IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Silver Sands Realty Ltd. v. Nova Scotia (Attorney General), 2007 NSSC 291

Date: 20071019
Docket: S.H. 261348
Registry: Halifax

Between:

Silver Sands Realty Ltd.

Plaintiff

v.

The Attorney General for the Province of Nova Scotia
The Registrar General of Land Titles and Service Nova Scotia and Municipal Relations

Defendants

D E C I S I O N

Judge:	The Honourable Justice Gerald R P Moir
Heard:	16, 17, 18, 19, and 20 April 2007 at Halifax
Last Written Submission:	27 April 2007
Counsel:	Mr. James D MacNeil and Mr. Robert L Miedema for the plaintiff Mr. Alexander Cameron for the defendants

Moir, J.:

Introduction

[1] There are two passages out of Halifax harbour. On the east side, a ship will pass the village of Eastern Passage, then Devil's Island, and the eastern head of the great harbour. That head is also the western head of the next inlet from the sea, Cow Bay. The small bay is followed to the east by Cole Harbour, then Lawrencetown beach. A sandy beach stretches from headland to headland at Cow Bay. It is a popular recreational site, and was very popular before two million tons of sand were removed to build the airport at CFB Shearwater between 1954 and 1970.

[2] Silver Sands Beach faces south into the Atlantic. Land in the area was granted in the first few decades following the founding of Dartmouth in 1750. One of these was a grant to Enoch Bean in 1785. Mr. Bean's southern boundary was the Sea Coast of Cow Bay". That is to say, Silver Sands Beach was included in, and formed the southern extremity of the grant.

[3] Immediately north of the beach is another body of water, Cow Bay Pond or Cow Bay Lake, which has an island in the centre called Moses Island. The large pond or small lake is within the lines described in the Bean grant. Roughly speaking, the western boundary of the Bean grant follows the east lines, where they meet the pond, of grants that stretch from the shore of

Eastern Passage to the bank of Cow Bay Pond; the eastern boundary follows the west line of grants that start at the shore of Cole Harbour, and; the dry lands of the Bean grant are at the north where the pond ends.

[4] The central issue in this case is the ownership of Cow Bay Pond. Excepting numerous transfers of subdivided pieces and the recent conveyance of the beach to the Halifax Regional Municipality, Silver Sands Realty Ltd. claims the Bean grant including the pond. The province also claims ownership of the pond.

[5] Ownership of the pond is important to Silver Sands because, if the same person owns the dry land and the pond, the lands can be subdivided into strips of dry land and water. On its own, the dry land is too small to be legally subdivided into many lots.

Attempts to Develop Silver Sands Land

[6] Mr. Arthur Rhyno and his brother bought the remains of the Bean grant, through their company, in October 2000. The first plan was to construct a golf course. This progressed through studies, and dealings with the municipality for a development agreement, and early attempts to attract investors.

[7] Some people in the Cow Bay community mounted a campaign to prevent the development. In that connection, the plaintiff emphasizes a letter written by Ms. Rosalind Penfound on behalf of the Minister of Natural Resources to one of the opponents. Ms. Penfound wrote:

> The *Environment Act*, S.N.S. 1994-5, c. 1, provides that watercourses are vested in the Province of Nova Scotia as of 1919. In Corkum v Nash and Sweet (1990), 98 N.S.R. (2d) 364, it was held that watercourse" means inland bodies of water, not coastal waters.
>
> Coastal submerged lands are vested in the Province of Nova Scotia (with the exception of some specific federal public harbours) and, therefore, remain Provincial Crown land. Crown grants have in the past been issued for submerged coastal land and give rise to private ownership of the land granted.
>
> With respect to Cow Bay Lake, it appears that it may have been the subject of a Crown grant. Accordingly, any determination of whether it reverted to the Crown as of 1919 by virtue of the *Water Act* (provisions relating to ownership of watercourses having been incorporated into the *Environment Act*) or remains in private ownership, depends on whether it can be considered an inland (fresh) or coastal (tidal or salt) water body. Such a determination would require further investigation and might ultimately only be settled by a court.

However, the project ran into another problem.

[8] After the atrocity in New York in September 2002 there was less interest in investing in a golf course. Eventually, Mr. Rhyno turned to developing lots. The company donated the beach to the municipality, a well-known statue of a moose was moved off the east headland and one lot was sold there. Mr.

Rhyno made various attempts to have the Municipal Development strategy softened for development in the Cow Bay area.

[9] Mr. Rhyno believes subdivision restrictions in the area are too stringent. He argues for 125 foot frontages instead of two hundred. He argues the minimum area requirements are too large. He points out that there is a limit of one subdivision a year applicable to the plaintiff's lands. He found the best he could do with the dry lands would be six lots over three years. Then he learned of an exception to the stringent regulations that applies to larger tracts of land. He learned about this from a commercial developer and was referred to that developer's consultant, Kirk Nutter of the Terrain Group.

[10] Clause 268(2) of the *Municipal Government Act*, SNS 1998, c. 18 provides:

> Subdivision approval is not required for a subdivision ... where all the lots to be created, including the remainder lot, exceed ten hectares in area... .

Mr. Rhyno and the plaintiff's advisers set about to subdivide the remains of the Bean grant into ten hectare, or twenty five acre, lots made up mainly of pond. This way Silver Sands could get eleven lots of twenty five acres each although the portion of dry land might be less than two acres on some of the lots.

[11] Mr. Rhyno, and his company, acted in good faith. He understood from his advisers that the deed to the company included the pond, and the description in the deed certainly supported that view, as did the letter from Ms. Penfound. Mr. Nutter consulted with a property mapping supervisor in the Land Registration Office, and he received advice that clause 268(2)(a) could be used for lands covered in part by water if the title came from a pre-confederation grant. There is no evidence by which any statement or assurance can be held against the province, such as to found an estoppel, but the evidence along these lines does show Mr. Rhyno's good faith.

[12] Terrain prepared a plan and Silver Sands retained Mr. Frank MacDonald to bring the ten new lots within the *Land Registration Act,* SNS 2001, c. 6.

Applications under Land Registration Act

[13] Ms. Catherine Walker, QC, who prepared the abstract upon which this decision relies, and who gave evidence for the Province, says there are two stages for bringing a land title onto the new system under the *Land Registration Act.* The first is focused on the description, the second upon title.

[14] Mr. Frank MacDonald is an experienced lawyer, who is well known for his work in real estate law. He has presided over the transfer of many properties, called migrations", from the old system to the new one.

[15] Mr. MacDonald prepared, and submitted to the Halifax County Land Registration Office, various documents required for approval of the descriptions of the Silver Sands land. The new system provides no assurance about location. However, it does assure title (with recourse against the government for those whose title interests are erroneously extinguished). It is essential to this system that the Land Registration Office is satisfied that a written description of land adequately positions the land in relation to other properties. Hence, the need for the first stage. The Silver Sands description was approved on 26 August 2005.

[16] (There was a problem with the description that was not noticed until much later. Five of the new lots were to call for a boundary across the pond from the dry lands that is sixteen and a half feet beyond the high water mark on the western bank. The Silver Sands description includes this strip along the other side of the pond. It clearly intrudes by sixteen and one half feet into lands that do not belong to Silver Sands. This is put forward by the province as an alternative justification of actions taken by the Registrar General. As

will be seen, I am of the opinion that the actions were justified on other grounds, and in the circumstances I am of the view that the court should not comment on the alternate argument.)

[17] With the description approval, Mr. MacDonald had fifteen days to file the necessary documents about title. The most important of these was his Opinion on Title". Qualified lawyers may submit the opinion and, subject to certain exceptions, future conveyances will pass title in accordance with the opinion. Mr. MacDonald prepared his opinion relying on a fresh abstract from a deed registered at least forty years earlier, a conventional period now recognized by s. 4(1) of the *Marketable Titles Act*, and he consulted older abstracts of the back-title, which he has in his office. On 31 August 2005, Mr. MacDonald received from the Halifax County Land Registration Office notices that each lot is registered.

[18] When Ms. Walker prepared her abstract earlier this year it became clear that there is a gap in title. The Bean grant in 1785 is followed by his deed to John Albro in 1790 and a deed from John Albro to Samuel Albro in July 1790. The next recorded activity is a mortgage by a Frederick Major in 1821 and the next deed purporting to convey full title is in 1854.

[19] I will return to the gap in reference to two things: its impact, if any, on the interpretation of the various legal descriptions and the argument made by the province that the gap defeats Silver Sand's assertion of ownership against the government.

[20] In my assessment, Mr. MacDonald formulated his opinion carefully. He stated:

> The attached abstract of title shows a chain of title of ownership of the parcel to the standard required to demonstrate a marketable title under the *Marketable Titles Act*.

Note, he does not certify back to a Crown grant. The *Marketable Titles Act* does not require it, and the vast number of privately owned lots in this province that have gaps in title from the eighteenth and nineteenth centuries may still be marketable. In my assessment, the gap has no impact on the justification of steps taken by the Registrar General.

[21] Mr. MacDonald next requested registration of a statutory declaration showing the subdivision under the *Municipal Government Act* of the Silver Sands lands. The declaration was registered, as was the Terrain plan, on 19 September 2005. Accordingly, the Land Registration Office assigned new

parcel identification numbers for each of the new lots, created new parcel registers for each, and described each as Land and Water".

Stop Orders

[22] Mr. Kevin Deveaux, the member of the Legislative Assembly for Cole Harbour-Eastern Passage, wrote to the Minister of Environment and Labour two weeks after the separate parcels were registered. He referred to the filing of the Statutory Declaration and to Silver Sands' claim to the lake". The MLA stated that it is imperative" that the Province challenge the claim and ensure Cow Bay Lake remains Crown property".

[23] The Minister responded on 11 October 2005. Contrary to the letter delivered some years earlier on behalf of the Minister of Natural Resources, the Minister of Environment and Labour asserted the provincial government owned Cow Bay Pond. Not understanding that the declaration was filed as part of the migration process, the Minister was unconcerned. Filing such a document with the Registry does not create a legal right...".

[24] Mr. Deveaux raised the matter in the House of Assembly. He also communicated with the office of the Registrar General of Land Titles. In the

House, the Minister of Environment and Labour said the minister responsible for Crown land and I will discuss this issue and get back to [Mr. Deveaux] with our results." And, the Minister of Service Nova Scotia and Municipal Relations said ...there is a requirement for all developers to follow all laws in the Province of Nova Scotia and if there are loopholes, we'll find ways to close them."

[25] On 20 October 2005 the Registrar General of Land Titles issued stop orders under s. 56(2)(a) of the *Land Registration Act* against each of the Silver Sands parcels. He wrote to Mr. MacDonald and advised that the orders were pending completion of an investigation into the registration and subsequent subdivision of PID 40127433 [the first Silver Sands registration]." The reasons were stated as follows:

> The stop orders were issued upon receipt of information that Her Majesty the Queen in Right of the Province of Nova Scotia claims ownership of all of the subject lands that are covered by water.

Clause 56(2)(a) permits the Registrar General to order no further registrations or recordings be made with respect to a parcel" if the Registrar General determines that either an error has been made in a registration or a recording" or there is risk of an improper or fraudulent registration". The Registrar General's letter

(pending completion of an investigation") make it clear that he could only have been proceeding on the later criterion, that he had determined there is a risk of improper registration.

[26] The Registrar General also wrote to MLA Deveaux and thanked him for bringing this matter to my attention".

[27] Correspondence followed between Mr. MacDonald and the Registrar General. Despite his indication that the stop orders were pending investigation, the Registrar General did not respond to the substance of Mr. MacDonald's arguments. Indeed, correspondence to Mr. MacDonald seems to suggest that the issue had been turned over by him to the Department of Justice.

[28] Silver Sands retained counsel, Mr. MacNeil. After that, submissions were made to the Registrar General by the Department of Environment and Labour and by Silver Sands' counsel. The Department's extensive submissions were towards the conclusion that Cow Bay Pond vested in the Province under the *Water Act* and its successor, the *Environment Act*. Counsel for Silver Sands countered that Cow Bay Pond was within the exclusive legislative jurisdiction of Parliament, and provincial legislation could not affect title to it.

[29] The submissions ended without the Registrar General making a final determination. He requested a further submission by Silver Sands, but the response was not very substantive. It demanded that the stop orders immediately be rescinded. This proceeding was commenced not long afterwards.

The Claims

[30] This proceeding started out as an application for an order under s. 90 of the *Land Registration Act* reversing the stop orders and recognizing the validity of the Silver Sands registration. The proceeding was converted to an action, and pleadings were filed. The plaintiff claims an order pursuant to the *Land Registration Act* . . . to rescind the stop orders and to perfect the registration". Damages are also claimed. We must begin with the claim for judicial review because the claims for damages are premised on the stop orders having been issued in error, or contrary to law.

Standard of Review

[31] We must begin by establishing the standard at which the court reviews the Registrar General's orders. Even if s. 90 provides a right of appeal, the standard of review must, according to *Canada (Deputy Minister of National Reserve)* v. *Mattel Canada Inc.*, [2001] S.C.J. 37, be determined by following the pragmatic and functional approach. The culmination of that approach is *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. 46.

[32] The standard is established by considering four factors: statutory provisions prohibiting review or providing for appeal, relative expertise of the Registrar General and this court, the purposes of the statute and of any section about review or appeal, and the nature of the problem as one of policy, law, fact, or mixed fact and law. The approach leads to one of three standards of review from most differential, interference only if patent unreasonableness is found, to the least, interference if the decision maker was incorrect. Simple reasonableness is in between.

[33] Section 90 does not, in my opinion, cover review of a Registrar General's stop order under s. 56(2). Section 90 provides for review of a registrar's decision, not review of the Registrar General's decision. Subsection 90(1) reads:

> A person who objects to and is aggrieved by
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> > (a) a registration or a recording;
> >
> > (b) a cancellation of a recording;
> >
> > (c) a revision of a registration; or
> >
> > (d) any decision of a registrar with respect to any action the registrar is required or authorized to take under this Act,
>
> may require the registrar to provide written reasons and, within thirty days after receipt of the reasons, may apply to the court for an order requiring the Registrar General to take any action that the Registrar General is required or authorized to take under this Act.

Subsection 90(2) simply provides that the court may make such order as it thinks just".

[34] The statute provides for the appointment of a Registrar General in s. 8. The Registrar General has power to supervise land registration offices, the land registration system generally, and the exercise of statutory powers by anyone employed in the system: s. 8(3).

[35] The statute provides for the appointment of registrars: s. 9. The Registrar General may also be appointed a registrar: s. 8(4). Indeed, in this case it appears the Registrar General also functions as the registrar at the Halifax office. However, the functions are clearly distinct and the registrars are subordinate to the Registrar General.

[36] The Registrar General's decision to issue a stop order is not within the specific language of paragraphs (a), (b), or (c) of s. 90(1). Indeed, each of those refer to an action (recording, registration, cancellation, and revision) that is in the primary authority of a registrar. The catchall paragraph (d), any decision of a registrar...", is clearly restricted to registrars' decisions. A decision of the Registrar General is not a decision of a registrar.

[37] That s. 90(1) is restricted to review of a registrars' decision is made absolutely clear by the closing words. The Registrar General has supervisory jurisdiction over all registrars' decisions, and sometimes the statute provides more specifically for this. Decisions on revision are an example of specific review powers of the Registrar, and ultimately the court: s. 18(14), s. 32(2), and s. 35(1). The closing words of s. 90(1) make it clear that the review is designed for the situation where a registrar has made a decision and the Registrar General has not reversed, or otherwise interfered with, the decision to the satisfaction of the aggrieved" party. The closing words provide for the court to order the Registrar General to exercise supervisory or specific powers over a registrar's decision.

[38] The statute does not provide an express right of appeal from the Registrar General's stop order. However, in my opinion, the statute allows for review

aside from the court's general supervisory jurisdiction. A stop order continues in effect until the order has been rescinded": s. 56(2). And the order shall be removed from the register when rescinded": s. 56(3). Nowhere else does the statute mention rescinding any decision or order, and it does not specifically identify the authority who does the rescinding.

[39] Subsection 92(1) gives the court broad powers. It provides:

> In any proceeding with respect to an interest, the court may order a registrar to
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> (a) record an interest;
>
> (b) cancel a recording;
>
> (c) revise the priority of recordings;
>
> (d) revise a registration;
>
> (e) take any other action that the court thinks just.

Interest" is broadly defined in s. 3(1)(g).

[40] When these provisions are interpreted in light of the scheme and purpose of the *Land Registration Act*, they allow the Registrar General to rescind his own stop order under s. 56(2) and, by combination of s. 52(2) and s. 92, they allow the court to do so and to give other relief. Further, the broad words any proceeding with respect to an interest" allow the court to go beyond

the record before the Registrar General and to take evidence going to the issue of whether the stop order is to be rescinded. I will comment further on the scheme and purpose of the statute. In summary, I interpret the legislation as creating a system for more certain land titles, but preserving the historical role of the court for determining land titles by including recourse to the court as part of the system of registration.

[41] So, on the first factor, the statute provides for review by the court of the Registrar General's stop order and allows the court a broad inquiry going beyond the record that was before the Registrar General. This suggests deference to the decision of the Registrar General is at the lowest level, a requirement for correctness.

[42] The next factor is the relative expertise of the decision maker and the court. This court historically, and perhaps constitutionally, determines land titles. The court and the Registrar are equal to this task.

[43] Thirdly, the functional and pragmatic approach to standard of review requires consideration of the nature of the problem. As will be seen, the issues are of mixed fact and law. On the latter, the review involves questions of real property law and statutory interpretation. These are subjects of equal competence for the Registrar General and the court.

Regarding the former, the statute does not require, or even allow for, adjudication by the Registrar General of factual disputes by hearing witnesses and otherwise taking evidence. The Registrar General may act, and in this case he did act, on representations. The court, on the other hand, functions in its traditional role. The court receives affidavit evidence and hears cross-examination in the hearing of an application, or it tries the issues in an action. The hearing or trial is a superior resource for settling factual disputes. This suggests deference at the least level.

[44] Section 92 is one of several provisions recognizing or allowing recourse to the court. Section 32 preserves the courts basic jurisdiction to determine land titles and allows for the filing of a judgment or other document evidencing the right to be registered as owner". Subsection 35(1) allows an interested person or the Registrar General to apply to the court for a declaration of rights when a revision is proposed or takes place. As discussed, s. 90 allows an application to the court under which the court effectively exercises the Registrar General's supervisory powers over the decision of a registrar. And, s. 91 permits the Registrar General to apply for directions on any subject. These provisions keep the court in the position of

ultimate arbiter of land titles. This purpose indicates deference at the least level.

[45] In conclusion, the provision allowing review of the Registrar General's stop order, the nature of the problem he confronted as one of mixed fact and law, and the purpose of the statute and of the provision allowing review indicate that this court pays the least deference to the Registrar's decision. Expertise is equal and, therefore, neutral on the question of deference. It follows that deference is at the lowest level. Did the Registrar General correctly issue stop orders?

Issues

[46] In my opinion, s. 56(2) provides an interim solution. It would not be in harmony with the scheme or purpose of the statute if a mere risk" of improper registration led to perpetual exclusion. The phrase until the order has been rescinded", and the several avenues for review, indicate a legislative intent that the stop order is to be reviewed on the basis of whether the registration is, in fact, improper or fraudulent.

[47] Thus, the issue is whether the government's assertion is correct. Does the Crown own Cow Bay Pond?

Documentary Title

[48] On 15 February 1785, a warrant was issued, presumably by the Governor, for a surveyor to lay out unto Enoch Bean a Plantation containing four hundred acres". The return, which is dated the very next day, described four hundred acres"

> situate, lying and being within the County of Halifax and is abutted and Bounded as follows, Beginning at the northeastern corner bound of land formerly granted Benjamin Garrish Esq on the Northeastern Passage out of the Harbour of Halifax. Thence to run North fifty five degrees East One Hundred and twenty chains or until it comes to the rear bounds of land granted Richard Monday in Cole Harbour. Thence to be Bounded Easterly by said Monday's land and land granted Charles Palmer and John Mignon. Southerly by the Coast of Cow Bay and Westerly by the lands granted the Rev. M. Tutty, Leonard Lockman, the Rev. A. Cleveland, Jacob Hunt & Benjamin Garrish aforesaid. Containing four hundred acres with allowances for Roads and Lakes according to the annexed Plan.

As with most old Crown Grants, we have a tracing of the original Plan done by the office of Crown Land Records.

[49] The tracing matches the four described bounds:

1 Garish to Monday at the north

2 Rear bounds of Cole Harbour grants at the east

3 Coast of Cow Bay Beach at the south, where the coast is shown as touching the head of Eastern Passage and Cow Bay granted to Tutty

4 Rear bounds of Eastern Passage Lots (Tutty then Lockman then Cleveland then Hunt then Garrish again) at the west.

The written description clearly encloses Cow Bay Pond. However, there is no mention of the pond or the large island in it. The plan shows the pond and the strip of beach between it and the bay.

[50] The tracing of the plan includes notations. It refers to Hill & Cowie", states forfeited and regranted", then refers to Enoch Bean, suggesting a possible reason for the one day it took to return the survey in response to the warrant.

[51] The grant to Mr. Bean was signed by Governor Parr in Council for George the Third on 1 April 1785. The description is the same as on the return except with allowances for Roads and Lakes according to the annexed Plan" is omitted.

[52] In what Ms. Walker advises to be standard language, the grant goes on to refer to the plan as showing the shape, form and marks" of the plantation. The standard language refers to ponds and lakes:

> ... together with all woods, underwoods, timber and timber trees, lakes, ponds, fishings, waters, water courses, profits, commodities, appurtenances, and hereditaments thereunto belonging or in anyways appertaining;

It also reserves white pine, some metals, and coal.

[53] The province submits that this grant does not include the part covered by water. I am referred to Anger and Honsberger", 2nd ed., 1985 Canada Book Inc. Volume 2, p. 1282 for the proposition that the words of the description prevail over standard language and to Joseph Chitty, (1820) A Treatise on the Law of the Prerogatives of the Crown", pp. 390-392 for this:

> Crown grants have at all times been construed most favourably for the King, where doubt exists as to the real meaning of the instrument... .

While there is, no doubt, instructive wisdom in authorities of this kind, I suggest that the basic principles that govern the interpretation of deeds and contracts generally" apply to the interpretation of deeds conveying lands. (The phrase is from McGuinness, Kevin Patrick *The Law of Guarantee*, 2nd ed., Carswell, 1996 at p. 238, as quoted with approval by Justice Iacobucci in his dissenting opinion in *Manulife Bank of Canada* v. *Conlin*, [1996] S.C.J. 101 at para. 78.)

[54] The court must ascertain the true intent of the parties at the time of entry into the contract", according to Justice Iacobucci writing for the Supreme

Court of Canada in *Eli Lilly & Co.* v. *Novapharm Ltd*., [1998] S.C.J. 59 at para. 54. This is done by reading the words of the contract in the context of the rest of the text and, possibly, surrounding circumstances. Also, at para. 54 of *Eli Lilly & Co.*:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time.

It may well be helpful to distinguish standard language from words that are not *pro forma* as part of the exercise to determine intent but that must depend on the circumstances, lest a maxim overshadow the basic principle of finding contractual intent through the words of the contract.

[55] Ms. Walker advises that the grant exceeds four hundred acres. It is made up of six hundred acres of dry land and nine hundred acres all told. The province submits this fact and the call for the smaller acreage show the grant excluded the water. Mr. Cameron submits that the key to understanding the discrepancy is in the return: with allowances for Roads and Lakes according to the annexed plan". This, it is said, shows an intent to reserve the pond.

[56] I interpret the grant as including the pond and island within the bounds.

[57] The text of the grant is compelling. Firstly, the text describing the bounds clearly includes the pond. Secondly, the *pro forma* text expressly includes lakes", ponds", and watercourses". Thirdly, the grant incorporates the plan by reference in both the text describing bounds and the *pro forma* text. The plan depicts one pond or lake, and two watercourses, within the described bounds.

[58] Other than the reference to four hundred acres, there is nothing to suggest the operative instrument, the grant, conveyed the pond by mistake. The reference to four hundred acres does not, in my assessment, necessarily indicate an intention to reserve the pond. Firstly, it is unlikely that the return intended to reserve the pond to the Crown because the grant, which was prepared at about the same time, clearly included it. Secondly, the return does not necessarily exclude the pond.

[59] The return describes the same bounds as in the grant. The phrase with allowances" does not suggest a reservation as much as an explanation of the acreage. Mr. Bean was to get a plantation of about four hundred acres. One reasonable interpretation of containing four hundred acres with allowances for Roads and Lakes according to the annexed plan", is that the surveyor had laid out four hundred acres of plantation". The closing words may

reasonably indicate the tract is about four hundred acres if one does not count the pond, which after all is not something Mr. Bean could plant on.

[60] This interpretation of the return is also truer to the text. One would not normally use the word allowance" in speaking of a reservation of legal rights, and the position of the phrase with allowances" right after four hundred acres" suggests it modifies acres" rather than the entire description.

[61] Finally, there is the guidance that bounds usually prevail over acreage and an error in acreage is not usually a good reason to depart from a description of the bounds: *Wegma Investments Inc.* v. *Brittain*, [2001] N.S.J. 267 (SC) at paras. 72 to 75.

[62] Thus, the Crown granted Cow Bay Pond to Mr. Bean in 1785.

[63] As discussed earlier, there is a gap in title from the end of the seventeenth century until a warranty deed in 1854 by which William Stearns conveys to Daniel Mosher Land and Land covered with water at Cow Bay . . . all land and premises owned and occupied by Frederick Major Deceased at the time of his death". The chain continues from there to a warranty deed from various Moshers to Robert Stanford in 1910. The description in this deed clearly includes the lands claimed by Silver Sands.

[64] The gap in title does not assist the Crown. It granted Cow Bay Pond in 1785 and, unlike the remote possibility of a claim under Samuel Albro, the government has no basis for asserting title to Cow Bay Pond unless legislation provides for it.

[65] The evidence establishes that Stanford was in possession of the lands in question. His trustees conveyed to Silver Sands Limited in 1955. It went into possession. There is no evidence of a competing claim at any time, and Silver Sands and its predecessors appear to have been in possession of the lands under deeds for at least ninety-seven years.

[66] In my assessment the gap in title has no impact on this review of the Registrar General's stop orders. The orders were made on the basis that the Crown claimed Cow Bay Pond, not on the basis of an imperfection in the Silver Sands chain of title. If the gap had been a basis for a stop order, the Registrar General might well have proceed differently than he did in this case. He might order a stop pending revision after the title is perfected, such as through a quieting of titles application. This court could do the same.

[67] There are references to the Bean grant, and subsequent ownership, in a newspaper article from 1901 admitted in accordance with Rule 31.05. The Crown objects to the introduction of those parts of the article. Rather than

rule on that objection, I merely indicate I have given this information no weight and have relied entirely on the abstract, recorded plans, recorded instruments, and evidence of possession in reaching conclusions about documentary title.

Legislative Title

[68] The first *Water Act*, S.N.S. 1919 c. 5 provided an expansive definition of Water Course" in s. 2(b). The phrase included every stream, river, lake, pond, creek, spring, ravine, and gulch". By s. 3, title to every privately held watercourse within the legislative competence of Nova Scotia was transferred to the government:

> Notwithstanding any law of Nova Scotia, whether statutory or otherwise, or by a grant, deed or transfer heretofore made, whether by the Crown or otherwise, or any possession, occupation, use or obstruction of any water course, or any use of any water by any person for any time whatever, every water course and the sole and exclusive right to use, divert and appropriate any and all water at any time in any water course, is declared to be vested forever in the Crown in right of the Province of Nova Scotia.

[69] A new definition of Watercourse" in the new *Water Act*, S.N.S. 1972, c. 58, s. 1(4) was as broad or more broad. It made mention of the jurisdictional limit:

> Watercourse" means the bed and shore of every river, stream, lake, creek, pond, spring, lagoon, swamp, marsh, wetland, ravine, gulch or other natural body of water, and the water therein, including ground water, within the jurisdiction of the province, whether it contains water or not.

The 1972 statute continued to vest watercourses in the government.

[70] In 1995, the *Water Act* was rolled into the *Environment Act*, S.N.S. 1994-95, c. 1. Mr. Cameron demonstrates, in his brief, a gradual evolution of statutory purpose. The 1919 *Water Act* replaced the *Act Respecting Water Power*, S.N.S. 1918, c. 13 which expressed, in a preamble, its purposes: the fullest conservation of the water resources" and the general management of running waters and water power" for agriculture, industry, lumbering and forestry. The 1918 statute replaced the *Act Respecting the Development of Water Powers within the Province* S.N.S. 1914, c. 8, which also made its industrial purposes clear in a preamble. Accordingly, Justice Davison was able to summarize the intent of the *Water Act* in *Corkum* v. *Nash* (1990), 71 D.L.R. (4th) 390 (NSSC) at p. 399 as allowing the provincial government,

> ...to take control of watercourses in order that watercourses and the water are reserved for the benefit of the public or a number of uses including fresh water supply, irrigation and industrial and recreational purposes... .

[71] Mr. Cameron points out that the industrial purpose of the 1919 *Water Act* was joined in 1962 with another purpose, environmental protection. The amendment appears in S.N.S. 1962, e. 54, s. 2, which first brought pollution control into the statute. Further changes in this direction were made in 1963 and, more seriously, in 1972. Mr. Cameron writes:

> The evolution of the *Water Act* from a statute initially designed to help encourage industrial development and reconcile competing demands for water, to a statute whose central thrust is environmental protection, was completed in 1995 when the *Water Act* was rolled into the *Environment Act*.

He says, and I agree, that in *Acheson & DeWolfe* v. *R.*, [2006] NSSC 211 at para. 27 Justice Stewart expressed the dual purposes of the vesting provision when she described the legislative intent this way:

> ...to permit the Province to take control of watercourses in order that watercourses and the water are preserved for the benefit of the public, inclusive of using a suitable waterway for power purposes and in a manner protective of the environment, and having safe ecological systems and habitat.

[72] Against this background of the legislation's evolving purpose, Mr. Cameron submits that the approach to legislative interpretation in *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2 compels a finding that Cow Bay Pond is within the meaning of watercourse. The vesting provision is now s. 103 of *Environment Act*, S.N.S. 1994-95, c. 1:

> Notwithstanding any enactment, or any grant, deed or transfer made on or before May 16, 1919, whether by Her Majesty or otherwise, or any possession, occupation, use or obstruction of any watercourse, or any use of any water by any person for any time whatever, but subject to subsection 3(2) of the Water Act, every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in Her Majesty in right of the Province and is deemed conclusively to have been so vested since May 16, 1919, and is fully freed, discharged and released of and from every fishery, right to take fish, easement, profit à prendre and of and from every estate, interest, claim, right and privilege, whether or not of the kind hereinbefore enumerated, and is deemed conclusively to have been so fully freed, discharged and released since May 16, 1919.

The definition of "watercourse" in clause 3(be) gives two meanings. The second is "all ground water". The first is:

> the bed and shore of every river, stream, lake, creek, pond, spring, lagoon or other natural body of water, and the water therein, within the jurisdiction of the Province, whether it contains water or not.

[73] The submission of Mr. MacNeil and Mr. Miedema relies on the decision in *Corkum* v. *Nash*. Justice Davison adopted an approach of strict construction based upon the former requirements about legislation that interferes with vested rights and alters the common law. He read "other natural body of water" in the 1972 *Water Act* definition according to the *ejusdem generis* maxim and found that the phrase was restricted to a genus of "interior bodies of water, for the most part non tidal and non brackish, which (except

incidentally with respect to some rivers) are not directly connected to the sea.”: para. 46. A harbour is not in that genus.

[74] With respect, I do not agree that *Corkum* v. *Nash* assists the plaintiff's position. Firstly, changes in our approach to statutory interpretation may compel a slightly different way of interpreting the *Environment Act* definition of watercourse than that followed by Justice Davison in his 1990 interpretation of the *Water Act* definition. Secondly, Justice Davison's interpretation excluded a harbour, not a lake, pond, or lagoon.

[75] Since the decision in *Stubart Investments Ltd.* v. *Canada*, [1984] 1 S.C.R. 536, we may question whether all doctrines of strict construction have to give way to the modern approach” adopted in *Rizzo & Rizzo Shoes* and to the principle in s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235. See, for example, Justice Davison's decision in *J. & A. Investments Ltd.* v. *Halifax*, [2000] N.S.J. 92 (SC), a case of legislative interference with property rights. Also, *ejusdem generis* may help explain some interpretations, but maxims cannot be determinative.

[76] The point here is not that the legislation has changed. The definition considered in *Corkum* v. *Nash* is almost identical to the present one and the context is not greatly changed although an important part of the context,

purpose, has further evolved since 1990. The *Water Act* transferred title in the context of its whole text and that of related statutes protecting the environment. Now the transfer provisions are in one statute, and the environmental protection purpose is more prominent. I merely point out that the issue cannot be determined on a doctrine of strict construction or a maxim of interpretation.

[77] Turning to the second and the concrete point, Cow Bay Pond is not a harbour. Resort need not be had to the catch-all phrase interpreted in *Corkum* v. *Nash* because this natural body of water is part lagoon" and mostly lake" or pond", each of which is explicitly in the definition.

Nature of Cow Bay Pond

[78] Mr. David L. DeWolfe, a physical oceanographer, was called by the plaintiff to give opinion evidence on tides at Cow Bay Pond, tidal influences, the affects of tides on shorelines, and salinity resulting from tides. Mr. DeWolfe visited the beach end of Cow Bay Pond. His observations were restricted to the beach area.

[79] Mr. DeWolfe observed a ten metre wide channel between the sea and the pond. This would be at the western end of the beach. He felt there was

some current in the channel in a direction from the sea towards the lake. He measured for tide in the area of the pond behind the beach. He found a tiny tidal range of three centimetres. This was during neap tide. Mr. DeWolfe extrapolated that during spring tides the pond would have a fifty to sixty centimetre tidal range, at least at the end bordering the beach. Mr. DeWolfe was cross-examined closely on this subject. His explanations make sense. I accept his opinion.

[80] Mr. DeWolfe tasted the water and found it to be brackish. The most likely source of the salt is the influx current at the channel. He gave evidence that very complex forces are often at play when seawater mixes with fresh.

[81] Mr. DeWolfe observed debris, including seaweed, on the pond side of the beach at two lower places. He took this to indicate that during serious tidal action seawater was washing in at those points also.

[82] I accept that the water in the area of Mr. DeWolfe's tests was brackish. I am satisfied, based on other evidence, that the usual flow through the channel is of fresh water from the pond to the sea. However, I accept, based on Mr. DeWolfe's observations, that the flow is sometimes the other way. I also find that seawater sometimes washes over the beach at two points.

[83] Today, Silver Sands Beach is a fairly narrow strip between the pond and the sea, with a tidal inlet at the west. It was not always so, and the nature of Cow Bay Pond as of 16 May 1919 cannot be ascertained just by looking at it presently.

[84] Mr. Robert B. Taylor is a marine geologist with the former Geological Survey of Canada, now Natural Resources Canada, at the Bedford Institute of Oceanography. He was called by the defendants as an expert in coastal geomorphology. He was qualified to offer a broad range of opinions on the understanding that he did not test salinity.

[85] Much of Mr. Taylor's work involved reliance upon, and interpretation of, Silver Sands beach going back to 1916. No objection was taken to this hearsay. To whatever extent it would be admissible for assessing Mr. Taylor's opinions, it would be generally admissible under the principled exception.

[86] Silver Sands Beach was much more substantial in 1916 than it is today. Despite the rising sea level documented for Halifax since the middle of the nineteenth century, Silver Sands was building seaward by the early 1900s. When Professor D. S. MacIntosh studied the beach in 1916 and Mr. J. W.

Goldthwait studied it in 1924 they found a much broader strip, described this way by Mr. Taylor (references omitted):

> McIntosh and Goldthwait although focusing on the differences in beach morphology provided valuable sketches and descriptions of the beach as well as speculations on how it had evolved. Primary components of the beach included a series of shoals; high, massive cobble beach ridges covered by lichen and trees along the backshore; intervening longshore sand patches with low dunes, and a fan-shaped series of beach ridges at the west end of the beach. McIntosh interpreted the course nearshore shoals as remnants of former drumlins which anchored the beach, supplied sediment and affected waves which produced the adjacent beach features.
>
> In the early 1900s the average width of the beach was 400 feet (122 m) with lobes of gravel extending into the shallow lake. Photos taken by Goldthwait show the central beach ridge was composed of well rounded cobble. The roundness of the clasts suggested the material had been reworked in the littoral system for a long time. The cobbles were also lichen covered and covered by trees of up to 120 yrs of age which confirms the stability and consolidation of the backshore. Goldthwaith also described two or three sandy gaps in the gravelly beach including a picnic grove on the east end which he concluded was formed in a more complex fashion than simply supply of drift from both ends of the beach. The curvature of the beach ridges also confirmed the presence of islands or anchor points within the beach as mapped by McIntosh. Beach ridges were extended from the anchors closing off all but a small drainage channel from the lake.

[87] This substantial structure had developed long ago, as shown by age of the trees observed by MacIntosh, the roundness of the cobbles, and the fact that Moses Island showed no signs of ever being exposed to wave erosion.

[88] The early descriptions and aerial photographs, critically analyzed for possibly misleading information about time and tide, show that, in 1954, Silver Sands remained as substantial as it was found to be in 1916 and 1924.

However, the beach had changed through natural adjustments. These included small changes in the inlet and the west end of the beach before the 1930s. After the 1930s another beach ridge developed at the west blocking part of the inlet (mostly outlet of fresh water) and clogging the lagoon. Two small outlets developed through the western beach and that beach migrated" to the western head before 1954. By then, the western beach was extensively overwashed and flattened. It was a shoal at high tide. Sediment continued to infill the lagoon and the beach migrated landward.

[89] The dramatic changes occurred after the 1954 aerial photograph when 1.7 million tons of aggregate, mainly the massively structured cobble, were removed.

> By 1960 a road and causeway was built at the east end of the beach to facilitate the movement of trucks to the west end. The causeway cut off a small part of Cow Bay Lake forming a small pond. In 1960 there was essentially nothing left of the western beach including the fan shaped ridges photographed by Goldthwait. All that remained was a narrow strip of beach along area 2 and a relict shoal closer to Hartlen Point. A new foreland had developed along the mainland shore of the new outlet. It was probably built from sediment derived from the breakdown of the outer barrier beach and the exposure of flood tidal deposits to wave action. The foreland was short lived. It migrated alongshore and infilled the small embayment at the west side of the new inlet. During the early 1960s the much wider tidal connection to Cow Bay Lake resulted in increased drainage of Cow Bay Lake. Jim Mosher (pers comm. 1996) reported he could walk across to the island but once sediment moved into the run" and nearly closed it off, the lake again ponded up. During the wider connection to the lake, a significant volume of sediment was transferred into it creating extensive

> flood tidal deposits extending towards Moses Island. These deposits were the first evidence of significant tidal flow into Cow Bay Lake.
>
> Repetitive measurements across the central part of the barrier beach showed that beach width decreased by 3.4 m between 1945 and 1954; by 44 m between July 1954 and May 15, 1964 and by an additional 7 m between 1964 and June 1966. Much of the loss was the result of sediment extraction and its hauling away for construction activities in the Halifax-Dartmouth area. Huntley reports that between 1954 and 1963 (inclusive) nearly 1.7 million tons of material were removed mainly from the western end of the beach. Between 1964 and 1971 and additional 332,231 tons of material were removed. Measurements across 5 sites along the central part of the beach suggest the beach was reduced by an average of 56% of its 1954 width by 1964 and 42% by 1971. Less than 5% change occurred after 1971 when sediment removal was prohibited.

[90] Mrs. Jane Hudock also testified for the defendants. She was born in Cow Bay in 1925, and her home overlooked Cow Bay Pond. She worked in Dartmouth for two years. Otherwise, Cow Bay has always been her home.

[91] Mrs. Hudock swam in the pond as a young woman. It was fresh. Cattle drank water from it. Sometimes it was a source of water for her grandfather's farm, where she lived.

[92] She knew Robert Stanford. When he retired from his work as a tailor, Mr. Stanford had more time for his Cow Bay property and he started charging for admission to the beach. During the 1950s, Mrs. Hudock worked for Mr. Stanford collecting the admission fees and operating a canteen.

[93] I find that Cow Bay Pond, or Cow Bay Lake, is a pond or lake connected to the sea by a lagoon. Its waters are fresh except at the south end along the

inland side of the beach. There, the water is brackish and shows a slight and irregular tidal influence. I find that water mostly flows outward from the pond to the sea, but it sometimes flows the other way. I also find that seawater sometimes washes over the beach into the pond.

Title to Cow Bay Pond

[94] The Crown granted Cow Bay Pond in 1785. It remained privately owned until no later than the 1919 *Water Act*. That legislation transferred the pond back to the Crown. Its nature as a lake" or pond" has not changed since. Accordingly, title to Cow Bay Pond remains in the Crown.

[95] I find that the beach was a much greater barrier in 1914 to 1919 than it is today. However, the beach was never rendered so insubstantial that the pond opened to the sea. In other words, it has always been sufficiently separated from the sea that one would recognize it as a lake or pond.

[96] I am satisfied that, when it was granted in 1785, when the first water statutes were enacted in 1914 to 1919, and when the beach was at its most depleted in the 1950s to 1970s, and today, Cow Bay Pond was, and is, a lake" or pond" within the meaning of the 1919 *Water Act* and the present

Environment Act. It includes a lagoon" within the meaning of the 1972 *Water Act* and the present *Environment Act*.

Other Claims

[97] Silver Sands says that the Registrar General acted improperly and with bias. I do not agree. Politicians are not excluded from bringing a possibly improper registration to the attention of the Registrar General, especially when some of these politicians are ministers of the Crown and the Crown asserts ownership contrary to a registration.

[98] A genuine assertion of ownership contrary to a registration would be a basis for issuing a s. 56(2) stop order. At one point, it seemed as though the Registrar General might be deferring to lawyers in the Department of Justice but, if that was the intent, the course was quickly corrected by a call for submissions.

[99] Further claims are made in tort, but these are based on the premise that Silver Sands owns Cow Bay Pond.

Conclusion

[100] I will grant an order dismissing this proceeding. Counsel may deliver submissions on costs, if necessary.

J.