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ADVERSE POSSESSION AND THE *LAND REGISTRATION ACT*

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AGENDA

1. Defining adverse possession
2. Migrating titles based on adverse possession under the *Land Registration Act*
3. Adverse possession in the modern context





WHAT IS ADVERSE POSSESSION?

Adverse possession is a legal concept that recognizes the situation in which the legal title to land is clear, but it is inconsistent with the facts of long-term occupation on the ground by another person who may be able to assert an interest in that land.

CHARACTERISTICS OF ADVERSE POSSESSION

To qualify as adverse possession, a claimant must show that they had actual, open, visible, notorious, exclusive, and continuous possession of the land for the full statutory period

- **Actual Possession:** land must be used without permission and as a titled owner would.
- **Open and Notorious Possession:** use and occupation of land must be open and visible so that any person having interest could know.
- **Exclusive Possession:** possession must intentionally and effectively exclude the possession of all others.
- **Statutory Period:** possession must endure continuously for a minimum of 20 years.
 - Only applies to land not migrated into Land Registry System
 - Maximum of 10 years to bring claim after migration.
 - For Crown land, the minimum period is 40 years of continuous possession

MIGRATION UNDER THE *LAND REGISTRATION ACT*

Under the *Land Registration Act (LRA)*, lawyers are permitted to migrate title based on adverse possession by taking the following steps:

1. Conduct a title search and determine the extent and description of the parcel being claimed
2. Document title and prepare evidence of adverse possession to be registered with the Registry of Deeds
3. Submit an Application for Registration in draft form
4. Submit a Parcel Description Certification Application
5. Submit an Application for Registration in final form and retain documentation

TITLE SEARCH AND DETERMINATION OF PARCEL

First, a solicitor will conduct a title search to show the chain title required for the statutory limitation period.

The solicitor must also determine the extent and description of the parcel claimed by having a survey conducted

- Determination of boundaries for a partial parcel claimed by adverse possession is to be done by a surveyor and not a lawyer
- It is good practice to survey a parcel claimed by adverse possession, even where boundaries are not in dispute

Giving consideration to the title search and survey, the solicitor will ascertain if the migration of title is viable.



DOCUMENT TITLE

A solicitor must document the title based on adverse possession

Documented title includes:

- The interests being registered in the land;
- Any encumbrances, liens, estates, qualifications, and other interests on the land;
- Direct and indirect right of access to the land; and
- The chain of title.

PREPARE EVIDENCE

A solicitor must prepare documentary evidence of adverse possession

- Evidence of title includes affidavits and statutory declarations from knowledgeable and impartial persons, such as surveyors.
- Evidence needs to show the extent of the area possessed and the characteristics of adverse possession: actual, open, visible, notorious, exclusive, and continuous possession.
- Statutory declarations are filed with the Registry of Deeds
- Statutory declarations are the listed as enabling documents in the registered interest portion of the Application for Registration



SUBMIT DRAFT APPLICATION FOR REGISTRATION

A solicitor is required to first submit a draft form of an Application for Registration (AFR) for preliminary approval by the Registrar

An AFR must include:

- An Application Form 6
- Opinion of title by solicitor
- A statement of whether and why a title insurance policy was issued
- The prescribed fee
- Evidence of compliance with Parts V and Part IX of *Municipal Government Act*
- The parcel identification number

The solicitor must provide notice of the application to the last known owner of the parcel in Form 9 and submit a copy of the notice with proof of service.

PARCEL DESCRIPTION CERTIFICATION APPLICATION (PDCA)

Before submitting an AFR in final form, a solicitor must have an approved PDCA.

- To submit PDCA, solicitor must identify the PID and the parcel by:
 - Reviewing the legal description
 - Reviewing the provincial mapping
 - Commenting on error in the provincial mapping, if any
- PDCA is submitted in Form 2.
- Where there are title issues with adverse possession, the appropriate affidavit evidence will likely be required for approval

SUBMIT FINAL APPLICATION FOR REGISTRATION (AFR)

After receiving preliminary approval of the AFR and the PDCA, the AFR is submitted by a solicitor in final form.

Once the final AFR is submitted, the title to the parcel is registered under the *LRA*.

A Solicitor is required to retain, and make available for review:

- the documents submitted in the AFR;
- written authorization to submit the PDCA and AFR, if required;
- an owner's declaration regarding occupation of the parcel in Form 5 and evidence of the information relied upon;
- the official report for the legal description from Property Online;
- the abstract of title.

ADVERSE POSSESSION IN THE MODERN CONTEXT

- *Pettipas v Hunter Noel Holdings Ltd*, 2015 NSSC 313
- *Fancy v Coade Estate*, 2022 NSCA 17
- *Urban Farm Museum Society of Spryfield v Auby*, 2021 NSSC 136
- *Johnston v Roode*, 2019 NSCA 98

Pettipas v Hunter Noel Holdings Ltd

Application for an order declaring that Pettipas had established adverse possession over a piece of land on their side of a fence

- Predecessor to HNL and Pettipas agreed to drainage pipe on Pettipas' property and a new fence was erected several feet over the neighbouring parcel.
- Applicant planted trees and gardens on their side of the fence – court found land use was open and notorious.
- Parcel was migrated to LRS in 2007 and Pettipas required to show 20-year continuous possession from 1987 to 2007.
- Predecessor had set foot on land and committed acts of ownership in 1988 (i.e., painted fence, hired surveyor) which reset the period – court found no continuous possession.

- Property in dispute was adjacent to Auby property and had become untended when it was donated to UFM in July 2016.
- UFM began constructing walking trails on Property and hired surveyor that showed Auby had erected a fence and various structures on a portion of the Property.
- Auby claimed adverse possession to the portion of the Property and claimed they had actively used and occupied it for 30 years.
- Court found that Auby's use of the Property was not inconsistent with the previous titled owner's use - they had held it for the purpose of sale or development. Use was not adverse until 2016 when donated to UFM and period to establish adverse possession therefore began in 2016.

Urban Farm Museum Society of Spryfield v Auby

Application by UFM to determine whether Auby had established a right to adverse possession over a portion of UFM's land.

Fancy v Coade Estate

Appeal from a dismissal of an application for adverse possession of two vacant parcels of land.

- Fancy argued adverse possession from 1986.
- Parcels were migrated to LRS in June 2019 and July 2019 – adverse possession required continuity from summer of 1999.
- Titled owner had sub-divided one of the parcels in 2000 – Fancy was aware and did not assert a right at the time.
- Court found that subdivision was an unequivocal act of possession and was enough on its own to oust the claim of adverse possession.

- Parties owned adjacent cottages on Caribou Island since the 1950s-60s.
- Roode maintained a garden and shrubs on a portion of the Johnston's property and occasionally mowed and parked their vehicles on the entire parcel.
- Trial judge found Roode had established adverse possession over shrub area and this extended to the entire 50' x102' parcel.
- Appeal judge found trial judge erred – Roode had only established adverse possession over portion of parcel with the garden and shrubs.
- Appeal Judge determined mowing and parking are not exclusionary in nature as others could have parked and mowing was done by Johnston's occasionally.

Johnston v Roode

Appeal of decision finding Roode had established adverse possession over a 50'x102' parcel of Johnston's titled land



THANK YOU!