Property Law Which May Be of Interest to Owners of Woodland

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Overview

a) Municipal Property Tax Assessment Issues;
b) Change in Use Tax;
c) Adverse Possession (Sometimes Known as Squatter's Rights);
d) Wandering Boundaries;
e) Prescriptive Rights (Easements or Rights of Way);
f) Ownership Rights

Municipal Property Tax Assessment Issues

Section 42(1) of the Assessment Act R.S.,c. 23:

> *"All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that, subject to Section 45A, taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality. "*

However, certain categories of property, including forest property, are exempt or qualify for a reduced level of taxation.

"Forest Property"

Section 2(1)(h) "Forest Property" means "any lot of land, excluding any buildings or structures thereon, not used or intended to be used **[Note: Pursuant to Section 2(1)(i) "intended to be used" means "a present intent supported by some substantial act to carry out the intent"]** for residential or commercial or industrial purposes or any combination of such purposes".

Although s.47(1) provides that "all forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act", there is a proviso "except as provided in the Municipal Government Act". Reference to s.78(1) of the Municipal Government Act indicates that forest property is to be assessed at twenty-five cents per acre if it is classified as resource property, or forty cents per acre if it is classified as commercial property. It should be noted that forest property owned by a person owning 50,000 acres or more of forest property in Nova Scotia is classified as commercial property. Thus for example the lands owned by Northern Timber Nova Scotia Corp. (the land-holding affiliate of Northern Pulp) are identified in Property Online as "commercial forest".

Forested lands owned by the Province are identified in Property Online as "Provincial Forest".

I have been advised by PVSC as follows:

> "The "bona fide" practice of silviculture is what distinguishes the vast majority of resource taxable land ("forest property" category under "Resource Property" definition) and makes some forest property exempt. There are two distinct uses of the term "forest". "Forest" is a category of taxable resource property (Section 2(1)(5)) and does not require the presence of trees. See the definition in Section 2(1)(h) set out above. Within that larger category, if forest property is bona fide being used for the practice of silviculture ("bona fide" used or intended to be used for forestry purposes . . ."), then it should be exempt per s. 47. Without evidence of bona fide silviculture use, forest property should be resource taxable land."

Generally speaking, within weeks or months of a forest property changing hands, the Buyer will receive a questionnaire "Statement of Property Use – Farming and/or Forestry" (see Resource 1 attached). This should not be ignored. Depending upon your response, the property tax assessment may remain as forest resource or it might be changed to resource taxable, which has significant cost implications for you. The

onus is upon the Landowner to show, not merely an intention, but an action-based plan to manage the woodlot. Simply standing back and letting the trees grow will not necessarily be enough to qualify for the preferential tax treatment resulting from a forest resource assessment. Conducting a clearcut but not following up with silviculture treatments is likely to be considered to be a "mining" activity as opposed to a forestry activity, and thus the preferential tax treatment is not likely to be available. Even if your treatment of the woodlot is no different than that which has existed for many years, the transfer of ownership is likely to trigger a review.

For that matter it is important to review the Notice of Assessment which is issued each year, as in many instances Property Valuation Services Corporation will have made a change, unilaterally, without notice. This happens quite often. The onus is upon the landowner to be proactive in this regard.

Thus we can see that there is a regime whereby certain land uses are encouraged/supported by way of preferential property tax treatment.

Change in Use Tax

"Forest Property"

Section 78(2) of the Municipal Government Act:

> *"Where any land, or part thereof, to which this Section applies, ceases to be land used for forestry purposes, a change in use tax, determined by the assessor pursuant to the Assessment Act, equal to **twenty per cent [my emphasis added]** of the value of the land, or part thereof, that ceased to be used for forestry purposes is due and payable to the municipality in which the land is situate by the person determined by the assessor to have been responsible for the change in use, unless the land, or part thereof, is used for agricultural purposes, in which case no change in use tax is payable ."*

EXEMPTIONS
Pursuant to s.78(3) of the Municipal Government Act "…an owner of forest property may transfer to each father, mother, brother, sister, son, daughter, grandson , grand-daughter or spouse or may convey or reserve to or set aside for the owner one lot suitable for the erection of a single family dwelling, and the change in use tax is not payable if the land ceases to be used for forestry purposes."

It is my opinion that it would be reasonable to suppose that a lot size of 100,000 square feet would be permissible in order to comply with Environment Act requirements unless the lot is serviced by a public sewer.

Be aware of the fact the exemption is available only if a statutory declaration is registered in the Land Registration Office (or Registry of Deeds), setting out the basis of the exemption.

However, things don't necessarily end with the registration of a statutory declaration. The Granter in the exempt transaction is liable to pay the tax if, within seven years of the date of the transfer, title is conveyed to a non-exempt person. The authority for this proposition is found in Sections 77(6) and 78(5) of the Municipal Government Act.

This impacts not only the original Granter but also the present owner of the property as the unpaid tax is essentially a lien on the property if crystallized by a later change of ownership.

Additional Points to Consider

1. Change in use tax should not be triggered if changing from one exempt use to another (by way of example, from forest to farm property). This may necessitate some dialogue with Property Valuation Services Corporation (PVSC).

2. There are many instances of parcels which are classified as farm property or forest property but such use has been discontinued. In those situations the classification ought to have been changed to "resource taxable" which would have the result of significantly higher municipal property taxes. Perhaps neither PVSC nor the owner is aware of the change or of the significance of the change. In advance of subdivision or transfer of ownership, PVSC can be asked to review the classification, perhaps resulting in a reclassification as "resource (taxable)". While that means higher municipal property taxes on a going-forward basis, it also means that change in use tax may not apply. Bear in mind the fact that the determination of incorrect classification or a change in use is determined on a case by case basis.

3. Let's suppose that John Doe owns one hundred acres of land, all of which is assessed as farm property and forest property. He is selling a building lot to a person to whom an exemption does not apply. However, this particular building lot has not been used for forestry or agricultural purposes. I would contact PVSC in advance of completion of the transaction and I would argue for a change of classification to resource exempt (of the area not used for forestry or farm purposes), thereby legally avoiding change in use tax. Will PVSC accept this argument? My prediction is that any such determination would be fact-specific and would be determined on a case by case basis. It had been suggested to me by PVSC that it might be difficult to convince them to accept this argument.

4. John Doe subdivides his one hundred acre of farm property by creating a 2.1 acre lot. He then retains ownership of the lot and continues to conduct his foresting operations on that lot as if it were part of the larger parcel. In that case I would argue that the creation of the new lot is only a red flag, it does not constitute a change in use in these particular circumstances. Some dialogue with PVSC will be critical. Of course change in use tax will be triggered upon sale or other transfer.

5. John Doe sells a portion of his forest property to a neighboring home owner who desires privacy but likes the fact that John Doe proposes to continue managing the forest growing upon the lot he has sold. In that case, I would argue that the change in use has not occurred, but I believe some dialogue with PVSC will be necessary in order to make them aware of the situation.

6. Title to the forest lands managed by John Doe is held by his corporation. I have been advised that PVSC will treat that corporation as a distinct legal person or individual, even though John Doe may be the sole shareholder, officer and director. Thus, if John Doe wishes to have the corporation create a building lot for transfer to John Doe's daughter, the exemption will not apply.

7. The exemption includes a transfer to a "spouse". However, the term "spouse" is not defined in the Assessment Act nor in the Municipal Government Act. PVSC has taken the following position:

"Both the Nova Scotia Interpretation Act R.S., c. 235, s. 1 and the Nova Scotia Assessment Act, R.S., c.23,s. 1 are silent regarding the definition of "spouse". However, having regard to trends in Canadian law, the Director of Assessment interprets "spouse" for the purposes of s. 45A(5) family transfers and the capped assessment program (CAP) to include individuals cohabiting in a conjugal relationship for a period of at least one (1) year continuously or individuals who have a subsisting registered domestic partner declaration pursuant to Part II of the Vital Statistics Act, R.S. c.494, s.1, regardless of the length of cohabitation."

How is the change in use tax calculated?

The price for which the property is being sold is not determinative of the value used for purposes of calculating the change in use tax. PVSC will value the land as though it were not exempt at the time the change in use occurs.

Adverse Possession (Sometimes Known as Squatter's Rights)

If someone has occupied your lands for an uninterrupted period of twenty years, without your consent, that person may be entitled to claim ownership of the occupied area and you may thus lose ownership of that area of land. The Courts have held that an owner of a property cannot stand aside and allow a trespasser to make improvements to the property and pay municipal property taxes over many years, and then come in and claim the land, even though he could see that the trespasser was in possession. This is a very complex area of law and at the risk of over-simplification I will mention the following principles:

1. Generally speaking, adverse possession can be established only by a Court Order or Affidavits of at least two persons, one of whom must be both knowledgeable and disinterested (i.e. have no financial or other interest in the outcome of the matter). General statements that the area has been occupied are insufficient; considerable detail of the facts of occupation must be set out.

2. Isolated and sporadic acts of trespass do not constitute open, visible and continuous occupation so as to establish adverse possession title. The extent of occupation required in order to establish possessory title depends upon the nature of the property and the use to which it might be made. It will be much easier to establish a possessory claim if a camp has been built and maintained throughout the twenty year period, than it would be to establish such a claim if small and isolated harvests have been carried out.

3. Adverse possession can never be established if possession was given by the owner of the land. The absence of consent is critical.

4. As noted above, the possession must span a period of twenty years and it must be uninterrupted.

5. The area of land to which adverse possession is established must be determined. Depending upon the scope of activities, it might constitute the entire property or just a defined portion thereof.

6. Adverse possession of Crown/municipal lands may be very difficult or impossible. Consider the following categories:

a. Provincial Crown land – To be successful, the claimant must establish possession for a period of forty years rather than twenty.
b. Federal Crown land – Successful claims can be made only if adverse possession for a period of more than sixty years prior to a June 1st, 1950 can be established.
c. Municipal land – Adverse possession is not possible.

7. Once a landowner has migrated title to a property, adverse possession by way of Affidavit is not possible. Only a Court can award title to trespasser/occupier. That is an expensive process and the outcome can be quite uncertain.
   Once the landowner has migrated, notice must be sent to any occupiers. The clock stops running and thus if the occupier has not been in possession for at least twenty years, he/she will never be in a position to establish adverse possession.

Wandering Boundaries

Let's suppose that I have built my house so that a portion of it encroaches upon your property. You have migrated and I do not have the required twenty years of occupation before your migration. Thus adverse possession is not an option for me.

However, I can file an application in the Supreme Court. The Court then has a number of options including:

a) Dismissing my claim.

b) Awarding me ownership of a portion of your land, upon terms established by the Court. I may be required to purchase the affected portion of your land, at a price determined by the Court.

c) I may be given (or required to buy) an easement. In that scenario ownership of the occupied portion of your property remains with you, but the encroachment is allowed to continue, indefinitely.

Prescriptive Rights (Easements or Rights of Way)

Again this is a very complex area of law, but suffice it to say that there are situations where a right of way can be established, through usage, even if none was legally granted. Here are some basic principles:

a) As is the case with adverse possession, the facts must be set out on the public record, and there must be evidence from a knowledgeable but disinterested person.

b) Usage for a period of twenty years is required.

c) The absence of consent is critical.

d) The same rules apply to Crown and municipal lands as those set out above.

e) There are rules against unreasonable expansion of the burden of the easement. For example if I have travelled across your property so as to access my cottage, and thus established a right of passage, I cannot then open a quarry on my property and impose heavy truck traffic upon you.

f) Unlike the situation respecting adverse possession, a prescriptive easement can be established even if the property I am crossing has been migrated.

Unlawful Cutting of Wood

Crown Lands Act

Pursuant to section 40 of the Crown Lands Act a person cutting or removing wood from Crown land is subject to the following penalties:

a) A fine;

b) A requirement to restore the land to "a condition as near as practicable as it was before the offence was committed", and;

c) Payment of an amount equal to twice the market value of the timber or other resources cut, damaged or removed.

However, as you will guess from its title, the Crown Lands Act applies only to land owned by the Province.

Criminal Code of Canada

Although I believe such charges are uncommon, it is possible, in certain circumstances, to prosecute for theft of wood under provisions of the Criminal Code of Canada. Of course this won't be an option in cases where the "offender" believed (albeit mistakenly) that he had the right to cut the wood. Unless you wish to embark upon a public prosecution, first you must convince the police and then the Crown Attorney must be convinced that this is appropriate to proceed with a criminal charge. The advantage to the rightful landowner, if the Crown Attorney decides to proceed, is that legal costs will not be incurred. The disadvantages include:

i. The very high standard of proof required (guilt beyond a reasonable doubt) in order to secure a conviction;

ii. Even though a restitution order may be issued, it is unlikely that you will receive much support when trying to collect.

On the plus side of the ledger, a restitution order may survive bankruptcy of the "offender", unlike the situation which exists if the "offender" goes bankrupt after you have entered judgement against him in the civil courts.

Civil Remedy

Most cases involving unlawful taking of wood, if not resolved by mutual agreement, end up in the civil courts. Depending upon the circumstances the Small Claims Court may have jurisdiction, but generally speaking the Supreme Court is the forum in which these matters are heard.

There has long been a rule of thumb, at least according to legend, that if I take your wood I must pay double stumpage. I know that a number of claims have been settled on that basis, without going to Court. However, I am not aware of any case in Nova Scotia history where a Court has ordered payment of a penalty based upon this double stumpage principle. There are New Brunswick and Quebec cases which have required payment of double stumpage, but I am unable to find any instance where a Court has ordered payment of double stumpage in Nova Scotia.

The Supreme Court of Nova Scotia in *Saulnier v. Bain*, 2006 NSSC 27, held that:

> [54] [The] authorities reveal that the measure of damages depends upon the nature of the trespass.
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> [55] There appear to be two rules for determining the measure of damages: a mild rule, where the trespass has been inadvertent or under a *bona fide* belief in title or by mere mistake; and a severe rule, to be applied where the trespass has been willful or fraudulent. Under the mild rule, the measure of damages is the value of the trees less the amount which the defendants by their labour have added to that value…

In *MacDonald v. Earle,* 2010 NSSC 151 the Supreme Court of Nova Scotia stated:

> The primary goal, when assessing damages, is to put the injured party in the position that he would have been in had the tortious conduct not occurred (see *Livingstone v. Rawyards Coal Company* (1880), 5 App. Cas. 25 (H.L.)). Prior to learning of the trespass in question, the Plaintiff had plans to call tenders for the cutting of the wood on the property. If this had occurred as planned, the Plaintiff would have been paid the stumpage value of the wood. There is no evidence to suggest that the Plaintiff intended to cut the wood himself and sell it. In these circumstances, I am satisfied that it is appropriate to assess damages against the Reginato Defendants based upon the stumpage value of the wood in question. Interestingly, that is what Nathanson, J. did in *Saulnier v. Bain, supra,* (see ¶64). The stumpage value of the timber was also used to assess damages in the case *Phillips Estate v. Noble*, [1995] N.B.J. No. 518 (Q.B.).
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> While in cases of willful trespass and conversion the Plaintiff can receive the benefit of the cost of severing the wood, the situation, in my view, is different when (as occurred here) the Defendants' conduct is not willful and is done in a *bona fide* manner (I refer here to the conduct of the Reginato Defendants.) As indicated, when assessing damages against the Reginato Defendants, I am satisfied that it is appropriate to award the Plaintiff the stumpage value of the wood.

In addition to being compensated for the value of the harvested wood, the landowner is usually entitled to be reimbursed for survey costs associated with determining the true boundary, scaling costs, and a portion of his legal costs. The use of the word “portion” is to be noted.

If the harvested trees had some particular aesthetic or other functional value, such as a windbreak or a privacy barrier, the “offender” may be required to pay remediation costs, to the extent remediation can be achieved and is practicable.

If the “offender” does a poor job of harvesting and marketing, he may be liable to pay more that the stumpage value which he received for the wood. At that point the onus would shift to the landowner, to show that the stumpage value was greater than that actually received by the “offender”.

The Landowner may also be compensated for damage to immature stands or impairing the value of building lots which might otherwise be marketable.

Ownership Rights

A person‘s home and other lands are his/her castle, but there are limits on what the landowner can do with his/her land. These limits can be in the form of:

1. Laws created by government, including but not limited to:

    a) Criminal Code of Canada
    b) Wildlife Act
    c) Angling Act
    d) Forests Act
    e) Protection of Property Act
    f) Environment Act
    g) Pipelines Act
    h) Occupiers, Liability Act
    i) Land Surveyors Act
    j) Expropriation Act
    k) Mineral Resources Act
    l) Petroleum Resources Act
    m) Beaches Act.

2. Common law developed as a result of Court decisions over the years.

Criminal Code

Creates limits on the amount of force which can be used to remove a trespasser. The force used must be reasonable in the circumstances. For example, a landowner can use more force to put a burglar out of his/her house than he/she can to remove a trespasser from a field. However, a landowner can't set a trap to catch or harm a trespasser.

Wildlife Act

Every licensed hunter may hunt upon forest land (a wooded area, forest stand. a tract covered by underbrush. barren ground. a marsh, or bog, excluding a tree plantation area or a Christmas tree management area and excluding the immediate area of a forest harvesting operation). However, the landowner may post “no trapping'" signs. Such signs must include the name and telephone number of the owner.

This Act doesn't provide for posting of “no hunting” signs; on the other hand it doesn't authorize trespass by hunters on privately owned land. The distinction lies in the fact that a hunter who is on posted, private forest land may not be guilty of an offence under the Wildlife Act but that hunter is still a trespasser in the eyes of the law and the landowner can sue for an injunction and/or damages.

Note that it is not necessary to post agricultural land.

This Act prohibits interference with a person lawfully hunting or fishing.

The Act also permits the landowner to apply for a permit to destroy wildlife causing (or in a position to cause) damage to crops.

Various provisions of interest can be found in the following Regulations made pursuant to this Act:

- General Wildlife Regulations
- Bear Harvesting Regulation
- Dog Hunting and Training Regulations

Angling Act

This Act gives any resident of Nova Scotia the right to “go on foot along the banks of any river, stream or lake, and across any uncultivated lands and Crown lands for the purpose of lawfully fishing with a rod and line in such rivers, streams or lakes.”

It should be noted that the legislation does not confer the right to build fires upon any lands.

However, the landowner can sue for damages caused by such person.

Forests Act

Harvesting of forest products, management of insect and fire risks, wildlife management and forest management in general are covered by this legislation.

Protection of Property Act

This Act allows the landowner to give notice to a person or persons (orally or in writing) prohibiting entry upon private land or buildings.

Although the notice can be given verbally, it is better to give written notice. Written notice can be in the form of a sign, including the name and telephone number of the landowner, but it is better if it is in the

form of a letter or paper specifically naming the individual and personally handed or delivered to that individual.

Notice is the key: the provisions of the Act don't apply unless prior notice is given.

The police can arrest the offender and can seize a vehicle used in the commission of the offence. Fines up to $500.00 can be levied.

Although the Act applies to trappers (where the owner or occupier of forest land posts a sign prohibiting trapping, without permission; no person shall trap without permission), it doesn't appear to prohibit hunters from hunting upon forest land. The definition of forest land is the same as in the Wildlife Act. In fact, Section 15(2) of the Protection of Property Act provides as follows:

> *"No person may be prosecuted for contravening any notice given pursuant to this Act prohibiting entry or prohibiting activity on forest land if that person is hunting as defined in the Wildlife Act, fishing, picnicking, camping, hiking, skiing, or engaged in another recreational activity or engaged in a study of flora or fauna."*

As well, it should be noted that Section l 6(b) provides that the Act does not apply to "… a person who is engaged in a peaceful demonstration in the vicinity of premises to which the public normally has access".

Environment Act

This legislation contains many, many provisions impacting upon a landowner's property rights. Examination of the Environment Act is beyond the scope of this presentation.

Pipelines Act

Section 32(l) of the Act provides as follows:

> *"When a holder of a permit or licence requires an interest in land for the purposes of a pipeline for which a permit or licence is issued, the interest may be acquired in such lands*
>
> *a) by agreement with the owner of the lands; or*
> *b) if the holder is unable to arrive at an agreement with the owner of the lands, by application to the Minister for an order that the interest in lands required be vested in the holder of the permit or licence. "*

If the Minister is persuaded that the pipeline should proceed through the property in question, expropriation occurs.

Upon completion of construction, the owner of the pipeline as well as regulatory authorities and their agents have the right to enter upon the lands to conduct inspections and required work.

Occupiers' Liability Act

It is worth taking the time to consider Sections 4, 5, 6 and 8 which read as follows:

"Duties of occupier

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;
(b) activities on the premises; and
(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises. 1996, c. 2 7. s.4.

Willing assumption of risk

5(1) The duty of care created by subsection 4(I) does not apply in respect of risks willingly assumed by the person who enters on the premises but, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act ·with reckless disregard of the presence of the person or property of that person.

(2) A person who is on premises without the permission of the occupier, for the purpose of committing an offence against the person or the right of property contrary to the Criminal Code (Canada) is deemed to have willingly assumed all risks and the duty of care created by subsection (1) applies.

(3) The question of whether a person is on premises, for the purpose set out in subsection (2) shall be determined on a balance of probabilities. 1996, c. 27. s.5.

Deemed willing assumption of risk

6(1) This Section applies to

(a) land used primarily for agricultural or forestry purposes;

(b) vacant or undeveloped rural land;

(c) forested or wilderness land;

(d) recreation facilities when closed for the season;

(e) utility rights-of-way and corridors, excluding structures located thereon;

(f) highway reservations under the Public Highways Act;

(g) mines as defined in either the Metalliferous Mines and Quarries Regulation Act or the Coal Mines Regulation Act, where the harm or damage suffered is not, in whole or in part, the result of non-compliance with a law relating to the security of such mine and the safety of persons and property;

(h) private roads situated on lands referred to in this subsection:

(i) private roads to which this Section does not otherwise apply, reasonably marked by notice as private, where persons are physically restricted from access by a gate or other structure; and

(j) recreational trails reasonably marked by notice as such.

(2) Subject to subsection (3), a person who enters premises described in subsection (1) is deemed to have willingly assumed all the risks and the duty created by subsection 5(1) applies.

(3) This Section does not apply to a person who

(a) enters premises for a purpose connected with the occupier or any person usually entitled to be on the premises;

(b) has paid a fee for the entry or activity of the person on premises, other than a benefit or payment received by the occupier of the premises from a government or government agency or a non-profit recreation club or association:

(c) is being provided, in exchange for consideration, with living accommodation by the occupier: or

(d) is authorized or permitted by any law to enter or use the premises, for other than recreational purposes, without the consent or permission of the occupiers. 1996. c. 2 7, s. 6.

Independent contractors

8(1) Notwithstanding subsection 4(1), where damage is caused to persons or property on premises solely by the negligence of an independent contractor engaged by the occupier of the premises, the occupier is not on that account liable pursuant to this Act if in all the circumstances,

(a) the occupier exercised reasonable care in the selection of the independent contractor: and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been done.

(2) Subsection (1) does not restrict, modify or deny the liability imposed by any other Act of the Legislature on an occupier of premises for the negligence of independent contractors engaged by the occupier.

(3) Where damage is caused to persons or property on premises by the negligence of an independent contractor engaged by an occupier of the premises and there are two or more occupiers of the premises, subsection (1) applies to each of those occupiers. 1996, c.27. s.8."

A review of these and other Sections contained in the Act tell us that:

- An occupier includes the owner and a person who has responsibility for the property.
- An occupier has a duty to ensure that persons entering the property are reasonably safe.
- In determining whether the duty of care has been met by the occupier, the circumstances of the entry and the age of the person entering the lands, along with other factors, will be considered.
- Risk can be willingly assumed by the person entering the land, in which case the occupier still has an obligation not to create a danger with the deliberate intent of doing harm to that person and not to act with reckless disregard.
- A person who enters the land without permission and for the purpose of committing an offence is deemed to have willingly assumed all risks (but again the occupier is under a duty not to create a danger or to act with reckless disregard).
- The landowner is not necessarily responsible for injury or property damage caused to a third party if such injury or damage is caused solely by the negligence of an independent contractor hired by the property owner.

Land Surveyor Act

Pursuant to Section 30 of the Act, surveyors and their assistants "when engaged in professional land surveying, may enter upon and pass over any land, doing as little damage as possible".

This right is limited to "*active*" members of the Association of Land Surveyors of Nova Scotia. It should be noted that a surveyor is liable for any unnecessary damage.

Expropriation

Expropriation of land or of an interest in land may be carried out by the Provincial or Federal Governments, by municipal units, or by corporations or other bodies which are legally authorized to do so. Most expropriations would occur under the provisions of the Federal and Provincial Expropriation Acts. I n Nova Scotia, most expropriations would occur according to the provisions of the Province's Expropriation Act. This allows the Province. a municipal unit, a village commission, Nova Scotia Power Incorporated and Maritime Telegraph and Telephone Company Limited (the predecessor of Bell Aliant) and certain others to expropriate. However, it is worth noting that if Nova Scotia Power or Bell Aliant wish to expropriate, they need the approval of the Province.

The effect of an expropriation is to take your property from you. Your consent is not required. Once the expropriating authority decides it wants your property, the transfer of title occurs without your signature. Certain documents have to be filed at the Land Registration Office and the transfer of title is then effective. Generally there is no room for argument, except with respect to the compensation you will receive.

It is significant to note that Section 2(1) of the Expropriation Act (Nova Scotia) reads as follows:

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

In other words, the Expropriation Act doesn't purport to limit the right of expropriation; it seems that its primary purpose is to establish rules for compensation. Elsewhere in the Act, the Province is given the right to expropriate for, among other things, any "public work" or for "any purpose that is a public purpose''. As if that weren't broad enough, the Province has the additional authority to create legislation allowing expropriation in particular circumstances.

The landowner is entitled to notice that the Government intends to expropriate his property but, apart from objecting, there is little he can do from a legal perspective to prevent an expropriation. Lobbying may be the most effective tool available to a landowner wishing to challenge the proposed expropriation.

Insofar as compensation is concerned there are certain basic principles:

1. If a family home is expropriated, the homeowner is to be compensated so that he will be substantially in the same position after the expropriation as compared with his position before the expropriation. This is to be interpreted broadly, so that the home owner ends up with "equivalent accommodation''. This degree of protection is not provided to a person whose land is a money asset or investment and not a family home".

2. Although compensation is generally set at the market value of the property, the Nova Scotia Utility and Review Board is not limited to relying upon rea l estate appraisals. It may accept other evidence or methodologies which it considers to be reliable or appropriate towards establishing market value.

3. When only part of an owner's lands are taken compensation may also be claimed for "injurious affection" to the remaining lands, including reduction in their market value. Thus, if only part of your land is taken but your means of access to a public highway is lost as a consequence of the expropriation, you will be able to claim compensation for the reduced value of the remaining land.

4. Landowners whose lands are not taken by way of expropriation, but who suffer loss of property value because of construction activity on nearby expropriated land may also be entitled to compensation. However, homeowners who claimed compensation because of traffic noise on nearby land expropriated for highway purposes were not entitled to compensation because any decrease in the value of their property was as a result of the use of the highway rather than the expropriation of the land and construction of the highway. This is so even though the traffic noise would not have occurred were it not for the expropriation.

Mineral Resources Act

Section 39 provides that: “no mineral right holder . . . shall enter upon . . . private land for the purpose of gaining access to and working the mineral right except with the consent of the owner or tenant or pursuant to Section 100.”

Section 100 provides that where the licence holder is unable to obtain an agreement with the owner, that licence holder may apply to the Minister Hafter notice to the owner or tenant, for a surface rights permit to pass over, enter upon and work such lands".

The Minister, if granting the application, will determine the amount of any compensation to be paid to the owner.

Pursuant to Section 70 a party holding a mineral lease may apply to the Province stating that:

a) It holds a mineral lease granted by the Province.

b) It requires certain land in order to develop a mineral resource. A plan and description of the proposed development must be attached.

c) It is willing to make an arrangement with the landowner for acquisition of the land for a stated price, but the landowner is unwilling to accept the offer.

The Province may grant an Order transferring ownership of the land (or a right or interest in the land) to the applicant. Thus, the landowner loses the land or an interest in the land, by way of expropriation. Compensation will be paid pursuant to the provisions of the Expropriation Act.

It is significant to note that pursuant to Section 4 (1) “all minerals are reserved to the Crown and the Crown owns all minerals in or upon lands in the Province and the right to explore for, work and remove those minerals”.

'The Act indicates that the following materials are not considered to be minerals, and thus by implication title to these materials remains in the landowner:

- ordinary stone, building stone or construction stone;
- sand;
- gravel;
- peat or peat moss;
- ordinary soil;
- gypsum;
- limestone (except limestone which is actually vested in the Crown)
- oil or gas (but see the provisions of the Petroleum Resources Act)

However, the Act reserves under the Crown the right to declare that any of the above are minerals and are thus owned by the Crown.

As a matter of interest, I note that the Crown has an ancient royal prerogative whereby it is entitled to all gold and silver deposits.

Petroleum Resources Act

Despite the fact that oil and gas are excluded from the operation of the Mineral Resources Act, all petroleum located in or under Nova Scotia lands is owned by the Province. While the holder of a petroleum right may not enter lands to explore or develop without the consent of the owner or lawful occupier of the land where such consent cannot be obtained the holder of the petroleum right may apply to the Province for the right of entry. The Province may grant a right of entry and it may order compensation. The Province may do more than just grant a right of entry it is also permitted to expropriate private land for the development of petroleum resources.

Beaches Act

Of course our properties only extend to the high water mark of a tidal area. As well, the Province owns inland bodies of water such as streams, rivers, and lakes.

Pursuant to the Beaches Act, the Province can designate as a beach an area of land which lies inland of the high water mark (tidal waters) including "any lakeshore area declared by [the Province] to be a beach". Such a designation will limit the landowner's right to do as he pleases with the affected land.

Common Law

Over the years, the Courts have established certain restrictions or limits upon what a landowner can do with his/her property. For example, if you conduct an activity which creates a nuisance to your neighbors, this may give the neighbors the right to sue you.

Examples of activities which might be prohibited by common law include:

a) fouling the neighbor's water supply, possibly as a consequence of farming or forestry activities on your own land;

b) creating dust which then blows onto the neighboring property;

c) erection of cables or digging of pits, so as to constitute a hazard to others, including trespassers;

d) interference with natural or pre-existing water drainage, causing flooding of the neighbor's property.

Trespassers

Trespassers are people who enter your lands without your permission, or without authority (for example, under the Angling Act, the Wildlife Act, etc.).

A trespasser can be sued in Supreme Court at common law, or he/she can be charged in Provincial Court under the provisions of the Protection of Property Act if served with notice prior to the act of trespass. However, remember that the Protection of Property Act does not apply to forest land (see earlier discussion of this subject).

As well, a trespasser who is trying to break into your home is guilty of a criminal offence and can be charged accordingly.

Damages

Damages are compensation for loss suffered. For example, if a person drives across your tree plantation and destroys a portion of your crop, you can sue for damages (the value of the lost crop along with restoration costs).

At the other extreme, if the trespasser has simply entered your lands but not caused any loss, he or she may still be guilty of trespassing but the damages are likely to be $ l.00 or some other token amount.