Quieting Titles Act: Chambers Practice

This article is penance. It is my punishment for using dusty boilerplate during the course of an action under the ***Quieting Titles Act****. Unknown to me, the judges of our Supreme Court had become fed up with the manner in which we barristers were presenting these applications. Documents were too brief and the busy Chambers judge was forced to play Hercule Poirot in order to confirm compliance with the Act.*

As a result they, and officials at the Department of the Attorney General, had undertaken a review and were in the process of approving new guidelines when into Chambers walked your writer.

His Lordship was not amused. He reflected on two options: throw me out and force a new and better application or make me his publicist. He choose the latter, reasoning that a dismissal would cure this writer, but an article might cure the whole Bar.

Three Part Process

The process of obtaining a certificate under the *Quieting Titles Act*, R.S.N.S. 1967, c. 259 can be divided into three parts: the statement of claim, the application for directions, and the application for a certificate.

Statement of Claim

The usual strategy of vague general pleadings does not work here. The Act is very specific and the contents will be the basis of the later application for directions. Additionally, the contents must be confirmed by affidavit *filed with the statement of claim*. Here is a checklist based on sections 4 to 6 of the Act and practice:

- join as defendants all persons who are "asserting an active claim". If you do not, the court will make you do so at stage two.
- set out the facts, including the title history. The fine detail can be in the abstract.
- include a legal description
- state names of abutting landowners or occupiers
- state whether the plaintiff is in actual or constructive possession
- state who is the assessed owner
- set out all property interests admitted by plaintiff
- set out all claims to rights known to plaintiff even though not admitted. This helps the judge at the second stage.
- attach a registerable plan of survey with the property in question marked in red
- attach an affidavit confirming "every material particular"
- attach an abstract of title which follows the *Ratto* guidelines (In *Ratto et al.* v. *Rainbow Realty Limited et al.* (1984), 68 N.S.R. (2d) 44 at p.51, Mr. Justice Nathanson listed several qualities of a good abstract).

Applications for Directions

At this stage the critical document is your pre-hearing memorandum. The notice, affidavit, and proposed order are important, but the judge wants to see the memorandum. This has been a problem in the past. We practitioners leaned towards obscurity in our documents and frequently failed to file any memorandum. This put the judge in the unwanted role of detective. Cover the following in the memorandum and you will not have to write articles for the *Law News*:

- explain briefly the nature of the title problem
- outline the basis of your client's claim
- list the abutters and confirm that your order provides for notification to them
- confirm that you have joined all those who are actively asserting a claim or name them now and confirm that your order joins them as defendants
- list those persons who may have an interest and confirm that your order provides that they be sent notices of right to intervene with a copy of the plan (with property marked in red). List them even though you hope your action will ultimately wipe them out. They have a right to be heard and the judge wants them to know this
- confirm that you have searched the registries of deeds and probate and anywhere else that might provide relevant information
- confirm that you have filed an affidavit proving service of the pleadings and documents for this application on all defendants and have provided counsel for the Attorney General with a copy of this memorandum
- confirm that your order provides for four advertisements for four consecutive weeks and point out any variations from the usual form including a short form legal description

Part of the move to tighten these procedures is instructions for the counsel representing the Attorney General to take a more active role in helping the court. This representative has a checklist like the one above and he or she will be watching you.

Application for Certificate

You have advertised and served all as ordered and no interventions or defences are filed. You can now proceed to make application for your certificate of title. At this stage the most important document will be the affidavit (or affidavits) supporting the requirements set forth in s.11(2) of the Act as well as confirming the terms of the order with directions. The checklist:

- confirm that all defendants have been added as ordered
- confirm that no defences have been filed
- confirm that all notices to intervene have been served
- confirm, with exhibits, compliance with advertising requirements
- confirm satisfaction of all other terms of the directions order
- as required by s.11(2) prove that:
  - plaintiff or predecessors have been in possession for twenty years

continued on page 28

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Survey Plans *continued*

government departments (Health, Transportation, etc.) and even LRIS are the Crown; one arm of the Crown (development officer) passing a plan, which the legislation indicates is vested in the Crown, to another arm of the Crown for legitimate Crown purposes (public registry system, property mapping) hardly seems open to challenge. As well, LRIS provides maps and attributes files, etc., to those departments involved in the development process, supporting their efforts and increasing their efficiency. This process is all part of legitimate government activity.

The Registry and Evidence Acts

The Nova Scotia *Registry Act* is silent with respect to the provision of copies of registered or filed documents, plans, etc. However, section 11(11) allows the Governor-in-Council to make regulations. Section 2 of the *Costs and Fees Act* provides that the setting of any fees under that Act is a regulation. Schedule A of the *Costs and Fees Act* among other things sets a fee to be charged by a Registrar of Deeds "for supplying copies of recorded or filed documents, plans, etc." Access fees for searching purposes are also prescribed. Therefore, by regulation it can be said the Registrar is empowered to make copies.

Section 12 of the Nova Scotia *Evidence Act* confirms the evidentiary status of certified copies of any "grant, map, plan, report, letter, or official or public document, belonging to or deposited in any department of the Government of Canada, of this Province, or any province of Canada . . ."

Hours of business are stipulated in Nova Scotia by s.7 of the *Registry Act* and s.9 of the *Public Officers Act*. One of the bases of operation of a Registry System is that the recording of a document, etc., puts the public on notice of its existence. The public must therefore have access. Registries of Deeds must be public offices (as the prescribing of hours of business implies), and the documents found in them (including plans) are necessarily public documents.

Conclusions

1. The copyright in survey plans is vested in the surveyor.
2. The provision of plan(s) to the client by the surveyor implies a license to use them, including making copies, in the manner and for the purposes for which they were produced.
3. Submitting a survey plan to the development process passes the property in that plan (arguably the copyright as well) to the Crown. Even if the copyright is retained by the surveyor, the physical plan belongs to the Crown and a license is implied for it to be used in the generally accepted manner which includes filing in the Registry of Deeds and forwarding to LRIS. Submission of any plan directly to LRIS would similarly result in it becoming Crown property, or at the least imply a license for LRIS to use it.
4. A plan filed in the Registry of Deeds is a public document open to public view and a copy of which may be obtained by the public.

— Rosalind C. Penfound

Quieting Titles *continued*

— any other person having an interest has not, during that time, (1) received any benefit, (2) paid any expense, or (3) exercised any proprietary right

The affidavit is critical because there is no judgment by default under the Act. Even if added defendants fail to file, this element of evidence under s.11(2) must be satisfied. Include another pre-hearing memorandum with your application noting anything unusual and summarizing where in your affidavits the required proofs are located.

In Conclusion

These checklists emphasize the important ingredients of the action and are not intended to be exhaustive. May all your applications be quiet. *Mea culpa.*

— A. Lawrence Graham

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