

HOW TO CONVERT POSSESSORY TITLE TO PAPER TITLE
RELANS LEGAL EDUCATION CONFERENCE
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Possessory title or adverse possession of real property is described in Survey Law in Canada in section 4.78 as: “Adverse possession combines the abstract idea of rights in lands with the real fact of occupation on the ground in a manner that is inconsistent with the rights of the true owner.”

Survey Law in Canada (sections 4.82 to 4.88) states the following:

“The conditions which must be fulfilled to perfect a possessory claim are that there is actual, open and visible, notorious, exclusive and continuous possession and enjoyment of the use of the land in a fashion which is adverse or hostile to an in derogation of the title of another person, by the claimant and those through whom he claims. The land must be under a claim of title as the whole or a part of a parcel, or, in other words, *the possessory claim must be over a boundary*. There has to be a defined, or definable, entity of land. Where part only of a parcel is claimed, adjoining other land of an adverse claimant, both the line or original boundary and the line of extent of the possessory claim must be shown by a survey. At this stage, the latter line is not a boundary; it is not definitive of extent of title until the court determines the validity of the claim and it is the court and the court alone, that will create the new boundary and state its position. A surveyor would be unwise to set marks as monuments prior to the decision; whatever he sets can only be reference or recovery marks for the survey of features until such time as the boundary is settled by the court.

As owner is deemed by law to have constructive possession of the whole of the parcel of his title although he may not use it all and therefore may not be in actual physical possession of it all. This principle of constructive possession does not operate to the benefit of a claimant for adverse possession; hence the claim can only be for the extent of the actual use and occupation, but if no defence is raised the extent could be of the whole parcel.

The proof of the preceding conditions is essential to the claim. The proof is strengthened by evidence showing that there is the receipt of profits as part of the enjoyment of the property, that there is the discharge of the burdens attached to the property such as the payment of taxes, and that there is the repair and maintenance of the property whether of buildings or of fences or of the land. The quality and the extent of possession are considered: an adverse claimant must show the conduct of a legitimate owner in possession, that is, *animus possidendi* or intention to possess in such a manner that prevents the owner from enjoying the land to the extent of which it is capable.

There are certain conditions that operate against claims to title by adverse possession: for example, if there has been an acknowledgement in writing by the adverse claimant, the time will date from the acknowledgement; and a claim will not succeed unless the ousted owner was *sui juris*, that is, of full legal capacity under no disability of infancy or mental incompetency. (Absence, as for instance on military service, is cause for extension of the limitation period in some jurisdictions but not, it appears, in Canada.)

Surveyors are cautioned against concluding adverse possession without proper consideration of the legal aspects which must be satisfied. These are quite apart from visible features on the ground which may stir the fancy as an immediate solution to a complex boundary problem. The perfection of a claim of adverse possession for title good against all the world including the dispossessed holder of the paper title is no small matter. This is not the place to discuss the many legal points which are open to testing in the courts; rather, it is directed to the surveyor's role of providing evidence of relevant factual things.

The materials needed to support a claim of adverse possession can be assembled in four categories, as follows:

- (1) The claim is brought before a court by satisfying the procedural prerequisites in commencing an action. (In Ontario, this is done under Rule 14 of the Rules of Civil Procedure, or on application to the Director of Titles under the *Certification of Titles Act*, or to a land registrar under the *Land Titles Act*.) The basis of the claim must be presented in all necessary detail, usually by a statutory declaration of facts confirmed by disinterested parties stating their means or sources of knowledge of the alleged facts.
- (2) Evidence must be provided as to when the land under claim was first enclosed to exclude the ousted owner; by whom the enclosure was made and the circumstances; the materials of fences or other structures of enclosure; the conditions of these enclosing structures from time to time and the repairs and maintenance carried out and by whom; the means of ingress to the land; the improvements that have been made to the land and buildings and the dates of improvements and made by whom; and the purpose for which the applicant uses the land.
- (3) If the applicant claims through predecessors in title, the assignment of the possessory rights of the predecessors is needed.
- (4) A plan of survey is so much an essential part of the application that it will seldom be dispensed with except for whole parcels already clearly defined. The surveyors must ascertain the history of the possession sufficiently to be able to show the enclosures on which the owner relies for his claim; the relation of these enclosures to the original boundaries of parcels; the roads, road allowances, lanes, paths, gates, doors or other means of entry to the land; the location and description of all buildings; the land-use such as pasture, cultivated field, orchard, market garden, storeyard, car park, etc.; any apparent easements, rights of way or encroachments.

While the onus is on the applicant to prove valid possession of the property (that is, reliance is placed on the strength of the claim, not the weakness of the other party's possession), the surveyor's role is one of affording information. Generally, there will need to be disclosure of all the information obtained, including discrepancies noted, difficulties in reconciling facts and features, uncertainties and even doubts. The court or tribunal seeks accuracy and completeness of the certification it is being asked to give. Consequently, the surveyor in these instances should see himself as an agent and advisor of the tribunal and never as a protagonist for the applicant."

Survey Law in Canada was published in 1989 and makes reference to title for an area of land being claimed by adverse possession to be confirmed by an action in the courts or a Quieting of Titles. Since the date of this book, Nova Scotia has enacted legislation, (Land Registration Act) which allows lawyers to bring adverse or possessory title to paper title and migrate this into the new land registration system. The Land Registration Act does not diminish the burden of proof to bring the adverse title to paper title.

Section 4.87(4) of Survey Law In Canada states that "a plan of survey is so much an essential part of the application that it will seldom be dispensed with except for the whole parcels already clearly defined." It is my opinion that a survey should be prepared anytime that a portion of land is being claimed by adverse or possessory title, so that the extent of the adverse or possessory title can be defined. The discussion paper prepared for the Nova Scotia Barristers' Society & The Association of Nova Scotia Land Surveyors by the working Group Respecting Parcel Description Questions, states that a Nova Scotia Land Surveyor should be providing the description for the land being claimed by adverse possession. Some debate will arise as who should be preparing the legal description (now the PDCA), but I feel that the description should be based on a Plan of Survey certified by a Nova Scotia Land Surveyor, and this plan should be recorded in the Parcel Register for the land be claimed by adverse or possessory title.

In the situation when the current land owner (occupier) needs to claim adverse or possessory title for the whole parcel to perfect title because of a missing heir, a half interest that may be recorded against the parcel more than 20 years ago, etc., and the boundaries are well established and not in dispute, the need for a survey may not be necessary. The problem Nova Scotia Land Surveyors encounter, is that the evidence contained is the legal description for the parcel of land (fences, rockwalls, stake and stones, etc) may exist in the document used for migration, but have not existed on the ground for many years.

Surveying parcels of lands that are migrated and contain an existing parcel and lands claimed by adverse possession, create a unique situation for Nova Scotia Land Surveyors. The first question in the surveyors mind is what do I show on my plan of survey? I believe that the Nova Scotia Land Surveyor should show the original boundaries of the existing parcel (before lands claimed by adverse possession), and the boundaries of the parcel of land as described in the migrated parcel (that would include any lands claimed by adverse or possessory title). I believe that the paper title owner that has lost real property (or their successors in title), have the right to contest the claim of adverse or possessory title under the Land Registration Act.

The Nova Land Surveyor is tasked with placing survey markers to delineate the extent of title as defined by deed (or migrated parcel). If the boundaries were not established by survey on the ground

before migration of the parcel identified as claimed by adverse or possessory title, then the placement of the boundary may lead to a dispute between adjacent lands owner, and even the neighborhood in general. It is often the case that when the survey markers are being placed, additional evidence relating to the occupation or possession is obtained from adjoining or other parties that have knowledge of the boundaries.

It is my opinion that the claim of adverse or possessory title needs the input of a Nova Scotia Land Surveyor, Lawyers, and third party witnesses that can provide reliable evidence to collaborate the evidence on the ground and to confirm with certainty the location of the “boundaries” on the ground. A boundary line agreement or surveying a conventional boundary is not a claim of establishing adverse or possessory title. A boundary line agreement or conventional boundary is established in the field by a Nova Scotia Land Surveyor when the true location of the boundary has been lost or cannot be established by original field evidence or by documentary evidence. If the parties agree to a location of the boundary, and it is intended to represent the true location of the boundary line, then the boundary as monumented on the ground should be confirmed by a legal document prepared by a lawyer and filed in the parcel registry for the affected parcels.