Schriften zum Notarrecht 52

Mathias Schmoeckel (Hrsg.)

Übertragung von Immobilienrechten im internationalen Vergleich

Conference on real property law and land register

Nomos

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Herausgegeben von der Deutschen Notarrechtlichen Vereinigung e.V. (NotRV)

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Preface

Prof. Dr. Mathias Schmoeckel

The transfer of land of most Western States, due to the modern well-functioning market of land property, is handled in such a well-established way that its elements appear to be unnecessary or even self-explanatory technicalities. Selling a parcel of land, a mortgage or a servitude tends to be unproblematic in most cases because the specialists dealing with the technicalities are there to ensure that the interests of the parties are as well-protected as the interests of the general public as regards to the clarity and certainty of the transaction. This observation of the day-to-day application of these rules involves, however, a pre-established set of rules for land law, applied by specialists of the law and / or by professional conveyers, often backed up by State officials who keep a public register.

These features can diverge remarkably in the different States. Is the public register decisive or only informative, and do the public servants therefore decide on the validity of the transaction? Not all countries involve public notaries, others do not even involve lawyers, but consultants and conveyors. Even the form of the public register can vary from the traditional book to a sophisticated internet site. More important still, the focus on the participation of the State and its organs in some countries are still met with sheer horror in others. To sum up, the comparison between the different modern land law systems shows that there is hardly any unanimity; the ideas, the ways of functioning and the people involved differ tremendously, even basic concepts can be quite contradictory.

The unification of land property law is, fortunately, still a fantasy even in Europe. Even if such a plan were to be put into practice in the future by some countries, the preliminary work has to involve an understanding of the different concepts, expectations and mentalities. This will show, eventually, if and for which countries any idea of unification can be conceivable.

The Rhenish Institute of Notary Law and the association of the founders and benefactors of this Institute united their forces to organize a conference on “Registration and Transfer of Rights in Real Estate. At the new premises of Bonn University’s “Forum” the meeting took place from the 18th to the 19th September, 2017. Members of different States and legal

systems were asked to give an insight into their real property law from two perspectives, first a general overview on the contemporary law in order to clarify the basic structures, then an attempt to explain the practise and expectations of the people, drawing on the earlier legal history, in order to understand the objective of the regulation and its typical shortcomings or other phenomena. The papers will hopefully show not only the differences in the letter of the law, but also in their objectives and the public expectations. We have been extremely lucky to assemble specialists of land law in their respective countries, who were able to present their chosen topic from these two perspectives. We are very grateful for their valuable participation!

It was not our aim – as it was hardly feasible – to have all European States and their land law systems represented in our volume, nor did it seem a good idea to embody all major law systems of the world. With a special interest in European law, we focused on property law systems and looked for specific ideas, which might render the comparison interesting. Our result is neither comprehensive nor systematic, and our collection reflects some of the most interesting yet different land law systems in the world. For this reason, even our publication cannot render the articles in a systematic order. The Institute considered the different scientific styles and citation methods of the authors.

The preparation of the conference was organised by Vincent Nossek. His able and far-sighted organisation ensured that the conference was held in a way which was to everyone's satisfaction. He also participated as the first speaker, drawing from his experiences of his future doctoral dissertation. We owe him much for his great effort!

The realisation of the publication was overseen with great attention and precision by Pascal Förster and the team. Once again, the staff of the Institute did everything with care and diligence. Finally, I would like to express my gratitude to all participants in the publication of this book!

Bonn, 11.4.2018

Landholding and Conveyancing in the Canadian Province of Ontario

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I. Introduction

In this chapter, we aim to explain fundamental concepts of real estate (real property) and real estate transactions in Ontario, the most populous province in Canada. Ontario is one of thirteen provinces and territories and is the location of Canada's economic centre, the City of Toronto. Like all Canadian provinces except Quebec, Ontario is a fully common law jurisdiction, although the law of property, similarly to other areas of the law, has been heavily modified by statute. Under the Canadian Constitution, property falls under provincial powers, rather than federal powers.[1] Our concentration in this chapter on one province is thus necessitated by the fact that there is no general federal common law or statutory law governing real estate transactions in Canada.[2]

Of course, given the space constraints, this chapter can only serve as an introduction, and numerous technical details and exceptions are necessarily omitted. Taking into account the venue of our scholarly meeting – the *Institut für Notarrecht* – and the fact that the contributions to this collection of our reflections are thus also aimed at an audience interested in the institutional and professional aspects of real estate law, we wish to emphasize in our chapter the specificities of a common law landholding system while also focusing on the role of legal professionals involved in property

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1 Constitution Act, 1867, 30 & 31 Vict, c 3, s 92(13).

2 On the diversity of landholding systems within the common law, and on the various reform initiatives, see e.g. *Greg Taylor*, The Law of the Land: The Advent of the Torrens System in Canada, Toronto 2008, pp. 5 ff.

conveyance. From the outset, it is important to note that in Ontario, and elsewhere in Canada outside of Quebec,[3] there is no analogue of the civil law notary in the sense of a necessarily neutral institution involved in the conveyance of real property;[4] however, the participation of lawyers, as we shall discuss, often serves similar functions, particularly with respect to protecting the interests of the involved parties. This sketch, we believe, will highlight that indeed, in the common law, "[t]here are no simple property transactions."[5] As such, there are certain pitfalls that might come as a surprise, especially to jurists trained in other legal traditions.

We start by outlining the participants in property conveyance in Ontario, followed by a discussion of landholding and registration. We then address several important considerations in real estate: title and off-title searches, third-party rights, risk management, and mortgages. With this foundation in place, we conclude by briefly setting out the process for effecting a sale of real property.[6] In light of this practical focus, we shall not delve into the historical background of property law in common law jurisdictions, nor will we touch upon the complex and topical issue of Aboriginal title, treaty rights, and Indigenous concepts of property in general.[7]

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3 For the exceptional role of notaries in the Canadian province of British Columbia, see most recently *Joan Brockman*, A Cold-Blooded Effort to Bolster Up the Legal Profession: The Battle Between Lawyers and Notaries in British Columbia, 1871-1930, Histoire social / Social History 1999, pp. 209ff. For some historical background on the notarial profession in Quebec, see *André Vachon*, Histoire du notariat canadien, 1621-1960, Quebec 1962, passim, and, on the reinstatement of notaries by the British government after the Quebec Act of 1774, see also *William Smith*, The Struggle Over the Laws of Canada, 1763-1783, 1 Canadian Historical Review 1920, pp. 166ff.

4 In cases where no conflict of interest can arise, one lawyer may, exceptionally, represent both vendor and purchaser; see below Section II.c.

5 Brandon v. Brandon, [2001] O.J. No. 2086 at para 117 (Ontario S.C.J.) – cited in *Marguerite E. Moore*, Title Searching & Conveyancing in Ontario, 6th ed, Markham 2010, p. 1.

6 For an overview of the sequence of steps involved in "conveyancing," see *Gabriel Brennan*, The Impact of eConveyancing on Title Registration: A Risk Assessment, 2015, p. 51f. (comparing Ireland and Ontario).

7 For an overview of the situation in Ontario, see *Moore*, supra note 5 at 6ff; for first introduction into the topic, see e.g. *Michael Asch*, On Being Here to Stay: Treaties and Aboriginal Rights in Canada, Toronto 2014, pp. 13ff.; *Kent McNeil*, Aboriginal Title and the Supreme Court: What's Happening?, 69 Saskatchewan Law Review 2006, pp. 281ff.; more generally cf. *John P.S. McLaren et al* (eds.), Despotic Dominion: Property Rights in British Settler Societies, Vancouver 2005. For the policy issues specifically in Ontario, see e.g. *Fraser McLeod et al*, Finding Common Ground: A Critical Review of Land Use and

At the commencement of a real estate transaction, it is frequently the case in Ontario that only the parties and their real estate agents, if any, are involved. Once a vendor has accepted a prospective purchaser's offer price, an Agreement of Purchase and Sale is drawn up and signed by both parties. The prospective purchaser then pays a deposit. If a real estate agent is involved on one or both sides, they will generally draft the agreement using a standard template corresponding to the type of property (e.g. resale freehold home, new freehold home, resale condominium, commercial property, etc.). The Agreement of Purchase and Sale is a binding contract but is normally conditional on a number of issues being resolved,[8] typically including ascertaining valid title, passing a building inspection, and so on. After the Agreement of Purchase and Sale is concluded, a stipulated amount of time is given for the parties to fulfill the stated conditions and perform any due diligence requirements; the deal then closes on a specific date, usually roughly one to two months after the Agreement date, at which time the mortgage funds (if any) are released by the lender, the balance of the purchase price is paid, and the transfer is completed and registered (see below Section VII.).

II. Who is involved in real estate transactions?

1. Vendor, purchaser, and real estate agents

To begin, there will of course be a vendor and a purchaser, either of which may be a natural person or a legal entity. It should also be noted that where the property in question is or will be a "matrimonial home" (a term that is defined by statute),[9] both spouses will enjoy rights in the property even if only one of them is a legal owner; for this reason, spousal consents or waivers on the vendor's side are required in real estate transactions involving residential property. A transaction may be set aside where the

Resource Management Policies in Ontario, Canada and Their Intersection with First Nations, 6 International Indigenous Policy Journal 2015, Art. 3. For the ongoing negotiations on the Algonquin land claim, see e.g. https://www.ontario.ca/page/algonquin-land-claim (retrieved 22.02.2018).

8 The sale of land falls under s. 4 of the Statute of Frauds (RSO 1990, c S.19). On the question as to the essential elements that have to be included in the written agreement to satisfy the form requirement, cf. Babcock v Carr, [1981] OJ No 3102; 127 DLR (3rd) 77 (Ontario H. C. J.).

9 Family Law Act, RSO 1990, c F.3, s 18.

purchaser had notice that the property was a matrimonial property and consent of the non-titled spouse was not given.[10]

In addition to the vendor and purchaser themselves, both parties are usually represented by real estate professionals: either salespersons or brokers. In common parlance, these are usually referred to as real estate agents or realtors. In Ontario, real estate is a regulated profession;[11] real estate salespersons must complete a post-secondary educational program mandated by the Real Estate Council of Ontario, and participate in continuous professional development. Real estate brokers are salespersons who have completed additional education and are thereby authorized to operate a real estate business on their own (with or without salespersons below them). Real estate agents normally take a percentage-based commission as their fee. Vendors and purchasers are not obligated to use the services of real estate professionals; on the vendor's side, conveyances completed without an agent are commonly referred to as "sale by owner" transactions, and various websites and guides are available to facilitate these transactions.

2. Third parties: Lenders, land surveyors, inspectors, etc.

In most cases, aside from the parties and their agents, third parties will play a role in the real estate transaction. Their involvement normally begins after the Agreement of Purchase and Sale is concluded, other than the common practice of purchasers obtaining "pre-approval" for a mortgage-backed loan from a lender.

In addition to lenders – especially banks and other institutional lenders – third parties may include various experts such as land surveyors and home inspectors. As discussed below, neither surveys nor building inspections are mandatory in order to close a real estate transaction. However, these services may be contractually required, for example under the terms of a mortgage. In the case of newly built property, a builder may also be involved, as distinct from the vendor company.

10 Ibid, ss 21(1)(a), (2).
11 Real Estate and Business Brokers Act, SO 2002, c 30, Sched C.

3. The role of lawyers

Lawyers play a unique role in real estate transactions. The first point that is important to appreciate is that in Ontario, as well as the other Canadian common law jurisdictions, the legal profession is not divided; the distinct terms "barrister" and "solicitor" are sometimes used to refer to different aspects of a lawyer's practice, but any lawyer in Ontario is licensed to practise any area of law.

As already mentioned, real estate agents are not required to complete a real estate transaction, but this is not the case for lawyers: lawyers are obligatory at least at the stage of closing a real estate transaction. Although a lawyer might well not participate in reviewing or negotiating the Agreement of Purchase and Sale, a lawyer is required to close the deal. This is because only lawyers are authorized under electronic title registration to "sign for completeness" any title registration documents that contain "compliance with law" statements (also known simply as "law statements");[12] these statements replace the previous requirement under the old paper-based system to file evidence in support of title documents, although lawyers should keep such evidence in their own files in case of future litigation. Land registrars and other lawyers are entitled to rely on "compliance with law" statements made by lawyers in good standing, without needing to review the supporting evidence themselves.

Lawyers frequently have another special role in real estate transactions: they may be required to give personal undertakings regarding steps they will complete after the closing of the deal. Most significant among these is a personal undertaking by the vendor's solicitor to pay off an existing (institutional) mortgage out of the proceeds of the sale and to ensure that the resulting discharge is registered on title (either by the lawyer him/herself or by the lender), thereby freeing the sold property from the prior encumbrance. Other common undertakings include an undertaking by the vendor's lawyer to pay off outstanding tax arrears or other sums that operate as a charge on the land being sold. In Ontario, a lawyer's failure to perform an undertaking can result in legal action and enforcement as well as disciplinary action by the professional order of lawyers for the province, the Law Society of Ontario.[13]

12 Electronic Registration, O Reg 19/99, s 40.

13 The name "Law Society of Ontario" was officially adopted on 8 May 2018. Throughout its history until that date, it was the "Law Society of Upper Canada" (Upper Canada being the historical name for the area now called Ontario).

Of note, normal conflict-of-interest rules for lawyers in Ontario are modified for certain real estate-related transactions. Most significantly, while lawyers are generally prohibited from representing parties on both sides of a transaction, they are exceptionally permitted to represent a borrower and lender in several specific situations, including wherever the lender is a bank or similar institutional lender. Thus, in a real estate transaction in which the purchaser intends to mortgage the property to pay for the deal, the lawyer for the purchaser may also represent the lending bank.

In certain exceptional cases, a single lawyer may also represent both the vendor and purchaser in a real estate transaction; the same rule applies for loan transactions not involving institutional lenders. In addition, in some situations, different lawyers from the same firm can represent the vendor and the purchaser (but not both the borrower and the lender). The conflict-of-interest exceptions mentioned here are not exhaustive.[14]

III. Landholding in Ontario

In this section of the chapter, we will sketch out in broad detail the nature of landholding in Ontario.[15]

1. Transfer into private ownership: Crown patent

As a fundamental principle, all land that is held in private hands in Ontario must have been the subject of an initial government grant, known as a Crown patent. In most cases, the Crown patent will date back at least a century, but in other cases, it will be more recent. Of note, privately held land automatically "escheats" (reverts) to the Crown at any time if it is owned by a corporation that involuntarily dissolves during the period of ownership;[16] subsequent transfers of land that escheated to the Crown will

Many documents and materials continue to refer to the Law Society of Upper Canada.

14 On these and further exceptions to the "two-lawyer rule," see *Moore*, supra note 5 at 557.

15 For an introduction to the historical background, see e.g. *Colin Read*, The Land Records of Old Ontario, 1791-1867, Histoire sociale / Social History 1997, pp. 127ff.

16 Escheats Act, 2015, SO 2015, c 38, Sched 4, s 2(1)(2). For further discussion, see *Moore*, supra note 5 at 6, 10.

be of no effect unless a new Crown patent was issued or title is guaranteed as discussed below.[17] This creates an important risk in real estate transactions, because neither the corporate owner's involuntary dissolution nor the escheatment of the land is recorded on title.

2. Original and modern (urban) division

Dating back to the 1790s, Ontario has been divided into large areas known as counties. Counties are subdivided into named townships, townships into numbered concessions, and concessions into numbered "lots" – tracts of approximately 200 acres (81 ha). It is the lots that would normally be the subject of a Crown patent. Most real estate transactions naturally pertain to smaller parcels of land, which are referred to as "part-lots." Dealing in part-lots is subject to restrictions as explained later in this chapter.

However, in much of urban Ontario, a newer organizational method has been superimposed over the original concession/lot designation. The new method applies to large parcels of land over which there is a "registered plan of subdivision" (RPS). An RPS is created when a municipality approves a land developer's proposal to divide the parcel into small units (each of which is typically suitable for a single house or other building) and roads. The units of an RPS are also generally referred to as "lots," but the meaning of an RPS lot and a lot under the historical concession method are of course very different.

3. Description of the property

a) Legal description

The first aspect of describing the property is referred to as the "legal description."[18] At its most basic, it consists of identifying the precise lot number under the RPS or, if there is no RPS over the land in question, the

17 Escheats Act, 2015, supra note 16, s 13.

18 Although it is not part of the legal description, it should also be noted that each parcel of real property in Ontario now has a Parcel Identification Number (PIN). This is a unique identifier that was assigned to every parcel as part of the conversion to electronic records. In some cases, what is generally considered to be a single property may have multiple PINs. For example, a parking space that "comes with" a condominium unit may have its own PIN.

concession method. The municipal address (that is to say, the street address) of a property has little legal significance for the purpose of real estate conveyancing.

If the property in question is less than a full lot, then a complete description is required to identify the precise boundaries. Historically, this was achieved through a detailed verbal description known as a "metes and bounds" description. Although this approach may still be used, it is common nowadays to use a "reference plan," which is a pictorial representation of the property's boundaries.

In addition, the legal description will usually include dimensions. In the case of residential land, the dimensions are normally qualified in the legal description provided in the Agreement of Purchase and Sale as being "more or less" accurate. Where land is purchased for development or other uses, the accuracy of the dimensions may be of greater importance, and the purchaser may seek protections accordingly (e.g. a condition precedent stipulated in the Agreement).

Critically, despite this emphasis on boundaries in the legal description, the legal description is not in fact conclusive of the boundaries or extent of a property in either of the two title systems described in the next section.[19] It is also conceivable that legal descriptions will vary from one document to the next, and therefore if one if performing a title search, the legal description on all documents registered on title should be compared to ensure consistency.

b) Quantity of title

The "gold standard" for determining the extent of a property (or the "quantity of title") is a survey. "Survey" is an official term that can only be used to refer to a two-part report prepared and sealed by a licensed Ontario land surveyor; the first part of the report is a pictorial plan illustrating not only the boundaries of the land (as a reference plan does) but also any buildings and other features, whether man-made or natural. The second part is a written document that describes encroachments on the land and other issues affecting the quantity of title.

19 In the case of the Registry System, this follows from the fact that the registry is never proof – it merely provides notice of instruments. In the case of the Land Titles System, this is provided in the Land Titles Act, RSO 1990, c L.5, s 140(2).

There is no legal requirement to obtain a new survey for every land conveyance or other real estate transaction. Surveys can be costly to commission and therefore purchasers and mortgagees may be willing to accept older surveys accompanied by a declaration from the vendor and/or mortgagor that it is still an accurate representation. As an alternative to a current or old survey, purchasers or mortgagees may consider accepting various non-survey documents such as a reference plan, sketches prepared for a building permit, site plans, and so on.

Some practitioners have urged caution regarding lawyers' reliance on anything less than a current survey prepared under seal in real estate transactions, at least in the absence of title insurance (see Section V.f).[20] Non-survey documents are prepared for other purposes and are not backed by the expertise and professional liability of a surveyor. As to old surveys, they can of course be out of date. Moreover, there is some doubt as to whether a surveyor would be liable for an error found in a survey he or she produced if the plaintiff relied on a copy made without the surveyor's consent.

IV. Land registration

Having summarized how land is held in Ontario, we will now explain the two systems of land registration that currently operate in the province: the Registry System and the Land Titles System. They have co-existed for well over a century, but since the 1990s, there has been a concerted push by the government to embrace the second system.[21]

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20 *Peter D. Quinn/Danny C. Grandilli*, Donahue, Quinn & Grandilli: Real Estate Practice in Ontario, 8th ed., Toronto 2016, p. 352.

21 An account of these events is provided in Keatley Surveying Ltd. v. Teranet Inc., 2012 ONSC 7120 at paras 10-41 [*Keatley Surveying (Certification)*], a decision on a motion for certification of a proposed class action by land surveyors against the company contracted by Ontario to build the electronic land registration system, on grounds that the system infringes copyright in the surveys it houses. The motion was initially dismissed in the decision cited above, but the dismissal was reversed on appeal (2014 ONSC 1677 (Div Ct), aff'd 2014 ONSC 1677), and the action proceeded. The class action was recently dismissed in 2016 on all grounds on a summary judgment (2016 ONSC 1717, aff'd 2017 ONCA 748). However, in June 2018, leave to appeal to the Supreme Court of Canada was granted. The appeal hearing is scheduled for January 2019.

The purpose of both systems is to provide public notice of the interests in every parcel of land and the priority of these interests; thus, they describe the quality of title. The precise effect of the two systems differs, however, as we will discuss. Note that the land registration systems do not describe quantity of title, which is the purpose of a survey.

1. Registry System

The older of the two systems of land registration is known as the Registry System and is largely governed by the *Registry Act*,[22] the earliest incarnation of which dates back to 1795.[23] Procedural aspects have, however, been significantly altered through application of the *Land Registration Reform Act*.[24] Nowadays, only about half a percent of all properties in Ontario remain under the Registry System;[25] the others were either converted upon application by the owner or as part of an automatic conversion effort in the 1990s and 2000s. Those that remain under the Registry System are called "non-converts" and typically have title-related issues that prevent the land registrar from issuing the guarantees that conversion to the Land Titles System would provide. If owners of these properties wish to convert to the Land Titles System, they must complete a special process intended to confirm title.

Under the Registry System, instruments purporting to affect title to a property are registered against the property; unregistered instruments "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration."[26] Crucially, the fact of registration is *not* proof of the *contents* or *validity* of the instrument. Instead, it

22 RSO 1990, c R.20.

23 "An Act for the public registering of deeds, conveyances, wills, and other incumbrances which shall be made, or may affect any lands, tenements, or hereditaments, within this province", 35 Geo III, c 5 (1795). The Registry Act in its current form dates to 1868 as An Act respecting Registrars, Registry Offices, and the Registration of Instruments relating to Lands in Ontario, 31 Vict, c 20, although the short name Registry Act was not formally adopted until the consolidation of 1877 (RSO 1877, c 111).

24 RSO 1990, c L.4.

25 *William D Snell*, Land Registration Update (Summer 2012), Ontario Professional Surveyor, p. 4 (noting that as of 2012, 36,000 of 5.8 million properties in Ontario remained in the Registry System). The number has presumably dropped further in the past six years.

26 Registry Act, supra note 22, s 70(1).

simply constitutes *notice* of the instrument; the person seeking to ascertain title must then review the instrument itself to verify that its content and form are sufficient to produce legal effect.

Thus, in order to ascertain title in the Registry System, a lawyer must review each instrument registered on title and determine the effect of each instrument so registered. This is called a "title search." The lawyer can delegate the title search to an agent called a "conveyancer" or to support staff within the law firm, but regardless of who performs the search itself, the lawyer is professionally responsible for reviewing the search results and preparing the chain of title. The date of registration of an instrument, rather than the date of the instrument itself, determines priority when there are competing interests.

In the past, registry searches required a visit to the local Registry Office. Around the turn of the present century, an electronic database entry was created for all properties in the Registry System, using the property's legal description as it appeared in what was at that time the most recent conveyance document, and each property was assigned a Parcel Identification Number (PIN). Registrations on title prior to the date of activation of the electronic record do not appear in the database; those that have occurred since electronic activation are "abstracted" on the record. Therefore, for Registry System properties, the lawyer begins with the electronic record but must still consult paper records to review each instrument.

Under the Registry System, virtually all claims against an owner's title are time-barred after 40 years unless they are renewed by a "notice of claim" (which must also be registered on title). Thus, in performing the title search, one must calculate 40 years backwards from the date of the Agreement of Purchase and Sale, identify all instruments registered on title after that date, and examine them.[27] The first conveyance within the 40-year period is referred to as the "root of title" and serves as the first entry in the chain of title, but non-conveyance instruments such as easements that appear earlier within the 40-year window and have not been expunged must also be considered.

Properties under the Registry System are susceptible to claims of adverse possession.[28] Under section 4 of the *Real Property Limitations Act*, possessory title may arise after ten years of continuous possession.[29] That said, the test established by the Ontario Court of Appeal to demonstrate

27 Ibid, s 112(1).
28 For discussion beyond this introduction, see *Moore*, supra note 5 at pp. 13f.
29 RSO 1990, c L.15.

adverse possession sets a high threshold.[30] The claimant must demonstrate (1) actual possession, (2) an intent to exclude the title holder, and (3) the dispossession of the title holder and all others.[31] Actual possession has six elements: it must be open, notorious, peaceful, adverse, exclusive, actual, and continuous for the entirety of the ten years.[32] The intent to possess and dispossession of the title holder are addressed through the "inconsistent use test," which is focused on the intended use of the title holder.[33] The court has repeatedly accepted that the title holder's use may simply be retaining the land for some future purpose;[34] in such a situation, it is very difficult for the would-be possessor to demonstrate that their use of the land is inconsistent with the title holder's *current* use. Nonetheless, there remains a risk of successful possessory claims for Registry System properties.

2. Land Titles System

The second land registration regime in Ontario is the Land Titles System. It dates back to 1885, and the original title of the Land Titles Act gives some indication of how it was intended to improve upon the Registry System: *An Act to simplify titles and to facilitate the transfer of land*.[35] Initially, the Land Titles System's applicability was restricted in two ways: by geography and by choice. With respect to geography, the *Land Titles Act* originally applied only to certain urban areas of the province (notably the City of Toronto), but over the next century, its jurisdiction was gradually expanded. Finally, in 1979, the Act was amended to have general application across the province.[36] Aside from the geographic limitations, the Land Titles System's application was also limited for most of its history in that it was an opt-in regime. Beginning in the 1990s, this situation was re-

30 See e.g. Elliott v Woodstock Agricultural Society, 2008 ONCA 648; Teis v Ancaster (Town of) (1997), 35 OR (3d) 216, 152 DLR (4th) 304 (CA).
31 *Elliott*, supra note 30 at para 9 (quoting the trial judge).
32 *Teis*, supra note 30 at para 13 ff.
33 *Elliott*, supra note 30 at para 13.
34 See e.g. ibid; *Teis*, supra note 30; Masidon Investments Lt. v Ham (1984), 45 OR (2d) 563 (CA).
35 48 Vict, c 22 (1885). For the modern Land Titles Act, see supra note 19. For a historical introduction on the Land Titles System in Ontario, see *Taylor*, supra note 2 at pp. 95 ff.
36 48 Vict, c 22 (1885); RSO 1970, c 234, s 3(1); SO 1979, c 93, s 2.

versed through the automated conversion of virtually all properties in the province from the Registry System into the Land Titles System, a process that took approximately 20 years to complete.[37] As mentioned, well over 99% of properties in the province are thus now in the Land Titles System, with the remainder left in the Registry System because of defects of title and other issues that cannot be readily resolved. Each individual property in the Land Titles System is referred to as a "parcel."

In contrast to the Registry System, a registration under the Land Titles System constitutes a confirmation of title because the government registrar reviews each instrument submitted in relation to a Land Titles property to ensure its validity prior to registration. When an instrument is registered that disposes of an earlier interest (for example, a transfer), the earlier interest is "ruled off," i.e. cancelled, and therefore there is no reason to conduct a historical search as is required for Registry properties, except for specific issues that depend on the category of the parcel, as discussed below.

As mentioned, the rollout of the Land Titles System has occurred in several different phases. For more than a century, conversion of Registry properties to the Land Titles System was a voluntary step (or was required because of some subsidiary reason, such as an intention to implement an RPS on the land). The second phase involved automatic conversion. The third and current phase is again voluntary. The type of parcel – and the associated title guarantees that form part of the parcel – depends on how and when the property underwent conversion.

There are thus three types of parcel in the Land Titles System, which we will now set out. It should be noted, however, that each of the qualifiers described in the next three subsections may be accompanied by specific encumbrances or other registrations against title affecting the particular property in question.

a) Land Titles Absolute

The first type of parcel is known as a Land Titles Absolute parcel, and is the "traditional" parcel that was created upon application for opt-in into the Land Titles System. The opt-in process, which was known as the "first application," involved various documentary requirements, including a new

37 For a fuller account, see *Keatley Surveying (Certification)*, supra note 21 at paras 10-41.

survey and notice to adjoining landowners. Objections by neighbouring landowners or other third parties were required to be dealt with before the registration under the *Land Titles Act* would be accepted.

Titleholders of traditional Land Titles Absolute parcels are protected against claims of adverse possession or other interests purported to have been created by prescription.[38] However, such properties are subject to a variety of other interests and liabilities set out in section 44 of the *Land Titles Act*, including outstanding tax accounts, easements, spousal and dower rights, *Planning Act* violations, municipal by-laws, corporate escheats and forfeitures to the Crown, provincial succession duties, and unregistered construction liens prior to the expiry of the registration period, among others.[39]

b) Land Titles Converted Qualified

The second type of Land Titles parcel is called "Land Titles Converted Qualified," commonly abbreviated as LTCQ. Parcels of this category were converted from the Registry System to the Land Titles System as part of the automated process undertaken by the government throughout the 1990s and 2000s; the majority of properties thus fall into this category. In the course of automated conversion, government personnel examined Registry documentation that permitted the removal of some of the liabilities – or "qualifiers" – that still apply to the traditional Land Titles Absolute parcels. In particular, LTCQ properties are guaranteed against *Planning Act* violations, dower and spousal rights, escheats and forfeitures to the Crown, and provincial succession duties, up to the date of conversion.[40] The other interests and liabilities noted with respect to traditional Land Titles Absolute parcels do apply to LTCQ properties, however.

On the other hand, the automated conversion process did not include any notification step. As a result, the guarantee against claims of adverse possession that applies to traditional Land Titles Absolute parcels does *not* apply to Land Titles Converted Qualified parcels. And, of course, *Plan-*

38 Land Titles Act, supra note 19, s 51.

39 Ibid, s 44(1). See also Teraview Reference Guide (2012) at p. 63, online: http://www.teraview.ca/wp-content/uploads/2016/04/Teraview_Reference_Guide_TV80_Dec_2013.pdf (retrieved 22.02.2018).

40 Teraview Reference Guide, supra note 39 at p. 63.

ning Act violations, spousal rights, and corporate escheats can arise after the date of conversion.[41]

c) Land Titles Absolute Plus

The last category of parcel under the Land Titles System is referred to as "Land Titles Absolute Plus." Properties are upgraded to this category upon application by the owner and completion of an additional process. The resulting parcel benefits from the greatest level of guarantee. Specifically, Land Titles Absolute Plus parcels are guaranteed against the liabilities and interests that LTCQ also guarantees, but in addition, they are protected against possessory and prescription-type claims – i.e. the types of claims against which LTCQ parcels are not guaranteed. This is accomplished by imposing the notification and objection steps that were omitted in the automated conversion procedure. Furthermore, since 2001, a *re*-confirmation that there are no *Planning Act*, corporate escheat, or forfeiture issues affecting title has been required prior to upgrading to the Absolute Plus designation, therefore the guarantee applies from the date of registration with an absolute title. However, as with traditional Land Titles Absolute and LTCQ parcels, the Land Titles Absolute Plus title remains subject to various other interests and liabilities set out in section 44 that are not investigated at the time of registration or that can arise after registration. The Land Title Absolute Plus designation is required for land intended for registered plans of subdivision or condominium construction.

V. Title search and other searches

Having set out how land is held in Ontario, we can now turn to the procedure of land conveyance. As mentioned earlier, once a transaction has been negotiated, the process of conveyance gets underway with the signing of an Agreement of Purchase and Sale. With the Agreement in place, the due diligence stage begins. It is conceivable that the purchaser could agree to the transaction without any conditions or rights of termination. Most often, however – and almost always if a lawyer and/or real estate agent was consulted by the purchaser – there will be conditions or rights

41 Dower rights arose under the previous state of the law and therefore cannot now be created.

of termination in relation to inquiries concerning the property. As a matter of law, only a lawyer is allowed to give an opinion on title.[42] Typically, the purchaser's lawyer will conduct the searches (or arrange for them to be conducted at his or her direction). Pursuant to the *Vendors and Purchasers Act*, searches are undertaken at the buyer's expense, unless the agreement stipulates otherwise.[43]

Searches fall into three basic categories: the title search and related inquiries, *Planning Act* inquiries, and off-title searches (also known as letter of inquiry searches). Agreements of Purchase and Sale are also frequently made conditional on the purchaser securing financing and the seller securing a discharge of any existing mortgages. The latter two topics are addressed later in this chapter.

1. Title search

The most fundamental search is the title search.[44] As discussed already, for properties under the Registry System, the search must extend back to the root of title, i.e. up to 40 years. Under the Land Titles System, the title search is generally restricted to current registrations. For both systems, the lawyer will examine the names of any parties identified on the instrument, the legal description of the property, and the effect of the instrument. In the Registry System, the lawyer will also consider the form and content of the instrument to assess its validity.

A variety of document types can be registered on title, but there are three basic categories. The first is "transfers," which include all types of conveyance of freehold and leasehold lands; this category replaces the old word "deed." The second is "charge," which includes the (former) term "mortgages" among others.[45] The third is "discharge of charge or other interest." In addition, under electronic registration, various other documents can be registered, including liens, restrictive covenants, powers of attorney, cautions, and assorted notices and applications. To reiterate the point made above, the registration of an instrument in relation to a proper-

42 *Moore*, supra note 5 at p. 22.
43 RSO 1990, c V.2, s 4(b).
44 On the details of the process, see *Moore*, supra note 5 at pp. 31ff.
45 Although the term "mortgage" is technically no longer current (other than for Registry System properties), it continues to be used in standard vernacular. For this reason, we use it in this chapter.

ty governed by the *Registry Act* simply provides notice of the instrument, whereas for a property governed by the *Land Titles Act*, the registration of an instrument constitutes an amendment to the registered title of the property in question and thus is "effective according to its nature and intent."[46] However, the *Land Titles Act* does create an exception to the rule of effectivity for fraudulent instruments.[47]

2. Other searches arising from title search

The title search itself gives rise to additional searches. One is the Crown patent, which is primarily important in order to confirm that the grant did indeed take place and that it covers the entirety of the property that is the subject of the transaction, with no reservations to the Crown (e.g. along shorelines). A second reason to review the Crown patent is to determine whether it specifies any restrictions on use of the property; since such limitations may not be time barred, any titleholder must be apprised of them.

Another important search, already alluded to, is for corporate owners in the chain of title. For each previous (or indeed current) corporate owner that is identified, a corporate search must be conducted with the provincial or federal authorities responsible for corporate registration to ensure that the corporation was never involuntary dissolved during the period of ownership; if a corporation does involuntary dissolve, all of its property automatically escheats to the Crown – a fact that is not necessarily registered on the title. In the case of Registry properties, the search for corporate owners should be conducted all the way back to the Crown patent. For traditional Land Titles Absolute properties, the search must likewise extend back to the Crown patent because, as noted earlier, corporate escheats and forfeitures are among the interests and liabilities not guaranteed for this type of parcel. By contrast, for properties in either the Land Titles Converted Qualified or Land Titles Absolute Plus categories, the corporate search need go back only as far as the date that the property was converted or upgraded to that category.

A third type of inquiry arising from the title search is executions against owners. For the Registry System, all owners in the 40-year chain of title should be investigated. For the Land Titles System, only the current owner

46 Land Titles Act, supra note 19, s 78(4). See also ibid, s 77(1).
47 Ibid, ss 78(4.1), 155.

need be searched, unless there is a notice of writ of execution registered against title in respect of a previous owner.

3. Section 50 *Planning Act*

Connected to the title search is a very significant area of potential problems in real estate conveyancing: section 50 of the Province of Ontario's *Planning Act*. Violations of this section can result in the present or past transactions being declared null, whether the property is governed by the *Registry Act* or the *Land Titles Act*.

In brief, the aim of section 50 of the *Planning Act* is to restrict owners' ability to divide their land into smaller pieces, so as to ensure government control over land use and development. This aim is accomplished via a framework that sets out a blanket restriction on most transactions involving real property in Ontario, accompanied by a series of exceptions.[48] If a transaction cannot be brought within the four corners of one of the exceptions – some of which are, however, very broad – the conveyance is automatically void. Since section 50 has been amended over the course of the last fifty years and numerous municipal bylaws have been enacted in individual jurisdictions to alter the provision's effects, it is critical for a lawyer to examine each transaction in the chain of title in relation to the precise state of the law at that time and ensure that a so-called exception can be identified for each transaction.

48 The most important "exception" to the blanket prohibition against real estate transactions in section 50 – that is, the one that "saves" most transactions, so to speak – is the "no abutting lands" exception. It provides that if a landowner seeking to transfer or charge their land will not retain ownership of any land that abuts – i.e. touches – the first land, then the transaction is permissible (assuming no other violations of the *Planning Act*). This means that a typical homeowner, for example, can safely sell their house and the land accompanying it. However, the homeowner would not generally be permitted to keep the house but sell someone else the garage, because they would thereby be divesting their interest in the garage while retaining their interest in abutting land. *Planning Act*, RSO 1990, c P.13, s 50(3)(b).

4. "Off-title" searches

In addition to the title searches and *Planning Act* inquiries, there are a number of other searches typically performed by the purchaser's solicitor to ensure that there are no unexpected encumbrances on title that are exempt from registration or other concerns or limitations related to the land.[49] These are generically called either "off-title" searches, since they are not registered on title, or "letter of inquiry" searches, in reference to how they have historically been conducted.

One of the most important of these searches is statutory liens. Pursuant to the *Municipal Act, 2001*,[50] unpaid property tax and other amounts owing to the municipality – for example, for certain utility charges after they go into default – run with the land and constitute a special lien against property. This special lien of the municipality ranks in priority over every other charge except another Crown charge.

It is also important to confirm that the property is in compliance with the applicable zoning bylaws. For example, municipalities may have restrictions on the number of storeys a building can have, the construction of outbuildings (such as garages and sheds), the use of a property, the setback from the street, and so on. The penalties for failure to comply with a municipal bylaw can be severe, up to and including demolishing an offending construction. In addition, in rural settings in particular, a new purchaser must also be aware of certain unregistered easements, for example for public works and public rights of way.

Another inquiry that should be made concerns mandatory work orders issued by the municipality or other public authority for non-conformity with statutory requirements, such as the *Building Code*,[51] the *Electricity Act, 1998*,[52] or the *Fire Protection and Prevention Act, 1997*.[53] If a municipality or authority determines that a work order has not been complied with, they may complete the order and charge the costs of the remedy to the owner of the property.

A further category of searches that may be relevant depending on the property is those that are environmental in nature; they are generally more

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49 For discussion beyond the scope of this chapter, see *Moore*, supra note 5 at pp. 487ff.
50 SO 2001, c 25, ss 349, 398(2).
51 O Reg 332/12.
52 SO 1998, c 15, Sched A.
53 SO 1997, c 4.

pertinent to rural, commercial, and/or vacant properties. Some of these pertain to the extent of title, for example riparian rights and ownership of the beds of bodies of water that exist on the property. Such information may be discerned from an up-to-date survey. Other environmental considerations relate to past or planned use, or charges on the land for environmental improvements undertaken by the public authorities. Use-related inquiries may include queries confirming registration of underground fuel oil tanks, searches for outstanding "clean-up" orders on industrial or otherwise polluted sites, confirmation of valid sewage permits, certificates for wells intended for drinking water, and so on. For properties that feature a water course or significant change of grade (i.e. sloping land), purchasers also need to be aware of any regulations passed by local conservation authorities to prohibit or limit certain activities or uses to reduce the risk of soil erosion, flooding, or other environmental impacts.

The last type of off-title search that should be mentioned is heritage designation. In Ontario, properties of historical or architectural significance may receive a heritage designation pursuant to the *Ontario Heritage Act*.[54] This Act permits municipalities to designate specific properties by by-law. Once designated, these properties are subject to significant restrictions on renovations and other alterations, unless the owner obtains consent from the municipal council.[55]

Various other searches and inquiries may be relevant for specific properties, particularly those of a commercial or industrial nature. Each search represents a cost to the purchaser. In some cases, and depending on the apparent risk, title insurance may be satisfactory to a purchaser (or mortgagee) in lieu of certain searches. Title insurance is discussed later in this chapter.

5. Third-party interests

Under Ontario law, several classes of individuals may have or acquire interests in real property that are not registered. The most important of these are legally married spouses (not merely co-habiting couples),[56] tenants

54 RSO 1990, c O.18, s 29.

55 Ibid, s 33.

56 Under the Family Law Act, supra note 9. On the extremely vulnerable status of married women historically under the unreformed common law, see e.g. *Anne*