

CANADA / JUDGMENT

Thomson v. Eadie et al

2006 BCSC 868

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 868 Thomson v. Eadie et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thomson v. Eadie et al,

2006 BCSC 868

Date: 20060605

Docket: 10321

Registry: Salmon Arm

Between:

Ronald Paul Thomson

Petitioner

And

James Eadie, Gwenith Ann Eadie and

Her Majesty the Queen in Right of the Province of British Columbia

by the Attorney General

Respondents

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Petitioner

R.A. Chorneyko

Counsel for the Respondents, James Eadie and Gwenith Ann Eadie

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Counsel for the Respondent, Attorney General of British Columbia

N.E. Brown

Date and Place of Trial/Hearing:

April 20, 2006

Kamloops, B.C.

INTRODUCTION

- [1] In Three Valley Lake, just off the western shore lies a 1.3 acre island referred to as Island No. 2. The respondents, James Eadie and Gwenith Ann Eadie (the "Eadies") are registered owners, holding certificates of indefeasible title to Island No. 2. Ms. Eadie and her family, and subsequently her husband, James Eadie, have enjoyed the use of Island No. 2 since the mid-1950s. There is a small cabin that is used as recreational property in summer and occasionally winter.
- [2] The petitioner, Ronald Paul Thomson, argues that in fact Island No. 2 is part of the property which he acquired in 2000, and to which he holds a certificate of indefeasible title. Mr. Thomson seeks a declaration that his title includes Island No. 2, and that the respondents' title be cancelled and they deliver up possession of Island No. 2. Alternatively, if the court declares that his title does not include Island No. 2, that the respondent, The Attorney General of British Columbia, take steps to modify the description of the lands in the Land Title Office. He also seeks an order that in that case British Columbia pay compensation to him for the value of Island No. 2.
- [3] Mr. Thomson relies on the Land Title Inquiry Act, R.S.B.C. 1996, c. 251 ("LTIA") in support of the orders he seeks.

BACKGROUND

- [4] The parties agree that the history of the lands is outlined in paragraphs 12 to 23 of the Outline prepared by British Columbia. For convenience I reproduce those paragraphs here:
12. Pursuant to section 11 of the Terms of Union between the Dominion of Canada and the Colony of British Columbia, under which British Columbia was admitted to the Dominion in 1871, British Columbia agreed to convey to the Dominion of Canada a tract of land across British Columbia for railway construction purposes not to exceed 20 miles on each side of the railway line (hereinafter the "Railway Belt").

Terms of Union, (U.K.), 1871 (34 Vict.), No. 54.

13. In 1880, the Province of British Columbia enacted legislation more particularly describing the tract of land granted by the Province of British Columbia to the Dominion of Canada for the Railway Belt.

An Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for the Canadian Pacific Railway purposes, S.B.C., 1880 (43 Vict.), c. 11.

14. In 1884, the Province of British Columbia enacted legislation amending the description of Railway Belt lands conveyed by the Province of British Columbia to the Dominion of Canada.

An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province 1883, 46 Vict., c. 17.

15. In 1886, the Dominion of Canada enacted legislation allowing for lands granted by British Columbia for Railway Belt purposes to be offered for sale to settlers.

An Act respecting certain Public Lands in British Columbia, R.S.C. 1886, c. 56.

16. On or about May 28, 1907, the Dominion of Canada granted to Alexander McRae certain lands as described in that grant.

Trenchard Affidavit, para. 9-10, Exhibit "F".

17. The lands granted to McRae were part of the Railway Belt lands granted to the Dominion of Canada.

Trenchard Affidavit, para. 10, Exhibits "F" and "G".

18. The grant to McRae was subject to a number of enumerated exceptions, including lands for the railway right of way, and specifically made reference to the 1906 Township Plan.

Yates affidavit, para. 5, 10.

19. Under a Memorandum of Agreement dated February 20th, 1930, the Dominion of Canada re-transferred unalienated lands within the Railway Belt to the Province of British Columbia.

Trenchard Affidavit, para. 12, Exhibit "H".

20. By Crown Grant No. 7000/640, dated October 21, 1936, the Province of British Columbia transferred to Almond Marcus Grimmatt lands described as "Island No. Two (2) in Three Valley Lake, being part of Fractional Legal Subdivision Three (3) of Section Ten (10) Township Twenty-three (23), Range Four (4), West of the Sixth (6) Meridian, as shown on the plan of the South-east quarter of said Township dated 21st October, 1919".

21. The provincial Crown Grant to Grimmatt was issued after the 1930 re-transfer from Canada to British Columbia of unalienated Railway Belt lands.

22. The Petitioner acquired his title to lands in September 2000.

Thomson affidavit, para. 4, Ex. "A", "B", "C" and "D".

23. Gwenith Ann Eadie acquired her title to an undivided $\frac{1}{2}$ interest to lands on or about May 20, 1970. James Eadie acquired his title to an undivided $\frac{1}{2}$ interest to lands on or about October 12, 1995. Such lands were described as "Island No. 2 in Three Valley Lake being part of fractional Legal Subdivision 3 of Section 10 Township 23 Range 4 west of the 6th Meridian Kamloops Division Yale District."
- [5] I should add that subsequent to the Crown grant of Island No. 2 to Mr. Grimmett on October 21, 1936, an indefeasible title was registered for Island No. 2 in Mr. Grimmett's name on September 18, 1947.
- [6] Ms. Eadie's mother, Mary Lillian Margaret Waby and Gladys Pearl Branden, became the registered owners of Island No. 2 in 1956. The respondent, Ms. Eadie, became the registered owner of a half interest in Island No. 2 with her mother, Lillian, in 1970. The respondent, Mr. Eadie, became the registered owner of a half interest in Island No. 2 in 1995.
- [7] Mr. Thomson's certificate of indefeasible title indicates that the application for registration was received on September 22, 2000 and entered September 22, 2000. He is shown as the registered owner in fee-simple. The description of the land is:

Parcel Identifier: 016-544-196

That part of Legal Subdivision 3, Section 10, Township 23, Range 4, West of the Sixth Meridian, Kamloops Division of Yale District which is not covered by the waters of Three Valley Lake, except part included in Plans 1879 and 4706

- [8] Mr. Eadie points out in paragraph 21 of his affidavit #1 that the cottage on Island No. 2 is regularly used and maintained, and the property well kept. It has been used as a summer vacation home by the Eadies for many years. The cottage is clearly visible from Mr. Thomson's property, and also from the Trans Canada Highway passing by the property. Mr. Thomson is a local resident and would have seen the cottage on Island No. 2 from the highway, and certainly when he inspected the property he purchased. The photographs attached as exhibits certainly verify that, and it is clear that Island No. 2 is not vacant property. The photographs clearly show the bridge which provides access to the island from what is described as a C.P. Rail right-of-way or the plaintiff's property, a boat ramp, dock and diving boards that were constructed on the island by the Eadies, and the cottage. There are a number of signs indicating that the island is private property, and stating that there should be no trespassing. There is also a sign with the Eadies' name on it which would indicate that they owned the property. All of this was readily apparent to anybody who attended Mr. Thomson's property or Island No. 2 itself.
- [9] Mr. Thomson acquired his property in 2000, and the assessment roll report indicates that it was a sale of a "single property, vacant sale" on September 22, 2000 for \$120,000.00. Island No. 2 was appraised on July 20, 2005 for \$185,000.00.

- [10] Mr. Thomson confirms in his affidavit #1 that he purchased the property in September of 2000. He states in paragraph 4 of his affidavit that he wondered whether it included the three islands located nearby. He states that at the time he was satisfied that he owned Island No. 2 because it was located in legal subdivision No. 3 and not covered by the waters of the lake. He states Island No. 2 is uninhabited, although there is a run-down cottage located on it.
- [11] The Eadies assert in their affidavit that in the spring or summer of 2001 they visited Mr. Thomson and his son on Mr. Thomson's property. They introduced themselves as neighbours and owners of Island No. 2. Mr. Thomson talked about building a home for himself and a cabin for his son, and stated he thought he owned what is described as Island No. 3. Mr. Eadie told Mr. Thomson he thought Island No. 3 belonged to the Crown. Mr. Eadie is adamant that Mr. Thomson did not say anything to indicate that he believed he owned Island No. 2, or questioned their ownership or presence.
- [12] Mr. Thomson filed affidavit #2 and alleges that Mr. Eadie alone attended at his property in the fall of 2001. He denies that Mr. Eadie claimed ownership of Island No. 2. Mr. Thomson agrees that Mr. Eadie said he was a neighbour, but believed that Mr. Eadie owned property in the area west of the C.P. Rail line. Mr. Thomson's version of events is that Mr. Eadie was confrontational and demanded to know what Mr. Thomson was doing there. Mr. Thomson advised him he owned the property and was building a home, and that Mr. Eadie's response was that he hoped he did not build a shack that would bring the property values down and then left.
- [13] I do not have the benefit of cross-examination of the parties on their affidavits or their viva voce evidence. However, Mr. Thomson's explanation in paragraph 4 of affidavit #1 that he wondered about and then he believed he owned Island No. 2 is difficult to accept. Clearly, Island No. 2 was not vacant property. It is only reasonable to expect that anybody who was purchasing property and believed Island No. 2 was part of their property would have inspected it. It would then be immediately obvious to them that there was some issue as to the ownership of that property. The Eadies say that Mr. Thomson is a resident of the Revelstoke area, and it is hard to accept that he would not be aware that Island No. 2 was occupied.
- [14] Mr. Thomson did not provide any evidence of any representations made to him by the vendor that Island No. 2 was part of the property he was acquiring. The vendor, a Mr. Albert Patrick Gerrow, of Vancouver, is elderly and ill. He has been unable to provide an affidavit, but in December of 2005 did provide a written statement to Mr. Eadie which is exhibit "O" to Mr. Eadie's affidavit. Mr. Gerrow's statement makes it clear that the property that he sold to Mr. Thomson did not include Island No. 2, and he did not indicate in any way to Mr. Thomson that it did. I remind myself, however, that Mr. Gerrow's statement, not being in the form of an affidavit, is not evidence.
- [15] Island No. 2 appears to be a very attractive piece of property. It is obvious that it has significant value.

ISSUES

1. Did the original grant to McRae include Island No. 2 or part of it?
2. Did the exceptions to the McRae grant exclude Island No. 2 or a part of it?
3. What was the effect of the Crown grant to Grimmett of Island No. 2?
4. Do the certificates of title in favour of Thomson and Eadies overlap, or cover the same property or part of the same property?
5. If so, which title takes priority, if either?
6. What is the effect of the Torrens system in British Columbia and the LTA?
7. Does the LTIA apply, and if so, what is the appropriate order?
8. If the LTIA does not apply is there some other basis for granting an order to resolve any apparent conflict in the title?
9. Is there any basis for granting compensation to Mr. Thomson or the Eadies depending on the outcome?
10. What is the appropriate disposition with regard to costs?

ISSUES 1 and 2

The Grants and Titles:

[16] Mr. Thomson is the registered owner of land described as:

Parcel Identifier: 016-544-196

That part of Legal Subdivision 3 Section 10 Township 23 Range 4 West of the 6th Meridian Kamloops Division of Yale District which is not covered by the waters of Three Valley Lake, except part included in plans 1879 and 4706.

[17] The respondent, Ms. Eadie, is the registered owner of land described as:

Parcel Identifier: 016-596-137

Island No. 2 in Three Valley Lake being part of fractional legal subdivision 3 of Section 10 Township 23 Range 4 West of the 6th Meridian Kamloops Division Yale District.

[18] Ms. Eadie's application for registration was received May 20, 1970 and entered June 9, 1970.

[19] The respondent, Mr. Eadie, is the registered owner of lands described as:

Parcel Identifier: 016-596-137

Island No. 2 in Three Valley Lake being part of fractional legal subdivision 3 of Section 10 Township 23 Range 4 West of the 6th Meridian Kamloops Division Yale District.

[20] Mr. Eadie's application for registration was received October 12, 1995 and entered October 17, 1995.

[21] The Eadies' titles are found at exhibit "E" of Mr. Thomson's affidavit #1.

[22] Mr. Thomson became the registered owner of his property in September of 2000. Mr. Thomson traces his title back to the original Crown grant issued by the Dominion of Canada. Exhibit "F" to his affidavit #1 is a copy of the Fiat for Patent with a final number 138172. A copy of the patent itself issued May 28, 1907, by the Dominion of Canada, is exhibit "F" to the affidavit of Hugh Trenchard. The legal description in the Fiat for Patent refers to lands:

Composed of all those portions of Legal Subdivisions Two and Three of Section Ten of the said Township which are not covered by any of the waters of Three Valley Lake, as shown upon a map or plan of survey of the said Township approved and confirmed at Ottawa on the 15th day of December A.D. 1906 by Edouard Deville Surveyor General of Dominion Lands and of record in the Department of the Interior containing by measurement together Fifty-two(52) acres more or less; saving and excepting

[23] The exceptions on the McRae grant include Grant No. 1668 to the CPR as right-of-way. They are the areas marked "Secondly" through "Fifthly" on the CPR grant and correspond with the areas "Firstly" through "Fourthly" on the McRae grant. The area marked "Fifthly" on the CPR grant and "Fourthly" on the McRae grant is an extension of the CPR grant right-of-way. This is shown on a December 1895 plan, exhibit "E" to the affidavit of David R. Yates, land surveyor, employed with the Land Title and Survey Authority of British Columbia. He points out that the 1895 plan does not show an island, but the extension of the CPR grant right-of-way appears to encompass a portion of what may now be Island No. 2. Mr. Yates points out that the 1895 survey was for the purposes of showing the CPR right-of-way and incidental scenery may have only been roughly located. He points out that it is difficult to know what relationship Island No. 2 has to the CPR grant without a more accurate survey.

[24] Mr. Thomson argues that the description in the Crown grant obviously included any islands in Three Valley Lake, and that the plan of 1906 does not show any islands. His argument is that because of the Crown grant in 1907, there was nothing which the Crown in right of British Columbia could pass, or give by grant, in 1936. Therefore, the grant in 1936 to Grimmatt could not pass an interest to Grimmatt, nor any of his successors in title.

[25] Mr. Thomson argues that the words of the original grant should govern, and would appear to include any islands in Three Valley Lake. If the words are unclear, then the plan of 1906 governs. By comparing this to other plans which show the islands, he argues it would appear that the 1906 plan included the island as part of the main land at the time. He also points to correspondence of July 9, 1930 in response to an application by someone other than Mr.

Grimmett to obtain title to Island No. 2. This was an application to the Federal Department of the Interior, who was managing the lands on behalf of the Dominion Government at the time. That letter indicates that at least a portion of Island No. 2 was covered by the McRae grant and part subject to the railway right-of-way (N.C. Reimer affidavit #1 - exhibit "I").

[26] The scale of the 1906 plan (exhibit "B" to the affidavit of Mr. Yates) makes it difficult to determine the details of the boundaries. It shows no islands whatsoever.

[27] The manual of instructions for surveyors of Dominion lands of 1903 states:

a parcel fronting on the river does not include the bed, nor does it include the adjoining islands unless the survey shows distinctly that the islands are included.

[28] This would also apply to a navigable lake greater than twenty acres, which would include Three Valley Lake.

[29] This would suggest that the islands in Three Valley Lake were not included in the original McRae grant despite the wording of the grant.

[30] The C.P. Rail right-of-way was an exception from the McRae grant. The plan referred to as the 1895 map which relates to the right-of-way does not show Island No. 2, but does show a promontory, or extension of the main land, which is covered in part by the right-of-way. It could be inferred that this promontory was land that ultimately became the island, if it was not an island at that time. Without a survey, however, it is difficult to know.

[31] A plan called "Plan 1879" which reflects a survey of 1915 shows the railway right-of-way coming into the waters of the lake and covering part of what may be Island No. 2. However, the representations of what may be Island No. 2 bear little resemblance to a plan dated in 1908.

[32] The lake is described as deep to the shore, and there is no evidence to suggest how there would be such a dramatic change in the property in such a short period of time.

[33] Copies of surveyors' notes from 1905, which were used to prepare the 1906 plan, were referred to. One of the surveyor's notes does refer to a small island which is probably something now referred to as Island No. 3. This raises the question of why Island No. 2 would not have been referred to if it was in existence at the time.

[34] A 1919 plan, which replaced the 1906 plan of the township, refers to Island No. 2 and Island No. 3. The 1919 plan was referred to when the Grimmett grant of 1936 was given.

[35] Counsel for Mr. Thomson took the trouble to overlay the 1919 and the 1906 plan, and argued that Island No. 2 appeared to be part of the upland on the 1906 plan. If that were so, then part of it was covered by the right-of-way and is not part of the property granted in the McRae grant in any event.

- [36] It is possible that the 1906 plan is in error, or for some reason simply ignored the island because it was not part of the lands granted. This would be consistent with the instructions to surveyors.
- [37] The July 9, 1930 letter from the Federal Department of the Interior also seemed to indicate that part of what was then Island No. 2 may be covered by the right-of-way, and not the property of McRae. It also indicated that .5 of an acre may remain Crown land.
- [38] Mr. Thomson also referred to a page from the B.C. Land Registry ledger which refers to the McRae grant and to the Grimmitt grant. There is a note on that ledger "(L.S3 on 1910 plan 28 6 AC Islands not shown) does not agree with Fiat".
- [39] There is also correspondence relating to the Grimmitt application for a grant of Island No. 2. A status report was done by the provincial government and that report indicates that title to the island is apparently clear, and that it is vacant Crown land.
- [40] Despite any confusion there may have been at the time, the right of Mr. Grimmitt and his successors to occupy, use, and to ownership of Island No. 2, remain unchallenged from 1936 until the action commenced by Mr. Thomson in September of 2005.
- [41] The Eadies argue that Island No. 2 was never part of the McRae grant. The McRae grant is referred to as fifty-two acres and that one of the exceptions refers to a plan of December 4, 1895. They point out that the 1895 plan shows no island, but it may have simply been intended to be a rough sketch and does not properly show, or may improperly show, Island No. 2 as part of the main land. They argue that the purpose of the McRae grant was for a mill site, and there would be no reason to include an island in that grant. They also argue that the 1906 plan shows insufficient detail to be helpful.
- [42] Mr. Eadie produced a copy of a plan of the C.P. Rail Pacific Division showing a railway spur line in existence at Three Valley Gap and dated April 30, 1908. This plan clearly shows Island No. 2 as separate from the main land. More recent photographs show the separation between Island No. 2 and the main land, and show that the bottom of the channel is filled with sunken logs from a logging operation. The Eadies argue that this shows that the island was obviously in existence at the time of the logging operations in the late 1800s and early 1900s.
- [43] This is consistent with all the subsequent surveys and field notes from the 1917 survey which referred to the lake as being very deep, and right up to the bank.
- [44] Mr. Eadie also refers to a copy of the Land Title Office registry documents relating to the McRae grant, which refers to it as:

FR.L.S. 3 S of river and W of lake

East of river and north of lake

and a reference to the 1919 plan which shows the island.

- [45] By this description, it would not include Island No. 2.
- [46] The Eadies argue that the evidence is insufficient to prove whether Island No. 2 was a part of the grant to McRae. They argue that there are conflicts between various surveys, or inaccuracies in the surveys. They argue that any promontory that may show on an 1895 plan is in error, and really should be part of Island No. 2. The 1879 plan shows Island 2 but of a different shape. The 1906 plan is inaccurate and that the 1908 plan clearly shows the island. They argue that the letters from the Department of the Interior in 1930 relied on the inaccurate 1906 plan.
- [47] The Eadies and the respondent, Province of British Columbia, argue that investigations were made in 1936 when Grimmett applied for a grant of Island No. 2, and at that time a determination was made, that Island No. 2 was vacant Crown land and, therefore, could be granted to Grimmett.
- [48] The Eadies also referred to correspondence relating to attempts by Grimmett and others to acquire Island No. 3. A land inspector's report in 1957 confirmed that Island No. 3 was vacant Crown land based on the investigations made at that time. However, that conclusion was originally preliminary and no grant of Island No. 3 was ever made because it was felt it should be preserved for public use.
- [49] British Columbia, in their written submissions, referred to some principles they suggested would be helpful in this analysis:

Some principles that will be helpful to the court in the required analysis of title were set out by the Court of Appeal in *Kirkpatrick v. British Columbia (Registrar of Land Titles)*, 2002 BCCA 669:

- [33] When lands conveyed in a grant are described by reference to a plan, the description of the lands is a question of legal construction: see *Grasett v. Carter* (1884), 10 S.C.R. 105, per Strong J. at p. 114:

When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury.

- [34] When such a grant contains words expressing area that might create doubt or uncertainty as to the extent of the grant, resort must be had to the plan to resolve the uncertainty.
- [35] Moreover, where doubt remains after examining the grant, the survey is determinative.

[R]eference must be had to the "Official Plan or Survey" in order to determine the precise extent of the grant.

- [40] Unfortunately, the Official Plan was not placed in evidence at the summary trial. As a result, we must look to "the actual work on the ground": *Re Ward*, supra, at p. 117. The best evidence of "the actual work on the ground" is the surveyor's field notes, made in 1877 contemporaneously with the survey. The Official Plan is a graphic representation of the Official Survey and the surveyor's notes are its written record. No objection was taken that the appellants had failed to produce the Official Plan and, in the circumstances, the field notes are the best evidence available of the Official Survey.
- [50] British Columbia did not attempt to take a position supporting either of the parties in this case, but did provide a great deal of information from their records. British Columbia argues that Mr. Thomson is attempting to overturn an existing title registered under the LTA and, therefore, there is a heavy burden upon him. They also point out the inconsistencies in the various surveys and plans. I agree with British Columbia that it is difficult to know whether the McRae grant did include Island No. 2, or whether it existed at the time of the McRae grant.
- [51] In all of the circumstances, I am not satisfied that Mr. Thomson has met the onus in establishing that Island No. 2 was a portion of the McRae grant at the time. It is argued by Mr. Thomson that the wording of the McRae grant itself is broad enough to include the island, but that would be inconsistent with the directions to surveyors contained in the Dominion Government's own guide. The 1908 plan clearly shows the island in existence, and the later 1917 plans and surveyors' notes, indicate that the lake is deep right to the shore. Again, that is inconsistent with a simple change in the channel of the river cutting off a portion of the main land. It is possible that Island No. 2 was a part of the main land at some time, but the evidence presented is insufficient to demonstrate that what is now Island No. 2 was a part of the original McRae grant. I find that Island No. 2 was not included in the McRae grant.

ISSUES 3, 4, 5 AND 6

The LTA and the Effect of the Torrens System in British Columbia

- [52] In the event that I am wrong, and that the island, or at least a portion of it, was contained in the original McRae grant, what is the effect of the Crown grant to Grimmatt, and the subsequent registration of titles of both the McRae property and the Grimmatt property in the Land Title Registry. British Columbia point out in their arguments the following:
24. The objectives and operation of the Torrens system of land registration were discussed by the Supreme Court of Canada in *C.P.R. and Imperial Oil Ltd. v. Turta et al*, [1954] S.C.R. 427, at 452-3 (per Rand, J.):

The general and primary conception underlying the statute, as it is of all legislation establishing what is known as the Torrens system of land titles, is that the existing certificate, bearing the name of a real person, is conclusive evidence of his title in favour of any person dealing with him in good faith and for valuable consideration:

The argument made involves this, that a person contemplating a purchase of land included in a certificate must not only examine that certificate and make a proper search for the interests to which, by the statute, it is declared to be subject, but must also examine every transfer back to the original grant from the Crown for errors in transcription into the successive certificates. The legislation was designed, obviously, to avoid just such inconvenience and risk, and such a requirement would completely reverse the opinion on which, since its introduction in 1886, conveyancing in the western provinces have proceeded.

25. Mr. Justice Estey stated that:

[T]he Torrens system is intended "to give certainty to title" as it appears in the land titles office. That one who is named as owner is 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 the land may ascertain the particulars of its title at the appropriate land titles office and deal with confidence, relying upon the information there disclosed. That such a system may from time to time impose hardships is obvious and, therefore, in addition to preserving actions against the wrongdoer, the legislature has provided an assurance fund out of which, in appropriate cases, compensation may be paid to those who suffer a loss. (p. 443)

26. In *Heller v. The Registrar, Vancouver Land Registration District and Heller* (1960), 26 D.L.R. (2d) 154, at 160, the British Columbia Court of Appeal concluded:

In my judgment the British Columbia Land Registry Act in substance and effect applies the same principles as those above cited [including *Turta*] and was enacted for the same purposes.

The answer to the second question propounded is, I think determined by s. 38 of the Act, read with ss. 39, 40, 51, 140, 141 and 156. Those sections, later referred to as the indefeasible sections, in my opinion must be interpreted as declaring in plain language that the person named as registered owner of lands described in a certificate of indefeasible title signed by the Registrar has title to those lands from the moment the signature of the latter is affixed thereto, good against all the world subject only to the exceptions enumerated in s. 38, and is not liable to an action for ejectment or recovery of the said lands by the rightful owner except in a case which falls within one of the exceptions enumerated in s. 39 (with which are included those in s. 38). (p. 160)

27. Section 23(2) of the LTA states:

An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title subject to the following:

- (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;
- (h) the right of a person to show that all or a portion of the title is, by wrong description of boundaries or parcels, improperly included in the title

28. "Indefeasible" means "that which cannot be defeated, revoked or made void."

Garner, Bryan A., Blacks Law Dictionary, (Thomson/West)

[53] In this case, a reading of the Thomson certificate of title is "that part of Legal Subdivision 3, Section 10, Township 23, Range 4, West of the Sixth Meridian, Kamloops Division of the Yale District which is not covered by the waters of Three Valley Lake, except part included in Plans 1879 and 4706." A plain reading would indicate that would include all land above the waters, including any islands. The Eadies' title describes their property as "Island No. 2 in Three Valley Lake being part of fractional Legal Subdivision 3, Section 10, Township 23, Range 4, West of the Sixth Meridian, Kamloops Division Yale District". Their title is certainly more specific with regard to the island than the Thomson title. It would appear that this is a situation where the legal descriptions of the properties may overlap. What then is the effect of the LTA on this application?

[54] Section 23(i) provides that the title is conclusive evidence against everyone subject to:

- (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;

[55] There is no suggestion that the Eadies have participated in any fraud or forgery.

[56] Section 25 is also important. It provides:

25(1) In this section, "courts" includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.

- (2) An action of ejectment or other action for the recovery of land for which an indefeasible title has been registered must not be commenced or maintained against the registered owner named in the indefeasible title, except in the case of
 - (d) a person deprived of land improperly included in an indefeasible title of other land by wrong description of boundaries or parcels,

- (e) 2 or more indefeasible titles having been registered under this Act in respect of the same land, the registered owner claiming under the instrument that was registered first,
 - (g) a right arising under section 23(2).
- (3) In any case other than those enumerated by way of exception in subsection (2), the production of a subsisting state of title certificate must be held in all courts to be an absolute bar and estoppel to an action referred to in subsection (2) against the registered owner named in the certificate, despite a rule of law or equity to the contrary.
- [57] This is not a case where a person has been deprived of property by being improperly included in indefeasible title by wrong description of boundaries or parcels. That would be ss. 25(2)(d). This is also not a case where s. 25(2)(g) would apply.
- [58] This seems to be more of a case where s. 25(5)(e) might apply. The Eadies rely on an instrument transferring the property to them in 1970 and 1995 respectively. Mr. Thomson relies on an instrument transferring land to him in the year 2000. Obviously, the Eadies' instrument was registered first and they would have priority. Mr. Thomson, therefore, cannot bring an action against the Eadies for ejectment or recovery of the land. Their title takes priority over his.
- [59] The LTA is an answer as well to Mr. Thomson's argument that the portion of the land that is now the island had already been transferred to McRae, and that the province did not have any title or interest that they could transfer to Grimmett. The LTA allowed those people who acquired the island from Grimmett to rely on his title. There is no indication that they or the Eadies were not parties who acquired in good faith for value.
- [60] This is not a situation which creates any hardship on Mr. Thomson. The evidence does not satisfy me that Mr. Thomson intended to acquire Island No. 2 at the time of his purchase. His own affidavit simply states that he assumed that it was included, although he initially had some questions about that. He purchased and intended to purchase vacant land. Island No. 2 was obviously not vacant land. There is no evidence that he inspected it in any way and that is certainly something which would be done in the normal course. Mr. Thomson paid \$120,000.00 for the property he acquired in 2000. Island No. 2 was worth \$185,000.00 in 2005. It is reasonable to assume that although it was worth less in 2000, it was still of significant value. There is nothing to indicate that it was part of the purchase price of the land Mr. Thomson acquired.
- [61] Mr. Thomson also argues that in essence the original grant to Mr. Grimmett from British Columbia was void because the federal government had already given a grant to Mr. McRae. Therefore, the island was not held by British Columbia (*Holman v. Green* (1881), 6 S.C.R. 707, 2 Cart. 147). In *Holman*, the court determined since the Summerside Harbour in Prince Edward Island was vested in the Dominion of Canada by the Constitution Act 1867, a grant of the same land by the Province of Prince Edward Island was void. However, the Eadies are entitled to rely on the same protection of indefeasibility of title as if the grant had been

valid. That is the intention and the effect of the LTA. Section 23(2)(a) of the LTA states that a certificate of indefeasible title is subject to:

- (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown.

[62] It does not apply to this situation.

[63] It could be argued that s. 25(2)(e) requires an inquiry as to when the original, or very first, instrument was registered in regard to particular piece of property. In other words, an inquiry as to the roots of each parties' title back to the very first registration. This, however, seems to me to be contrary to the entire purpose of the LTA. There does not appear to be any British Columbia cases on point. In the decision *Re Land Registry Act Re Evans Application* (1955), 31 W.W.R. 665 (B.C.S.C.), the court dealt with a situation where the registrar required an amendment to a description of a title in order to avoid a potential conflict. An original lot was described as being sixty-six feet more or less. The original owner divided the lot and conveyed the easterly twenty-six feet of the lot. This was registered in 1905. The original owner then executed a conveyance of the westerly forty feet of the lot which was registered in 1906. The subsequent purchaser of the westerly forty feet objected when the registrar would not register the title as the westerly forty feet due to the potential conflict. The registrar took the position that one of the certificates of title would contain an incorrect description if in fact the property were more less than sixty-six feet. The court held that the description of the westerly forty feet would have to be amended. The court found the registrar could not be compelled to continue with an incorrect description of the westerly portion. The court found that the registrar was correct in determining that he could not satisfy himself that there was a good safe holding and marketable title and, therefore, could not issue a certificate of indefeasible title in the terms described. The registrar was not compelled to perpetuate an error. In the *Evans* case, the court found the registrar was merely clarifying and properly describing the interests. The court found that this was a case in which there had been a wrong description of boundaries, and the registrar was correct in refusing to register the title as presented.

[64] That case is not precisely on point and does not, in my opinion, support the argument that the parties must go back to the original grants to determine which title has priority.

[65] In any event, this is not a case where Mr. Thomson could simply rely on the title as he found it. Despite the allegations in his affidavit, I find that he could not help but be aware of the fact that Island No. 2 was being used and occupied, and that there was clearly some issue as to whether or not it was included in his title. At the very best, he simply chose not to make any inquiries when it was apparent that such inquiries were necessary if in fact he believed he was acquiring Island No. 2.

THE LTIA

- [66] The respondents in this proceeding argue that the LTIA is not available to Mr. Thomson in the circumstances of this case. They argue that it is not available with respect to lands for which a certificate of indefeasible title has been issued. They rely on the decisions *Re Quieting Titles Act Re A Certain Lot in Kootenay District* (1967), 61 D.L.R. (2d) 642 and *Re Canadian Pacific Railway Co.*, [2002] B.C.J. No. 1595, 2002 BCSC1041. The Kootenay District case involves an application to have a transfer of land registered. The difficulty there was that the original transfers and subsequent transfers of land had not been properly registered. The registrar of titles was not prepared to accept this last transfer until the others had been dealt with. The court found that this was not a situation where there was some question about the title of the land, and that the certificate of indefeasible title eliminated any issues with regard to title of land.
- [67] The Canadian Pacific Railway case dealt with a situation where a small portion of a right-of-way did not appear to be subject to any registered title, and after a period of long usage the court found it was appropriate to resolve the issue in favour of the railway at that time. There was no opposition to that application in any event. The court accepted the proposition, however, that the LTIA did not apply to land which was subject to a certificate of indefeasible title under the LTA.
- [68] Mr. Thomson argues that there must be some remedy available to him and that this appears to be the most appropriate legislation to rely on. He argues that this requires a judicial inquiry as contemplated by the LTIA. The LTIA does provide a mechanism for the registration of land after its title has been determined. It is reasonable to argue that there is confusion as to the titles because they overlap in this case and those types of directions would be appropriate. The issue is whether the LTIA provides that direct remedy. I find that it does not apply.
- [69] It is not necessary to bring an application under the LTIA in order to have the issue of conflicting titles resolved. A simple action between parties could be brought in order to obtain a declaration as to ownership of land, which could lead to an order dealing with the clarification of title if it were necessary.
- [70] Based on the analysis below, the LTIA applied to land held under a certificate of indefeasible title only when the claimant is asserting ownership of the land via adverse possession (accrued before 1975), against a first certificate of indefeasible title.
- [71] There are authorities that bluntly state the LTIA does not apply to situations in which a certificate of indefeasible title has been issued.
- [72] In *Reference re Quieting Titles Act (British Columbia)*(1967), 60 W.W.R. 119, sub. nom. *Certain Lot in Kootenay District Re*, 61 D.L.R. (2d) 642, Kirke Smith L.J.S.C. considered Ontario and British Columbia authorities that suggested that the LTIA did not apply to properties held under indefeasible titles (*Re Waters*, sub nom *Re Sherman* (1957), 22 W.W.R.

698 (B.C.S.C.); *Re Certain Lot New Westminster Dist.* (1962), 40 W.W.R. 182, sub nom. *Re Maple Leaf Mills Ltd.*, 35 D.L.R. (2d) 684 (B.C.S.C.); and, *Re Heaslip*, as well as provisions in the Land Registry Act (since renamed the LTA). Kirke Smith L.J.S.C. summarized at 122:

The Quieting Titles Act, in my view, is designed simply and solely to enable the court to investigate and declare a title which is "unquiet." It can, therefore, have no function or application when the title involved is one which has been conclusively certified by the state.

[73] In the recent case of *Re Canadian Pacific*, Smith J. stated at ¶43:

That the Act does not apply to property held under an indefeasible title is established by *Re Quieting Titles Act; Re a Certain Lot, Kootenay District* (1967) 60 W.W.R. 119 (B.C.S.C.).

[74] Academic authorities have also taken the position that the LTIA applies only to land to which no certificate of indefeasible title has been issued. *The Land Title Practice Manual*, 2nd ed., looseleaf (Vancouver, B.C.: Continuing Legal Education Society of British Columbia, 1999) vol. 2 states at §43:

The Act does not address inquiries about indefeasible titles. Rather, it sets out requirements for applications to the court whereby title to unregistered land can be investigated and the validity of title determined

[75] Similarly, Victor Di Castri states in *Registration of Title to Land*, looseleaf (Toronto, Ont.: Thomson Carswell, 1987) vol. 1 at §49:

The statutory declaration of a conclusive title made by a Torrens Act is to be distinguished from a declaration of title made by the court under the Quieting Titles Act. The machinery under the latter Act is intended to enable the court to investigate a title which is "unquiet", e.g., a title based on adverse possession or a prima facie title registered in the absolute fees register, or rights acquired by accretion

[76] Authorities in relation to the LTIA support Di Castri's position. The LTIA has been used in British Columbia to claim ownership of accreted lands (*Quieting Titles Act* (re), [1974] B.C.J. No. 676 (S.C.)(QL); *Neilsen v. Canada (Attorney General)* (1954), 13 W.W.R. (N.S.) 241 (B.C.S.C.), aff'd [1955] 5 D.L.R. 56, 16 W.W.R. 625 (B.C.C.A.), rev'd [1956] S.C.R. 819, 5 D.L.R. (2d) 449) and ownership by way of possession (*Canadian Pacific Railway, Hirst Estate Land Co. (Re)* (1943), 59 B.C.R. 321, [1943] 2 D.L.R. 422, [1943] 2 W.W.R. 666 (S.C.); *Loewem & Erb (Re)* (1892), 2 B.C.R. 135 (S.C.); *McIntyre v. Haynes* (1925), 35 B.C.R. 40, [1925] 2 D.L.R. 546 (C.A.)). Furthermore, it appears that actions for recovery of land to which one or more of the parties hold a certificate of indefeasible title, the LTIA (or its predecessors) is not employed: see e.g. *Nanaimo Ice and Cold Storage Ltd. v. R.* (1946), 63 B.C.R. 150, [1946] 4 D.L.R. 524, [1946] 3 W.W.R. 719 (C.A.). I could not find any cases in which the LTIA had been used in relation to property held under an indefeasible title.

COMPENSATION

[77] Mr. Thomson seeks compensation from British Columbia if his title is found not to include the island. British Columbia argues that if Island No. 2 is not included in the McRae grant, or if Mr. Thomson has failed to prove that it was, that he would not be entitled to any compensation. If Island No. 2 was part of the McRae grant and was subsequently transferred by the Crown in right of British Columbia to Grimmett, then the court could consider the issue of compensation. British Columbia points out, however, that the compensation would be limited to that potentially payable by the Assurance Fund if the conditions required for such payment are met and the application brought within time (LTA, R.S.B.S. 1996 c. 250, ss.296 and 298). The amount of compensation would be limited to the value of the land at the time of the loss; that would be the time of the Grimmett grant (LTA, R.S.B.C. 1996, c. 250, s.304). British Columbia also points out additional limitations to any actions against British Columbia or its ministers, or the registrar of land titles as follows:

48. Section 7(6) of the Land Act provides that:

7 (6) No action may be brought by any person against the government for loss or damage caused by reliance on the records of the registry by that person for any reason or purpose including, without limitation, reliance for the purpose of establishing priorities of interest or reliance on the completeness of the records.

49. Section 18 of the Land Act provides that:

107 Ac action may not be brought against the minister, a public official in the ministry, a person appointed under section 63(2) or a land commissioner for an act or omission done or omitted, in good faith in the performance of a duty imposed or authority conferred under this Act.

50. Section 18 of the LTA provides that:

18 The director and registrar are not, nor is a person acting under their directions, liable personally in a proceeding for or in respect of an act or matter that is, in good faith, done, or omitted to be done, in the exercise or supposed exercise of the powers conferred on either of them, or in the performance of their duties under this Act or any other Act, or under an order or regulation made under this Act or any other Act, or for costs in connection with a proceeding.

51. Further, the Land Act sets out, it is submitted, an exclusive process for adjustment of rights of competing grantees of Crown lands, in s. 53(6).

52. There is no omission or misfeasance of the registrar when he or she performs their statutory duties in accordance with the Act and in a proper manner without neglect:

G.W. Harris Drywall Ltd. v. Reg., Regina Land Registration District (1982), 24 R.P.R. 21 (Sask. Q.B.).

53. Error of a surveyor cannot be attributable to the registrar. An error of survey is not an error of title.

Dempster v. Richardson, Recorder of Titles (1930), 44 C.L.R. 576 at 590.

54. Registrar not guilty of an omission where he carries out a mandatory duty in accordance with relevant authority.

Nazaruk v. Reg. of Land Titles (1969), 5 D.L.R. (3d) 78 (Sask. C.A.).

55. A misapprehension as to the extent of a physical boundary is not a misdescription.

Hawkes Estate v. Silver Campsites Ltd., [1991] 5 W.W.R. 34 (BCCA).

[78] British Columbia referred to the Land Act and the exclusive process for adjustments of rights of competing grantees of Crown lands. However, this is not a situation where there is an adjustment of rights between competing grantees of Crown lands. This is a situation where holders of certificates of indefeasible title are in conflict as to what lands their titles cover.

[79] To make a claim against the Assurance Fund under the LTA must be brought within three years after the loss or damages discovered by the claimant (s. 298(2)):

- (2) Despite the Limitation Act, an action may not be brought against the minister under this section unless the action is commenced within 3 years after the loss or damage is discovered by the claimant.

[80] Clearly, Mr. Thomson was alerted to the possibility of adverse claims to Island No. 2 as early as 2000 or 2001. No action was commenced until 2005, and that would appear to be outside the limitation period. He could have discovered the problem if he had exercised due diligence. In fact, in this case it is a situation where a prudent person would have made inquiries before completing the purchase. It is like purchasing land without bothering to have a survey done when they are aware that there may be some problems, or confusion about the actual boundaries of the property.

[81] In addition, the LTA seems to preclude recovery for compensation in the circumstances which include s. 303(c):

If the land in question may have been included in 2 or more grants from the Crown.

[82] The Crown includes the Federal Crown and Provincial Crown pursuant to the Interpretation Act, R.S.B.C. 1996, c. 238, s. 29.

[83] This section, however, would more appropriately apply where two grants continue to be in existence and the original grant holders are then able to make application to the Crown for correction or compensation. This would not be the situation where there is in fact a dispute between holders of certificates of indefeasible title which may or may not overlap, and are subsequent to the original grantees.

- [84] However, I find that British Columbia is correct that the limitation in the LTA of three years applies to this case, and Mr. Thomson is not able to make his claim against British Columbia. In any event, if he were able to it would be limited to the value of the property in 1936. The evidence is that was \$25.00.
- [85] I have found that in any event Mr. Thomson got what he bargained for, and that did not include Island No. 2. Therefore, he has suffered no loss.
- [86] The Eadies argued the principle of proprietary estoppel.
- [87] They referred to the case *Flello v. Baird*, 172 D.L.R. (4th) 741, 122 B.C.A.C. 96, 200 W.A.C. 96, 67 B.C.L.R. (3d) 293, 1999 BCCA 244 was an appeal from the decision of the trial judge to resolve a disputed boundary between two lots in a subdivision plan. The issues of the boundaries and the correctness of the plan had been outstanding for approximately ninety years. There was not sufficient survey evidence to establish what the actual surveyed lots were. It was agreed that the plan did not represent the survey and that there were errors. The surveyors were unable to agree as to the true boundaries. The owner of lot 29 had a dispute with the owner of lot 28 and in order to support his arguments with the owner of lot 28, he encouraged the owner of lot 30 to rely on a survey and build his house accordingly. Subsequently, the owner of lot 29 purchased lot 28 and then reversed his position, arguing that the survey he had encouraged the lot 30 owner to rely on was incorrect. The court found that this did not create a problem with the Torrens system because the boundaries could not be determined. They were not simply unknown, they were unascertainable and therefore the court could apply the doctrine of proprietary estoppel against the owner of lot 29, and vested the disputed piece of property in the owners of lot 30.
- [88] The court distinguished this from British Columbia case *Hawkes Estate v. Silver Campsites Ltd.*, [1991] 5 W.W.R. 34 (BCCA). In that case it was a dispute about the boundary of a piece of property. The northern boundary of the property was defined by the southern boundary of the Cowichan River as referenced on a map dated 1894. The river had changed its course, moving further north. A declaration was granted that the owner of the land to the north owned the land defined by the original property line, and not the new southern boundary of the river. The basis was that the 1894 boundaries could be determined by modern survey techniques and there was no erroneous conveyance earlier in the chain of title. The court in *Hawkes* did not apply the doctrine of conventional boundary because it was in conflict with the Torrens system which provided conclusive evidence of indefeasible title to the land described. I find that the principle of proprietary estoppel and the doctrine of principle of conventional boundary do not apply in the present case.

[89] Despite my findings, the present state of the titles could cause confusion in the future. It seems to me that the best way to remedy this confusion is for the Thomson title to be amended to make it clear that it excludes Island No. 2. I am not sure of the exact process that should be followed, but I find that the result would benefit both Mr. Thomson and the Eadies, and that they should share equally in the cost of that process. Either party are at liberty to apply to the court for further orders or directions regarding this remedy.

COSTS

[90] British Columbia has not taken sides in this litigation. British Columbia, in fact, provided a great deal of assistance to the parties by providing evidence which assisted the court and the parties. There is no reason for costs to be ordered against British Columbia. Neither Mr. Thomson or the Eadies are responsible for any confusion that may have arisen because of the history of the properties. This litigation has hopefully helped to resolve any confusion regarding the title to Island No. 2, and the extent of Mr. Thomson's title as well. I appreciate that this has caused each of the parties a great deal financially and emotionally. However, in the circumstances, and despite the fact that I have found in favour of the Eadies, I find that this is an appropriate case to order that all of the parties bear their own costs.

"R.E. Powers, J."

The Honourable Mr. Justice R.E. Powers

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