

PRESCRIPTIVE RIGHTS AND POSSESSORY TITLE UNDER LAND TITLES CONVERSION

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Possessory Title And Prescriptive Rights: Legal Basis

The *Real Property Limitations Act* (the "RPLA")² provides, in part, that the registered owner of lands will not assert any claim in possession, or trespass against the party claiming possessory title or a prescriptive right to a right of way or easement following the passage of a prescribed amount of time. In the case of possessory title claims, the period of time is ten years³ and with prescriptive rights (i.e. easements or rights of way) twenty years, with prescriptive rights becoming indefeasible should no claim be brought within forty years of possession.⁴

Possessory Title: The Applicable Law

The leading case setting out the test for establishment of an adverse possession is the 1984 Court of Appeal decision in *Masidon Investments Ltd. v. Ham*.⁵ In that case Blair, J.A. restated the law thus:

It is clear 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.

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² *Real Property Limitations Act*, R.S.O. c. L.15. The "RPLA" is, in fact, the text of Part 1 of the former *Limitations Act*, (also R.S.O. c. L.15) which had been repealed upon the coming into force of the *Limitations Act*, 2002

³ *Ibid.*, s. 4

⁴ *Ibid.*, s. 31.

⁵ *Masidon Investments Ltd. v. Ham* (1984) 45 O.R. (2d) 563 (CA)

The claim will fail unless the claimant meets each of these three tests and time will begin to run against the owner only from the last date when all three of them are satisfied.⁶

Prescriptive Rights: The Applicable Law

Prescriptive rights are distinct from possessory title. Not only do they have different limitation periods under the RPLA, but different tests are required to establish them. The leading Ontario case on prescriptive easements is *Temma Realty Limited v. Ress Enterprises Limited*.⁷ In that case, the court held that in order to establish a claim to an easement under the then *Limitations Act* (the provisions of the RPLA are identical), the owner of the alleged dominant tenement must prove:

use and enjoyment of the way under a claim of right and which was continuous, uninterrupted, open, peaceable, with the knowledge of and without objection of the owner [of the alleged servient tenement].⁸

The use of the right of way must have been for at least twenty years immediately prior to commencing an action to exercise a prescriptive right.⁹

Possessory Title and Prescriptive Rights Under the Land Titles Act

The land title regime under the *Land Titles Act*¹⁰(the "LTA") does not permit the creation of any possessory title or prescriptive rights. Such rights, which had existed at common law and which are contemplated in the registry system governed by the *Registry Act*¹¹ are incompatible with the certified title system under the LTA. Section 51 of the LTA creates the statutory bar in question. That section provides:

⁶ Ibid., at 567. For elaboration on the law respecting each of the three parts of the test, see: Katherine Christie and Karen Yolevski "Possessory Title and Prescriptive Rights Under Land Titles Conversion" presented at Recent Developments in Real Property and Conveyancing Law Ontario Bar Association program held Tuesday January 24,2006.

⁷ *Temma Realty Limited v. Ress Enterprises Limited* [1968] 2 O.R. 293.

⁸ Ibid., at 296

⁹ For further elaboration on the law with respect to prescriptive rights, see: Katherine Christie and Karen Yolevski "Possessory Title and Prescriptive Rights Under Land Titles Conversion, supra note 6.

¹⁰ *Land Titles Act*, R.S.O. 1990, c. L.5

¹¹ *Registry Act*, R.S.O. 1990, c. R. 20

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

Section 51 (1) applies to all land in the land titles system that has been in that system from the date of the Crown Grant or land that has been converted from the registry system, without qualification (i.e. land titles absolute).

With the advent of conversion of lands in the registry system to the land titles system at the instance of the now Ministry of Government Services (the "Ministry")¹² a hybrid land titles system was created: that of land titles conversion qualified ("LTCQ").

On conversion by the Ministry to LTCQ the title that has been converted contains the following notation:

"Subject, on first registration under the Land Titles Act, to:

...the rights of any person who would, but for the Land Titles Act, be entitled to the land or any part of it through length of adverse possession, prescription, misdescription or boundaries settled by convention."

The foregoing notation on title corresponds, at least with respect to claims of adverse possession, to subsection 51(2) of the LTA, which provides:

51(2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place.

Notwithstanding that the LTCQ lands are in the land titles system, certain rights that were in existence in the registry system are preserved. The question is what rights and for how long? As the RPLA extinguishes title of a registered owner after the running of a statutory period, how do the relevant provisions of the LTA and the RPLA interplay?

¹² Formerly Ministry of Consumer and Business Services and prior to that the Ministry of Commercial and Consumer Relations.

Caselaw Considering Adverse Possession/Prescriptive Rights under the LTA

Section 51 of the LTA has, as of April 21, 2006, been considered in four recent decisions of what is now the Superior Court of Justice.

The first of these cases is the 1998 judgment of McCartney J. in *Cates v. Salamon*.¹³ It was decided primarily based on reasons not germane to this paper, but does address application of section 51. In that case, the plaintiff sought to have an access road used to access her property over the property of the defendant declared an access road under the Road Access Act¹⁴, or alternatively, a right of way, by prescription (or otherwise). The plaintiff had acquired her lands in October 1986, with an access road having been put in some "two to three years later". At the time she took title to her lands, they were already in the Land Titles System. His Honour found that

"... the evidence [did] not disclose any pre-existing right of way, i.e. pre-existing the date the property was registered under the Land Titles System, and so no right of way by adverse possession has been established.

From the facts of this case, it is not clear if the lands were in LTCQ, however, it was immaterial, as the lands were in Land Titles (of some sort) at all relevant times, precluding any claim under the RPLA (or its predecessor).

The first of these cases to expressly deal with LTCQ is the 2002 judgment of Madam Justice Metivier in *Carrozzi v. Guo*.¹⁵ Her Honour was faced with the following fact situation. Carrozzi purchased a property in 1986. The adjoining property was purchased by Guo in 1992. Since at least 1983 a chain link fence existed just inside the property line, on Carrozzi's property. The foundation and eaves of the house on Guo's property encroached on Carrozzi's property. Surveys prepared throughout the period correctly located the fence on Carrozzi's property. Both parties gave evidence that they believed the fence marked the property line until 2000. Guo maintained an action for adverse possession. Her Honour held:

"...that at least ten years of occupation had elapsed before the Land Titles Registration System came into being and that Mr. Guo had

¹³ *Cates v. Salamon* [1998] O.J. No. 3060 (Gen. Div.)

¹⁴ *Road Access Act*, R.S.O. 1980 c. R.34

¹⁵ *Carrozzi v. Guo* [2002] O.J. No. 3629 (S.C.J.)

made out his claim for adverse possession by meeting all four of the tests..."¹⁶

Crucial to Metivier J.'s decision was the fact that the rights of Mr. Guo were in existence at the time of first registration of the lands in Land Titles, in 1996.¹⁷ Her Honour came to the conclusion that in order for a party to claim entitlement to ownership by way of adverse possession in lands that have been converted to LTCQ, the limitation period for the claims against parties against those asserting adverse possession, being ten years, would have to have passed prior to the date of conversion into LTCQ.

In *Morray Investments Limited et al. v. Zerwas et al.* [2003] O.J. No. 3389, the plaintiffs were owners of fourteen abutting properties on Eglinton Avenue in the City of Toronto, constituting a strip mall of retail stores built in 1959. In 1973 the defendants, resident abroad, purchased a building built in 1971 and 1972, abutting the plaintiffs' lands. At the rear of the defendants' property, there was an access route to and from a street to the rear of the plaintiffs' property. In 1995 the lands were converted to LTCQ. In the fall of 1996, the defendants acquired actual notice that tenants of the plaintiffs were using the access route to the street located to the rear of the plaintiff's property. In 1998, the defendants built a chain link fence along the boundary of the property, leaving an opening for the access route. In March 1999, the defendants contacted the plaintiffs and contested the use of the access route. In the fall of 1999, the defendants erected but left open a gate for the access route. In February 2001, the defendants threatened to lock the gate unless the plaintiffs agreed on a usage fee. In the absence of an agreement, in April 2001, the defendants locked the gate. In November 2001, the plaintiffs sued for declaration of an easement by prescriptive right under the relevant provisions of the RPLA over the access route.

Cameron J. held:

"...each of the plaintiffs must establish that they had acquired a prescriptive easement of at least twenty years by the date of first registration under the LTA, namely June 5, 1995.

There must be clear evidence of continuous, open, uninterrupted and peaceful use of the defendants lands for a period of twenty

¹⁶ Ibid at par. 62

¹⁷ Ibid at par. 24

years commencing not later than June 5, 1975, twenty years prior to the first registration under the LTA.”¹⁸

Cameron J. therefore formed the same opinion with respect to prescriptive right claims under LTCQ as did Metivier J. in respect of adverse possession claims. Any rights that may have existed under the *Registry Act* and the RPLA must have “crystallized” prior to the date of conversion to LTCQ.

The third and most recent case to consider adverse possession in the context of LTCQ is that of *Wigle v. Vanderkruk*,¹⁹ a decision of C.R. Harris J. In that case, Wigle brought an action for damages resulting from encroachment on her property by the defendant Vanderkruk. Vanderkruk counterclaimed seeking, *inter alia*, adverse possession. Vanderkruk had purchased a part of the land owned by Wigle. He constructed structures on his property to grow plant products. The structures installed at some point following acquisition of title to his property encroached onto Wigle’s property, ultimately using about 40% of the Wigle lands. Prior to the encroachment, Vanderkruk had been made aware of the proper boundary bars. The survey bars could not, however, later be relocated. Vanderkruk had rejected his solicitor’s counsel to obtain a survey. In 2001, Wigle noticed the encroachment. The lands had been converted to LTCQ in 1996.

C.R. Harris J. found that the claim of Vanderkruk’s title by adverse possession was unfounded for reasons other than those that are the subject matter this paper. He did observe, in obiter, that Vanderkruk had acquired the property in 1988, less than 8 years prior to conversion of the land to the land title system.²⁰ In fact, adverse possession could only have been claimed from 1993, when the structures erected by Vanderkruk started being located on Wigle’s land.²¹

While C.R. Harris J. did make reference to Cameron’s decision in *Morray Investments*, it was only in the context of using the earlier decision as support for the proposition that the fact that lands are converted into the land titles system by LTCQ rather than land titles absolute should have no bearing on the cessation of any prescriptive claim. Other than that one reference, none of the four cases make reference to any of the others, on point.

¹⁸ *Morray Investments Limited et al. v. Zerwas et al.* [2003] O.J. No. 3389 (S.C.J.) at par. 39

¹⁹ *Wigle v. Vanderkruk* [2005] O.J. No. 3032 (S.C.J.)

²⁰ *Ibid* at par. 107.

²¹ *Ibid* at par. 105.

Case Critique by Christie and Yolevski

In their paper "Possessory Title and Prescriptive Rights under Lands Titles Conversion",²² the authors take the position that the language of subsection 51(2) of the LTA and of the qualifier in the title in all LTCQ properties has the effect of preserving any claim for adverse possession or prescriptive rights beyond the date of conversion into LTCQ. So long as rights had come into existence prior to conversion (i.e. the "clock" established under the RPLA had started running prior to the conversion into LTCQ) the party making the claim that would have existed, but for conversion into Land Titles will be permitted to make such claim.

They posit that:

On conversion, it is arguable that whatever existing possessory rights are in existence, whether greater or less than ten years duration, are preserved as a result of subsection 51(2) and the inclusion of the above notation in the Parcel Register, regardless of the date of conversion. Those rights then continue to exist until such time as the registered owner takes action to reassert his or her rights prior to the running of the statutory period, or risks losing title to the possessed portion of the property if action is not taken within the statutory period.²³

The foregoing position is one not supported by the case law reviewed above. Rather, it is a position taken from a review of the language of the LTA and the standard notation on title, when read in the context of the case law the relevant portions of the RPLA. The time period to establish the right having commenced,²⁴ the LTA will not prejudice a claim in respect of possession of any other person who was in possession of the land at the time when registration under LTCQ took place.²⁵ While there may be some justification for this position, from a reading of the legislation and the prescribed notation on the parcel register, with respect, it disregards not only the precedent that has emerged to date, but also the spirit in which that legislation has been interpreted by the courts. As noted by C.R. Harris J. "Adverse possession is an anachronistic doctrine in our

²² Katherine Christie and Karen Yolevski, *supra*

²³ *Supra* at p.8

²⁴ *Supra* at pp. 3 and 6

²⁵ subsection 51(2) of the LTA.

law with decreasing relevance given modern survey procedures, registration and the Land Titles Act".²⁶

One should also take into account the recent decision of the Court of Appeal in *1387881 Ontario Inc. v. Ramsay*. At paragraph 37, the court quoted approvingly from Maxwell on Interpretation of Statutes:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts."²⁷

In that case the Court of Appeal considered the impact of an amendment to the *Registry Act* and its effect on owners of rights of way. They upheld a strict interpretation of legislation so as to keep alive interests registered on title that might not otherwise have appeared within a 40-year search of title.

Were one to apply similar principles of interpretation to adverse possession or prescriptive rights claims, one could argue that the rights being encroached are either those of the person registered as first owner under the LTA or those of the person asserting a claim under the RPLA. I submit that it is the former whose rights should not be unduly encroached. Lands throughout the province are being converted to the Land Titles System. In the foreseeable future, rights under ss. 4 and 31 of the RPLA

Applying a similar interpretation to the notation in the parcel register one notes that it preserves

"...the rights of any person who would, but for the Land Titles Act, be entitled to the land or any part of it through length of adverse possession, prescription, misdescription or boundaries settled by convention"

It is my contention that the party seeking to assert a right adverse to the interest of the registered title holder, would have been entitled, but for the fact that the LTA then applied (effective at conversion to LTCQ), to possession, which possession could not have been disputed, at the time of conversion, by the registered owner. The party asserting the adverse claim must have been *entitled* to maintain that claim at the time of conversion. Such entitlement must surely be meant to be no longer subject to challenge. They would not otherwise *be entitled* to the land,

²⁶ *Wigle v. Vanderkruk*, supra at par. 108

²⁷ *1387881 Ontario Inc. v. Ramsay* (2005), 77 O.R. (3d) 666 (C.A.) at 677

but rather, *claiming entitlement*, subject always to the registered landholder's interest.

Similarly, subsection 51(2) of the LTA, which, notably, makes no reference to prescriptive rights and, therefore, applying a strict interpretation of the statute, cannot be relied on by a party claiming same, provides:

51(2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place.

While this subsection preserves the adverse possession claim of a person in possession of land at the time of conversion to land titles, it applies to the "adverse claim in respect of length of possession" that existed at the time of conversion into LTCQ. Furthermore, the rights preserved are only in respect of a *person registered as first owner of land with a possessory title only*. A person who is not already registered as such would appear to be without any remedy under subsection 51(2).

The limited sub-group of persons actually registered with possessory title who would benefit from application of subsection 51(2) may still be subject to challenge by a first owner of the lands who would have been able to resist the possessory claim at the time immediately prior to conversion into LTCQ. Thereafter, subsection 51(1) ought to apply,

"...no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired thereafter or be deemed to have been acquired heretofore by any length of possession or be prescription...".

Conclusion

While the law has been applied consistently in the few reported cases on point, that adverse possession or prescriptive rights claims must have "crystallised" prior to conversion to LTCQ, judicial pronouncements have been sporadic, at best.

Notwithstanding the foregoing, or perhaps as a result of it, in the absence of a determinative precedent from an appellate court, whether or not in agreement with them, it may be prudent to follow the counsel of Christie and Yolevski. The authors conclude their paper as follows:

“When acting on the purchase of LTCQ parcels, the practice has grown to request declarations of possession from the Vendor covering the period up to the date of conversion. Given the present state of the law in my opinion this would be a prudent practice to continue when dealing with LTCQ properties. In this way potential possessory or prescriptive rights can be identified and dealt with to the same extent that might be when dealing with lands under the Registry System. Lawyers should also continue to recommend to the purchaser clients that they obtain up-to-date survey and explain the importance of the survey in revealing the title “on the ground”.”

While prudent, the advice to commission surveys is one that will not often be followed, often for reasons of cost or impracticality. In this era title of insurance and of clients’ expectations of closings within weeks of entering agreements of purchase and sale, obtaining new surveys is an exceptionally rare occurrence. As for seeking declarations of possession, paragraph 12 of the CCLA’s recommended form of Vendor’s Closing Certificate (“VCC”) would appear to address issues identified from a review of a survey (past or current). Solicitors should be more vigilant, when acting for purchasers, in ensuring that a survey is attached to the VCC and that the contents of the completed paragraph 12 are made known the purchasers’ solicitor earlier than on the afternoon of closing, as is often the case.

Perhaps the most prudent course of action, although one offered with tongue planted firmly in cheek, is to not accept retainers in files involving LTCQ parcels, for at least ten, if not twenty, years following conversion.