

THE CLARIFICATION OF TITLES ACT --

Report and Commentaries

Office of the Attorney General
Law Reform Branch
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INTRODUCTORY NOTE

The proposed Clarification of Titles Act was presented to the Legislative Assembly in 1991, and was referred to the Standing Committee on Law Amendments for review. The Committee held hearings, but before it could report, the Legislative Assembly was dissolved for the 1991 provincial election.

This paper contains the Bill and the explanatory material prepared for the Committee.

4th Session, 51st Legislature
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BILL

CLARIFICATION OF
TITLES ACT

PROJET DE LOI

LOI SUR LA
CLARIFICATION DES TITRES

HON. JAMES E. LOCKYER, Q.C.

L'HON. JAMES E. LOCKYER, c.r.

Clarification of Titles Act

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1 In this Act

“closing date” means a date on which a transaction with respect to land occurs;

“fee simple” means a legal fee simple absolute;

“notice of claim” means a notice of claim registered under section 7;

“registered” means registered in accordance with the *Registry Act*;

“root of title” means the most recent document, other than a will, that purports to convey a fee simple and is registered at least forty years immediately before the closing date;

“title” means the fee simple estate in land;

“title period” means the period commencing on the day the root of title is registered and ending on the day immediately before the closing date.

Loi sur la clarification des titres

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:

1 Dans la présente loi

«avis de demande» désigne un avis de demande enregistré en vertu de l'article 7;

«date de clôture» désigne la date à laquelle une transaction à l'égard d'un bien-fonds survient;

«durée du titre» désigne la période débutant le jour de l'enregistrement du titre originaire et terminant fin le jour précédant immédiatement la date de clôture;

«enregistré» signifie enregistré conformément à la *Loi sur l'enregistrement*;

«fief simple» désigne le fief simple en common law absolu;

«titre» désigne le droit de tenure en fief simple dans un bien-fonds;

«titre originaire» désigne le document le plus récent, autre qu'un testament, qui est enregistré comme transférant un fief simple et qui est enregistré au moins quarante années immédiatement avant la date de clôture.

Nothing in this Act shall be construed as causing or permitting the revival of an interest in land if a person has lost the right to recover under the *Limitation of Actions Act*.

This Act binds the Crown.

1) This Act does not apply to a title with respect to

- (a) ungranted Crown lands,
- (b) a public road, highway or Crown reserved road,
- (c) a railway right of way, or
- (d) land the title to which is registered under the *Land Titles Act*.

(2) This Act does not apply to an interest

- (a) that is reserved to the Crown in a Crown grant,
- (b) in minerals that are property separate from the soil where the interest has been separated from a fee simple,
- (c) in minerals that are property separate from the soil where the interest is vested in the Crown,
- (d) acquired by the public by dedication or adverse use, or
- (e) in a public utility easement.

3(1) An interest in land that is a fee simple that existed before a title period is extinguished.

3(2) Subsection (1) does not apply if a notice of claim is registered with respect to the fee simple before the end of the first title period

2 Rien à la présente loi ne peut être interprété de manière à causer ou à permettre la renaissance d'un droit dans un bien-fonds qu'une personne a perdu le droit de recouvrer en vertu de la *Loi sur la prescription*.

3 La présente loi lie la Couronne.

4(1) La présente loi ne s'applique pas

- (a) aux terres de la Couronne non concédées,
- (b) à un chemin public, une route ou un chemin réservé à la Couronne,
- (c) à un droit de passage de voie ferrée, ou
- (d) à un bien-fonds dont le titre est enregistré en vertu de la *Loi sur l'enregistrement foncier*.

4(2) La présente loi ne s'applique pas à un droit

- (a) qui est réservé à la Couronne sur une concession de la Couronne,
- (b) dans un minéral qui est un bien détaché du sol lorsque le droit a été détaché d'un fief simple,
- (c) dans un minéral qui est un bien détaché du sol lorsque le droit est dévolu à la Couronne,
- (d) acquis par le public par affectation ou usage adversatif, ou
- (e) à une servitude d'une entreprise de service public.

5(1) Un droit dans un bien-fonds qui est un fief simple qui existait avant une durée du titre est éteint.

5(2) Le paragraphe (1) ne s'applique pas si un avis de demande est enregistré à l'égard d'un fief simple avant la fin de la première durée du titre

(a) that commences after the fee simple arose, and

(b) in which the document that conveys the fee simple is not the root of title.

5(3) An interest in land that is not a fee simple is extinguished at the end of forty years after the date when the interest was conveyed or created, unless a notice of claim with respect to the interest is registered before the end of the forty years.

6(1) If a person has an interest in land that arises by adverse possession, the person shall be deemed to have registered a notice of claim in accordance with this Act.

6(2) Subsection (1) ceases to apply when the person discontinues possession of the land.

6(3) Notwithstanding subsection (2), a person referred to in subsection (2) who has an interest in land that arises by adverse possession may protect the interest in the land by registering a notice of claim in accordance with this Act before the person discontinues possession.

7(1) A person who has an interest in land referred to in section 5 or 6 may register a notice of claim in the form prescribed by regulation.

7(2) A notice of claim shall

- (a) provide a description that is sufficient for identification of the land to which the claim relates,
- (b) identify the type of interest being claimed,
- (c) specify the grounds for the claim,
- (d) provide the name of the registered owner of the land, and

a) qui débute après que le fief simple est survenu, et

b) dans lequel le document qui transfère le fief simple n'est pas le titre originaire.

5(3) Le droit dans un bien-fonds qui n'est pas un fief simple est éteint à la fin de quarante années suivant la date à laquelle le droit a été transféré ou créé à moins qu'un avis de demande à l'égard du droit ne soit enregistré avant la fin des quarante années.

6(1) Si une personne a un droit dans un bien-fonds qui résulte de la possession adversative, la personne est réputée avoir enregistré un avis de demande conformément à la présente loi.

6(2) Le paragraphe (1) cesse de s'appliquer lorsque la personne discontinue la possession du bien-fonds.

6(3) Nonobstant le paragraphe (2), la personne visée au paragraphe (2) qui a un droit dans un bien-fonds qui résulte de la possession adversative peut protéger le droit dans le bien-fonds en enregistrant un avis de demande conformément à la présente loi avant que la personne ne discontinue la possession.

7(1) La personne qui a un droit dans un bien-fonds visé à l'article 5 ou 6 peut enregistrer un avis de demande au moyen de la formule prescrite par règlement.

7(2) L'avis de demande doit

- a) fournir une description suffisante permettant l'identification du bien-fonds auquel la demande se rapporte,
- b) identifier le genre de droit demandé,
- c) spécifier les motifs de la demande,
- d) fournir les nom et prénom du propriétaire enregistré du bien-fonds, et

(e) provide the name of any person whom the person registering the notice of claim believes to have or is claiming to have a fee simple interest in the land.

7(3) A notice of claim expires forty years after the date of its registration.

7(4) The registration of a notice of claim does not protect, validate, extend or revive an interest in land that is extinguished or invalid.

7(5) A notice of claim may be renewed from time to time by the registration of a notice of claim in accordance with subsection (1) before the expiration of the existing notice of claim.

7(6) A person is not entitled to an extension of the period during which a notice of claim may be registered.

8(1) Notwithstanding any other provision in this Act, a certificate of title under the *Quieting of Titles Act* that is registered less than forty years before the closing date shall be deemed to be a root of title.

8(2) Notwithstanding any other provision in this Act, a certificate of title under the *Quieting of Titles Act* that is registered at least forty years before the closing date shall be deemed to be a root of title if no other subsequently registered document qualifies as a root of title to the land.

8(3) Where a certificate of title under the *Quieting of Titles Act* constitutes a root of title, the title to the land is subject to

(a) existing charges, encumbrances, exceptions or qualifications contained in the certificate or in the schedule attached to the certificate, and

e) fournir le nom et prénom de toute personne qui, selon ce que croit la personne qui enregistre l'avis de demande, a ou prétend avoir un droit en fief simple dans le bien-fonds.

7(3) Un avis de demande prend fin quarante années après la date de son enregistrement.

7(4) L'enregistrement d'un avis de demande ne protège pas, ne valide pas, ne proroge pas ou ne fait pas renaître un droit dans un bien-fonds qui est éteint ou qui est invalide.

7(5) L'avis de demande peut être renouvelé de temps à autre au moyen de l'enregistrement d'un avis de demande conformément au paragraphe (1) avant l'expiration de l'avis de demande en vigueur.

7(6) Une personne ne peut avoir droit à une prorogation du délai pendant lequel un avis de demande peut être enregistré.

8(1) Nonobstant une autre disposition de la présente loi, un certificat de titre de propriété prévu à la *Loi sur la validation des titres de propriété* qui est enregistré moins de quarante années avant la date de clôture est réputé être un titre originaire.

8(2) Nonobstant une autre disposition de la présente loi, un certificat de titre de propriété prévu à la *Loi sur la validation des titres de propriété* qui est enregistré au moins quarante années avant la date de clôture est réputé être un titre originaire si aucun autre document enregistré subséquemment ne répond aux exigences requises pour constituer un titre originaire dans un bien-fonds.

8(3) Lorsqu'un certificat de titre de propriété prévu à la *Loi sur la validation des titres de propriété* constitue un titre originaire, le titre d'un bien-fonds est assujéti

a) aux charges existantes, exceptions ou réserves qui sont mentionnées au certificat ou dans l'annexe du certificat, et

(b) existing interests in the land that are conveyed or created after the certificate is issued.

8(4) Subject to section 4, all charges, encumbrances, exceptions, qualifications or other interests referred to in subsection (3) are subject to extinguishment in accordance with this Act.

9 The New Brunswick Geographic Information Corporation is responsible for the administration of this Act and the regulations and may designate persons to act on behalf of the Corporation for the purposes of this Act and the regulations.

10 The Lieutenant-Governor in Council may make regulations

(a) prescribing the form and content of the notice of claim referred to in subsection 7(1);

(b) respecting the manner in which a notice of claim is to be registered and indexed.

11 Subject to section 4, this Act applies to all interests in land that are in existence on the commencement of this Act.

12 A person who has an interest in land that would be extinguished by the operation of section 5 or 6 may, before the commencement of these sections, register a notice of claim in order to preserve the interest.

13 *This Act or any provision of it comes into force on a day or days to be fixed by proclamation.*

b) aux droits existants dans le bien-fonds qui sont transférés ou créés après que le certificat est délivré.

8(4) Sous réserve de l'article 4, toutes les charges, exceptions, réserves ou autres droits visés au paragraphe (3) sont assujéti à l'extinction conformément à la présente loi.

9 La Corporation d'information géographique du Nouveau-Brunswick est responsable de l'application de la présente loi et des règlements et peut désigner des personnes pour la représenter aux fins de la présente loi et des règlements.

10 Le lieutenant-gouverneur en conseil peut émettre des règlements

a) prescrivant la formule et le contenu de l'avis de demande visé au paragraphe 7(1);

b) concernant la manière selon laquelle l'avis de demande doit être enregistré et indexé.

11 Sous réserve de l'article 4, la présente loi s'applique à tous les droits dans un bien-fonds existant lors de l'entrée en vigueur de la présente loi.

12 Une personne qui a un droit dans un bien-fonds qui serait éteint par l'application de l'article 5 ou 6 peut, avant l'entrée en vigueur de ces articles, enregistrer un avis de demande afin de conserver ce droit.

13 *La présente loi ou l'une de ses dispositions entre en vigueur à la date aux dates fixées par proclamation.*

**Report Concerning the
"Clarification of Titles Act"**

The purposes of the proposed Act are:

(a) To render more certain title to land through clarifying certain issues.

(b) To facilitate real estate transactions by dealing with certain issues that affect the marketability of titles.

(c) To render simpler and more certain the process of searching and certifying titles.

This report deals with each of those objectives in turn and explains how the proposed Act seeks to accomplish them.

(a) A principal source of uncertainty as to the state of a title in a registry system such as ours is the fact that instruments of considerable vintage remain in the system concerning interests that may or may not be subsisting. A prime example is the undischarged mortgage.

The proposed Act deals with this issue by requiring persons with claims to land that are based on "old" transactions to give current advice of their claims by registering notices of such claims in the registry system. The provisions that address this matter directly are sections 5, 6 and 7.

Subsection 5(1) would extinguish a fee simple absolute interest that arose prior to the title period unless a notice of claim is registered during the title period. For this purpose the title period is a period of at least forty years that commences with the registration of a root of title and ends on the day immediately preceding the date on which the state of the title is to be established, that is, the transaction closing date. The relevant root of title is the fee simple instrument that is the last one registered at least forty years before the closing date.

For example, if the closing date for sale of Blackacre is June 1, 1990 the title period will begin with the last fee simple instrument that was registered before June 1, 1950. If that instrument was registered on June 1, 1945, then the title period will be a period of forty-five years. A claim to a fee simple estate in Blackacre based on a transaction that took place before June 1, 1945 would be extinguished unless the claimant registered a notice of such claim sometime between June 1, 1945 and June 1, 1990. The claim would have to be registered by May 31, 1990 since that is the day on which the title period would end in this example.

An exception to subsection 5(1) would arise in the case where the root of title consists of a registered certificate of title issued under the Quieting of Titles Act. Such a

certificate would constitute a good root of title regardless of when it was registered, that is, whether it was registered before or during the forty year period mentioned above. The only claims predating the certificate that would be protected would be those identified in the certificate itself or in the schedule to it. A claim based on a fee simple instrument postdating the certificate would be protected if either that instrument or the certificate were to constitute the root of title. In either of those cases the claim would have arisen during the title period.

Under subsection 5(2), a claim to an interest less than a legal fee simple absolute would be extinguished after forty years from the date that it arose unless a notice of claim is registered before the expiration of that forty year period. In other words, any interest less than a legal fee simple absolute would have an initial maximum lifespan of forty years. If the interest is capable of lasting longer than forty years, that can be accomplished by registering a notice of claim before the forty year lifespan expires. A notice of claim would be valid for forty years and could be renewed by registering a new notice before the expiration of the prior notice.

For example, a mortgage dated June 1, 1960 would expire on May 31, 2000 unless a notice of claim is registered by that date. A person searching title on June 1, 2000 could ignore

that mortgage even though it was registered during the title period if its life had not been extended by the registration of a notice of claim.

Similarly, if a ninety-nine year lease had been granted on June 1, 1960 it would expire on May 31, 2000 unless a notice of claim is registered by that date. The onus would be on the person claiming the leasehold interest to give currency to that claim by registering a notice, otherwise the claim would be extinguished.

The purpose of section 5 is to ensure that apparent claims to interests in land based on registered documents are reasonably current. It is consistent with other aspects of our registry system in which claims must be renewed and kept current in order to be continued.

Section 6 makes special provision for claims based on adverse possession. As long as the possession continues it will not be necessary for the claimant to register a notice of claim. However, if the possession is discontinued, the title will be extinguished unless the claimant registers a notice of claim. This is intended to prevent persons proposing to purchase the land from the registered owner from suffering a loss due to lack of evidence of the adverse claimant's title.

Section 7 makes provision for the registration of notices of claim in order to prevent interests from being extinguished under section 5. An interest that is capable in law of surviving the lifespan indicated in section 5 can be continued in existence by complying with the notice requirements.

Section 12 is a transitional provision that will allow the registration of notices under section 7 before sections 5 and 6 come into force. This is intended to ensure that interests will not be extinguished before claimants have ample opportunity to protect them.

As a general rule, under the Act the only interests to which a title to land will be subject are those:

(i) which are exempt from the application of the Act by Section 4;

(ii) which have not been extinguished through passage of time; and

(iii) which have been continued in existence through registration of notices of claim.

(b) It is anticipated that the Act will facilitate real estate transactions by extinguishing interests that could constitute clouds on the title. The Act does not purport to produce a marketable title because the conflicting interests that survive extinguishment under the Act could, of course, prevent the title from being marketable.

It is anticipated, as well, that the operation of the Act will obviate the need in some cases to institute proceedings under the Quieting of Titles Act in order to establish the state of a title. Similarly, it should reduce the incidence of requisitions on title and the cost and inconvenience of the negotiations and possibly litigation that may be necessary to resolve such matters. By those means the Act should serve to facilitate commerce in land.

(c) The Act does not, as such, limit the title search to a specified number of years. Except in the case where a certificate under the Quieting of Titles Act constitutes the root of title, the search must cover a longer period than forty years because to constitute a good root of title an instrument must have been registered more than forty years before the closing date. Accordingly, the required search period could be slightly in excess of forty years or considerably longer, depending on the circumstances of the case.

In addition, the presence of some of the exceptions contained in section 4 could mean that the search should be taken back to the Crown grant in order to ensure that all of the interests identified in section 4 have been discovered. It is not anticipated, however, that such an extensive search will be required in many cases. Even where it is indicated, such a search would be considerably more limited in scope than is a thorough search under the present law because of the types of interests toward which the extended search would be directed.

What would facilitate and relieve the work of the title searcher in particular would be the entitlement, without concern, to ignore "vintage interests" for which no current notices of claim have been registered.

It should be emphasized, as well, that nothing in the proposed Act is intended to lower the standard of care that the title searcher is required to meet. A searcher who failed to meet that standard in carrying out a search in accordance with the requirements of the Act would be liable for negligence as is the case today.

(d) Summary of Legislation

The operation of the Proposed Clarification of Titles Act may be summarized as follows:

(i) A search of title would have to be carried back to a good root of title which, in most cases, would entail a search period of more than forty years. The exception would be where the root of title consists of a certificate under the Quieting of Titles Act that was registered less than forty years before the search was undertaken.

(ii) Legal fee simple absolute interests that arose before the title period, that is, before the root of title was registered, would be extinguished unless a notice of claim had been filed during the title period.

(iii) Interests less than a legal fee simple absolute would be extinguished after forty years unless a notice of claim was registered before the forty year lifespan expired.

(iv) In searching title, the searcher could ignore any interest that had been extinguished, notwithstanding that it arose during the title period.

(v) The only interests about which the searcher would have to be concerned would be those exempted from application of the Act and those that have not been extinguished by operation of the Act.

(vi) The presence of some of the interests identified in section 4 could require that a limited search be conducted for a period longer than the title period.

(vii) Interests that are subject to extinguishment under the Act could be protected by the registration of notices of claim. While such a notice would have an effective life of forty years, the registration of a new notice before the expiration of that period could serve to keep the claim alive indefinitely.

(viii) Where a claim based on adverse possession is accompanied by continuous possession of the land in question since the interest arose, the required notice would be deemed to have been registered. However, if such possession is discontinued, actual registration of a notice of claim would be required to prevent the title from being extinguished.

(ix) Implementation of the provisions of the Act by which interests would be extinguished would be delayed for a sufficient period to allow persons with such interests to register notices of claim.

Clarification of Titles Act

COMMENTARIES

1. Section 1 - Interpretation

Most of the definitions do not require explanation. The following observations are offered for greater understanding of the underlying concepts of the Act.

"closing date" - The Act operates, among other things, to establish the length of a search that will be required to determine the state of the title to land. The premise is that the state of the title is to be determined for the purpose of a proposed transaction. Accordingly, the length of the required search is established in relation to the closing date of a transaction.

"root of title" - To serve as a root of title an instrument must be registered at least forty years before the closing date in relation to which a search is being conducted. This ensures that every search of title will cover a period of at least forty years. This ties in with section 5 under which interests less than fees have a life of only forty years. That life can be extended by the registering of notices of claim that are valid for forty years. A fee

simple that predates the root of title can be continued by registering a notice of claim during the title period. As a consequence, a title search of at least forty years will encompass all interests and claims that are currently valid.

"title period" - The title period is the period during which a search of title must be conducted in a particular case. The title period begins with the registration of the root of title and ends on the date immediately preceding the closing date. As noted above, this will be a period of at least forty years and can be considerably longer if the property has not been actively traded.

The search of title will be limited to the title period since, by operation of the Act, only interests that arise during the title period or for which notices of claim are registered during the title period need to be taken into account in determining the state of the title.

2. Section 2 - Limitations of Action Act

A landowner who is dispossessed of land and fails to take action in time to recover possession loses title to the land by operation of the Limitations of Action Act.

Section 2 makes it clear that this Act does not operate in any way to revive an interest that has been lost in that manner.

3. Section 3 - Act Binding on Crown

As a general matter, the Act applies to the Crown as it does to other owners of interests in land. By section 4, however, certain significant exceptions are created in relation to interests of the Crown.

4. Section 4 - Application

This section exempts certain types of interests from the application of the Act. Such interests are not usually a source of uncertainty or difficulty for searchers. As a consequence, the benefits that might be realized from subjecting them to the Act would be outweighed by the costs and inconvenience that would result to their owners from compliance with the notice requirement.

5. Section 5 - Extinguishment of Interests

In order to limit title searches to the "title period" it is necessary to extinguish every interest that does not arise during the title period or for which a notice of claim is not registered during the title period. As a consequence, any interest that arose before the title period began will be extinguished unless a valid notice of claim is registered during the title period.

An interest that is less than a fee simple has an initial lifespan of only forty years. It can be continued in existence by the registering of a notice of claim before that forty year period runs out. Since the title period will be somewhat longer than forty years, it is possible for an interest to arise after the root of title is registered and to be extinguished before the title period ends. Any interest that ceases to be valid before the title period ends will not, of course, affect the state of the title. That has always been the case. The only difference the Act makes in that regard is to cause interests that might have lasted for more than forty years to be extinguished at the end of that period if the required notices of claim are not registered in time.

6. Section 6 - Adverse Possession

A title acquired by adverse possession is not subject to the requirements of the Act as long as the possession continues. However, if that possession is discontinued the title will be lost if a notice of claim is not registered.

At present, a claim based on adverse possession can be valid without the need to enter it in the registry system. A prospective purchaser of the land from the registered

owner should not be prejudiced by the lack of such registration as long as the possession is apparent. Such prejudice can result, however, where the possession is discontinued and the prospective purchaser has no certain knowledge that anyone other than the registered owner is claiming title to the land. In these circumstances, it seems appropriate to require the adverse claimant to give notice of such claim.

7. Section 7 - Notices of Claim

This section sets out the requirements for registering a notice of claim in order to prevent an interest from being extinguished by operation of the Act.

8. Section 8 - Quieting of Titles Certificates

Ordinarily, an instrument must be registered at least forty years before a closing date in order to constitute a root of title. This ensures that the title search period will be at least forty years. In the case of a certificate under the Quieting of Titles Act, however, it can constitute a root of title regardless of when it is registered. Accordingly, in such a case the search period

can be considerably less than the normal forty years. That is not a problem since the "state of the title" will have been determined and reflected in the certificate and only occurrences since that time will be relevant to determining the current situation.

9. Section 9 - Administration

Administration of the Act will come under the New Brunswick Geographic Information Corporation which is responsible for the land registry system.

10. Section 10 - Regulations

The notice of claim form will be prescribed by regulation and the manner in which registration of such notices will be effected will be governed by the regulations as well.

11. Section 11 - Retrospective Effect

The Act will apply retrospectively as well as prospectively so that all interests in existence now or to be created in the future will be subject to it unless expressly exempted. This means that existing interests could be extinguished when the relevant provisions come into force.

12. Section 12 - Early Registration of Notices of Claim

Persons whose interests would be extinguished upon the coming into force of sections 5 and 6 will be provided with the opportunity to register notices of claim in advance of that occurrence. This will be done by delaying proclamation of sections 5 and 6 for a sufficient period to allow the Act to be publicized and for the necessary regulations to be enacted and notices registered.