



## **ADVERSE POSSESSION – PULLING OUT ALL THE STOPS**

**John A. Keith, Cox Hanson O'Reilly Matheson**

This paper considers the legal, procedural and evidentiary issues which can arise in claims for adverse possession.

### **PROCEDURAL OPTIONS**

When contemplating a claim for adverse possession, there are a number of procedural alternatives all of which have various benefits and risks depending on the circumstances. The alternatives include:

1. **Informal Agreement.** Where all interested parties can be clearly and easily identified, it may be possible to:
  - (a) obtain agreements by which any interest in the land is either denied or disclaimed; and then
  - (b) migrate the land in question.

Privacy, reduced costs and an expedited resolution are obvious benefits associated with this strategy. That said, the informality of these sort of arrangements combined with the possibility of not properly identifying and addressing all potential claimants (including, for example, the Crown) gives rise to obvious risks including the possibility of providing an incomplete or inaccurate title opinion when migrating the property. This strategy is best suited for those situations where there is clear protection under the *Marketable Titles Act* and no potential claim from the one party specifically excluded from the provisions of that statute (i.e. the Crown).

2. **If the dispute involves claims by the Crown, an application under section 37(1) of the *Crown Lands Act*, R.S.N.S. 1989, c. 114.** Section 37(1) states:

“**37 (1)** Where it appears to the Minister that a person, known or unknown, has acquired rights or claim by possession in or to Crown lands and the Minister so reports to the Executive Council, the Governor in Council may authorize and direct the Minister to issue a certificate to the effect that the Crown asserts no interest or claim to the land

and upon the issuance of the certificate all interest or claim of the Crown to the land described therein ceases.”

Note that this section relates to rights or claims acquired “by possession”. Quare whether the Minister under this statute can or will release any its interests where the rights or claims being asserted did not arise “by possession”. In other words, is this provision restricted to possessory claims (adverse possession)? It would appear so. As a result, many boundary disputes may not be amenable to an application under the *Crown Lands Act*. That said, there are distinct advantages associated with this procedure. It does not involve public proceedings and can certainly be quicker and less expensive than formal litigation. In addition, if the application is successful, the Minister will issue a Certificate which shall be registered in the applicable lands registry office (section 37(2)). Thus, this strategy offers a measure of finality and certainty. The disadvantages are that the Crown understandably requires time to properly research its interest, if any. In addition, while less expensive than formal litigation, the likelihood of succeeding is directly related to the quality of the submission and underlying research. Thus, one should not underestimate the effort and expense required to properly prepare an application. Finally, the manner in which these applications are processed is not especially clear. In particular, the standards against which the application will be measured are difficult to ascertain and may not be consistently applied. This can lead to considerable uncertainty.

3. **Application for declaratory relief.** It is often tempting to proceed quickly with an action under the *Quieting Title Act* to finally resolve competing claims over the same parcel of land. However, a proceeding under the *Quieting Titles Act* involves considerable publicity and specific, unique procedures defined both under the Act and Practice Memorandum No. 12 of the Rules of Civil Procedure. All of this can lead to unforeseen complications and delay. If all interested parties can be easily identified, an application for declaratory relief may be the most efficient procedure. There is, of course, the risk that the application will be converted to an action thereby giving rise to potential delay and additional expense.<sup>1</sup> Moreover, as indicated, it is essential that one be able to accurately identify all interested parties and thereby avoid a multiplicity of proceedings and/or waste. However, an application for declaratory relief affords greater control over the proceeding. Finally, keep in mind that any such proceeding will trigger section 2 of *Land Actions Venue Act*, R.S.N.S. 1989, c. 247 which states:

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<sup>1</sup> Note that the Courts have demonstrated an increasing willingness to broaden the scope of applications in appropriate matters. As Leblanc, J. observed in *Renaud v. Nova Scotia (Attorney General)* 2005 CarswellNS 359, 2005 NSSC 226, 15 C.P.C. (6th) 290, 236 N.S.R. (2d) 164, 749 A.P.R. 164 (NSSC): “Even where there is a dispute of fact, that, in and of itself, does not render the application route objectionable, because it may involve a dispute of facts in the construction or interpretation of an enactment: see *Goodman Rosen Inc. v. Sobeys Group Inc.*, [2002] N.S.J. No. 551 (N.S. S.C.) at paras. 13-14 and *Winlow v. ACF Equity Atlantic Inc.*, [2003] N.S.J. No. 321 (N.S. S.C.) at para. 23. Nor does the fact that a matter may involve multiple parties, intervenors, issues of education funding and the *Charter* exclude the application route: see, for instance *Adler v. Ontario* (1996), 140 D.L.R. (4th) 385 (S.C.C.), where the issue of state funding for religious schools was litigated under the *Charter*.”

“All actions for trespass to lands or in which possession or recovery of lands is sought, and all actions in which the title to lands is in issue, shall, unless the court or a judge otherwise orders, be tried in the justice centre area in which the lands lie, and if the lands lie in more than one justice centre area, then in any of the justice centre areas in which any part of the lands lie.”

4. **Action under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382.** There is no doubt that an action under this Act offers the most definitive resolution of title problems. A Certificate of Title under this Act is final and enforceable against all potential claimants. For that reason, it involves the most publicity and procedural complexity. One has to be careful to comply with both the provisions of the Act and the applicable Practise Memorandum No. 12. One also has to be prepared for the fall-out which might emerge from the publication requirements. It is not always easy to predict the persons who might seek to assert claims over the lands in question. For example, in *Frank Georges Island Investments v. Nova Scotia (Attorney General)*, 2004 CarswellNS 280, 2004 NSSC 136, 23 R.P.R. (4th) 157, 1 C.P.C. (6th) 117, 225 N.S.R. (2d) 264, 713 A.P.R. 264 (NSSC), a number of local residents sought to be named as defendants in a *Quieting Titles Act* application. The issue was whether these applicants “may have claims as members of the amorphous public, distinct from and, indeed, contrary to the government's claim to absolute title.” (paragraph 36) The legal issue was “whether there is a possibility of a claim that the island was dedicated to the public and the dedication was accepted by the public, or of a claim that members of the Seabright community have customary rights in respect of the island, or of a claim that the island is a local commons.” (paragraph 36) This issue was considered in the context of the fairly onerous provisions contained in section 10(2) of the Act whereby interested parties must be added as defendants "unless it is clear that the person has no interest that may be affected by the proceedings". Ultimately, Justice Moir denied the application in the circumstances but the decision illustrates the broad and somewhat unpredictable nature of actions under this statute.<sup>2</sup>

#### ADVERSE POSSESSION

In Nova Scotia, the statutory period for grounding a claim in adverse possession as against private parties is 20 years.<sup>3</sup> With respect to the Crown, the requisite period is extended from 20 to 40 years.<sup>4</sup>

The two basic elements in a claim for adverse possession are:

<sup>2</sup> This decision is also interesting for its consideration of the sort of “interest” which must be asserted before an applicant will be granted party status in a quieting of titles proceeding.

<sup>3</sup> Section 10 of the *Limitations of Actions Act*, R.S.N.S. 1989, c. 258, as amended. Note that the limitation period is extended for persons under a disability (section 20).

<sup>4</sup> Section 21 of the *Limitations of Actions Act*, R.S.N.S. 1989, c. 258, as amended.

- (a) a physical or possessory component whereby the claimant must establish actual, open and continuous occupation for the full statutory period; and
- (b) an animus possidendi or intention of excluding the true owner.<sup>5</sup>

These two basic principles were confirmed in *Taylor v. Willigar* (1979), 32 N.S.R. (2d) 11 (N.S.C.A.) where the Court quoted with approval the following passage from Anger and Honsberger, *Canadian Law of Real Property* which states:

“The possession that is necessary to extinguish title of the true owner must be actual, constant, open, visible and notorious occupation” or “open, visible and continuous possession, known, or which might have been known” to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is “equivocal, occasional or for a special or temporary purpose.” It is trite law that in order to establish adverse possession for the full limitation period, there must be actual and continuous possession. Moreover, the possession must be open and visible. It also must be notorious and capable of being known to the actual owner.

In addition to these basic elements, the following additional issues should be considered when assessing the strength of the claim for adverse possession:

The Courts recognize a strong presumption in favour of the owner. As MacQuarrie, J. said in *Ezbeidy v. Phalen* (1958), 11 D.L.R. (2d) 660 (N.S.S.C.) at p. 665). “ This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after

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<sup>5</sup> In *Board of Trustees of Common Lands v. Tanner* (2005), 36 R.P.R. (4<sup>th</sup>) 105, 236 N.S.R. (2<sup>d</sup>) 295 (N.S.S.C.), Warner, broke down these two basic elements into five parts:

actual and constructive possession;

continuous possession;

open, visible and notorious possession;

exclusive possession; and

adverse possession or animus possidendi.

This decision is interesting in that it also provides specific commentary on the legal principles which apply to each constituent part.

that has been proved, the position is that the owner is disseised and the other person is in possession.” A similar comment was made by Oland, J.A., in *Fralick v. Dauphinee*, 2003 NSCA 128 (N.S. C.A.), at paragraph 27, where she noted that the legal owner is not to be deprived of his property lightly. Similarly, in *Lynch v. Nova Scotia (Attorney General)*, Hallett, J. (as he then was) confirmed that in claims for adverse possession, the Court should only act on very cogent evidence;

The doctrine of colour of title provides that the registered owner is not required, in the first instance, to demonstrate possession over the entire parcel. Where an individual has a good root (or “colour”) of title (as in this case), possession over part is deemed to be possession over the entire parcel. In other words, the doctrine of colour of title supports or assists the claims of an individual claiming under a good root of title (see *Nemeskeri v. Nova Scotia (Attorney General)*, (Quicklaw) [1992] N.S.J. No. 332 (N.S.S.C.); aff’d (Quicklaw) [1993] N.S.J. No. 377 (N.S.C.A.)). This presumption of possession applies equally in a claim for adverse possession (*Nemeskeri v. Nova Scotia (Attorney General)*, *supra*.)

5. Claims for adverse possession involve issues of fact and law but primarily fact. The issue of possession is particularly driven by the unique facts of each case. The nature of physical control required to demonstrate adverse possession will turn on the particular circumstances surrounding the lands in question. Depending on the nature of the lands, the requirements may be relaxed. Thus, in Anger and Honsberger, *Canadian Law of Real Property*, the authors state:

“Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another; the character and value of the property, the suitable and natural mode of using it, the course and conduct which the proprietor might reasonably be expected to follow with due regard to his own interests, are to be taken into account in determining the sufficiency of possession.” (at p. 787)

In *Taylor v. Willigar and Skidmore*, *supra*, Cooper, J.A. of the Nova Scotia Court of Appeal stated:

... I cannot subscribe to the view that in this Province, where summer cottages abound, possession of them is lost from the snow and ice of winter preclude their use in any practicable sense. The nature of the possession required under the statute to extinguish the title of the true owner must necessarily vary with the circumstances (at paragraph 20).

In *MacNeil v. Nova Scotia*, [1998] N.S.J. No. 233 (N.S.S.C.); aff'd [2000] N.S.J. No. 49 (N.S.C.A.), possessory title was based on camping, in-filling a swamp, making paths, building a cabin in one spot and putting a fishing hut in another, generally recreational uses and "being on the property constantly". On appeal, Cromwell, J. A. confirmed that the *Quieting of Titles Act* should be applied in a "practical way" (at para. 43). In *Newfoundland v. Collingwood* (1996), 138 Nfld. & P.E.I.R. 1 (Nfld. C.A.), possessory title was found on the basis of a seasonal camp.

In *Piper v. Stevenson* (1913), 28 O.L.R. 379 (Ont. S.C.- Appeal Division), Clute, J. wrote:

It is impossible, I think, to treat what took place in the present case as abandonment. The land was entirely enclosed. It was cultivated and cropped every year. It is begging the question to say that, because the land was not used in the wintertime, when it could not be used for any useful purpose, therefore there was an abandonment. Surely abandonment is a matter of intention, and the cultivating and cropping from year to year shows that there never was any intention of the abandonment (at paragraph 21). [emphasis added]

The Prince Edward Island Court of Appeal adopted a similar view in *Re MacKinnon*, 2003 PESCAD 17 (PEICA) when Mitchell, C.J. wrote that:

Occupation does not have to be incessant under all conditions in order to be sufficiently continuous for the Statute to run." (at para. 20)

Rather, Mitchell, C.J. concluded that the individual claiming adverse possession must "keep his flag flying" over the land over the statutory period.

Finally, in *R. v. Bernard* (2005), 2005 (S.C.C.) 43, 15 CELR (3d) 163, 255 D.L.R. (4<sup>th</sup>) 1 (S.C.C.), the Supreme Court of Canada wrote:

"The common law recognized that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular, the nature of the land and the manner in which the land is commonly enjoyed; *Powell v. McFarlane* (1977), 38 P & CR 452 (English Chancery Div.) at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may relate adverse possession; *Redhouse Farms (Thorndon) v. Catchpole* (1976), 244 E.G. 295 (Eng. C.A.), [1977] E.G.D. 798. The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or

sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2<sup>nd</sup>) 680 (Ont. C.A.), per Wilson, J. A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of the land” (at para. 54).

6. The unique nature of the land in question gives rise to two other related and equally thorny issues:
- (a) Exclusivity; and
  - (b) Continuity.

Dealing first with continuity, as indicated, possession must be “continuous” over the entire statutory period. The question of continuity creates its own problems but, again, the unique qualities of the land are recognized and accepted. In *Taylor v. Willigar and Skidmore, supra*, for the definition of “continuity” of possession is *Nattress v. Goodchild*, [1914] 6 O.W.N. 156. The property at issue was an island that had been used as a fishing station and held a gravel deposit and was suited for a summer residence. The defendants had been in possession of the island for eighteen years and spent their summers there. Justice Middleton stated:

“The possession, during the winter, of this island was precisely the possession that there would have been by the actual owner. Such personal belongings as it was not desired to remove were left upon the island. The house was closed, and left ready for occupation in the fall and spring. Reluctantly I am compelled to accept this view. The pedal possession, required under some of the earlier cases to be absolutely continuous, is, I think, sufficiently shewn by possession such as I have described (at page 157).”

In *Burke v. Nova Scotia (Attorney General)* (1997), 160 N.S.R. (2d), 233 (N.S.S.C.), the occupation consisted largely of grazing cattle; picking bake apples or blueberries at various times during the year recreation. The case of *Bellefontaine v. Nova Scotia (Attorney General)* (1992), 114 N.S.R. (2d) 202 involved the seasonal use of summer cottages.

Similar concepts are found in the English jurisprudence. In *Batt v. Adams*, [2001] 32 E.R. 90 (Chancery Division), the English Court wrote:

Although I accept that the onus is on Mr. Adams, Snr. to demonstrate that there was the necessary continuous period of adverse possession, this does not mean that he had to give a detailed, day by day account of what use was made of the land. The Court must determine, on the balance of

probabilities, whether there was uninterrupted adverse possession throughout the relevant period. (emphasis added)

Thus, possession does not necessary require daily occupation of the entire lands.

As to exclusivity, as indicated, each case turns on its own facts and one of the things which makes claims for adverse possession simultaneously fascinating and frustrating is that the unique nature of land can prove to be a double edged sword. On the one hand, as indicated above, it may help to support a claim for adverse possession. On the other hand, there is recent case law from the Nova Scotia Court of Appeal indicating that the original owner may equally use the unique nature of the land to suggest that it has never been put out of possession. In *Spicer v. Bowater Mersey Paper Co.*, [2004] N.S.J. No. 104 (N.S.C.A.), Roscoe, J.A. wrote that adverse possession requires an element of exclusivity such that the true owner's title is not extinguished unless there is open invisible and continuous possession to the exclusion of the owner. Whether or not the owner has been truly excluded will depend on the nature of the land and the typical use to which the owner would otherwise make of the land. At paragraphs 22 and 23 of this decision, Justice Roscoe wrote:

In this case, the prerequisite that the respondents clearly failed to prove, in my opinion, was that of exclusivity. Possibly, because at the trial the appellant argued primarily that the possession was not open and notorious, or continuous, the trial judge overlooked the requirement that the possession of the trespasser must dispossess the true owner and it is insufficient if the trespasser's possession is merely a possession shared with others during the relevant period of time. Here there was uncontradicted evidence that the respondents did not lock the cabin, that it was open for others to use, was used by other hunters and passers by, without permission of the respondents, and in fact employees of the appellant had been in the cabin on more than one occasion. The use by the respondents of the half acre of land did not in any way interfere with the normal use and occupation of the appellant. The appellant did not abandon the land. The evidence was clear that the appellant's use of the huge tract was to survey or cruise the forest on a routine basis, every five years, to determine the density, variety, and maturity of the trees, and to clear cut large portions of the forest when sufficient growth had been reached. The appellant paid the taxes on the land for all the years in question as well. Nothing done by the respondents interfered with that use by the appellant or excluded the appellant from the land.

While I have focused chiefly on the exclusivity issue, and it is not necessary to deal with the other elements of possession, nothing herein should be taken to confirm the finding by the trial judge that the limitation period in this case began to run in 1975 when the respondents first built the camp. Although I do not agree with the appellant's contention that the discoverability rules adopted in contract and tort cases should apply to adverse possession matters, the common law already has a built-in safeguard in these cases in the requirement of proof of "open and notorious" possession. The nature of the required acts would generally bring them to the attention of a reasonably prudent owner. But the protection from undiscovered adverse claims lies in the nature of the required acts of adverse possession, not the so-called discoverability rule. In a case like this, where the lands consist of a vast wilderness not accessible by road, the date the limitation period begins to run may not coincide with the time of the entry by the squatters. Although the cabin was apparently known to other trespassers before 1981, it was not visible from the lake or in aerial photographs. It was when the road was built in 1981 that it became plainly open and notorious. I question whether there was proof by the claimants, by cogent evidence, that the appellants ought to have known of their entry on its land as early as 1975. In my opinion, the evidence in that respect was, at best, dubious.

Similarly in *Fralick v. Dauphinee*, Oland, J. A. cited with approval, the following passage from the earlier decision of *Lynch v. Nova Scotia (Attorney General)*:

As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the Limitation of Actions Act provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and

firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the courts for hundreds of years. Each case turns on its own facts.

7. In terms of evidence, it should be noted that several factual issues often raised in connection with adverse possession may be compelling but not necessarily determinative. These issues include:
- (a) Payment of taxes: This is one issue which many laypersons find difficult to understand. How can one person pay taxes while another ignores them and yet retain a strong ownership interest and yet the law is clear on this point. (*Duggan v. Nova Scotia (Attorney General)* (Quicklaw) [2004] N.S.J. No. 116 (N.S.S.C.));
  - (b) Fences are strong evidence of possession but, again, they are not determinative. (*Duggan v. Nova Scotia (Attorney General)* (Quicklaw) [2004] N.S.J. No. 116 (N.S.S.C.)). Similarly, in *Skoropad v. 726950 Ontario Ltd.* (1990), 12 RPR (2d) 225 the Court concluded that fencing is only one factor. The claimant must still satisfy test of exclusion. It is only one factor. Need not be impenetrable but must be effective. *Anger and Honsberger*, at page 1515 state that mere fencing is not enough to give a trespasser title against the true owner.
  - (c) An interesting issue arises with respect to islands because they enjoy natural boundaries (water).

#### SOURCES OF EVIDENCE

Developing a case for adverse possession can be enormously interesting and satisfying from a legal, social and historical perspective. Depending on the property in question, it may be necessary to investigate possession stretching back hundreds of years. In doing so, I offer the following suggestions:

Depending how far back the possessory claims extend, consider hiring a competent historian. The reasons are numerous and include:

a historian can review archival material in a fraction of the time and for a fraction of the cost that it would take a lawyer. Plus, the results will likely be much more comprehensive and useful;

a historian can place the activities on the land in their proper context. The uses made of land can change from generation to generation depending on local circumstances and economic activity. All of these issues can assist in matching the alleged acts of possession with typical usage;

Aerial photography – this an obvious suggestion but it is important to note that both the Provincial and Federal Governments maintain photographic records. Both sources should be canvassed;

School records, church records, (including information regarding birth, baptisms, weddings and deaths);

Probate records which may contain unique and specific information regarding the lands in question;

Census records which again may contain important information regarding the use made of the land and those persons who were using or working the land. In addition, the census information may help actually locate all of those individuals who would use or occupy the lands in question from time to time;

A competent genealogist to assist in identifying all previous owners and, perhaps, occupants on the land;

Interviews with local persons. One can never underestimate the value of conducting interviews with long time residents of the lands in question. While much of the information may only be oral or verbal, there is also a possibility that these individuals will have photographs or the records which could prove invaluable;

Newspapers articles.