

TAX DEEDS, TITLE SEARCHING AND MARKETABLE TITLE

I. INTRODUCTION

Although this topic brings to mind a formidable body of decisions and legislation that we would all rather forget it is worthwhile to take stock of where we are in this mire, and what light there may be at the end of the day through legislative change.

The purpose of this paper is to briefly review the background with which those of us who practice property are all too painfully aware, so that the backdrop is set for the discussion of the proposed legislative changes. It is in the interest of all practitioners to take advantage of this opportunity, to lobby within your respective political arenas, (or bullrings as the case may be) for passage of the pending Marketable Title Legislation.

II. TAX DEEDS

The legislation effective January 1, 1976 (Assessment Act) purported to confirm that a grantee could rely on all necessary steps having been followed by the municipality when purchasing property at a tax sale. The tax deed was purported to convey to the grantee an estate "in fee simple, free and discharged from all encumbrances whatsoever."

I use the term purported for reasons all too apparent given the body of subsequent judicial interpretation.

Time was one could take great comfort in the discovery of a tax deed in a title search. One needed to go no further it was thought. The judicial interpretation might have been easier to bear had it been consistent. Some decisions held that tax deeds were only effective to transfer the interest of the owner referenced in the tax deed to the extent of the owner's interest in the land at the time of the sale. (Deveraux & Robinson v. Sanders (1978) 26 N.S.R. 2d 283). However, other cases have indicated that a tax deed can convey only the interest of the assessed owner held in the land (Marsman v. Prevost (1987) 76 N.S.R. 83). Some cases held that the owners interest was foreclosed at a tax sale (assessment "owner unknown") because the owner had failed in his responsibility to make inquiries and protect himself from an erroneous assessment (Horyl v. Town of New Waterford (1989) 44 N.S.T. (2d) 70). This principle was recently upheld by Gruchy, J. in D & M. Investments v. Hub Town Foods Ltd. (1993) 119 N.S.R. (2d) 369), in a similar situation of "owner unknown" assessment and the uncertainties objected to by the purchaser in that case were rejected as unfounded.

Tax sales in which less than all of the true owners have been assessed for taxes have in some cases been found to be effective (Hage Enterprises Ltd. v. Loughan & Conrad (1983) 56 N.S.R. (2d) 181) and in other cases found to be effective only against the interest of the named assessed owner (Moore & Armsworthy v. Wheadon Nov 1993 S.H. No.93-5255). So in today's climate, far from being a source of comfort when discovered in a chain of title, the pendulum has swung so far in the opposite direction as to consider your "find" in a chain to be somewhat on the same plane as carcinogens. Some effort to bring the pendulum back to a more balanced position is essential if there is to be any reason brought back into the process.

Let us switch gears for a moment to another pendulum, with a mounting degree of swing.

III. Title Searching

Many real estate practitioners, at least in the metropolitan area, have been generally comfortable with the standard of searching 40 years for properties situate in the City; and sixty years in the County. Thanks to the recent eminent words of Mr. Charles MacIntosh, Q.C., (N.S. Law News Vol. 14, No. 3, Dec. 1987) among others, any degree of comfort we may have contrived for ourselves has long since dissipated. We are left with continued uncertainty in discussing with those eager and enthusiastic tenderpads of the bar whether even sixty years is sufficient. Perhaps it is the case that one can only be truly protected by searching back to the Crown grant in each and every case. If one were restricted to ten searches a year, all in Colby Village, or Forest Hills, one could probably still manage to adhere to that standard. However, this standard is practically unachievable for any property practitioner with a busy practice. So how is it that we can proceed to determine a reasonable standard that balances the interests of the purchaser who looks to us for certification of what is hopefully "marketable", with our desire for quality legal services and the reality of busy property practices?

IV. Proposed Marketable Title Legislation

DiCastrì defines "marketable title" as follows:

"... one which at all times and under all circumstances can be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation or hazard."

It is this "marketable title" which all of us hope our clients in fact have when we get one of those "do you remember acting for ..." calls on Friday afternoon. Given the history just reviewed with regard to tax deeds and title searching it would appear to be somewhat of a moving target.

Attached to this paper (Appendix "A") is the third draft of the legislation which is proposed to be introduced at the Spring session of the legislature. (The Spring of 1994, that is, if all goes well.) While Nova Scotia cannot be said to be the pioneer in this type of legislation, it is the generally held view that this will go a long way to resolving the uncertainties that currently exist for lawyers and the judiciary alike. It cannot be forgotten that there is a third group of persons who will benefit substantially from the creation of these standards - property owners generally in the Province of Nova Scotia. Mr. Charles MacIntosh, Q.C. had indicated a few years ago that in his view approximately 15% - 20% of the titles in Nova Scotia have, at some point in their title chain a tax deed - Given the difficulties of ascertaining the extent of many Nova Scotia titles, this is not a surprising statistic.

So as not to be accused of trying to reinvent the wheel in assessing the proposed legislation, it is useful to examine the comparable legislation in effect in other provinces. Both Ontario (1960) and P.E.I. (1974) have legislation in this area. As the provisions of the relevant pieces are short, I have attached them as appendices (Appendices B, C).

The purpose of our Act, as proposed is two-fold:

1. to provide a sunset clause for tax sales of six years with particular exceptions for those situations involving fraud or breach of trust, (Section 9); and
2. to sanction a period of forty years for a title search commencing with a registered instrument other than a will as sufficient to determine the "marketability" of title (Section 4).

Some of the highlights of this legislation are as follows:

Definitions (Section 2):

1. Our definition section is short and may not be sufficient when comparing it with Ontario and P.E.I. - for example, we have no definition for "claim" (unlike both Ontario and P.E.I.).

Title Search Period (Section 4):

2. This section confirms the "marketability" of a 40 year title search and while the wording varies slightly among the three Acts, (Ontario s. 112, P.E.I. s. 2) I believe the language contained in ours to be preferable. P.E.I.'s is drafted in the negative and is somewhat cumbersome. The language in the Ontario Act is somewhat confusing and has led to a large

discrepancy within the legal profession as to what constitutes compliance with the standard described. (For an enlightening discussion see the paper by Delee A. Fromm, McCarthy Tetrault, as reported in The National Real Property Law Review Vol 1, 1992, pg. 137. Copies can be obtained from the N.S. Barristers' Library on request.)

Sunset Clause - Tax Deeds (Section 9):

3. This section provides that "a deed duly signed by a person authorized to sell land for non-payment of taxes should not be set aside after a period of six years following registration of the deed."

Neither the Ontario or the P.E.I. acts contain this provision. While this is a long sought after declaration, one cannot help but wonder how the exemption described in s. 9(2) will affect the application of the standard set out in s. 9(1). Section 9(2) provides that a tax deed may be "rectified by order of the Court" so as to exclude from its operation land of a person other than the assessed owner upon which taxes were not in arrears at the time of the sale. I have emphasized these last few words as I am of the view that these words will restrict the scope of possible rectification applications. However, it has yet to be determined what inquiries will be necessary to satisfy yourself that this exemption will not apply.

Conflict - Priority of Statute Established

4. Unlike both Ontario (Section 115) and P.E.I. (Section 9) statutes which provide that in the event that the provisions of the Act conflict with any other statute, the marketable title statute will prevail, our Act is silent with regard to conflicts. This is an important provision to be included to ensure certainty of application of the provisions contained in this legislation.

Exceptions to the Application of the Title Search Period (Section 7):

5. Section 7 sets out nine exceptions to the application of the forty year rule. The P.E.I. Act excepts only a certificate of title issued under the Quieting Titles Act (section 2(2)). Ontario's exemptions are contained in s. 113(5) and include Crown lands, public highways a claim arising under any Act and claims of a corporation authorized to construct a railway. The Ontario legislation has one further exemption which in my view is paramount to be included in our proposed legislation;

namely - claims of "a person to an unregistered right of way or other easement or right that the person is openly enjoying and using". (Section 113(5)(a)(iv))

Summary

In summary, I believe that the Marketable Title legislation, as proposed goes a long way towards bringing back to a measurable standard the issues surrounding title searching and tax sales. I also believe that we can assist the government in putting forward the best possible form of this legislation and to that end I encourage all of you to take a moment to lobby your representative in the legislature, and to put forward your thoughts on the way in which this legislation can reduce the casualties of property practice.

1. This Act may be cited as the MARKETABLE TITLE ACT.

2. In this Act:

"instrument" means an instrument which is authorized to be registered in a Registry of Deeds;

"interest" means any interest in land;

"notice period" means the period of greater than forty years immediately preceding the date the marketability of a title is to be determined, referred to in Section 4;

"owner" means a person, other than a mortgagee, or holder of an encumbrance, who is entitled to an interest in land, in equity, in possession, in futurity, or in expectancy;

"purchaser" means a purchaser for value and includes a mortgage;

"registered" means registered in the Registry of Deeds for the district in which the land is situate.

3. This Act shall be administered by the Attorney General.

4. (1) An owner of land shall be deemed to have a marketable title to the land if he has an unbroken good and sufficient chain of title during a period greater than forty years immediately preceding the date the marketability is to be determined except in respect of an interest referred to in Section 7 and subject to such encumbrances and interests as are created by instruments registered since the commencement of the chain of title.

(2) A chain of title commences with the instrument other than a will most recently registered before the commencement of the forty year period referred to in subsection (1) which conveys the land or the equity of redemption therein.

(3) An interest or claim based on an instrument registered or dated prior to the commencement of the chain of title is extinguished unless a Notice of Claim with respect to it is registered pursuant to Section 5 or it is an interest referred to in Section 7.

5. (1) A person having an interest in land may register a Notice of Claim in the prescribed form.
 - (2) A Notice of Claim shall have the effect of preserving the interest claimed therein if it is registered:
 - (a) during the notice period referred to in Section 4(1); or
 - (b) at any time after the expiration of the notice period but before the registration of a conflicting instrument.
 - (3) A Notice of Claim shall be directed to the registered owner of the land and served by the person making the claim on such registered owner, all persons having an interest registered with respect to the land, and all persons known by the claimant to have an interest in the land.
 - (4) A new Notice of Claim may be registered from time to time in accordance with subsection (2).
 - (5) The registration of a Notice of Claim does not validate or extend an interest that has expired or is invalid.
 - (6) Legal disability, lack of knowledge, or absence from the Province on the part of any person shall not extend the period during which a Notice of Claim may be registered.
6. If the owner of land derives title from an instrument dated and registered prior to the commencement of the forty year period referred to in Section 4(2) during which time no title transaction with respect to such interest has been registered in his chain of title and he has been in continuous possession of the land for the forty year period, such period of possession shall be deemed to be equivalent to the registration with respect to his interest in the land of a Notice of Claim under Section 5 immediately before the expiration of the forty year period.
7. This Act does not apply to affect:
 - (a) ungranted Crown lands or an interest reserved to Her Majesty in a Crown grant;
 - (b) a public road, highway, or Crown road reserve;
 - (c) an interest arising under an Act;
 - (d) a railway;
 - (e) the reversion of a lessor;

- (f) land registered under the Land Titles Act;
 - (h) land with respect to which a certificate of title under the Quieting Titles Act has been issued during the period referred to in Section 4;
 - (i) land which the registered owner has lost the right to bring action to recover pursuant to the Limitation of Actions Act, to the extent of the interest so lost; and
 - (j) any mineral.
8. A purchaser may acquire land which has a marketable title, free from any interest extinguished hereunder.
9. (1) Subject to subsections (2) and (3), a deed duly signed by a person authorized to sell land for non-payment of taxes shall not be set aside after a period of six years following registration of the deed.
- (2) A tax deed may be rectified by order of the Court so as to exclude from its operation land of a person other than the assessed owner upon which taxes were not in arrears at the time of the sale.
- (3) A tax deed may be set aside as to the interest of the present owner of the land who committed or participated in fraud or breach of trust with respect to the sale for taxes.
10. The Governor in Council may make such regulations as are necessary for the administration of this Act or to make provision for matters required for the purpose of this Act, and without limiting the generality of the foregoing, may make regulations:
- (a) respecting the form of a Notice of Claim;
 - (b) respecting the manner in which a Registrar of Deeds shall receive, register, or enter in the records of the Registry a Notice of Claim.