LAND TITLES ACT APPLICATIONS

EMERGING ISSUES IN REAL ESTATE

Presented by:

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INTRODUCTION

This paper addresses the means by which a property owner may make application to convert the title of the property from either Registry to Land Titles Absolute (LTA) or from Land Titles Conversion Qualified (LTCQ) to Land Titles Absolute Plus (LTA+), thereby providing the land owner with arguably the highest form of title available in the province. The main reasons why an owner would want to make such application would be in order to:

1. Register a plan of subdivision or condominium against the lands (as is required pursuant to the Land Titles Act, Section 144(1));
2. Consolidate a Registry or LTCQ parcel with a LTA parcel;
3. Address and finalize mature claims for adverse possession and resolve title disputes; and/or
4. Satisfy the needs of a third party lender or purchaser making a requisition for the completion of such an application.

There are helpful but somewhat outdated client guides and checklists available from the Government of Ontario website (wwww.ontario.ca – search "Ontario Land Registration Client Guides") to assist with Land Titles Applications. As the First Registration forms have recently been amended, it is expected that the client guides will be replaced in the near future. In the meantime, although the guides are useful, updated forms should be sought out from the Province of Ontario web site and confirmed in the Regulations.

HISTORY

In order to understand the nature and purpose of the current Land Titles Applications, it is helpful to understand the history of the land registry systems in Ontario and the eventual merger and automation of these systems.

The Province of Ontario is the first jurisdiction in the world to provide electronic registration of land related documents under a system called the Province of Ontario Land Registration and Information System (POLARIS). In order to move towards an electronic registration system, all land related documents were automated in all 54 land registry offices across Ontario and are now stored in three databases: one that contains the title database with abstracts of title information; a second that contains maps that depict approximately 5.7 million land parcels in the province and; a third separate database of digitized copies of instruments.

As part of the automation process, it was necessary to take steps to move all properties registered under the registry system, and governed by the *Registry Act*, R.S.O. 1990, as amended ("Registry Act") to the newer land titles system where under the *Land Titles Act*, R.S.O., 1990, as amended ("Land Titles Act") the Province of Ontario guarantees ownership and title to property, subject to certain exemptions. The automation of the records and conversion of the registry system lands to land titles has been undertaken by the private sector electronic service delivery provider, Teranet Inc. and the Province of Ontario in accordance with rules developed by the Province.

REGISTRY

The land registration system originally created in Ontario was a notice based system where individuals and corporations would register instruments to record their

interests in land in a public forum. Most land in Southern Ontario settled after 1795 was entered into the registry system. The registry system provided a manner by which to establish the priorities of the various registrations on title. However, documents were not specifically reviewed by the government for accuracy or content and lawyers were required to review title and the instruments to confirm the legitimacy of the documents recorded and to provide opinions on priorities and ownership. A notice registered in registry was not deemed conclusive evidence of the information contained in the document.

Documents that continue to be registered in the Registry System are governed by the *Registry Act*, R.S.O. 1990, as amended, ("Registry Act").

LAND TITLES

The *Land Titles Act*, R.S.O. 1990, as amended, ("LTA") governs the land titles system of land registration and provides a system whereby the documents are reviewed for legal effect and confirms the legal ownership prior to the transfer of title rights from one party to another. Lands in Northern Ontario, settled after 1885, were immediately placed into the land titles system as opposed to the registry system.

In land titles, each separately owned piece of land is a parcel and each parcel has a number registered in a book or electronically registered in the parcel register. Each parcel page shows the registered owner and the encumbrances. Prior documents are ruled off (in the book system) or deleted (in the current electronic system). As the province guarantees ownership, there is no ability for any party to acquire possession or ownership to any lands in land titles through adverse possession.

Every document which purports to create, transfer or end an interest in land is an "application" to amend the registered title. The land registrar may refuse a registration of a document. When a document is reviewed, approved and accepted by the land registrar, it is certified.

LAND TITLES ABSOLUTE

To begin the automation of the land registry system in Ontario, parcels which were originally in land titles became registered as Land Titles Absolute through a First Application process completed by the Ministry. Land Titles Absolute parcels remain subject to various qualifiers as set out in the Land Titles Act, Section 44(1) (see Appendix "A").

It should be noted that violations under the *Planning Act,* R.S.O. 1990, as amended, ("Planning Act") were not searched for or forgiven in this process and unless an exemption is noted on the parcel register, title in Land Titles Absolute is subject to the Planning Act and the adjoining lands must be checked back to June 15, 1967 or June 27, 1970, as applicable.

ADMINISTRATIVE CONVERSION FROM REGISTRY TO LAND TITLES

The *Land Registration Reform Act*, R.S.O. 1990, ("LRRA") as amended, authorized that properties governed by both the Registry Act and the Land Titles Act could be automated. Beginning in 1999, all remaining registry system records were parcelized and converted to the land titles system. Each parcel of land was assigned a property identifier and was entered into the automated system. The administrative conversion of all lands from registry to LTCQ is authorized under the Land Titles Act, Section 32 which provides that a land registrar under the direction of the Director of

Titles may register in the land titles division any lands to which the Registry Act applies and that the registration of such lands within land titles may be qualified.

During administrative conversion, most registry records were converted to land titles and all active interests were brought forward and recorded on the parcel register. The land registry offices carried out searches and examined all records in relation to compliance with the Planning Act, dower rights, succession duties and escheats. Because the process did not involve the owner of the property, a review of the survey of the land, or notice to interested parties, the title to the land was converted to land titles, but remained "qualified" by the Land Titles Act, Section 44(1), with the exception of and subject to the following as are set out on each parcel register:

Qualifiers:

Subject, on First Registration Under the Land Titles Act, to:

- Subsection 44(1) of the Land Titles Act, except paragraph 11, paragraph 14, provincial succession duties and escheats or forfeiture to the Crown.
- 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.
- Any lease to which s. 70(2) of the Registry Act applies.

As a result of these qualifiers, parcels administratively converted provide certain guarantees that are not available to lands that have been converted to Land Titles Absolute. These include:

1. A guarantee against Planning Act contravention up to the time the parcel is issued (paragraph 11);

2. A guarantee against dower (paragraph 14); and

3. A guarantee against succession duty and previous corporate escheats or forfeitures to the Crown.

It should be noted that the guarantee against Planning Act contraventions is only up to the date of the conversion to LTCQ and therefore Planning Act searches from that date need to be conducted. Because of the guarantees against dower, succession duty, previous corporate escheats or forfeitures to the Crown, searches behind the record do not need to be undertaken, however, status searches on corporate owners from the date of conversion would be required.

As a result, LTCQ title is more guaranteed than title in LTA Title where subsection 44(1) is concerned, but is less guaranteed than LTA Title where mature adverse possessory claims or subsection 70 (2) Registry Act searches are concerned. In addition, Land Titles Absolute (LTA) parcels do not provide any Planning Act assurances.

REGISTRY NON-CONVERT

There continue to be some properties that have not been converted from Registry to LTCQ due to a deficiency in title such as: the identity and ownership of the property cannot be guaranteed; apparent Planning Act contravention; invalid power of sale; and description problems. In these cases, a complete 40 year load of instruments is available in the automated system but the lands remain in registry and therefore governed by the Registry Act. The Registry Office will generally have a file describing the nature of the problems uncovered during automation that have prevented the lands from being

administratively converted and it may be possible to make an application to the Land Registrar in order to deal with the deficiencies and convert the title to LTCQ. This is highly desirable if the lands need to be converted to LTA as the Application to convert the title to the lands from LTCQ to LTA+ is significantly less cumbersome than making a First Application from Registry to LTA.

Generally, in order to bring the title from a Registry Non-Convert to LTCQ, a Deposit under the Registry Act, Section 107, will have to be made, with a solicitor's affidavit in support of the Deposit setting out the following:

1. confirmation that a full search of the property has been undertaken and a listing of all title deficiencies discovered;

2. an explanation of how the deficiencies were rectified by registering or depositing additional information;

3. unequivocal statements that there have been no violations of the Planning Act;

4. the name of the registered owners and their capacity based on registered ownership documents;

5. a full legal description including easements; and

6. a list of documents and interests that the property subject to and documents to be brought forward.

If the procedure is not sufficient to cure the apparent defect or deficiency, a First Application will have to be made. For further information pertaining to Non-Converts, refer to Bulletin No. 2004-02.

PARCELIZED DAY FORWARD REGISTRY (PDFR)

Some lands could simply not be converted at all and remain in registry as Parcelized Day Forward Registry (PDRF). These properties are entered into the parcel register but will only bring forward the last apparent change of ownership document into

the automated system. Instruments registered prior to that change of ownership need to be searched in the paper index. Instruments registered after are available for viewing in the automated system.

APPLICATIONS FOR LAND TITLES ABSOLUTE

All applications for Land Titles Absolute must now be made under the *Land Titles Act* as either:

a) a First Application for land remaining in Registry, which will convert the lands to LTA, subject to the qualifiers as set out in the Land Titles Act, Subsection 44(1), unless otherwise noticed on the parcel register ("First Application"); or

b) an Application for Absolute Title Plus for lands that have been administratively converted to LTCQ or brought into LTCQ by application ("Land Titles Plus Application").

Although the First Application is a bit more cumbersome as it requires the Applicant to prove title to the lands from the crown grant, there are many similarities between the two processes that can be generalized. Prior to commencing either form of application, a thorough search of the lands and the adjoining lands must be undertaken and all obvious title issues need to be resolved and parties who have an interest in the lands need to be identified on the draft Reference Plan.

Basic process for each form of application is the same:

1. Obtain a draft Reference Plan;

2. Give notice to all adjoining land owners and those parties who appear to have an interest in the lands and provide a thirty (30) day period by which valid objections can be submitted;
3. Interested parties may object and if their objections cannot be resolved, a hearing before the Director of Titles (or his or her designate) can be ordered;
4. The Applicant can include a claim for possessory title in the Application;
5. All issues of adverse possession are deemed dealt with upon conclusion of the Application process; and
6. If no objections are received, the Application is submitted to the Land Registrar and the Applicant receives title in Land Titles Absolute Plus.

SERVICE OF APPLICATION ON INTERESTED PARTIES

A Notice of Application and a copy of the draft Plan is to be served on every party who, according to the draft plan, could claim an encroachment, unregistered easement, or other registerable right in and over the Applicant's lands. Service is to be affected by registered mail or other form of personal service. Registered mail receipts must be filed with the final submission of the Application. If service cannot be affected by registered mail, because the owner does not accept service, the applicant must confirm the address for service on the owner through the Municipal Property Assessment Corporation (MPAC) records, the municipal tax roll, Canada 411 or such other reasonable search methods. In the event the owner cannot be ascertained or service cannot be affected through registered mail or courier, service may have to be affected by notice in the local newspaper.

Bulletin No. 2009-06 sets out further direction with respect to the service of interested parties and provides that the Land Registrar may direct further service if in his/her opinion there is sufficient reason to do so. Further, the bulletin provides that if the property abuts a body of water, a Notice of Application will be required to be published in a local newspaper and a copy is to be sent to the local municipality so that members of the public will have an opportunity to become aware of the Application.

Questions with respect to service in unique circumstances must be canvassed with the Land Registry Office prior to the commencement of the Application. In the event service has not been completed to the satisfaction of the Land Registrar, the Applicant will be required to re-serve the parties and wait out the thirty (30) day notice period a second time.

Pursuant to the Land Titles Act, Subsection 44(3), the only conceivable way for a possessory claimant to keep a claim alive after the completion of First Application is through an allegation of deficient service. This has been affirmed by the Ontario Court of Appeal in *Mills v. Star Quality Homes Ltd.,* 1978 Carswell Ont 1278 at Para. 6 .. "the failure of the [possessory claimant] to make any objection to the [applicant's] application for first registration is fatal to her claim by virtue of [s.44(3)] of the statute." Therefore, if no objection is filed, the first registration will occur and "a possessory claim…cannot derogate from the registered title."

It is generally advisable to serve the materials on the parties with correspondence that sufficiently sets out the nature and purpose of the application and instructions in the event of questions. The Ministry provides sample letters which should be tailored to suit the applicant's needs. The letter to the interested parties must also include a prescribed

form of Statement of Objection. Generally surveyors do not want to be contacted by the general public to explain the Reference Plan and the nature of the Application, and therefore, the law office contact who is prepared to address enquiries should be identified in the correspondence that accompanies the Notice of Application.

Adjoining land owners and interested parties can be asked to provide a Consent and Waiver of Notice in order to waive the necessity for service, however, the land owners must sign the draft Reference Plan and any amendments made to the draft Reference Plan which may affect their interests.

It should be noted that in the Certificate of Solicitor that is filed with the final Application, the solicitor must state that:

> "*I undertake to retain all proof of service, consent and waiver of notice and other evidence in support of this application for a minimum of 20 years after this application is registered and to produce it for examination if required by the (Deputy) Director of Titles.*"

The Land Registry Office does not retain proof of service and therefore it is incumbent upon the solicitor to retain the proof service documentation.

It must also be noted that although the interested parties are provided with a thirty (30) day period within which to make valid objections, objections may be accepted by the Land Registrar until the final Application has been finalized.

FIRST REGISTRATION or FIRST APPLICATION

If the parcel remains in registry and the Land Registry Office has the capacity for registration in the land titles system (which is the case in all Land Registry Offices as of

December 31, 2010), an application to convert the parcel to LTA will be made following the rules with respect to an Application for First Registration governed by the Land Titles Act, and Regulation 690, as amended.

One of the biggest distinctions between a First Application and a Land Titles Plus Application is the requirement during the First Application process for the Applicant to obtain and present the Crown Patent and provide a title abstract and title tree which sets out at least 40 years to prove a valid chain of title. In addition, title abstracts are required to be prepared for the adjoining lands (although full 40 year searches are not required) and for any Appurtenant Easements.

Ultimately the Land Registry Office will rely heavily upon the Certificate of Solicitor and Certificate of Surveyor, each of which provides certification of various aspects of the Application, including the Planning Act searches.

APPLICATION FOR ABSOLUTE TITLE/ LAND TITLES ABSOLUTE PLUS

Under the First Application process, the owner provides a 40 year title search, a survey and serves notices on adjoining owners and interested parties who could perfect a right to ownership of land passed on the length of possession or use. Once a property has been converted to LTCQ, the 40 year title search has already been completed by the Land Registry staff during the administrative conversion, and therefore, the Land Titles Plus Application is akin to a modified First Application to remove the qualifiers under Section 44(1) of the Land Titles Act that pertain to adverse possession, misdescription and Registry Act leases. Ownership has already been established and guaranteed in the administrative conversion.

Upon completion, the owner will hold title to a parcel that is not subject to the qualifiers as set out in the Land Titles Act, Subsection 44(1) in respect of Planning Act compliance, possessory interest of adjoining land owners, dower rights, escheats and succession duties and therefore this form of title offers more protection than the standard absolute title.

NOTICE OF CLAIM/CLAIMS FOR ADVERSE POSSESSION

A person in occupation of land for a sufficient length of time and under the appropriate circumstances (adverse possessor) cannot be dispossessed and may have a claim for adverse possession in the fee or a prescriptive easement over a part of the lands. The adverse possessor's rights must have been acquired prior to conversion of the lands to land titles. Details of the legal requirements for making a successful claim for adverse possession are beyond to scope of this paper and are very fact dependant. Therefore, claims for possession (on the part of either the Applicant or objector) should be fully researched and explored on a case by case basis.

With respect to either a First Application or a Land Titles Plus Application, the Applicant can make a claim for adverse possession during the Application process by registering a Notice of Claim prior to registering the Notice of Application. Such a Notice of Claim must include a detailed Declaration of Possession covering at least 20 years and detailing the nature of the claim; a registerable description of the lands (such as a Part on a Reference Plan) and setting out that the possession and/or use has been actual, peaceful, continuous, exclusive, open and adverse to the use and title of the registered owner. The registered owner of the lands being claimed, along with any mortgagees and

other parties with a registered interest must be served with the Notice of Claim. The Applicant must also file a Covenant to Indemnify the Land Titles Assurance Fund (being Form 54, Regulation 690, R.R.O. 1990, made under the Land Titles Act). If the Land Registrar is satisfied with the evidence provided, the Applicant can be registered with an absolute title over those lands being claimed.

An adjoining land owner or interested party may raise a claim for adverse possession and if the Applicant is satisfied that the claim has merit, the Applicant may wish to amend the original application to exclude that portion of land being claimed and/or take steps to have such rights acknowledged and registered on title in the event that the claim is accepted.

OBJECTIONS AND HEARINGS

Whether making a First Application or Land Titles Plus Application, any objections received must be addressed and withdrawn in writing prior to the Application being accepted and completed. The Land Registry Office strongly encourages the Applicant to work directly with the objector without its involvement.

Some objections may result from issues that are not in fact title related or related to the Application for Land Titles Absolute but rather reflect a misunderstanding of the process by the adjoining land owners and/or the fact that the objector is taking advantage of the process as an avenue to express displeasure with the eventual development of the lands.

Simple objections may be raised by utility service providers which may request that easement rights be better defined or brought forward on the draft Reference Plan. Objections could result from a difference of opinion among surveyors with respect to

boundaries and title wherein an application under the Boundaries Act may have to be made.

Objections could also stem from claims made by adjoining land owners who had a perceived or actual claim for possession. The Applicant could choose to remove the disputed lands from the Application. If the objector does not have a valid claim and cannot be encouraged to withdraw the claim, or if the parties are in disagreement with respect to the viability of the claim, the Applicant can request that the Regional Surveyor review the merits of the objection. If this does not result in resolution, the Applicant can request that the Director of Titles hold a hearing pursuant to the Land Titles Act.

Hearings under Land Titles Act are relatively informal. There is generally no court reporter unless the parties request. There is one hearing officer who has no jurisdiction to award costs. Witnesses are sworn and may be summonsed. A written decision of the hearing officer will be provided to the parties and the Director of Titles as a result of the decision can order that the draft Plan or Application is acceptable or may direct amendments. In order to complete the Application, the solicitor must certify that the appeal period has expired and that there are no outstanding appeals and apply to the Director for approval of the draft Plan. After approval of the Plan by the Director of Titles, the file is returned to the Land Registrar for completion. The procedure of the hearing is governed by Land Titles Act and the *Statutory Powers Procedures Act*, R.S.O. 1990, as amended and appeals lie with the Divisional Court.

Appendix "A" - Land Titles Act, R.S.O., 1990, as amended, Section 44(1)

Liability of registered land to easements and certain other rights

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:

1. Provincial taxes and municipal taxes, charges, rates or assessments, and school or water rates.

2. Any right of way, watercourse, and right of water, and other easements.

3. Any title or lien that, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the land.

4. Any lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

5. Any right under Part II of the *Family Law Act*, of the spouse of the person registered as owner.

6. A construction lien where the time limited for its registration has not expired.

7. Any right of expropriation, access or user, or any other right, conferred upon or reserved to or vested in the Crown by or under the authority of any statute of Canada or Ontario.

8. Any public highway.

9. Any liabilities, rights and interests created under section 38 of the *Public Transportation and Highway Improvement Act*.

10. Any by-law heretofore passed under section 34 of the *Planning Act* or a predecessor of that section, and any other municipal by-law heretofore or hereafter passed, affecting land that does not directly affect the title to land.

11. Sections 50 and 50.1 of the *Planning Act*.

12. Where the registered owner is or a previous registered owner was a railway company, any interest that may be or may have been created by any instrument deposited in the office of the Secretary of State of Canada or the Registrar General of Canada, as the case may be, under section 104 of the *Canada Transportation Act* (Canada), or any predecessor of it, but, where the previous registered owner was a railway company, this paragraph does not apply to a subsequent registered owner, except a railway company, unless a note of the previous ownership of the land by the railway company has been entered in the title register.

13. REPEALED: 1997, c. 24, s. 214.

14. Any right of the wife of the person registered as owner to dower in case of surviving the owner. R.S.O. 1990, c. L.5, s. 44 (1); 1991, c. 9, s. 2; 1993, c. 27, Sched.; 1997, c. 24, s. 214; 2006, c. 19, Sched. G, s. 3 (3); 2009, c. 34, Sched. T, s. 2 (1).