

AFFIDAVIT TEMPLATES & COMMENTS
FOR DOCUMENTING POSSESSORY INTERESTS

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PART I - GENERAL

1. Introduction

- a. Many affidavits recorded to evidence possessory interests do not address all the elements required for such affidavits by the courts. This outline is a drafting tool to assist lawyers in properly drafting these affidavits. This outline includes references and annotated templates for documenting possessory interests. The templates are divided by headings for the categories of evidence required to substantiate possessory interests. This is a drafting tool only. As always, your professional judgment in a particular matter must prevail.
- b. Part II deals with documenting adverse possession.
- c. Part III deals with documenting prescriptive easements.

2. Definitions

- a. "LAA" means the *Limitations of Actions Act*, as amended;
- b. "LRA" means the *Land Registration Act*, as amended; and
- c. "MTA" means the *Marketable Titles Act*, as amended.

3. Underlying Crown Interests

- a. Ensure there is no underlying Crown interest in the parcel that will override your client's interest. See the annexed "Checklist for considering underlying Crown interests".
- b. The Nova Scotia Department of Natural Resources (DNR) has published guidelines for obtaining *Crown Lands Act*, s.37, releases. DNR requires statutory declarations from the owner and at least one disinterested knowledgeable third party as well as a plan showing the extent of use or occupation. It would be prudent to follow this practice in evidencing possessory interests generally.

4. Affidavits proving possessory interests

- a. Refer to Nova Scotia Civil Procedure Rule 38 respecting affidavits.
- b. Affidavits evidencing possessory interests must not contain general statements but only specific facts which are relied upon as establishing possession or use. Avoid "cookie-cutter" affidavits, affidavits in which lay-persons state legal conclusions, affidavits that "parrot" the *Limitations of Actions Act* and affidavits using language that the deponent would not normally use.
- c. Identification. Ensure you identify the person swearing the affidavit before you as the person he or she purports to be so you are not, unwittingly, part of a fraud¹. Ask for photo ID from deponents you do not know personally; place a copy in your file. For deponents you do know it would be prudent to make a file note confirming your means of confirming their identity. In *Yamada v. Mock*² Day, J., found a solicitor who acted for both mortgagor and mortgagee negligent for failing to confirm the identity of a female signing a mortgage as wife of the male mortgagor. The female was an imposter. When the wife of the male mortgagor claimed her interest in the mortgaged property the lawyer's mortgagee client suffered a loss. The judge stated:

"I focus on the foreseeability of the risk. What should a solicitor be expected to foresee? Should a solicitor anticipate that the person before him in a transaction with major financial consequences may be an impostor? While the solicitor should not be expected to act as guarantor, he or she should take reasonable steps to protect the interest of the party which he or she is serving. While the eliciting of identification may not prevent fraud, it would make it much more difficult. The likelihood of someone producing false documentation is far less than someone simply asserting that they are someone other than who they are. It would have been an easy step to take. Both parties are innocent. As between them, who should bear the risk? [The solicitor] could have easily sought identity; there is nothing [the mortgagee client] could have done."
- d. Indexing. Registry Office staff have advised us that they only index affidavits related to *Registry Act* parcels under names that are either
 - i. included in the "In The Matter Of..." block at the head of the affidavit, or
 - ii. included in a cover letter specifically requesting that the affidavit be indexed under other names.
- e. Registry Office staff also advised us that they disregard PID numbers in Form 44 when indexing *Registry Act* documents.
- f. Be sure to consider the operation of sections 74 and 75 of the *Land Registration Act* before recording an affidavit respecting a possessory interest in a parcel that is already converted

1 Patrick I. Cassidy, *Statutory Declarations*, Real Estate Continuing Legal Education Materials, April 24, 1994.

2 (1996), 2 R.P.R. (3d) 162, 136 D.L.R. (4th) 124, 29 O.R. (3d) 731, 5 O.T.C. 391 (Ont. Gen. Div.)

5. Risk assessment

- a. Risk. The extent and detail of the affidavits you prepare to document possessory interests may, to some extent, depend on your judgment about the likelihood of a third party contesting the possessory interest you are advancing. When you believe there may be a material risk of a challenge you should negotiate appropriate releases of interests or obtain a *Quieting Titles Act* order to settle the parcel's status definitively.
- b. It is prudent to advise your client to engage a surveyor to examine the possessory interest claimed for physical evidence supporting the claim. Apart from determining the extent of the interest claimed the surveyor should alert you and the client to any other material issues that come to his or her attention during the examination.

6. Survey - proving the extent of an interest

- a. A survey is essential if the result of your affidavit is to create new boundary lines between the resulting parcels - e.g. when establishing adverse possession of part of a previously described parcel. While a survey may not be critical in a claim for possessory title to the whole of a parcel with well defined boundaries, it would be prudent to recommend a survey to the client in any case - to protect your client and you if boundary issues arise later.
- b. Remember that you must establish title to the full extent of the possessory interest claimed by appropriate recorded evidence *before* you either
 - i. convert registration of the interest to the Land Registration System, or
 - ii. consolidate a parcel owned by adverse possession with other lands.
- c. Nova Scotia Land Surveyors have recently identified a number of instances where lawyers have created new parcels (including consolidating lands of different owners) simply by creating new descriptions without engaging surveyors and without proper attention to existing parcel descriptions and survey work. In each case the lawyer's work has created substantial problems for property owners and resulted in complaints to the Barristers' Society. Don't create problems; have a licensed Nova Scotia Land Surveyor do any necessary survey work in determining the extent of the possessory interest you are advancing.

7. CLE resources

- a. Catherine S. Walker, Q.C., *Adverse Possession and Prescriptive Rights - Old Doctrines in A New Environment*, Nova Scotia Barristers' Society and Real Estate Lawyers' Association of Nova Scotia, Property Practice In New Environments, February 1, 2003.

- b. Anthony Chapman, Q.C., *Of Wharves, Water Lots and Kings*, CBANS Presentation November 16, 2004, CBANS website.
- c. Arthur G.H. Fordham, Q.C., *Adverse Possession*, Practical Property 1982, March 1982.
- d. Arthur G.H. Fordham, Q.C., *Prescription and Adverse Possession*, Real Estate Practice, January 1994.
- e. Charles W. MacIntosh, Q.C., *How Far Back Do You Have to Search*, Nova Scotia Law News, Volume 14, No. 3, December 1987, 37.

8. Professional Standards, Real Property Transactions in Nova Scotia.

- a. Refer to the Nova Scotia Barristers' Society, *Professional Standards Real Property Transactions In Nova Scotia*, Standard 3.2 (Possessory Title) and Professional Standard 3.3 (Prescriptive Rights).
- b. Professional Standard 3.1 (Abstracting), citing *Hebb v. Woods*³, permits solicitors to certify possessory title under principles established by case law. See Catherine Walker's paper, above, pp.18 *et seq.*

PART II - ADVERSE POSSESSION

9. Alternatives. If there is no Marketable Titles Act root of title can you find an acceptable alternative before documenting adverse possession? Subject to possible underlying Crown interests:

- a. Do recitals "bridge a gap" in title to connect recent title with a recognized root of title? See *Inter Lake Developments Ltd. v. Slauenwhite*⁴.
- b. Is there an expropriation that can be used as a root⁵?
- c. Is there a *Quieting Titles Act* order in the chain of title?
- d. Consider section 5(3) of the *Veterans' Land Act*. In *Carmichael v. Durant*⁶ Hamilton, J., stated, *inter alia*, that

3 (1996), 150 N.S.R. (2d) 16 (N.S.S.C.).

4 (1988), 86 N.S.R. (2d) 23, 49 R.P.R. 13, 218 A.P.R. 23, 1988 CarswellNS 91, (N.S.S.C.).

5 Arthur A.G.H. Fordham, Q.C., *Certification Of Title To Expropriated Land*, Practical Property 1984, October 1984. See Professional Standard 3.16.

6 (1995), 143 N.S.R. (2d) 234; 411 A.P.R. 234, (N.S.S.C.).

"[6] Counsel for both parties agreed that my decision on the constitutional validity of s. 5(3) of the Veterans' Land Act will answer the issue between the parties. Section 5(3) provides as follows:

"5(3) All conveyances from the Director constitute new titles to the land conveyed and have the same and as full effect as grants from the Crown of previously ungranted Crown lands."

[7] I am prepared to grant an order stating that s. 5(3) of the Veterans' Land Act is within the legislative authority of the federal government and that the effect of s. 5(3) of the Veterans' Land Act, in this case, is that the deed from the Director, the Veterans' Land Act, to Eleanor Marie Covey dated September 19, 1989, has the same force and effect as if it were a Crown grant."

Carmichael may allay earlier reservations about the constitutionality of this section but Charles MacIntosh, Q.C., still expresses some reservations about whether a Federal or a provincial Crown Grant is conveyed - *Nova Scotia Real Property Practice Manual*, s.5.1D.

- e. Is there a tax deed older than 6 years in the chain of title that can be relied upon under MTA, s.6⁷?
- f. Is any material interest extinguished by MTA, s.4(4), (pre-LRA amendments), or by s.4(A) (post-LRA amendments)? Note the inconsistency between s.4A and repealed s.4(4).
- g. Is there a registered or recorded instrument or series of instruments that will suffice as a root of title? In *Olsen Estate v. ASC Residential Properties*⁸ a Will was found to be good root of title when considered in the context of other recorded instruments. See Professional Standard 3.1 Abstracting.
- h. Is the parcel a former school property that vested in a municipality under ss.221-225 of the former *Municipal Act*⁹ in the mid-1950s?
- i. Is the interest acknowledged or specifically referenced in a *deed* in the chain of title of the parcel - see MTA, s.7(3)?

10. Crown interests - Federal

- a. The *Federal Real Property and Federal Immovables Act*, s.14, states:

"No person acquires any federal real property or federal immovable by prescription."

7 See Michael LeBlanc's Pre Trial Memorandum in *Stuart Dow and Sherri Dow v. Allan Zinck and Allan Young*, S.H. No. 118046, August 5, 1997, (Stewart, J.). A copy was published with Mr. LeBlanc's consent in the materials for the Real Estate '99 Conference, March 1999.

8 (1990), 102 N.S.R. (2d) 94 (N.S.S.C.).

9 R.S.N.S. 1967, c.192.

This provision became effective June 1, 1950 under the *Public Land Grants Act*, S.C. 1950, c.19. One must establish 60 years adverse possession against the federal Crown before June 1, 1950 - the *Nullum Tempus Act* of 1769 applies to the Crown in right of Canada in Nova Scotia¹⁰.

- b. Check the Treasury Board of Canada Secretariat's on-line "Directory of Federal Real Property" (DFRP) that is presented as a complete list of Federal Government real estate holdings.
- c. Consider section 5(3) of the *Veterans' Land Act* as discussed above.

11. Harbours

- a. **Article & Cases.** Refer to *Of Wharves, Water Lots and Kings*, above. It is available to CBANS members on the CBANS website. See *1588145 Nova Scotia Ltd. v. Cape Breton Regional Municipality et al.*¹¹ - ownership of public harbour land for MGA enforcement purposes - and *Nickerson v. Canada (Attorney General)*¹² - adverse possession of public harbour beds.
- b. The beds of public harbours became federal property upon Confederation in 1867 under s.108 of the *British North America Act*. By post-confederation Orders-in-Council the federal government proclaimed some Nova Scotia harbours as ports to which *An Act Respecting Harbour Masters* R.S.C., c.86¹³ applied. The Province of Nova Scotia holds that these post-confederation proclamations of harbours for this purpose does not affect ownership of the harbour bed. In an email message from DNR to this author dated January 20, 2005 a DNR official stated:

"The province has treated public harbours established under the provisions of section 108 of the British North America Act in a different manner than those subsequently proclaimed. In the case of the former it is deemed that the harbour including the bed became the property of the Federal government. Beds of harbours proclaimed after Confederation are deemed to vest with the Province."
- c. The federal Minister of Transport has the administration of federal real property that forms part of public ports or public port facilities. See the *Canada Marine Act*, Part II (ss.65-72), and Orders made under the Public Ports and Public Ports Facilities Regulations to determine if a body of water is now a "public harbour" according to the federal government. Check the Transport Canada website, Port Programs and

10 *Nickerson v. Canada (Attorney General)* (2000), 185 N.S.R. (2d) 36; 575 A.P.R. 36 32 R.P.R. (3d) 141, 2000 Carswell NS 160. The Court found possessory title against the Federal Government respecting a parcel in Sydney Harbour.

11 (2002), 206 N.S.R. (2d) 285 (C.A.).

12 *supra*, fn 8.

13 *E.g.* The Port of Mahone Bay, Order In Council P.C. 948, May 16, 1887. Orders-in-Council made between 1867 and 1882 can be found using Library and Archives Canada ArciviaNet research tool under the link "Orders-in-Council 1867-1882".

Divestiture, for the Transfer Inventory web page. It links to several pages including: Deproclaimed Harbours, Sites Transferred to Provinces, Sites Transferred to other Federal Departments, Sites Transferred to Local Interests, Sites Demolished, Transport Canada Interests Terminated, Partial Divestitures , Progress Summary, Remaining Regional / Local Ports, under the purview of Port Programs and Divestiture, Remaining Remote Ports under the purview of Port Programs and Divestiture. Some of the harbours in the various lists are marked "Harbour bed remains to be divested".

- d. By correspondence of January 21, 2005 the federal Department of Transport indicated to this author that it has only 13 harbour beds remaining in Nova Scotia: Digby Harbour, Halifax Harbour, Hantsport Harbour, LeHave River, Liverpool Harbour, Lunenburg Harbour, Louisbough Harbour, Pictou Harbour, Pugwash Harbour, Shelburne Harbour, Strait of Canso, Sydney Harbour and Yarmouth Harbour.
- e. When considering property interests in or near harbours it would be prudent to check with both levels of government to determine what they believe their respective interests in the property may be before you invest a lot of effort in your drafting.

12. Adverse Possession - Legislative Considerations

- a. ***Crown Lands Act (Nova Scotia) releases.*** You may apply to the Department of Natural Resources for a release of its interest in a parcel under *Crown Lands Act*, s.37(1):

"37(1) Where it appears to the Minister that a person, known or unknown, has acquired rights or claim by possession in or to Crown lands and the Minister so reports to the Executive Council, the Governor in Council may authorize and direct the Minister to issue a certificate to the effect that the Crown asserts no interest or claim to the land and upon the issuance of the certificate all interest or claim of the Crown to the land described therein ceases."

- b. ***Environment Act, s.108(2) - in-filled watercourses.*** Refer to Anthony Chapman's paper cited in the Resource list, above. The *Environment Act* (Nova Scotia), s.108(2), states:

"108(2) Notwithstanding subsection (1), possession, occupation or use of a watercourse where the land is no longer covered by water, for a period of not less than forty years continuously, may give an interest therein in accordance with the principles of adverse possession or prescription."

In *Corkum v. Nash*¹⁴ "watercourse" was held not to include a harbour:

"42 The words river, stream, lake, creek, pond, spring, lagoon, swamp, march, wetland, ravine, gulch are interior bodies of water, for the most part non tidal and non brackish, which (except incidentally with respect to some rivers) are not directly connected to the sea. A harbour does not fall into the same genus or category and, in my opinion, does not fall within the definition of watercourse in the *Water Act*."

14 (1990), 98 N.S.R. (2d) 364 (N.S.S.C.)

c. **Public highways**¹⁵. The *Public Highways Act*, provides, *inter alia*:

What is a public highway?

s.11(1) Except in so far as they have been closed according to law,

- (a) all allowances for highways made by surveyors for the Crown;
- (b) all highways laid out or established under the authority of any statute;
- (c) all roads on which public money has been expended for opening, or, on which statute labour has been performed prior to the twenty-first day of March, 1953;
- (d) all roads passing through Indian Lands;
- (e) all roads dedicated by the owners of the land to public use¹⁶;
- (f) every road now open and used as a public road or highway; and
- (g) all alterations and deviations of, and all bridges on or along any road or highway

shall be deemed to be common and public highway until the contrary is shown.

(2) Every common and public highway, together with the land within the highway's boundaries, is vested in Her Majesty in right of the Province."

Deemed width of public highways

16 (1) Any new highway or any alteration of an existing highway shall be at least twenty metres in width, but may be laid out less in width than twenty metres if the Minister deems a lesser width sufficient for the public convenience.

Acceptance of road or allowance as public highway required

16(2) No road or allowance for a road laid out, made or set aside by any person other than the Minister or some person acting on his behalf after the twenty-first day of March, 1953, becomes a public highway for the purposes of this Act until the Minister indicates formally that he accepts the road or allowance as a public highway for the purposes of this Act. R.S., c. 371, s. 16.

Possession of a public highway

s.17. Possession, occupation, user or obstruction of a highway or any part thereof by any person for any time whatever, whether before, on or after the twenty-first day of March, 1953, shall not be deemed to have given or to give to any person any estate, right, title or interest therein, or thereto, or in respect thereof, but the highway or part thereof shall, notwithstanding such possession, occupation, user or obstruction be and remain a common and public highway.¹⁷

d. **Municipal Government Act**

- i. Refer to the following *Municipal Government Act* sections:

15 Beware of Municipal Land Use By-laws that may define "public highways" for development permit purposes as "public highways that are listed and maintained".

16 *Herman v. Whynot* (1976), 21 N.S.R. (2d) 201 (N.S.S.C.).

17 *Ewing v. Publicover* (1976), 13 N.S.R. (2d) 346 (N.S.S.C.). A purchaser had an Agreement of Purchase and Sale put aside because part of the property to be conveyed was within the statutory highway width and was not the vendor's to sell.

s.59(4) Possession, occupation, use or obstruction of property of a municipality does not give an estate, right or title to the property.

s.308(4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street.

ii. Note that encroachments on municipal streets may be permitted by the Municipal Engineer if enabled by By-law:

s.314(1) Where any part of a street, other than the travelled way, has been built upon and it is determined that the encroachment was made in error, the engineer may permit, in accordance with any by-law made pursuant to subsection (2), the encroachment to continue until such time as the building or structure encroaching upon the street is taken down or destroyed.

s.314(2) A council may, by by-law, regulate encroachments upon, under or over streets, including stipulating the period of time an encroachment may remain and the entering into of agreements, including terms and conditions, for particular encroachments.

e. LAA

i. LAA, provides, *inter alia*:

10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

...

13 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.

...

19 If at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent first accrues as aforesaid, such person is under any of the disabilities hereinafter mentioned, that is to say, infancy or unsoundness of mind, then such person, or the persons claiming through him may, notwithstanding the period of twenty years hereinbefore limited has expired, make an entry, or distress or bring an action to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued as aforesaid ceased to be under any such disability, or died, whichever first happened.

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

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

22 At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

...

- ii. LAA, s.21, limits the Provincial Crown's prerogative to recover interests in land to 40 years because it expressly binds the Provincial Crown. Adverse possession may be based on *bona fide* colour of title where there is sufficient possession of at least part of the parcel claimed by possession. See *Canada (Attorney General) v. Acadia Forest Products Ltd.*¹⁸ as to colour of title against ungranted Crown lands and *Mason v. Mason Estate*¹⁹ as to colour of title generally.
- iii. LAA, s.22, applies to the Provincial Crown as well as subjects; once the limitation period expires against the Crown or a subject, the registered owner's title is extinguished *McGibbon v. McGibbon*²⁰. Under *McGibbon* adverse possession extending over a period of more than 60 years (the limitation period then in effect) was sufficient against the Crown and anyone claiming an interest under the Crown. A Crown grant made after the limitation period expired was ineffective against the subject in possession.
- iv. LRA, s.115(7), reduced the limitation period respecting Crown lands under LAA, s.21, from 60 years to 40 years. It also reduced several other limitation periods to facilitate the land registration system enacted by LRA.
- v. LRA section 115A²¹ provides that the LRA changes to limitation periods in LAA operate retroactively:

"115A The changes to the *Limitation of Actions Act* contained in Section 115 apply to interests that arise before or after the coming into force of this Act except for claims of adverse possession that were determined by a court prior to the coming into force of this Act."

f. **LRA.**

- i. Sections 74 and 75 limit possessory interests in a parcel after conversion of the parcel:

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

18 47 R.P.R. 100, 79 N.R. 5, 41 D.L.R. (4th) 338, 1987 CarswellNat 231, (Fed. C.A.).

19 (1999), 176 N.S.R. (2d) 321(C.A.) at paragraph 27 *et. seq.*

20 *McGibbon v. McGibbon*, 46 N.S.R. 552, 9 D.L.R. 308, 1913 CarswellNS 78, (N.S.S.C.).

21 S.N.S. 2002, c.19, s.35.

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.

75(1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

(1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.

(2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act.

g. **MTA**

- i. With the possible exception of underlying Crown interests²², sections 4(1) and 4(2) of the Act now make it unnecessary to conduct a title search before the proper root instrument. That is the purpose of the Act. Our Supreme Court has recognized this limit. In *Penney v. Hartling*²³, Justice Carver found that there was marketable title in a "forty year plus a day deed notwithstanding that the Grantor held only a one-third interest in the parcel under an earlier intestacy.

"Applying s.4 in this case, there will be marketable title if there is "*good and sufficient chain of title*" extending back for more than 40 years (40 years plus one day)."

- ii. MTA has a number of savings provisions. A lawyer should determine that the following provisions in the Act do not protect a competing instrument:

22 See the annexed Checklist for considering underlying Crown interests

23 (1999), 177 N.S.R. (2d) 378 (N.S.S.C.).

- (1) Section 4(A). Confirm there is no Notice of Claim filed under s.5 of the Act to preserve any third party interest in the subject lands.
 - (2) Section 7(1)(a) - interests created or preserved by statute²⁴. Confirm there is no interest protected by this provision.
 - (3) Section 7(3). Confirm that no description in any deed in the chain of title acknowledges or specifically refers to a competing interest thus protecting that competing interest under s.7(3) of the Act.
 - (4) Section 9 re underlying Crown Grants. Confirm there is no enforceable underlying Crown interest in the parcel.
- iii. There may be limited judicial safeguards affecting the operation of MTA, s.4(1) as illustrated by Ontario decisions under analogous legislation:
- (1) It may be inferred from the comments of Osborne, J.A. in *National Sewer Pipe Ltd. v. Azova Investments Limited*²⁵ at paragraph 31e, that fraudulent conduct by the defendant would be grounds to deny protection under the Act.
 - (2) *Ontario Hydro v. Tkach*²⁶ suggests the Act may not protect a subsequent owner who had actual notice of the prior interest at the time the subsequent owner acquired his or her interest in the parcel *if* that notice arose from physical indicia on the ground or from the actions of the paper-title holder on or respecting the parcel. Tkach's solicitor's knowledge of Hydro's prior interest under an instrument *recorded before the marketable titles chain of title to the parcel commenced* was held not to constitute notice of Hydro's interest.
- iv. Purpose of the *Marketable Titles Act*
- (1) According to its preamble, the purpose of the *Marketable Titles Act* is, *inter alia*, "to remove uncertainties respecting the determination of marketable titles to land in the interests of all present and future landowners and facilitate the development of the Province".

24 For example see *Ontario Hydro v. Tkach* (1992), 95 D.L.R. (4th) 18 (Ont. C.A.) in which the Hydro interest was held not to be an interest arising by statute.

25 (1993), 105 D.L.R. (4th) 1. Although Osborne, J.A., dissented from the majority in this case, the Supreme Court of Canada in *Fire v. Longin* effectively overruled this decision and, *inter alia*, stated "I agree with the full and compelling dissenting reasons of Osborne, J.A. on this issue..." The issue referred to was that of what constituted actual notice.

26 *supra*, fn 21.

- (2) In *Fire v. Longtin* the Supreme Court of Canada recognized that the corresponding Ontario law would occasionally result in apparent injustices to persons. Adopting in its entirety the judgment of the unanimous Ontario Court of Appeal appealed from²⁷, the Supreme Court of Canada, at paragraph 30 of the Ontario Court of Appeal decision, states:

"30. ... It is my view that when ... the Act was passed ... one of its specific purposes was to clear up title problems of this sort, and support titles on which successive grantees may have relied. As commented by Grange J.A. in the *Tkach* case, the application of Part III may result from time to time in apparent injustices to persons with claims to real property which are older than 40 years. However, the legislature has weighed that possibility against the expectations of persons more recently dealing with the land. In the final result it has opted for legislation which, although it may appear to favour more recent grantees, still contains many safeguards of the rights of those claiming under more ancient conveyances."

PART III - PRESCRIPTIVE EASEMENTS

13. General

- a. Proving prescriptive easements is similar to proving adverse possession. Hopefully the annexed template will assist in this process.

14. Resources

- a. A.G.H. Fordham, Q.C., *Easements, Licences & Rights of Way*, CLE Real Property, April 11, 1987.
- b. Equitable Easements. See *Hill v. Nova Scotia (Attorney General) (1994)*, 132 N.S.R. (2d) 265 (N.S.S.C., Scanlan, J.).
- c. Diana Ginn, *Easements: Part I: Back to Basics* and *Easements: Part II: Beyond The Basics, From Challenges to Opportunities...navigating the Real Property Paths*, Easements, Nova Scotia Barristers' Society 2005 Real Property Conference, February 11, 2005.
- d. Charles W. MacIntosh, Q.C., *Nova Scotia Real Property Practice Manual*, Butterworths, Chapter 13 Access To Land - Roads and Easements.
- e. Rights of way of necessity. Refer to *B.O.J. Properties Ltd. v. Allen's Mobile Home Park Ltd.* (1980), 36 N.S.R. (2d) 362 (C.A.).

27 (1995), 48 R.P.R. (2d) 1, 128 D.L.R. (4th) 767, 25 O.R. (3d) 416 (note), [1995] 4 S.C.R. 3, 188 N.R. 234, 86 O.A.C. 288, 1995 CarswellOnt. See 1994 CarswellOnt 690 at paragraph 30.

15. Legislation

- a. *Angling Act*. Section 3 gives any resident of the Province the right to go on foot along the bank of any river, stream, or lake for the purpose of lawfully fishing with rod and line.
- b. *Assessment Act*.
 - i. Section 44(3) preserves easements stating they are not terminated or extinguished by a tax sale. An easement passes with the dominant tenement if that is the property sold and remains with the servient tenement if that is the property sold under tax sale.
 - ii. S.139(10) preserves easements and rights of way in favour of the Province when either dominant or servient tenement of "owner unknown" land is vested in the Province by section 139.
- c. *Conveyancing Act*. If a previously granted easement is left out of a deed in the chain of title consider if the *Conveyancing Act*, s.13(d), bridges the gap. It provides that "Except where a contrary intention appears by the conveyance,
...
(d) a conveyance of any property right in land includes the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining to that property right. R.S., c. 97, s. 13."

Consider if the common law rule that an easement was extinguished when the dominant and servient tenements come into common ownership applies.

- d. *Private Ways Act*. This Act provides for the acquisition of access in certain circumstances.
- e. *Protection of Property Act*. This Act can be used to restrict access to property. It can be used to make certain types of trespass to land an offence, provides for the posting of Notices of Prohibited Activities, and for restitution orders. The Act is of special interest to farmers and shopping centre owners. See Joel E. Pink, *Loitering, Disturbances and Shoplifting: Landlord's and Tenants' Rights Versus Shoppers' Rights*, Continuing Legal Education Society of Nova Scotia, 1979.
- f. LAA. LAA, provides, *inter alia*:

"s.32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as

aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing.

...

34 Each of the respective periods of years, mentioned in Sections 32 and 33, shall be deemed and taken to be the period next before some action or proceeding wherein the claim or matter to which such period relates, was, or is, brought into question and no act or other matter shall be deemed an interruption within the meaning of the said two Sections, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making or authorizing the same to be made.

35 In the several cases mentioned in and provided for by the said two Sections of the claims to ways, or other easements, watercourses, the use of any water or lights, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the said two Sections as is applicable to the case and to the nature of the claim.

36 The time during which any person otherwise capable of resisting any claim to any of the matters mentioned in the said two Sections is an infant, idiot, person of unsound mind, or tenant for life, or during which any action or proceeding has been pending, and has been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods mentioned in the said two Sections, except only in cases where the right or claim is thereby declared to be absolute and indefeasible.

37 Where any land or water upon, over, or from which any such way or watercourse, or use of water has been enjoyed or derived, is held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of any such term, shall be excluded in the computation of the said period of twenty-five years in case the claim is within three years next after the end or sooner determination of such term resisted by any person entitled to any reversion expectant on the determination thereof."

g. LRA (Effective December 1, 2004. Also see above in Part I)

- i. 19A (1) A person who owns a registered interest in a parcel may grant an easement in the parcel for the benefit of another parcel that the person owns.

(2) The easement continues to exist notwithstanding subsequent vesting of the dominant and servient tenements in the same person absent an express release of the easement.

- ii. Is the interest protected as an easement or right of way that is "used or enjoyed" across the servient tenement even if it is not registered - LRA, s.73(1)(e)?

h. MGA

s.280(2) The owners of lots shown on a plan of subdivision as abutting on a private right of way are deemed to have an easement over the private right of way for vehicular and pedestrian access to the lot and for the installation of electricity, telephone and other services to the lot. [This section is not retroactive; it became effective April 1, 1999 - s.584(1).]

(3) The new streets and new extensions of streets shown on a plan of subdivision, excluding roads that are shown on the plan as private roads, are vested absolutely in the municipality in which they are situated when the final approved plan is filed in the registry.

- i. MTA. Is the interest protected as an easement or right of way that is "used or enjoyed" across the servient tenement even if it is not registered - MTA, s.7(1)(e)?
- j. *Trails Act*. This act provides for trails across private & public property.
- k. *Treasure Trove Act*. This act permits applications to secure right of access over private lands for seeking treasure.

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

IN THE MATTER OF TITLE TO THE PARCEL OF
LAND AT _____, _____ COUNTY,
NOVA SCOTIA, ASSIGNED PID NUMBER
_____ and AAN NUMBER _____, and
REGISTERED IN THE NAME(S) OF _____,
THE "SUBJECT PARCEL".

Affidavit Template - Adverse Possession

[Refer to Civil Procedure Rule 38 respecting affidavits. State facts not conclusions. Adapt for supporting affidavits from others.]

I, [Full Name] of [Place of Residence], _____ County, Nova Scotia, [Occupation], make oath and swear that:

Purpose

1. This affidavit is sworn to evidence my title in fee simple to the subject parcel under sections _____ and 22 of the *Limitation of Actions Act* [and subsection 108(2) of the *Environment Act* (Nova Scotia)²⁸].

Identification of the parcel

2. The subject parcel is described in Exhibit "A" to this affidavit.
3. All registration and recording references in this affidavit refer to registrations and recordings in the _____ County, Nova Scotia, Land Registration Office, the "Registry Office", unless otherwise stated.

Registered ownership interest(s)

4. I acquired an interest in the subject parcel from my predecessor(s) in title under the deed dated _____ registered in the Registry Office on _____ in Book _____, Page _____ as Document _____, "the Deed". **[Include this paragraph if applicable - e.g. the claimant has a title instrument to the parcel but not marketable title. This paragraph may be relevant to a "colour of title" argument based on the referenced deed.]**
5. I have been advised by my solicitor [Name of Solicitor], and I truly believe, that his/her search of title to the subject parcel in the Registry Office for a period of _____ or more years shows that [Names of registered owners] are the registered owners of the subject parcel by virtue of a [Instrument Type] dated _____ registered in the

28 The *Environment Act*, s.108(2) permits adverse possession respecting infilled parcels.

Registry Office on _____ as document number _____. I refer to [them] as the "Registered Owner(s)" in this affidavit.

6. To the best of my knowledge and belief no other parties are entitled to an interest in the subject parcel [except...burdens or, possibly, fishing and navigation rights affecting foreshore properties].

Extent of the subject parcel

[Adapt such of the following as apply to the parcel. If establishing adverse possession to part of an existing parcel, have the claimed area surveyed by a licensed Nova Scotia Land Surveyor for certainty of the extent of the parcel claimed.]

7. The subject parcel is shown as _____ in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, the "Plan". The Plan was recorded in the Registry Office on _____ as plan _____, "Plan 1". A partial copy of Plan 1 is annexed to this affidavit as Exhibit "_____".
8. Parts of the subject parcel including _____ thereon are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, "Plan 2"; Plan 2 was recorded in the Registry Office on _____ as plan _____. A partial copy of Plan 2 is annexed to this affidavit as Exhibit "_____".
9. The road frontage of the subject parcel is shown, incidently, in the Nova Scotia Department of Transportation and Public Works plan of plan _____ recorded in the Registry Office on _____ as plan _____, "Plan 3". A partial copy of Plan 3 is annexed to this affidavit as Exhibit "_____".
10. National Air Photo Library aerial photograph Roll Number _____ Photo Number _____ dated _____ shows that the subject parcel was occupied as shown in the Plan on or before that date. [It also shows]
11. The subject parcel is shown in the sketch annexed to the forest management plan [dated]
12. My possession of the subject parcel extends to the entire area of the subject property shown as _____ in the [Plan]. [Expand your explanation if possession is claimed under "colour of right". Click on comment for case cite]

Acts of actual exclusive possession

[The claimant must prove a sufficient degree of physical custody and control ("factual possession") and an intention to exercise such custody and control on his or her behalf and for his or her benefit ("intention to possess")²⁹. The use of the parcel must be consistent with the nature of the land and in

29 Proof of intention does not apply in the case of mutual mistake. *Gould v. Edmonds*, 2001 NSCA 184, 203 N.S.R. (2d) 163, 635 A.P.R. 163, 2001 CarswellNS 518.

a manner similar to the use a true owner might make of the land. Isolated and separate acts of trespass do not establish adverse possession title.]

13. I rely on the following acts of possession or use in support of my title to the subject parcel by adverse possession:

[Use the following checklist as a starting point - adapt as required for the subject parcel; be sure to state the grounds of knowledge - personal knowledge or basis of knowledge and belief.]

Deal with your client's predecessors in possession as required.

- a. Fences, hedges or other acts to enclose a parcel are particularly strong evidence of possession³⁰.
- b. Occupation of a residence on the parcel.
- c. Rental of all or part of the parcel to others.
- d. Occupation or use of other structures or improvements on the parcel.
- e. For seasonal properties see *Taylor v. Willigar*³¹.
- f. Running others off the subject parcel?
- g. Infilling - see s.108(2) of the *Environment Act*.
- h. Woodland³². Clearing land, cutting timber, taking firewood, blazing boundaries, posting owner's signs, building wood roads or maintaining wood roads? Silva culture programs? Regular timber cruising? Regular patrols re trespassers?³³
- i. Posting and enforcing no trespassing signs or *Protection of Property Act* signs.
- j. Cultivation - caring for crops or orchards.
- k. Grazing livestock on the parcel.
- l. Was the cultivation or grazing continuous or intermittent?
- m. Acquisition of government permits for aquiculture, wharves, mooring, infilling, or other activities on or affecting the parcel.
- n. Deeds taken from the claimant or claimant's predecessors in occupation for part of the parcel by Department of Transportation.
- o. Taking or selling natural products from the parcel.
- p. Sufficient use of part of a driveway.

30 *Duggan v. Nova Scotia (Attorney General)*, 2004 NSSC 66, 18 R.P.R. (4th) 88, 222 N.S.R. (2d) 229, 701 A.P.R. 229, 2004 CarswellNS 115.

31 (1979), 32 N.S.R. (2d), 54 A.P.R. 11, 99 D.L.R. (3d) 118, 1979 CarswellNS 352 (C.A.)

32 *Spicer v. Bowater Mersey Paper Co.*; 2004 NSCA 39, 237 D.L.R. (4th) 453, 222 N.S.R. (2d) 103, 701 A.P.R. 103, 18 R.P.R. (4th) 30 2004 CarswellNS 99; leave to appeal denied by the Supreme Court of Canada 2004 CarswellNS 368 September 16, 2004. In *MacNeil v. Nova Scotia (Attorney General)*, [1998] N.S.J. No. 233 (N.S. S.C.); affirmed *MacNeil v. Nova Scotia (Attorney General)* (2000), 183 N.S.R. (2d) 119 (C.A.) Justice Goodfellow granted a certificate of title to a parcel in a rural Cape Breton based upon camping, in-filling a swamp, making paths or makeshift roads, building a cabin in one spot, putting up a fishing hut in another, other recreational uses and being "on the property constantly". *Halifax Power Co. v. Christie*, 48 N.S.R. 264, 23 D.L.R. 481, 1915 CarswellNS 8, (C.A.).

33 *Bowater Mersey Paper Co. v. Nova Scotia (Attorney General)*, [1987] N.S.J. No. 170, 80 N.S.R. (2d) 229 (N.S. S.C.); affirmed (1988), 83 N.S.R. (2d) 162 (C.A.)

- q. Other acts of ownership?³⁴.

Taxes [Payment of taxes is not conclusive in itself³⁵ but it is a factor which ought be taken into account³⁶.]

14. The provincial government has assessed the subject parcel in my name from _____ to _____. It is currently assigned PID account number _____ and Assessment account number _____.
15. I have paid all realty taxes levied on the subject parcel from _____ to the date of this affidavit. [Describe the payment of taxes by predecessors in possession as required.]

External evidence of possession

[This information may be outside CPR 38 but it is desirable for registration in the LRO for a full documentation of the possessory interest]

16. I also rely on the following external evidence in support of my title to the subject parcel by adverse possession: [Marshall/state third party or external supporting evidence of the acts of possession. The following checklist may help.]
- a. Note interests, if any, disclosed in the descriptions of adjoining parcels. Tie to surveys if appropriate.
 - b. Note community recognition of possessor as owner.
 - c. Note deeds taken from possessors by DOT highways.
 - d. Government permits for land use?
 - e. Do aerial photographs show evidence of possession?
 - i. Federal air photo "footprints" can be viewed on-line with dates of photo runs.
 - ii. Provincial air photos are available from the Nova Scotia Geomatics Centre 160 Willow Street, Amherst, NS B4H 3W5. (902) 667-7231).
 - f. Do any old family or other photographs show evidence of possession of the subject parcel?
 - g. Do old Insurance Bureau town maps show possession?
 - h. Note the presence or absence of real property in relevant probate records.
 - i. Note recorded affidavits, statutory declarations or recitals about recorded title to, or possession of, the parcel.
 - j. Note corroborating affidavits of disinterested, knowledgeable, surveyors, neighbours, former neighbours or others who have particular knowledge of the parcel to corroborate the claim.
 - k. Do any published works provide supporting evidence? These could include local community histories, A.F. Church maps, and County Atlases. Thanks to Ian H.

34 Catherine S. Walker, Q.C., *Adverse Possession and Prescriptive Rights - Old Doctrines in A New Environment*, supra, pp.21-22 referring to *J.A. Pye (Oxford) Ltd.v. Graham* [2002] H.L.J. No. 30 at para. 35.

35 *Robertson v. McCarron* (1985), 71 N.S.R. (2d) 34 (N.S.S.C.) at paragraph 23.

36 *Duggan v. Nova Scotia (Attorney General)*, above.

MacLean, MacLean & MacDonald, for the following contribution: "In or about the mid-1870s Atlases were compiled and published and these contain a wealth of information including depiction of wood roads, farm lanes, location of dwellings and other buildings of substance, and so on. On occasion I have been able to obtain required information from local community histories. Sometimes these works include information respecting ownership and occupation of specific properties during specified periods of time in the past. This can be very helpful."

Possession was continuous and uninterrupted for the required limitation period

[Establish that the claimant's possession was for the duration of the statutory period depending on the nature and location of the land. A series of adverse possessors may be linked together to make a continuous period ("tacking" is permitted); if applicable describe the continuity of all successive possessory interests relied upon³⁷.]

17. I commenced possession of the subject parcel on _____ by[describe how possession began]..[my taking possession of the subject parcel on or before _____.] [by consent (*e.g.* original tenancy at will became adverse possession after one year from [date]³⁸)[by mutual mistake³⁹ as to the claimant's ownership namely.....]. I am advised by _____ and truly believe that the limitation period began to run on or before _____ pursuant to subsection 11(____) of the *Limitations of Actions Act*. The limitation period expired on or before _____ pursuant to subsection [10]/[21(____)] of the *Limitations of Actions Act*.
18. My possession of the subject parcel against the Registered Owner(s) was continuous and uninterrupted for _____ years from _____ to _____. My possession of the subject parcel continues to the date of this affidavit. There have been no gaps or discontinuances in my possession of the subject parcels from _____ to [_____] / [the date of this affidavit].
19. To the best of my knowledge and belief each of the Registered Owner(s) of the subject parcel is nineteen years of age or older and is competent. **[Consider the possibility that the registered owner may be under a disability - LAA, ss. 19, 20.]**

37 *McGibbon v. McGibbon*, 1913 CarswellNS 78; 46 N.S.R. 552, 9 D.L.R. 308 (N.S.S.C.)

38 *MacLean and MacLean v. Reid* (1978), 30 N.S.R. (2d) 422 (C.A.).

39 *Gould v. Edmonds*, C.A. No. 172340, Freeman, J.A., December 19, 2001. 2001 NSCA 184; S476/21. 71 This principle has been applied in Nova Scotia. *Logan v. Smith* (1984), 64 N.S.R. (2d) 234 (N.S.S.C.) Burchell, J. stated at p. 237: "...I agree with the submission for the defendants that a specific intention to exclude the true owner is not a necessary element in the acquisition of possessory title and that one may acquire such title while under a mistaken impression that one is himself or herself the actual legal owner."

Possession was open and visible

[The use and possession must take place in an open and visible manner so that others, in particular the Registered Owner(s), might readily know of it or could regularly observe it. The use and possession will generally be widely known by others in the area. The degree of notoriety will be consistent with the nature of the area in which the land is located.]

EITHER

20. The Registered Owner(s) became aware of my possession of the subject parcel on or about _____ by virtue of....[state specific evidence of Registered Owner(s)'s awareness *e.g.* ...my refusal to vacate the subject parcel when the Registered Owner(s) demanded that I do so on or before _____ and the Registered Owner(s) has made no attempt to evict me since].

OR

21. The Registered Owner(s) were aware, or ought to have been aware, of my possession of the subject parcel because [State specific facts evidencing wide public knowledge of the possession, the visibility of the possession, and absence of concealment - deliberate or by circumstances] *e.g.* [The construction of the fence in _____, the garage in _____, the retaining wall in _____ and {other improvements} in _____ was visible to everyone passing the parcel on {Main Street}.]

Possession was to the exclusion of the registered owner(s) and all others

[Establish that possession has been exclusive to the claimant, not only with regard to the true owner, but also all others *i.e.* the claimant did not use the parcel concurrently with the owner or others.]

22. My possession of the subject parcel since _____ has been to the exclusion of the Registered Owner(s) and all others. Neither the Registered Owner(s) nor any other party has occupied or used any part of the subject parcel during the period of my possession [except for the tenancy of certain tenants to whom I have rented part of the subject parcel from time to time]. [Note there are some permitted exceptions re fishing and navigation rights in the beds of water bodies.]

ADDRESS EITHER

Intention to possess the subject parcel

23. I declare that my possession of the subject parcel was made with the intention of possessing the subject parcel to the exclusion of the Registered Owner(s) and all others.
24. I rely on the several acts of possession stated elsewhere in this affidavit as evidence of my intention to possess the subject parcel exclusively.

OR

Possession under mutual mistake [Proof of intention does not apply in the case of mutual mistake]

25. *Gould v. Edmonds*⁴⁰ - a specific intention to exclude the true owner is not a necessary element while one is under a mistaken impression that one is himself or herself the actual

40 *Gould v. Edmonds*, 2001 NSCA 184, 203 N.S.R. (2d) 163, 635 A.P.R. 163, 2001 CarswellNS 518.

legal owner of the interest. If applicable state the facts describing the mutual mistake relied upon in lieu of intention to possess the subject parcel.

No acknowledgement, consent or claims

[Establish that the claimant has not acknowledged the Registered Owner(s) title to them or to their agent(s) in writing within the limitation period. An acknowledgement made after the limitation period has expired is not effective⁴¹. The *Limitations of Actions Act*, s.17, requires the signature of the person in possession of the parcel to effectively acknowledge the claim; an acknowledgment by the possessor's solicitor or agent is not effective⁴².]

26. I have not at any time during my possession of the subject parcel acknowledged, in writing or otherwise, to any party that the Registered Owner(s) or any other party have or have had any interest in the subject parcel.
27. I have not at any time before or during my possession of the subject parcel sought or received the consent of the Registered Owner(s) or of any other party for my possession of the subject parcel.
28. I am not aware of any claim advanced against either my adverse possession of the subject parcel or against the interests of my predecessors in possession of the subject parcel. **[If there have been claims describe how they were dealt with.]**

Estoppel and laches

29. State facts, if any, that reasonably support arguments for either or both estoppel⁴³ and laches⁴⁴ against the Registered Owner(s) if appropriate.

Sworn before me at ...etc.

41 *Ford v. Kennie*. 2002 CarswellNS 461, 2002 NSCA 140, 4 R.P.R. (4th) 252, 210 N.S.R. (2d) 50, 659 A.P.R. 50. See also *Hamilton v. R* (1917), 54 S.C.R. 331, 35 D.L.R. 226, at p. 235, per Davis, J:

"It seems clear under the decided cases of *Re Alison*, 11 Ch. D. 284, and *Sanders v. Sanders*, 19 Ch. D. 382, that where a statutory title has once been acquired under the *Statute of Limitations* it cannot be defeated by any subsequent acknowledgment or even by any subsequent payments of rent unless these continue for such a period as creates a new statutory title." [Emphasis added.]

42 *McGibbon v. McGibbon*, 1913 CarswellNS 78; 46 N.S.R. 552, 9 D.L.R. 308 (N.S.S.C.) at paragraph 35.

43 *Ford v. Kennie*. 2002 CarswellNS 461, 2002 NSCA 140, 4 R.P.R. (4th) 252, 210 N.S.R. (2d) 50, 659 A.P.R. 50.

44 *MacDonell v. M & M Developments Ltd. et al.* (1997), 164 N.S.R.(2d), 81 (S.C.) *MacDonell v. M & M Developments Ltd. et al.* (1998), 165 N.S.R.(2d) 115 (C.A.).

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

IN THE MATTER OF A PRESCRIPTIVE EASEMENT
BENEFITING THE PARCEL OF LAND AT _____,
_____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER
_____ and AAN NUMBER _____, THE "DOMINANT
TENEMENT".

AND IN THE MATTER OF A PRESCRIPTIVE EASEMENT
BURDENING THE PARCEL OF LAND AT _____,
_____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER
_____ and AAN NUMBER _____, REGISTERED IN
THE NAME(S) OF _____, THE "SERVIENT TENEMENT".

Affidavit Template - Prescriptive Easement

[Refer to Civil Procedure Rule 38 respecting affidavits. State facts not conclusions. Adapt for supporting affidavits from others.]

I, [Full Name] of [Place of Residence], _____ County, Nova Scotia, [Occupation], make oath and swear that:

Purpose

1. This affidavit is sworn to evidence the prescriptive easement benefiting the Dominant Tenement and burdening the Servient Tenement.

Identification of the prescriptive easement

2. All registration and recording references in this affidavit refer to registrations and recordings in the _____ County, Nova Scotia, Land Registration Office, the "Registry Office", unless otherwise stated.
3. The Dominant Tenement benefiting from the prescriptive easement is described in Exhibit "A" to this affidavit.
4. The Servient Tenement burdened by the prescriptive easement is described in Exhibit "B" to this affidavit.
5. The prescriptive easement is described in Exhibit "A".

Registered ownership interest(s)

6. I acquired a registered interest in the Dominant Tenement from my predecessor(s) in title under the deed dated _____ that is registered in the Registry Office on _____ in Book _____, Page _____ as Document _____, "the Deed".
7. I have been advised by my solicitor [Name of Solicitor _____], and I truly believe that his/her inquiry concerning the Servient Tenement in the Property On-line Database and in the Registry Office shows that [Names of registered owners] appear to be the registered owners of the Servient Tenement. I refer to [them] as the "Registered Owner(s)" in this affidavit.
8. To the best of my knowledge and belief [based on the advice of _____ which I truly believe,] no other parties appear to hold an interest in the Servient Tenement material to the prescriptive easement or this affidavit.
9. To the best of my knowledge and belief none of the Registered Owner(s) is either or both under the age of nineteen or incompetent. [Use only if correct and you are documenting less than twenty-five years use of the prescriptive easement.]

Extent of the Prescriptive Easement

[Adapt such of the following as apply to the prescriptive easement. Describe its course and its width. It may be advisable to have the prescriptive easement surveyed by a licensed Nova Scotia Land Surveyor for certainty of its extent.]

10. The prescriptive easement is [approximately] _____ feet in width.
11. The course of the prescriptive easement is shown in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, "Plan 1". Plan 1 was recorded in the Registry Office on _____ as plan _____. A partial copy of Plan 1 is annexed to this affidavit as Exhibit "_____".
12. The course of the prescriptive easement is shown, approximately, in the sketch annexed to this affidavit as Exhibit "_____".
13. Parts of the prescriptive easement are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____; this plan was recorded in the Registry Office on _____ as plan _____, "Plan 2". A partial copy of Plan 2 is annexed to this affidavit as Exhibit "_____".
14. National Air Photo Library aerial photograph Roll Number _____ Photo Number _____ dated _____ shows a travelled way over the course of the prescriptive easement so the way was used on or before that date. [It also shows] A partial copy of the photograph is annexed to this affidavit as Exhibit "_____".

Actual of use of the prescriptive easement

15. I rely on the following acts of actual use of the prescriptive easement in support of my right to use the prescriptive easement: **[Use the following checklist as a starting point.]**
- a. Building the way, grading, installing drainage or culverts, applying gravel, laying pavement?
 - b. Maintaining the way - re-paving, repairs, re-surfacing, marking the course of the way in winter, snow-plowing?
 - c. Use of the way - use by deponent, deliveries, mail carriers, newspaper & flyer delivery, fuel delivery, use of way for access by friends, visitors & canvassers? Hauling crops, wood, fish or other commodities across the way? Define the purposes for which the prescriptive easement has been used.
 - d. Other acts of use?.

External evidence of use

[This information may be outside CPR 38 but it is desirable for registration in the LRO for a full documentation of the possessory interest]

16. I also rely on the following external evidence in support of my title to the prescriptive easement: **[Use the following checklist as a starting point.]**
- a. The prescriptive easement is acknowledged in the legal description of the Servient Tenement annexed to this affidavit as Exhibit "B".
 - b. Note other references, if any, disclosed in the descriptions of adjoining parcels.
 - c. Do aerial photographs show evidence of use?
 - d. Do any old family or other photographs show evidence of use of the prescriptive easement?
 - e. Do old Insurance Bureau town maps show the prescriptive easement as a way?
 - f. Note recorded affidavits, statutory declarations or recitals about use of the prescriptive easement.
 - g. Note corroborating affidavits of disinterested, knowledgeable, surveyors, neighbours, former neighbours or others who have particular knowledge of the way to corroborate the claim.
 - h. Do any of the "Church Maps", historical tracts or statements in registered instruments for adjoining properties provide material evidence of the prescriptive easement?

Use was continuous and unobstructed

[Establish that the claimant's possession was for the duration of the statutory period. You should evidence more than 25 years of continuous use - tacking is recognized. If applicable, describe the continuity of all successive uses of the prescriptive easement relied upon.]

17. [I]/[Name of Predecessor] commenced use of the prescriptive easement on or before _____, 19__ by[describe how use began].

18. My use of the prescriptive easement against the Registered Owner(s) was continuous and unobstructed without gaps for _____ years from _____ to [_____] / [the date of this affidavit]. My use of the prescriptive easement continues to the date of this affidavit. [Refer to ss.32 *et seq.* of the *Limitations of Actions Act* and consider the doctrine of "lost modern grant". Adapt this paragraph according to your circumstances.]

Use was open and visible

[The use must take place in an open and visible manner so that others, in particular the Registered Owner(s), might readily know of it or could regularly observe it. The use will generally be widely known by others in the area. The degree of notoriety will be consistent with the nature of the area in which the land is located.]

EITHER

19. The Registered Owner(s) became aware of my use of the prescriptive easement on or about _____ by virtue of the act of use set out above and[state specific evidence of Registered Owner(s)'s awareness *e.g.* ...my refusal to stop using the prescriptive easement when the Registered Owner(s) demanded that I do so on or before ___[date]___ and the Registered Owner(s) has made no attempt to stop me from using the prescriptive easement since].

OR

20. The Registered Owner(s) were aware, or ought to have been aware, of my use of the prescriptive easement because [State specific facts evidencing wide public knowledge of the use, and absence of concealment - deliberate or by circumstances] *e.g.* [My use of the prescriptive easement in _____ was visible to the neighbours and to everyone passing the Servient Tenement on {Main Street} because.....]

No acknowledgement or consent

21. I have not at any time during my use of the prescriptive easement acknowledged, in writing or otherwise, to any party that I do not have the right to exercise the prescriptive easement across the Servient Tenement.
22. I have not at any time before or during my use of the prescriptive easement sought or received the consent, express or tacit, of the Registered Owner(s) or of any other party for my use of the prescriptive easement.
23. I have not at any time during my use of the prescriptive easement used force, secrecy or evasion in my use of the prescriptive easement.
24. I am not aware of any claim advanced against either my right to use the prescriptive easement or against the right of my predecessors in title to the Dominant Tenement to use the prescriptive easement for access to and from the Dominant Tenement across the Servient Tenement. [If there have been claims describe how they were dealt with.]

Estoppel and laches

State facts, if any, that reasonably support arguments for either or both estoppel⁴⁵ or laches⁴⁶ against the Registered Owner(s) of the Servient Tenement.

Sworn before me at ...etc.

45 *Ford v. Kennie*. 2002 CarswellNS 461, 2002 NSCA 140, 4 R.P.R. (4th) 252, 210 N.S.R. (2d) 50, 659 A.P.R. 50.

46 *MacDonell v. M & M Developments Ltd. et al.* (1997), 164 N.S.R.(2d), 81 (S.C.) *MacDonell v. M & M Developments Ltd. et al.* (1998), 165 N.S.R.(2d) 115 (C.A.).

Checklist for considering underlying Crown interests⁴⁷

Reliance	Effect	Reference
Rely on a Crown Grant or deed as a release of the Crown's interest.	Crown Grant is good root of title. A Crown deed is at least a release of the Crown's interest.	
Rely on <i>Crown Lands Act</i> , s.37 release or NSFLB or NSHC deed in chain of title.	<i>Crown Lands Act</i> , s.37 release is good against the Crown but ensure no superior possessory claims exist. Deeds from provincial Crown Agencies like NSFLB & NSHC should bind the Crown.	<i>Crown Lands Act</i> , s.37.
Rely on a DVLA deed.	Deemed Crown grant.	<i>Veteran's Land Act</i> , s.5; <i>Carmichael v. Durant</i> , <i>supra</i> .
Rely on expropriation in chain of title.	Expropriation extinguishes previous title; later deed of parcel from Crown releases Crown interest.	Professional Standard 3.16. <i>Certification Of Title To Expropriated Land</i> , Arthur A.G.H. Fordham, Q.C., <i>supra</i> .
Rely on 40 years possession adverse to the Crown.	Extinguishes Crown interest. Retroactive effect - LRA, s.115A.	LAA, ss.21 & 22; LRA ss.115, 115A. See <i>McGibbon v. McGibbon</i> , <i>supra</i> ; consider the effect of <i>Nemeskeri v. Nova Scotia (Attorney General)</i> .
Rely on a <i>Quieting Titles Act</i> order.	Binds the Provincial Crown.	<i>Quieting Titles Act</i> . Professional Standard 3.1.
Consider relying on a common law (60 year) chain of title.	Caution: This may or may not be binding on the Crown under MTA, s.9, but it represents hundreds of years of practice. It is worth arguing particularly with the <i>Nemeskeri</i> decision and LRA, ss. 115 & 115A changes to LAA and s.116 changes to MTA.	Charles MacIntosh, Q.C., <i>How Far Back Do You Have to Search</i> . Consider <i>Nemeskeri v. Nova Scotia (Attorney General)</i> . Refer to <i>Cunard (Lessee of) v. Irvine</i> (1854), 2 N.S.R. 31 (C.A.), James Reports p. 31.; <i>Halifax Power Co v. Christie</i> , 1915 CarswellNS 8, 48 N.S.R. 264, 23 D.L.R. 481 (C.A.) - both trial and appeal decisions are in this report.
Consider arguing that the Crown prerogative is limited by the common law "benefit and burden" ⁴⁸ principle or the "necessary implication" ⁴⁹ principle.	Caution. These principles may or may not limit the Crown prerogative preserved by MTA, s.9. Their possible application may be worth exploring as a counter the Crown prerogative. The LRA ss.115, 115A and 116 amendments to MTA and LAA clearly intend to establish a 40 year marketable titles regime. MTA, s.9, however, may effectively require title searches back to a Crown Grant or to other instruments well beyond a 40 year plus a day root of title either frustrating the goals of the legislation or producing an absurd result. The Crown cannot enjoy the advantages of 40 year plus a day LRA titles and reserve its prerogative to attack ancient registered titles at the same time.	

⁴⁷ Schedule adapted from Garth C. Gordon, *Comments about Underlying Crown Grants*, unpublished, March 28, 2005.

⁴⁸ This principle is thoroughly discussed in *Agricultural Financial Services Corp. v. Redmond*, 1999 CarswellAlta 487 (C.A.)

⁴⁹ *Bombay Province v. Bombay Municipal Corp.* [1947] A.C. 58 (P.C.). See also *Kansa General International Insurance Company Ltd, Re* 1999 CarswellQue 636 (C.A.) at paragraph 17 *et seq.*