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Porch bandits – adverse possession alive and well in Toronto

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The doctrine of adverse possession remains alive and well in Toronto despite the conversion of most properties into the Land Titles registry system many years ago. Under the *Land Titles Act*, properties are not generally subject to claims for unregistered ownership. However, claims for unregistered ownership interests that were created before the date of conversion into Land Titles may survive. In older Toronto neighbourhoods, where homes are often in close proximity, such ownership interests may have been created years before the properties were converted into the Land Titles system.

In *Macquarrie v. Singh*, 2021 ONSC 3896 (CanLII), the court addressed a claim for adverse possession by the applicants over a section of their front veranda that was built over the property line onto their neighbour's property. The homes of the applicants and the respondents were connected by a common wall. For as long as anyone could remember, four feet of the veranda of the applicants' property encroached upon their neighbour. The veranda led only to the front door of the applicants' property and abutted the outer wall of the respondent's house. The veranda was physically attached to the respondent's house on the roof, on the deck, and by concrete steps due to the close proximity of the two houses.

In 2016, the respondent bought his house without notice that the applicants' veranda encroached over the lot line onto his property. However, there was proof that the seller had sworn a statutory declaration about the encroachments 26 years before she sold the property to the respondent, which read:

> "…from 1975 until the present time, I have been in actual possession of the whole of the said lands *save and except* for a 9 inch portion of the rear two-storey section of the building municipally known as 163 Pape Avenue, Toronto, and four feet of the front veranda and concrete steps of the building municipally known as 163 Pape Avenue, Toronto,

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> which encroach approximately four feet onto my property." [emphasis added]

The former owner also swore that during the entire period from 1975 to 1990 neither she nor her husband had asked for the four-foot section of the veranda to be removed or altered and that neither had been altered or changed in any way. To establish adverse possession, a person must establish the following factors affirmed by the Court of Appeal in *Barbour v. Bailey*, 2016 ONCA 98:

- For a 10-year period they were in actual possession of the land (which must also have been "open, notorious and peaceful" possession such that the owner of the land knows, or has an opportunity to know that he/she is being excluded from his/her land by the adverse possessor);
- They intended to exclude the true owners from the land; and
- The true owners were, in fact, excluded from the land.

The respondent's property was provisionally registered in the Land Titles system on May 26, 2003, and accordingly any claim for adverse possession had to have been completely formed by that time. The applicants had to establish a ten-year period of adverse possession starting no later than May 26, 1993.

To support a claim in such circumstances, an applicant will typically need to locate historical evidence that may be several decades old in order to establish when and where something was built. In the case at hand, the applicants relied on the period of September 12, 1975, to August 31, 1990, as being more than sufficient to establish their claim.

The parties agreed on the basic law that the applicants' possession must be "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner" for the full term of the ten-year statutory period: *Fletcher v. Storoschuk* (1981), 1981 CanLII 1724 (ON CA). The respondent argued there was no evidence that his predecessor in title did not access the applicants' veranda every so often to clean her windows or to maintain the sill. Further, he argued that the wording of the statutory declaration amounted to a license or a grant of permission by the former owner allowing her neighbours to use her land for their veranda.

The court stated that these arguments raised the question of the burden of proof and that there was no question that the burden lies on the applicants to prove all of the elements of the three-part test on a balance of probabilities. However, the burden of proof does not mean that the applicants must *exclude* every hypothetical possibility.

The court relied on the decision in *Condos and Castles Realty Inc. v. Janeve Corp.*, 2015 ONCA 466, where the Court of Appeal discussed the nature of the burden in considering whether acquiescence by an owner is actually a positive grant of permission:

> "…Once the appellant had proven facts that support the inference of acquiesce in 20 years of use, the evidentiary burden passed to the appellant to lead evidence to rebut the inference by proving the use was by permission."

In assessing the distinction between acquiescence and permission, the court stated that the longstanding physical layout of the veranda, coupled with the clear evidence of the former owner of the respondent's property, readily supported an inference that the respondents' predecessors in title had acquiesced in their exclusion from the veranda (as well as a sliver of land at the rear of the properties) for more than the requisite ten-year period. The court was of the view that the permanent physical layout and statutory declaration met the three parts of the test set out in *Barbour*. Accordingly, the applicants acquired title to the front porch encroachment by reason of adverse possession.

The case demonstrates how a property owner may continue to prove that they have acquired title by adverse possession notwithstanding that properties may have been converted into Land Titles decades earlier. The same result has been reached in other cases involving properties in older Toronto neighbourhoods: *e.g. Saeid Mahamedi Fard v. Renee De Villiers*, 2021 ONSC 6734 (CanLII).

Importantly, the court in *Macquarrie v. Singh*, noted that while the burden of proof rests upon an applicant to meet the initial requirements of the test set out in *Barbour*, it does not require them to then exclude every "hypothetical possibility." The burden may shift to the respondent to lead evidence to show that use was by permission rather than acquiescence. This may also mean that someone buying a home in an older neighbourhood will not be aware of all potential claims for unregistered ownership interests in the property.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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