

Brighter Future

Bill 88: Planning Act's new 20-year search rule

By Harjot Atwal



Harjot Atwal

(June 7, 2019, 11:19 AM EDT) -- For real estate lawyers in Ontario, searching title to the subject property involved in a transaction — as well as any relevant lands that may abut it — is all about time. On the one hand, in order to ensure a breach of the *Planning Act* has not occurred, a solicitor may have to search title all the way back to June 15, 1967. This is a result of s. 10(3) of the *Planning Act Amendment, 1967* which indicates that any contraventions of the Act occurring prior to that date are deemed not to have been contraventions. On the other hand, conducting searches and determining the ownership of land back 52 years (currently) also takes up a lot of billable time, which does not necessarily translate into readily apparent value for our clients.

Thankfully *Planning Amendment Act, 2019* (Bill 88) contains an answer that may speed things up. The bill makes multiple changes to the *Planning Act*, the most significant of which is the following new 20-year search rule:

"57.1 (1) A contravention of section 50 or a predecessor of it in respect of a parcel of land that is being dealt with does not have, and is deemed never to have had, the effect of preventing the conveyance of the land or the creation of any interest in the land if the contravention occurred more than 20 years before the date of dealing with the parcel."

As noted in s. 57.1(1), contraventions of the *Planning Act* cause great concern because they prevent the conveyance of land or the creation of any interest in land, such that the owner's ability to convey or otherwise deal with the land has been nullified.

If, for example, a conveyance contravened s. 50 in 1985 because the past owner of your land also simultaneously owned abutting land but did not convey the lands together, the fee simple title was never conveyed to the 1985 purchaser and any subsequent conveyances afterwards are also deemed to be of no force and effect.

This is the case regardless of whether there was only one subsequent conveyance or multiple ones, including the conveyance to you.

For this reason, solicitors must search title to the subject property and abutting lands back to 1967 to ensure compliance with the *Planning Act*, unless some exception or remedy applies. The first curative provision to consider involves s. 50(22) of the Act, whereby solicitors can sign off on three *Planning Act* statements when registering a transfer/deed which then deems that any contraventions prior to that registration never had the effect of preventing the conveyance of any interest in the land.

Next, if that remedy is not available, one will want to consider whether the parcel of land you are dealing with is identical to a parcel of land previously conveyed with consent, as s. 50(12)-(14) will then have the effect of curing all prior defects and that identical consented parcel may be conveyed in the future without the necessity of searching adjoining properties or otherwise being concerned with s. 50 compliance. Indeed, Bill 88 strengthens the effect of these consent provisions by making them retroactive in nature, as there is currently debate about whether they apply if the consent was given prior to Dec. 15, 1978.

Other possibilities include only searching back to the date a validation certificate was issued by the relevant council as this also has the effect of curing prior contraventions on a specific parcel of land (s. 57), only searching back to the date of registration of a plan of subdivision or condominium plan since one is not required to search back behind that registration date (s. 50(14)), or only searching back to the date a title was converted from the registry system to the land titles system as long as the parcel register contains a qualification that states: "SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO: SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11 ...". If, however, none of these exceptions or remedies is applicable, then one may have to search title all the way back to 1967 until the new 20-year search rule becomes codified as law.

Future of Planning Act

These retroactive changes contemplated by Bill 88 could still have possibly negative repercussions in the future. For example, if one wanted to circumvent subdivision and part-lot control, one could simply make a contravening conveyance to a trusted family member and then wait 20 years for the new s. 57.1(1.1) to remedy the breach of the *Planning Act*.

After all, there is no requirement in Bill 88 to make such conveyances in "good faith," and clever conveyancers could make use of this section to create a new loophole. This is not unprecedented as previous loopholes have had to be plugged by the legislature's passing of new provisions, such as with respect to foreclosure orders (s. 50(18)), *Partition Act* orders (s. 50(20)), and partial discharges (s. 50(16)-(17)) when *Planning Act* avoidance schemes involving them came to light through case law.

At the end of the day, however, it appears the new 20-year search rule's benefits will outweigh its costs. Most importantly, it will save time.

As of now, Bill 88's second reading was on May 30, 2019, and there are still few steps that must be taken before it receives royal assent and becomes law. Hopefully, after the passage of some time, Bill 88 will become proclaimed and make the future for real estate solicitors shine a bit brighter.

Harjot Atwal is an associate lawyer in the commercial real estate practice group of Pallett Valo LLP. You can reach him at hatwal@pallettvalo.com or on LinkedIn.

Photo credit / RaStudio ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.