The Boundary Point

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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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Property rights, and their protection, are elements of common law that have driven the need for certainty in land title registration systems. These systems in turn seek to minimize boundary disputes and allow for stability in dealings involving interests in land. The ability to own or "hold" property and transact in same has been one of the keystone elements of what economic participation means for the individual within broader concepts of democracy and freedom.

But what if the system, designed for certainty and stability is blocking groups in society from full economic participation because of either historic design or systemic racism? What if attempts to rectify this discrepancy in the name of fairness and justice are not effective? What kinds of changes are needed in order to respond to a number of demands for justice that are motivating many movements for change in our society today? More than just a philosophical question, systemic racism is a burning issue facing western democracies, including Canada.

The Importance of the *Land Titles Clarification Act* and Eliminating Racism

Key Words: *certificate of title, adverse possession, legal process, property, systemic racism*

In this issue we consider a decision made by a court in Nova Scotia that set aside a refusal by an administrative decision maker to recognize a claim to registered title to a parcel of land because (at least ostensibly), the applicant had not made out proof of adverse possession for the requisite 20 years. The court explained that the underlying reasons had more to do with a need to eliminate systemic racism. What is the role of the land surveyor in aiding an end to systemic racism? For that matter, do land surveyors need to play a greater role on this social issue? These are complex questions that may require further reflection, but positive change can at least begin with an awareness of the potential systemic barriers in our society.

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In *Downey v. Nova Scotia (Attorney General)*,[1] a claim was made under the *Land Titles Clarification Act.*[2] This legislation was first enacted in Nova Scotia in the 1960s with the aim of righting past wrongs that had denied proper title to Nova Scotians of African descent. It is meant to offer a simplified and flexible route to confirming title long denied, but depending on the requirements of the decision-maker, applicants may find themselves facing the same hurdles that the legislation had intended to remove. This decision brings some clarity to the scope of the discretion of the decision-maker under the legislation and reminds us of the systemic racism faced by African Nova Scotians.

Overt historical racism and ongoing systemic racism have been and continue to be significant problems in Canada. These ills are embedded in many of our governing systems, including land titles. In the recent decision of the Nova Scotia Supreme Court in *Downey v. Nova Scotia (Attorney General)* the issue of lack of a registered title in many communities of African Nova Scotians was explored in the context of an application for judicial review of a decision by the Department of Lands and Forestry under the *Land Titles Clarification Act*. The claim was summarized by the court as follows:

> This is a judicial review of a decision made by the Department of Lands and Forestry with respect to Christopher Downey's claim under the *Land Titles Clarification Act* R.S.N.S., c. 250. In 2017 Mr. Downey applied for certificate of claim to land on which he had lived in North Preston since 2001. The Department denied the claim because the 20-year time period required by the Department to establish ownership based on adverse possession had not been met. Mr. Downey says that the legislation does not contain any requirement that adverse possession be established in order to have a certificate of claim issued. He asserts that because the Department imposed a requirement that was not set out in the legislation, the decision was unreasonable and should be set aside.[3]

This is a case which must viewed in a broad context to understand the significance of the *Act* in question and the importance of decision-making thereunder. The Court explained:

> African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates. That is a fundamental historical fact and an observation of present reality.
>
> That has real implications for things like land ownership. Residents in African Nova Scotian communities are more likely to have unclear title to land on which they may have lived for many generations. That is because in those communities, informal arrangements were

[1] *Downey v. Nova Scotia (Attorney General)*, 2020 NSSC 201 (CanLII), http://canlii.ca/t/j8jwb

[2] *Land Titles Clarification Act*, RSNS 1989, c 250 https://www.canlii.org/en/ns/laws/stat/rsns-1989-c-250/latest/rsns-1989-c-250.html

[3] *Downey*, at para 1

> more common. Financial and other obstacles made it less likely that people in those communities would retain lawyers and surveyors to research title, register deeds or wills, or to survey boundaries. People may have lived on land for generations without having title registered. No one else might claim it and it may be that no one in the community disputes their entitlement to it. But they still have no formal title.
>
> The legislation under which Mr. Downey made his application was intended to provide people who live in designated areas with a simpler and less expensive way to clarify title to their property. North Preston is one of those designated areas.[4]

Additional historical context was explained in another decision involving the *Act* from earlier this year, *Beals v. Nova Scotia (Attorney General)*, as follows:

> […] black settlers arrived in Nova Scotia in three main groups -- the Loyalists (1783-1785), the Maroons (1796), and the refugees of the War of 1812 (1813-1815). These settlers arrived in Nova Scotia under the pretence of offers of generous land grants from the British government. Unlike their white counterparts who typically received at least 100 acres of fertile land, black families were given ten-acre lots of poor-quality land. That land was segregated from the lands given to white families. In addition, while white settlers were given deeds to their land, black settlers were given "tickets of location" and "licenses of occupation". Without legal title to their land, black settlers could not sell or mortgage their property, or legally pass it down to their descendants upon their death. Although a limited number of land titles were eventually issued in Preston, and some settlers were able to purchase land, most black families never attained clear title to their land. Lack of clear title and the segregated nature of their land triggered a cycle of poverty for African Nova Scotian families that persisted for generations.[5]

Turning to the legislation itself, the court summarized the alternative process set out by the *Act*:

> Under the legislation a person who resides in Nova Scotia and claims to own land in one of the designated areas can make an application for a certificate of claim. That application must contain a description of the land so that it can be identified and distinguished from other land. The application must include a concise statement of the facts on which the person bases the claim for ownership, and it must name other people who have occupied the land or who have claimed ownership or an interest in the land. That application must be accompanied by an abstract of title, a statutory declaration attesting to the history of the occupation of the land and a statement showing the names of anyone who holds any form of charge on the land, like a mortgage or judgment. It could be described as an alternative to the more cumbersome, expensive and time-consuming process of the *Quieting Titles Act*

[4] *Ibid.*, at paras. 4-6

[5] *Beals v. Nova Scotia (Attorney General)* 2020 NSSC 60 at para 22

R.S.N.S., c. 382. One of the issues here is just how much more expeditated that process should be in order to achieve the purposes of the legislation.[6]

Land title clarification areas were set by the provincial government; a map of the area of North Preston is included below at Figure 1.

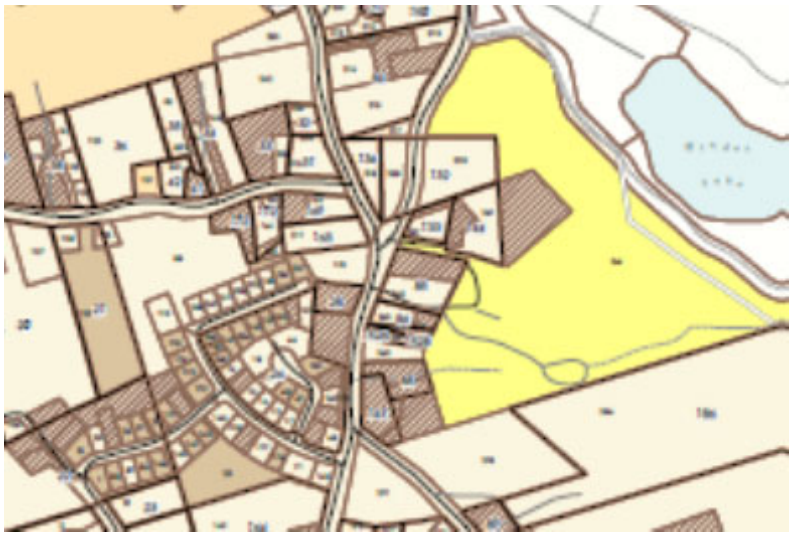

***Figure 1*:** Excerpt from the government of Nova Scotia map of North Preston Land Titles Clarification Area and Ungranted Lands. All rights reserved.

The decision set out particulars of the application for judicial review and Downey's claim that had started the process:

> In Mr. Downey's case, he filed an application with respect to a small portion of another larger parcel of land. The property was confirmed to be within one of the designated areas to which the *Land Titles Clarification Act* applies. No certificate of title had been issued previously for that property. Mr. Downey's lawyer filed an abstract of title, a statutory declaration and a statement listing the encumbrances on the property.
>
> Mr. Downey's statutory declaration set out the history of the property. He and his wife had built a home there between the summer of 2001 and October 2002. They had lived in the house continuously since then.
>
> His great grandfather Peter Beals and his wife, Heidi, had settled on the larger parcel ten-acre lot that included the property at 39 Beals Crescent. That was in 1913. That larger parcel was passed on to their daughter, Mr. Downey's grandmother, Lena. Lena and her husband, James Downey Sr. built a new house there. Lena (Beals) and James Downey Sr. got a certificate of title under the predecessor legislation the *Community Land Titles Clarification Act* in 1970. That house lot is now owned by Wesley Kay Downey and Mary Jo-Ann Neish. That larger property has road access and 39 Beals Crescent could only have road

[6] *Downey* at para. 7

> access if a right of way were granted by the owners of that larger parcel. Mr. Downey now gets access to the road over that property.[7]

The dwellings as built along Beals Crescent are visible from an areal view in Figure 2 below.

***Figure 2*:** View from GoogleMaps® Satellite image of Beals Crescent in North Preston, Nova Scotia. All rights reserved.

The certificate of claim was denied based on the fact that a 20 year period for adverse possession had not been met. Note however, that had he waited just one more year to bring his application, the period ***would*** have been met by Mr. Downey. Was the denial of the certificate of claim based on a failure to meet the test of adverse possession reasonable? This was the key issue for the court in the application for judicial review which was answered in the negative.

> The governing statute is always a constraint on administrative decision makers. The Department of Lands and Forestry must operate within the constraints imposed by the *Land Titles Clarification Act.*
>
> Section 4 of the *Act* sets out the information that is required for a person to apply for a certificate of claim. That document is required before a person can get a certificate of title. It is a first step. The section deals with the quality of the information that must be provided by a person making a claim. It does not require that a claimant establish a period of 20 years of adverse possession or provide information that would allow the Department to assess whether the property had been occupied for 20 years. It contains no reference at all to adverse possession or facts that would establish a claim of adverse possession. It does

[7] *Downey* at paras 14-16

> require that the applicant provide a history of the occupation of the land. That history then must have some bearing on the apparent entitlement of the applicant to the land that is the subject of the application.
>
> Section 5 requires the Minister to determine whether it appears as though the applicant is entitled to the lot. The legislation is silent on the basis upon which entitlement is established. There are no regulations. The legislation does not specifically require a period of possession for 20 years, but it may be presumed that entitlement must be based on some objective criteria in order for that issue to be assessed.
>
> The Minister cannot fetter their discretion by applying a standard that is not set out in the legislation. In *Chaffey v. Newfoundland and Labrador* 2020 NLSC 56, the Minister of Justice had refused to issue a licence under the *Exhumation Act* because the applicant had not established the consent of the deceased's next of kin. That criterion was found in the application form for the licence, but it was not contained in the legislation. The court found that a statutory decision maker with wide discretionary authority cannot fetter that discretion by imposing one or more conditions that must be met before the authority can be exercised. The court said that administrative decision makers who treat policies as if they were law and consider themselves bound by them are fettering their discretion and making an unreasonable decision.[8]

Adverse possession is not identified within the *Land Titles Clarification Act* as a requirement for a claim to title, but it has been used ***as a matter of policy*** by the department reviewing claims. However, doing so goes against the purpose of the legislation under which the claim is being made. The court explained further:

> Adverse possession is a concept that acts to prevent a person from being displaced by the legal title owner of the land. The person in possession is necessarily not the holder of that legal title, otherwise the possession would not be adverse. The *Land Titles Clarification Act* is intended to clarify title to land of which the applicant claims to be the real owner.
>
> Adverse possession is an impractical test in the context of the remedial nature of the legislation. A person like Mr. Downey who was permitted by a relative to build a house on a piece of land could not claim that he occupied the land in a way that would be adverse to the interests of his relative or to those of some unknown holder of the legal title. In Mr. Downey's case, no one has ever disputed his, or his family's ownership, or occupation of the land.
>
> Adverse possession deals with a situation in which the legal title is clear but is inconsistent with the facts of long-term occupation on the ground. The *Land Titles Clarification Act* is

[8] *Downey* at paras 26-29

> intended to deal with the situation in communities in which the legal title is for various historical reasons, unclear.[9]

The decision not to grant the certificate of claim was set aside and the court remitted the application to the Minister for reconsideration noting that "[t]he length of time during which he has openly occupied the land may be a factor for consideration but adverse possession for 20 years is not a condition precedent to assessment of his claim."[10]

Mechanisms like the *Land Titles Clarification Act* which are put in place to right historic wrongs are only effective where they are implemented in a way that is fair and accessible. Lack of effective implementation, or implementation within a system still plagued with systemic racism will do little for advancement and the correction of past wrongs. This is an issue that had caught the attention of the United Nations, and was noted in the *Report of the Working Group on People of African Descent* in its mission to Canada in 2016. The report contained the following specific reference to land title issues in Nova Scotia and serves as a reminder that this is not only a land title issue, but a human rights issue as well.

> 60. The Working Group is concerned about the lack of implementation of the *Land Titles Clarification Act* in Nova Scotia, which should assist people of African descent in obtaining titles to the lands on which they live. The Act was passed in Nova Scotia in 1963 to create a process to assist with the clarification of land title and land ownership issues for residents living in 13 specific communities in Nova Scotia. For historic and systemic reasons, there was a lack of land ownership documentation for the residents of those areas and communities, many of whom are African Nova Scotian. The Act was intended to provide a simpler and inexpensive mechanism to obtain clarification of land titles. Under the Act, a certificate of title is issued to applicants who can show that they used and occupied the land claimed for at least 20 years. The process provides for notice to be given to the community and issues such as competing ownership claims and unsettled boundaries to be resolved before a certificate can be issued.
>
> 61. Civil society informed the Working Group that the system in place under the Act was not working as hoped. The process is reportedly unjust and discriminatory, and many have had their claims rejected. Residents must bear the burden for submitting all the documentation, as well as the application, lawyer and surveyor fees necessary to have the land title clarified. In May 2015, the Department of Natural Resources, which is responsible for processing the applications, acknowledged that the process was unclear and stated they were attempting to pilot a project to assist residents in the community to obtain the title to their property. It was recognized that there were financial and logistical hurdles for some residents wishing to obtain a certificate of title, as residents were responsible for all the costs of the process, include [*sic*] surveying and legal fees. However, an interdepartmental

[9] *Downey* at paras. 33-35

[10] *Downey* at para 41

> committee was currently considering various options for removing or reducing those barriers and providing support to African Nova Scotians to help them clarify titles to their properties. The Working Group emphasized that the Act must be implemented in collaboration with, and for the benefit of, the affected population group. All resources should be made available, fees should be waived and remedies should be provided for any discriminatory policies relating to the process of granting a certificate of title.[11]

Since the report was issued, funding and support have gone into the system to bring implementation closer to reaching the intended goals of a simpler, more accessible mechanism to confirm title to properties in the identified communities. Access is one part of the equation, but, as noted above, where policy hurdles of relatively onerous requirements that are not stated in the legislation itself are imposed, there is unlikely to be much forward movement towards equality.

Editors: Izaak de Rijcke and Megan Mills

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

For a discussion of land title registration and certainty, please see *Chapter 7: Boundaries and Land Registration Systems*, at p. 265: *Nova Scotia*

FYI

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[11] *Report of the Working Group of Experts on People of African Descent on its Mission to Canada* A/HRC/36/60/Add.1 United Nations Human Rights Council, August 2017 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/239/60/PDF/G1723960.pdf?OpenElement

[12] 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.

Course: Survey Law 1

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Risk Management in Searching for Boundary Evidence

This CPD product is an outgrowth from the presentation "*Risk Management in Searching for Boundary Evidence in the Electronic Land Registration*" delivered by Anne Cole and Izaak de Rijcke at the AOLS AGM in February, 2020. The original presentation has been reconfigured as 3 webinars with accompanying resources. Please contact the AOLS for the access code.[13]

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[13] This CPD product qualifies for 3 *Formal Activity* AOLS CPD hours.