THE INCREASING NEED FOR LAND TITLES IN ONTARIO COMMUNITIES

by David I. McWilliams*

It is generally assumed that lawyers, as part of the practice of law, disagree with each other on all possible occasions. This arises from the admittedly imprecise and subjective nature of the application of the law in its dealings between man and man. It is also generally assumed that surveyors, because of the apparent precision of their measurements and calculations, should in all cases agree on the theory that "figures do not lie". It is only when one has some background in engineering and law that one realizes the degree of approximation under which surveyors must suffer every day. With increasing experience, one realizes also that surveyors can, and do, disagree among themselves. This, gentlemen, is the first disillusionment of a lawyer. It is a disillusionment of short duration, however. When one examines the reasons for these differences, one begins to have considerable sympathy for the surveyor in his search for precision. I hope, therefore, that you will approach my remarks today with the sympathy which must come for the remarks of one who is also labouring in the field of error for a perfection which can never be achieved.

Land transfer in ancient English and European communities was simple. It involved the physical and public transfer of possession by parties standing on the soil, the recital of the traditional formula of words of conveyance and the symbolic handing over of a piece of earth before witnesses, and the recording of the transfer in the rolls of the manorial courts. This rustic formality sufficed for many centuries but the increase of population, the parcelling out of land into ever-smaller plots, the tendency of witnesses to disappear and forget, the increasing value of land and the inadequacy of the manorial court rolls eventually made a continuation of this simple system unwise.

You are all aware of how title was established in England before the passing of the Registry Acts: by the actual production of title deeds over a period of time, sometimes running back into hundreds of years. Ths loss or theft of any of these deeds, which established the chain of title, would throw the title into jeopardy. Such losses and thefts were made more likely because of the varying ways in which the people deposited their title deeds for safekeeping.

The first great advance in maintaining of records for land transfer were the Registry Acts in England which followed a roughly similar system prevailing over the whole of Europe. The essential feature of these arrangements was that all documents affecting land were registered in full in a central office and that generally, preference was given to the document which was registered first in time and in all cases in favour of the registered document against the unregistered.

This system still prevails across Europe and in most of the States of the United States and in a large part of Southern Ontario. It establishes title by the registration of deeds and requires the purchaser to satisfy himself on the basis of these registered deeds that the title alleged by the vendor is, in fact, a good and marketable one.

Increasing dissatisfaction with this method of establishing title to land produced the Land Transfer Act of 1875, commonly known in England as Lord Cairn's Act from which our Land Titles Act of Ontario is derived. The Land Titles Act envisages a system of registration of title and not registration of deeds. The registers are the title and the deeds merely the evidence thereof.

It was introduced in its present form into Ontario in 1865 and so long as Ontario remained a predominately rural Province, it did its work well, where the incidence of transfer was small and the parcels large. However, I submit that the sophistication of modern land holding, and the subdivision of property into small city lots at rising values makes a continuation of such a system impractical.

May I illustrate my point by the enumeration of a number of examples which present themselves to you as surveyors every day in your practice and which are a

constant source of difficulty to us as lawyers in our examination of titles:

1. The problem of the lost landmark which is referred to in old deeds and which no longer exists on the land. Recently, I had occasion to search the title to Bob-Lo (Bois Blanc) Island in the Detroit River. The land had been divided into two large parcels and the division line had been marked by four iron bars which have long since disappeared under an amusement park. The property has been held substantially in the same hands for many years and the problem of these landmarks did not arise until a portion of the Island was to be subdivided for mortgage purposes. The surveyor was faced with the problems of preparing a description which was at once sufficiently accurate for the mortgagee and which would also tie in with the old description. Happily, we discovered a stone cairn which appeared incidently in the old description to mark the limit of a piece of Crown property. It was possible by the use of this monument to prepare an entirely new description which by reference, at least, bore some relation to the old descriptions. Shortly after the survey was completed, the surveyor, in making further investigations, arrived upon the scene in sufficient time to prevent a bulldozer from removing the landmark completely. This monument now stands as the only landmark on the island from which descriptions can be prepared which can be connected to the old descriptions.

2. How many of you have been presented with the problem of the registered plan prepared in 1870 or earlier which contains a minimum of measurements, and those in chains and links with lots 200 feet by 300 feet and covering some of the most valuable real estate in the downtown area of our cities and towns; and worse, what of the registered plan which has disappeared, the dimensions of which can only be guessed at "by interpolation" from chance references in later plans.

3. The process of subdivision in the cities has been haphazard in the extreme: not only are the old plans obsolete but they do not cover all of the built-up portions in the cities. We all find with disturbing frequency the residue of the old farm lots remaining unsubdivided by registered plan in the centre of our cities with 20 or 30 pages of abstract entries to engage our curiosity and lots of irregular shape containing, in many cases, 60 or 70 parcels of land. The ordinary processes of buying and selling over the past 20 years have made the examination and certification of such titles all but impossible.

4. How many of you have despaired with me over the examination of 10 to 30 pages of abstract on properties on the outskirts of our cities which the owners, 20 or 30 years ago, had failed to subdivide by registered plan and which the present subdivision control by-laws are helpless to solve.

5. How many of you have been asked to prepared surveys covering lakefront properties which have been subdivided by the farmer owner into 50 or 60 lots with rights-of-way running in all directions. The problems here are exaggerated not only by the initial reluctance of the farmer-owner to hire a surveyor to stake the lots and to hire a lawyer to ensure that the original deeds did not overlap, but also by the apparent inability of the owners to build their cottages on the properties which they purchased. I hazard a guess that there has been no more fruitful source of controversy and bad feeling among friendly summer-cottage neighbours than the eventual and inevitable disputes which arise as a result of the local Registrar of Deeds finally throwing his hands up in disgust and forcing the owners into the expense of a "Judge's Plan" and the shock which these owners endure when they see for the first time the shape of their properties based on their title deeds compared with the shape which those properties assumed in their minds on the basis of their possession.

6. How many of you have discovered to your sorrow that the fundamental deeds in your chain of title are the product of:

(a) illiterate parties preparing the deed themselves;

(b) incompetent conveyancers and notaries;

(c) complicated metes and bounds descriptions prepared without the assistance of surveyors;

(d) that your title is based upon a succession of three or four consecutive intestacies arising in families that "don't believe in Wills".

7. How many of you have been faced with the problem of deciding between conflicting descriptions, interpreting meaningless qualifications in courses and reconciling the approximate but acceptable inaccuracies of surveying methods 75 or 100 years ago with the precise and necessary accuracies of 1964. It is apparent that several feet difference in the measurement of a large farm acreage is of less concern to a farmer than it is to a city dweller when inches count.

I can speak with authority only about Essex County but I am sure that what I am about to say applies with equal force to many other counties. There are parts of towns in Essex County where the solicitors will not give you a certificate of title because of the unrestrained subdivision without registered plan of the farm lots now inside these towns; where the monstrosity of a "name search" is all that can be obtained by even the most careful solicitor unless the client is prepared to accept a legal fee commensurate with a two or three weeks' search at the registry office. The distressing thing is that even after such a search, the solicitor, in many cases, is more confused than he was before he started. We have already heard today that in many cases, the precise boundaries of the townships themselves are not known. In many places, the only township plans of any value are to be obtained from the Department of Highways!

Even more distressing is the fact that, every day, the situation is getting worse!

8. In some of the foregoing cases, possession is the only crutch upon which the owner has to lean and this possession is often based upon faulty and inadequate declarations and descriptions which are meaningless.

9. Even in the new plans which are being put down in such great number in our burgeoning suburbs, the seeds of future confusion are being sown. The subdivider of 20 years ago made provision for 20 and 35 foot lots. The subdivider of 1950's and 1960's provides for 40 and 60 foot lots. The purchasers and builders unfortunately seldom conform themselves to these lot dimensions and it is an unusual house which is being built today that is not situated upon part of two lots and the whole of the third. I ask you to cast your eyes forward 20 years hence after these houses have changed hands perhaps 10 to 30 times and consider the problem which is presented to the surveyor and the lawyer in searching the title to these new homes. Three separate abstract pages must be examined. These pages will be only roughly similar and instead of making one search on the whole parcel, one is forced to make three separate searches.

10. Consider also the problem presented to the local Chamber of Commerce in its search for new industry. It is here that the poor conveyancing and inadequacy of the present system comes home to roost. The industry concerned may be entirely satisfied with the land and the town or city facilities with which it is surrounded, but it may be entirely unable to get what it regards as an adequate certificate of title to justify the expenditure of sometimes millions of dollars in the construction of the plant on that land. The failure to get such a certificate may result in the industry not moving into that locality at all. And it is no answer to suggest that the industry in building a plant of that size on a certain property will undoubtedly hold the land for a sufficient time to establish a possessory title.

But all of this is merely telling you what you know already and I am sure that every person here can give me examples at least as disturbing as those I have described.

We have been living with these problems for a number of years. Those of us who have addressed ourselves to them have done little but patch up the edifice as best

we could for the individual client whom we are serving at any given time. I think you will agree that this is not sufficient, that a radical change is required if we are not to be damned by our progeny as we are now damning our forbears. We must make a bold correction - a correction which will satisfy the needs of the 1960's and be so contrived that it will accommodate itself to the changing needs of the 1970's, 1980's and 1990's.

What then are the remedies available to us.

1. The Quieting Titles Act.
2. The Registry Act.
3. The Certification of Titles Act.
4. The Land Titles Act.

I will deal with these in order:

The Quieting Titles Act

Anyone of you who has waited through the morass of the Quieting Titles Act, and who has had a client of sufficient means to pay the shot, will agree that the cure is worse than the disease. It is hopelessly inadequate as a remedy which might be taken by the average man to solve his title problems.

The Registry Act

I think I have already commented sufficiently on its inadequacies. This is not to say that for a large portion of Southern Ontario, the Registry Act, for many years to come, may not continue to serve the public as well as any other system but is presumes the continuance of a predominately rural area with little subdivision and large parcels. Its chief defect is that the Local Registrar must accept for registration any document which is in proper form - the substance of the document is beyond his control.

The Certification of Titles Act

I do not think I need to explain the purpose of the Certification of Titles Act except that it requires, in areas where it is brought into effect, that all subdividers of land submit their title to certification as a condition of the plan being registered. It merely continues the defect of the present Registry Act system but establishes, compulsorily, a new root of title. This departure point will be adequate for a few years and is highly desirable and necessary but it can only be regarded as a temporary stopgap to prevent the rot getting out of control. Its chief virtue is as a supplement to the Land Titles Act.

The Land Titles Act

This, in my humble opinion, is the answer to the modern problem of title registration. It is admittedly not perfect but it has the virtues of simplicity, certainty, guarantee, economy and speed. It is the only system which anticipates the continued subdivision of what is, after all, a finite quantity of land into smaller and smaller parcels. It is the only system in which the element of discretion given to the Master of Titles to accept a doubtful and insoluble title problem can be asserted in such a way that the matter may not be raised again by anyone.

It is the only system which will result in a saving of time by surveyors and solicitors in the examination of titles and will free them for what is, after all, their more important and fundamental responsibilities. It is not, in my opinion, the proper function of a solicitor or a surveyor to occupy his time as a drudge in the Registry Office searching titles which have been searched many times before in the hope that by a constant process of distillation, he may discover some small and insignificant error in past conveyancing which may justify the time and labour spent in searching the title.

There is no element of compulsion in establishing the Land Titles System in your county. No one would be required to place his lands under Land Titles unless he wished to do so, but the advantages of doing so, especially for new subdividers and industries and business contemplating large expenditures, are overwhelming.

And yet are the benefits of this Act freely available to the public and our professions in Ontario? Strangely enough, they are not. Roughly speaking, the whole of Northern Ontario is now in the Land Titles System and always has been. The heavily populated portion of Southern Ontario and, more particularly, the older areas where the problems are greatest, are lacking in these facilities. By this I mean, that if a person in Kent County or in Lambton County (and until recently in Essex County) wishes to place a new subdivision or a parcel of land under the Land Titles System there are no means available to do so.

What is required is a simple by-law of the Councils of the Separated Municipalities and the County Council in each County requesting the necessary Order-in-Council establishing a Land Titles Office. In most cases, this could be operated in the present Registry Office using the present Registrar as a Local Master of Titles. The expenditure involved in new books in the first instance would not exceed $100.00 and yet the benefit would be incalculable.

The cost of putting a new subdivision under the Land Titles System is insignificant when distributed over the whole subdivision and compared with the benefits and attractions which this presents to the average purchaser.

I respectfully submit that the surveyors and the legal profession have a duty to do everything in their power to bring the benefits of the Land Titles System to their County at the earliest possible date so that we can hand on to those who come after us something better than that which we received.

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Mr. McWilliam's paper was given to the First Annual Conference on Land Transfer at Sarnia.

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