DELCARATIONS OF POSSESSION

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OBA Institute 2017

Introduction

Possessory title and prescriptive rights are concepts that linger in Ontario. Possessory title and prescriptive rights do not attach to land registered under the *Land Titles Act* (the "LTA")[2] While nearly all[3] of the province is now registered under the LTA, some tracts remain under the *Registry Act*[4] . These properties are typically called "non-converts". Rights also persist amongst those properties that have been converted administratively to the land titles system and continue to be registered as "land titles conversion qualified" ("LTCQ") under s. 46 of the LTA. As possessory or prescriptive rights persist, a document that would otherwise have long gone the way of the dodo continues to have practical application: the declaration of possession.

What is a Declaration of Possession?

A declaration of possession is a sworn or affirmed statement given as evidence in real property transactions (typically a sale or mortgage). The party giving the declaration is stating that during their period of ownership, their possession has been undisturbed by claims of possession adverse to the interest of the declarant or claims of prescriptive easements by third parties, except as set out in the declaration. They may also contain evidence of assertion of such claims as against real property other than the subject property.

Solicitors acting in transactions involving potential adverse or prescriptive claims, where land is, or was, in registry, typically seek declarations from people who can give evidence

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[2] *Land Titles Act*, R.S.O. 1990 c. L.5
[3] 99.9%, according to Teranet - http://www.teranet.ca/land-registration-system-ontario?popup=1
[4] *Registry Act*, R.S.O. 1990, c. R. 20

of matters for the entire period that is necessary to establish such adverse claims. Such a period can run for as long as twenty years prior to the date of conversion of the subject land into LTCQ, which started occurring in Middlesex County in December, 1989.Simply obtaining declarations of possession, without due consideration to their content, is not sufficient. Nor, is getting them, where clearly not warranted, appropriate.

Adverse Possession

Lands registered under the *Registry Act* are subject to claims against their title by anyone who possesses them for a long enough period, despite the fact that the land may rightfully be owned at the time by someone else. In other words, adverse possession, if allowed to continue long enough, can dispossess the owner of his or her land. The length of time required for this right to accrue, or period of possession, is laid out in s. 4 of the *Real Property Limitations Act* ("RPLA")[5]. Containing language which traces its roots to the English Statute of Limitations of 1623, it provides:

> **4.** No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten 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 the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten 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 it.

If a party has had possession of a property for the prescribed period of ten years, the dispossessed owner is thereafter estopped from bringing an action to recover possession. This is called possessory title. Courts have over the years (there having been many since the first passage of the 1623 legislation) elaborated upon what must be done to dispossess the rightful owner of the land.

[5] *Real Property Limitations Act*, R.S.O. 1990 c. L.15

The Court of Appeal, in *McClatchie v. Rideau Lakes (Township)* succinctly summarized the test to establish adverse possession thusly:

> To establish actual possession, the acts of possession must be "open, notorious, peaceful, adverse, exclusive, actual and continuous": *Teis v. Ancaster (Town)* (1997), 1997 CanLII 1688 (ON CA), 35 O.R. (3d) 216 (C.A.), at p. 221. If any one of these elements is missing at any time during the statutory ten-year period, the claim for possessory title will fail: *Teis,* at p. 221.*Teis v. Ancaster (Town of),* 1997 CanLII 1688 (ON CA)[6]

A particularly well written overview of the law of adverse possession can also be found in the 2007 decision of Justice Perell in *Mueller v. Lee*.[7]

Prescriptive Easements

Prescriptive easements are distinct from possessory title. Not only do they have different limitation periods under the RPLA, but different tests are required to establish them.

> To establish a prescriptive easement of either kind, the user must first meet the four essential characteristics of an easement at common law, namely:
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> (a) there must be a dominant and servient tenement;
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> (b) an easement must accommodate the dominant tenement;
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> (c) the dominant and servient owners must be different persons; and
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> (d) a right must be capable of forming the subject matter of a grant.[8]

The Court of Appeal in *McClatchie* went on to find:

> [28] In addition, for an easement to be created by prescription, the user of the alleged right (for the applicable time period) must be shown to have been (i) continuous and (ii) "as of right".

[6] McClatchie v. Rideau Lakes (Township), 2015 ONCA 233 (CanLII), para. 11

[7] *Mueller v. Lee*, 2007 CanLII 23914 (ON SC)

[8] Kaminskas v. Storm, 2009 ONCA 318 (CanLII), para 27

…

[30] User "as of right" means that the use has been uninterrupted, open, peaceful and without permission for the relevant period of time. It is often described using the Latin maxim nec vi, nec clam, nec precario (i.e., without force, without secrecy and without "precario"). "Precario" in this sense is taken to mean "[t]hat which depends not on right, but on the will of another person": Burrows v. Lang, [1901] 2 Ch. 502 (Ch. Div.), at p. 510, cited in Jonathan Gaunt, Q.C., and Paul Morgan, Q.C., Gale on Easements, 17th ed. (London: Sweet & Maxwell, 2002), at para. 4-82. Nec precario, therefore, means "without permission".

The Current State of the Law

As was succinctly put by the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*[9] :

> In Ontario, a prescriptive easement can only be created over lands governed by the Registry Act, R.S.O. 1990, c. R.20, because s. 51(1) of the Land Titles Act prevents the maturing of claims for adverse possession and for prescriptive easements once a property is transferred into the land titles system.

Those rights which had existed at common law and which are contemplated in the registry system governed by the *Registry Act* are incompatible with the certified title system under the LTA. The relevant provision of the LTA provides:

> 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.

[9] *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, affd on other grounds by the SCC in *Hryniak v. Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 (CanLII)

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"), a hybrid land titles system was created: that of LTCQ.

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

> "Subject, on first registration under the Land Titles Act, to:
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> …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."[10]

This notation flows from s-s. 44(1) of the LTA, which provides:

> 44. (1) All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:

The rationale for the notation is summarised in Bulletin 2008-05 of the Director of Titles:

> There is no survey of the property; no notice is served on interested parties and some issues that can be dealt with in a First Application such as adverse possession, cannot be dealt with. As a result, the land registration system brings the land into Land Titles with additional qualifiers to those listed in Section 44 of the Land Titles Act added to the parcel.[11]

Notwithstanding that the LTCQ lands are in the land titles system, certain rights that were in existence in the registry system are preserved. For the purposes of this paper, suffice

[10] See – Land Titles Conversion Qualified (LTCQ) to Land Titles Plus (LTplus) – Client Guide
[11] Land Titles Act – Director of Titles Bulletin 2008-05

it to say that any rights that had accrued to parties either due to adverse possession or prescription became crystallised, as of the date of conversion to LTCQ. The relevant dates for calculation of limitation period under the RPLA is ten or twenty years (as may be applicable) before the date of conversion into LTCQ.[12]

Declarations of Possession

The declaration of possession is not some generic document to be signed in response to a “sign here” presentation. Rather, it is a sworn or affirmed declaration of a vendor given in response to a requisition by the purchaser’s solicitor. Declaring false statements in such a declaration could have dire consequences, both for the purchaser who relies on them and the vendor, who should have known better.

The leading case on this point is *Hanisch v. McKean*[13], a 2014 Ontario Court of Appeal decision. Justice Simmons, for a unanimous court, found at paragraphs 47 and 49:

> [47] The appellant therefore knew, or, at the very least, ought to have known, that his representation to the contrary, in a statutory declaration executed under oath, was false. In swearing the statutory declaration in the face of the knowledge, and in failing to consult with his long-time lawyer about the shared waterline, the appellant failed to exercise the reasonable care that the circumstances demanded. The trial judge was entitled to so find.
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> …
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> [49] … The appellant acted negligently in delivering a false statutory declaration on closing. Moreover, he delivered the false statutory declaration in response to a requisition from the respondent – a requisition that was contemplated by the agreement of purchase and sale.

A properly drafted and duly considered declaration of possession can also serve to protect the declarant in any subsequent action seeking to lessen its evidentiary impact.

[12] *Morray Investments Ltd. v. Zerwas*, 2003 CanLII 12138 (ON SC)

[13] *Hanisch v. McKean*, 2014 ONCA 698

In the 1996 decision in *Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd,*[14] a declaration of possession contained reference to lands being subject to a "gravel pit agreement". The declaration did not provide details of the agreement in question. There was evidence that the declaration of possession was considered by both the receiving party's counsel and the receiving party itself. The declaration was found to constitute actual notice of an agreement that was not registered on title. This finding of actual notice meant that an agreement prejudicial to the receiving party bound it, notwithstanding that the receiving party's interest, being a mortgage, was shown on title to be subject to no such prior encumbrance.

As a sworn or affirmed document, courts will give weight to a declaration that might not be of the best calibre. In *Bialkowski v. Cowling*[15], MacDougall J. found that a declaration containing hearsay evidence as to use by the declarant's uncle was considered reliable owing to it having been sworn, notwithstanding that it could not be tested under cross-examination, the declarant having since died.

An Example from Personal Experience

By a deed dated September 24, 2001, registered on September 25, 2001 as instrument 315008, David and Victoria McClatchie (the parties to the above-referenced Court of Appeal proceeding) took title to lot 16 on plan 198 in the Township of Rideau Lakes, County of Leeds. The deed described the lands as being:

Together with a right-of-way over Part of Lot 21, Concession 5, designated as Part 2 on Reference Plan 28R2383 & Part of Lot 20, Concession 5, designated as Parts 3 & 4 on Plan 28R9462 & Part of Lot 20, Concession 5, designated as Part 3 on Plan 28R3361.

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[14] Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd, 1996 CanLII 8007 (ON SC) affd 1998 CanLII 17692 (ON CA)

[15] Urszula Bialkowski v. Sean Paul Ronald Cowling, 2015 ONSC 1744 (CanLII)

The “together with” interest was reflective of a declaration of possession of the transferor in the above deed, which declaration was registered as instrument 315007. The declaration read as follows:

I, DEBORAH FAYE, of the City of Brockville, in the County of Leeds, DO SOLEMNLY DECLARE:

1. I am the absolute owner of the above mentioned lands and either personally or by my tenants have been in actual, peaceable, continuous, exclusive, open, undisturbed and undisputed possession and occupation thereof, and of the house and other buildings used in connection therewith throughout my period of ownership of the property.

2. I am not aware of any person or corporations having any claim or interest in the said lands or any part thereof adverse to or inconsistent with registered title and are positive that none exists.

3. That possession and occupation of the above mentioned lands has been undisturbed throughout by any action, suit or other proceedings or adverse possession and occupation on the part of any person whomsoever and during such possession and occupation, no payment has ever been made or acknowledgement of title given by the undersigned, or, so far as I know, by anyone else, to any person in respect of any right, title, interest, or claim upon the said lands.

4. To the best of my knowledge and belief the buildings used in connection with the premises are situate wholly within the limits of the lands above described, and there is no dispute as to the boundaries of the said lands. I have never heard of any claim of easement affecting the lands, either for light, drainage, or right-of-way or otherwise.

5. I do not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment with respect to any land abutting the lands being conveyed in the subject transaction.

6. I am not a non-resident of Canada within the meaning of Section 116 of the Income Tax Act (Canada) and nor will I be non-resident of Canada at the time of closing.

7. Within the meaning of the Family Law Act (Ontario):

I am not a spouse.

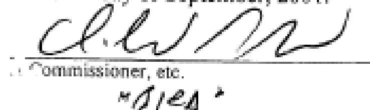
8. Deborah Faye is one and the same person as Deborarh Fay Banford as in Instrument No. 256606.

9 Throughout my possession and occupation of the Lands, I have used the right-of-way designated as Parts 2, 3 and 4, Plan 28R-9462 and Part 2, Plan 28R-2363 and Part 3, Plan 28R-3361. Throughout my possession and occupation of the lands, the right-of-way has been used openly since I acquired the property on September 14, 1982 by Instrument No. 132899.

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

DECLARED before me at the City of Brockville, in the County of Leeds, this 24th day of September, 2001.

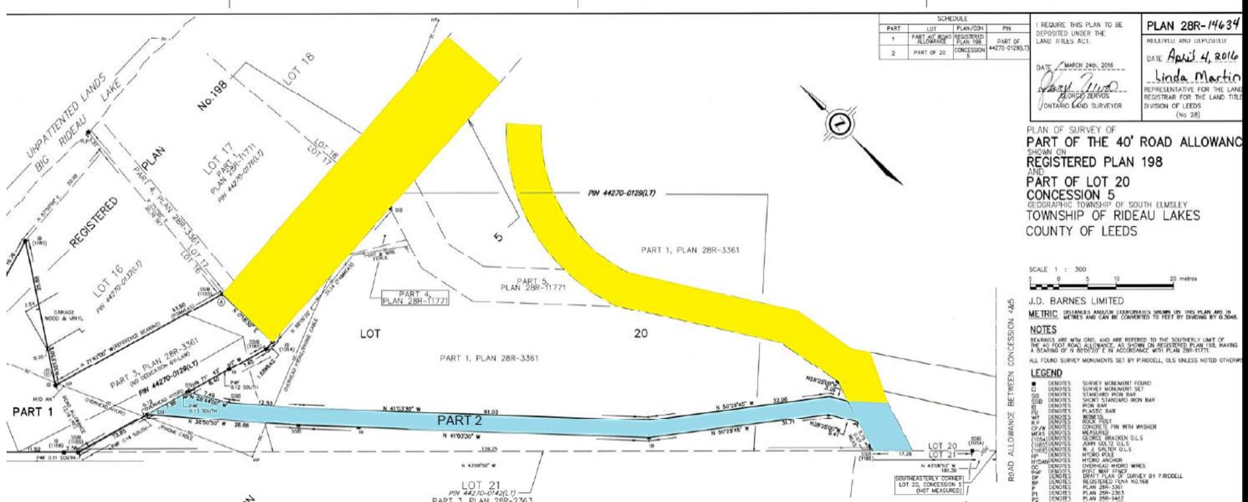
DEBORAH FAYE



A Commissioner, etc.

The right-of-way described in paragraph 9 of the declaration was in fact the description contained in the requisition letter prepared by the McClatchies' solicitor and was copied verbatim into the above document, without consideration of the actually travelled route. The declarant did not have an opportunity to review the reference plans referred to in the declaration, prior to signing it.[16]

In fact, the means of access were not as described in the declaration of possession. The actual route travelled to access the subject property is shown as part 2 on plan 28R-14634. On the sketch below (being a marked up copy of plan 28R-14634), is the actual travelled route, shown in a more or less horizontal path, marked in light blue. Also marked on the sketch, in yellow, is the route declared in instrument 315007 to be the means of access to lot 16.



Needless to say, the owner of the lands where the travelled route is located was not particularly co-operative and only agreed to the continued use of that route by Mr. and Ms. McClatchie upon payment of periodic sums and compliance with other conditions, which the McClatchies were not keen on doing.

The matter found its way to court.[17] Justice Kane found, as a matter of fact, at paragraph 103, that:

> Access to Lot 16-198 over [the parts marked in light blue – above] since 1980 was obvious to everyone. The statutory declaration relied upon on the plaintiffs' closing inaccurately describes the access exercised since at least 1980. Actual access to Lot 16-198 was over

[16] McClatchie v. Rideau Lakes (Township) 2014 ONSC 811 (CanLII), para 110
[17] Ibid para. 103

> [the parts marked in light blue] and not as described in the declaration signed by Ms. Banford [alias Deborah Faye].

Justice Kane went on to comment, at paragraph 106 that:

> The conduct by the two law firms explains how the McClatchies now find their title and investment under the cloud and attack of Mr. Churchill.

The purchase by the McClatchies was title insured. The litigation that ensued was underwritten by the title insurer. Presumably owing to the waiver of subrogation typically incorporated into title insurance policies so as to eliminate the requirement to collection the real property transaction levy surcharge, there is no record of any action having been brought against any of the solicitors involved in the transaction.

<u>Conclusion</u>

A declaration of possession is a powerful tool available to solicitors acting in the area or real property law. Care should be used. Calling for one where they are clearly not required, particularly in the case of lands that are registered under land titles absolute, can be embarrassing or a sign of sloppy drafting. Overuse of the declaration of possession, where it is not called for, invites treatment of the document of a standard form of document, to be dealt with quickly and without due consideration of its contents or ramifications.

Further, due consideration must be given to the contents of the declaration. This consideration must be given, both by the parties drafting and signing the declaration, to ensure accuracy, and by the receiving party, to ensure that the import of its contents is properly considered.