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How Far Back Do You Have To Search?

Why Search Back Title?

A lawyer searching a title must not only check transactions involving the present owner of a property to identify outstanding encumbrances, but must also take his inquiries back in time a number of years to ensure that the ostensible owner can deliver good title.

This measure is required for several reasons.

First, the lawyer does not want to disappoint his client, who expects to get a good title and may become annoyed if the quality of ownership is less than his expectations.

Secondly, the lawyer may be sued personally if the title is flawed. It is in his own best interests to ensure there will be no trouble.

Thirdly, news that a title is bad and that the lawyer has not alerted his client to this fact can spread quickly throughout the community, and the reputation of the lawyer involved may be damaged as well as that of the legal profession generally.

If, however, a lawyer can point to generally accepted professional standards and show that he has followed them, he may escape both liability and blame. In fact, if the standards are adhered to, the problems with the title may be uncovered and corrective action taken before closing.

The question remains, "How far back should a title be searched?"

The English Rule

As stated in Greenwood's *Manual of the Practice o Conveyancing* (5th ed., London, 1877) p. 17:

> "A person may have a safe holding title from having for twenty years enjoyed property adversely against persons not under a disability; but this would not in equity be considered a marketable title: the genera rule of that Court being, before the passing of the *Vendor and Purchaser Act*, that a vendor must deduce a sixty years' title."

The rule that an abstractor must search back 60 years is enunciated in *Law of Vendor and Purchaser* by Di Castr as follows:

> "Apart from agreement or statute, the abstract should commence with the Crown patent or grant, or cover a period of at least 60 years prior to the date of the contract to a point where a good root of title is established."

The origin of the 60 year rule is to be found in the Writ of Right developed under William the Conqueror to allow a person to recover possession of land. A typical writ would read as follows:

> "The King to Lord Salsbury, greetings! We order you that without delay you do full right to Sir Robert de

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> Huestis concerning one messuage with its appurtenances in the Manor of Dale which he claims to hold of you by the free service of a rose at midsummer for all service, of which Robin of the Glen deforces him. And unless you do so, the Sheriff of Nottingham will do so, lest we hear further complaint on the matter for want of right."

Until 1540 there was no time limit for initiating an action by means of the Writ of Right, but instead of this the number of years the alleged dispossession had lasted was inserted in the Writ.

In 1540 a statute (32 Henry VIII, c.2) was passed that established a limitation period for the Writs of Right as being 60 years from the time the right accrued.

It was only logical then, for conveyancers to protect purchasers against dispossession by means of this Writ by insisting that vendors provide abstracts showing at least 60 years continuous title from a solid root document.

In 1833 the first *Statute of Limitations* was passed, and at the same time the old Writs of Right were abolished. This, however, did not have the effect of doing away with the requirement that a vendor must show 60 years good title.

In *Cooper* v. *Emery* (1844) 1 Ph. 388; 41 E.R. 679, Lyndhurst, Lord Chancellor, held that the vendor had to show an abstract going back 60 years. Commenting that this rule was based upon the life span of a man, the Chancellor made it clear that this length of time was not altered by the passage of the *Statute of Limitations*. He stated:

> "Several points, and points of instance, were argued upon this appeal. The first, and the most important, was effect of the statute of 3 & 4 W.4 as to the period to which a good title should extend since the passing of that Act. It was supposed that, by the operation of that Act it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it I am of opinion that the statute does not introduce any new rule in this respect and that to introduce any new rule shortening the period would affect the security of title. One ground of the rule was the duration of human life; and that is not affected by the statute. It is true that, in other respects, the security of a sixty years' title is better now than it was before. But I think that is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years instead of the sixty. I think the rule ought to remain as it is and that it would be dangerous to make any alteration."

The reference to 60 years being the duration of a human life and the Lord Chancellor's concern with this factor is puzzling until one reads *Purves* v. *Rayer* (1821) 9 Price 488, 147 E.R. 159 and *Souter* v. *Drake* (1834) 5 B. & Ad. 992, 110 E.R. 1058. In these cases the court dealt with the adequacy of leasehold titles, and was concerned that a sufficiently lengthy title be made out by the vendor to preclude the possibility that the title obtained from a person in possession of the land could be based upon a life estate which would collapse upon the death of a life tenant allowing a remainderman to claim the property.

This was, in fact, what had happened in *Thompson* v. *Pitchers* (1843) 13 Sim. 327; 60 E.R. 127, where despite the fact that there was more than 40 years of continuous possession, the title was upset by reason of an interest arising before that period commenced.

There were similar judicial declarations in favour of the 60 year period in *Hodgkins* v. *Cooper* (1846) 9 Beav. 304; 50 E.R. 361; and *Moulton* v. *Edmonds* (1859) 1 De G.F. & J. 246; 45 E.R. 352.

In *Barnwell* v. *Harris* (1809) 1 Taut. 430; 127 E.R. 901 there were no title documents going back the requisite number of years, but continuous possession was proven. Heath J. said, "It is a technical rule among conveyancers to approve a possession of 60 years as a good title in fee simple."

In 1874 the *Vendor and Purchaser Act*, 37 & 38 Vict., c.78, was passed which provided that a 40 year unbroken chain of title was sufficient. This time was further reduced to 30 years in 1925 by the *Law of Property Act* (15 & 16 Geo. 5, c.20), and again to 15 years in 1969 (*Law of Property Act*, 1969 s.23).

Canadian Practice

Writing in 1925, Archibald D. Armour stated:

> "It has been said that the reasons for the sixty year limit do not apply to this country. The writer cannot agree with this view.
>
> The statement that the abstract must cover a period of 60 years anterior to the contract is to be taken subject to this qualification that it shall commence with a good root of title; and if this cannot be found at a distance of 60 years, the abstract must begin at an earlier period." (*Armour on Titles*, 4th ed., Toronto, 1925, p.33, 34).

The Canadian courts have not been consistent, however, in their application of the 60 year rule, and there has been much confusion as regards the application of the *Statute of Limitations*. As the earlier English cases illustrate, the 40 year period which may cut out the true owner's title has nothing to do with the 60 year rule. The distinction between those two processes is a real one:

Claim under Limitations Act — During the 40 years the vendor and his predecessors in title must have been in continuous, visible, uninterrupted, adverse possession of the property to the exclusion of the true owner and of any other third party.

Claim to paper title — During the 60 years of unbroken title, physical possession of the land need not be shown, but the documentation itself raises a presumption of possession, and if documentation of continuous title for this length of time can be shown, a purchaser cannot refuse the vendor's title, except in certain exceptional circumstances.

Conflicting messages are sent by court decisions which deal with the length of title to be shown.

60 years *Floyd* v. *Hanson* (1915) 43 N.B.R. 339. White, J. stated that the historic rule was 60 years which was not changed by the *Statute of Limitations* as the rule rested on other grounds.

52 years *Boudreau* v. *Tattersall* (1984) 58 N.B.R. (2d) 12. Meldrum, J. considered a title commencing with a deed in 1931. He stated, "here the fact of possessory title (if title by recorded document is not satisfactory) is not questioned. Both the records at the Registry office and the evidence of possession show good title in the vendor."

46 years *Stevens* v. *MacKenzie* (1979) 41 N.S.R. (2d) 91. Glube, J. found that a title commencing with a quit claim deed in 1931 was not good.

40 years *Dooks* v. *Rhodes* (1982) 52 N.S.R. (2d) 650. Rogers, J. considered a chain of title commencing with a deed dated 1941 but not registered until 1970. Citing s.19 of the *Limitation of Actions Act* he said, "it is this provision that imposes what is accepted as a forty year period beyond which a root of title must be found in order to certify marketable title to land in Nova Scotia. Thus is established a chain of title back to 1941, sufficient to bring into play the provisions of section 19 of the *Limitations of Actions Act* and overcome the objections taken in this case that title can only be established to July 31, 1970 and not May 21, 1941."

40 years *Knox* v. *Veinote* (1982) 54 N.S.R. (2d) 666. Hallett, J., considering a paper title going back only 25 years, stated: "Of course, the principal problem with respect to the title was the fact that there was no record at the Registry of Deeds for Lunenburg County of a deed to prove the conveyance of the property by Captain John Schwartz to Angus Tanner. This gap in title would have been disclosed in a normal search of title going back at least forty years as is the practice in Nova Scotia because of the extended limitation period within which persons under disability, such as being outside the province, may bring actions for possession of land (s.19, *Limitation of Actions Act*, R.S.N.S. 1967, c.168). There was no record in the Registry of a deed conveying the land to Angus Tanner and, thus, no registered title before 1953. The Veinotes could not show good title for forty years."

37 years *Zed* v. *Barristers' Society of New Brunswick* (1986) 73 N.B.R. (2d) 422; 31 D.L.R. (4th) 390 (N.B.T.D.). Higgins, J. agreed that a solicitor was negligent in approving a title based upon 37 years continuous paper title. This problem with the title was uncovered when the property was under agreement of sale 2 years later, and the solicitor for the new purchaser took a different view of the sufficiency of the title.

21 years *Maple Leaf Enterprises Ltd.* v. *MacKay* (198(42 N.S.R. (2d) 60. Hallett, J. considere abstracts of title commencing in 1955 an 1957 respectively with quit claim deeds; h stated, "I have some difficulty in understand ing how the defendant law firm could hav certified title in 1976 based on their abstrac that showed title commencing with a qu claim deed in 1955."

15 years *Hull* v. *Hennigan* (1958) 16 D.L.R. (2d) 78 Ilsley C.J. considered a case involving a gap in chain of title and declined to find that a titl continuous from 1943 to 1958 was sufficient.

The practice by some solicitors of commencing a searcl 40 years back from the present appears to be founded o an assumption that the *Limitations of Actions Act* had se this as a standard. This is not the case. The traditiona search period of 60 years was developed to protec against the possibility of double claims of title and t establish a standard, short of a chain continuous from grant from the Sovereign, which would be recognized a one which a purchaser would not be able to reject. The reasons for the 60 year search are as valid today as the were in 1749.

A Solution to the Problem?

Since it appears that the rule requiring a 60 year chain o title still applies to property transactions, the necessity arises to consider alternatives.

Many lawyers are content with a 40 year search, but this length of time is not sufficient to extinguish an earlier claim if there has not been such possession of the property sc as to allow the owner to claim advantage of the *Statute o Limitations*. An objection to the quality of the paper title would force the vendor's solicitor to shift his ground and allege a title by possession. As indicated by Hart, J. in *Parsons* v. *Smith* (1971) 3 N.S.R. (2d) 561 such evidence must be produced in satisfactory form within the time limited for removal of objections. In many cases such evidence would just not be available and the transaction would collapse with the potential of damages payable to the purchaser.

It is generally recognized that a 60 year search is not really a practical standard in this century. Many jurisdictions in the United States, as well as Ontario and Prince Edward Island, have passed acts to deal with this problem. This is known as marketable title legislation.

The Ontario act, now part III of the *Registry Act*, states that a 40 year search period is sufficient. Under active consideration is a proposal to further reduce this period. The Ontario act protects a purchaser who relies on the 40 year search and buys a property. The owner of an interest arising prior to the 40 years period may protect himself by filing a Notice of Claim, which may be renewed from time to time.

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Many American jurisdictions with registry systems identical to our own have marketable record title acts as well as curative acts barring ancient rights, such as those arising under old mortgages. The legislation in Florida, North Carolina, and Wyoming might serve as a guide for legislation in this province.

It would be in the interest of the legal profession to press for consideration of such marketable title legislation here to protect property owners and lawyers from the expense and inconvenience attendant upon the present state of law.

— **C. W. MacIntosh**

To Obtain Decisions

All the decisions summarized in this issue are available from the Nova Scotia Barristers' Society Library, 1815 Upper Water Street, Halifax, N.S. B3J 1S7 (425-2665). Lawyers outside the Metro area may contact the Library for photocopies of decisions. The number in bold face type following the date of the decision is the number under which the decision may be located in the Barristers' Library and the Judges' Library.

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Index to Articles in Nova Scotia Law News

An index to the articles which have appeared in Nova Scotia Law News since its commencement in 1974 has been prepared. This consists of a table of authors, a table of subjects and a table of titles.

The index will be distributed on request by the Nova Scotia Barristers' Library for the cost of photocopying ($2.80). Call 425-2665.

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