

# Letters



December 2004

I am writing to request a copy of the Winter 2004 issue (Vol. 13, No. 4) of *The Scrivener*. That issue on BC Surveyors is quite relevant to our historical map collection.

Thank you very much!

Katherine Kalsbeek  
Rare Books and Special Collections  
Main Library, University of British Columbia

It's that time of the year again—time to renew our ad for *The Scrivener* Magazine, which we do very happily.

Because the magazine carries our ad, we have been receiving *The Scrivener* subscription as an added benefit. Not only have we found our advertising dollar well spent, we have always enjoyed reading *The Scrivener*. We have found it one of the best periodicals out there—informative, easy to read, well laid out, with very up-to-date-information. The articles cover topics and issues that need timely and concise clarification. *The Scrivener* is always fun to read and is very helpful.

To the office staff—keep up all the excellent work!

Don & Laura,  
Westcoast Surveys

Would you like to receive *The Scrivener*, quarterly—compliments of The Society of Notaries Public of BC?  
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unoccupied land, belonging to absent owners, to impersonate them, sell the land, and abscond with the money. The innocent purchasers cannot be evicted. The true owners are left with claims against the Assurance Fund, if they are lucky.

Another possibility under the Torrens system is that an owner or a prospective owner of an interest in land may suffer a loss due to the “omission, mistake, or misfeasance” of the Registrar or land registry employees. “Misfeasance” is not limited to unethical conduct. It includes “doing things the wrong way.” (See the *Rieger* case below.)

At the time of the creation of the land title registration system, a person who suffered a loss as a result of the negligence or dishonesty of an employee of the Government (such as the Registrar) could not sue the Government (or “the Crown”) because of the old maxim, “the King can do no wrong.” In British Columbia, a citizen who wanted to sue the Crown first had to get permission from the Government. Such permission, called a *fiat*, was rarely given.

The creation of the Assurance Fund was therefore, in part, intended to give citizens, the victims of negligence or fraud in the land registry, a remedy against the Government, which they would not have had at common law.

Not until 1973 was it possible to sue the Crown in British Columbia without the permission of the Government. In that year, at long last, the *Crown Proceedings Act* was enacted here, making it possible to sue the Government in the same manner as any other corporation, whether for the negligence or other wrongdoing of its employees or for debt or breach of contract.

The *Crown Proceedings Act*, however, expressly prohibits citizens from suing the Crown for the sort of claims that could be brought against the Fund, and thus denies the victims of the negligence or fraud of land registry officials the remedies they might otherwise have had by suing the Government directly.

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The new *Land Title and Survey Act* provides for the creation of a new assurance fund, without abolishing the existing one, which is now renamed the “Government Assurance Fund.” Claims that arose before the new Act came into force must still be made against the Government Assurance Fund and those thereafter against the new Fund.

Court actions in respect of claims against the old Fund must cite the Minister (formerly the Attorney General) as nominal defendant and those against the new Fund must cite the Authority itself.

What then are the hurdles?

### Time Limits

In respect of both types of claims, there is a time limit for bringing an action.

Until October 23, 2003, Section 296(8) and (9) of the *Land Title Act* read:

- (8) A proceeding for the recovery of damages sustained through the deprivation of land may not be brought under this section:
- (a) against the Attorney General, or
  - (b) against the person by whose fraud or wrongful act the person entitled to the land has been deprived of it,

unless the proceeding is *commenced within 6 years after the deprivation occurs*.

Thus, not only the Assurance Fund, but also the crook who wrongly acquired title to the land were protected by the six-year limitation period; it made no difference that the victim might not have known about the deprivation, unless the victim was a child or a mentally incompetent person, in which case the *Limitation Act* provided some relief.

Where a claim was based on the “omission, mistake, or misfeasance” of the Registrar, Section 298(2) read:

- (2) Despite the *Limitation Act*, an action may not be brought against the Attorney General under this section unless the action is commenced within a period of 6 years from the time the loss or damage occurred.

This was a particularly harsh provision. It meant that whether or not the victim

was aware of the fault that gave rise to his or her claim, the six years began to run as soon as the loss or damage occurred—in other words when the act, omission, or misfeasance occurred—and none of the provisions of the *Limitation Act* gave any protection, even if the victim was a child or if he or she only discovered the error or fraud long after the six years were up.

**It was vital to their scheme that the whole of the parcel be bounded by a road.**

In *Rieger v. Vancouver (City)* [1999] B.C.J. No. 711, the facts were that a mistake had been made in the land registry office when a new certificate of title was issued, erroneously describing the land as “except the north 10 feet,” when it should have read “except the north 17 feet.” The error arose because there had been two previous expropriations, one of the north 7 feet, which was overlooked in the title description, and one of the adjoining 10 feet, thus a total of 17 feet.

The mistake was made in 1954. The property changed hands several times. The Riegers purchased it in 1983, relying on the mistaken description. In 1984 a staff member of the land registry office corrected the description and the Riegers, for the first time, learned that the 1954 description on which they had relied was wrong and that the property they had bought was in fact smaller by an additional 7 feet.

Nevertheless their claim against the Assurance Fund was dismissed. The court held that the six-year limitation period ran from 1954, when the error was made, and not from 1984 when the Riegers discovered it as a result of the correction made in that year.

The *Rieger* decision was followed recently in *Kirkpatrick v. Parkinson Estate* [2004] B.C.J. No. 157. Plans deposited over a 60-year period erroneously showed a strip of privately owned land adjoining the Kirkpatrick property as a “road.” The latest such plan was deposited in 1971.

In 1996 the Kirkpatricks bought 10 acres bordering on the “road” with the intention of subdividing the parcel. It was vital to their scheme that the whole of the parcel be bounded by a road. They relied on their title and plan search that showed that the whole of their parcel was bounded by a strip of land, and marked “road.” In fact, they bought a land-locked parcel.

When they discovered that, they sued, but their action was dismissed on the grounds that the six-year limitation period had expired, at the latest, six years after the deposit of the 1971 plan, 26 years before the action was commenced.

To address this type of injustice, the Legislature amended the Act in 2003 by providing that no claim may be brought later than three years after the deprivation or error “is discovered.” Future claims of the kind brought by the Riegers and the Kirkpatricks may now be pursued.

### Contributory Negligence

At common law, a victim of a tort could not successfully sue if she or he was partly at fault, even in a minor way. That harsh rule was abolished by the *Contributory Negligence Act*, 1925, which provided that where a victim is partly at fault, the court apportions blame between the two parties and the victim recovers the percentage of his or her loss that corresponds to the percentage of his or her fault.

That civilized principle has never applied and does not apply to claims against the Government Assurance Fund. The slightest degree of “fault” on the part of the victim or of any other party that contributed to the deprivation or loss creates a complete bar to recovery.

A less-than-thorough historic title search by or on behalf of a purchaser that might have revealed an error—for example, in a subdivision plan on deposit—would probably be fatal to a claim against the Fund (but perhaps not against the Notary or solicitor who carried out the search).

Another example of a situation where the error that resulted in the loss was not “solely the result” of the land registry error would be where the Registrar erroneously

