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HAND DELIVERED

The Honourable Justice Peter Rosinski
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax NS B3J 3C8

My Lord:

Re: Municipality of the District of Guysborough v. The Heirs at Law of Joseph Fogarty, James P. Fogarty and Frank Fogarty – Hfx. No. 431696
Motion for Date and Directions: November 10, 2014 at 11:00 a.m.

As Your Lordship will recall, this is a proceeding under Section 17 of the *Expropriation Act* to address issues with the title of properties expropriated by the Municipality of the District of Guysborough ("MODG") so that the matter of compensation can be settled.

To date, only one of the Respondents has appeared before the Court, Mr. Frank Fogarty.

We have received a copy of Mr. Fogarty's Affidavit filed with the Court November 5, 2014.

MODG takes no position regarding the state of the title as between the various Fogarty heirs.

However, MODG wishes to provide the following authorities for the assistance of the court in determining what scope of notice is required at this stage of the proceedings.

The Law of Hearsay as it Pertains to Oral Family Histories

Mr. Fogarty's Affidavit contains a great deal of evidence which, on its face, might be considered hearsay. These are the statements regarding the family history that Mr. Fogarty as heard from his father and grandfather.

As a preliminary matter, MODG draws the Court's attention to Rule 22.15(2):

> *22.15 (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:*
>
> *(c) a motion to determine a procedural right;*

This Motion for Date and Directions will address the procedural issue of what notice must be given to potential heirs to the Fogarty Properties. MODG submits to the Court that it is a "motion to determine a procedural right" and that therefore the court may consider Mr. Fogarty's oral family history.

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, Lederman & Bryant: The Law of Evidence in Canada (4ed) at p. 265.

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 oral histories may be the only 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.

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.

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.

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.*

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

While this traditional exception to the hearsay rule appears to be applicable primarily in cases regarding disputes about paternity, MODG submits that some of these principles may be of assistance to the court in assessing the use to be made of Mr. Fogarty's Affidavit.

The Law of Adverse Possession

MODG notes that in paragraph 41 of Mr. Fogarty's Affidavit, Mr. Fogarty deposes that his grandfather, Michael Vincent Fogarty, lived on the Fogarty Properties until the 1930's. In the Affidavit of Betty Dobson, Exhibit A, p. 1, Ms. Dobson notes that the genealogical records show that Joseph Fogarty, the father of Michael Vincent Fogarty died on November 21, 1907.

Based on Mr. Frank Fogarty's Affidavit, it appears that his grandfather, Michael Vincent Fogarty fished from, and lived on the Fogarty Properties for at least 23 years, if not 32 years (i.e. from 1907 until 1930 at the earliest or 1939 at the latest).

For the assistance of the Court, 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 regarding adverse possession.

It appears from Mr. Frank Fogarty's Affidavit that his grandfather made actual, continuous, open and notorious use of the land as though it were his own from the death of his father until the 1930's. Additionally, Michael Vincent Fogarty and his descendants have openly and notoriously continued to visit the property on a seasonal basis even after the family relocated to Hazel Hill.

While MODG does not wish to make submissions in support of the assertion that the Michael Vincent Fogarty branch of the descendants of Joseph Fogarty have conclusively obtained an adverse possessory title to the Fogarty Properties, MODG submits that the evidence of Mr. Frank Fogarty does establish that this is a reasonable claim. For land that has been uninhabited for an exceedingly long period, it seems unlikely that others will present a stronger claim.

Accordingly, MODG respectfully asks the Court to consider the evidence of Mr. Frank Fogarty in determining a proportional approach to giving notice of this proceeding to the other potential descendants of Joseph Fogarty.

All of which is respectfully submitted,

Robert G. Grant, Q.C.

RGG/adk

Enclosure
c. Client
Frank Fogarty

THE LAW OF EVIDENCE IN CANADA

FOURTH EDITION

Sidney N. Lederman
Superior Court of Justice
for Ontario

Alan W. Bryant
Superior Court of Justice
for Ontario

Michelle K. Fuerst
Superior Court of Justice
for Ontario

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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.

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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. Willigar 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. Williga*r,[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.

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