2014 Hfx No. 431696

SUPREME COURT OF NOVA SCOTIA

Between:

MUNICIPALITY OF THE DISTRICT OF GUYSBOROUGH

APPLICANT

and

THE HEIRS AT LAW OF JOSEPH FOGARTY, JAMES P. FOGARTY AND FRANK FOGARTY

RESPONDENTS

BRIEF OF THE APPLICANT

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FACTS

1. The Municipality of the District of Guysborough ("MODG") is the Applicant in this proceeding. The MODG has brought this Application in Court pursuant to s. 17 of the *Expropriation Act* (the "*Act*") to obtain an order clarifying the state of title to properties that have been expropriated by the MODG. The most recent deed for these properties was held by Joseph Fogarty and registered in 1913. These properties will be referred to as the "Fogarty Properties."

2. Frank Fogarty and his relations, who appear to be descendants of Michael Vincent Fogarty, have filed materials claiming an interest in the Fogarty Properties based on the use and occupation of the land by their grandfather.

3. The only other affidavit filed with the Court is the affidavit of Patricia Campbell.

4. The MODG takes no position on the question of who should be found to hold an interest in the Fogarty Properties.

5. The MODG's sole interest is in ensuring that the title to the Fogarty Properties is clarified prior to any offers or payment of compensation under the *Act*.

6. Accordingly, the MODG is filing this brief for the assistance of the Court but will not be taking a position at the hearing as to how the state of title to the Fogarty Properties should be settled.

ISSUES

7. The sole issue in this hearing is, based on the evidence before the Court: what person or persons had an interest in the Fogarty Properties at the time of expropriation?

LAW

8. MODG wishes to provide the following authorities for the Court's assistance. Much of these materials will overlap with the MODG's submissions at the various motions for dates and directions. They have been gathered together in this brief for ease of reference.

9. The *Act* provides explicit directions for an application made under s. 17:

> *17 (1) Where the expropriating authority, at any time after the registration of the expropriation document at the appropriate office of the registrar of deeds, is in doubt as to the persons who had any right, estate or interest*

> *in the land to which the expropriation document relates, or as to the nature or extent thereof, it may apply to the Court to make a determination respecting the state of the title to the land or any part thereof and to order who had a right, estate or interest in the land at that time and the nature and extent thereof.*
>
> *(2) An application under this Section shall in the first instance be ex parte and the Court shall fix a time and place for the hearing of the persons concerned and give directions as to*
>
> > *(a) the persons who are to be served, the notice of the hearing, the contents of the notice and the manner of service thereof;*
> >
> > *(b) the material and information to be submitted by the expropriating authority or any other person; and*
> >
> > *(c) such other matters as the Court considers necessary.*
>
> *(3) After the hearing the Court shall either judge for the purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof or direct an issue or issues to be tried for the purpose of enabling the Court to make such an adjudication.*
>
> *(4) An adjudication made by the Court for the purposes of this Act shall be deemed to be a final judgment of the Court and, subject to variation on appeal, if any, shall finally determine for all purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof.*
>
> *Expropriation Act, R.S.N.S., 1989 c. 156, Tab 1*

10. Three motions for dates and directions were held in this matter, leading to the upcoming hearing on the merits.

11. At the upcoming hearing, the task before the Court is to issue an order, based on the evidence before the Court, settling the state of title to the Fogarty Properties at the time of expropriation.

12. The questions of intestate succession, the use of oral history, and the concepts of adverse possession may be of use to the Court in reaching a determination on the state of title.

Intestate Succession

13. The *Intestate Succession Act* provides that

> *Surviving spouse*

> *4 (1) If an intestate dies leaving a surviving spouse and issue, the intestate's estate, where the net value does not exceed fifty thousand dollars, shall go to the surviving spouse. ....*
>
> *(6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the surviving spouse shall take the same share of the estate as if the child had been living at that date.*
>
> *(7) If an intestate dies leaving issue, the intestate's estate shall be distributed, subject to the right of the surviving spouse, if any,* per stirpes *among the issue.*

Intestate Succession Act, R.S.N.S., 1989 c. 236 ("ISA") Tab 2

The Law of Hearsay as it Pertains to Oral Family Histories

14. For the further assistance of the Court, MODG refers the Court to the principled approach for the admission of hearsay. In brief, this approach considers the necessity of admitting the hearsay statements and the reliability of those statements, see Sopinka, at p. 265.

Sopinka, Lederman & Bryant: The Law of Evidence in Canada (4ed) ("Sopinka") Tab 3

15. Additionally, MODG submits that p. 320-322 of Sopinka may be of assistance to the Court. These pages deal with the recognition of aboriginal oral histories in circumstances where such oral histories may be the sole record of past events. As set out in Sopinka, the Supreme Court of Canada "has held that various forms of oral history are admissible in order to do justice in aboriginal claims cases" at p. 321.

Sopinka, Tab 3

16. MODG suggests to the Court that the Court may wish to consider a similarly flexible approach in examining the oral history of the Fogarty family, as there do not appear to be any other records regarding the use and occupation of the Fogarty Properties.

17. Additionally, MODG draws the Court's attention to p. 322-327 of Sopinka, which addresses the traditional hearsay exception for declarations as to pedigree and family history.

Sopinka, Tab 3

18. At p. 322, Sopinka notes:

> *The rationale for admitting this type of evidence is the general inability to secure other evidence of family relationships, and the inherent reliability*

> *or accuracy of statements made by relatives with respect to family matters with which they are intimately concerned.*

Sopinka, Tab 3

19. The learned authors of Sopinka go on to note that reliability is ensured if statements are made prior to litigation.

20. While this traditional exception to the hearsay rule appears to be applicable primarily in cases regarding disputes about paternity, MODG provides this authority as it may be of assistance to the Court.

Adverse Possession

21. For the assistance of the Court on the general principles regarding adverse possesion, the MODG refers the Court to Chapter 7 of the Nova Scotia Real Property Practice Manual, authored by Charles W. MacIntosh, Q.C. at pages 7-3 through 7-5 and p. 7-21 through 7-35.

Nova Scotia Real Property Practice Manual, Charles W. MacIntosh, Q.C ("MacIntosh"), Tab 4

22. Put briefly, a claim based on adverse possession must show actual, continuous, open, notorious, possession of the land to the exclusion of the true owner.

MacIntosh, at p. 7-21, Tab 4

23. Possession with the above noted characteristics must persist for 20 years.

Limitation of Actions Act, R.S.N.S, c. 258, s. 10 and 22, Tab 5.

24. The doctrine of adverse possession can, as a matter of law, apply in cases of tenants-in-common who would otherwise take an interest in land pursuant to intestate succession, as Justice Hallett noted *in obiter* in *Re Manthorne*.

Re Manthorne, 1977 CarswellNS 393, 26 N.S.R. (2d) 74, ("Re Manthorne") Tab 6

25. *Manthorne* was an application pursuant to s. 17 of the *Expropriation Act*. The case was decided on the basis of an agreement by which parents agreed to give up their property to one of their children in exchange for support. However, the Court held that this agreement created an equitable interest in land in favour of the children who remained on the property to support the parents. However, at paragraphs 18-23, the Court noted *in obiter* that even if the equitable agreement was ineffective, that the open, continuous,

notorious and adverse possession of one branch of the family would have been sufficient to extinguish the interest of the other.

26. A later case, *Lynch v. Nova Scotia*, also decided by Justice Hallett sets out eight principles that must be applied where a party seeks to establish possessory title against co-tenants. These principles can be found at paragraphs 7-14 of the decision.

Lynch v. Nova Scotia (Attorney General), 1985 CarswellNS 212, 71 N.S.R. (2d) 69, ("Lynch") Tab 7

CONCLUSION

27. MODG hopes that the enclosed authorities are of assistance to the Court in determining the state of title to this property.

28. MODG submits that the final order in this matter should also provide for the removal of the materials posted to the MODG's website in accordance with the interim order of Justice Rosinski dated November 25, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10 day of April, 2015.

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2.	*Intestate Succession Act*, R.S.N.S., 1989 c. 236
3.	Sopinka, Lederman & Bryant: The Law of Evidence in Canada (4ed)
4.	Nova Scotia Real Property Practice Manual, Charles W. MacIntosh, Q.C
5.	*Limitation of Actions Act*, R.S.N.S, c. 258
6.	*Re Manthorne*, 1977 CarswellNS 393, 26 N.S.R. (2d) 74,
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Tab 1

Expropriation Act

CHAPTER 156

OF THE

REVISED STATUTES, 1989

amended 1992, c. 11, s. 36; 1995-96, c. 19; 2001, c. 6, s. 106;
2006, c. 16, s. 7

An Act Respecting Expropriation

PART I

SHORT TITLE

Short title

1 This Act may be cited as the Expropriation Act. *R.S., c. 156, s. 1.*

PURPOSE OF ACT

Purpose of Act

2 (1) It is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation.

(2) Further, it is the intent and purpose of this Act that where a family home is expropriated the position of the owner in regards to compensation shall be such that he will be substantially in the same position after the expropriation as compared with his position before the expropriation.

(3) Recognizing that strict market value is not in all cases a true compensation for a family home that is expropriated since it may not provide equivalent accommodation to the owner of the family home,

this Act shall be interpreted broadly in respect of the expropriation of a family home so that effect is given to the intent and purpose set forth in subsection (2).

(4) The protection given by subsections (2) and (3) shall not extend to any person whose land is a money asset or investment and not a family home. *R.S., c. 156, s. 2.*

INTERPRETATION

Interpretation of Act and service of documents

3 (1) In this Act,

(a) "appraisal report" is a written report which follows and would meet the requirements and standards adopted by The Appraisal Institute of Canada for such reports;

(aa) "Board" means the Nova Scotia Utility and Review Board;

(b) "Court" or "Supreme Court" means the Trial Division of the Supreme Court and includes a judge thereof whether sitting in court or in chambers;

(c) "expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers but does not include a reservation under Section 13 of the Public Highways Act or a designation under Section 106 of the Environment Act;

(d) "expropriating authority" means Her Majesty in right of the Province and in all other cases any person or body empowered by statute to expropriate land;

(e) "expropriation documents" means those documents required to be deposited in the office of a registrar of deeds pursuant to Section 11;

(f) "family home" means the home which is the home of the owner held by him in fee simple or to which he holds the equity of redemption and is used by him for his family residence together, with the land immediately appurtenant thereto, not exceeding one and one-half acres, and any immediately appurtenant outbuildings;

(g) "former Expropriation Act" means Chapter 96 of the Revised Statutes, 1967;

(h) "injurious affection" means

(i) where a statutory authority acquires part of the land of an owner,

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(ii) where the statutory authority does not acquire part of the land of an owner,

(A) such reduction in the market value of the land of the owner, and

(B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of subclause (i), part of the land of an owner shall be deemed to have been acquired where the owner from whom land is acquired retains land contiguous to that acquired or retains land of which the use is enhanced by unified ownership with that acquired;

(i) "land" includes any estate, term, easement, right or interest in, to, over or affecting land;

(j) "owner" includes a mortgagee, tenant, registered judgment creditor, a person entitled to a limited estate or interest in land, a guardian or trustee of an incompetent person or of a person incapable of managing his affairs, and a guardian, executor, administrator or trustee in whom land is vested;

(k) "prescribed" means prescribed by the regulations made under this Act;

(l) "purchase-money mortgage" means a mortgage given by a purchaser of land to the vendor of the land or his nominee as security for the payment of all or part of the consideration for the sale;

(m) "registered judgment creditor" means a creditor who has obtained a judgment and registered it in accordance with the provisions of the Registry Act or the Land Registration Act;

(n) "registered owner" means an owner of land whose interest in the land is defined and whose name is specified in an instrument in the registry of deeds office, and includes a person shown as a tenant of land on the last revised assessment roll and also includes a person shown as the owner of any registered interest in the parcel register established pursuant to the Land Registration Act;

(o) "security holder" means a person who has an interest in land as security for the payment of money and includes a vendor under an agreement of purchase and sale;

(p) "statutory authority" means Her Majesty in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection;

(q) "tenant" includes a lessee or occupant occupying premises under any tenancy whether written, oral or implied.

(2) Any document required by this Act to be served may be served personally or by registered mail addressed to the person to be served at his last known address, or, if that person or his address is unknown, by publication once a week for three weeks in a newspaper having general circulation in the locality in which the land concerned is situate and service shall be deemed to be made,

(a) in the case of service by registered mail, on the fifth day after the day of mailing; and

(b) in the case of service by publication, on the date of the third publication. *R.S., c. 156, s. 3; 1992, c. 11, s. 36; 1995-96, c. 19, s. 1; 2001, c. 6, s. 106; 2006, c. 16, s. 7.*

Application of Act and conflict with other Acts

4 (1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.

(2) The provisions of any general or special Act providing procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection shall be deemed to refer to this Act and not to the Act in question.

(3) Where there is conflict between a provision of this Act and provisions of any other general or special Act, the provision of this Act prevails. *R.S., c. 156, s. 4.*

Act binds Crown

5 This Act binds Her Majesty in right of the Province. *R.S., c. 156, s. 5.*

PART II

EXPROPRIATION

Acquisition and Abandonment of Land

Expropriation by statutory authority

6 Where a statutory authority desires to expropriate land, it shall be expropriated in accordance with the provisions of this Part but only for the purposes authorized by its statute and to the extent set forth therein. *R.S., c. 156, s. 6.*

Approval by approving authority

7 (1) Notwithstanding Section 6, an expropriating authority shall not expropriate land without the approval of the approving authority.

(2) Any expropriation of land without the approval of the approving authority shall be null and void.

(3) Notwithstanding subsection (2), nothing herein contained prevents an expropriating authority from expropriating anew land forming part of an expropriation that is null and void so long as the new expropriation is in accord with this Act.

(4) The Governor in Council may make regulations concerning the requirements of approval by the approving authority and the documents necessary to evidence the same. *R.S., c. 156, s. 7.*

"approving authority" defined

8 For the purposes of this Act, "approving authority" means

(a) the Governor in Council in respect of land expropriated by

(i) Her Majesty in right of the Province,

(ii) the Nova Scotia Power Corporation,

(iii) Maritime Telegraph and Telephone Company Limited,

(iv) the Halifax-Dartmouth Bridge Commission;

(b) the municipal council in respect of land expropriated by a municipality;

(c) the town council in respect of land expropriated by a town;

(d) the village commissioners in respect of land expropriated by a village;

(e) the appropriate city council in respect of land expropriated by

(i) the City of Halifax,

(ii) the City of Dartmouth,

(iii) the City of Sydney;

(f) the city council of Halifax in respect of land expropriated by the Halifax Water Commission;

(g) the elected political body to which it is responsible in respect of land expropriated by any corporation, commission or body not coming within the above clauses, except that in the case of Her Majesty in right of the Province, the Governor in Council; and

(h) any case not provided for herein, the Attorney General. *R.S., c. 156, s. 8.*

Expropriation by Crown

9 (1) Notwithstanding any special or general Act, where Her Majesty in right of the Province desires to expropriate land a request shall be made to the Governor in Council for approval of the expropriation by the appropriate Minister or person requesting the same and, upon approval by the Governor in Council, the Attorney General shall be the expropriating authority.

(2) The Governor in Council may make regulations setting forth the nature, type and amount of information required to consider a request for expropriation under subsection (1). *R.S., c. 156, s. 9.*

Power of Crown to expropriate

10 (1) Her Majesty in right of the Province may expropriate land

(a) for any purpose for which a Minister or the Governor in Council is authorized under a specific Act or the former Expropriation Act to expropriate lands;

(b) to implement or carry out or effect an agreement entered into between the Province and the Government of Canada or a city, town or municipality or any combination thereof if the agreement is financed from public funds;

(c) for any public work;

(d) for any purpose that is a public purpose.

(2) For the purpose of this Section, "public work" includes highways, roads and bridges, public buildings, and all other works and property, whether or not of the kind hereinbefore mentioned, belonging to the Province, and also all other works and property acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Province or for the acquisition, construction, repair, extension, enlargement or improvement of which any public money is appropriated by the Legislature, and every work required for any such purpose but not any work for which money is appropriated as a subsidy only. *R.S., c. 156, s. 10.*

Expropriation document

11 (1) Where a statutory authority has authority to expropriate land and it is desired to expropriate the same, the expropriating authority shall deposit at the office of the registrar of deeds for the registration district in which the land is located a document or documents setting forth

(a) a description of the land;

(b) a plan of the land;

(c) the nature of the interest intended to be expropriated and whether such interest is intended to be subject to any existing interest in the land;

(d) the statutory purpose for which the land is expropriated; and

(e) a certificate of approval executed by the approving authority or a true copy thereof.

(2) Upon the documents being deposited at the office of the appropriate registrar of deeds

(a) the land expropriated becomes and is absolutely vested in the expropriating authority; and

(b) any other right, estate or interest is as against the expropriating authority, or any per-son claiming through or under the expropriating authority, thereby lost to the extent that such right, estate or interest is inconsistent with the interest expropriated.

(3) In the case of an omission, misstatement or erroneous description in an expropriation document deposited under this Section, the expropriating authority may deposit in the proper registry of deeds office a document replacing or amending the original document and signed by the expropriating authority, and a document registered under this subsection shall be marked to show the nature of the replacement or amendment and shall have the same force and effect as, and shall be in substitution for, the original document to the extent that such document is replaced or amended thereby.

(3A) In the case of an interest registered pursuant to the Land Registration Act, documents shall be recorded at the land registration office in the parcel register of the interest being expropriated and the registrar shall establish a new register for the interest expropriated.

(4) Where a document purports to have been signed by an expropriating authority under this Section, it shall be presumed to have been signed by the expropriating authority without proof of the signature or official character of the person appearing to have signed it, unless otherwise directed by a court or the Board.

(5) At any time after the expropriating authority deposits the expropriation documents in accordance with subsection (1), it may in writing request the owner to provide it with all information of which the owner has knowledge relating to any interest in the land expropriated and if the owner does not provide such information within thirty days after the written request then the period for serving documents and offering compensation under Sections 13 and 15 shall be increased by one day for each two days delay on the part of the owner without affecting the provisions contained in Section 13 for entering into possession.

(6) The Governor in Council may make regulations as to the form and the contents of the written request referred to in subsection (5).

(7) Notwithstanding Sections 13, 14 and 15, where the Attorney General is of the opinion that the physical possession or use of any land expropriated by an expropriating authority, including himself, is immediately required in the public interest, he may by order authorize the expropriating authority, including himself, to take physical possession of the land expropriated or to use the land to the extent specified in the order and as of the date specified in the order. *R.S., c. 156, s. 11; 2001, c. 6, s. 106.*

Agreement with owner

12 A statutory authority has the authority to make and form an agreement with an owner in respect of any claim of the owner under this Act, including any costs of the owner. *R.S., c. 156, s. 12.*

Offer to registered owner if no agreement

13 (1) In this Section, "registered owner" means a known registered owner.

(2) Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within ninety days after the deposit of the expropriation document under Section 11 and before taking possession of the land, serve upon the registered owner

(a) a true copy of the expropriation documents;

(b) an offer of an amount in full compensation for his interest; and

(c) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land,

excepting compensation for business loss for which the determination is postponed under subsection (1) of Section 29.

(3) The expropriating authority shall base its offer of compensation made under subsection (2) upon a report appraising the market value of the lands being taken and damages for injurious affection, and shall serve a copy of the appraisal report upon the owner at the time the offer is made.

(4) The expropriating authority may, within the period mentioned in subsection (2) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to a judge for an order extending any time referred to in subsection (2), and a judge may in his order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the offer or statement under clause (a) of subsection (2) upon such conditions as may be specified in the order.

(5) If any registered owner is not served with the offer required to be served on him under subsection (2) within the time limited by subsection (2) or by an order of a judge under subsection (4) or by agreement, the failure does not invalidate the expropriation but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document. *R.S., c. 156, s. 13.*

Offer to settle

13A In addition to the offer referred to in subsection 13(2), an expropriation authority may make an offer to settle as defined in Section 52, and in making an offer to settle, the expropriating authority may have reference to such additional information as the expropriating authority considers necessary which may include, but which is not limited to, an amended appraisal report. *1995-96, c. 19, s. 2.*

Service of offer on unknown registered owner

14 (1) Where the registered owner is unknown or his address is unknown, the expropriating authority shall, within ninety days after the deposit of the expropriation document under Section 11, serve the registered owner by publication as provided for in subsection (2) of Section 3 and may take possession of the land immediately upon the third publication of the notice in the newspaper.

(2) For the purposes of subsection (1), only the description of the land and the purpose for which it is expropriated and the name of the expropriating authority need be published. *R.S., c. 156, s. 14.*

Offer to other owners

15 (1) Where the owner is a person other than those described in Sections 13 and 14 and no agreement as to compensation has been made, the expropriating authority shall, within one hundred and eighty days after the deposit of the expropriation document under Section 11, make, to each person who is entitled to compensation under this Act in respect of land expropriated to which the expropriation document relates, an offer in writing of compensation in an amount estimated by the expropriating authority to be equal to the compensation to which that person is then entitled in respect of his interest therein.

(2) An offer of compensation made to a person under this Section in respect of land expropriated shall be based on a written appraisal of the value of such interest, and a copy of the appraisal shall be sent to such person at the time of the making of the offer.

(3) Failure to comply with subsection (1) does not invalidate the expropriation but interest upon the unpaid portion of any compensation payable to the owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document. *R.S., c. 156, s. 15.*

Payment

16 (1) Where an offer of full compensation has been made to a person under this Act and that person accepts the offer, the full amount thereof shall forthwith upon acceptance of the offer be paid to that person.

(2) If the registered owner under Section 13 or the owner under Section 15 does not accept the offer of the amount of full compensation made, then the statutory authority shall immediately pay to him seventy-five per cent thereof without prejudice to the right of that person to claim additional compensation in respect of the expropriation.

(3) If the amount paid pursuant to subsection (2) exceeds the amount of compensation as determined by the Board, the Board shall order the registered owner to pay the excess to the expropriating authority and, upon such order being made, the registered owner shall pay the excess to the expropriating authority. *R.S., c. 156, s. 16; 1995-96, c. 19, s. 3.*

If state of title in doubt

17 (1) Where the expropriating authority, at any time after the registration of the expropriation document at the appropriate office of the registrar of deeds, is in doubt as to the persons who had any right, estate or interest in the land to which the expropriation document relates, or as to the nature or extent thereof, it may apply to the Court to make a determination respecting the state of the title to the land or any part thereof and to order who had a right, estate or interest in the land at that time and the nature and extent thereof.

(2) An application under this Section shall in the first instance be ex parte and the Court shall fix a time and place for the hearing of the persons concerned and give directions as to

(a) the persons who are to be served, the notice of the hearing, the contents of the notice and the manner of service thereof;

(b) the material and information to be submitted by the expropriating authority or any other person; and

(c) such other matters as the Court considers necessary.

(3) After the hearing the Court shall either judge for the purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof or direct an issue or issues to be tried for the purpose of enabling the Court to make such an adjudication.

(4) An adjudication made by the Court for the purposes of this Act shall be deemed to be a final judgment of the Court and, subject to variation on appeal, if any, shall finally determine for all purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof.

(5) An application for appeal under this Section shall be made to the Appeal Division of the Supreme Court, within thirty days after the filing of the decision. *R.S., c. 156, s. 17.*

Possession of land after offer served

18 (1) Where land that has been expropriated is vested in an expropriating authority and the expropriating authority has served the registered owner with an offer in accordance with Section 13, the expropriating authority, subject to any agreement to the contrary and if no application is made under subsection (4) of Section 13, shall take possession of the land on the date specified in the notice.

(2) Subject to subsection (4) of Section 13, the date for possession shall be at least three months after the date of the serving of the offer required by Section 13. *R.S., c. 156, s. 18.*

Possession resisted

19 (1) Where resistance or opposition is made to the expropriating authority or any person authorized by it in entering upon, using or taking possession of land when it is entitled so to do, it may apply ex parte to the Court for an order directing the sheriff to put the expropriating authority into possession of the land expropriated.

(2) On proof of the resistance or opposition, the Court may grant the order ex parte or it may appoint a time and place for the hearing of the application and in the appointment may direct that it shall be served upon such person as it may prescribe and, after a hearing upon proof of the resistance or opposition, may grant the order.

(3) The sheriff shall forthwith execute the order and make a return to the Court of the execution thereof. *R.S., c. 156, s. 19.*

Abandonment of expropriated land

20 (1) Where, at any time before the compensation has been paid in full in satisfaction of proceedings taken under this Act, land expropriated under the provisions of this Act, or any part of such land, is found to be unnecessary for the purpose for which the same was expropriated, or if it is found that a more limited estate or interest therein only is required, the expropriating authority may, by writing under proper execution by its duly authorized officers, registered in the proper registry office, declare that the land or such part thereof is not required and is abandoned by the expropriating authority, or that it is intended to retain only such limited estate or interest as is mentioned in such writing, and thereupon

(a) the land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him; or

(b) in the event of a limited estate or interest therein being retained by the expropriating authority, the land shall so revest subject to the estate or interest so retained.

(2) Where part only of the land or all of it but a limited estate or interest therein is abandoned, the fact of such abandonment and the damage, if any, sustained in consequence of that which is abandoned having been taken, and all the other circumstances of the case, shall be taken into account in determining the amount to be paid to any person claiming compensation.

(3) Where the whole of the land taken is abandoned, the person from whom it was taken shall be entitled to all damages sustained and all costs incurred by him in consequence of the taking and abandonment, and the amount of the damages shall be determined in the manner provided by this Act, and if a reference as to compensation is pending, shall be determined on such reference. *R.S., c. 156, s. 20.*

Duty of registrar of deeds

21 Notwithstanding the provisions of the Registry Act, every registrar of deeds shall receive and permanently preserve in his office such expropriation documents as the expropriating authority causes to be deposited under this Act, and shall endorse thereon the day, hour and minute when the same were received by him as the time of registration and make such entries in his records as will make their registration a public record. *R.S., c. 156, s. 21.*

Filing procedure deemed followed

22 In all cases, when expropriation documents purporting to be signed by the expropriating authority are deposited in the office of the registrar of deeds, the same shall be deemed to have been so deposited by the direction and authority of the expropriating authority and the formality and procedure relating to the filing of the documents to have been followed. *R.S., c. 156, s. 22.*

Certified document as evidence

23 A document purporting to be certified by a registrar of deeds to be a true copy of an expropriation document registered under this Act at a time stated in the certificate is, without proof of the official character or signature of the registrar, evidence of the facts stated therein and of the registration of the expropriation document at the time so stated. *R.S., c. 156, s. 23.*

PART III

COMPENSATION

Duty to pay compensation

24 Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act. *R.S., c. 156, s. 24.*

Rules to determine land value

25 (1) The rules set forth in this Part shall be applied in determining the value of land expropriated.

(2) The value of land expropriated shall be the value of that land at the time the expropriation documents are deposited at the office of the registrar of deeds. *R.S., c. 156, s. 25.*

Aggregate of items to be compensated

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

(a) the market value of the land or a family home for a family home determined as hereinafter set forth;

(b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;

(c) damages for injurious affection as hereinafter set forth; and

(d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation. *R.S., c. 156, s. 26.*

Value

27 (1) In this Section and Section 28, "bonus" means the amount by which the amount secured under a mortgage exceeds the amount actually advanced and does not include accrued interest outstanding and unpaid.

(2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

(3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

(a) the market value thereof determined as set forth in subsection (2); and

(b) the aggregate of

> (i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and
>
> (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

(4) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate for that purpose, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.

(5) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

(6) Notwithstanding subsection (3), where any land expropriated is, at the time the expropriation document was deposited in the registry of deeds, used as a family home by the owner the value of the land expropriated shall be such value as will at current costs and prices put the owner in a position to acquire by purchase or construction a home reasonably equivalent to that which was expropriated.

(7) Persons negotiating or determining a case under subsection (6) shall consider the question whether the reasonably equivalent home can be acquired by purchase, or whether it is certainly or probably

impracticable in the state of the market so to acquire it, in which latter case it may be necessary for them to award sufficient compensation for its construction in lieu of current market value.

(8) For the purposes of subclause (ii) of clause (b) of subsection (3) consideration shall be given to the time and circumstances in which an owner was allowed to continue in occupation of the land after the expropriating authority became entitled to take physical possession or make use thereof, and to any assistance given by the expropriating authority to enable such owner to seek and obtain alternative premises.

(9) The expropriating authority shall pay to a tenant occupying land expropriated in respect of disturbance so much of the cost referred to in subclause (ii) of clause (b) of subsection (3) as is appropriate having regard to

(a) the length of the term of the lease and the portion of the term remaining at the time at which the determination is relevant;

(b) any right or reasonable prospect of renewal of the term that the tenant had; and

(c) any investment in the land by the tenant and the nature of any business carried on by him thereon.

(10) Security holders shall be paid the amount of principal and interest outstanding against the security out of the market value of the land and any damages for injurious affection payable in respect of the land subject to the security in accordance with their priorities, whether or not such principal and interest is due, and subject to subsections (11) and (12).

(11) Where land is subject to a mortgage and the amount payable to the mortgagee under subsection (10) is insufficient to satisfy the mortgage in full,

(a) where the mortgage is a purchase-money mortgage the mortgage shall, to the extent that the mortgage affects title to the land, be deemed to be fully paid, satisfied and discharged for all purposes upon payment of the amount payable to the mortgagee under subsection (10); and

(b) where the mortgage is not a purchase-money mortgage and includes a bonus,

(i) the amount by which the amount payable to the mortgagee under subsection (10) is insufficient to pay the amount remaining unpaid under the mortgage, or

(ii) the amount of the bonus,

whichever is the lesser, shall, to the extent that the mortgage affects title to the land, be deemed to be fully paid and satisfied for all purposes upon payment of the amount payable to the mortgagee under subsection (10).

(12) No amount shall be paid in respect of a bonus until all security holders have been paid all amounts payable other than any bonus.

(13) Where land held as security is expropriated in part or is injuriously affected, a security holder is entitled to be paid to the extent possible in accordance with his priority, out of the market value portion of the compensation and any damages for injurious affection therefor, as the case may be, a sum that is in the same ratio to such portion of the compensation and damages as the balance outstanding on the security at the date of the expropriation or injurious affection is to the market value

of the entire land, provided however that the sum so determined shall be reduced by the amount of any payments made to the security holder by the owner after the date of expropriation or injurious affection. *R.S., c. 156, s. 27; 1995-96, c. 19, s. 4.*

If mortgage prepaid by statutory authority

28 Where a statutory authority prepays a mortgage in whole or in part, the statutory authority

(a) shall pay to the mortgagee an amount in respect of the prepayment amounting to

(i) three months interest on the amount of principal prepaid at the rate of six per cent a year or at such other rate as is prescribed by the Governor in Council by regulation, or

(ii) the value of any notice or bonus for prepayment provided for in the mortgage,

whichever is the lesser;

(b) shall pay to the mortgagee where

(i) the prevailing interest rate for an equivalent investment is lower than the rate under the mortgage, and

(ii) there is no provision in the mortgage permitting prepayment at the date of the expropriation,

an amount to compensate for the difference in the interest rates for the period for which the amount of principal prepaid has been advanced, not to exceed five years; and

(c) shall pay to the mortgagor, whose interest is expropriated, an amount to compensate for any loss incurred by reason of a difference in the interest rates during the period for which the payment of principal provided for in the mortgage has been advanced, but such difference shall not be calculated on a new interest rate any greater than the prevailing interest rate for an equivalent mortgage. *R.S., c. 156, s. 28.*

Business loss from relocating and loss of goodwill

29 (1) Where a business is located on the land expropriated, the statutory authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the statutory authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for twelve months or until a three-year period has elapsed from the date of the expropriation, whichever occurs first.

(2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.

(3) For the purpose of determining the compensation for loss of goodwill, the value of the goodwill shall be determined in accordance with generally accepted accounting principles. *R.S., c. 156, s. 29; 1995-96, c. 19, s. 5.*

Injurious affection and loss of access

30 (1) A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

(2) No compensation is payable for the loss of access to land or egress from land, or both, where the loss is the result of a designation pursuant to the Public Highways Act of a highway or land as a controlled access highway, if other access to the land or egress from the land, as the case may be, is available as a result of a service or land access road being provided. *R.S., c. 156, s. 30; 1995-96, c. 19, s. 6.*

Procedure for claim for injurious affection

31 (1) Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred.

(2) Where the person who is injuriously affected is an infant, an incompetent or a person incapable of managing his affairs, his claim for compensation, if not made on his behalf within the time period stipulated in subsection (1), shall be made within one year after he ceased to be under the disability or, in the case of his death while under the disability, within one year after his death and, if not so made, the right to compensation is forever barred. *R.S., c. 156, s. 31.*

Set-off

32 The value of any advantage to the land or remaining land of an owner derived from any work for which land was expropriated or by which land was injuriously affected shall be set-off only against the amount of the damages for injurious affection to the owner's land or remaining land. *R.S., c. 156, s. 32.*

Not to be considered in land valuation

33 In determining the value of land expropriated, no account shall be taken of

(a) any anticipated or actual use by the expropriating authority of the land at any time after the depositing of the expropriation document in the registry of deeds;

(b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the interest or any part thereof, where such transaction or agreement was entered into after the deposit of the expropriation document in the registry of deeds;

(c) any increase or decrease in the value of the land resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated; or

(d) any increase in the value of the land resulting from its having been put to a use that was contrary to law. *R.S., c. 156, s. 33.*

Factors in amount of compensation payable

34 The fact of

(a) an abandonment or revesting under this Act of an interest or remainder of an interest in land; or

(b) any undertaking given on behalf of the expropriating authority, or by any other person within the scope of his authority, to make any alteration, construct any work or grant or convey any other land or interest therein,

shall be taken into account, in connection with all other circumstances of the case, in determining the amount to be paid to any person claiming compensation for land expropriated. *R.S., c. 156, s. 34.*

35 repealed 1995-96, c. 19, s. 7.

PART IV

NEGOTIATION

If compensation not agreed upon

36 (1) Where the statutory authority and the owner have not agreed upon the compensation payable under this Act and, in the case of injurious affection, Section 31 has been complied with or, in the case of expropriation, Section 13 has been complied with, or the time for complying therewith has expired,

(a) the statutory authority or the owner may serve notice of negotiation upon the other of them stating that it or he, as the case may be, requires the compensation to be negotiated; or

(b) where the statutory authority and the owner have agreed to dispense with negotiation proceedings or are unable to agree to a negotiator within thirty days of service of the notice referred to in clause (a), the statutory authority or the owner may serve notice upon the other of them or upon the Board, to have the compensation determined by the Board.

(2) In any case in which a notice of negotiation is served, the negotiator shall, upon reasonable notice to the statutory authority and the owner, meet with them and, without prejudice to any subsequent proceedings, proceed in a summary and informal manner to negotiate a settlement of the compensation.

(3) Before or during the negotiation proceedings, the negotiator shall inspect the land that has been expropriated or injuriously affected.

(4) If the negotiation proceedings do not result in a settlement of the compensation, the statutory authority or the owner may serve notice upon the other of them and upon the Board stating that it or he, as the case may be, requires the compensation to be determined by the Board as though the negotiation proceedings had not taken place. *R.S., c. 156, s. 36.*

PART V

NOVA SCOTIA UTILITY AND REVIEW BOARD

37 to 46 repealed 1992, c. 11, s. 36.

Duty of Board

47 (1) The Board shall determine any compensation where the parties have not agreed on the amount of compensation, and in the absence of agreement, determine any other matter required by this or any other Act to be determined by the Board.

(2) to (4) repealed 1992, c. 11, s. 36.

R.S., c. 156, s. 47; 1992, c. 11, s. 36; 1995-96, c. 19, s. 8.

48 and 49 repealed 1992, c. 11, s. 36.

Expert evidence

50 (1) A party is not entitled to adduce the evidence of an expert witness at the hearing unless the party has filed with the Board and served upon the other party or parties at least sixty days before the hearing begins a copy of the expert's report.

(1A) Where a report has been filed with the Board and served on the other party pursuant to subsection (1), the other party may file an expert's report in response at least thirty days before the hearing and is entitled to adduce the evidence in that report.

(2) Subject to subsections (1) and (1A), each party shall be entitled to call two expert witnesses, however the Board may grant leave for additional experts to be called.

(3) The Board may appoint experts to assist it in interpreting evidence of a special or technical nature. *R.S., c. 156, s. 50; 1995-96, c. 19, s. 9.*

Notice of hearing

51 The Board shall give notice of its hearings to those parties known to the Board who claim any interest or who, in the opinion of the Board, may have an interest in the land which was expropriated and shall accord to those parties a reasonable opportunity to offer evidence at the hearings. *R.S., c. 156, s. 51.*

Costs

52 (1) In this Section, "offer to settle" means a written offer of an amount in full compensation for land expropriated or for injurious affection caused to an owner, or for both, made by an expropriating authority to the owner at least fourteen days prior to the date of a hearing by the Board that is held to determine the amount of the compensation.

(2) Subject to subsection (5), an owner whose interest in land is expropriated or injuriously affected is entitled to be paid the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation.

(3) Subject to subsection (5), where an expropriating authority and an owner agree on the amount of compensation, but do not agree on the amount of costs to be paid, the costs to be paid to the owner shall be determined by the Board.

(4) Where the compensation awarded to an owner by the Board is greater than the amount offered in the offer to settle, the expropriating authority shall pay to the owner costs as determined by the Board.

(5) Where the compensation awarded to an owner by the Board is equal to or less than the amount offered in the offer to settle, the owner is entitled to costs, as determined by the Board, to the date of service of the offer to settle but the owner shall bear the owner's own costs that are incurred after that date.

(6) An offer to settle shall not be disclosed to the Board before its determination of the compensation payable to the owner.

(7) The costs payable to the owner are

(a) those costs referred to in subsection (2), (3), (4) or (5); or

(b) where the Governor in Council prescribes a schedule of costs, the amounts prescribed in the schedule and not the costs referred to in clause (a).

(8) In a determination of costs pursuant to subsection (2), (3), (4) or (5), the following shall be taken into account:

(a) the number and complexity of the issues;

(b) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(c) any step in the proceeding that was improper, vexatious, prolix or unnecessary;

(d) the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;

(e) the skill, labour and responsibility involved;

(f) the amount of the award or settlement;

(g) any other matter relevant to the question of costs.

(9) The expropriating authority shall pay interest on an unpaid account for costs payable pursuant to this Section at the rate of six per cent per year or such rate as determined by the Governor in Council, from the date the account is served on the expropriating authority by the owner.

(10) Costs awarded pursuant to this Section are payable upon settlement or final adjudication of compensation to the owner. *1995-96, c. 19, s. 10.*

Interest on outstanding compensation

53 (1) Subject to Sections 13 and 15, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, outstanding from time to time, at the rate of six per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.

(2) Subject to subsection (3), where the Board is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow him interest for the whole or any part of the time for which he might otherwise be entitled to interest, or may allow interest at such rate less than six per cent a year as appears reasonable.

(3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, notwithstanding that the compensation as finally determined is less than the offer.

(4) Where the Board is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Board may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding six per cent a year but not exceeding twelve per cent a year. *R.S., c. 156, s. 53.*

Abatement of rent

54 (1) Subject to subsection (2), where only part of the interest of a lessee is expropriated, the lessee's obligation to pay rent under the lease shall be abated pro tanto, as determined by the Board.

(2) Where all the interest of a lessee in land is expropriated or where part of the lessee's interest is expropriated and the expropriation renders the remaining part of the lessee's interest unfit for the purposes of the lease, as determined by the Board, the lease shall be deemed to be frustrated from the date of the expropriation. *R.S., c. 156, s. 54.*

55 to 62 repealed 1992, c. 11, s. 36.

Payment of compensation under one thousand dollars

63 Where the owner who is entitled to convey the land that has been expropriated or injuriously affected and the statutory authority agree as to the compensation or the compensation has been determined and in either case it does not exceed one thousand dollars, the statutory authority may pay the compensation to the owner who is entitled to convey the land, saving always the rights of any other person to the compensation as against the person receiving it, and such payment discharges the statutory authority from all liability in respect of the compensation. *R.S., c. 156, s. 63.*

Appointment of guardian ad litem

64 (1) The Court may, where a trustee, guardian or other person representing any person under a disability or any other persons including issue unborn is unable or unwilling to act on his or their behalf or where any such person or persons including issue unborn are not so represented or where the person or persons entitled to compensation are unknown or missing, after such notice as the Court may direct, appoint a trustee, guardian or other person ad litem to act on his or their behalf for the purposes of this Act.

(2) The Court in making any appointment under subsection (1) may give such directions as to the disposal, application or investment of any compensation payable under this Act as it deems necessary to secure the interests of all persons having a claim thereto.

(3) Any contract, agreement, release or receipt made or given by any person appointed under subsection (1) and any conveyance or other instrument made or given in pursuance of such contract or agreement is binding for all purposes upon the person by whom, and any person or persons including issue unborn on behalf of whom, such contract, agreement, release or receipt is made or given.

(4) For the purposes of this Section, the Public Trustee is a person eligible for appointment by the Court and may, in his discretion, of his own initiative, make application for such appointment. *R.S., c. 156, s. 64.*

Undertaking by statutory authority

65 Where land is expropriated or is injuriously affected by a statutory authority, the statutory authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct additional work or make a grant of other lands, in which case, the compensation shall be determined having regard to such undertaking, and, if the undertaking has not already been carried out, the Board may declare that, in addition to the compensation determined, if any, the owner is entitled to have such alteration or addition made or such additional work constructed or such grant made to him. *R.S., c. 156, s. 65.*

PART VI

GENERAL

Regulations

66 The Governor in Council may make regulations

(a) prescribing rates of interest for the purposes of Section 28;

(b) prescribing forms for the purposes of this Act and providing for their use;

(c) prescribing a schedule of costs payable to an owner under this Act and the rate of interest on unpaid costs;

(d) defining any word or expression used but not defined in this Act;

(e) generally for any matter or thing necessary to effect the purposes of this Act. *R.S., c. 156, s. 66; 1992, c. 11, s. 36; 1995-96, c. 19, s. 11.*

Alienation of land acquired under Act

67 (1) Any land acquired under this Act for any purpose for which a statutory authority is authorized to acquire the same may be granted, sold, leased, transferred or otherwise disposed of by the statutory authority upon such terms and subject to such conditions as will assure, in the opinion of the statutory

authority, the carrying out of the purposes for which the land was acquired and subject to any statutory provision governing the disposition of land by the statutory authority.

(2) Any land referred to in subsection (1) when not required by a statutory authority may be disposed of by that statutory authority as if acquired by purchase. *R.S., c. 156, s. 67.*

Regulations Act

68 Regulations made by the Governor in Council pursuant to subsection (4) of Section 7, subsection (2) of Section 9, subsection (6) of Section 11 and Section 66 and regulations made by the Board under subsection (3) of Section 48 and approved by the Governor in Council shall be regulations within the meaning of the Regulations Act. *R.S., c. 156, s. 67.*

PART VII

PURCHASE AND DISPOSAL OF LAND BY
HER MAJESTY IN RIGHT OF THE PROVINCE

Application of Part

69 This Part applies only to Her Majesty in right of the Province. *R.S., c. 156, s. 69.*

Interpretation of Part

70 In this Part,

(a) "conveyance" includes a surrender to the Crown, and any conveyance to Her Majesty or to a minister or to any officer of his department, in trust, for or to the use of Her Majesty, shall be held to be a surrender;

(b) "land" includes any estate, term, easement, right or interest to, over, or affecting land;

(c) "lease" includes agreement for a lease;

(d) "minister" means the minister presiding over a department of the Government of the Province and charged with or having the supervision, management or control of the construction, maintenance or repair of the public work;

(e) "owner" includes mortgagee, lessee, tenant, occupant, person entitled to a limited estate or interest, and a guardian, executor, administrator or a trustee in whom land or any interest therein is vested;

(f) "public work" includes highways, roads and bridges, public buildings, and all other works and property, whether or not of the kind hereinbefore mentioned, belonging to the Province, and also all other works and property acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Province, or for the acquisition, construction, repair, extension, enlargement or improvement of which any public money is appropriated by the Legislature, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only. *R.S., c. 156, s. 70.*

Powers respecting public works

71 A minister may himself or by his engineers, superintendents, agents, workers or servants, for any purpose relative to the use, construction, maintenance or repair of a public work, or for obtaining better access thereto, and without the consent of the owner

(a) enter into and upon any land and survey and take levels of the same, and make such borings or sink such trial pits as he deems necessary for any purpose related to a public work;

(b) enter upon any land and deposit thereon such material as is required for a public work or for the purpose of digging, quarrying, cutting or carrying away any material therefrom for the purpose of the construction, repair or maintenance of a public work;

(c) make and use all such temporary roads to and from timber, stone, clay, gravel or sand or gravel pits as are required by him for the convenient passing to and from a public work during the construction, repair or maintenance thereof;

(d) enter upon any land for the purpose of making proper drains to carry off water from a public work, or for keeping such drains in repair;

(e) divert or alter, temporarily or permanently, the course of any river or other watercourse or any railway, road, street or other way, or raise or sink its level, in order to carry it over or under, on the level of or by the side of a public work, as he deems necessary for any purpose related to that work;

(f) for the purposes of a public work, divert or alter the position of any water pipe, oil or gas pipe, sewer or drain, or any telegraph, telephone or electric wire, pole or tower. *R.S., c. 156, s. 71.*

If wall removed or ditch built

72 Whenever it is necessary, in the construction, repair or maintenance of a public work, to take down or remove any wall or fence of any owner or occupier of land adjoining a public work, or to construct any drain or ditch for carrying off water, the wall or fence shall be replaced as soon as the necessity that caused its taking down or removal has ceased, and after it has been so replaced, or when the drain or ditch is completed, the owner or occupier of the land shall maintain the wall, fence, drain or ditch to the same extent as he might by law be required to do if the wall or fence had never been so taken down or removed, or the drain or ditch had always existed. *R.S., c. 156, s. 72.*

Blasting

73 (1) Where the Province has contracted with any person for the construction or execution of any public work, or where, by direction of the Governor in Council, or of a minister within the scope of his powers, any officer, employee or agent of the Province is charged with the construction or execution of any public work, the Governor in Council may, if in his opinion it is necessary or expedient that any material be excavated or removed by blasting or the use of explosives, authorize the work to be performed in that manner, notwithstanding that the blasting or explosions may cause damage to land or other property or to the prosecution of any industry or work that is situated in the vicinity of the work or that may be thereby affected.

(2) Notice of the authorization of any work in the manner set forth in subsection (1) shall be sent at least seven days in advance to the owner of any land or other property or to any person carrying on any industry or work that may be affected by such work, and any such owner or person may, within seven days after the sending of such notice to him, apply to the Governor in Council or to any person designated by him for a review of the authorization.

(3) If the construction or execution of a public work is contracted for, then unless the contract otherwise provides, the amount of compensation payable by the Province is chargeable to the contractor, and, if not paid by him forthwith upon demand, may be recovered from him by the Province as money paid to the contractor's use, or may be deducted from any money in the hands of the Province belonging or payable to the contractor. *R.S., c. 156, s. 73.*

Compensation by Province for damage

74 Compensation shall be paid by the Province to each person by whom any actual loss or damage is sustained by reason of the exercise of any power under this Part, equal to the amount of any such loss or damage for which the Province would be liable to that person if the power had not been exercised under the authority of a statute. *R.S., c. 156, s. 74.*

Power of minister to acquire land

75 A minister may, for and in the name of Her Majesty in right of the Province, purchase or acquire any land which he may deem necessary

(a) for any purpose for which a minister is authorized under a specific Act or the former Expropriation Act to purchase and acquire any land;

(b) to implement or carry out or effect an agreement entered into between the Province and the Government of Canada or a city, town or municipality or any combination thereof if the agreement is financed from public funds;

(c) for any public work;

(d) for any purpose that is a public purpose. *R.S., c. 156, s. 75.*

Survey or establishment of boundary

76 (1) A minister may employ a Nova Scotia Land Surveyor or engineer to make any survey or establish any boundary and furnish the plans and descriptions of any property acquired or to be acquired by Her Majesty for any of the purposes authorized by this Act.

(2) The boundaries of such properties may be permanently established by means of proper stone or iron monuments planted by the surveyor or engineer. *R.S., c. 156, s. 76.*

Deposit of plan

77 Where land appropriated for a public work is Crown land, under the control of the Government of the Province, a plan of such land shall be deposited with the Department of Lands and Forests. *R.S., c. 156, s. 77.*

Power of guardian or executor to contract

78 (1) Any tenant for life, guardian, tutor, curator, executor, administrator, committee or person, not only for and on behalf of himself, his heirs and assigns, but also for and on behalf of those whom he represents, whether married women, infants, issue unborn, lunatics, idiots, or other persons, seised, possessed, or interested in any land or other property may contract and agree with a minister for the sale of the whole or any part thereof, and may convey the same to the Crown, and may also contract and agree with the minister as to the amount of compensation to be paid for any such land or property or for damages occasioned thereto, and may also act for and on behalf of those whom he represents in any proceeding for determining the compensation to be paid under this Act.

(2) Where there is no guardian or other person to represent a person under disability, the judge may, after due notice to the persons interested, appoint a guardian or person to represent, for any of the purposes mentioned in subsection (1), the person under disability. *R.S., c. 156, s. 78.*

Compensation payable from Consolidated Fund

79 The Minister of Finance may pay to any person out of any unappropriated moneys forming part of the Consolidated Fund of the Province any sum to which, under this Act, he is entitled as compensation or for costs as a result of the Province purchasing, acquiring or expropriating land. *R.S., c. 156, s. 79.*

Property acquired for public purpose

80 All lands, streams, watercourses and property acquired under this Act or otherwise by the Crown for any public work and purpose shall be vested in the Crown and, when not required for the public work or purpose may be sold, leased or otherwise disposed of under the authority of the Governor in Council. *R.S., c. 156, s. 80.*

Alienation of land acquired by Crown

81 Any land acquired under this Act for any of the purposes set out in Section 10 or 75 may be granted, sold, leased, transferred or otherwise disposed of by the Governor in Council upon such terms and subject to such conditions as will assure, in the opinion of the Governor in Council, the carrying out of the purposes for which the land was acquired. *R.S., c. 156, s. 81.*

PART VIII

TRANSITIONAL

Transitional provisions

82 (1) Notwithstanding the former Expropriation Procedure Act and the former Expropriation Act, and any other general or private Act, where subsequent to the thirty-first day of December, 1970, a plan and description of land have been filed at the office of the registrar of deeds for the registration district in which the land is located, or the procedure under that Act equivalent to such filing by an expropriating authority has been followed, and no compensation settlement has been made for the land expropriated before the twentieth day of June, 1974, the land shown in the plan and described in

the description is vested in the statutory authority and the said expropriating authority shall be deemed to have complied with Section 11 of this Act as of the twentieth day of June, 1974, and Sections 12 to 68 of this Act apply mutatis mutandis to that expropriation except that if the expropriating authority is in possession immediately before the twentieth day of June, 1974, service of the documents and the making of offers of compensation required by this Act prior to possession shall not affect that possession.

(2) Expropriations prior to the first day of January, 1971, shall be governed by the law in effect at the time of such expropriations.

(3) Expropriations subsequent to the thirty-first day of December, 1970, shall be governed by the law in effect at the time of such expropriations except to the extent and in those cases where subsection (1) applies.

(4) This Act applies to land expropriated on or after the twentieth day of June, 1974.

(5) A reference in any Act other than this Act to the "Expropriation Act" or the Expropriation Procedure Act or the procedure under either or both of those Acts shall mean and shall be construed to mean a reference to this Act.

(6) Nothing herein contained shall mean or be construed to mean that the power of a statutory authority to expropriate land is revoked or changed except that in the case of Her Majesty in right of the Province, the execution of expropriation documents shall be under the signature of the Attorney General rather than the minister named or designated in the appropriate Act. *R.S., c. 156, s. 82.*

Tab 2

Intestate Succession Act

CHAPTER 236

OF THE

REVISED STATUTES, 1989

amended 1999 (2nd Sess.), c. 8, s. 7

An Act to Make Uniform the Law Respecting the Distribution of Estates of Intestates

Short title

1 This Act may be cited as the *Intestate Succession Act*. R.S., c. 236, s. 1.

Interpretation

2 In this Act,

(a) "estate" includes both real and personal property;

(b) "issue" includes all lawful lineal descendants of the ancestor;

(c) "net value" means the value of the estate, wherever situate, both within and without the Province, after payment of the charges thereon and the debts, funeral expenses, expenses of administration, succession duty and estate tax. R.S., c. 236, s. 2.

Application of Act

3 (1) This Act applies only in cases of death on or after the first day of September, 1966.

(2) Chapter 69 of the Revised Statutes, 1954, the *Descent of Property Act,* does not apply to cases of death on or after the first day of September, 1966. R.S., c. 236, s. 3.

Surviving spouse

4 (1) If an intestate dies leaving a surviving spouse and issue, the intestate's estate, where the net value does not exceed fifty thousand dollars, shall go to the surviving spouse.

(2) Where the net value of the estate exceeds fifty thousand dollars, the surviving spouse is entitled to fifty thousand dollars and has a charge upon the estate for that sum with accrued interest from the date of the death of the intestate.

(3) In this Section,

(a) "home" means a dwelling owned and occupied as the principal residence by the intestate at the date of death of the intestate and includes any land appurtenant thereto and all household goods and furnishings of the dwelling;

(b) the value of the home shall be the fair market value less any charges attaching thereto.

(4) Where the surviving spouse is entitled to fifty thousand dollars pursuant to subsection (2), the surviving spouse may elect to receive the home

(a) in lieu of the said fifty thousand dollars where the value of the home is in excess of fifty thousand dollars; or

(b) as part of the said fifty thousand dollars where the value of the home does not exceed fifty thousand dollars.

(5) The residue of the estate shall be divided among the surviving spouse and children in the manner following:

(a) if the intestate dies leaving a surviving spouse and one child, one half shall go to the surviving spouse;

(b) if the intestate dies leaving a surviving spouse and more than one child, one third shall go to the surviving spouse.

(6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the surviving spouse shall take the same share of the estate as if the child had been living at that date.

(7) If an intestate dies leaving issue, the intestate's estate shall be distributed, subject to the right of the surviving spouse, if any, *per stirpes* among the issue. R.S., c. 236, s. 4.

Surviving spouse but no issue

5 If an intestate dies leaving a surviving spouse but no issue, the intestate's estate shall go to the surviving spouse. R.S., c. 236, s. 5.

Regulations respecting election by surviving spouse

6 (1) The Attorney General may by regulation prescribe the requirements of an election by the surviving spouse pursuant to subsection (4) of Section 4 and determine what forms or documentation are required to evidence such election and the requirements of recording such election in any court of probate or registry of deeds.

(2) The exercise by the Attorney General of the power conferred by subsection (1) shall be a regulation within the meaning of the *Regulations Act*. R.S., c. 236, s. 6.

No surviving spouse or issue

7 If an intestate dies leaving no surviving spouse or issue, the intestate's estate shall go to the intestate's father and mother in equal shares if both are living, but, if either of them is dead, the estate shall go to the survivor. R.S., c. 236, s. 7.

No surviving spouse, issue or parent

8 If an intestate dies leaving no surviving spouse, issue, father or mother, the intestate's estate shall go to the intestate's brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living. R.S., c. 236, s. 8.

Distribution to niece and nephew

9 If an intestate dies leaving no surviving spouse, issue, father, mother, brother or sister, the intestate's estate shall go to the intestate's nephews and nieces in equal shares and in no case shall representation be admitted. R.S., c. 236, s. 9.

Distribution to next of kin

10 If an intestate dies leaving no surviving spouse, issue, father, mother, brother, sister, nephew or niece, the intestate's estate shall go in equal shares to the next of kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted. R.S., c. 236, s. 10.

Computation of degrees of kindred

11 For the purposes of this Act, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree. R.S., c. 236, s. 11.

Child en ventre sa mère

12 Descendants and relatives of the intestate, begotten before the intestate's death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate. R.S., c. 236, s. 12.

Advancement

13 (1) If a child or grandchild of a person who has died wholly intestate has been advanced by the intestate by portion, the portion shall be reckoned, for the purposes of this Section only, as part of the estate of the intestate distributable according to law and

(a) if the advancement is equal to or greater than the share of the estate that the child or grandchild would be entitled to receive as above reckoned, the child or grandchild and their descendants shall be excluded from any share in the estate; but

(b) if the advancement is not equal to such share, the child or grandchild and their descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.

(2) The value of any portion advanced shall be deemed to be that which has been expressed by the intestate or acknowledged by the child or grandchild in writing, otherwise the value is the value of the portion when advanced.

(3) The onus of proving that a child or grandchild has been maintained or educated, or has been given money, with a view to a portion, is upon the person so asserting, unless the advancement has been expressed by the intestate or acknowledged by the child or grandchild in writing. R.S., c. 236, s. 13.

Estate not disposed of by will and lands held in trust

14 (1) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

(2) The interest of any person in lands held in trust for the person in fee simple shall descend and be chargeable with the person's debts in like manner as if the person had died seised thereof. R.S., c. 236, s. 14.

Dower and curtesy

15 Subject to this Act, no widow is entitled to dower in the land of her deceased husband dying intestate, and no husband is entitled to an estate by curtesy in the land of his deceased wife so dying. R.S., c. 236, s. 15.

Illegitimate child

16 For the purposes of this Act, an illegitimate child shall be treated as if the child were the legitimate child of the child's mother or father. R.S., c. 236, s. 16; 1999 (2nd Sess.), c. 8, s. 7.

Adultery

17 (1) If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate under this Act.

(2) If a husband has left his wife and is living in adultery at the time of her death, he shall take no part of his wife's estate under this Act. R.S., c. 236, s. 17.

Tab 3

THE LAW OF EVIDENCE IN CANADA

FOURTH EDITION

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5. *Necessity and Reliability*

§6.92 In *R. v. Khelawon*,[106] Justice Charron stated that the two requirements of necessity and reliability seek to achieve trial fairness which embraces not only the rights of the accused to make full answer in defence, but society's interest in having the trial process arrive at the truth. The criterion of necessity is founded on society's interest in getting at the truth. When the optimal test of contemporaneous cross-examination is not possible, rather than simply losing the value of the evidence, it becomes necessary in the interest of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. Although needed, the evidence will not be received unless it is sufficiently reliable to overcome the dangers arising from the difficulty in testing it. In some cases, the reliability requirement may be met because the very circumstances in which the statement came about provides sufficient comfort in its truth and accuracy. In other cases, the reliability requirement may be met, not because the circumstances under which the hearsay statement was made make it more likely to be accurate, but because there were present at the time adequate substitutes (such as the declarant being subjected to cross-examination or under oath or video or audiotaped) for the traditional safeguards relied upon to test the evidence at trial.

§6.93 Justice McLachlin, in *R. v. Rockey*, stated:

> ... a trial judge on an application to admit hearsay evidence pursuant to *Khan* should formally consider and rule on whether the requirements of necessity and reliability are met. Hearsay evidence is not admissible unless these requirements are present. It should not lightly be assumed that they are present, even where the statements are those of a young child. There is no presumption of necessity; it must always be considered on the circumstances of a particular case.[107]

§6.94 The trial judge must determine on a *voir dire* that the *indicia* of necessity and reliability have been established on a balance of probabilities before admitting the statement.[108]

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[106] [2006] 2 S.C.R. 787, [2006] S.C.J. No. 57 (S.C.C.). See also *R. v. Blackman*, [2008] 2 S.C.R. 298, [2008] S.C.J. No. 38, at para. 35 (S.C.C.). See discussion in Shawn Moen, "Seeking More Than Truth: A Rationalization of the Principled Exception to the Hearsay Rule" (2011) 48 Alta. L. Rev. 753, at paras. 23-30.

[107] [1996] 3 S.C.R. 829, at 839, [1996] S.C.J. No. 114 (S.C.C.).

[108] *R. v. Meaney* (1996), 111 C.C.C. (3d) 55, [1996] N.J. No. 261 (Nfld. C.A.), leave to appeal refused, [1996] S.C.C.A. No. 591 (S.C.C.); *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at 800, [1993] S.C.J. No. 22 (S.C.C.); *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, at 794-95, [1995] S.C.J. No. 82

deceased openly, had children by him, whom he acknowledged to be legitimate, and was accepted by people of repute as his wife, was quite sufficient.

§6.263 Similarly, documentary evidence between the parties is also admissible to establish reputation of a marriage. In *R. v. Debard*,[337] the Court admitted letters between a husband and wife to prove the marital status of the parties.

§6.264 With respect to family relationships other than marriage, there is some doubt as to whether community reputation will be admissible. In *Ontario (Attorney General) v. Brunsden*,[338] it was acknowledged that reputation evidence was admissible to establish the illegitimacy of a person.[339] A different view, however, was taken by a New Brunswick court in *Re Anderson*,[340] where, in probate proceedings, community repute was held inadmissible to prove illegitimacy. Similarly, in *Doe d. Marr v. Marr*,[341] in which legitimacy had to be established in order to claim a right of inheritance, reputation evidence as to the mother having had illicit intercourse with another was rejected.

2. Matters of General History

§6.265 Closely aligned to reputation evidence of public or general rights is reputation evidence of historical facts of general and public notoriety. Such reputation may be proven by written historical works known to be authorities in their field.[342] The event which is sought to be proved by the history or treatise must be an ancient one, or at least one which was not observed by any living witness.[343] Furthermore, the event in question must be of general interest which would ensure that the matter was subjected to general public scrutiny so that the reputation thereof had become settled.

3. Aboriginal Oral Histories

§6.266 Recently, in claims for aboriginal title to lands, courts have received oral history to prove the existence of ancient culture and civilization, its antiquity

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337 (1918), 31 C.C.C. 122, [1918] O.J. No. 40 (Ont. C.A.).

338 (1893), 24 O.R. 324, [1893] O.J. No. 51 (Ont. C.P.).

339 General reputation of legitimacy was also considered proper evidence in favour of the legitimacy of the party in question in *Banbury Peerage Case* (1811), 1 Sim. & St. 153, as referred to in 5 Wigmore, *Evidence* (Chadbourn rev. 1970), § 1605.

340 (1947), 19 M.P.R. 339, [1947] 3 D.L.R. 302 (N.B.C.A.).

341 (1853), 3 U.C.C.P. 36, at 49, [1852] O.J. No. 172 (U.C.C.P.).

342 5 Wigmore, *Evidence* (Chadbourn rev. 1970), §§ 1597-99.

343 See *Ontario (Attorney General) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321, at 339, [1984] O.J. No. 3432 (Ont. H.C.J.), affd (1989), 68 O.R. (2d) 394, [1989] O.J. No. 267 (Ont. C.A.), affd [1991] 2 S.C.R. 570, [1991] S.C.J. No. 61 (S.C.C.).

and its assertion of rights over specific lands and fishing sites.[344] In *Delgamuukw v. British Columbia*,[345] the Supreme Court of Canada recognized that the laws of evidence must be adopted to accommodate oral histories of aboriginal people, which may be the only record of their past. In such circumstances, the use of oral histories as proof of historical facts should be placed on an equal footing with the types of documentary historical evidence that courts traditionally receive.

§6.267 Evidence rules are not cast in stone and must be adapted to particular circumstances. Aboriginal rights and claims are of a special nature and demand a unique approach to the treatment of evidence. These rights originated in times when there were no written records of the practices, customs and traditions that were followed. Thus, there is difficulty in proving such rights unless hearsay rules are applied more flexibly.[346] The Supreme Court of Canada has held that various forms of oral history are admissible in order to do justice in aboriginal claims cases.[347]

§6.268 Evidence of ancestral practices and their significance from historians, archeologists and elders would not otherwise be available. Thus, on a case-by-case basis, oral histories are admissible where they are both useful and reasonably reliable, subject to exclusionary discretion of the trial judge if their probative value is overborne by their potential prejudice.

§6.269 In *Benoit v. Canada*,[348] the Federal Court of Appeal overturned a trial decision because the evidence of oral history was too unreliable. The case concerned the right of the federal government to tax certain Aboriginal peoples. The issue was whether as part of an 1899 land treaty with the Crown, there was an unwritten understanding and promise by the Crown to exempt the Aboriginal signatories from all taxes for all time.

§6.270 The Federal Court of Appeal held that unlike the formal and regimented oral histories of other native groups, the statements in this case were unreliable hearsay passed on from individual to individual in an informal manner with

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344 *R. v. Simon*, [1985] 2 S.C.R. 387, at 408, [1985] S.C.J. No. 67 (S.C.C.).

345 [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 (S.C.C.). See the concerns expressed by Geoffrey S. Lester in "The Problem of Ancient Documents: Part II" (1998) 20 Advocates' Q. 133, at 149-51.

346 See Brian J. Gover & Mary Locke Macaulay, "'Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty rights Cases" (1996) 60 Sask. L. Rev. 47.

347 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, [2001] S.C.J. No. 33 (S.C.C.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] S.C.J. No. 77 (S.C.C.); *R. v. Sappier*, [2006] 2 S.C.R. 686, [2006] S.C.J. No. 54 (S.C.C.). Also see *Xeni Gwet'in First Nations Government v. British Columbia*, [2006] B.C.J. No. 2156 (B.C.S.C.); *Ermineskin Indian Band and Nation v. Canada*, [2007] 3 F.C.R. 245, [2006] F.C.J. No. 1961 (F.C.A.); *Samson Indian Nation and Band v. Canada* (2005), 269 F.T.R. 1, [2005] F.C.J. No. 1991 (F.C.).

348 (2003), 242 F.T.R. 159, [2003] F.C.J. No. 923 (F.C.A.).

none of the checks and balances required to ensure authenticity. Of particular significance was the fact that the treaty and the documentary evidence relating to it were silent about any tax promises.

§6.271 This decision warns, as did the Supreme Court of Canada, that in their desire to be sensitive to the oral history adduced the courts should not cross the line "between a sensitive application and a complete abandonment of the rules of evidence".[349]

4. Declaration as to Pedigree and Family History

§6.272 One of the earliest exceptions to the hearsay rule was the admission of declarations by deceased individuals with respect to matters of family history relating to such things as familial relationship and descent, details of births, deaths, and marriages. The importance of this exception has been superseded to a great extent by the provincial statutes which require the maintenance of a uniform system of registration of births, marriages, deaths, adoptions, divorces, and changes of name.[350] The statutes also facilitate the proof of issues of pedigree by providing that certified copies of the registration are *prima facie* evidence of the facts so certified.[351] Nevertheless, this exception is still of some importance, particularly where the issue at trial is paternity of illegitimate children or the distribution of estates in which remote relatives have an interest.

§6.273 As with declarations relating to public or general rights, the rationale for admitting this type of evidence is the general inability to secure other evidence of family relationships, and the inherent reliability or accuracy of statements made by relatives with respect to family matters with which they are intimately concerned. In *Re Stasun; Stasun v. Nesteroff*,[352] statements by the deceased to the effect that he had a brother in the old country and also that he had a brother named Peter Stasun in Lithuania, were admitted as evidence of the latter's status as next-of-kin to the deceased. Such declarations are:

> The natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of its truth.[353]

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[349] *Ibid.*, at para. 23, quoting McLachlin C.J.C. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, [2001] S.C.J. No. 33, at para. 39 (S.C.C.).

[350] For example, see the *Vital Statistics Act*, R.S.O. 1990, c. V.4.

[351] *Ibid.*, s. 46.

[352] (1967), 65 D.L.R. (2d) 340, [1967] S.J. No. 223 (Sask. C.A.), revd on other grounds (1969), 3 D.L.R. (3d) 22*n*, [1969] S.C.J. No. 94 (S.C.C.).

[353] *Whitelocke v. Baker* (1807), 13 Ves. 511, at 514, quoted in *Re Woods; Brown v. Carter* (1912), 23 O.W.R. 353, at 355, 4 O.W.N. 388.

§6.274 The reliability is ensured only if the statements are made *ante litem motam*. The *lis* may encompass more than actual litigation. Justice Rinfret, in *Farren v. Pejepscot Paper Co.*,[354] stated:

> The phrase *ante litem motam* in itself might be capable of mis-construction. It contemplates a time anterior to the commencement of any actual controversy upon the point at issue.[355]

§6.275 Thus, if a dispute has arisen which is likely to create bias in members of the family, then a subsequent declaration as to pedigree will be inadmissible. The fact that the declarant was not aware of the controversy in question at the time that he made the statement is irrelevant.[356] In *Anderson v. Walden*,[357] a declaration of a deceased wife was tendered to the effect that her husband was the father of her child, but was rejected because, at the time that the declaration was made, proceedings had been launched by the husband for an order to commence a divorce action against her without naming the alleged father of the child in question as co-respondent. The Ontario Court of Appeal was not impressed with the argument that the declarant wife was unaware of that proceeding when she made the statement. Justice Schroeder stated:

> It does not appear that the deceased wife was aware of the institution or the contemplated institution of such proceedings founded upon the birth of the child Pauline, but upon the authorities cited, that fact would appear to be irrelevant. At the time of the making of the questioned declaration the dispute had already arisen although, for all that appears, the dispute was unknown to the declarant.[358]

§6.276 Statements, however, will not be rejected if they are made before any real dispute arose but with a view to their use in a prospective controversy over pedigree.[359] But declarations made by deceased relatives have been held inadmissible merely because they are favourable to the interest of the declarant. The statement made by the wife as to the legitimacy of her child was excluded in *Anderson v. Walden*[360] because, *inter alia*, she had an interest in making it, as divorce proceedings in which it was alleged that the child was born out of an adulterous relationship were pending against her. The Court took the view that "there was that degree of interest on the part of the deceased wife to make the

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354 [1933] S.C.R. 388, [1933] S.C.J. No. 34 (S.C.C.).

355 *Ibid.*, at 392 (S.C.R.); see also *Re Rosenmeyer; Porteous v. Dorn* (1973), 37 D.L.R. (3d) 120, [1973] S.J. No. 402 (Sask. C.A.), affd (*sub nom. Porteous v. Dorn*), [1975] 2 S.C.R. 37, [1974] S.C.J. No. 81 (S.C.C.).

356 *Shedden v. Attorney General* (1860), 2 Sw. & Tr. 170, 164 E.R. 958.

357 [1960] O.R. 50, [1959] O.J. No. 708 (Ont. C.A.).

358 *Ibid.*, at 56 (O.R.).

359 *Shedden v. Attorney General* (1860), 2 Sw. & Tr. 170, 164 E.R. 958.

360 [1960] O.R. 50, [1959] O.J. No. 708 (Ont. C.A.).

declaration which was sufficient to exclude it as evidence against the defendant".[361]

§6.277 The admissibility of hearsay statements concerning paternity depends upon the statements being made at a time when litigation is not contemplated or pending on this point. Otherwise, there is no assurance of reliability, since the statements may have been made to advance the interests of one party to the controversy. If a statement that was made while litigation was ongoing is repeated in another context when the litigation is over, that latter statement would be inadmissible as well.[362]

§6.278 The reliability of this exception to the hearsay rule permitting statements as to paternity turns upon them being admissions against interest. In *V. (M.) v. V. (W.P.)*,[363] an attempt was made to introduce statements by a deceased denying that he was the father of the applicant, who was seeking a share of the family estate: such statements had been held as not falling within the pedigree exception because to admit the statements would be to create an illegitimacy. Even though the law no longer recognizes the status of illegitimacy, Sinclair J. held that, in addition to there being no foundation for the declarant's belief as to paternity, such statements were "imbued with a significant degree of self-interest"[364] so as to render them unreliable and, therefore, inadmissible.

§6.279 In addition to the requirements that the statement be made before the origin of the controversy giving rise to the action in which the statement is tendered, and that there be absent any motive to misrepresent, other prerequisites must be established. In keeping with the other common law exceptions, it must be shown that the declarant is deceased.[365] Moreover, it must be established that the declarant bore a family relationship to the person whose pedigree is in issue.[366] By requiring proof of the family relationship of the declarant to the subject whose pedigree is in issue, the court is given some assurance that the declarant had an opportunity to learn the relevant facts by reason of his or her relationship and position. The assumption is that, by reason

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361 *Ibid.*, at 56-57 (O.R.). See also *Re G.* (1973), 1 O.R. (2d) 318, at 322, [1973] O.J. No. 2166 (Ont. Surr. Ct.), revd on other grounds (1974), 5 O.R. (2d) 337, [1974] O.J. No. 2061 (Ont. C.A.); *Plant v. Taylor* (1861), 7 H. & N. 211; but see contra, *Doe d. Tilman v. Tarver* (1824), Ry. & Mood. 141, 171 E.R. 972 (N.P.); and R.W. Baker, *The Hearsay Rule* (London: Pitman, 1950), at 107.

362 *V. (M.) v. V. (W.P.)* (2003), 175 Man. R. (2d) 192, [2003] M.J. No. 169 (Man. Q.B.).

363 *Ibid.*

364 *Ibid.*, at para. 36.

365 *May v. Logie* (1897), 27 S.C.R. 443, [1897] S.C.J. No. 35 (S.C.C.); *Doe d. Dunlop v. Servos* (1849), 5 U.C.R. 284, at 288-89 (U.C.Q.B.); *Butler v. Mountgarret* (1859), 7 H.L.C. 633, at 648.

366 [1933] S.C.R. 388, at 390-91, [1933] S.C.J. No. 34 (S.C.C.); *Croft v. Wamboldt* (1930), 1 M.P.R. 415, [1930] 2 D.L.R. 996 (N.S.C.A.); *Wallbridge v. Jones* (1873), 33 U.C.R. 613, at 618, [1873] O.J. No. 80 (Ont. Q.B.).

of the declarant's relationship, he or she must have had a fairly accurate knowledge of the family affairs, for he or she would be expected to have an interest in such matters. Generally, the proof of the declarant's family relationship must be independent of the declaration itself. In *Farren v. Pejepscot Paper Co.*,[367] the Supreme Court of Canada put it this way:

> The declarant's relationship must be proved independently and cannot be established by his own statement.
>
> The rule, we think, must be understood in this sense, that the party on whom the onus lies to establish the affirmative of the issue and who, for the purposes of the issues, must show that A was in family relation with B (as, for example, in such cases as the present where the party seeks to establish a right to property through inheritance from B) must adduce some evidence that the declarant was "*de jure* by blood or marriage" a member of the family of B.
>
> It was said by Lord Brougham, apparently, in *Monkton v. Attorney General* [(1831), 2 Russ. & M. 147, at 156, 157] that it would be sufficient to show that the declarant was a member of the family of A; and this view of Lord Brougham has been acted upon in other cases and has been very vigorously supported by a well known and very able American writer on the law of evidence, Professor Wigmore.
>
> The weight of authority, however, is decisively in favour of the rule as stated.[368]

§6.280 Although independent evidence must establish the family relationship of the declarant when he or she is talking about the pedigree of other members of his or her family, no such requirement exists when the declarant is talking about his or her own lineage, for example, about the declarant's own relationship to the person in question. One must distinguish the circumstances where a declaration is tendered for the purpose of claiming a right to the declarant's estate from the situation in which the declaration is used to establish a right through the declarant to the property of others. The declarations in the first situation are considered statements of the declarant's own pedigree and are admissible as such without any corroborative, independent evidence of the relationship. In the former case, if it were necessary to prove that the declarant was related to the subject by independent evidence, without reference to the declarations, it would then be necessary to prove the very fact for which the declarations were tendered.[369] In the latter situation, although it must be established that the declarant is a blood relation or related by marriage to the subject, the witness who is testifying as to what the declarant said need not be a relative.[370]

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367 *Farren, ibid.*

368 *Ibid.*, at 390-91 (S.C.R.).

369 *Robb v. Robb* (1891), 20 O.R. 591, at 598, [1891] O.J. No. 135 (Ont. C.P.); *Walker v. Murray* (1884), 5 O.R. 638, at 641, [1884] O.J. No. 244 (Ont. Q.B.).

370 *Wallbridge v. Jones* (1873), 33 U.C.R. 613, [1873] O.J. No. 80 (Ont. Q.B.).

§6.281 Furthermore, it is not a condition of admissibility that the declarant be shown to have personal knowledge of the subject matter contained in the statement.[371] Hearsay upon hearsay has been admitted to establish pedigree facts because the matters often relate to events so far in the past that they would be beyond the realm of the declarant's personal knowledge.

§6.282 The declarant must be related to the person whose pedigree is in issue, either by blood or by marriage. Relationship by marriage, however, is limited to spouses of the person in question and does not include the blood relatives of the spouse. In *Croft v. Wamboldt*,[372] a declaration by a brother of the spouse of the person in question was held inadmissible. In *Johnson v. Lawson*,[373] the Court held inadmissible declarations of the housekeeper who had intimate knowledge of the affairs of the family.[374] In a country such as Canada where families tend to be more mobile and tend to separate and live in various parts of the land, the test of intimacy rather than relationship with family would be more sensible.[375] In *Alston v. Alston*,[376] an American court admitted statements by foster parents to establish the relationship of the child that they had reared.[377]

§6.283 Under this exception, not only are oral declarations of pedigree admitted, but assertions by way of conduct, or evidence showing that the person "acted upon [the statements], or assented to them, or did anything that amounted to

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371 *Doe, Lessee of Banning v. Griffin* (1812), 15 East. 293.

372 (1930), 1 M.P.R. 415, [1930] 2 D.L.R. 996 (N.S.C.A.).

373 (1824), 2 Bing. 86.

374 See also *Re Cochran's Trusts; Robinson v. Simpson* (1919), 47 D.L.R. 1, at 7 (S.C.C.); *Doe d. Arnold v. Auldjo* (1848), 5 U.C.R. 171 (U.C.Q.B.).

375 R.W. Baker in *The Hearsay Rule* (London: Pitman, 1950), at 104, criticized Best C.J.'s admonition in *Johnson v. Lawson* (1824), 2 Bing. 86, as follows:

> "If the admissibility of such evidence (in pedigree cases)," said Best C.J., "were not restrained we should on every occasion before the testimony could be admitted have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant." This argument, weak enough in the circumstances then before the Court, can be criticised on *a priori* grounds. Firstly, in many other kinds of case the Courts have to inquire into the qualifications of witnesses and secondly, the proof of family relationship would often be just as difficult and lengthy as proof of the intimacy of servants or friends. It is submitted that there is no sufficient reason for this restriction of the class of declarants and that the law ought to be amended to put declarations by family servants and intimate friends on the same footing as members of the family. This is the course recommended by the American Model Code.

Rule 803(19) of the United States *Federal Rules of Evidence* (1998) 28 U.S.C.A. extends the category of declarant to the person's associates or to those in the community who are aware of the reputation.

376 114 Iowa 29, 86 N.W. 55 (1901).

377 For a further analysis of the Court's admitting declarations of non-relatives, see 15 A.L.R. (2d) 1412.

showing that they recognized them"[378] will be accepted. Moreover, entries contained in family bibles, inscriptions on tombstones, and engravings on rings are all admissible as proper declarations.[379]

§6.284 There is one further restriction on admissibility. All other conditions of admissibility having been met, the declaration will be admitted to prove pedigree only when the issue in question is genealogical, that is, a question of family. Baker described matters of genealogical issue as follows:

> ...: primarily they are the ordinary incidents of family life, such things as family succession, descent, relationship, legitimacy or illegitimacy.[380]

§6.285 In *Haines v. Guthrie*,[381] the defence of infancy was pleaded in an action for goods sold and delivered. In order to prove the defendant's age, an affidavit of his deceased father, which had been used in an earlier and different proceeding, was tendered. The Court rejected it because no question of family was raised. The evidence must be given on a question of pedigree to prove pedigree.[382]

5. Statements Contained in Ancient Documents as Evidencing a Proprietary Interest in Land

§6.286 Ancient documents such as deeds or leases which affect an interest in property have been admitted by the courts as evidence of possession of the realty.[383] This exception is usually restricted in its application to property deeds and similar documents.[384] Most authors do not treat the admissibility of such evidence as an exception to the hearsay rule.[385] They are inclined to treat such evidence as presumptive evidence of possession and thus as original evidence in its own right. Other authors, however, think that the documents are tendered not only to establish the inference of possession from the mere existence of the

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[378] *Sturla v. Freccia* (1880), 5 App. Cas. 623, at 641, [1874-80] All E.R. Rep. 657 (H.L.).

[379] *Currie v. Stairs* (1885), 25 N.B.R. 4, [1885] N.B.J. No. 1 (N.B.C.A.); *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591, at 454; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147, at 162-63, affd (*sub nom. Robson v. A.-G.*) (1843), 10 Cl. & Fin. 471 (H.L.); *Vowles v. Young* (1806), 13 Ves. 140.

[380] R.W. Baker, *The Hearsay Rule* (London: Pitman, 1950), at 102.

[381] (1884), 13 Q.B.D. 818 (C.A.).

[382] *Ibid.*, at 828.

[383] *Tobias v. Nolan* (1987), 78 N.S.R. (2d) 271, [1987] N.S.J. No. 145 (N.S.C.A.); *Malcomson v. O'Dea* (1863), 10 H.L.C. 593; *Bristow v. Cormican* (1878), 3 App. Cas. 641, at 668 (H.L.); *Attorney General v. Emerson*, [1891] A.C. 649, at 658 (H.L.); *Blandy-Jenkins v. Earl of Dunraven*, [1899] 2 Ch. 121 (C.A.).

[384] *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, at 168, [1987] O.J. No. 52 (Ont. C.A.), leave to appeal refused [1987] 1 S.C.R. xii, 61 O.R. (2d) 588*n* (S.C.C.).

[385] 2 Wigmore, *Evidence* (Chadbourn rev. 1970), § 157; R.W. Baker, *The Hearsay Rule* (London: Pitman, 1950), at 162-63.

Tab 4

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NOVA SCOTIA REAL PROPERTY PRACTICE MANUAL

MacIntosh

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NOVA SCOTIA REAL PROPERTY PRACTICE MANUAL

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CHAPTER 7

POSSESSORY CLAIMS

[7.1] ADVERSE POSSESSION

[7.1A] Limitation of Actions Act[1] (Statute of Limitations)

The title to an estate in fee simply may be extinguished by virtue of the possession of land by by one other than the true owner, *i.e.*, the person who claims by or under a paper title. Section 10 of the *Statute of Limitations* prescribes a 20-year period within which the true owner may make an entry or distress, or bring an action to recover land. The time starts to run when the true owner's right of action first accrues. Section 10 is as follows:

> [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.

Following the expiration of the 20-year period, the true owner's title to the land and his right of action are extinguished. Section 22 provides as follows:

> [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 fight and title of such person to the land or rant, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

At this time the person in possession of the land may successfully defend an action for recovery of the land by the true owner, or obtain a declaration under the *Statute of Limitations* to the effect that the true owner' s title to the land, and his right of action have been extinguished.[2]

Because the Statute operates to bar the right of the true owner to possession and not to confer title on the trespasser, courts have been reluctant, or an application pursuant to *the Limitation of Actions Act,* to grant a declaration has to title, that is, that the person in possession is entitled to the fee simple in the land as against the true owner.[3] The Supreme Court of Nova Scotia has, however, granted declarations as to the title of property pursuant to authority conferred by the Supreme Court Rules and the *Judicature Act.*[4]

The more common practice in Nova Scotia is to commence an action for a certificate of title pursuant to s. 3 of the *Quieting Titles Act.*[5] It should be noted that the Court may grant a certificate of title under the Act where the claimant or his predecessors in title have been in possession for 20 years, and a person whether or not his whereabouts are known who had an interest in the land has not received any benefit, paid any expenses or exercised any proprietory rights in respect of the lands.[6] This allows the Court to exercise its discretion and grant an order under the Act in circumstances where the length of time to establish a possessory title cannot be shown. In *Meredith v. Attorney General of Nova Scotia,*[7] *the* Court ordered that the certificate be issued to conform to the provisions of the *Land Titles Act*[8] and registered under that Act as a certificate of absolute title.

The Limitation of Actions Act prescribes longer limitation periods in certain circumstances. Section 19 provides that a person under disability (infancy, idiocy, lunacy, unsoundness of mind or absence from the province), or a person claiming through him, may bring an action for the recovery of land within ten years after the. time at which the person ceased to be under disability, or died (whichever happened first). However, s. 40 provides a maximum of 40 years within which such a person may commence an action, whether or not the person is still under disability, or the ten-year period as set out in s. 19 has expired. Merely moving one's residence to another province does not constitute "absence from the province", particularly when a visit is made to Nova Scotia at least one each year. This rule is to be narrowly construed in this age when worldwide communications and rapid transit facilitate supervision of property.[9] The disability based upon absence from the province ceases to apply when the absent owner conveys the property to a resident of the province.[10] Section 21 provides that the Crown has 60 years within which to commence an action for rent or for the recovery of land.[11]

In the case of lands owned by the Crown by reason of having been granted and subsequently escheated, the time commences to run at the date of the escheat, since possession prior to that time would not be adverse to the Crown.[12]

The rationale of the law depriving the "true owners" of their title was considered by Moir, J. in *Duggan v. Nova Scotia (Attorney General) et al.*[13] He stated as follows:

> Possessory title plays a mundane role in land use throughout this province. In urban settings, where in years gone by subdivisions were laid out without the precision of modern surveying, one might find, as Mrs. Dempsey did, that the total area of all legal descriptions in a city block exceed the actual size of the block: *Dempsey v. J.E.S. Developments Ltd.* (1976), 15 N.S.R. (2d) 448, 14 A.P.R. 448 (T.D.); affirmed N.S.R. (2d) (S.C.A.D.). Even with precise surveying, sensible people will tolerate some shifting of boundaries by use. The *Limitation of Actions Act* and the law of possessory title permit neighbourhoods to peaceably determine boundaries in rural areas, where a grant of land made in another age may not have been found to have had much value, whole neighbourhoods will depend on possessory title not only to enforce boundaries created by use and tolerance, but to establish their very titles. We have seen some of that in this case with some of the established lots along the highway. So, the law concerning extinguishment of title by adverse possession involves some balance between respect for the interests of "true owners" and the practicality of land uses inconsistent with documentary title.

In the case of property brought under the *Land Registration Act*, the legislation provides that once land is registered no person may obtain a title to it by adverse possession, unless the necessary prescription period (usually 20 years) was completed before the parcel was registered. The party claiming adverse possession, however, has a ten-year period following registration of the property to assert a claim based upon prior adverse possession pursuant to section 74(2) of the Act.[14]

See *Myers v. Bradstock*[15] for a case in which a party was successful in obtaining such an order.

In certain cases, there is no limitation period, and therefore a person may not claim an interest in an estate by reason of possession. Section 16 of the *Public Highways Act*[16] provides that no one can obtain any interest in a street or public highway by possession. Similarly, no person may, by reason of adverse possession, occupation or obstruction obtain an interest in lands or arrears owned by a municipality.[17]

The fact that lands of a local commons are held in trust by trustees for local residents, who have certain rights of entry and use, does not preclude the

[7.1C] The Nature of Possession Required

The kind of possession necessary to start the time running under the Statute and thus extinguish the title of the true owner is stated as follows in *Canadian Law of Real Property.*

> The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".[46]

This definition has been adopted by the Appeal Division of the Nova Scotia Supreme Court.[47]

The foregoing requirements may now be subject to qualification. The Ontario Court of Appeal has ruled that it is not necessary that the element of exclusion of the rightful be present in order for his rights to be extinguished by the possession of another. This opinion arose in a case where one neighbour had improved and placed gravel on a strip of the property next to his, and used it as a driveway for a number of years. This use during the limitation period was held to be sufficient to establish a possessory title.[48]

As further stated in *Ezbeidy v. Phalen:*

> 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.[49]

Many years ago the requirements for a possessory title were stated to *be* "*nec clam, nec vie, nec precaria*" (without stealth, without violence, without permission). The present statement of the requirements is that "possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail".[50] However, where there is a mutual mistake and both parties are under a misapprehension as to the location of the boundary between their properties, the requirement for "adversity" is not applicable.[51]

Where the court finds that a claimant for title pursuant to adverse possession had permission from the owner to occupy the land, the claim for ownership based upon possession will be denied.[52]

The requirement that possession by a claimant be adverse to that of the holder of the paper title should not be used to defeat the claim of a person who mistakenly believes himself or herself to be the true owner. In cases of mutual mistake as to the location of a boundary, the court may infer that the claimant

intended to exclude all others, including the owner of the paper title.[53] It is not necessary for a party claiming a possessory title to land to positively prove that the registered owner was not only aware of the occupation of its land by the claimant, but also aware that an adverse or hostile claim was being made to the land.[54]

This statement of the law was agreed with by the Court of Appeal, which overturned the decision on the question of exclusivity of possession.[55]

Possession must be open, visible and notorious so that any person having an interest in the property would be put on notice. However, it is not necessary that such a person actually know of the adverse possession.[56] The degree of notoriety need only be consistent with the nature of the area in which the land is located. A high degree of notoriety could not be expected where the land was only sparsely inhabited, and concealed from public view by a thick row of trees.[57] Possession is not open and notorious when a cabin in the woods was not visible from air and ground, and the occupants did not adduce evidence of knowledge by other persons of the cabin's existence.[58] "Open" and "notorious" are requirements that are generally linked, and both elements are directed to the knowledge by the owner of the possession by the claimant. In the case of lands in remote areas, the claimant does not need to prove that the adverse possessor took steps to specifically notify true owners, or that the true owners became aware of the occupation when they "stumbled upon" the occupied area.[59] When a woods camp built by the claimants was not visible from the air or from the adjacent lake, the fact that its existence was known to the true owner during the limitation period precluded the true owner from relying on the camp's lack of visibility as a bar to the possessory claim.[60] In this case Haliburton, J stated, at paragraphs [31] and [32]:

> I would not foreclose the possibility that such a defense might be successfully raised where the true owner is in fact unaware of the encroachment and some conscious and deliberate concealment or fraud is practiced by the trespasser and which contributes in a material way to the lack of knowledge of the true owner. An intriguing case on this point has been tendered for consideration. It is an English case, *Rains v. Buxton* [1880] 14 C.H.O. 537. In that case the party claiming a possessory interest had, for sixty years occupied a cellar under land belonging to the Defendant. It was argued on behalf of the title holder that the possession had been taken secretly. The statute, it was said does not apply in a case of "concealed fraud". The Defendants "were ignorant of the existence of the cellar until just before the action was commenced". With respect to concealment, Fry J. concluded:
>
> > ... the door opened outwards into the area so that it was always visible to any person who chose to look down the area, and no effort whatever was made to

> produce concealment, although, no doubt, from its very nature, it was not perhaps a thing at all times necessarily seen. I am bound to say these facts do not prove concealment.
>
> [32] In reaching his conclusion that the occupier was entitled under the statute to have a declaration as to the right to occupy the cellar, the judge had dismissed the argument made on behalf of the titleholder that it was necessary for the possessor to establish, in a positive fashion, some negligence or default on the part of the owner in failing to know of the trespass.

If the holder of the paper title is in possession of the lands, occupation by a trespasser will lack the ingredient of being in "exclusive" possession of the land and such a person cannot obtain a possessory title. As stated by Roscoe, J.A. in *Spicer v Bowater Mersey Paper Co.*:[61]

> [20.] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land for a full 20 years, and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

The *Bowater* test was analyzed in *Bain v. Nova Scotia (Attorney General)*,[62] following which the court stated:

> [38] "Adversity" being a requirement for adverse possession, I think there is a difference in stating "every time the owner (or its employers, or agents) stepped on the land, they were in actual possession" (as in Bowater), as compared to every time "an owner" steps foot on the land. The incidents of normal usage will vary as will the type of occupation. This goes without saying, but it bears repeating that the nature of the adversity and the reasons for it, will determine whether the onus has been discharged. Put another way, is it simple exclusivity that is required, or is it exclusivity from normal usage? The cases would seem to suggest it is the latter. In short, each case is fact specific.

The test for determining whether a possessory title has been obtained was examined by Klowak, J. of the Ontario Superior Court of Justice in *Bellini Custom Cabinetry Ltd. v. Delight Textiles Ltd.*,[63] who stated as follows:

> It is well settled that a claimant to a possessory title throughout the statutory period must have:
>
> 1. had actual possession;
> 2. had the intention of excluding the true owner from possession; and

3. effectively excluded the true owner from possession;

and accordingly, the party claiming a possessory title must show that the use which they made of the land was inconsistent with the form of use and enjoyment to which the true owner intended to put the land.

Isolated and sporadic acts of trespass do not constitute open, visible and continuous occupation so as to establish possessory title.[64] In *Deadder v. North Kent Development*,[65] it was found that the occasional pasturing of a horse on the land, the cutting of hay on portions of the land at certain times of the year, keeping pigs in a pigpen on the land, cutting a few dead apple trees and ploughing a small portion of the land on one occasion did not constitute possession. Morrison, J. did suggest that fencing land or cultivating even a portion of it would have indicated that the land was being continually and adversely occupied. Isolated acts of berry-picking, cutting wood and children playing are not sufficient to constitute acts of possession.[66] A purchaser who did not search the title to property conveyed to him accidentally received a deed describing land the vendors did not own. In attempting to establish a possessory title he alleged acts of possession:

1. correspondence with National Revenue concerning property values and capital gains, without specifying the property;
2. a deed of the property to him and his wife as joint tenants;
3. receipt of assessment notices that did not describe the property;
4. payment of taxes; and
5. hiring a company to manage the land as a woodlot.

In a Quieting Titles action the court found these acts did not constitute possession sufficient to defeat the title of the holder of the paper title to the property.[67]

Similarly, the use by a landowner of a portion of his neighbour's property as a driveway without objection was found not to constitute an act of adverse possession since the neighbour was not excluded from the land, and the usage was classified by the Court as "neighbourly possession" since it was tacitly consented to by the holder of legal title.[68] This case was reversed on appeal, but this doctrine was not specifically dealt with. See *Gould v. Edmonds*.[69]

Once consent for a person to use the property has been given by the owner, such use is not considered to be adverse so as to constitute adverse possession. The statute does not begin to run one year after such consent has been granted, and consent does not have to be given once every year. Continuous use of the property in the manner consented to, without objection, will be presumed to have been with continued consent, and the person using the property cannot

base a claim for a possessory title on such use.[70] There is, however, a burden on the owner of the paper title to adduce existence of an agreement sufficient to negative adverse possession.[71]

Acts which consisted of placing picnic tables and the storage of crates on the land were found to be "slight, sporadic and seasonable" and insufficient upon which to found a possessory title.[72]

It is clear from the case authorities that the consent of the title holder to property will defeat the claim of a trespasser which would otherwise be adverse possession. It has further been recognized that there is a burden on the title holder to produce in an action sufficient evidence of such agreement of consent, where the acts of a trespasser would otherwise establish adverse possession.[73]

When it was found that a property owner had continuously used a ten-foot strip of land next to his property as a right of way for more than 20 years, without consent of the owners of the strip, his claim for ownership of the strip by reason of adverse possession was allowed by the court.[74]

Possession must be continuous for the duration of the statutory period. If a trespasser vacates the lands before the period has expired, the true owner is deemed to be in possession once again, and time stops running. If the trespasser reoccupies the land, time starts running anew and the former possession is excluded from the time computation.[75] On the other hand, when a house burned and a new one was built over two years by the former occupant, this did not interrupt the statute and constituted continuous possession when coupled with payment of taxes.[76]

A series of adverse possessions not long enough to satisfy the statutory period may be tacked together to make a continuous period. The person in possession at the expiry of the 20-year period must establish that the previous trespassers followed each other in close succession in an unbroken chain during the time that the statute was running. The presumptions are all in favour of the true owner.[77] However, in order that possessory title be transferred to the person in possession at the expiration of 20 years, the person must claim privity with the persons preceding him for the 20-year period.[78] That is, the possession must be transferred to the succeeding holder by descent, devise, conveyance, gift or agreement.[79] If there is no privity, the last of a series of trespassers does not obtain possessory title to the property, the consequence being that he may not bring an action for recovery of the property should he ever be dispossessed. However, because the true owner's right to commence an action and his title to the property are extinguished, the trespasser may successfully defend an action by the true owner for recovery of property.[80]

Possession must be exclusive, not only as regards the true owner,[81] but also other trespassers.[82] A specific intention to exclude the true owner may not be a

necessary element in the acquisition of a possessory title and one may acquire such title under a mistaken impression that oneself is the true owner.[83]

When the claimants to an isolated parcel of land, on which there was a cabin, left it open for others to use, and it was in fact used by hunters and passers-by without permission, and the holder of the paper title paid the taxes, this was not found to constitute exclusive possession so as to be possession adverse to the holder of the paper title.[84]

While several authorities state that the claimant of possessory title must have the *animus possidendi,* that is, occupation with the intention of excluding the owner as well as others,[85] Burchell, J. stated in *Logan v. Smith*[86] 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". Such would be the case when the trespasser enters the land under colour of title.[87] In most cases, the intention is evidenced by acts which effectively exclude the true owner[88] and the intention of the trespasser really becomes relevant only when dispossession or discontinuance of possession are to be inferred from equivocal acts.[89] Possession with consent of the true owner is not adverse possession.[90] Use by consent which amounts to a licence only is not adverse. In a case where the person making use of another's land had repeatedly asked for a conveyance, the Court stated "The title gives rise to a presumption that the true owner is in possession, and this presumption is not defeated by any lack of exercise of possession or occupancy by the owner over the area in dispute."[91] However, s. 15 of the *Statute of Limitations* provides that exclusive possession of land by a co-owner, co-partner, joint tenant, or tenant in common is regarded as adverse against the others.[92]

Although possession of land which is occasional, or for a special or temporary purpose is generally considered to be adverse possession, the extent of the control necessary to constitute adverse possession varies according to the nature of the land.[93] On the subject of summer cottages, Cooper J.A. stated as follows in *Taylor v. Williger and Skidmore*[94]:

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

The degree of possession required to establish a claim to property depends on the circumstances of the property. As stated by LeBlanc, J. in *MacDonald v. McCormick*:[95]

> The nature of the occupation and possession must be suited to the character of the property. A summer cottage or trailer property will not likely be occupied during the

> winter months. As such, the failure by the MacDonalds and McAuleys to occupy the land during this period would not interrupt their continued adverse occupation and possession of the land.

In certain situations the requirements will be relaxed. As stated in *Canadian Law of Real Property*:

> Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another; the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests, are to be taken into account in determining the sufficiency of possession.[96]

The question as to whether the occasional cutting of wood on a property is sufficient to establish a title by possession was considered in a number of cases.

In *Grant v. Morton* (1924),[97] it was stated:

> ... it is to be observed that the plaintiff's occupation was only seasonal, that is during the summer months, and the plaintiff's possession would not be continuous, no more than would not be continuous, no more than would the carrying on of lumber operations in winter. The possession of the true owner revives the moment the intruding trespasser retires, unless there be other and additional controlling facts — wholly absent in this case — which would in fact prevent the revival.

In *McLeod v. McRae* (1918),[98] the Court stated:

> I do not think the acts relied upon by the defendant were such as to give him a title to the land under the *Statute of Limitations*. Those acts are: payment of taxes, fencing, cutting and removing timber from and pasturing cattle on the lands in question. In order to acquire title under the statute, open, visible, and continuous possession is necessary. The cutting and removal of timber and the pasturing of cattle in this case were but intermittent acts of trespass and do not constitute possession as against the true owner. As each act of trespass ceased, the possession quoad the defendant became vacant, and the law presumes that the real owner then resumed possession ... therefore there was no continuous possession...Mere fencing, or payment of taxes, unaccompanied by actual, visible, and continuous possession, could not give a title.

In *Trites v. Nova Scotia*,[99] it was found that terms such as "equivocal", "occasional", "for a special purpose" or "seasonal" seemed far more apposite than terms or concepts such as "continuous", "actual", "open", "notorious" and "constant" which are the very building blocks required by law to establish possessory title, and the claim to a possessory title was denied.

In the case of woodlands, the acts of possession required to establish a title pursuant to the Act may be less substantial than in the case of property in developed areas. In a case involving an application for an order under the *Quieting Titles Act* the Court stated: "While Bowater's acts of possession are not substantial, the purpose of the *Quieting Titles Act* is to provide a mechanism to quiet titles. These are woodlands."[100]

In a *Quieting Titles Act* application to establish ownership of ungranted Crown lands, a claimant was successful when he was able to satisfy the Court that, for more than 60 years, he and his predecessors had made what limited use could be made of pasture land and barrens, such as pasturing of animals, and cutting what few trees there were from time to time. In addition, it was shown that the claimant paid taxes and that people in the community recognized his family's claim to the property and sought permission before using it or cutting trees growing there.[101]

In a case, however, where there were two claimants to the same property, the payment of taxes was dismissed as an act evidencing ownership. The Court stated:-

> It is clear from a review of the evidence that double assessments were not uncommon in the municipality. Therefore the fact that both claimants paid property taxes is of no great consequence in this case. [102]

However, payment of taxes may be considered as a factor evidencing ownership. As stated by MacLellan, J. in *Cummings v. MacKay*,[103]

> I conclude that where there is a dispute between parties about ownership of property, the fact that one party is the assessed owner could assist that party in establishing ownership.

Certain factors will tend to negatively affect a claim for adverse possession. In *Robichaud v. Ellis*,[104] the court noted that:

- the claimant was aware of a dispute as to the boundary when she bought the property;
- she observed the holder of the paper title marking the boundary with stakes but did not object to this; and in addition,
- she obtained permission from the holder of the paper title to locate a well on the area in question.

After considering all these factors and other evidence, the court rejected the claim for adverse possession.

In *Leslie v. MacNearney*,[105] the ownership of a small portion of land which contained a small fish house and a wharf was in dispute. The land was used during fishing season only. It was found that this was not use of an occasional or seasonal nature; that the use was seasonal only in the sense that fishing was prohibited by the climate during the winter months. Similarly, in *Taylor v. Williger*,[106] the Court held that land which contained camps or cottages used only during summer months was not used merely for a special purpose and that the use thereof was continuous for the purpose of the Statute of Limitations.[107]

The nature of acts of possession necessary to establish a possessory title depends upon the type of property concerned. Matters such as, the nature of the property, the appropriate and natural uses to which it can be put, and the course of conduct which the owner might reasonably be expected to adopt with a due regard to his own interests, are all matters to be considered in evaluating adverse possession which has been exercised by a trespasser or successive trespassers. For some types of property even intermittent use is sufficient. An argument that use of a property was seasonal rather than continuous was rejected by the Court. The Court pointed out that although the claimants did not use the land during the winter, they planted winter wheat in the fall with the intention of it being harvested the following spring or summer, and this showed on-going or continuous use.[108]

The Court of Appeal reversed the decision of a trial judge that acts of possession described by claimants were sufficient to establish a possessory title when these acts of possession consisted of cutting 80-90 cords of wood in one year, hunting, paying real property taxes on the property, having their children camp on the property several times, picking cranberries, and visiting the property three times each summer. The Appeal Court ruled that these acts were not exclusive, continuous and notorious as are required to extinguish the title of the true owner.[109]

Acts alleged by the owner of a property next to the subject land to constitute adverse possession consisted of: playing there as a child, digging up worms for fishing, and cutting grass. These were found by the court to be insufficient to establish adverse possession, there being no evidence the claimant made any substantial or permanent improvements to the land, and the holder of the paper title was assessed for and paid taxes.[110]

In considering whether certain activities were sufficient to support a claim for adverse possession, Coady J. stated in *Podgorski v. Cook*:[111]

> [37] The garden referred to in the Cook's evidence is vague as to its location. I find that Mr. Cook has not established, on a balance of probabilities, the location of the garden. I cannot conclude that the area where tractors turned around extended beyond Mr. Berrigan's line. Further, the evidence is uncertain as to when the garden existed

> or for how many years. The evidence of recreational use is not sufficient to oust the title of Ms. Podgorski. The evidence of burning brush suffers from the same deficiency. I am also of the same view in relation to the parking of vehicles and boats on the disputed area. This is not the kind of evidence needed to support a claim based on adverse possession. In conclusion, I find that Mr. Cook has failed to establish possessory title.

Considering acts that amounted to possession, Davison, J. stated as follows:

> One of the cleanest and most precise ways to meet the burden of proving adverse possession is by evidence of fencing which is a clear indication to all that the property is being claimed by open, continuous and visible means. In the case before me the defendants would be successful in convincing the court that they were entitled to ownership if the fence they erected was in the same location as the old fence that divided the property for many years.[112]

In the course of his decision in *Duggan v. Nova Scotia (Attorney General et al.)*,[113] Moir, J. stated:

> To fence a property is often a strong act of possession.

In a case where the claimants alleged they had obtained title to land by adverse possession, their claim was denied by the court on the ground that it was inadequate since two of the prerequisites were lacking, namely exclusivity and continuity of possession. The court stated:[114]

> The activities of the appellants and others referred to in Mr. Thomas's affidavit were not acts that ousted the true owners or excluded them from entry on the land. Sporadic acts, even if frequent, of berry-picking, crossing over the land to go to the beach and walking around on the land are not capable of proving continuous occupation.

There may be adverse possession of a portion of a driveway, as long as it can be shown that it was used exclusively by the party seeking possessory title.[115]

Often, when the issue is whether or not occasional or seasonal use of land constitutes open, obvious, exclusive and continuous possession, the courts will determine if the land is being used as the true owner would use it. It has been held by Hallett, J. in *Scott v. Smith*[116] that the test with respect to obtaining title by possession of lands suitable for cultivation is that the persons claiming the land must do such acts as would naturally be done by the true owner if he were in possession. In that case, cutting wood in a woodlot and marking the lot with blazelines over the statutory period were sufficient acts to establish possessory title. It was not necessary that the woodlot be fenced because in Nova Scotia boundary lines for woodlots are traditionally marked by blazelines.[117]

A water lot may be the subject of adverse possession so as to deprive the registered owner of title. In *Canada (A.G.) v. Acadia Forest Products Ltd.*[118] a

water lot had been used for 77 years in conjunction with a lot on the shore. The Federal Court found that this constituted adverse possession.

In order to establish title by possession to a portion of the foreshore, it is not necessary to prove the same exclusive possession of it that would be required for a property in the uplands. A grantee of foreshore property holds subject to the *jus publicum* of navigation and fishing. A title by possession may be established by proof of such beneficial enjoyment as a grantee, holding subject to the *jus publicum*, might have exercised.[119]

In many instances a party who owns an undivided interest in land seeks to claim a possessory title against one of his co-tenants. The law with respect to this situation was analyzed by Hallett, J. in *Lynch v. Lynch*. He stated as follows:

> There are certain basic principles that must be applied where a party seeks to establish a possessory title against co-tenants.
>
> 1. The Holder of the legal estate in land is deemed to be in possession until he is dispossessed by another going into possession.
> 2. The title of the holder of the legal estate is not extinguished until the expiration of twenty years from the time the person claiming the possessory title first went into possession; if the holder of the legal title is outside the province, the period is forty years.
> 3. It is a question of fact whether a party claiming possessory title has exercised acts of possession with respect to the lands of a kind sufficient to extinguish the title of the legal owner.
> 4. The acts of possession relied upon must be such that they constitute proof that the possession was actual, continuous, open, notorious, visible, exclusive and adverse for the statutory period, be it twenty or forty years. These words are not an idle litany but describe in detail the nature of the possession that can ripen into a possessory title.
> 5. The burden of proof is on the person seeking to extinguish the title of the legal owner to prove acts of possession that are capable of extinguishing title considering the nature of the lands and other circumstances.
> 6. Section 10 of the *Limitation of Actions Act*, R.S.N.S. 1967, c. 168 and amendments thereto, specifies when the time starts to run against the legal owner that can lead to extinguishment of his title. When time begins to run depends on the legal circumstances associated with the entry by the persons claiming the legal owner's title has been extinguished. Title is extinguished pursuant to section 21 of the Act which provides:
>
> 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.

7. The exclusive possession of one or more tenants in common is sufficient to extinguish the title of the other tenants in common if for the required statutory period. If more than one tenant in common is in possession for the required period, that possession is exclusive vis-à-vis the other tenants in common whose interests are thus extinguished. This is so because of the provisions of section 14 of the Act which provides as follows:

> *Where any one, or more,* of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.
> (My italics)

8. While the nature of the land and nature of the acts performed thereon are factors to consider, including the payment of taxes by the person in possession, each case turns on its own facts and before a court should order that the title of the legal owner has been extinguished pursuant to the Act, the evidence must establish acts of possession that clearly prove that the legal owner's title has been extinguished. Cases like *Kirby v. Cowderoy,* [1912] A.C. 599; 5 D.L.R. 675, where the only act of possession was payment of taxes, cannot be applied to every factual situation.

> The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession.[120]

Possession of part of a parcel can be regarded by the law as possession of the whole lot. In an application under the *Quieting Titles Act,* Glube, C.J. explained the operation of this doctrine as follows:

> When a person has paper title to land and occupies any part of it, the law provides that the person who is in possession of a part is regarded as being in possession of the whole unless it can be shown that another person is in actual physical possession of some part of that property to the exclusion of the true owner.

In the case of colour of title, the issue is different. It is not essential that the title is valid, as it is not the document which gives title, but rather adverse possession by a person for the requisite period.[121]

Applying the facts of the case to this interpretation of the law, she found that the defendants had good documentary title, and failing that good colour of title that had ripened into an indefeasible title of the whole land.

In the event that adjacent owners enter into an encumbrance agreement, permitting a chain link fence to remain in its present location, it may be held to be evidence of the extent of the property claimed by the party who is asserting a possessory title to the land enclosed.[122]

In order to defeat the title of the owner shown by the Registry of Deeds as having title to a property, a person claiming under the doctrine of colour of title must be able to show continuous and uninterrupted possession on a portion of the property described in the document, sufficient to amount to an ouster of possession of the holder of the paper title; that ouster must be maintained for the statutory period, and then this occupation would be considered occupation of the whole property described in the document. Failure to meet this standard will lead to rejection of the claim.[123]

A party claiming a larger piece of land than that actually occupied by virtue of the doctrine of colour of title must have good faith and lack knowledge of a competing claim to the land by another. [124]

A party who enters into possession of a parcel of land under a bonafide belief that ownership has been acquired under a deed can claim the benefit of the doctrine of color of title even if it transpires that a tax deed was invalid. The fact that the deed was invalid does not disentitle the claimant from claiming the benefit of colour of title.[125]

The owner of a farm died leaving seven children, three of whom, two sons and a daughter, continued to live on the property. The two sons actively operated the farm, grew hay, grain, turnips and vegetables. In addition, they had a dairy herd of 30 animals and cut wood for their own use and sold logs from the property. They maintained fences and blazes at the boundaries. They cleared 12 acres of land. The Court found all these acts of possession extinguished the rights of the non-resident siblings. The sister who continued to live in the house on the property with her family did not contribute to the farming operations. One of the two brothers who remained on the property purchased the interest of the other. In a Quieting Titles action the court granted that brother an order declaring he was sole owner of the property, subject to him paying the heirs of the sister one third of the value of the house and one seventh the value of the land.[126]

A party who has given a warranty deed of property cannot, by acts of possession, acquire title to defeat the title of his grantee or persons who derive title through the grantee.[127]

A person claiming adverse possession must establish all of the elements of possession. The court found that a claimant had failed to demonstrate "uninterrupted user for 20 years" when fences had been erected around a garden area to keep out animals and were not intended to mark a boundary, and gardening was not a use adverse to the true owners, who were trustees of common lands.[128]

In order to obtain a title by adverse possession of land, the claimant must be able to demonstrate that his or her possession of the property was such to exclude the owner of the paper title, in other words that the claimant was in possession of the property and the owner by title was not. This requires more than isolated acts of petty trespass. Having a surveyor enter the property for the purpose of running a line does not qualify as such occupation, nor does preparation of documents relating to subdivision and sale, since these do not take place on the property.[129]

A recent case provides insight into the process followed by a judge in analyzing the facts in a case and arriving at a conclusion. In his analysis of a claim for adverse possession in *Behie v. Carrigan*,[130] Duncan J. proceeded as follows:

1. The title holder of land is presumed to be in possession of that land. When adverse possession of the land by a non title holder is proved, then they acquire title that is inconsistent with that of the title holder.
2. The plaintiffs' claim relies on the provisions of section 10 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, as amended.
3. The possession that is necessary to extinguish the title of the true owner must be actual, constant, open, visible and notorious occupation or open, visible and continuous possession, known or which might have been known to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period.
4. The party must demonstrate a starting date so the limitation period may be computed.
5. If any of the essential elements are missing at any time during the statutory period, the claim for possessory title will fail.
6. Presumptions favour the true owner.
7. The true owner is presumed to be in possession of the lands, even if the lands lie vacant.

He then examined the sufficiency of evidence needed to dispossess the holder of the paper title. It was then necessary for the court to determine the boundaries of the land subject to the possessory claim, since the survey plans produced during the trial did not disclose how far from the highway the claim extended.

After dealing with the question of credibility, and witnesses disobeying the order not to discuss the case with others, he found sufficient evidence existed to grant the plaintiffs a possessory title.

[Next page 7-51]

Tab 5

Limitation of Actions Act

CHAPTER 258

OF THE

REVISED STATUTES, 1989

amended 1993, c. 27; 1995-96, c. 13, s. 82; 2001, c. 6, s. 115;
2003 (2nd Sess.), c. 1, s. 27; 2007, c. 17, s. 16

An Act Respecting the Limitation of Actions

Short title

1 This Act may be cited as the Limitation of Actions Act or the Statute of Limitations. *R.S., c. 258, s. 1.*

LIMITATION OF CERTAIN ACTIONS

Limitation periods

2 (1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

(a) actions for assault, menace, battery, wounding, imprisonment or slander, within one year after the cause of any such action arose;

(b) actions for penalties, damages or sums of money given to the parties aggrieved by any statute, within two years after the cause of any such action arose;

(c) actions for rent upon an indenture of demise, actions upon a bond or other specialty, actions upon any judgment or recognizance, within twenty years after the cause of any such action arose, or the recovery of such judgment;

(d) actions for negligence or malpractice

(i) by reason of professional services requested of or rendered by a person duly registered under the Medical Act or under the Dental Act, or

(ii) against any officer, nurse or employee in any hospital for the treatment of the sick in the Province which has on its staff qualified medical practitioners and nurses qualified under the Registered Nurses' Association Act, or against any employer of such officer, nurse or employee, by reason of any professional services or hospital services requested of or rendered by such officer, nurse, employee or employer,

within two years after the date in the matter complained of such professional services or hospital services terminated;

(e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

(f) actions for recovery of damages on account of injury to persons or damage to property occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle, within three years after the cause of action arose.

(2) All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced within six years after the cause of any such action arose and no claim in respect of a matter which arose more than six years before the commencement of any such action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action.

(3) Nothing in this Section contained shall extend to any action given by any statute when the time for bringing such action is by any statute specially limited.

(4) Notwithstanding Section 38, where an action for recovery of damages occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle is commenced within the time limited by clause (f) of subsection (1) and a counterclaim is made or third-party proceedings are instituted by the defendant in respect of damages arising out of the same accident, the lapse of time limited by said clause (f) shall not be a bar to the counterclaim or third-party proceedings.

(5) In any action for assault, menace, battery or wounding based on sexual abuse of a person,

(a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse. *R.S., c. 258, s. 2; 1993, c. 27, s. 1; 2003 (2nd Sess.), c. 1, s. 27.*

Disallowance or invocation of time limitation

3 (1) In this Section,

(a) "action" means an action of a type mentioned in subsection (1) of Section 2;

(b) "notice" means a notice which is required before the commencement of an action;

(c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this Act,

(iii) the provisions of an agreement or contract.

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

(3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

(a) the length of and the reasons for the delay on the part of the plaintiff;

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

(d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose

of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(5) The provisions of this Section shall have effect in relation to causes of action arising

(a) before the twenty-sixth day of June, 1982, if the time limitation has not expired before that date;

(b) on or after the twenty-sixth day of June, 1982.

(6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired.

(7) This Section does not apply to an action where

(a) the time limitation is ten years or more; or

(b) the time limitation is contained in the Mechanics' Lien Act. *R.S., c. 258, s. 3.*

DISABILITIES AND EXCEPTIONS

Plaintiff under disability

4 If any person who is entitled to any action mentioned in Section 2 is, at the time any such cause of action accrues, within the age of nineteen years or a person of unsound mind, then such person shall be at liberty to bring the same action, so as such person commences the same within such time after his or her coming to or being of full age or of sound mind, as other persons having no such impediment should, according to this Act, have done, or within five years, whichever is the shorter time. *R.S., c. 258, s. 4; 2001, c. 6, s. 115.*

Defendant under disability

5 (1) If any person against whom there is any such cause of action is, at the time the cause of action accrues, within the age of nineteen years or a person of unsound mind, then the person entitled to any such cause of action shall be at liberty to bring the same against such person within such time, after his or her coming to or being of full age or of sound mind as are before limited.

(2) and (3) repealed 2001, c. 6, s. 115.

R.S., c. 258, s. 5; 2001, c. 6, s. 115.

WRITTEN PROMISES
AND ACKNOWLEDGMENTS

Sufficiency of acknowledgment or promise

6 (1) In any action grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the preceding Sections of this Act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise.

(2) When there are two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any co-contractor or co-debtor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the preceding Sections of this Act, or any of them, by reason only of

(a) any written acknowledgment or promise made and signed by any other or others of such co-contractors or co-debtors, executors or administrators; or

(b) any payment of any principal, interest or other money made by any other or others of such co-contractors or co-debtors, executors or administrators.

(3) In any actions against two or more co-contractors or co-debtors or executors or administrators of any contractor, if it appears at the trial or otherwise that the plaintiff, though barred by such Sections as to one or more of such co-contractors or co-debtors or executors or administrators, is nevertheless entitled to recover against any other defendant by virtue of a new acknowledgment or promise or payment, judgment may be given and cost allowed for the plaintiff as to such defendant against whom he recovers and for the other defendant against the plaintiff. *R.S., c. 258, s. 6; revision corrected 1998.*

Non-joinder defence

7 If any defendant in an action on a simple contract pleads any matter to the effect that any other person ought to be jointly sued, or makes any application grounded upon such contention, and it appears that the action could not, by reason of this Act, be maintained against such person, such pleading or application shall be dismissed. *R.S., c. 258, s. 7.*

Acknowledgment of debt

8 If any acknowledgment has been made, either by writing signed by the party liable by virtue of an indenture, or by virtue of any specialty or recognizance, or his agent, or by part payment, or part satisfaction on account of any principal or interest being then due thereon, the person entitled may bring an action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid, or in case the person entitled to such action is, at the time of acknowledgment, under disability as aforesaid, then within twenty years after such disability has ceased, as aforesaid, and the plaintiff in any such action on any indenture, specialty, or recognizance may, by way of reply, state such acknowledgment, and that such action was brought within the time aforesaid to answer to a pleading setting up this Act. *R.S., c. 258, s. 8; 2001, c. 6, s. 115.*

Indorsement by payee

9 No indorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of this Act. *R.S., c. 258, s. 9.*

LAND AND RENT

Action respecting land or rent

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. *R.S., c. 258, s. 10.*

Commencement of limitation period

11 In the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:

(a) where the person claiming such land or rent, or some person through whom he claims, has, in respect to the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;

(b) where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt in respect to the same estate or interest until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;

(c) where the person claiming such land or rent claims in respect to an estate or interest in possession granted, appointed, or otherwise assured by any instrument, other than a will, to him, or some person through whom he claims, by a person being in respect to the same estate, or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument has been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;

(d) where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect to such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;

(e) where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken;

(f) where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or the person through whom he claims, to make an entry, or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined, provided always that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee;

(g) where any person is in possession or receipt of the profits of any land, or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make entry, or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years, or other periods, or at the last time when any rent payable in respect to such tenancy was received, whichever last happened. *R.S., c. 258, s. 11.*

Action by administrator

12 For the purposes of this Act, an administrator, claiming the estate or interest of the deceased person, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. *R.S., c. 258, s. 12.*

Effect of entry on land

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. *R.S., c. 258, s. 13.*

Effect of continual or other claim

14 No continual or other claim, upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action. *R.S., c. 258, s. 14.*

Possession by one interest holder

15 Where any one, or more, of several persons entitled to any land or rent as co-parceners, joint tenants or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them. *R.S., c. 258, s. 15.*

Possession by relative of heir

16 Where a relation of the persons entitled as heirs to the possession or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs. *R.S., c. 258, s. 16.*

Acknowledgment of title

17 Where any acknowledgment of the title of the person entitled to any land or rent has been given to him, or to his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession, or receipt of or by the person by whom such acknowledgment was given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom, or to whose agent, such acknowledgment was given, at the time of giving the same and the right of such last-mentioned person, or of any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. *R.S., c. 258, s. 17.*

Effect of receipt of rent

18 The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act. *R.S., c. 258, s. 18.*

Person ceasing to be under disability

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. *R.S., c. 258, s. 19; 2001, c. 6, s. 115.*

Limitation on claim by person under disability

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. *R.S., c. 258, s. 20; 2001, c. 6, s. 115.*

Limitation on claim by Her Majesty

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. *R.S., c. 258, s. 21; 2001, c. 6, s. 115.*

Claim extinguished

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. *R.S., c. 258, s. 22.*

MORTGAGES AND CHARGES ON LAND

Limitation respecting charge against land

23 No action or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the same is payable, or his agent, to the person entitled thereto, or his agent and in such case no such action or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given. *R.S., c. 258, s. 23.*

Claim under mortgage

24 (1) Any person entitled to or claiming under a mortgage of land, may make an entry, or bring an action to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued.

(2) Notwithstanding subsection (1), no person claiming under a mortgage of land may make an entry or bring an action to recover such land after twenty years have elapsed from the maturity date set out in the mortgage or any registered or recorded renewal thereof. *R.S., c. 258, s. 24; 2001, c. 6, s. 115.*

ENFORCEMENT PROCEEDINGS PURSUANT TO
THE PERSONAL PROPERTY SECURITY ACT

Enforcement proceedings

24A No proceedings to enforce security pursuant to Part V of the Personal Property Security Act shall be taken by a secured party within the meaning of Part V of the Personal Property Security Act or a person claiming through the secured party but within twenty years next after the right to take the proceedings first accrued to the secured party, or if the right did not accrue to the secured party, then within twenty years next after the right first accrued to the person claiming through the secured party. *1995-96, c. 13, s. 82.*

ARREARS OF DOWER, RENT AND INTEREST

Arrears of dower

25 No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or proceeding for a longer period than six years next before the commencement of such action or suit. *R.S., c. 258, s. 25.*

Arrears of rent or interest

26 No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in any respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or proceeding, but within six years next after the same respectively have become due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. *R.S., c. 258, s. 26; revision corrected 1998.*

EQUITABLE CLAIMS

Claim against trustee

27 (1) In any action or other proceeding against a trustee, or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:

(a) all rights and privileges, conferred by any of the provisions of this Act, shall be enjoyed in the like manner, and to the like extent, as they would have been enjoyed in such action or other proceeding if the trustee, or person claiming through him, had not been a trustee or person claiming through him;

(b) if the action or other proceeding is brought to recover money or other property, and is one to which no other provision of this Act applies, the trustee, or person claiming through him, shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute of limitations shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this Section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this Section had been pleaded. *R.S., c. 258, s. 27.*

Action for breach of trust respecting land

28 Where any land or rent is vested in a trustee upon any express trust, the right of the beneficiary, or any person claiming through him, to bring an action against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the

meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. *R.S., c. 258, s. 28.*

Claim based upon fraud

29 In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land, or rent, of which he, or any person through whom he claims, has been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud was, or with reasonable diligence might have been, first known or discovered. *R.S., c. 258, s. 29.*

Protection of bona fide purchaser

30 Nothing contained in Section 29 shall enable any owner of lands or rents to bring an action for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who, at the time he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed. *R.S., c. 258, s. 30.*

Rule of equity preserved

31 Nothing contained 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 action is not barred by virtue of this Act. *R.S., c. 258, s. 31.*

PRESCRIPTION IN CASE OF EASEMENTS

Prescription

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. *R.S., c. 258, s. 32; 2001, c. 6, s. 115.*

Access and use of light

33 (1) When the access and use of light to and for any dwelling house, workshop, or other building has been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary

notwithstanding, unless it appears that the same was enjoyed by some consent or agreement expressly made or given for the purpose by deed or writing.

(2) From and after the fifteenth day of April, 1931, no person shall acquire a right by prescription or by virtue of subsection (1) to the access and use of light or air to or for any building situate in any city or in any incorporated town, but this subsection shall not apply to any such right which has been acquired before the fifteenth day of April, 1931, nor affect the rights of the parties to any proceeding pending at the fifteenth day of April, 1931, in which such question has arisen before that date.

(3) For the purpose of subsection (2), "city" and "incorporated town" include any area of a regional municipality that, prior to the incorporation of the regional municipality, was a city or incorporated town. *R.S., c. 258, s. 33; 2001, c. 6, s. 115.*

Interruption of prescription period

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. *R.S., c. 258, s. 34.*

No presumption

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. *R.S., c. 258, s. 35.*

Period when party under disability

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, incompetent person, 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. *R.S., c. 258, s. 36; 2007, c. 17, s. 16.*

Term excluded in corporation

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. *R.S., c. 258, s. 37; 2001, c. 6, s. 115.*

SET-OFF AND COUNTERCLAIM

Set-off and counterclaim

38 This Act shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off or counterclaim on the part of any defendant. *R.S., c. 258, s. 38.*

Tab 6

1977 CarswellNS 393
Nova Scotia Supreme Court (Trial Division)

Manthorne, Re

1977 CarswellNS 393, [1977] 1 A.C.W.S. 848, 26 N.S.R. (2d) 74, 40 A.P.R. 74

Re Manthorne

Hallett, J.

Heard: March 29-30, 1977
Judgment: April 20, 1977
Docket: None given.

Counsel: *W. M. Wilson*, for Attorney General of Nova Scotia
K. J. Kenney, Q.C., for Robert Manthorne
T. O. Boyne, for Mervin Manthorne

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Limitation of Actions --- Real property — Adverse possession — Possession — Adverse — Effect of consent or agreement

Limitation of Actions Act, R.S.N.S. 1967, c. 168, s. 14.

In 1915 an elderly couple gave the title document to their property to one of their sons in return for support. The document was not registered until 1964. The son and wife moved in and looked after the old couple until they died intestate. The son and his descendants continued to live on the property. Upon an application to determine the owners of the property after it was expropriated, the claims of other heirs of the couple were barred by adverse possession.

Real Property --- Creation of estates — Estate upon conditions — Conditions precedent or subsequent

Document not in form of deed — Whether sufficient to convey interest.

Parents gave a document to their son in which they gave him their house and property in return for support. The son looked after them until their death. Upon an application to determine the

owners of the property after it was expropriated, held, the document, although not in the form of a deed, was given for valuable consideration, was delivered to the son, and was sufficient to transfer to him the equitable interest in the property, subject only to his supporting the parents.

Real Property --- Registration of land — Land registry — Purpose and effect of registration — Priorities — Notice to defeat priority

Actual notice: constructive notice — Registry Act, R.S.N.S. 1967, c. 265, s. 25.

Actual knowledge of prior document superceding priority of registration.

***Hallett, J.*:**

1 This was an application by the Attorney General pursuant to Section 17 of the *Expropriation Act*, S.N.S. 1973, c. 7, to have the Court determine the owners of a property on King Street in the Town of Bridgewater which was expropriated so that the Attorney General of Nova Scotia can pay the compensation that may be awarded under the *Expropriation Act* to the rightful owners.

2 The application was supported by the affidavit of William M. Wilson, sworn to on the 8th of February, 1977, to which was attached, in addition to the expropriation documents, an abstract of title to the property in question.

3 Robert Manthorne appeared on the application, filed an affidavit dated the 18th of February, 1977, and gave evidence claiming that he had title to the expropriated lands by possession of the same exclusively by himself and his mother, who had willed her interest in the property to him, and also by reason of the conveyance from his mother, brothers and sisters to him. His sister, Audrey Hirtle, also gave evidence in support of his claim of ownership of the expropriated lands.

4 Mervin Manthorne, a brother of Robert, appeared on the application and filed an affidavit dated the 23rd of March, 1977, in which he claimed the following interest in the lands expropriated:

(a) "one-half of the interest acquired by my mother and conveyed to me by deed," that is, 1/2 of his mother's 3/4 interest; and

(b) 1/13 of the interest of Mervin Manthorne's father, Eldridge Manthorne, that is, 1/13 of Eldridge Manthorne's purported 1/4 interest.

Mervin Manthorne calculated these interests as being 45.2 per cent of the whole interest in the lands expropriated. He gave evidence on the hearing and I reserved decision.

5 The facts are as follows:

> By deed dated May 30, 1870, Henry Manthorne acquired the expropriated lands, being located on King Street in the Town of Bridgewater, and hereinafter referred to as the Manthorne home.

6 By a document made at Bridgewater on October 26, 1915, by Henry Manthorne and his wife in favour of Eldridge Manthorne, Henry Manthorne and his wife purported to transfer an interest in the Manthorne home to Eldridge Manthorne in accordance with the following words:

> This is to certify that I the said Henry Manthorne and wife we agree to give up our house and property for our support to Eldridge Manthorne. This is to certify that Losin Manthorne and family is to stay away from these premises until things are made right. The two sisters namely Mrs. James Wentzell Mrs. William Baker are satisfied to the agreement.

The agreement was signed by Henry Manthorne, Mary Jane Manthorne, his wife, and by Eldridge Manthorne and Tillie Manthorne. It was witnessed by Maude A. Baker and Florence M. Wentzell. The original document was introduced into evidence. It was recorded at the Registry of Deeds many years later on August 14, 1964, following the death of Matilda Manthorne, the wife of Eldridge Manthorne.

7 The evidence disclosed that Henry Manthorne, who had acquired the property in 1870, died intestate in 1916 and left surviving four children, and possibly a fifth, the four children being Eldridge Manthorne, Lawson Manthorne, Florence M. Wentzell and his daughter, Cora, who became Cora Appleton. There was some evidence that there may have been a fifth child, Theodosia, but there is no evidence as to the names of her heirs; although counsel for Robert Manthorne thought there may be heirs of Theodosia living in the Bridgewater area.

8 Eldridge Manthorne, following the agreement made in 1915, referred to in the previous paragraph, moved into the Manthorne home and looked after his parents in accordance with the agreement. In support of this finding, are the recitals contained in the deed from Florence Wentzelle and Cora Appleton to Matilda Manthorne dated August 20, 1941, which set out the following:

> WHEREAS Henry Manthorne departed this life intestate,
>
> AND WHEREAS the said Henry Manthorne was at the date of his death the owner of the land hereinafter described, subject to an agreement to convey the same to his son, Eldridge Manthorne in consideration of the maintenance of the said Henry Manthorne,
>
> AND WHEREAS the said Eldridge Manthorne well and truly maintained the said Henry Manthorne in accordance with the terms of the said agreement, but the said Henry Manthorne

did not complete the conveyance to the said Eldridge Manthorne of the said real estate hereinafter described.

AND WHEREAS the said Florence Wentzelle and Cora Appleton are daughters and two of the heirs-at-law of the said Henry Manthorne.

9 The evidence indicated that "Losin" referred to in the agreement made between Henry Manthorne and Eldridge Manthorne referred to "Lawson." Apparently Henry Manthorne's son, Lawson, lived adjacent to the Henry Manthorne home.

10 The evidence disclosed that following the death of Henry Manthorne in 1916, Eldridge Manthorne and his family lived in the Manthorne home until 1929, when the family moved to Yarmouth, returning on vacations from time to time. Eldridge died in 1933 in Yarmouth. The evidence indicated that his widow, Matilda, returned to Bridgewater permanently in 1937 with her children and took up residence in the Manthorne home.

11 As stated above, Matilda Manthorne, widow of Eldridge, obtained a deed from two of the heirs of Henry Manthorne in 1942.

12 The evidence disclosed that from the time Mrs. Matilda Manthorne returned to the property in 1937 through the war and after the war into the early 1950's, most of the children from time to time lived in the Manthorne home and it was used as a home for them all. From time to time some of them lived there with their wives, including Mervin Manthorne. Roberrt Manthorne, although he was working away from Bridgewater, regularly stayed at the Manthorne home through this period following the war.

13 By deed dated January 19, 1949, Matilda Manthorne purported to convey the Manthorne home to Robert Manthorne and Mervin Manthorne. The deed was registered on February 4, 1949, but the evidence of both Robert and Mervin Manthorne disclosed that neither of them was aware that the deed had been made and, in fact, were unaware of the existence of the deed until their mother's death in 1964.

14 There was substantial evidence that Robert made sizeable financial contributions to his mother to maintain the Manthorne home and to effect necessary repairs and improvements. There was likewise evidence that Mervin assisted in actually doing the work that was required to maintain the home in this period. There was evidence that in 1952, following a fight between Robert and Mervin, Mrs. Matilda Manthorne directed Mervin to leave the home, which he, in fact, did. Mr. Mervin Manthorne denies that his mother required him to leave, but that he simply left because he wished to establish a home for him and his wife. On the 20th day of June, 1960, Matilda Manthorne made a will bequeathing all her real and personal property to Robert Douglas Manthorne. The will was duly proved before the Court of Probate for the County of Lunenburg on the 17th day of July,

1964, following the death of Matilda Tilton Manthorne on the 10th of July, 1964. By the time of her death, Mrs. Eldridge Manthorne was 85 years of age.

15 On July 14, 1964, four days after the death of their mother, all the children of the late Eldridge and Matilda Manthorne conveyed their interest, if any, in the Manthorne home to their brother, Robert Manthorne, with one exception; Mervin did not convey his interest. The conveyances were by way of quit claim deed and were joined in by the wives of the respective male heirs of the late Eldridge and Matilda Manthorne.

16 The property was eventually expropriated by the Province and the dispute as to who is entitled to the compensation gave rise to this application.

17 Having reviewed the evidence and the documents tendered as exhibits in this application, I am satisfied that the document signed by Henry Manthorne and his wife in favour of Eldridge Manthorne on October 26, 1915, created an equitable interest in the said Eldridge Manthorne in the Manthorne home. The consideration for the agreement to give up "our house and property" was for their support. The recitals in the deed from the two daughters, Mrs. Wentzelle and Mrs. Appleton, made August 20, 1941, in favour of Matilda Manthorne is evidence that Eldridge Manthorne carried out his obligation to support his father, Henry Manthorne. The document, although not in the form of a deed, was given for valuable consideration and was delivered to Eldridge Manthorne and was sufficient to transfer to him the equitable interest in the Manthorne home, subject only to his supporting his father, which I find he did.

18 On the evidence, it is clear that Eldridge Manthorne, his wife and his children went into possession in 1915 and have been in continuous and exclusive possession of the Manthorne home ever since, and the claims of the heirs of Lawson Manthorne and Theodosia Manthorne are barred by reason of the *Limitation of Actions Act*, R.S.N.S. 1967, c.168.

19 I would come to the same conclusion even if I did not find that the 1915 agreement created an equitable interest. Pursuant to the intestacy laws in effect in the Province in 1915, the interest of Henry Manthorne passed to his five children subject to his wife's dower interest.

20 There has always been some question as to whether or not one co-tenant can hold possession adverse to another co-tenant. It is my view that had I not found the agreement of 1915 to be effective, the five children of Henry Manthorne would have been co-tenants following his death in 1916. The history of the present state of the law is set forth in Anger and Honsberger's *Canadian Law of Real Property* at pp. 774-5:

> The earlier Statutes of Limitation distinguished adverse possession from other possession and the time did not begin to run until adverse possession had been taken, there often being much difficulty in determining whether or not possession was adverse. For example, possession was not regarded as adverse if the parties claimed under the same title, so that possession

by one was not adverse to the title of the other, or if the party holding title was regarded by implication as having possession. Thus, possession by one of several joint tenants, tenants in common or co-parceners was regarded as possession by all, so that receipt by one of all of the profits was not sufficient to cause his possession to be regarded as adverse, it being necessary to prove actual or implied ouster of the others, such as refusal to pay to the others their share or sole possession by one for forty years. Also, possession by an overholding tenant or tenant at will was not regarded as adverse. Again, possession by a relative of the heir might be regarded as not adverse to him, so that, if a younger brother of the heir entered into possession, he was presumed to do so on behalf of the eldest son but, if the latter entered and were dispossessed by the younger, this possession by the younger was regarded as adverse.

With certain exceptions, the effect of the statute now is that the doctrine of non-adverse possession is done away with and the time begins to run from the time when the right of the true owner to possession first arose, regardless of the nature of the actual possession by another (see *Nepean v. Doe d. Knight*, (1837) 2 M. & W. 894, 150 E.R. 1021; *Re Anderton*, (1908) 8 W.L.R. 319; *Hamilton v. The King*, (1917) 35 D.L.R. 226, 54 S.C.R. 331). Thus, where the owner of land put his father in possession under a parol agreement that the father should clear up and cultivate the land, taking the profit for his benefit, and the father remained in possession for twenty-three years until his death, it was held that he had obtained title by possession (*Truesdell v. Cook*, (1871) 18 Gr. 532).

The exceptions are possession by a tenant under a lease in writing for an annual rent of less than four dollars and possession by a tenant at will, in which cases the time runs from determination of the tenancy (e.g. see s.5(5) and (7) of the Ont. Act); which topic is discussed later when dealing with leaseholds. The statute expressly provides that possession by one or more of several joint tenants, tenants in common or co-parceners is not possession by the others and receipt by one or more of them or more than the right share or shares of the profits or rent is not receipt by the others (Imp. Act. s.12; Ont., s.11; B.C., s.26; N.B., s.32; N.S., s.14; Nfld., s.13).

Hence, as possession by one co-owner is separate and is not possession by the others, exclusive possession by one of the whole or any part of the land for the statutory period will extinguish the title of the others to their undivided shares in the whole or in such part (Ex parte Hasell, *Re Manchester Gas Act*, (1839) 3 Y. & C. Ex. 617, 160 E.R. 848, *Tidball v. James*, (1859) 29 L.J. Ex. 91; *Weeks v. Birch*, (1893) 69 L.T. 759; *Thornton v. France*, [1897] 2 Q.B. 143, C.A.; *Glyn v. Howell*, [1909] 1 Ch. 666).

21 The section the authors were referring to is the same section as Section 14 of the Revised Statutes of Nova Scotia 1967, which I quote as follows:

> Where any one, or more, of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, of any of them.

22 The present Section 14 is a successor to Section 17 of the Revised Statutes of Nova Scotia 1884, which was in effect at the time of the death of the said Henry Manthorne.

23 I therefore find, even if the document made in 1915 was ineffective to create any interest in Eldridge Manthorne, the interests of Lawson Manthorne and Theodosia Manthorne are barred by reason of Section 14 of The *Limitation of Actions Act* as Eldridge Manthorne and his family have been in exclusive, continuous, notorious, open and adverse possession of the Manthorne home since the death of Henry Manthorne in 1916.

24 Having found that the document of 1915 transferred to Eldridge Manthorne the equitable interest in the whole of the estate of the late Henry Manthorne in the Manthorne home, I find that on the death of Eldridge Manthorne in 1933, his interest passed to his thirteen children pursuant to the intestacy laws of the Province in force at that time subject to his widow's dower rights.

25 I find that the deed executed in 1941 by Eldridge Manthorne's two sisters, Florence Wentzelle and Cora Appleton, in favour of Matilda Manthorne, was in the nature of a comfort deed, to adopt an adjective that is common in legal circles with respect to certain types of letters. There were no covenants in the deed. The recital recognizes that Eldridge Manthorne had carried out his obligations to his father and that the two daughters of the late Henry Manthorne wished to convey whatever legal title they had, if any, to their brother's widow. This is not unusual as a perusal of the records at the Registry of Deeds might indicate to a cautious solicitor that there should be a conveyance of whatever legal interest Florence Wentzelle and Cora Appleton may have had in the property. It is clear that, although the agreement of 1915 was not registered until 1964, that both Florence Wentzelle and Cora Appleton knew of the agreement. The fact that it was produced following the death of Matilda Manthorne in 1964 is clear evidence that it was well known by those two members of the family as to how their father had acquired an interest in the Manthorne home.

26 Therefore, from 1933 onward the thirteen children of Eldridge Manthorne were possessed of Eldridge's interest in the property subject to the dower interest of their mother. She was a resident in the Manthorne home with their permission and consent. It cannot be suggested that she was in possession adverse to her children. However, her possession of the Manthorne home and that of her children was exclusive, continuous, and adverse to the possession of any of the children of the

late Henry Manthorne and continued from 1916 until the expropriation on the 15th of November, 1975.

27 Having found that the Manthorne home passed to Eldridge Manthorne's children on his death intestate in 1933 and that Matilda Manthorne, his widow, was in joint possession of the Manthorne home with the consent of the heirs-at-law of Eldridge Manthorne, I find that when Matilda Manthorne executed the conveyance on January 19, 1949, which purported to convey the Manthorne home to Robert and Mervin Manthorne, she had nothing to convey, as she had acquired nothing other than her dower interest following the intestacy of her husband and that the deed from her husband's sisters conveyed nothing as they had nothing to convey at the time, not having acquired any interest on the death of Henry Manthorne.

28 It is to be noted that Matilda Manthorne left everything by her will to Robert Manthorne but as she had no interest in the property at the date of her death, it does not affect title. Robert Manthorne acquired the interest of all his brothers and sisters with the exception of Mervin following the death of his mother in 1964, which leaves me with the question of whether or not Mervin's interest in the Manthorne home is barred by the *Limitation of Actions Act*. Counsel for Robert Manthorne has suggested that Mervin has been out of possession since 1952. I am not satisfied on the evidence that such was the case, as his mother was in possession as a licensee of the children which included Mervin. (See *Anger and Honsberger*, p. 775.) Therefore, time did not begin to run against Mervin pursuant to the provisions of the *Limitation of Actions* until 1964, when Robert was in possession adverse to Mervin. The time period not having expired, I find that Mervin has 1/13 interest in the Manthorne home.

29 I feel I should deal with the argument put forward by Mervin Manthorne which is based on Section 25 of the *Registry Act*, R.S.N.S. 1967, c. 265:

> No equitable lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs or assigns.

30 Counsel for Mervin Manthorne argues that the deed made by the two sisters in 1941 to Matilda Manthorne conveyed to her at least a 2/5 interest in the property and possibly a 1/2, depending on the existence or status of Theodosia, and that such conveyance, having been registered prior to the registration of the 1915 document creating the equitable interest, gives to Matilda Manthorne the protection afforded by Section 25 of the *Registry Act* and argues from there that Matilda, having had an interest in 1941, was capable of conveying that interest to Mervin and Robert by the deed she executed in 1949. I find from the facts of this case that Mervin Manthorne cannot rely on the provisions of Section 25 of the *Registry Act*. Although the agreement of 1915 was not registered until 1964, I am satisfied that Mervin Manthorne, as did all the children of the late Eldridge Manthorne, knew of the manner by which their father had acquired an interest in the

property. It is my view that Section 25 of the *Registry Act* must be read in conjunction with Section 17 of the *Registry Act* which I quote as follows:

> Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

Section 17 is the very essence of the *Registry Act* which simply provides that one must register all instruments or run the risk of them being ineffective against any subsequent instrument given in favour of a person who can show valuable consideration and lack of notice of the prior unregistered instrument.

31 The purpose of the *Registry Act* is to protect purchasers for value without notice of unregistered instruments against the effect of the same and thus require persons who wish to avoid problems that might be created by the *Registry Act* to register all instruments which affect title. By no stretch of the imagination can it be suggested that Matilda Manthorne was a purchaser for value when she obtained a conveyance from her two sisters-in-law in 1941 or that either Robert or Mervin were purchasers for value without notice of the equitable interest when Matilda Manthorne executed the deed in 1949. Both acknowledged that they were not even aware of the existence of the deed until after her death.

32 Mervin Manthorne was asked to leave the house by his mother in 1952 and on this point I accept the evidence of Robert Manthorne and Audrey Hirtle as to the events which led up to his departure rather than the explanation given by Mervin Manthorne. It should be noted that since 1964, following the death of Matilda Manthorne, Robert Manthorne, having acquired the interests of all his other brothers and sisters, has occupied the Manthorne home. At no time during the period from 1964 to 1975, the date of the expropriation, nor for that matter after 1952, did Mervin Manthorne institute any proceedings to claim ownership of the property. His claim now, based on the 1941 and 1949 deeds, appears to be motivated by a total animosity towards his brother, Robert.

33 I find on the evidence that Mervin Manthorne knew of the instrument dated October 26, 1915, and it would be a gross injustice if he could claim pursuant to Section 25 of the *Registry Act* that he is entitled to certain interests in the Manthorne home by reason of the fact that the heirs of the late Henry Manthorne executed an instrument in favour of Matilda Manthorne, which was registered prior to the registration of the agreement of October 26, 1915, when all parties were aware of its existence. In my view, where all persons had notice of the unregistered equitable interest, which is what I have found on the evidence, Section 25 does not apply and, therefore, the equitable interest created by the October 26, 1915, document is valid as against the subsequent registered instruments and, in particular, the deed made in favour of Matilda Manthorne in 1941 and the deed

made by Matilda Manthorne in favour of Robert Manthorne and Mervin Vincent Manthorne on January 19, 1949, notwithstanding the fact that the 1915 document was not registered until 1964.

34 Robert Manthorne therefore is entitled to 12/13 of the compensation and Mervin Manthorne 1/13. There will be no award respecting costs.

End of Document

Tab 7

1985 CarswellNS 212
Nova Scotia Supreme Court Trial Division

Lynch v. Nova Scotia (Attorney General)

1985 CarswellNS 212, [1985] N.S.J. No. 456, 171
A.P.R. 69, 37 A.C.W.S. (2d) 268, 71 N.S.R. (2d) 69

Ross Lawrence Lynch and Barbara Ruth Lynch, Plaintiffs v. The Attorney General for the Province of Nova Scotia and Victor Currie Lynch, Defendants; Darrell Lynch, Douglas Lynch, Gwen Olsen and Gerald Lynch, Third Parties

Hallett, J.

Judgment: December 13, 1985
Docket: Doc. 49961, 0753

Counsel: *Peter M. Landry, Esq., D. Timothy Gabriel, Esq.*, for the plaintiffs.
Harold G. S. Adams, Esq., for the defendant, The Attorney General of Nova Scotia.
Derrick J. Kimball, Esq., for the defendant, Victor Currie Lynch.

Subject: Evidence; Civil Practice and Procedure; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Evidence --- Hearsay rule and exceptions — Exceptions

Evidence Act, R.S.N.S. 1967, c. 94.

Plaintiffs bringing action for declaration that real property owned by them -- Defendant also claiming title to property -- Plaintiffs seeking to tender as evidence declarations made by residents of area, now deceased, supporting plaintiffs' position regarding possession of property -- Declarations ruled inadmissible -- No provision in Act for admission of such declaration -- Rules of evidence not permitting their admission as deponents not available for cross-examination -- Declarations not fitting into any standard exception to hearsay rule such as declaration of deceased person against interest.

Limitation of Actions --- Real property — Adverse possession — Possession — By joint tenants or tenants in common

Deceased dying intestate in 1934 and certain real property devolving to his seven children, including father of male plaintiff and father of defendant -- Plaintiffs seeking declaration that fee simple in property owned by them, while defendant also claiming to be owner of fee simple -- Plaintiffs declared to be holding interest in three-sevenths of property and defendant four-sevenths interest -- Plaintiffs and their predecessor in open, visible, continuous, exclusive and adverse possession of part of property -- Defendant and his predecessor having possession of similar quality with respect to other part of property -- Other heirs at law of deceased taking no interest in property after 1934 and their titles extinguished.

***Hallett, J.*:**

1 In this case the plaintiffs seek a declaration that they are the owners of the fee simple interest in a one hundred and forty acre parcel of land situate at East Uniacke. The defendant, Victor Lynch, also claims that he is entitled to a certificate under the Act that he is the owner of the fee simple. The third parties did not actually participate in the proceedings.

2 The property in question was owned by Charles Lynch who acquired the property, along with another forty acre parcel, from a Mr. Polkinhorne prior to 1920. The property lies to the east of Savage Lake and the East Uniacke Road. Immediately to the east of the property is the forty acre parcel of land that had been acquired by Mr. Charles Lynch at the same time.

3 In the 1920's Charles Lynch conveyed this forty acre parcel of land to his son, Dorris Lynch. Access to the forty acre parcel of land owned by Dorris Lynch was through a road extending easterly from the East Uniacke Road across the property in dispute near its northern extremity.

4 In 1930 Mr. Charles Lynch allowed his son, Daniel Lynch, to build a home on the property just to the north of the access road to Dorris Lynch's house which was the old Polkinhorne residence. By 1931 Mr. Daniel Lynch had completed his house and had moved in with his rapidly growing family.

5 In 1934 Charles Lynch died intestate, leaving seven children and his widow, Minnie. Under the descent of property laws in force in Nova Scotia at that time his real property, which included the property in dispute, devolved to his seven children. The plaintiff, Ross Lynch, is a son of Daniel Lynch and the defendant, Victor Lynch, is a son of Dorris Lynch. Each has acquired the interests of their respective fathers and each claims a certificate in fee simple to the property in dispute.

6 There are certain basic principles that must be applied where a party seeks to establish a possessory title against co-tenants.

7 1. The holder of the legal estate in land is deemed to be in possession until he is dispossessed by another going into possession.

8 2. The title of the holder of the legal estate is not extinguished until the expiration of twenty years from the time the person claiming the possessory title first went into possession; if the holder of the legal title is outside the province, the period is forty years.

9 3. It is a question of fact whether a party claiming possessory title has exercised acts of possession with respect to the lands of a kind sufficient to extinguish the title of the legal owner.

10 4. The acts of possession relied upon must be such that they constitute proof that the possession was actual, continuous, open, notorious, visible, exclusive and adverse for the statutory period, be it twenty or forty years. These words are not an idle litany but describe in detail the nature of the possession that can ripen into a possessory title.

11 5. The burden of proof is on the person seeking to extinguish the title of the legal owner to prove acts of possession that are capable of extinguishing title considering the nature of the lands and other circumstances.

12 6. Section 10 of the *Limitation of Actions Act*, R.S.N.S. 1967, c. 168 and amendments thereto, specifies when the time starts to run against the legal owner that can lead to extinguishment of his title. When time begins to run depends on the legal circumstances associated with the entry by the person claiming the legal owner's title has been extinguished. Title is extinguished pursuant to Section 21 of the Act which provides:

> 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.

13 7. The exclusive possession of one or more tenants in common is sufficient to extinguish the title of the other tenants in common if for the required statutory period. If more than one tenant in common is in possession for the required period, that possession is exclusive *vis-a-vis* the other tenants in common whose interests are thus extinguished. This is so because of the provisions of Section 14 of the Act which provide as follows:

> *Where any one, or more*, of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or

receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.

(my italics)

14 8. While the nature of the land and nature of the acts performed thereon are factors to consider, including the payment of taxes by the person in possession, each case turns on its own facts and before a Court should order that the title of the legal owner has been extinguished pursuant to the Act, the evidence must establish acts of possession that clearly prove that the legal owner's title has been extinguished. Cases like *Kirby v. Cowderoy*, [1912] A.C. 599, 5 D.L.R. 675, where the only act of possession was payment of taxes, cannot be applied to every factual situation.

15 The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. As a safeguard to the legal owner, the Courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a Court before a finding is made that the title of the legal owner to wood land, in particular, is extinguished as the acts relied upon are very often sporadic in nature and observed by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.

16 As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the Court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the *Limitation of Actions Act* provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the Courts for hundreds of years. Each case turns on its own facts.

17 I find that Mr. Daniel Lynch and his successor, the plaintiffs, were in open, visible, continuous, exclusive and adverse possession of the cleared areas surrounding his house since 1931 and that Dorris Lynch and his successor, Victor Lynch, had possession of a similar quality

with respect to a small area of land on south and north sides of the access road where he had located his garage and wood yard for many years. The title of all the other heirs at law of Charles Lynch has been extinguished with respect to these small portions of the property.

18 With respect to that part of the property consisting of the pasture lands and wood lands which make up the bulk of the property, I find that neither Daniel Lynch nor Dorris Lynch exercised possession exclusively *vis-a-vis* one another. They both used the pasture land extensively for their cattle and both cut logs, hardwood and fire wood from the wood lands for many years. *None of the other heirs at law of Charles Lynch took any interest in the property since he died in 1934.* On the facts, I am satisfied that by 1955 possession of the pasture and the wood lands by Daniel Lynch and Dorris Lynch was of sufficient quality to extinguish the title of all the other heirs of Charles Lynch with the exception of Cecil Lynch.

19 Mr. Cecil Lynch had moved from Nova Scotia prior to his father's death. He resided out of the province until his death in October, 1966, in Alberta. Pursuant to the descent of property laws in effect in Nova Scotia at that time his legal interest in the property devolved to his widow, Eva, who, in 1972, conveyed her interest to the defendant, Victor Lynch. Pursuant to the *Limitation of Actions Act*, at the time Eva Lynch conveyed the interest of Cecil Lynch to Victor Lynch in 1972, her right to make an entry or bring an action to recover the land had not been extinguished as forty years had not passed since his right to make an entry first arose on the death of his father in 1934, at which time his brothers, Daniel and Dorris Lynch, began exercising possession over the wood land and pasture land which made up the great percentage of the property. As a consequence, the deed from Eva Lynch to Victor Lynch, executed in 1972, passed a one-seventh interest to Victor Lynch in the property subject to the possessory title of the plaintiffs to the cleared area where his house and field were located as Cecil Lynch's interest in it was extinguished in 1971.

20 The rights of all the other children of Charles Lynch having been extinguished pursuant to the *Limitation of Actions Act*, the present title is vested three-sevenths interest in the plaintiffs and four-sevenths interest in the defendant, Victor Lynch, subject, however, to my finding that the plaintiffs have the fee simple interest in the area of the home of the late Daniel Lynch and the defendant, Victor Lynch, has the fee simple interest of a small parcel of land where his father's garage and wood yard were located, and subject to my finding that a small portion of the land located at the southern tip of the property which was not included in the deed from Eva Lynch to Victor Lynch is owned equally between the plaintiffs and the defendant, Victor Lynch, as a result of their having acquired possessory title to the wood land and pasture land. The property, of course, is subject to the right-of-way across the same as shown on the Ashcroft survey plan dated August 22, 1984, to permit access on the old road to the Dorris Lynch property, being the forty acre lot now owned by the defendant immediately to the east of the property in dispute.

21 Neither the plaintiffs nor the defendant have satisfied me on the evidence that they were in exclusive possession of other than the small parcels of land to which I have referred; that is,

exclusive as to one another and therefore neither is entitled to the declaration that was sought by each of them.

22 The plaintiffs argued that they were in possession under colour of title in that Ethel Sarson testified that in 1939 her grandmother, Minnie Lynch, the widow of Charles Lynch, came to the home of Daniel Lynch, the father of Ethel Sarson, and while they were seated around the dining room table gave the deed Polkinhorne to Charles Lynch to her parents and told them to have a deed drawn to their land. It was argued on behalf of the plaintiffs that this constitutes colour of title. I shall leave aside the questions whether the evidence is admissible or whether it does constitute colour of title and deal with the argument made by the plaintiffs that having colour of title, Daniel Lynch would have constructive possession of the entire lot, irrespective of any acts of possession he may have undertaken on the wood lands. Even if one were to concede (and I am not) that on these facts Daniel Lynch would have been in constructive possession of the wood land, the argument does not assist the plaintiffs as there '50's, clear evidence that in the 1930's, '40's and early 50's the Dorris Lynch family exercised substantial acts of possession on the property under colour of title, Dorris Lynch having had a one-seventh interest devolve upon him on the intestacy of his father, Charles Lynch. The fact is that both Daniel and Dorris Lynch exercised acts of possession over the property and irrespective of what one can argue as to a person being deemed to be in constructive possession of the whole when claiming under a colour of title, if another person with title is exercising acts of possession, the possession of the person claiming under colour of title is not exclusive and therefore cannot extinguish the claim of the person exercising acts of possession who has a legal interest in the property. Had the facts shown that Dorris Lynch had not exercised any acts of possession over the property, then there might be something to consider. That not being the case, there is no need to decide whether the evidence was admissible or just what effect the handing over the deed under those circumstances had.

23 The plaintiffs' counsel argued that Daniel Lynch paid the taxes on the property from the mid-thirties until 1961 and this, coupled with his other acts of possession, showed that he had exercised full ownership over the property. Payment of nominal taxes by a co-tenant in occupation of a small part of the land is not significant where one of the other co-tenants exercised acts of possession over substantial parts of the property for the entire period during which the taxes were paid. Daniel Lynch's payment of taxes, coupled with his acts of possession, could well have ripened into possessory title were it not for the fact that Dorris Lynch too exercised acts of possession over these years. The acts of Dorris Lynch were not sporadic or occasional but continuous; for example, he occupied the following parts of the property: where his garage was located on the south side of the access road, where his wood yard was located on the north side of the access road, where he pushed a road through to adjacent property from the access road northwesterly towards his own line, where his pig yard was located on the property near the western boundary of his forty acre parcel and where his cows grazed on the property. He cut fire wood, logs and hardwood over a period of years and used the roads extensively. There were many different acts over a long period although each act not continuing for the entire period. The facts do not support

a contention that Daniel Lynch was in exclusive possession. The facts, however, do support a finding that none of the other children of Charles Lynch exercised any acts of possession since their father's death in 1934. Only Daniel Lynch and Dorris Lynch exercised acts of possession with respect to the property.

24 I find that Daniel Lynch and hence the plaintiffs have acquired a possessory title to lands to the north of the driveway bounded on the east by the approximate tree line as shown on a sketch prepared by the defendant, Victor Lynch, Exhibit 5; bounded on the north by the survey line; on the west by a line extending north from the access road at right angles approximately sixty feet to the west of the well located on the property and extending northerly two hundred and eighty-four feet to the survey line. I also find that Daniel Lynch and hence the plaintiffs acquired possessory title to lands on the south side of the access road. Despite the fact that Dorris Lynch's cattle occasionally roamed on this part of the lands, generally it was controlled by Daniel Lynch. The land is bounded as follows: On the east by the western boundary of the Dorris Lynch forty acre parcel of land; on the north by the access road and extending easterly from the Dorris Lynch western boundary to the western edge of the excavated area as shown on the Ashcroft plan; and thence extending southerly along the west side of the excavated area as shown on the Ashcroft plan; and thence easterly parallel to the access road to the western side line of the Dorris Lynch property as shown on the Ashcroft plan.

25 The defendant, Victor Lynch, has a fee simple interest in the land upon which the garage is located and that portion of land extending from the garage to the south side of the driveway. He shall also have a fee simple interest in a parcel of land on the north side of the driveway measuring forty feet in depth by one hundred and fifty feet in length located immediately to the east of the prolongation northerly of the eastern side of the garage; the usage of these two locations was exclusive; it was not occasional but continuous and visible to the exclusion of Daniel Lynch.

26 The plaintiffs shall have access through the property along the access road shown as "driveway" on the Ashcroft plan to the parcel of land which I have found the plaintiffs have a fee simple interest in by reason of their exclusive and adverse possession for a period to extinguish all the claims of the other heirs at law of Charles Lynch and their successors. The defendant has a right-of-way over the driveway from the East Uniacke Road to the forty acre parcel owned by the defendant and has access over it to the garage lot and the wood yard lot as I have delineated them.

27 The parties respectively sought an accounting with respect to taxes paid, fill sold from the property as well as logs and hardwood sold. I am satisfied from the evidence that the fill was sold from that part of the property to which the plaintiffs and their predecessors had acquired possessory title. Accordingly, the plaintiff, Ross Lynch, shall retain any moneys he realized from the sale of the fill in the early '70's.

28 About 1975 the plaintiff, Ross Lynch, cut thirty-five thousand board feet of logs from the property. Victor Lynch estimated that the value of stumpage in 1975 was approximately $25.00 to $30.00 a thousand. Based on a $25.00 figure, the stumpage for the logs cut would be $825.00. The logs were not removed from the property by either the plaintiffs or the defendant and remain there to this day. Unless there was some agreement between the parties to the contrary, there will be no order that the plaintiff, Ross Lynch, pay to the defendant anything in connection with the cutting of these logs as neither of them chose to remove the logs and sell them. It was open to either of them to do so.

29 The defendant cut logs within the last few years and there is in the trust account of the defendant's counsel the sum of $1,500.00, being the amount realized from the sale of the logs. That amount shall be divided between the parties, four-sevenths to the defendant and three-sevenths to the plaintiffs.

30 With respect to the payment of taxes, there is evidence that at least in one of the years prior to 1940 Daniel Lynch had paid the municipal taxes. There is clear evidence that from 1941 to 1961 Daniel Lynch paid the taxes to the Municipality. The taxes were not paid between 1961 and 1971. In 1971 the plaintiff, Mrs. Barbara Lynch, paid the arrears of taxes plus survey and advertising expenses totalling $800.85. The plaintiffs paid the taxes from 1971 to 1977 and the defendant has paid the taxes from 1978 to date. The taxes up to 1961 were very nominal and I would infer related in the main to the dwelling owned and occupied by the late Daniel Lynch, the father of the plaintiff, Ross Lynch. I can see no reason to require the defendant to make any contribution towards those taxes. In 1961 Daniel Lynch died and his widow, Edith Lynch, stayed on for a year or so before moving from the property. So since 1962 the property has been more or less vacant. The taxes were allowed to go in arrears and the property was advertised for sale by the Municipality in 1971. It was at that time that the plaintiff, Mrs. Barbara Lynch, paid the taxes. Since that time, the plaintiffs paid taxes on the property for approximately half the years and the defendant for the other half. I shall order that the defendant reimburse the plaintiffs for $400.00 in connection with the payment of arrears of taxes from 1963 to 1970 and the survey expense, advertising, etc., in connection with the tax sale scheduled but not held in 1971. I have arrived at this figure taking into account the fact that the defendant has a four-sevenths interest in the land but, on the other hand, the plaintiffs have the full interest in the lands on which the Daniel Lynch's house is located. An equal sharing of the tax bill would seem appropriate as since 1963 the old dwelling has been abandoned and it appears to be in disrepair so not too much of the tax bill should be attributed to the building.

31 I am satisfied it was necessary for the purpose of these proceedings to have a survey plan of the property prepared. This was paid for at some considerable expense by the plaintiffs. This was required not only pursuant to the provisions of the *Quieting Titles Act* but also from a practical point of view. It would have been difficult to try the case without the ability of witnesses to make

references to a plan; a small sketch the defendant had would have been inadequate. It was also necessary to pay advertising costs pursuant to the requirements in the *Quieting Titles Act* that notice of the proceedings be brought to the attention of any interested parties that they have a right to intervene.

32 I will hear the parties on the question of costs. Each made a claim under the Act for a certificate of title and it would seem whereas each failed to establish entitlement to a fee simple title in the entire one hundred and forty acre property, it would be an appropriate case for them to pay their own costs and share equally in any necessary disbursements. I understand from counsel that there may have been an offer to settle that could have an effect on the costs issue depending on my disposition of their respective claims. I will accordingly reserve my judgment on costs pending hearing from counsel on this matter.

33 I shall issue a certificate pursuant to the *Quieting Titles Act* that the plaintiff and the defendant are respectively entitled to a certificate of title that they hold the entire fee simple interest in the lands that I have designated to them respectively; a certificate that they are entitled to hold the balance of the lands other than the southern tip as tenants in common, the plaintiffs holding a three-seventh interest and the defendant a four-seventh interest. With respect to the southern tip, being the lands to the south of the line drawn on the plan extending from Nicholson Lake and proceeding north 47° 59' west to the "run" as shown on the Ashcroft plan, I shall issue a certificate of title that the plaintiffs and the defendant hold equal interest as tenants in common in this small parcel of land.

34 The certificate to be issued to the plaintiffs shall be subject to the interest of Mae Lena Lively, the only one of Daniel Lynch's fifteen children who did not sign off her interest as an heir at law of Daniel Lynch. This issue was not addressed by plaintiff's counsel at trial but the acts of possession since 1961 by the plaintiffs were not sufficient to extinguish her claim which would be a one-fifteenth interest in the house and pasture lot and a one-fifteenth of three-sevenths interest in the wood land and pasture land.

35 There is one evidentiary matter that warrants a comment as apparently there are not any cases on the point. The plaintiffs sought to tender as evidence certain declarations made under the *Evidence Act*, R.S.N.S. 1967, c. 94, that were made by old residents of the area who are now deceased. It is common practice to take such declarations relating to the possession of property. The declarations had been registered in the Registry of Deeds.

36 Counsel relied on Civil Procedure Rules 31.04 and 31.10(1) to have these declarations admitted in evidence. Those Rules provide:

> 31.04. (1) The court may by order permit,
>
> (a) any fact to be proved by affidavit;

(b) the affidavit of any witness to be read at a trial; and unless the court otherwise orders, the deponent shall not be subject to cross-examination and need not attend the trial.

(2) An order under paragraph (1) may be made on such terms as to filing and service of the affidavit and to the production of the deponent for cross-examination as the court thinks just.

31.10. (1) The court may, at a trial, make an order concerning the method of proving any fact or document or of adducing any evidence if it appears that the order can be safely made having due regard to the interests of justice.

37 I ruled against the admission of the declarations because (1) there is no provision in the *Evidence Act* to admit the declarations and (2) the rules of evidence do not permit the admission of such documents as the deponent is not available for cross-examination and (3) the declarations did not fit into any of the standard exceptions to the hearsay rule such as being declarations of a deceased person against interest. The declarations essentially supported the position of the plaintiffs that they and their predecessors had been in possession of the lands for many years. It was apparent from the face of the declarations that they were all in error on a particular fact. Furthermore, 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.

38 There are the provisions in our Civil Procedure Rules to which I have referred pursuant to which affidavits can be tendered in evidence in the discretion of the Court. I can think of situations where in a property case such declarations could be quite useful; for instance, if they were declarations of a deceased surveyor, known for his integrity and competency, that dealt with the location of old lines, etc. If a Court were satisfied that the declarations had been duly signed and sworn to by the deponent and satisfied of his competency and impartiality, then a Court could exercise its discretion under Civil Procedure Rule 31 to admit such documents even though the surveyor was not alive to be cross-examined. The reason why such evidence might be accepted is that a surveyor engaged by one of the parties to give expert opinion evidence as to the location of a line would be acting within recognizable bounds if he were to consult work of other surveyors and give his opinion based in part on his review of their work so that in effect his opinion is based in part on hearsay but is nevertheless admitted; the hearsay component only going to weight.

39 In this case, the deponents whose statutory declarations the plaintiffs sought to introduce were not experts and from the face of the documents it could be readily seen that one would have to question the reliability of the declarations and I exercised my discretion not to allow them to

be tendered. It would only be cases in which the Court was very satisfied as to the reliability of the declarations that such declarations should be accepted if the deponent was dead and therefore not available for cross-examination.

40 The defendant sought a partition order. I was advised by counsel during argument that both parties have a strong attachment to the land and that it might be inappropriate to order a sale. Considering the topography of the land, counsel recognize the difficulty of dividing the land on a fair basis simply by drawing a line that would give the parties an acreage equivalent to their percentage interest in the wood land and the pasture land. Having heard the evidence, I can well understand the difficulties that would be involved in doing so. If the parties cannot agree on a division of the lands, I would be prepared to hear them on this issue at a subsequent date.

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