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The Supreme Court Rules That Acquisitive Prescription Trumps the Québec Land Register

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In *Ostiguy v. Allie*, 2017 SCC 22, the Supreme Court of Canada (SCC) found that one cannot entirely rely on the entries in the Québec land register and that they do not take precedence over the rights acquired by prescription. The Supreme Court also decided on the effect of the judgment regarding acquisitive prescription in relation to immovables, describing its scope as declarative, intended to recognize pre-existing rights, rather than constitutive of rights.

The Facts

Between 1994 and 2011, Mrs. Allie and her family used one or two parking spaces located on their then-neighbour's land, without any objection by the neighbour. Between 2004 and 2011, the respondent, Allie, brought no legal proceedings to have her right to acquisitive prescription recognized. In 2011, Mr. Ostiguy and Mrs. Savard purchased Mrs. Allie's neighbouring property. A few months after taking possession of the property, the couple applied for an injunction to stop Mrs. Allie from parking her car in the two parking spaces in question. Mrs. Allie argued that she had come to own the parking spaces by acquisitive prescription. The Superior Court of Québec was of the view that Mrs. Allie had acquired one of the two parking spaces she claimed. A majority of the Court of Appeal of Québec and the SCC affirmed the judgment.

The SCC had to determine whether a prescription acquired before a purchase can be set up against the new owner who registers title in the land register even though the third-party possessor had not instituted legal proceedings to have this right recognized.

Acquisitive Prescription and the Publication of Rights

On the one hand, the SCC pointed out that acquisitive prescription is a means of acquiring a right of ownership through the effect of possession. Possession occurs through the exercise of the right claimed and the intention of exercising it as the holder of the right. Possession must be peaceful, continuous, public and unequivocal during the prescription period – that is, 10 years for immovables. The possessor of an immovable must also obtain a judgment confirming the right so acquired.

On the other hand, the SCC pointed out that publication is limited to allowing rights to be set up against third persons, establishing their rank and giving them effect where the law so provides. The Court concluded that this scope cannot be extended, particularly in light of the abortive reform of the publication of rights system under the *Civil Code of Québec*. Indeed, in 2000, the legislature abandoned its ambitious reform aimed at attributing absolute probative value to the land register and extinguishing any uncatalogued rights.

Rights Acquired by Prescription May Be Set Up Against a Third Party Without Publication

The SCC concluded that the abandonment of the reform confirmed the purely declarative role of the publication of rights. It confirmed that the rights acquired by prescription do not need to be published in order to be set up against third parties and that the land register is no guarantee of the titles registered in it, thus finding in Mrs. Allie's favour.

The SCC was of the view that Mr. Ostiguy and Mrs. Savard were not left without recourse and that they could claim damages from the vendors reflecting the loss of the land suffered if the vendors were aware of Mrs. Allie's encroachment and failed to disclose it to the purchasers. However, the SCC also acknowledged that such recourse was merely an imperfect solution.

The SCC was further of the view that the approach adopted introduces no more uncertainty into real estate transactions and instead accounts for the effect of acquisitive prescription.

The Nature of a Judgment in Acquisitive Prescription of Immovables

Lastly, the SCC was of the view that the judgment for acquisitive prescription is declarative rather than constitutive of rights – although it pointed out that this determination was not necessary for the decision in this dispute; in the SCC's opinion, it merely confirms the rights already acquired by prescription.

Conclusion

The judgment in *Ostiguy v. Allie* confirms the primacy of acquisitive prescription and rejects the absolute reliability of the Québec land register. Therefore, the purchaser of an immovable, the hypothecary creditor and, more generally, users of the land register should be vigilant before relying on the titles and entries in the register. A third party can subsequently claim having acquired a portion of the immovable in question by prescription several years earlier, even without taking any steps to have this right confirmed.

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