

## ***Downey v Nova Scotia (Attorney General),***

**2020 NSSC 201**

Campbell J., —

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

### **Summary**

[2] The policy requirement that an applicant establish adverse possession of property for a period of 20 years to show apparent entitlement in order to have an application for a certificate of claim under the *Land Titles Clarification Act* considered, is not mandated by the act. The policy is not consistent with the purpose of the legislation. The Minister's decision is set aside, and the matter is remitted for reconsideration. Adverse possession for 20 years may be a factor to assist in determining apparent entitlement but the absence of proof of adverse possession is not a barrier to having an application considered.

### **The *Land Titles Clarification Act***

[3] On November 24, 2017 Mr. Downey filed an application for land titles clarification under the *Land Titles Clarification Act* with respect to a property at 39 Beals Crescent in North Preston. The history, context and purpose of that legislation has been reviewed in detail by my colleague Justice Bodurtha in *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60 (N.S. S.C.).

[4] African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates. That is a fundamental historical fact and an observation of present reality.

[5] That has real implications for things like land ownership. Residents in African Nova Scotian communities are more likely to have unclear title to land on which they may have lived for many generations. That is because in those communities, informal arrangements were more common. Financial and other obstacles made it less likely that people in those communities would retain lawyers and surveyors to research title, register deeds or wills, or to survey boundaries. People may have lived on land for generations without having title registered. No one else might

claim it and it may be that no one in the community disputes their entitlement to it. But they still have no formal title.

[6] The legislation under which Mr. Downey made his application was intended to provide people who live in designated areas with a simpler and less expensive way to clarify title to their property. North Preston is one of those designated areas.

[7] Under the legislation a person who resides in Nova Scotia and claims to own land in one of the designated areas can make an application for a certificate of claim. That application must contain a description of the land so that it can be identified and distinguished from other land. The application must include a concise statement of the facts on which the person bases the claim for ownership, and it must name other people who have occupied the land or who have claimed ownership or an interest in the land. That application must be accompanied by an abstract of title, a statutory declaration attesting to the history of the occupation of the land and a statement showing the names of anyone who holds any form of charge on the land, like a mortgage or judgment. It could be described as an alternative to the more cumbersome, expensive and time-consuming process of the *Quieting Titles Act* R.S.N.S., c. 382. One of the issues here is just how much more expedited that process should be in order to achieve the purposes of the legislation.

[8] Section 4(4) of the *Land Titles Clarification Act* provides that the Minister of Lands and Forestry may require the applicant to provide any information that the Minister desires and may require the applicant to verify any material or information accompanying the application. That provides the Minister with considerable discretion in terms of the information that may be required.

[9] The certificate of claim is the first step toward obtaining a certificate of title. Section 5(1) says that when it appears from the application that the “applicant is entitled to the lot of land” the Minister may issue a certificate of claim. If the Minister cannot determine whether the applicant is entitled to the land the matter is referred to a commissioner to examine the claim. That commissioner, who is a barrister appointed by the Minister, recommends issuance of a certificate or provides reasons for not making the recommendation. When the commissioner recommends issuing a certificate of claim, the Minister may issue one without making further inquiries.

[10] Once a certificate of claim is issued the Minister is required to register it. The public is notified through publication in a newspaper. The certificate of claim then places an onus on those who also claim an interest in the land. Holders of liens, mortgages and judgments affecting the land, which have been in place for more than 2 years and on which no payments or written acknowledgments have been made for two years or more are required to take steps to enforce the security. Once notice has been provided, they have 3 months to enforce it. If steps are not taken the lien or charge on the property, it is deemed to no longer be binding on the land. Others, who claim an interest in the land can file a

notice with the Minister within 60 days of the certificate of claim having been filed. That person then has 60 more days within which to start an action in the Supreme Court for a declaration that the interest they claim is valid. If that action has not been started the Minister will grant a certificate of title to the applicant.

[11] So, the certificate of claim starts a process by which other interested parties are then required to take some action to either enforce the registered charge on the property if they have one, or make a formal claim for a declaration of an interest in the land. If no claims are made within the time limits set out in the act, the Minister is required to grant the certificate of title. The applicant then has title to the land in fee simple.

[12] The issuing of a certificate of claim is then more than an acknowledgement that a claim has been made. It grants that claim status as a presumptive interest in the land which others are then required to contest.

[13] The Minister “may” issue a certificate of claim, when it appears that the applicant is “entitled to the lot of land”. The Minister then has to make a determination of whether the applicant appears to be “entitled”. The legislation does not set out the grounds upon which the Minister can make that determination and does not provide any definition of entitlement. What does it mean to be “entitled” to land, within the context of this remedial legislation?

### **The Application**

[14] In Mr. Downey’s case, he filed an application with respect to a small portion of another larger parcel of land. The property was confirmed to be within one of the designated areas to which the *Land Titles Clarification Act* applies. No certificate of title had been issued previously for that property. Mr. Downey’s lawyer filed an abstract of title, a statutory declaration and a statement listing the encumbrances on the property.

[15] Mr. Downey’s statutory declaration set out the history of the property. He and his wife had built a home there between the summer of 2001 and October 2002. They had lived in the house continuously since then.

[16] His great grandfather Peter Beals and his wife, Heidi, had settled on the larger parcel ten-acre lot that included the property at 39 Beals Crescent. That was in 1913. That larger parcel was passed on to their daughter, Mr. Downey’s grandmother, Lena. Lena and her husband, James Downey Sr. built a new house there. Lena (Beals) and James Downey Sr. got a certificate of title under the predecessor legislation the *Community Land Titles Clarification Act* in 1970. That house lot is now owned by Wesley Kay Downey and Mary Jo-Ann Neish. That larger property has road access and 39 Beals Crescent could only have road access if a right of way were granted by the owners of that larger parcel. Mr. Downey now gets access to the road over that property.

[17] The smaller parcel of property claimed by Christopher Downey and on which his house has been built, was at one time claimed by his uncle, Texas Downey

and his wife Jennifer Downey. They have relinquished that claim and have given the land to Christopher Downey and his wife, Christselina.

[18] From the time the house was built in 2001/2002 Mr. Downey says that no one has disputed his claim to ownership. He added a front deck to the house in 2011 and paved and extended the driveway. He built a back deck and a fence in 2016. He has tried to pay property taxes but because he was not the assessed owner of the land he could not. Mr. Downey says that other people in the community know that he and his wife have lived on the land and they consider it to belong to them.

[19] Pastor Wallace Smith was born in North Preston in 1941 and has lived there almost all of his life. He knows the area and the people who live in it. He confirmed Mr. Downey's history of the property.

[20] When Mr. Downey's claim was considered, the Senior Land Administration Officer in the Department of Lands and Forestry informed Mr. Downey's lawyer that the 20-year limitation period to establish ownership based on adverse possession had not been met.

#### **The Issue**

[21] The issue is whether the denial of the certificate of claim based on a requirement of 20 years of adverse possession was unreasonable.

#### **[22] The Standard of Review**

[23] Reasonableness is now the presumptive standard of review in all cases. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.), at para. 10.

[24] In *Vavilov* the Supreme Court of Canada said that there are two ways in which an administrative decision can be found to have been unreasonable. The first is if there has been a failure of rationality internal to the reasoning process. The second is if the decision is untenable in light of relevant factual and legal constraints that bear on it. The issue here is whether the interpretation of the *Land Titles Clarification Act* by the Department of Lands and Forestry in Mr. Downey's case is untenable in light of the relevant factual and legal constraints.

[25] The approach to review based on the reasonableness standard is intended to take into account the various kinds of administrative decisions that are subject to review. What is reasonable in a given situation depends on constraints imposed by the legal and factual context of that particular decision. "These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt." *Vavilov*, at para. 90.

[26] The court provided examples of the "constraints". They include the governing statutory scheme and the principles of statutory interpretation, relevant statutory or common law, past practices and decisions of the Department, and the potential impact of the decision on the individual to whom it applies.

[27] **Legislative Constraints**

[28] The governing statute is always a constraint on administrative decision makers. The Department of Lands and Forestry must operate within the constraints imposed by the *Land Titles Clarification Act*.

[29] Section 4 of the act sets out the information that is required for a person to apply for a certificate of claim. That document is required before a person can get a certificate of title. It is a first step. The section deals with the quality of the information that must be provided by a person making a claim. It does not require that a claimant establish a period of 20 years of adverse possession or provide information that would allow the Department to assess whether the property had been occupied for 20 years. It contains no reference at all to adverse possession or facts that would establish a claim of adverse possession. It does require that the applicant provide a history of the occupation of the land. That history then must have some bearing on the apparent entitlement of the applicant to the land that is the subject of the application.

[30] Section 5 requires the Minister to determine whether it appears as though the applicant is entitled to the lot. The legislation is silent on the basis upon which entitlement is established. There are no regulations. The legislation does not specifically require a period of possession for 20 years, but it may be presumed that entitlement must be based on some objective criteria in order for that issue to be assessed.

[31] The Minister cannot fetter their discretion by applying a standard that is not set out in the legislation. In *Chaffey v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56 (N.L. S.C.), the Minister of Justice had refused to issue a licence under the *Exhumation Act* because the applicant had not established the consent of the deceased's next of kin. That criterion was found in the application form for the licence, but it was not contained in the legislation. The court found that a statutory decision maker with wide discretionary authority cannot fetter that discretion by imposing one or more conditions that must be met before the authority can be exercised. The court said that administrative decision makers who treat policies as if they were law and consider themselves bound by them are fettering their discretion and making an unreasonable decision.

[32] Justice Noel in that case answered the question that this proposition inevitably raises. Decision makers have to be able to rely on some factors, otherwise their decisions are open to being criticized as being arbitrary. How do they consider those factors without fettering their discretion? Justice Noel noted that the legislation did not contain any direction as to how the Minister's discretion should be exercised. A policy that required the Minister to take into consideration the presence or absence of consent would be justifiable. But to say that no consideration would be given to a request in the absence of consent would be an abdication of the statutory responsibility to consider all circumstances. Any absence of consent is one factor in the consideration of all the circumstances for

or against the grant of a licence.

[33] Applying that reasoning to this case, having 20 years of adverse possession would be a factor that could be considered when assessing entitlement. It is not set out in the legislation as a condition precedent to having an application considered and it should not be treated, in effect, as one. The Minister is required to assess whether it appears as though the applicant is entitled to the land. Possession over a period of time can be good evidence of such an entitlement but if it is treated as a requirement it is no longer a form of proof but a hurdle.

[34] Possession itself may be proof of entitlement but requiring adverse possession would be inconsistent with the purposes of the *Land Titles Clarification Act*. Adverse possession must be open, notorious, adverse, exclusive, peaceful, actual, and continuous. The holder of legal title can be displaced by a trespasser whose possession of land is unchallenged for a set time. That time is usually set out by statute. In Nova Scotia it is set out in the *Real Property Limitations Act*. Section 10 of that act prevents actions from being taken for recovery of land beyond 20 years from the date on which the action could first have been taken. The *Land Titles Clarification Act* and the *Real Property Limitations Act* do not reference each other. The *Land Titles Clarification Act* deals with addressing historical wrongs, by simplifying the process by which people can obtain title to land. The 20-year time limitation set out in the *Real Property Limitations Act* has nothing to do with that process.

[35] Adverse possession is a concept that acts to prevent a person from being displaced by the legal title owner of the land. The person in possession is necessarily not the holder of that legal title, otherwise the possession would not be adverse. The *Land Titles Clarification Act* is intended to clarify title to land of which the applicant claims to be the real owner.

[36] Adverse possession is an impractical test in the context of the remedial nature of the legislation. A person like Mr. Downey who was permitted by a relative to build a house on a piece of land could not claim that he occupied the land in a way that would be adverse to the interests of his relative or to those of some unknown holder of the legal title. In Mr. Downey's case, no one has ever disputed his, or his family's ownership, or occupation of the land.

[37] Adverse possession deals with a situation in which the legal title is clear but is inconsistent with the facts of long-term occupation on the ground. The *Land Titles Clarification Act* is intended to deal with the situation in communities in which the legal title is for various historical reasons, unclear.

[38] **Previous Decisions**

[39] One of the constraints that should be considered as bearing upon the decision is the past decisions made by the administrative body. Adverse possession was a test for entitlement has been used by the Department of Lands and Forestry likely since 2015. The test is set out in the application materials and in various presentations made to public and stakeholder groups. Justice

Bodurtha acknowledged the test in *Beals* but that was not an issue that he was required to decide in that case. Inconsistency of application can render a decision unreasonable. Consistent application of an unreasonable standard cannot make it reasonable. A test cannot be deemed reasonable simply because an administrative decision maker has consistently applied a factor that was not mandated by the legislation as a condition precedent.

[40] **Impact of the Decision**

[41] The impact of the decision on the applicant is a consideration. In this case, Mr. Downey is seeking to have clarification of title to the land that he says he has occupied for close to 20 years. As Justice Bodurtha noted in *Beals*, the lack of clear title and the segregated nature of their land triggered a cycle of poverty for black families that persisted for generations. The *Land Titles Clarification Act* was intended to help in redressing that historical wrong. By requiring Mr. Downey to prove adverse possession for 20 years or more, he is left with his house built on land to which he does not have clear title.

[42] If he waited for just another year, he would meet the 20-year standard. While that may be true, it is not entirely clear that he would meet the test of adverse possession, because it is not clear against whom he would be claiming that right.

[43] **Conclusion**

[44] The decision to not grant a certificate of claim because adverse possession has not been established was unreasonable and the decision is set aside.

[45] As noted in *Vavilov* when a decision reviewed by applying the reasonableness standard cannot be upheld, it is most often appropriate to remit the matter to the decision maker for reconsideration. The decision maker may arrive at the same, or a different conclusion.

[46] Mr. Downey's application is remitted to the Minister for reconsideration, without the requirement that he prove 20 years of adverse possession. The length of time during which he has openly occupied the land may be a factor for consideration but adverse possession for 20 years is not a condition precedent to assessment of his claim.

[47] Mr. Downey has not claimed costs in this matter.

[48] *Application granted.*