

CANADA / JUDGMENT

Allen v. British Columbia (Attorney General)

2019 BCSC 292

COURT

Supreme Court of British Columbia

DECIDED

6 March 2019

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2019 BCSC 292 Allen v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Allen v. British Columbia (Attorney General),

2019 BCSC 292

Date: 20190306

Docket: 55469

Registry: Kamloops

Between:

Elizabeth Allen

Petitioner

And

The Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Marchand

Reasons for Judgment

Counsel for the Petitioner:

K.M. Walker

Counsel for the Respondent:

S.A. Bevan

Place and Date of Hearing:

Kamloops, B.C.

May 18, 2018 and

February 15, 2019

Place and Date of Judgment:

Kamloops, B.C.

March 6, 2019

Introduction

- [1] In 1988, Elizabeth Allen and her late husband, Ken, purchased the historic Rosebank Ranch (the "ranch") between Lytton and Lillooet. The ranch had been owned and operated by William Arthur Smith and three generations of his descendants for the previous 73 years.
- [2] Since 1921, the ranch has been operated on two parcels of land that are registered in the Land Title Office and three adjoining fractions that are not. Ms. Allen has applied under the Land Title Inquiry Act, R.S.B.C. 1996, c. 251 [LTIA] for a declaration that she is the legal and beneficial owner of the three unregistered fractions.
- [3] The ranch lies within what is known as the "Railway Belt". The Railway Belt is the strip of land approximately 20 miles wide along either side of the Canadian Pacific Railway that the Colony of British Columbia agreed to convey to the Dominion of Canada (the "Dominion") as part of the exchange that brought British Columbia into Confederation in 1871. Going the other way was the Dominion's promise to build a railway to connect British Columbia to the rest of the Dominion.[1]
- [4] A subsequent provincial Order in Council specified December 19, 1883 as the effective date of the Railway Belt transfer and reserved from the transfer all lands within the Railway Belt already provincially granted or under pre-emption on or before December 19, 1883.[2]
- [5] The Railway Belt was re-conveyed to the Province of British Columbia (the "Province") in 1930. Any land that had not been alienated by the Dominion prior to that time reverted to being provincial Crown land.[3]
- [6] Ms. Allen asserts that the Dominion issued a Crown grant of the three unregistered fractions to W.A. Smith in 1921 but for unknown reasons he did not register the grant. Ms. Allen also asserts there is a chain of title from the original grant to her such that I should make the declaration she seeks.

- [7] The Attorney General of British Columbia ("AGBC") is a respondent because, if I determine that no grant of the unregistered fractions was issued by the Dominion, the unregistered fractions are provincial Crown land. The AGBC has, however, participated primarily to ensure that the Court has a more complete history regarding the unregistered fractions and that the appropriate legal principles are applied.
- [8] Pursuant to an order made on January 8, 2018, Ms. Allen published notice of her petition in the BC Gazette and the Bridge River Lillooet News. Pursuant to an order made on May 18, 2018, Ms. Allen served her petition on a named descendant of W.A. Smith. Ms. Allen has also chosen to give notice of her petition to virtually every living adult descendant of W.A. Smith.
- [9] The vendors and other members of W.A. Smith's family either do not oppose or expressly support Ms. Allen's petition.

The Land Title Inquiry Act

- [10] Ms. Allen brings her petition under the LTIA. This legislation provides for a "specialized judicial inquiry into title": *Mowatt v. British Columbia (Attorney General)*, 2016 BCCA 113 at para. 74, reversed but not on this point, 2017 SCC 8. It is designed to enable the court to investigate and confirm a title to land that is "unquiet": *Thomson v. Eadie*, 2006 BCSC 868 at para. 72 [*Thomson (BCSC)*], aff'd 2007 BCCA 524.
- [11] Under s. 1, a person with an interest in land may apply to a court "to have the title judicially investigated and its validity declared by the court."
- [12] The application must be made by petition and supported by the documents and particulars identified in ss. 4 to 6. The court may dispense with some of these materials. In this case, Ms. Allen seeks an order dispensing with the usual requirement under ss. 4(f) and 6 that the petition be supported by a certificate of counsel.
- [13] In keeping with the historical nature of many inquiries under the LTIA, ss. 8 and 9 provide for relaxed evidentiary standards.
- [14] In addition to requiring proof that a copy of the petition and supporting materials seeking a declaration of title under the LTIA have been served on the AGBC, s. 10 requires evidence establishing that "all taxes, rates and assessments for which the land is liable have been paid". The AGBC acknowledges that these requirements have been met by Ms. Allen.
- [15] If the court is not satisfied with the evidence of title produced in the first instance, s. 11 requires the court to give the applicant "a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced."

- [16] Before a court gives a declaration of title under the LTIA, s. 12 requires that it direct a notice of the application and of the decision or order of the court be published in the Gazette. Further, the declaration of title must not be signed or executed until after at least four weeks has expired from the first publication of the notice or such other period as the court appoints.
- [17] Section 16 permits a person with an adverse claim to file a statement of claim at any time prior to the granting of a declaration of title. In the case of a contested title, s. 17 gives the court broad discretion as to how it will determine title.
- [18] Section 22 provides that every claim of title under the LTIA is presumed to be subject to the conditions, exceptions and reservations under ss. 23(2)(a)-(j) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].
- [19] Sections 23-24 set out the required form of declaration of title and empower the court to make an order of possession.
- [20] Section 26 provides that proceedings under the LTIA are not invalid because of any informality, technical irregularity or mistake "not affecting the substantial justice of the proceeding."
- [21] Once a declaration of title has been made and a certified copy of the declaration is filed together with an application for registration in the appropriate Land Title Office, s. 27 requires the registrar of titles to register the indefeasible title in the name of the declared owner.
- [22] Finally, s. 30 sets out a statement of the LTIA's purpose:

Construction of Act

30 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.

- [23] I agree with Ms. Allen that the LTIA is remedial in nature. It is designed to resolve and remediate questions of title prudently, practically, efficiently and fairly.
- [24] In *Hamilton v. Attorney General (British Columbia)*, 2017 BCSC 1334 at para. 36, after citing passages from the Court of Appeal and Supreme Court of Canada decisions in *Mowatt*, Myers J. neatly summarized the standard of proof under the LTIA and how historic evidence is to be considered, as follows:
- [36] In short, then, the petitioners must therefore prove their claim on a balance of probabilities. The historic nature of the claim must be considered in determining the evidence that can reasonably be expected to be brought to bear by them.

[25] I turn now to the facts.

Background

[26] The parties went to extraordinary lengths to document the history of the operation of the ranch, the genealogy of the W.A. Smith family, the origins of the properties at issue and all transactions involving those properties.

[27] Given the passage of time, there are understandable gaps in the evidence. That said, based on the evidence the parties have been able to gather, the relevant background is not in serious dispute. As a result, it is not necessary for me to delve into its minutiae. Instead, I will summarize as much of the background as is necessary to resolve the issues raised by Ms. Allen's petition. In a few instances, I have largely reproduced passages from the very helpful written submissions of the AGBC.

The Ranch Lands Operated by Ms. Allen

[28] Ms. Allen currently operates the ranch on the following lands:

- District Lot 287 Kamloops Division Yale (formerly Lillooet) District ("DL 287");
- That part of the North West $\frac{1}{4}$ of Section 12, Township 18, Range 28, West of the 6th Meridian, Kamloops Division Yale (formerly Lillooet) District, which is not included within DL 287 as shown on a plan of survey of the south east $\frac{1}{4}$ of said township, dated at Ottawa the 6th day of February, 1911 ("NW $\frac{1}{4}$ ");
- All that portion of legal subdivision four of section thirteen of the said township, which lies to the east of the eastern limit of lot numbered 287, group one, as shown upon a map or plan of survey of the south-east quarter of the said township, approved and confirmed at Ottawa, on the 12th day of November, A.D. 1915, by Edouard Deville, Surveyor General of Dominion Lands, and of record in the Department of the Interior, containing by admeasurement five and thirty hundredths acres more or less ("Fraction 4");
- All that portion of the north-west quarter of legal subdivision five of said section thirteen, which lies to the north of the northern limit of said lot numbered 287, Group One, as shown upon said map or plan of survey of the south-east quarter of the said township, containing by admeasurement four and twenty five hundredths acres more or less ("Fraction 5"); and
- All that portion of the north-east quarter of legal subdivision eight of section fourteen of the said township, which lies to the north of the said northern limit of the said lot, as shown upon said map or plan of survey of the south-east quarter of the said township, containing by admeasurement four and fifteen hundredths acres more or less ("Fraction 8").

- [29] DL 287 and NW ¼ are the registered parcels. Fractions 4, 5 and 8 are the unregistered fractions. DL 287 is approximately 160 acres. NW ¼ is approximately 152.8 acres. Fractions 4, 5 and 8 total approximately 13.7 acres. Fraction 4 is on the eastern boundary of DL 287. Fractions 5 and 8 are on the northern boundary of DL 287. The total area of DL 287, NW ¼ and Fractions 4, 5 and 8 is approximately 326.5 acres.
- [30] DL 287, NW ¼ and Fractions 4, 5 and 8 are contiguous. They have been surrounded by a single fence since well before the Allens purchased the ranch. Fractions 4, 5 and 8 are only accessible through DL 287. They have been fully integrated into the operations of the ranch, including irrigation, haying and grazing, dating back to the time of W.A. Smith.
- [31] The Allens purchased the ranch on March 25, 1988 from Dorothy Glasgow ("Dorothy") and Heather Clyde ("Heather"), great-granddaughters of W.A. Smith. Ms. Allen was not able to locate the contract of purchase and sale but produced correspondence from her conveyancing solicitor that described the lands included in the sale as encompassing DL 287 and NW ¼ as well as "three fractional portions which are located outside the boundaries of D.L. 287." The correspondence indicates that the titles to DL 287 and NW ¼ "are not in question." The correspondence also indicates that a copy of the "Fiat for Patent originally granted to William Arthur Smith" in relation to the three fractional portions was attached as a schedule to the contract of purchase and sale.

History of the Registered Parcels

- [32] Title to DL 287 originated from a provincial Crown grant issued on May 23, 1894. The Province, rather than the Dominion, issued the grant for DL 287 because the grant was issued pursuant to a pre-emption process that commenced prior to 1883.
- [33] Title to NW ¼ originated from a Dominion grant issued on December 1, 1914. On that date, the Land Patents Branch of the Dominion Department of the Interior issued Fiat for Patent No. 312832, which led to the issuance of the actual grant. The AGBC has produced copies of both the Fiat for Patent and the grant. The grant bears signatures above the words "Deputy Governor", "Assistant Under-Secretary of State" and "for Deputy of the Minister of the Interior". The grant is affixed with a seal.
- [34] Pursuant to s. 7 of the Land Act, R.S.B.C. 1996, c. 245, the Province maintains a Crown land registry "to record all lands administered by the government, and to record the acquisition and disposition of those lands, for the purpose of maintaining an inventory of Crown land." The AGBC has produced copies of pages taken from original hardcopy land register books, including a page which records the original grant of NW ¼ on December 1, 1914 and the associated Fiat No. 312832.

- [35] The signed and sealed Dominion grant of NW ¼ was registered under the provincial land title system and remains on file at the Kamloops Land Title Office. The AGBC highlights the original grant of NW ¼ as an illustration of a properly signed, sealed and, therefore, registrable Dominion grant.
- [36] W.A. Smith acquired a one-half interest in DL 287 in 1914. He then acquired NW ¼ and the other one-half interest in DL 287 in 1915.
- [37] A foreclosure action was commenced in relation to DL 287 and NW ¼ in 1916. The foreclosure action was assigned to James William Jameson on August 21, 1921. Mr. Jameson was W.A. Smith's brother-in-law. Family legend has it that Mr. Jameson was a wealthy businessman in California who intervened in the foreclosure to ensure the ranch remained with the Smith family. Apparently, the Jamesons were confident W.A. Smith would be a good farmer but recognized that he was not a good businessman. Essentially, they financed the operation of the ranch until it could be passed to the next generation. Though W.A. Smith lost title to the registered parcels, he appears to have remained in occupation and to have operated the ranch until 1935.
- [38] On March 23, 1923, Mr. Jameson became the owner of the registered parcels through the foreclosure action.
- [39] On February 25, 1927, Mr. Jameson conveyed the registered parcels to the children of W.A. Smith, Harry Adams Smith ("Harry") and Adelaide Eliza Porter ("Adelaide"). For unknown reasons, this conveyance was not registered until 1949, by which time Harry had died intestate (on March 19, 1939). The initial registration of the conveyance was, therefore, to Adelaide and the executors of Harry Smith's estate, his daughters Ruth Zoella Smith Bird ("Ruth") and Olive Fern Adelaide Smith Swann ("Olive") as tenants in common. In 1950, Ruth and Olive sold their half interest in the registered parcels to Adelaide, making Adelaide the sole owner of those parcels.
- [40] Following Adelaide's death in 1965, her daughter and son-in-law, Mary and John Glasgow ("Mary" and "John"), acquired the registered parcels from Adelaide's estate, under a right of purchase in Adelaide's will. Following Mary's death in 1968, the registered parcels were transferred to John as the surviving joint tenant. Then, pursuant to John's will, the registered parcels passed to his daughters, Dorothy and Heather, as tenants in common in 1975. As noted above, in 1988, Dorothy and Heather sold their respective interests in the registered parcels to the Allens, as joint tenants. Finally, on her husband's death in 2014, Ms. Allen became the sole owner of DL 287 and NW ¼.

History of the Unregistered Fractions

- [41] On November 4, 1921, the Land Patents Branch of the Dominion Department of the Interior issued Fiat for Patent No. 442235 to grant Fractions 4, 5 and 8 to W.A. Smith. The AGBC produced the Fiat for Patent from the Surveyor General's vault at the offices of the Land Title and Survey Authority ("LTSA") in Victoria.
- [42] The AGBC also produced a copy of a land grant document obtained from Library and Archives Canada, which relates to Fractions 4, 5 and 8. The document is in the same form as the Dominion grant issued in relation to NW ¼. Except for the fact that it is neither signed nor sealed, it appears to be a copy of a Dominion grant issued to W.A. Smith as a result of a Fiat for Patent. I cannot make out the exact day but the document is dated November 1921 and references Fiat No. 442235.
- [43] Though the land grant document is neither signed nor sealed, three names are stamped in the same location as the signatures that appear on the grant of NW ¼. The words "B.C. Reserving Mines and Minerals and Timber" appear in the location of the seal applied on the grant of NW ¼.
- [44] Pages produced by the AGBC from original hardcopy land register books contain entries related to Fractions 4, 5 and 8. Each entry records the name "Wm. A. Smith". Under a column titled "How Acquired" are identical entries for each of Fractions 4, 5 and 8 which indicate "Sale 6932" with "[Sale] 1886" immediately below. Across from each entry for Fractions 4, 5 and 8 are the words "Fiat No. 442235" and "Tbr. Res'd. - Dom. Patent 4.11.21".
- [45] If a Dominion grant for Fractions 4, 5 and 8 was issued to W.A. Smith, he did not register the grant in the provincial Land Title Office. A clue as to why was uncovered by the AGBC within the Crown land registry files. Within a file pertaining to Fiat for Patent No. 442235, the AGBC found a letter from a notary public named R. Evans to the Provincial Land Department concerning Fractions 4, 5 and 8 dated September 28, 1938. The letter reads as follows:

The above lands [meaning Fractions 4, 5 and 8] being situate near Lytton B.C. in the Cariboo in the Land District of Kamloops B.C. were purchased from the Government a few years ago by W.A. Smith. Mr. Smith cannot find any Deed or Crown Grant which should have been obtained by him at the time of purchase. Would you please inform me where such a Document was sent to. I have been instructed by his wife to obtain this information from you, as Mr. Smith is seriously ill, and no papers can be found.

- [46] The Department of Lands replied on October 1, 1938, in part, as follows:

„[A]ccording to the records of this Department, the land as described was patented in the name of W.A. Smith on November 4th, 1919[4], prior to the transfer of the natural resources in the Railway Belt from Dominion to Provincial control. The patent to this land was therefore issued by the Dominion Government.

It is gathered from your letter that you have searched the records of the Land Registry Office, Kamloops, and it is suggested therefore that you communicate with the Dominion Lands Office, Department of Interior, Ottawa, who may be in a position to furnish you with information in respect to the issuance of title to the lands referred to.

- [47] W.A. Smith died on October 2, 1938. There is no evidence that the family of W.A. Smith ever followed up on the advice of the Provincial Department of Lands to "communicate with the Dominion Lands Office".
- [48] The parties have produced a number of documents that evidence the devolution of DL 287 and NW ¼ from W.A. Smith through to Adelaide in 1950. None expressly documents the devolution of Fractions 4, 5 and 8.
- [49] The wills of Adelaide and her son-in-law John used more general property descriptions, such as the "Rosebank Ranch" and "all my property of every nature and kind and wheresoever situate", respectively. However, appended inventories for these wills expressly listed DL 287 and NW ¼ but not Fractions 4, 5 and 8.
- [50] Consistent with the entries in the provincial Crown land registry, there is evidence that provincial authorities have at times assumed, or been concerned that, Fractions 4, 5 and 8 are already private land and thus unavailable to be granted by the Province. For example, in the mid-1960s, an applicant sought a grant of a small triangular-shaped parcel adjacent to Fraction 5 as well as Fraction 5 itself. In a letter dated September 25, 1964 from the provincial Superintendent of Lands to the applicant, the Superintendent advised that Fraction 5 was private, could not be granted and was "assessed for tax purposes in the name of Arthur W. Smith, Lytton, B.C."
- [51] Since the Allens' purchase of the ranch in 1988, the Province has issued property tax notices for Fractions 4, 5 and 8 in Dorothy's name and the Allens have paid the property taxes in full.

Issues

- [52] On my view of the petition, the issues to be determined are factual:
1. Did the Dominion make a grant of the three unregistered fractions to W.A. Smith in 1921?
 2. If so, is there a chain of title that can be traced from the original grant to Ms. Allen?

Analysis

- [53] Ms. Allen's petition is supported by the materials required by ss. 4 and 5 of the LTIA. As noted previously, she seeks an order dispensing with the requirement that she file a certificate of counsel. Section 6 sets out the necessary contents of the certificate:
6. The certificate of counsel must state that

- (a) counsel has investigated the title and believes the party to be the owner of the estate which the petition claims in the land in question, subject only to any charges or encumbrances that may be set out in the schedule to the petition or that counsel so believes, subject to any condition, qualification or exemption to be set out in the certificate, and
 - (b) counsel has conferred with the deponent on the subject of the various matters set out in the affidavit and believes the affidavit to be true.
- [54] In my respectful view, in the circumstances of this case, a certificate of counsel would not assist me in my consideration of the petition. While there are some gaps in the evidence, these are primarily due to the historic nature of the application. I am satisfied that there is ample evidence to determine the question of title to Fractions 4, 5 and 8, without a certificate of counsel and without requiring Ms. Allen to adduce further evidence under s. 11 of the LTIA.

Issue 1: Did the Dominion make a grant of the Fractions 4, 5 and 8 to W.A. Smith in 1921?

[55] There are four key documents that suggest the Dominion granted Fractions 4, 5 and 8 to W.A. Smith in 1921:

1. the Fiat for Patent held in Victoria at the LTSA;
2. the land register books at the provincial Crown land registry;
3. what appears to be an unsigned and unsealed copy of a Dominion land grant held in Ottawa; and
4. the letter from the notary public, Mr. Evans.

[56] Before addressing each of these documents, I will first set out some of the legislation enacted by the Province and the Dominion to give effect to the conveyance of the Railway Belt to the Dominion.

Legislation Governing Dominion Grants within the Railway Belt

- [57] In the 1880s and 1890s, the Province and the Dominion enacted legislation to give effect to the conveyance of the Railway Belt to the Dominion and to provide for the Dominion's surveying, administration, and disposition of lands within it.
- [58] An Act respecting certain Public Lands in British Columbia, R.S.C. 1886, c. 56 required the Dominion to offer the Railway Belt lands for sale on liberal terms to settlers at the earliest date possible. This Act also enabled regulations to be made by the Governor in Council to address "the manner in which, and the terms and conditions on which, the said lands shall be surveyed, laid out, administered, dealt with and disposed of": s. 4.

- [59] The Dominion Regulations for the disposal of Dominion Lands within the Railway Belt in the Province of British Columbia (Order in Council 1877-1887) (the "Regulations") charged the Department of the Minister of the Interior with the administration and management of the lands.
- [60] Section 8 of the Regulations made s. 53 of the Dominion Lands Act, R.S.C. 1886, c. 54 applicable to lands within the Railway Belt. Section 53 of the Dominion Lands Act required that a Dominion patent for land be signed by each of the Minister of the Interior, the Governor General, and the Secretary of State (or by the Deputy of each), and affixed with the Great Seal of Canada.
- [61] Section 10 of the Regulations provided two alternative mechanisms for disposition of lands within the Railway Belt: (i) homestead entry or (ii) public auction to the highest bidder.
- [62] Parallel provincial legislation enabled purchasers of lands within the Railway Belt to register Dominion patents under the land registry laws of the Province. Section 2(a) of provincial Order in Council 466/1895 provided that:

It shall be the duty of the Registrar General of Titles, and of each Deputy Registrar of Titles, to register titles to lands within the Railway Belt as defined by the first section of this Order, arising under any patent or grant issuing or purporting to issue under authority of the Dominion Government as fully and effectually to all intents and purposes as titles arising under Provincial grants to other lands in the Province are now registered in the said Offices:

- [63] Section 8 of provincial Order in Council 458/1897, continued the practice of the Dominion Minister of the Interior providing notice to the provincial Registrar General of Titles of Dominion patents of land issued within the Railway Belt:

The information furnished by the Department of the Interior for the purpose of securing Provincial registration of Dominion Patents of lands in the Belt being now regarded as sufficient, and application under the Provincial "Land Registry Act" being all that is required to ensure the registration of such Patents, it is agreed that the Minister of the Interior shall cause to be furnished to the Registrar General of the Province a statement giving the names of all Dominion Patentees, to whom Patents have been issued up to the date of this agreement, a short description of the lands patented and if necessary a map identifying the locality and such other particulars as will afford the Registrar General the necessary information to furnish each Patentee with a printed form of the application herein above referred to; and the Minister of the Interior shall thereafter continue to cause to be furnished to the Registrar General upon the issue of each Patent after the date of this agreement, a notice containing like information thereof to that above mentioned.

Fiat for Patent

- [64] The Concise Oxford English Dictionary defines "fiat" to mean "an official order or authorization." As such, the existence of Fiat for Patent No. 442235 in relation to Fractions 4, 5 and 8 is compelling evidence that an official order was made for the Dominion to issue the grant of Fractions 4, 5 and 8 to W.A. Smith. The fact that the Fiat for Patent was located in the Surveyor General's vault in Victoria is compelling evidence that the Dominion provided notice of the issuance of the grant to the Province as required by s. 8 of provincial Order in Council 458/1897.
- [65] That said, as the AGBC has pointed out, there is no historical evidence to establish that the Dominion invariably issued a grant following the creation of a Fiat for Patent.

Provincial Land Registry Books

- [66] It appears that, as a result of the transmission of the Fiat for Patent, or perhaps some other form of notice, entries were made in the Province's land registry regarding Fractions 4, 5 and 8. These entries match the date and number of the Fiat for Patent. They also appear to indicate a reservation of timber, just like the unsigned and unsealed land grant document.
- [67] The AGBC accurately observes that, unlike the land title registry, the land registry is not a registry of title. It is simply a collection of documents and recorded information. It is not conclusive proof of title.[5] Nevertheless, consistent with the entries, the Province has conducted itself as if a grant was issued to W.A. Smith. I consider this to be compelling evidence that that is what occurred.

Unsigned and Unsealed Land Grant Document

- [68] The unsigned and unsealed land grant document is, of course, not an actual grant. Further, there is no historic evidence to establish an invariable practice of the Dominion creating copies of grants in the form of an unsigned and unsealed land grant document only when an actual grant had been issued. Nevertheless, while copying technology was not advanced in 1921, it was no less necessary then to keep accurate records of important transactions than it is today, and I consider it highly likely that Dominion made and kept copies of the land grants it issued.
- [69] The document in question is in the identical form as the Dominion grant issued in relation to NW ¼ except that it bears three stamped names in place of three signatures and the words "B.C. Reserving Mines and Minerals and Timber" in place of a seal. The information it contains corresponds with Fiat for Patent No. 442235 issued at around the same time. In these circumstances and bearing in mind the purpose of the LTIA, I consider this to be compelling evidence that the unsigned and unsealed document is an accurate copy of a grant of Fractions 4, 5 and 8 issued to W.A. Smith.

Letter of Notary Public

[70] I consider the 1938 letter from notary public, R. Evans, to the Provincial Land Department to support the conclusion that the Dominion issued a grant of Fractions 4, 5 and 8 to W.A. Smith. The letter is clear evidence that W.A. Smith instructed Mr. Evans that a grant had been issued to him. While it is conceivable in the days before his death W.A. Smith was mistaken about this, I think the opposite is more likely to be the case.

Conclusion Regarding the Issuance of a Dominion Grant of Fractions 4, 5 and 8 to W.A. Smith in 1921

[71] In this case, there is no single piece of evidence that conclusively establishes that the Dominion issued a grant of Fractions 4, 5 and 8 to W.A. Smith in November 1921. Frankly, only the grant itself would provide such evidence. Of course, it is the absence of the grant which is at the root of Ms. Allen's petition.

[72] As noted, the standard of proof under the LTIA is the balance of probabilities. Conclusive proof is not required. While Ms. Allen's case would have been strengthened by evidence from a historian with knowledge of the practices followed by the Dominion in the issuance of land grants in 1921, in my view, such evidence is not necessary. All of the available evidence, especially when considered collectively, strongly supports the inference that the Dominion issued a grant of Fractions 4, 5 and 8 to W.A. Smith in November 1921. There is no evidence to seriously suggest otherwise.

[73] Accordingly, I am satisfied well beyond a balance of probabilities that the Dominion issued a grant of Fractions 4, 5 and 8 to W.A. Smith in November 1921.

Issue 2: Is there a chain of title which can be traced from the original grant to Ms. Allen?

[74] Section 34(1) of the LTA, provides as follows:

Registration of indefeasible title by court order

34(1) Except as provided in section 180, the registrar must not register an indefeasible title in favour of a person under a direction contained in an order of a court unless the order declares that it has been proved to the satisfaction of the court on investigation that the title of the person designated in the direction is a good safe holding and marketable title.

[75] To similar effect, s. 169(1) of the LTA provides:

Registration of title

169(1) If an application is made for the registration of indefeasible title to land, the registrar must register the title claimed by the applicant, if the registrar is satisfied that

- (a) the boundaries of the land are sufficiently defined by the description or plan on record in the land title office or provided by the applicant, and
- (b) a good safe holding and marketable title in fee simple has been established by the applicant.

[76] Accordingly, before making a declaration of title under the LTIA, I must be satisfied that Ms. Allen has a "good safe holding and marketable title."

[77] Although there is no definition of "good safe holding and marketable title" in the LTA, the Court of Appeal accepted the following description in *Smith v. Graham*, 2009 BCCA 192 at para. 19:

What the cases suggest is that a good safe holding and marketable title is a title where (1) the possession of the person on title is safe from attack and they cannot be displaced (safe holding) and (2) it is title "which, so far as its antecedents are concerned, may at all times and under all circumstances be forced upon an unwilling purchaser" (marketable). These cases suggest that the question of whether or not a person's title is 'doubtful' is not one of whether there is a strict legal defect in the claimed title but whether there is some issue which would lead a reasonable purchaser to question the title and thus refuse to complete a transaction.

[78] In this case, it is not contentious that, in order to establish a good safe holding and marketable title, Ms. Allen must demonstrate a chain of title from the original grant to her.

[79] The AGBC submits that the petition materials are factually and legally deficient to establish the necessary chain of title. Specifically, at paragraph 84 of its written submission, the AGBC submits:

A properly constituted petition seeking the declaration on this basis would provide the following:

- i. Factual context and legal principles to support the making of an inference from the fiat and the LAC copy that there was in fact a federal Crown grant in 1921.
- ii. Legal principles to support that, despite his non-possession of the signed and sealed dominion patent at the time of his death, W.A. Smith nevertheless had a legal or equitable interest in the Unregistered Fractions (e.g., a right to apply for registration) capable of being passed to his descendants. Relatedly, the petitioner would identify whether provincial legislation allowing registration of dominion patents remained in effect in 1938, and if not, the significance of this legislative vacuum for recognition of an interest under the (missing) patent.
- iii. Proper documentation to establish devolution of W.A. Smith's interest to great-granddaughters Dorothy and Heather. As noted, key estate documents are missing. "Title, like other key ingredients in civil actions, cannot be established or, for that matter, undermined, on the basis of pure speculation": *Mihaylov v. Long Beach Residents' Assn.*, 2018 ONSC 14 at para. 23.

iv. Explanation of how, if at all, unregistered interests in land may be validly transferred in British Columbia, including discussion of s. 20(1) of the Land Title Act, relevant provisions of the Property Law Act, R.S.B.C. 1996, c. 377 and Law and Equity Act, R.S.B.C. 1996, c. 253, and applicable common law.

[80] I will deal with each of these submissions in turn.

Was there a Dominion grant in 1921?

[81] For the reasons I have already expressed, I am satisfied that a Dominion grant of Fractions 4, 5 and 8 was made to W.A. Smith in November 1921.

Did W.A. Smith have a legal or equitable interest in the Fractions 4, 5 and 8 that was capable of being passed to his descendants at the time of his death?

[82] There is no evidence that W.A. Smith transferred his legal or equitable interest in Fractions 4, 5 and 8 to any third party prior to his death. Despite very extensive notice, there is also no evidence that any third party has ever asserted otherwise. These facts satisfy me on a balance of probabilities that W.A. Smith remained the legal and beneficial owner of Fractions 4, 5 and 8 at the time of his death and that his interest in Fractions 4, 5 and 8 was capable of being passed to his descendants.

[83] The AGBC submits, however, that Ms. Allen's petition is deficient for failing to answer the question of how W.A. Smith's interest in Fractions 4, 5 and 8 could have been registered under the provincial legislation in force at the time of his death.

[84] It is true that Ms. Allen has not identified the legislative path for registering a Dominion grant within the Railway Belt in 1938. In fact, Ms. Allen did not even make submissions on the point. On my view of the case, however, that was not necessary and is not fatal to her application.

[85] I have not undertaken my own historical legal research into provincial land legislation in 1938 but there are only two possibilities, both of which lead to the same result. Either W.A. Smith could have registered his Dominion grant under specific legislative provisions in place in 1938 or, if there was no such legislation, he could have applied for a declaration of title under predecessor legislation to the LTIA. Much like the current legislation, the Quieting Titles Act, R.S.B.C. 1936, c. 238, permitted an owner of land to have his title judicially investigated and its validity ascertained by the court. Accordingly, it is unnecessary, in my view, to delve deeper into this issue because either way W.A. Smith had the means to register his title.

Did W.A. Smith's title to Fractions 4, 5 and 8 devolve to Ms. Allen?

- [86] Though I have concluded that a Dominion grant of Fractions 4, 5 and 8 was issued to W.A. Smith, a tricky issue arises due to the fact that W.A. Smith owned only the unregistered and not the registered parcels that together comprised the ranch at the time of his death. In other words, there was a readily identifiable divergence of ownership at the time of W.A. Smith's death, which could lead to a difference in the present ownership of the registered and unregistered parcels.
- [87] Owing to foreclosure proceedings, Mr. Jameson became the owner of the registered parcels in 1923. The unregistered parcels did not exist at the time the foreclosure proceedings were initiated and were, therefore, not subject to the foreclosure. In 1927, Mr. Jameson transferred the registered parcels to W.A. Smith's children, Harry and Adelaide.
- [88] As for Fractions 4, 5 and 8, I have concluded these were owned by W.A. Smith at the time of his death. The parties were unable to locate a copy of his will. There is therefore uncertainty regarding how W.A. Smith disposed of Fractions 4, 5 and 8 in his will.
- [89] Despite the absence of direct evidence as to what provision W.A. Smith made in his will regarding Fractions 4, 5 and 8, I am satisfied on a balance of probabilities that he left them to his children, Harry and Adelaide. I have reached this conclusion for several reasons.
- [90] First, Harry and Adelaide were operating the ranch and Fractions 4, 5 and 8 were an integral part of the ranch. Second, W.A. Smith was represented by a notary public who was alive to the existence of Fractions 4, 5 and 8 so likely would have been careful to deal with them in W.A. Smith's will. Third, it would have made no sense whatsoever for W.A. Smith to leave Fractions 4, 5 and 8 to anyone other than Harry and Adelaide. Finally, virtually every living adult descendant of W.A. Smith has been served with a copy of Ms. Allen's petition and none asserts otherwise.
- [91] When Harry died intestate, his daughters Ruth and Olive each became owners of one-half of Harry's interest in Fractions 4, 5 and 8 as tenants in common. The indenture by which Ruth and Olive sold DL 287 and NW $\frac{1}{4}$ to Adelaide in 1950 makes no mention of Fractions 4, 5 and 8. However, "actual lands are sold not a legal description of the land": Hamilton at para. 44. I find on a balance of probabilities that Ruth and Olive sold their entire interest in the ranch, including Fractions 4, 5 and 8, to Adelaide in 1950, not just their interest in DL 287 and NW $\frac{1}{4}$. Again, I have reached this conclusion for several reasons.
- [92] First, Adelaide was operating the ranch and Fractions 4, 5 and 8 were integral to the operation of the ranch. Second, Olive is alive, has been served with a copy of Ms. Allen's petition, has been described by one of her nephews as "mentally capable" and has not opposed Ms. Allen's petition. Third, though Ruth died in 2013, her son, Steven Bird, has sworn an affidavit in support of Ms. Allen's petition. In his affidavit, Mr. Bird swears that "the descendants of William Arthur Smith have always treated the three unregistered fractions described in the Petition in this proceeding, as part of the Rosebank Ranch" and "(i)t is my wish that ownership of the unregistered fractions follow the ownership of the deeded land forming part of the Rosebank Ranch." Mr. Bird further swears "I do not have any claim or

interest in the unregistered fractions."

- [93] As a result, I am satisfied on a balance of probabilities that Adelaide became the sole owner of the ranch, including Fractions 4, 5 and 8, in 1950.
- [94] For essentially the same reasons, I am satisfied on a balance of probabilities that all subsequent transactions involving the ranch and/or DL 287 and NW ¼ included Fractions 4, 5 and 8.
- [95] When Mary and John purchased DL 287 and NW ¼ from Adelaide's estate, this must have included Fractions 4, 5 and 8 as they were integral to the operation of the ranch and W.A. Smith's descendants treated them as such.
- [96] When John died, his property was left to his daughters Heather and Dorothy, including Fractions 4, 5 and 8. Of course, Heather and Dorothy understood they became the owners of Fractions 4, 5 and 8 as they expressly included Fractions 4, 5 and 8 in the sale of the ranch to the Allens.

Explanation of Transfers of Unregistered Titles in British Columbia

- [97] The AGBC has raised an interesting, though in my view, academic, issue regarding how unregistered titles could be transferred in British Columbia over the years at issue.
- [98] The LTIA is designed to quiet "unquiet" titles. Some authorities suggest that the LTIA only applies when there is no indefeasible title: Thomson (BCSC) at paras. 72-76. Though neither party cited any case dealing with analogous facts, surely the fact that there is no indefeasible title in relation to Fractions 4, 5 and 8 makes Ms. Allen's case precisely the type of case intended to be addressed by the LTIA.
- [99] The title to Fractions 4, 5 and 8 is "unquiet" specifically because the titles were not registered. In my view, it is self-evident that the type of problem the LTIA was designed to resolve cannot be an impediment to its use. As a result, I consider it unnecessary to examine what W.A. Smith and his descendants might have done over the years under other pieces of property-related legislation to transfer unregistered parcels.

Conclusion Regarding the Chain of Title

- [100] I have found on a balance of probabilities that a Dominion grant of Fractions 4, 5 and 8 was made to W.A. Smith in 1921. Fractions 4, 5 and 8 now belong to someone. Ms. Allen's petition asks me to determine if that someone is her.
- [101] For the reasons I have expressed, I am satisfied on a balance of probabilities that there is a chain of title from the original grant of Fractions 4, 5 and 8 to W.A. Smith through to Ms. Allen.

[102] Given the extent of the notice of Ms. Allen's petition, I cannot foresee a future attack on her title. Given my findings, no reasonable purchaser could question Ms. Allen's title and refuse to complete a transaction. As a result, as required by the LTA, I am satisfied on a balance of probabilities that Ms. Allen has a good safe holding and marketable title.

Order

[103] I make the following order:

1. Under the authority of the Land Title Inquiry Act, Elizabeth Allen is the legal and beneficial owner in fee simple in possession of Fractions 4, 5 and 8, subject to the conditions, exceptions and reservations enumerated or referred to in section 23(2)(a) to (j), of the Land Title Act, and to those appearing in the original grant made by the Dominion, but free from all other rights, interests, claims and demands.
2. A copy of the original grant of Fractions 4, 5 and 8 made by the Dominion shall be attached as a Schedule to this order.
3. Under ss. 34(1) and 169(1) of the Land Title Act, Elizabeth Allen has established a good safe holding and marketable title in fee simple to Fractions 4, 5 and 8.
4. The requirement of a certificate of counsel under s. 4(f) of the Land Title Inquiry Act is dispensed with.
5. Elizabeth Allen shall publish this order in the Gazette and the order shall be filed with the Registrar of Land Titles at least four weeks following such publication.

[104] As the AGBC appeared to assist the Court rather than to oppose Ms. Allen's petition, the parties shall bear their own costs.

[105] I thank counsel for their extraordinary diligence in preparing for the inquiry and for their very capable assistance throughout.

[106] I wish Ms. Allen the very best in the future.

"L.S. Marchand J."

MARCHAND J.

[1] British North America Act, 1871, 34-35 Vict., c. 28 (U.K.); Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871.

[2] Order in Council (458/1897), ss. 1-2.

[3] The Railway Belt and Peace River Block Act, S.C. 1930, c. 37; Railway Belt Re-transfer Agreement Act, S.B.C. 1930, c. 60; British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.).

[4] I believe the date of November 4, 1919 to be in error. The balance of the evidence suggests that the date was November 4, 1921.

- [5] See by contrast s. 23(2) of the LTA in relation to indefeasible titles in the provincial land title registry.
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Prepared on 28 October 2026 · Esheria