrar may file the judgment (subject to s. 191 confirmation judgment is final) and issue a new certificate

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SASKATCHEWAN - Land Titles Act 2000, S.S. 2000, c. L-5.1

s. 18(overriding interests) 18(1)(f) - any claim or interest set out in s. 21;

s. 21(1)(a) - After issuance of first title pursuant to Crown Grant, no person acquires by way of possession any right, title or interest adverse to or in derogation of the registered owners' title or right to possess the land.

MANITOBA - The Real Property Act - C.C.S.M., c. R30

s. 29(1) - may apply to have interest or estate or whole title to land registered, but

registrar may refuse unless “all persons who are interest in land are consenting thereto”

s. 58(1) (overriding interests) - any certificate of title issued shall be deemed to be subject to:

(a) “the title of a person adversely in actual occupation of and rightly entitled to land at the time it was brought under this Act, and who continues in such occupation”

s. 61(1) Every Certificate of Title is void as against the title of a person adversely in actual occupation of and rightly entitled to the land at the time the land was brought under the new system, and who continues in occupation.

s. 61(2) After land has been brought in under this Act, no title thereto adverse to, or in derogation of, the title of the registered owner is acquired by any length of possession merely.

s. 145 Caveat may be filed objecting to registration of land.

ONTARIO - Land Titles Act R.S.O. 1990, c. L.5

s.36(1) Where on an application for first registration, it appears that the applicant is so entitled by virtue of length of possession of the land, the applicant may be registered as the owner of the land with a possessory title;

s. 36(2) Subject to the approval of the Director of Titles, an applicant for first registration whose claim to ownership is based upon length of possession of the land may be registered as the owner in fee simple with an absolute title of the land.

s. 37 A qualified title may be registered.

s. 47(1) Registration on AFR of owner with possessory title only does not affect or prejudice enforcement of any estate, right or interest adverse to or in derogation of the title of the first registered owner ..., but otherwise has the same effect as registration of a person with absolute title.

s. 47(2) Registered owner with possessory title may apply at any time to apply to be registered as owner of the land with an absolute or qualified title.

s. 47(3) After expiration of 10 years from date of registration of person as registered owner with a possessory title only, the then registered owner of the land may, upon paying prescribed fees apply to the land registrar to be entered as owner with an absolute or qualified title, and the land registrar may, either forthwith or after requiring such evidence to be furnished and notices to be given as he or she considers expedient, register the applicant as owner in fee simple with an absolute

title or qualified title subject to such encumbrances, if and, as the condition of the title requires.

s. 51(1) Despite any provision of this Act, the *Limitations Act* or any other Act, no title and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

(2) Section doesn't apply to person in possession at the time of registration of person with possessory title only.

s. 89 - Transfer of title for possessory title only - does not affect person whose interest is adverse to first registered owner with possession

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NEW BRUNSWICK - Land Titles Act, S.N.B. 1989, c. L-1

s. 17(1) After Title to land registered under Act:

(a) No right, title or interest adverse to or in derogation of the title of the registered owner or his right to possession shall be acquired by the possession of another; and any such rights acquired by any person prior to the date on which the title was first registered under this Act shall not be enforceable as against a registered owner if the existence of the right is not shown in the title register;

s. 17(2) Any person who, prior to the date on which title to land first registered... had use and enjoyment of a right of way or right of access to property and such right of way or right of access is not registered against a parcel of registered land, may apply to the court for relief;

s.17(3) Court may grant relief and order title registered rectified, or determine compensation and costs;

There is a requirement for owner, at the time of AFR to confirm:

"6. That there is no person having any claim or interest in the land adverse to or inconsistent with my title, except as specified in the application.

7. That I am in possession of the land".

(Taken from Form 2 - *Land Titles Act*, S.N.B., 1981, c.L-1.1, s. 11 as provided by D. Hayward Aiton)

APPENDIX "D"

CANADIAN LAND TITLES JURISDICTIONS

PRESCRIPTIVE RIGHTS

BRITISH COLUMBIA - Land Title Act R.S.B.C. 1996, c. 250

s. 24 - All existing methods of acquiring prescription abolished **AND** - common law doctrines of prescription and lost grant abolished

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ALBERTA - Land Titles Act R.S.A. 2000, c. L-4

s. 130 - Person may file caveat if claiming an interest in land (easement, right-of-way);
s. 71(4) - When land has appurtenant to it, or enjoyed with it any rights, privileges, easements and covenants under a party wall agreement those rights, privileges, easements and covenants are deemed to run with the land;
s. 72(1) encroachment agreements once received may be enforced as easements.

Law of Property Act R.S.A. 2000, c. L-7

s. 69(3) - No right to access and use of light or any other easement ... shall be acquired by a person by prescription, and no such right is deemed to have ever been acquired.

SASKATCHEWAN - The Land Titles Act, S.S.2000, L-5.1

s. 18 - implied (overriding) interests include easements and rights-of-way that are granted by an Act, and that are not required to be registered Crown interests reserved in original Crown grants, etc.

s. 150 - Doctrine of prescription abolished. No right of access and use of light or any easement, right ingress or profit a prendre is

1. acquired by any person by prescription; or
2. deemed to have been acquired at any time.

MANITOBA - Law of Property Act C.C.S.M., c. L90

s. 29 - No person acquires a right by prescription to the access and use of light to any building structure or work.

The Real Property Act C.C.S.M., c. - R30

58(1) - The land mentioned in the certificate of title shall, by implication and without special mention in the certificate, unless the contrary be expressly declared be deemed to be subject to;

c) any right-of-way or other easement howsoever created, upon, over or in respect of, the land.

ONTARIO - Land Titles Act

s. 39(2) Where an easement in or over unregistered land is granted as appurtenant to registered land, the land registrar after such examination as he or she considers necessary, may enter the easement in the register of dominant land with a declaration that the title thereto is absolute, qualified or possessory, or otherwise as the case requires, and shall cause to be registered in the proper registry division a certificate of such entry. (See also *Certification of Titles Act*, R.S.O. 1990, c.6)

S. 4(2) A person whose claim is based on length of adverse possession may apply to the Director to have the title to the land certified in the name of the applicant; - The Directory may hold a hearing (s.6(2)) or refer to judge of Superior Court of Justice (s. 6(4)).

s. 51(1) Despite any provision of this Act, the *Limitations Act*, or any other Act, no title to and no right or interest in the land registered in this Act that is adverse to or in derogation of the title to the registered owner shall be acquired hereafter or

be deemed to have been acquired heretofore by any length of possession or by prescription.

NEW BRUNSWICK - The Limitations of Actions Act, C.S.N.B., c. L-8 has no provision for prescriptive rights;

Land Titles Act, S.N.B. 1989 c. L-1.1

s. 17(1) - after title to land registered:
b) no right to the access and use of light or any easement shall be acquired in or in respect of land by any person by prescription and any such rights acquired by any person prior to the date on which the title was first registered under this Act shall not be enforceable as against a registered owner if the existence of the right is not shown on the title register;

s. 17(2) - Any person who, prior to the date on which title to land first registered ... had use and enjoyment of a right-of-way or right of access is not registered against a parcel of registered land, may apply to the court for relief;

s. 17(3) - court may grant relief and order title register rectified, or determine compensation, and costs;

s. 17(4) unless the contrary is expressly declared in the title register, all registered land is, by implication and without special mention subject to the following overriding interest:

d) No mention of possessory interest, easements, or prescriptive rights unless granted by statute;

APPENDIX "E"

CANADIAN LAND TITLES JURISDICTIONS

LIMITATIONS OF ACTIONS ACTS

BRITISH COLUMBIA - Limitation Act [RSBC, 1996], c. 266

s. 3(4) - The following actions are not governed by a limitation period and may be brought at any time:
a) for possession of land if person entitled to possession has been dispossessed in circumstances amount to trespass ...
h) to enforce an easement, or restrictive covenant ...
j) for the title to property or for a declaration about the title to property by any

person in possession of that property;

s. 12 - Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession;

s. 14(5) - Nothing in this act interferes with any right or title to land acquired by adverse possession before July 1, 1975;

s. 2 - Nothing in Act interferes with application of equitable relief - acquiescence, etc.

ALBERTA - Limitations Act RSA 2000 c. L-12

s. 2(4) none for Crown
s. 3(1)(b) 10 years for land

SASKATCHEWAN - Land Titles Act 2000 S.S. 2000, c. L-5.1

s. 21(1)(b) right of owner to bring action to recover land for which title has issued is not impaired or affected by possession of land by any other person

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MANITOBA - Limitation of Actions Act CCSM, c. L150

s. 25 - No person shall take proceedings to recover land but within 10 years next after the time at which the right to do so first occurred to some person through whom he claims

s. 26 - time runs from date owner "dispossessed" or has discontinued possession;

s. 39 - Acknowledgment of title of owner by person in possession is equivalent to possession by owner, and time starts for possession from date of acknowledgment.

s. 53 - At end of period - the right and title of that person is extinguished.

ONTARIO - Limitations Act, R.S.O. 1990 c. L.15

s. 2 - Nothing in the Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

s. 3 - 60 years as against the Crown.

s. 4 - 10 years as against owner of land.

s. 5(1) - time runs from when owner dispossessed or has discontinued possession;

s. 5(4) - unimproved land - provided land granted by Crown, and owner has not taken actual possession of land, unless it is shown that owner has knowledge of actual possession by another, lapse of 10 years will not bar action for recovery of land, - but after 20 years right barred;

s. 13 - acknowledgment in writing by person in possession will be deemed to be possession of owner to whom acknowledgment given;

s. 15 - at end of time frames period set out by act - "right and title of such person to the land ... is extinguished;

s. 33 - right to access and use of light by prescription abolished.

NEW BRUNSWICK - Limitation of Actions Act

s. 1 - "Disability" - infant or incompetent

s. 29 - 20 years for action to recover land - (or from acknowledgment)

s. 18 - If disability two years from end of disability added on;

s. 30 - No action may be brought by Crown after a continuous adverse possession of sixty (60) years;

s. 31 - Time shall start from time owner has been "dispossessed" or has "discontinued possession";

s. 32 - Co-tenants - time can run against co-ower if possession by one;

s. 59 - No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon;

s. 60 - Once time has run, "the right and title of such person to the land ... shall be extinguished".

s. 65 - Equitable remedies acquiescence or otherwise not interfered with;

NOVA SCOTIA - Limitations of Actions Act, R.S.N.S., 1989, c. 258

s. 10 - twenty years for owner to commence action to recover land;

s. 11 - commencement of time -
(a) ... from time owners, while entitled has "been dispossessed, or has discontinued such possession";
(b) tenant at will - one year after commencement of tenancy;

s. 13 "No person shall be deemed to have been in possession within the meaning of this Act merely by reason of having made an entry thereon";

s. 15 - Co-owners - possession by one owner or more than his/her share such possession shall not be deemed to be possession by non-possessing co-owner;

s. 16 - If acknowledgment made by possession to owner entitled, in writing, time starts anew;

s. 19 - If owner entitled is under disability (absence from Province no longer a disability s. 115(5) LRA) then time extended to 25 years;

s. 21 - claims against Crown reduced rom 60 to 40 (s. 115(7) LRA);

s. 22 - Once time periods have expired, right and title of "owner" extinguished - (s. 115A LRA - changes to Act apply to interests arising before or after coming into force of Act.

S. 31 - Rules of Equity preserved - "Nothing in this Act shall be deemed to interfere with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an actin is not barred by virtue of this acquiescience, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act."

APPENDIX "F"

CANADIAN LAND TITLES JURISDICTIONS

LASTING IMPROVEMENTS

BRITISH COLUMBIA - Property Law Act R.S.B.C. 1996 c. 377

s. 36 - "owner" includes person with an interest in, or right to possession of land - provision for applying to Supreme Court if building or fence encroaches on adjoining land, Supreme Court may, on application:

1. owner has easement on paying compensation to adjoiner;
2. vest title to land encroached in owner making compensation that court determines; or
3. order owner to remove encroachment

ALBERTA - Line Fence Act

provision for allocation of costs of relocating fence *Holmes* v. *Nil-Ray Farms Ltd.* 2000 (Alta. CA) 323

Law of Property Act - RSA 2000, c.L-7

s. 69(1) Where person has made lasting improvements on land under belief the land owner, person

1. entitled to lien to extent of enhanced value; or
2. entitled to retain land if court feels this is appropriate;
3. court may order compensation

SASKATCHEWAN- The Improvements under Mistake of Title Act R.S.S. 1978, c.I-1

s. 2 Where a person has made lasting improvements on land, under the belief that the land is his own, he or his assignee shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements; or shall be entitled or may be required to retain the land if the Court of Queen's Bench is of opinion or requires that this should be done, according as may under all circumstances of the case by most just, making compensation for the land, if retained, as the court may direct.

MANITOBA - Law of Property Act, C.C.S.M., c. L90

s. 28 - If building encroaching on adjoining land court may:

(a) declare owner of building has easement upon making payment of compensation;
(b) vest title to land to owner upon payment of value as court determines; or
(c) order owner of building to remove encroachment.

ONTARIO - Conveyancing and Law of Property Act, R.S.O., 1990, c. 34 s. 37(1)

Where a person makes lasting improvements on land under the belief that it is the persons own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements or are entitled or may be required to retain the land if the Ontario Court (General Division) is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensiont of the land, if retained as the court directs.

Appendix "G" - U.K.

Land Registration Act 2002, c. 9

Adverse Possession

s. 96(1) No time limits in Limitation Act, 1980 s. 15((2)(s. 16)) shall run against any person, other than a chargee in relation to an estate in land or rent charge the title to which is registered

s.96(3) s. 17 of *Limitation Act* 1980 (extinguishment of title on expiry of time) does not operate to extinguish title of any person where, by virtue of this section a period of limitation does not run against him.

S. 97 - Schedule 6 - has effect (provides for basis for registration of adverse possession);

s. 98 - Defences available to action for possession of land.

Schedule 6

1. If for ten years immediately preceding application a person is in adverse possession of estate, may apply to be registered as owner;

2. Registrar to give notice of application to those persons interested

3. Provisions for registration of possessory title if equitable principles of estoppel apply (s. 5(2))
or
s.(3) "the applicant is for some other reason entitled to be registered";

or

if an adjacent land owner and an exact boundary line between parcels not agreed.

6. If person's application rejected, he may ,if he continues in adverse possession make on application after expiry of two years if paper title holder has not in the meantime proceeded to secure judgment in action for possession, or succeeded in application for ejectment.

11. A person is in adverse possession of an estate in land if but for s. 96 period of *Limitation Act* 1980 would run in his favour.

LIMITATION PERIODS UK

s.1(1) 10 years for land;

s. 13 (Schedule 6) if applicant in adverse possession of land owned by crown, sixty years adverse possession required (amendment to s. 1(1) of Schedule 6).

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