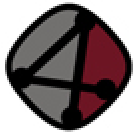

The Boundary Point

Volume 7, Issue 11, November 2019

CASE COMMENTARIES ON PROPERTY TITLE AND BOUNDARY LAW

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

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Despite the exclusion of adverse possession in many land title jurisdictions, the courts continue to deal with the inequities as part of their inherent jurisdiction. In many parts of Canada, the legislation will specifically allow for a court to order a correction (sometimes referred to as "rectification") as part of its role.

In this month's issue, we review the decision of the British Columbia Court of Appeal in *Hamilton and Squario v. British Columbia (Attorney General)* that followed an earlier order that had corrected the description in a certificate of title to the wrong legal subdivision number. The appellant, on behalf of the Crown in BC argued that the decision of the BC Superior Court below was tantamount to undermining the certainty of title in the Province's title registration system. At the core of the appeal, the issue looked more and more like a survey mistake that had led to the first error over one hundred years ago.

Correcting a Misdescription of Title

Key Words: *patent, unrun survey line, township, legal subdivision, title, boundary*

Earlier this month, the British Columbia Court of Appeal dismissed[1] the Attorney General's appeal of the BC Supreme Court 2017 decision in *Hamilton v British Columbia (Attorney General)*.[2] The decision provides an interesting view into the legal framework available for rectifying title errors. In British Columbia, the *Land Title Inquiry Act*[3] empowers the court, upon application by a party with an estate or interest in land to investigate title and provide a declaration as to its validity. The intended purpose of this particular mechanism is to provide

[1] *Hamilton and Squario v. British Columbia (Attorney General),* 2019 BCCA 348 (CanLII), http://canlii.ca/t/j2w28

[2] *Hamilton v British Columbia (Attorney General)*, 2017 BCSC 1334 (CanLII), http://canlii.ca/t/h54px

[3] *Land Title Inquiry Act,* RSBC 1996, c 251, http://canlii.ca/t/kv6q

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certainty in an efficient manner - something which can be gleaned from the language in s.30 of the *Act* which reads:

> This Act must be construed and carried out to facilitate, as much as possible, the obtaining of perfect titles by the owners of estates in land, through the simplest machinery, at the smallest expense and in the shortest time, consistent with reasonable prudence in reference to the rights or claims of other persons.[4]

Is this particular mechanism effective for achieving certainty, correcting errors and maintaining the integrity of the land titles system? The appeal raised some of these questions. First however, let us examine the facts that gave rise to this petition. The essence of this particular case, as well as its context relative to the Supreme Court of Canada decision in *Nelson v Mowatt*[5] was explained by the lower court:

> The petitioners seek a judicial investigation of title under the *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251.
>
> The essence of the petitioners' case is that in 1898 a mistake was made in the title for a parcel of land on the Columbia River near Golden, B.C. The disputed area is known as Carbonite Landing. What the petitioners say should have been included in the title for part of parcel Legal Section (LS) 8 is now included as part of LS 7, which is Crown land that has never been granted.
>
> The primary position of the petitioners is that the title should be rectified after a survey is done. In the alternative, the petitioners claim adverse possession and proprietary estoppel.
>
> During the hearing I was informed that this case was being argued several days after the Supreme Court of Canada heard an appeal of another decision under the *Land Title Inquiry Act* involving several points that are in issue here. I therefore decided I would withhold consideration of this case until the Supreme Court rendered its decision, following which the parties would make further submissions. The Supreme Court has now issued its decision: *Nelson (City) v. Mowatt*, 2017 SCC 8 (CanLII), and I have the parties' submissions.

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[4] *Ibid.* at s. 30

[5] From the headnote in *Nelson v Mowatt* we are reminded of the Court's rejection of the inconsistent use test as part of the law of adverse possession in British Columbia:

> "Adverse possession is a long-standing common law device by which the right of the prior possessor of land, typically the holder of registered title, may be displaced by a trespasser whose possession of the land goes unchallenged for a prescribed period of time. To meet the test of establishing adverse possession, the act of possession must be open and notorious, adverse, exclusive, peaceful, actual and continuous. The adverse possessor who successfully obtains title need not always be the same person whose adverse possession triggered the running of the limitation period. The inconsistent use doctrine, that is, that the possessor's use of the disputed lot must have been inconsistent with the true owner's present or future enjoyment of the land, does not accord with the legislation in the province of British Columbia and therefore, the inconsistent use requirement forms no part of the law of British Columbia governing adverse possession."

> In view of my conclusion, it is unnecessary for me to deal with the issues of adverse possession or proprietary estoppel. I will therefore largely only set out the early historical facts necessary to deal with the issue of what was encompassed in the original Crown grant.[6]

Accordingly, the outcome in the decision below did not depend on the making of any determination of adverse possession; it was decided on other grounds. While the story is fact-specific, it is not only interesting, but sets the stage for what students of boundary law will frequently encounter as a key question: *When is an unrun survey line elevated to the status of a legal boundary?* The lower court explained:

> Carbonite Landing is located on the west bank of the Columbia River approximately 20 kilometres south of Golden.
>
> The first relevant document is a May 5, 1893 agreement between James Durick and Charles Cartwright. For $1,150 Durick agreed to grant and convey:
>
> > … a parcel of land situate at "Carbonate Landing", on the west side of the Columbia River, in the district of East Kootenay, British Columbia, containing 40 acres more or less in all buildings and other improvements thereon belonging to the party of the first part and consisting of an hotel and out-buildings and other improvements…
>
> At the time, Carbonite Landing and the surrounding area had not been surveyed. The land was in the railway belt, which, at the time, was owned by Canada pursuant to the *Terms of Union*, (U.K.), 1871 (34 Vict.), No. 54.
>
> Durick had no legal title to the land, although as a squatter who had made improvements, he may have had priority to buy the land pursuant to *An Act Respecting Certain Public Lands in British Columbia*, R.S.C. 1886, c. 56, and the *Dominion Lands Act*, R.S.C. 1886, c. 54. The sale contract therefore does not have any legal effect on the present case; its significance is factual.
>
> As is apparent from a July 5, 1893 article in the Golden Era, Cartwright began operating the hotel immediately:
>
> > Charles Cartwright visited us this week. Charlie deserves to do well. His hotel is situated very conveniently to the McMurdo District those therefore who are going that way should give him a call. He is prepared to provide pack and saddle horses when required at reasonable rates.
>
> In 1897, the Dominion Surveyor General, Edouard de Ville, directed Arthur St. Cyr to subdivide the Columbia River area above Golden into sections. The written direction noted that it would be necessary to traverse the river for the purposes of calculating the area of

[6] *Ibid.*, at paras. 1 to 5.

each quarter section and that it was likely that St. Cyr would have difficulties in marking corners. He was told, "Whatever you do you must provide permanent marks for your lines".

In March 1897 St. Cyr sent de Ville sketches of what he had done to date, including Township 25, the area in which Carbonite Landing was located. Based on those sketches the dominion land surveyor certified the plan for Township 25. We have the plan, but not the sketches, although it is conceivable they are the same. The plan showed sections only. Counsel advises they did not locate any document showing a more detailed survey or plan.

To understand the issue in this case, it is necessary to set out the numbering system used in the Dominion Land Survey System, which was mandated by the Dominion Lands Act, s. 8. Land was surveyed into townships of 36 square miles, or 2,400 acres. A township was divided into 36 sections of one square mile (640 acres). The numbering system of the sections is:

31	32	33	34	35	36
30	29	28	27	26	25
19	20	21	22	23	24
18	17	16	15	14	13
7	8	9	10	11	12
6	5	4	3	2	1

Sections could be divided into 16 legal subdivisions of 40 acres each. The numbering of legal subdivisions within a section is:

13	14	15	16
12	11	10	9
5	6	7	8
4	3	2	1

In October 1898, Cartwright applied to Dominion Lands for title to [emphasis added]:

> **L.S. 8** West of River, Sec. 8, Tp 25, Rg. 20, **5 acres**

It will be seen from the preceding paragraph that section 8 is to the west of section 9 and that the eastern-most legal subdivision within section 8, was LS 8. ***Therefore, the setting of the boundary between sections 8 and 9 would also have set the eastern boundary of LS 8. This bears emphasizing because the legal sections were not surveyed, and therefore the western boundary of LS 8 (i.e., the boundary between LS 8 and LS 7) was not surveyed. It is that boundary that is critical here. [emphasis added].***

On April 8, 1899 the Secretary of the Department of Interior wrote to the Dominion land agent in Kamloops stating:

> With reference to your letter of the 4th ultimo … enclosing the agreement entered into between J.C. Durick and Charles Cartwright; I beg to return the same herewith, and to say that the land applied for may be sold to Mr. Cartwright, the area of which is computed as 4 acres.

On July 25, 1899 Cartwright was granted the land described as:

> Township 25, Range 20, W. of the 5th mer., Sec L.S. 8 of 8, acres 4

On July 25, 1899 the Dominion Department of the Interior issued Cartwright letters patent for the land, with the following legal description:

> … all that portion of Legal Subdivision 8, of Section 8 … which lies to the West of the Columbia River, as shewn upon a map or plan of the survey of the said township, signed at Ottawa on the 7th day of June A.D. 1898 by Edward Deville…

As I said above, the level of detail of the plan was division into sections. Therefore, the land granted was not shown on the plan.

In 1901, Dominion records note that St. Cyr had not done the survey as directed:

> Traversed by St. Cyr in 1897 but not sufficiently to give full areas.
>
> Complete new traverse, together with some section lines, might be made.

In March 1901, the Dominion Surveyor General requested that Mr. Ross, the Dominion land surveyor in Kamloops, re-survey the area. Ross stayed at the hotel at Carbonite Landing on January 31, 1903, as noted in his journal. The Ross survey identified the east boundary of LS 7 a short distance west of the Columbia, and the fact that some of the buildings were on LS 7.

In 1903, Cartwright registered his 1899 grant in the land registry. The certificate of title mirrors the description in the grant and again noted the size as being four acres.

In 1904 Cartwright attempted to get a free grant of part of LS 7 in 1904. The documents noted that the portion he was seeking to acquire had his improvements on it. The Dominion authorities were prepared, as of February 19, 1904, to sell "at the current rate and on the usual terms" if the land was surveyed.

> Cartwright engaged James Brady as a private surveyor. Brady's plans confirmed the buildings were west of the line between LS 8 and LS 7 (i.e., on LS 7) and showed the buildings below the natural boundary, on the foreshore of the Columbia, which was provincial land. The Dominion Surveyor General rejected the plan and told Brady to survey again at Cartwright's expense, giving him precise instructions. The Dominion Department of the Interior also said that if the buildings were on the foreshore, Cartwright should ask the province for a grant. The second survey was never done and the sale was never completed. A July 28, 1917 letter from Department of the Interior to the Dominion land agent in Revelstoke noted:
>
> > This survey was not satisfactory and no further action was taken in connection with the sale. It would appear, however, that Mr. Cartwright has secured some form of title for the above-mentioned land, probably from the province.
>
> In 1917 the Department of Interior office in Ottawa requested an inspection of improvements made by Cartwright. There is no document showing the purpose of the inspection. On October 2, 1917, a report was forwarded by the land agent in Revelstoke noting that there were improvements on LS 7. It noted that the Registrar of Titles at Nelson could not locate any registrations affecting LS 7, but that four acres in LS 8 was registered pursuant to the 1899 grant.
>
> LS 8 was sold by Cartwright in 1925. The Form A under the Land Registry Act described the land as being four acres. The legal description was that the parcel lay to the west of the Columbia River. The land was transferred five more times before being purchased by the petitioners in November, 1997.[7]

The real estate sale listing described the property in 1996 as being "...in the middle of nowhere."

The court's jurisdiction lay in the *Land Title Inquiry Act* which allows a person who has an interest in land to apply to a court for an investigation of the person's title and a declaration as to its validity. The application is made by petition and the *Act* provides for what materials are to be filed. The petitioners had to prove their claim on a balance of probabilities. The historic nature of the claim was then considered in determining the evidence that can reasonably be expected to be brought to bear by them.

The court's analysis began by concluding that the former *Limitation Act*, S.B.C. 2012, c. 13, does not apply to a proceeding in which the court is only asked to make a declaration of title under the *Land Title Inquiry Act*.

[7] *Ibid.*, at paras. 6 to 26

The court then stated two principles that apply. The first is that a Crown grant for valuable consideration is to be construed against the Crown. Citing *Anger & Honsberger, Law of Real Property (3rd ed)* at §31:90.10, the court quoted:

> Where the Crown is the grantor, the grant is generally to be interpreted in favour of the Crown. This rule will not apply when it would be necessary to give a forced construction in favour of the Crown. It will also not apply when a grantee gave valuable consideration. Where this is the case, the grant will be construed, where possible, in favour of the grantee.[8]

The second principle was that actual lands sold and not a legal description of the land will prevail. Referring to *Okanagan Radio Ltd. v. Registrar of Land Titles*,[9] and the approval of the quote in Donald H.L. Lamont, *Real Estate Conveyancing (1976)* at p.550, the court stated:

> The most important principle is that it is the actual lands on the surface of the earth which were subdivided for exchange, which are in fact transferred, not the written description of them or the plan drawn to portray them. The purchaser buys what he sees, the new parcel enclosed by original survey monuments. The description whether written - metes and bounds, or graphic, a plan, is an attempt to reduce the physical fact of the land to a recorded entity. If, on later inspection it is found that the written words or drawn picture do not in fact accurately follow the real land boundaries, then the physical fact itself, the land, must prevail and the attempt to portray it by the description or plan must be rejected.

The court concluded:

> The original Crown grant intended to convey and did convey a four-acre parcel straddling what is now LS 7 and LS 8 containing what was known as Carbonite Landing and the hotel buildings.
>
> Whether the error in the description or mistaken assumption arose from a survey error by St. Cyr with respect to section lines or from the fact that the legal subdivision had not been surveyed does not matter.
>
> There is no indication that the title was extinguished. While the Crown says that Cartwright's failure to correct the title within one year as provided by the Dominion Lands Act, ss. 55, 56, and 57 is a bar to equitable relief, it has not argued that it bars the declaration contemplated by the Land Title Investigation Act.
>
> The petitioners are therefore entitled to a declaration in some form. To grant a declaration with any precision, a survey needs to be done. The petitioners submit that the Crown should do this at its expense. There is no authority for me to make that order. I direct that

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[8] *Ibid.*

[9] *Okanagan Radio Ltd. v. Registrar of Land Titles*, [1996] B.C.J. No. 1913 (S.C.) at para. 32

> the petitioners arrange and pay for a survey. Whether the survey fees are recoverable as a cost in the litigation can be debated at a later stage.
>
> The obvious goal of the survey is to describe the lands that are comprised in the four-acre grant west of the Columbia on which the hotel was located that apparently straddles LS 7 and LS 8. I am not able to provide precise instructions as to the survey. I suggest that counsel discuss this in advance so that there will be no debate on the survey results, and that proportionality be borne in mind, given the small size of the disputed parcel and that there is no extraordinary value (such as mineral deposits) on it.[10]

British Columbia appealed.[11]

The summary or headnote of the reported case provides a succinct explanation for the dismissal of the Crown's appeal:

> Attorney General of British Columbia appeals from order made pursuant to a judicial investigation of title under the *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251. The judge found that the initial Crown grant with respect to the land at issue, made to a Mr. Cartwright, mistakenly described the land as legal subdivision 8. The Crown intended to convey and Mr. Cartwright intended to receive land that is in fact partly within legal subdivision 7. ***Held***: appeal dismissed. There was no basis to interfere with the trial judge's findings of fact. The legal description of the land granted was mistaken. Petitioner's claim was not for rectification of contract, but for declaration as to title arising from a judicial investigation of title under the *Land Title Inquiry Act*. Under the former *Limitation Act*, R.S.B.C., 1996 c. 266, in force when the petitioners discovered their claim, an action for a declaration about title to property is not subject to a limitation period.[12]

Despite the extraordinary lengths to which land administrators and surveyors went in the 19th Century to improve survey accuracy and certainty of title, what remained was human error. Errors did occur in projecting lines on the ground and in attempting to describe the parcel of land that was meant to be the subject of a Crown patent. Accordingly, there ought to be – and are - mechanisms in place to correct such errors when they become apparent in order to restore clarity. Such mechanisms work most efficiently when there is clarity in analysis about the nature of the rectification: is it to repair the title or is it to correct a survey mistake?

Editor: Izaak de Rijcke

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[10] *Ibid.*, at paras. 51 to 55

[11] *Hamilton and Squario v. British Columbia (Attorney General)*, 2019 BCCA 348 (CanLII), http://canlii.ca/t/j2w28

[12] *Ibid*

Cross-references to *Principles of Boundary Law in Canada*

Chapter 7, *Boundaries and Land Registration Systems*, includes a discussion about the relationship of surveys, and parcel descriptions as basic elements supporting certainty in a title registration system.

FYI

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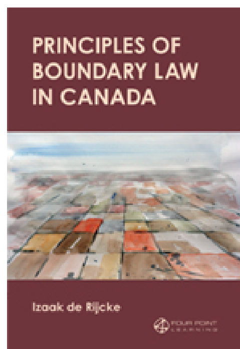
Principles of Boundary Law in Canada



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[13] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

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