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PUBLICATION

Real Estate Meets Trust Law: Land Registration Ontario Style

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What a tangled web it currently is when Ontario real estate lawyers attempt to register transactions involving real property held in trust.[1] The electronic registration system ("e-reg") in Ontario has seemingly relevant and valid boxes to tick to reflect the true nature of what is intended to transpire. However, the present Director of Titles' perspective regarding trusts is at odds with the system and practice standards that have developed since the implementation of the e-reg system, not to mention the law.

It is uncontroversial to state that interests in real property can be held personally and in trust under Ontario law. Where a trust is involved, the trustee or trustees hold legal title to the property that is the object of the trust, with the beneficiaries having a beneficial interest. This is all fine and well as an intellectual exercise, but title needs to be accurately reflected in the government's land registration records. Further complicating matters is the fact that Ontario has two systems: registry and land titles, with the former being phased out due to the move to electronic registration. The goal of the land titles system and e-reg is a more reliable record of title.

The registry system is what is referred to as a notice system. This means a wide range of information related to title can be deposited and recorded in the registration system. Unfortunately, this made title searching very cumbersome and potentially prone to error. By contrast, the land titles system represents the actual chain of title and, therefore, is not a notice system. As a result, there are more stringent restrictions about what can be registered on title and how information related to title can be recorded in the registration system.

Historically, land held in trust and subject to the land titles system showed owner capacity as "trustee" to signify legal ownership only. This appears to be authorized by section 62 of the *Land Title Act*[2] *("LTA")*. However, Ontario's current Director of Titles, Jeffrey Lem, disagrees and

has made some proclamations in the name of protecting property owners that are disturbing to trust lawyers. More specifically, in a recent CPD program regarding real estate law issues, Mr. Lem stated that it is not permissible to register the capacity of “trustee” and any such registrations will be rejected. He further expanded his comments to state that self-to-self transfers (currently used when setting up trusts such as alter ego or joint partner) will not be accepted. Respectfully, the author disagrees that this perspective provides the desired protection or is supported at law.

Take the example of A and B holding a cottage property in trust for themselves during their lifetime (i.e. a joint partner or spousal trust). A and B owned the property in joint tenancy and at least one of them was over 65 at the time they settled the joint partner trust. The trust deed provides that if either or both of A and B are unable to act as trustees, they will be replaced by C and D successively. Further, on the death of the last to die of A and B, C and D are the beneficiaries of the trust.

The first quandary involves the proper way to reflect the existence of the trust in Ontario from a real estate conveyancing perspective. For ease of discussion, it is assumed that the property is in the land titles system at the time the trust is created and always was in the land titles system. One potential option is to do nothing since A and B are still in control of the property. Another is to transfer the property from A and B to A and B but now show them as having the capacity of trustees. It is this second option that has attracted the ire of Director of Titles because the land titles system is not a notice system.

Respectfully, there is notice and then there is legal notice. Black’s Law Dictionary defines notice as follows:

notice *n.* (16c) **1.** Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); **definite legal cognizance**, actual or constructive, of an existing right or title <under the lease, the tenant must give the landlord written notice 30 days before vacating the premises>. • A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. **2.** The condition of being so notified, whether or not actual awareness exists <all prospective buyers were on notice of the judgment lien>. Cf. KNOWLEDGE. **3.** A written or printed announcement <the notice of sale was posted on the courthouse bulletin board>.

[Emphasis added.]

Even if there was a form of notice with respect to trusts that cannot be submitted for registration such that it would have legal effect, the *LTA* contemplates a difference between mere knowledge and notice with legal import. There are still several kinds of notices that can be registered pursuant to the *LTA* such as:

- Form 2 Notice of Application for First Registration

- Form 10 Notice of Hearing
- Form 14 Notice to Sheriff

These Notices all have one thing in common: they direct someone to take legal notice rather than just being aware of a particular fact. By comparison, simply stating the capacity with which a person holds title does not require any particular action to be taken nor does it start any form of limitation period to run. It is simply information and the viewer is left to govern themselves accordingly, which may include seeking to verify the validity of the trust if that appears relevant.

The wording and structure of the *LTA* accord with the Black's definition of notice. The relevant portions of section 62 of the *LTA* are as follows:

Trusts not to be entered

62 (1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.

Description of owner as a trustee

(2) Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.

[Emphasis added.]

Not only does ss.62(2) state that describing an owner of property as a trustee shall not be deemed to be notice of a trust, the subsection specifically uses variants of "describe" to reinforce the point that a description of an owner's capacity is not notice. If we interpret subsections 62(1) and (2) as the Director of Titles wishes and refuse to register trustee capacity, it gives no effect to 62(2) rendering it moot. Surely this cannot have been the intention of the legislature and it does not accord with the rules for statutory interpretation. To determine how 62(1) and 62(2) work together, it is worth remembering the old maxim which reads as follows:

The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to effect only the other parts of the statute to which it may properly apply.[3]

The Director of Titles' interpretation and refusal to allow capacity to be recorded notwithstanding ss.62(2) clearly contradicts this longstanding rule of statutory interpretation. Not only does it

nullify the operation of ss.62(2), it nullifies trust law, which cannot reasonably have been intended by the legislature, as will be demonstrated below.

Why is the description of the legal owner's capacity important? Does it really make a difference? According to the Director of Titles, registering trustee capacity is not only prohibited but also does more harm than good. The author respectfully disagrees for practical reasons as well as the legal analysis already stated. For example, if the capacity of A and B as trustees is not recorded, and they are indebted to creditors who commence litigation against them unawares, time and money may be wasted including that of the beneficial owner, X, who may need to defend his/her rights in the property. Instead, describing A and B as trustees allows (but does not require) a creditor to make further inquiries before taking enforcement action.

Trust law is well established in Canada, and elsewhere, and has been a cornerstone of estate planning for much longer than the author has been alive. Trusts accomplish many purposes in estate planning, such as protection for the claims of creditors and dependants; minimizing the estate administration tax (by excluding trust assets from the estate of the transferor); providing more effective asset management than a power of attorney for property; and serving as a training ground for inheritors to become involved in asset management. This is a spritely accomplishment for what appears on the surface to be quite a demure legal construct.

It is helpful to consider a continuation of our earlier scenario. Again, let us assume that A and B are spouses (married or common law) and that they own a cottage as joint tenants. For various reasons, they decide to transfer the property into a joint partner/spousal trust and want to be the original trustees. The trust deed is drafted accordingly and C and D are named, successively, as alternate trustees to A and B.

Until recently, a conveyance would be registered from A and B to A and B as trustees. Subsequently, if either of A or B resigned, became incapable of managing property or died, a new registration would record the transfer of title to the successor trustee, while leaving beneficial entitlements to continue to be governed as stated in the trust deed. After all, trusts are a relationship with respect to property whereby there is a separation of legal and beneficial interests.

Presently, some but not all Ontario Land Registry Offices ("LROs") are refusing to accept the A and B to A and B registration, or an A to A registration in the case of alter ego or similar self-benefit trust. This of course was not always the case, with the result that some real property in Ontario held in trust has the legal owners registered on title in their capacity as trustee, while other property does not.

Leaving aside for a moment the proper interpretation of ss.62(2), there is a potentially serious trust law problem with the refusal to record trustee capacity. The problem is the requirement of delivery in order to effect a valid trust. Most lawyers are acquainted with the three certainties required to create a valid trust of: intention, object and subject. What is sometimes forgotten is the delivery requirement. A person settling property upon a trust must do all that they can to

transfer the property to the trustee. If the object is a physical item such as a painting, handing the painting to the trustee should be sufficient. However, some types of property, such as real estate or corporate shares, are subject to a registration or record-keeping system. The settlor and trustee do not control the land registration system. Therefore, all they can do is complete the appropriate documentation prescribed by the land registration system and submit it to the governing LRO. If that LRO refuses to register the transfer, it is open to argument that delivery has not been completed, which could open the door to challenging the validity and existence of the trust by the Canada Revenue Agency or others with an interest in the settlor's property or estate.

(It should be noted that under the CRA's current trust audit program, the CRA has attempted to allege that a trust does not exist simply because the settlement object has been misplaced. This is more about trustee negligence than the validity of the trust, but CRA has a clear motivation to deny the existence of trusts.)

Now consider the situation where the same trust is set up and either A and B both become incapacitated during their life or both have died. In either case, the property needs to be transferred into the names of C and D as the new trustees. Additionally, if A and B are both deceased, C and D need to be able to administer the terms of the trust to transfer the property to the beneficiaries. Where A and B are both deceased and C and D are both the trustees and the sole beneficiaries on the death of A and B, it may be possible to simplify the registration by transferring from A and B to C and D. It would be done as a gift for no consideration, not even $2.00. Any attendant income tax implications of a deemed, or other, disposition is something for the estate lawyer and accountant to address.

Let us further consider the above situation where A and B have now become incapable, or otherwise do not wish to continue in their role as trustees, and title has simply been registered in the names of C and D as joint tenants and they are still the beneficiaries. To the outside world it looks like C and D hold the fee simple, much to the delight of a creditor who wishes to pursue a claim against C or D for an outstanding debt.

Creditors are going to be faced with the difficult decision of contacting the registered owner to ask if they have a beneficial interest in the property, or just hold it in trust for someone, which might spark avoidance strategies. The alternative is to start a claim against a debtor only to discover that the debtor has no interest in the property. Who will be responsible for the debtor's costs to defend the claim? What about the potential consequences and costs to the innocent beneficiaries of the trust, especially if attempts to defend the claim fail.

For a moment, let us change the above example slightly such that A and B are siblings who own a cottage together and hold title as tenants in common. The *LTA* contemplates this situation and allows A and B to be shown as trustees who hold title as tenants in common. Based on his comments in a recent CPD program, currently the Director of Titles only wants trustees to be recorded as joint tenants, which clearly contradicts the express wording of the *LTA* as well as the terms of some trusts and trust law itself. Subsection 62(3) states as follows:

Owners described as trustees to be joint tenants

(3) Where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants unless the contrary is expressly stated.

[Emphasis added.]

A trust may very well state that if either A or B can no longer act as trustee, the person is to be replaced firstly by C and then by D, just as set out in the example above.

An example similar to this is currently under consideration in one Ontario LRO. Both A and B are now deceased (A first and then B) and the Registrar is insisting that the alternate trustee, C, apply for probate in respect of B's estate or obtain some other form of court order, before C can be registered on title. In this case, not only is the Registrar refusing to register what he/she thinks is notice of a trust, the Registrar is refusing to take legal notice of a valid trust deed which clearly states C is the successor trustee. The property under consideration is not part of B's estate and, therefore, the probate process has no application. It is quite possible that A and B transferred the property into trust as a valid probate avoidance strategy just like many, many other Ontario residents do regularly.

The nature and purpose of land registration laws is to have an efficient and effective set of rules to accurately record the ownership of interests in real property and transactions related thereto. The purpose is not to change or misrepresent what is otherwise legally permitted. Therefore, the law relating to land titles does not change property law or trust law. All it should do is reflect what is otherwise permitted under these and related substantive areas of law. Land registration law is administrative.

Where does this leave Ontario lawyers, whether they practice real estate law or not? This author suggests that, knowing that the current system does not accurately reflect the true nature of title to land in the province, no lawyer can trust their title search anymore, and to avoid being negligent they must conduct additional due diligence that would otherwise be unnecessary. At a minimum, all requisition letters should now include a request to confirm whether the transferor holds title personally or in a fiduciary or representative capacity. If the response indicates the title holder holds title in a fiduciary capacity, the diligent lawyer should request further details including a copy of the trust deed. This is the opposite of what the land titles system is supposed to be about, of course.

A final issue to consider is the potential for increased title fraud. Unscrupulous trustees could try to sell the property. A purchaser for value without notice of the trustee capacity will be protected, but what happens to the innocent beneficiaries? At least with capacity registered, there is more opportunity to scrutinize a suspicious transaction and ensure that beneficiaries are not needlessly dragged into claims against the trustees in their personal capacity.

The author agrees that the land titles system in Ontario is not a notice system in the same vein as the registry system, but that does not mean it is prudent or permitted to obscure the true

nature of land ownership by withholding essential information on which third parties may wish to, and would normally, rely. Longstanding rules of statutory interpretation as well as simple logic favour giving effect to ss.62(2) of the *LTA*. In order to do this, it is essential to untangle the current web of confusion before the integrity of the system is irreparably compromised, if it has not been already.

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[1] Kind thanks to Andrew Coates, Articling Student at Blaney McMurtry LLP, for his research assistance.

[2] *Land Titles Act*, R.S.O. 1990, c. L.5.

[3] *Pretty v. Solly* (1859), 26 Beav. 606, at p. 610, 53 E.R. 1032, at p. 1034.