Possessory Title and Prescriptive Rights

A possessory title has been determined to be one that is considered marketable by the common law and by the courts considering the Limitation of Actions Act.

Subsection 4(1) of the Marketable Titles Act, which incorporates the definition of ‘marketable title’, was amended by the LRA ss. 116(1) to include a marketable title ‘at common law or equity or otherwise’.

An owner pursuant to the Limitations of Actions Act, must bring an action to recover land within 20 years of being dispossessed. This time frame has not changed.

However, what has changed is the extension of time for those under a disability. The Limitations of Action Act defines a person under disability as being within the age of nineteen years or a person of unsound mind. Absence from the province is no longer considered a disability. If an owner is under disability the time is only extended by 5 years (ie total 25 years maximum), instead of a further 20 years as was previously the case.


The LRA attempts to balance the desire to preserve historic possessory interests and prescriptive rights in land, while creating a land registration system that provides certainty of ownership interests in land in the future.

The LRA achieves this balance by having matured possessory interests qualify for registration under the Act without any requirement for a prior judicial review. This means a possessory title may be converted to a guaranteed title if the lawyer, in his or her professional opinion determines that the title is “marketable”.

The relevant practice standards are 3.2 and 3.3, as follows:

**Possessory Title (3.2)**

A lawyer may certify title established by possession in accordance with legislation, common law and equity.

A lawyer must document sufficient actual facts evidencing possession that will meet all the tests set by the courts for establishing possession sufficient to extinguish the interest of the paper title holder. The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence. The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing
possession and address the extent of the area of land possessed. In determining whether the standard of proof of possessory title has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title established by possession, a lawyer must consider the effect of the Registration Act with respect to possessory interests and lasting improvements and advise the client accordingly.

When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the Registration Act, a lawyer must explain the qualifications to the client and confirm the client’s instruction prior to closing.

Prescriptive Rights (3.3)

A lawyer may certify title to interests acquired by prescription in accordance with legislation, common law and equity.

A lawyer must document sufficient actual facts evidencing prescriptive rights that will meet all the tests of establishing prescription. The documentation to be obtained and filed by the lawyer must contain the best possible and reasonably attainable evidence. The evidence should include affidavits or statutory declarations of knowledgeable and impartial persons, such as surveyors and neighbouring property owners, which should provide facts evidencing prescription and address the extent of the prescriptive rights. In determining whether the standard of proof of prescriptive rights has been met, a lawyer must consider the quantity and quality of the evidence as a whole and exercise professional judgment accordingly.

When preparing an opinion of title to certify title to interests acquired by prescription, a lawyer must consider the effect of the Registration Act with respect to prescriptive rights and advise the client accordingly.

When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the Registration Act, a lawyer must explain the qualifications to the client and confirm the client’s instruction prior to closing.

The type of evidence required will vary from case to case but will generally be of a high standard – “the best possible and reasonably attainable evidence.” Garth Gordon’s templates and suggestions are discussed in the next section. See also the suggestions of Hallett, J. (as he then was) in Lynch v. Lynch (1985), 71 N.S.R. (2d) 69 (S.C.,T.D.).