



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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Torrens type systems of land title registration can be found in a number of Canadian jurisdictions.¹ These systems create certainty for transactions involving land, based on three pillars – the mirror principle, the curtain principle, and the assurance or indemnity principle. These principles imply, respectively that the parcel register reflects all of the interests affecting the parcel, that any need to look behind the title register for affirmation of the marketability of title is eliminated and there is some guarantee or indemnity provided by the state operating the system. The extent to which these principles are adopted in different jurisdictions varies and is defined within the relevant legislative framework. While these systems “guarantee” title, one must be cognizant of the fact that there is no similar guarantee of boundaries. It is a subtle but critical distinction. In a recent decision of the Court of Queen’s Bench of Alberta there was a close and careful reading of a number of sections of the *Land Titles Act*,² as the court assessed the impact of a “Road Plan” that never appeared as an exception on the certificate of title. At the heart of the dispute in *Calgary (City) v. Teulon*³ was the question of the extent of the reliance that a purchaser could make on a certificate of title – what was that certainty and what were the limits and formal framework to title qualifications. In this decision, the court held that the municipality had not met any of the exceptions set out in the legislative framework and that the purchaser had appropriately relied upon the certificate of title.

Reliance on a Certificate of Title: Is Misdescription a Defect in Title?

Key Words: *land titles, mirror principle, curtain principle, notice, expropriation, misdescription, bona fide purchaser*

¹ Western provinces rely on *Torrens*-type systems of title registration while Ontario and Nova Scotia have adopted title registration as their primary approach through reform.

² *Land Titles Act*, RSA 2000, c L-4

³ *Calgary (City) v. Teulon*, 2021 ABQB 388 (CanLII), <https://canlii.ca/t/jg56w>

Land titles registration systems offer a level of certainty in land transactions through a simplified mechanism that facilitates an efficient search of the interests in a particular parcel. Prospective purchasers, through this simplified search, receive notice of interests in and encumbrances on title and from there can make an informed decision on whether or not to proceed with a purchase transaction. In order for an instrument to have an effect on title, it must be registered following the processes defined within the relevant statutory framework for a particular jurisdiction. Notably, the mere creation of a survey or other plan does not readjust the spatial extent of title or offer a boundary guarantee.⁴ In *Calgary (City) v. Teulon*,⁵ the applicant, the City of Calgary claimed ownership of a portion of a residential parcel based on its registration of a plan of survey relating to the disputed portion. However, the respondent landowner's certificate of title for the parcel made no reference to the plan. The respondent claimed that, had she known of the impact the plan would have in depriving her of almost all of her front yard, she would not have purchased the property in the first place. Does the plan, referred to as the "Road Plan" in the decision, transfer title to the municipality? To do so it would need to be properly registered under the *Land Titles Act*.⁶ The background to the dispute was set out by the court as follows:

In April 1988, the City granted permission to the then current owners of a residential parcel of land (the "Predecessor Owners") to subdivide their parcel ("Predecessor Parcel") into two new parcels of land: the Parcel and the parcel adjacent to the Parcel (the "Adjacent Parcel").

On September 19, 1988, the City entered into an agreement (the "Agreement") with the Predecessor Owners whereby they agreed to dedicate to the City the Disputed Portion and the north 5.182 m portion of the Adjacent Parcel, once the Parcel and Adjacent Parcel were created. The Agreement is clear that this dedication was a condition of the City's grant of subdivision. By paragraph 2 of the Agreement, the City was entitled to register a caveat against the Parcel and the Adjacent Parcel, once created, which caveat was to be withdrawn upon the registration of a road plan.

The City filed the affidavit of Ms. D, a Project Manager with the City's Urban Initiative business unit, sworn August 13, 2020. Attached is a caveat (the "Caveat"), which includes a copy of the Agreement, and which references the legal description of the Parcel. The City points to the number stamped on the Caveat by the Registrar of Land Titles in the Land Titles Office (collectively referred to as the "LTO"), and the LTO instrument number shown on the first page of the document produced by the LTO, to assert that the Caveat was registered against the certificate of title to the Parcel. Similarly, the City takes the position that the Caveat was registered on October 4, 1988, as that date is stamped on the Caveat.

⁴ For one thing, there is no guarantee of boundaries in land title registration systems.

⁵ *Calgary (City) v. Teulon*, 2021 ABQB 388 (CanLII), <https://canlii.ca/t/jg56w>

⁶ *Land Titles Act*, RSA 2000, c L-4

There is no evidence showing that the Caveat was registered against the certificate of title for the Parcel or the date on which it was registered. Just because the Caveat has the legal description of the Parcel on its face, this does not prove that it was actually registered on the certificate of title for the Parcel, and does not prove date of registration. This case arises from a registration omission and, to prove registration of the Caveat, the historical title showing registration of the Caveat should have been produced.

The City produced an historical title, but it was for the Parcel after the subdivision and not for the Predecessor Parcel. Further, the City provided no evidence regarding any discharge of the Caveat.

After the 1988 subdivision and the execution of the Agreement, the first certificate of title for the Parcel ("1988 Parcel Title") was issued by the LTO on November 16, 1988.

The Disputed Portion and the northern 5.182 m portion of the Adjacent Parcel are shown on the Road Plan, which includes a surveyor affidavit from November, 1988, and which Ms. D says was registered with the LTO on January 10, 1989 and given an instrument number by the LTO.

In accordance with Agreement, the Road Plan was made an exception to the Adjacent Parcel certificate of title, which includes, after reference to the plan, block and width of lot, the following exception:

EXCEPTING THEREOUT

PLAN	NUMBER	AREA
ROAD	8910003	PTN

However, due to an "oversight" by the LTO, the Road Plan was not noted as an exception to the 1988 Parcel Title, or any future certificate of title for the Parcel, including the Current Parcel Title.

The affidavit of Ms. D exhibited a historical certificate of title for the Parcel showing an initial registration date of November 16, 1988, with the last encumbrance registered on July 12, 1994. There is no reference to the Road Plan in the legal description, or any caveat registered by the City, on that historical certificate of title.⁷

The dispute emerged when the City commenced its "Streetscape Master Plan." The respondent contacted the city to find out how the project would impact her parcel. It was at that point that the City reviewed the current parcel title and realised that the Road Plan was not noted as an exception thereon. The proposed "Streetscape Master Plan" would involve widening the sidewalk in front of the respondent's parcel, a replacement of her fence and the construction of a step to accommodate grade changes. However, public infrastructure would not encroach onto her parcel. To complete the work, access to the respondent's property would be needed.

⁷ *Supra.*, footnote 5, at paras 5-14

It was the respondent's evidence that she did not take issue with accommodating temporary access to her parcel while the work was being completed. However, the project was put on hold until the issue regarding the status of the Road Plan was resolved and the City took the position that it had an interest in the disputed portion because it registered the Road Plan – in spite of the fact that the current parcel title did not except out the Road Plan from the description.

The court succinctly summarized the issues in the dispute as follows:

The overarching issue in this litigation is the applicability of the principle of infeasibility of title in the Torrens land titles registration system in Alberta under the *LTA*. The Torrens system is intended to save persons from having to go behind the registered title to investigate the predecessor's title and satisfy themselves of its validity: *Bank of Montreal v. 1323606 Alberta Ltd*, 2013 ABQB 596, at para 23, referring to *Gibbs v. Messer*, [1891] AC 248.

This case raises the following issues:

- a) Is the Current Parcel Title subject to the Road Plan because:
 - (i) the Current Parcel Title is subject to the estate or interest of the City claiming the same land under a prior certificate of title pursuant to s. 60 of the *LTA*?
 - (ii) the Road Plan is a "public highway" for the purposes of s. 61(1)(c) of the *LTA* and the Current Parcel is subject to the Road Plan?
 - (iii) the failure to register the Road Plan against the 1988 Parcel Title or the Current Parcel Title amounted to a "wrong description of boundaries or parcels included in the certificate of title" which is an exception to indefeasibility in s. 62 of the *LTA*?
- b) If the Current Certificate of Title is subject to the Road Plan, is it appropriate for this Court to exercise its discretion and direct the LTO to cancel, correct and re-issue the Current Parcel Title under s. 190 of the *LTA*?⁸

The issues, as described by the court, require a careful reading of certain relevant provisions of the Alberta *Land Titles Act*, so at first blush it would seem that such a decision has little relevance outside of that jurisdiction. The overarching theme though is the importance of the basic mirror and curtain principles of Torrens type systems and the certainty that they aim to provide for property transactions. There is a recognition within land title systems of the difference between public and private interests – for example, roads and other public works enjoy a different status in the form of exceptions than private building projects. That said, the framework must still be followed in a manner that creates certainty for all those landowners who rely upon the system for guarantees of title.

The court, in addressing the issues noted above, began with a careful reading of the *Act*:

⁸ *Ibid.*, at paras 36 and 37

Section 60 of the *LTA* states:

60(1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud in which the owner has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which the person claiming priority or any person through whom that person derives title has held possession.
[emphasis added]

The exception to indefeasibility in s. 60(1) relates to “an owner claiming the same land under a prior certificate of title”. The City’s evidence is that the Road Plan was registered in the LTO, but no certificate of title was ever granted to the City for the Disputed Portion. Without a certificate of title, the City cannot be an owner claiming the same land “under a prior certificate of title” and therefore the Road Plan is not an exception to the indefeasibility of the Current Parcel Title under s. 60(1).⁹

On the question of the exemption for public highways, the court held that historical definitions did not apply, but rather followed *Nelson v. 1153696 Alberta Ltd*, 2009 ABQB and found that there was a requirement for a physical highway, not merely what was contemplated in the Road Plan.

The implied exception set out in s. 61 of the *LTA* refers to a public highway “on, over or in respect of the land”. In *Nelson v. 1153696 Alberta Ltd*, 2009 ABQB 732, reversed on other grounds, 2011 ABCA 203, leave to the SCC denied [2011] SCCA No 423, Moen J, at para 30, described when a purchaser should be alert to a s. 61(1)(c) exception to indefeasibility:

Therefore, a person purchasing land with an obvious roadway across the land, could, according to the law, anticipate that [such] publicly travelled road is a public highway which, though not shown on the certificate of title, would nevertheless be public land.

In *Twogee Developments Ltd v. Felger Farming Co Ltd*, 2017 ABCA 138, the majority said, at para 19, that to “establish a public highway by dedication the owner must have the actual intention to dedicate, and it must appear that the intention was carried out by the road being thrown open to the public and accepted by the public.” Here, there is no current or future intention to use the Disputed Portion for any type of public highway, road, street or lane.

⁹ *Ibid.*, at paras 38-39

I agree with Moen J in *Nelson* that the reference to “public highway” in s. 61(1)(c) is a reference to something physical because it must be “created, on, over or in respect of the land”. Regardless of whether the interest referred to in the Road Plan could be used a public highway, road, street or lane, there is no physical public highway, road, street or lane of any kind on the Disputed Portion and I find that the Road Plan is not an implied exception to indefeasibility of the Current Parcel Title pursuant to s. 61(1)(c).¹⁰

In addressing the issue of whether the failure to properly register the Road Plan amounted to an incorrect description of boundaries for the purposes of the *LTA*, the respondent relied on the 1954 Supreme Court of Canada decision in *Turta v. Canadian Pacific Railway*, 1954 CanLII 58 (SCC), and its discussion of boundary misdescription which the Alberta Court of Queen’s Bench referred to as follows:

The facts in *Turta*, and in this case, arose from a clerical error made by the LTO whereby a reservation, or exception, was omitted from a certificate of title which was later transferred to a *bona fide* purchase for value. In *Turta*, the majority found in favour of the *bona fide* purchaser for value, Mr. Turta. In arriving at this conclusion, Estey J said, at pages 443 and 444:

... the Torrens system is intended “to give certainty to the title” as it appears in the land titles office. That one who is named as owner in an uncanceled certificate of title possesses an “indefeasible title against all the world”, subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office and deal with confidence, relying upon the information there disclosed. ...

Estey J also explored the use of the term “misdescription” in s. 104(e) of the *Land Titles Act*, 1906 ch 24, and other sections in that legislation. The same subsection still exists in the *LTA*, in a near identical form. Section 183(1)(e) of the *LTA* states as follows:

No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted lies or shall be sustained against the owner under this Act in respect of it, except in any of the following cases:

...

(e) the case of a person deprived of or claiming any land included in a grant or certificate of title to other land by misdescription of the other land or of its boundaries, as against the owner of the other land; ...

In *Turta*, the fact that the interest being asserted related to petroleum and not land was integral to the analysis of the majority: see page 447. After making the point that the omission of a reservation of petroleum could not be considered a “misdescription of such other land or its boundaries”, Estey J said, also at page 447:

¹⁰ Ibid at paras 44-46

... That this phrase should receive a limited or restricted construction finds support, not only in the fact that it appears as an exception in s. 104(e) [now s. 183(1)(e)] and as it is imported into s. 106 [now s. 170], but also in the provisions of s. 108 [now s. 168(1)(b)]. In the latter it is contemplated that a “person deprived of any land ... by any error, omission or misdescription in any certificate of title ...” may be barred from recovery of either the land or damages from parties involved and thereafter, and in that event only, may he “bring an action against the registrar as nominal defendant” for damages.

Estey J considered all of these sections in conjunction with s. 44 of the *Land Titles Act*, 1906 ch 24, which also contained the same exception as now found in s. 62 of the *LTA*: “except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title”. Estey J also linked this exception in s. 44 directedly to the exception set out in s. 104(e) of the *Land Titles Act*, 1906 ch 24: see page 445. Using the current sections of the *LTA*, the link was made directly between the exceptions in s. 62(1) and s. 183(1)(e).

At pages 447 and 448, Estey J explained that it was not the intention of the legislature that an error on the part of the LTO would render a certificate of title a nullity and, further, that the validity of the *bona fide* purchaser for value’s certificate of title derived from the statute and not the erroneous transfer:

Nowhere throughout the statute is it provided that failure upon the part of the registrar to comply with these provisions, or that any omission, mistake or misfeasance on his part, in the preparation of a certificate of title, shall render that certificate a nullity. That such was not the intention of the legislature is evidenced by the provisions under which a certificate of title may be corrected and damages claimed in the event of omission, mistake or misfeasance on the part of the registrar, his officers or clerks. There are also those provisions which contemplate the correction of the registrar’s omissions in a certificate such as that issued to Podgorny while it remained outstanding and those other provisions under which the position is entirely changed when Podgorny’s certificate is cancelled and a new certificate of title issued to one in the position of Anton Turta. Once the certificate is issued to Turta it derives its force and validity, not from the transfer of the C.P.R. to Podgorny, but by virtue of the provisions of the statute.

Notwithstanding that the majority of the Supreme Court of Canada found in favour of the *bona fide* purchaser for value in *Turta*, Ms. Teulon places reliance on the dissenting opinion of Cartwright J in *Turta* for his reliance on *Hamilton v. Iredale* (1903), 3 S.R. (N.S.W.) 535 (SCNSW), and that court’s explanation of misdescription. The same quotation was referred in the concurring reasons of Locke JA in *Hawkes Estate v. Silver Campsites Ltd* (1991), 1991 CanLII 5718 (BC CA), 79 DLR (4th) 677 (BCCA), at para 72:

There are a number of examples of misdescription given in the cases: they have been recited by Gibbs J.A. In my opinion what we have here is not a misdescription. In *Turta*

Cartwright J., in dissent, referred to the case of *Hamilton v. Iredale* ... Walker J. in the Court of Appeal gave, I think, the classic discussion of “misdescription”:

As I understand it the law is to this effect. If I apply to bring Blackacre (to which I am entitled) under the Act, and in my application, or in the certificate, Blackacre is misdescribed so that a certificate is issued to me of the adjoining Whiteacre, or of Blackacre plus a strip of Whiteacre, there is plainly a misdescription of parcels or boundaries, which can be rectified as against me or any volunteer claiming under me. If, however, I apply to have land to which, in fact, I have no title, brought under the Act, and a certificate is issued to me of that land, it is not a case of misdescription of parcels or boundaries. Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine. It is then a case, not of misdescription, but of no title, and the position depends on my conduct in the matter. If I tried to get a certificate of land to which I knew I had no title, that would be fraud on my part, and in such case, under the express terms of the Act, neither myself, nor volunteers claiming under me, can claim to be protected by the certificate. If, however, I acted *bona fide*, believing, however mistakenly, that I had a title to the land applied for, then the case does not fall within any of the exceptions to the efficacy of the certificate, and ss. 40 and 42 give me an absolute title, which no Court can take away or review. I see nothing in the cases which is opposed to this view of the law.

In *Turta* Cartwright J., in dissent, commented on Walker J.’s view with apparent approval, but distinguished the case on the facts. As always, these principles must be applied to what is in front of the court.

This case does not arise from a mistake made by a person seeking a certificate of title and misdescribing the lands. It arises from the LTO making a clerical error and failing to include an exception from the legal description of the Parcel. The facts of this case do not align with the characterisation in *Hamilton v. Iredale* of a misdescription occurring when a land owner, intending to describe A, instead describes B, or a land owner describes A, and inadvertently includes B. Here, it was not the land owner who misdescribed anything and, furthermore, the error did not describe some other parcel or include another parcel, the error was an omission of an exception to the legal description.¹¹

In finding for the respondent, the court summarized its conclusions as follows:

In summary, I find that the exception in s. 62(1) for “any portion of land by wrong description of boundaries or parcels included in the certificate of title” does not apply in this case for the following reasons:

¹¹ *Ibid.*, at paras 54-63.

- a) Although I find no substantive difference between the terms “misdescription” and “wrong description” as used in the *LTA*, as noted by Estey J in *Turta*, such a phrase should receive a limited or restricted construction.
- b) This case is not similar to the other cases of misdescription which are described in the caselaw. In *Turta*, both Kellock J and Cartwright J, who referred to the *Hamilton v. Iredale* characterization of misdescription, distinguished it from the clerical error that occurred in the *Turta* case. In his reasons, concurring with the majority, Kellock J, at page 460, said:

In my view, the “misdescription” (if that be the correct term) of which the appellants complain, arising as it did from an error on the part of the registrar, is not of the character dealt with by s. 104(1)(e) [now s. 183(1)(e)]. Accordingly, in the language of s-s (2) of that section, the certificate of title held by *Turta* is “an absolute bar and estoppel” to any such action as is here in question.

- c) In this case, I find that there is no wrong description of “boundaries”. I also find that the use of the term “boundaries” in s. 62(1) of the *LTA* is used in the context of perimeter, border or the limit of a parcel and that it not the issue in this case.
- d) In this case, I find that there is no wrong description of the “parcels included in the certificate of title”. I find that this phrase in s. 62(1) of the *LTA* is used in the context of a whole unit of land, such as a lot, and not a road plan. Here, the clerical error arose from the omission of the road plan exception, not a parcel exception.
- e) There is a remedy in the *LTA* for LTO clerical errors as against the LTO, which failed to note the exception on the 1988 Parcel Title due to an “oversight”. I make no comment, however, on whether the City is able to make a claim against the LTO as that question is not before me.
- f) The City may have had the opportunity to have protected itself from the omission that it now seeks to correct by not discharging the Caveat without first ensuring that the Road Plan was excepted-out in the legal description of the Parcel. As I have noted, there is no evidence regarding the discharge of the Caveat before me.

I conclude that none of the exceptions relied on by the City apply. As a result, the Current Parcel Title is indefeasible under the *LTA* and is not subject to the Road Plan.¹²

Having found that none of the exceptions applied, the court further held that it was not appropriate for it to exercise its discretion and direct the Land Titles Office to correct the parcel title by adding the road plan. In doing so, the court noted that the impact of such an order would be to deprive the owner of nearly all of her front yard when she had relied, appropriately, on the certificate of title before it was transferred to her. Further, the respondent land owner had already agreed to permit the City to undertake its sidewalk

¹² Ibid at paras 72-73

widening project and there was no evidence that the disputed portion was needed for the public highway or road.

The decision is an affirmation of the certainty that land titles registration systems are intended to provide to purchasers. The parcel register should represent accurately the interests and encumbrances on title and a prospective purchaser should not need to look behind the curtain. Further we see the distinction between boundary certainty and title certainty playing out with the court's discussion of misdescription. Yes, misdescription does occur and guarantees of title do not provide guarantees of boundary, but that was not the case in this particular scenario.

Editors: Izaak de Rijcke and Megan Mills

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

A discussion of the interplay between land registration systems and boundaries including a discussion of the nature of guarantees that Torrens type land titles systems do (and do not) provide can be found at *Chapter 7: Boundaries and Land Registration Systems*.

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Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 8th. For more information, consult the [syllabus](#). Please note that registration is via [CBEPS](#).

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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We thank all who attended this year's conference: *Complex Cadastral Problems: Searching for Solutions*.¹⁴ Using the perspective of "surveyor as expert witness" as the overall connector, this series of eight weekly lunch and learn sessions delved into "processes" guided by principles established through legislation, the courts, and standards of practice to address complex cadastral surveying scenarios in a changing environment. The webinar [version](#) of the conference includes the annotated readings, slide decks, and recorded presentations.

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¹⁴ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.