Real Property — Conveyancing — Certifying Title to vacant Lands — *Re Tri-Development Ltd. et al.*

The decision of Mr. Justice Leger in *Re Tri-Development Ltd. et al.*[1] illustrates two aspects of real estate conveyancing in New Brunswick which are in need of legislative intervention. The first relates to the scope of the search to be performed by a purchaser's solicitor when investigating the title to vacant land; the second pertains to the question whether a certificate of title should be obtained before vacant lands are developed and subdivided.

Sylvain LeBlanc acquired two parcels of land, the first being the "Homestead" property and the second being "wild" and "vacant" land known as the "Pansec" property. The lands are approximately one mile apart[2]. Upon the death of Mr. LeBlanc in 1904 and by virtue of his will the "Homestead" property vested in his two sons, Jacques and Humphrey LeBlanc, while the "Pansec" property was left to his widow, Maggie LeBlanc, as part of the residuary estate. Humphrey LeBlanc, however, eventually conveyed the "Pansec" property to a third party to which Tri-Development Ltd., a purchaser in time, claimed ownership. This land was developed by the company and several lots, upon which homes were constructed, were sold with conventional mortgage financing. In 1977 Tri-Development Ltd. brought an application under the *Quieting of Titles Act*[3] for a certificate of title. The application was opposed by the heirs-at-law of Maggie LeBlanc.

The applicant[4] claimed ownership on the basis of adverse possession and asserted that the adverse claimants were barred from recovering the land by virtue of the *Statute of Limitations*[5]. The acts upon which the applicant relied as constituting adverse possession were the occasional cutting of timber and the payment of real property taxes. Mr. Justice Leger came to the conclusion that these acts in themselves did not amount to a continuous and uninterrupted possession and declared that the adverse claimants were entitled to a certificate showing that they were the cumulative owners of a 7/9 interest in the "Pansec" property.

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[1](1978), 23 N.B.R. (2d) 439 (N.B.S.C.).

[2]Although it is not clear from the judgment it would appear that the descriptions of each of the parcels would make it difficult for a solicitor to determine where precisely each lot is located.

[3]R.S.N.B. 1973, c. Q-4.

[4]It would appear that some of the homeowners became parties to the application in order to clear the title to their individual lots.

[5]*Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 29-31.

It would necessarily follow that in searching a title to vacant or uncultivated land a solicitor should commence his investigation with the crown grant. If, for example, A conveyed vacant scrub land to his son B, who subsequently registers his deed, land to which A had no registered title, it is conceivable that the registered owner (or his assigns or heirs-at-law) whose chain of title stems from the crown grant, could assert title over B and his assigns in the year 1980.[6] Rarely, however, do solicitors commence their search with the crown grant and many may feel that a good chain of title based on a good root of title[7] can be obtained within a sixty year time span.

In New Brunswick, the precise period through which a title should be abstracted is uncertain and generally depends on local conveyancing practice. Consequently, the varied practice of either sixty or forty year searches is maintained in the Province.

The concept of the sixty year search is actually an off-shoot of the common law requirement that a vendor provide the purchaser's solicitor with an abstract of title convering a sixty year period. This did not mean, however, that the purchaser's solicitor was not required to carry the search further back in time.[8]

The concept of the forty year search must not be confused with the provisions of the Ontario *Registry Act*[9] and its predecessor, the *Investigation of Titles Act*[10] wherein provision is made for the length of the search to be performed. Indeed, Ontario solicitors have been able to avail themselves of such legislation for over forty years. Generally speaking, a solicitor in Ontario must satisfy himself that the vendor has a good chain of title for the forty years preceding the date of the transaction. This, of course, is based on a good root of title outside the forty year period.[11] As well, provision is made for any outstanding claims or interests in land by stipulating that notice of such must be registered before the expiration of forty years from the date of its initial registration. Otherwise such claims or interests will be invalid. It is not uncommon for a conveyancer in New Brunswick to be requisitioned on a mortgage which has been on record for over forty years but not discharged.

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[6]See G. V. LaForest, "The History and Place of the *Registry Act* in New Brunswick", (1970) 20 *U.N.B.L.J.* 1 for a discussion of the effect of unregistered deeds prior to 1904.

[7]It is widely accepted that an executor's deed or a mortgagee's deed is not a good root of title. For the effect of a tax deed see *Savoie* v. *Savoie* (1979), 25 N.B.R. (2d) 541 (N.B.C.A.).

[8]See *Amour on Titles* (4th ed.), at 32 *et seq.*

[9]R.S.O. 1970, c. 409, ss. 110-113.

[10]R.S.O. 1937, c. 171.

[11]It is admitted that, if similar legislative provisions were to exist in New Brunswick, then it is questionable whether they would have been of assistance to Tri-Development Ltd.

The effects of the decision in *Re Tri-Development Ltd.* will undoubtedly produce further litigation in the event that the adverse claimants are forced to pursue their legal rights as owners of the 7/9 interest in the land. Once again Ontario legislation has circumvented this problem by requiring in most areas of that province that the owner of land which is to be subdivided by means of a registered plan must first obtain a certificate of title under either the *Land Titles Act, Certification of Titles Act* or the *Quieting Titles Act.*[12]

The development of vacant land for commercial or residential purposes by means of subdivisions leaves open the possibility that the developer's title is marked by a "flaw" so as to render the concept of ownership meaningless. Needless to say, the flaw may not be discovered until several years have lapsed and many structures have been erected. In such a case, the statutory limitations barring the proceedings to recover land after a twenty year period may prove ineffectual in extinguishing claims of the paper title holder or his heirs. Admittedly, these provisions are of assistance when one is dealing with residential and commercial properties which have been occupied for over twenty years.

In the event that a good and marketable title to a subdivision exists a solicitor is faced with a further problem. Without a certificate of title a conveyancer must attempt to assure himself that a metes and bounds description, often containing the words "beginning at a birch tree standing . . .", can be reconciled with the boundaries as evidenced by a registered plan. Indeed, many conveyancers may wonder how New Brunswick solicitors are able to certify title to vacant lands at all. Legislative direction in these areas would be of assistance to both solicitors and the public.

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[12]The *Certification of Titles Act,* R.S.O. 1970, c. 59 applies only to land under the registery system and is much less expensive and cumbersome than the *Quieting Titles Act,* R.S.O. 1970, c. 396. The *Land Titles Act,* R.S.O. 1970, c. 234 applies to land under the land titles system.

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