

***Brill v. Nova Scotia Attorney General***, 2008 NSSC 330

By Derek M. Land, Blackburn English

This was an application for summary judgment on an application under the *Quieting of Titles Act*. In the context of this application, the applicant sought a determination on the question as to whether the 60-year common law rule for establishing good and marketable title is binding upon the Crown.

The application related to Bella Island, located in Mahone Bay. The applicant could demonstrate 200 years of paper title to the island. The Attorney General took the position that as there was no grant from the Crown, the chain of title was inadequate to establish marketable title to the island.

As to the question of the “60-year common law rule,” Justice Coady confirmed it no longer existed in Nova Scotia, having been extinguished by the *Marketable Titles Act*. His Lordship noted that the *Marketable Titles Act* was established in 1996 to remedy inconsistencies in the practice wherein some solicitors were searching only 40 years back on the assumption that the *Limitations of Actions Act* had reduced the limitation from 60 years to 40. The *Marketable Titles Act* confirmed that a chain of title 40 years in length was adequate. However, for the purposes of the application the point was moot, as his Lordship noted that section 9 of the *Marketable Titles Act* specifically exempts the Crown from the implications of that *Act*.

As to the summary judgment issue, Justice Coady confirmed that the test to be applied by the court in determining whether to grant summary judgment is a two-step test. The initial onus is upon the applicant to demonstrate there is no genuine issue of material fact requiring trial, and once the applicant has done so, the respondent bears a burden of establishing its claim as being one with a real chance of success. The respondent cannot, in so doing, rely on unsupported denials. The case law is clear that the respondent must “put his best foot forward.”

The court found that the respondent had identified a number of arguable issues, and that it had furnished the court with adequate proof of the possible factual basis for its defence. The case would involve expert testimony as to historical opinions, and historical documents that were subject to multiple interpretations. As such, his Lordship did not find this to be a case for which summary judgment would be appropriate.

The application was dismissed.