Dalhousie Law Journal

Volume 47 | Issue 2 Article 3

9-2024

Good Deeds? A Critical Race Analysis of the Nova Scotia *Land Titles Clarification Act*

Melisa Marsman
Dalhousie University Schulich School of Law

Recommended Citation

Melisa Marsman, "Good Deeds? A Critical Race Analysis of the Nova Scotia *Land Titles Clarification Act*" (2024) 47:2 Dal LJ.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.rosborough@dal.ca.

Melisa Marsman*

Good Deeds? A Critical Race Analysis of the Nova Scotia *Land Titles Clarification Act*

The Nova Scotia Land Titles Clarification Act ("LTCA") *is remedial legislation that was enacted in 1964 to resolve insecure land titles within designated communities, particularly African Nova Scotian communities. However, African Nova Scotians had been advocating for legal title to their land for over 100 years prior to the enactment of the* LTCA*, and those demands were largely ignored by the government. Furthermore, despite the 60-year existence of this remedial legislation, many African Nova Scotians still hold insecure title to their land. Through a critical race analysis, this article explores why the* LTCA *has failed to achieve its promise to African Nova Scotians and attributes that failure to the converging interests which gave rise to the enactment of the* LTCA *but were insufficient to sustain transformative change. The author concludes that unless the motivations for racial equality change, the promise of prosperity for African Nova Scotians will not be achieved.*

La loi sur la clarification des titres de propriété (Land Titles Clarification Act) *de la Nouvelle-Écosse* ("LTCA") *est une loi corrective qui a été adoptée en 1964 pour résoudre le problème des titres fonciers non sécurisés au sein des communautés désignées, en particulier les Afro-Néo-Écossais. Cependant, les Néo-Écossais d'origine africaine réclamaient depuis plus de cent ans des titres de propriété pour leurs terres depuis plus de cent ans avant la promulgation de la loi, et ces demandes ont été pour l'essentiel ignorées par le gouvernement. En outre, malgré les soixante ans d'existence de cette législation corrective, de nombreux Néo-Écossais d'origine africaine détiennent toujours des titres fonciers incertains. Par le biais d'une analyse raciale critique, cet article explore les raisons pour lesquelles la* LTCA *n'a pas tenu ses promesses à l'égard des Néo-Écossais africains. L'auteur conclut qu'à moins que les motivations en faveur de l'égalité raciale ne changent, la promesse de prospérité pour les Afro-Néo-Écossais ne sera pas tenue.*

* Assistant Professor, Schulich School of Law at Dalhousie University. The author would like to thank her colleagues for their guidance and support. This paper is dedicated to the African Nova Scotians who resiliently strive to resolve land titles and pursue redress for all land-related racial injustices in African Nova Scotian communities.

> "No matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern."
>
> – Derrick A. Bell Jr.[1]

Introduction

African Nova Scotians are a distinct people[2] who descend from free and enslaved people of African descent who were settled into fifty-two land-

1. Derrick A Bell, "Diversity's Distraction" (2003) 103 Colum L Rev 1622 at 1624, DOI: <10.2307/3593396>.

2. The term "African Nova Scotian" refers to a specific group of people based on ancestry. See Dalhousie University, "African Nova Scotian Strategy," online: <dal.ca/about-dal/african-nova-scotian-connection/african-nova-scotian-strategy.html> [perma.cc/F8GU-SB5K] ["African Nova Scotian Strategy"]. The distinctiveness of African Nova Scotians as a people was recognized by the United Nations through its Working Group of Experts on People of African Descent on its mission to Canada. See *United Nations Report of the Working Group of Experts on People of African Descent*, UN HRC, 36, UN Doc A/HRC/36/60/Add.1 (2017), online: <digitallibrary.un.org/record/1304262?ln=en> [perma.cc/6QTV-WVWN] [*United Nations DPAD Report*], which states at 5: "There has been a long history of resistance and resilience by African Nova Scotians and they have developed a distinct culture, traditions and social and political practices." Similarly, the Nova Scotia Court of Appeal in *R v Anderson* states: "African Nova Scotians have a distinct history reflected in how they arrived here and their experience over the past 400 years. This history is rooted in systemic and institutionalized racism and injustice" (*R v Anderson*, 2021 NSCA 62 at para 94 [*Anderson*]). The unique experience of African Nova Scotians has also been recognized by the Nova Scotia Supreme Court in *Beals v Nova Scotia (Attorney General)*, 2020 NSSC 60 at paras 22, 36 [*Beals*]; and in *Downey v Nova Scotia (Attorney General)*, 2020 NSSC 201 at para 4 [*Downey*], where Justice Campbell states: "African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded

based African Nova Scotian communities located in that part of Mi'kma'ki known as Nova Scotia.[3] Many African Nova Scotians whose ancestors were settled into these racially-segregated communities never received legal title to the land on which they were settled.[4] Today, many African Nova Scotians still hold insecure title to the land on which their ancestors were settled.[5] In 1964, the Nova Scotia government purportedly sought to remedy this racial injustice through the enactment of the *Land Titles Clarification Act* ("*LTCA*").[6] The *LTCA* is a statutory mechanism through which claimants may obtain a government issued certificate of title, vesting in them fee simple interest in the subject land.[7] The advantages of this remedial legislation are its simplified procedures and reduced costs, based on the premise that African Nova Scotians are in "necessitous circumstances" resulting from a lack of property development due to insecure land titles.[8] However, many African Nova Scotians had been experiencing financial hardship and pursuing racial justice (including

within the systems that govern how our society operates. That is a fundamental historical fact and an observation of present reality."

3. Mi'kma'ki is the ancestral and unceded territory of the Mi'kmaq Nation. While the Mi'kmaw people have lived in the region for over 10,000 years (Daniel N. Paul, *We Were Not The Savages* (Halifax: Fernwood, 2002) at 14); during the eighteenth century British settlers built settlements in the area and imposed a land ownership and administration system contrary to Britain's Peace and Friendship Treaties with the Mi'kmaq Nation (Paula Madden, *African Nova Scotian and Mi'kmaw Relations* (Halifax: Fernwood, 2009) at 42). It is within this context that the British promised land grants to the formerly enslaved African Americans who fled captivity and sided with Britain during the American Revolutionary War (known as the Black Loyalists) and during the War of 1812 (known as the Black Refugees), and who were subsequently settled by Britain into racially segregated African Nova Scotian communities.

4. CB Ferguson, *A Documentary Study of the Establishment of the Negroes in Nova Scotia between the War of 1812 and the Winning of Responsible Government*, (Halifax, Nova Scotia: The Public Archives of Nova Scotia, 1948) at 50 [Ferguson, *A Documentary Study*]. See also *Beals*, *supra* note 2 at para 36.

5. *Downey*, *supra* note 2 at para 5.

6. *Land Titles Clarification Act*, RNS 1989 c 250 [*LTCA*].

7. A fee simple interest is an estate in land which encompasses several rights and obligations. There are different types of estates, the greatest being a fee simple estate (often referred to as freehold estate) which most closely resembles absolute ownership in common law. See Halsbury's Laws of Canada (online), *Real Property*, "Estates in Land: Types of Interests in Land" (I.1.(2)) at HRP-13 "Nature of Estate" (2021 Reissue).

8. *LTCA*, *supra* note 6 at s 3(1) refers to "necessitous circumstances." See also *Beals*, *supra* note 2 at paras 22, 36 and *Downey*, *supra* note 2 at para 37 where the court connects obscure land titles to an intergenerational cycle of poverty for African Nova Scotians, which the *LTCA* sought to redress. The term "necessitous circumstances" in this context means financial hardship. While other factors no doubt contributed to the lack of property development by African Nova Scotians, such as pervasive anti-Black racism, it is evident from the text of the *LTCA* and the circumstances in which it was enacted that policymakers perceived a connection between land titles and property development, and further, a connection between property development and financial prosperity. Following this logic, policymakers seemingly perceived clarification of land titles as a strategy to achieve financial prosperity for African Nova Scotians.

through land titles) for over 100 years prior to the enactment of the *LTCA*, and those demands were largely ignored.[9] What changed in 1964 that gave rise to the implementation of this remedial legislation? Moreover, despite the 60-year existence of the *LTCA*, why do many African Nova Scotians still hold insecure title to their land and still experience financial hardship?

This article seeks to explain why the *LTCA* has not achieved its promise of land titles and financial prosperity for African Nova Scotians, and attributes that failure to the underlying self-serving interests of policymakers who were predominately Euro-American or Caucasian (referred to as White) which motivated them to enact it. The assertion is that the *LTCA* was enacted primarily because White policymakers concluded that doing so would advance their own interests, more so than being motivated by African Nova Scotians' suffering with insecure land titles or financial hardship. As a result, White policymakers' support for the *LTCA* waned shortly after its enactment because the White-serving interests which precipitated the racial remedy were insufficient motivators to sustain it. That is, until new policymakers emerged who were motivated by the same White-serving aspirations, only to be confronted with the same insufficiencies, resulting in the same abrogated results.[10] These conclusions may seem pessimistic, but that is not the intent. The intent is awareness.[11] In the tradition of critical race praxis, this article aspires to

9. Harvey Amani Whitfield, *Blacks on the Border: The Black Refugees in British North America 1815–1860* (Burlington, Vermont: University of Vermont Press, 2006) at 76 [Whitfield, *Blacks on Border*] notes that during the late 1830s and early 1840s African Nova Scotians petitioned the government to convert their tickets of location into freehold grants. See also Ferguson, *A Documentary Study*, *supra* note 4 at Appendix XXI: "Petition of Colored People at Preston" dated 11 March 1841; and Erica Colter, "A State of Affairs Most Uncommon: Black Nova Scotians and the Stanfield Government's Interdepartmental Committee on Human Rights, 1959–1967" (MA Thesis, Dalhousie University, 2006) at 18 [unpublished] [Colter, "A State of Affairs"] where Colter points out that Reverend William Oliver spent considerable time seeking resolution to the African Nova Scotian land titles problem.

10. It is possible that individual policymakers are *also* motivated by, or *believe* they are motivated by, altruistic motivations. Interest-convergence theory (the theoretical framework used in this article and discussed below) acknowledges that some individuals can be motivated by morality to make change, but that individual morality alone is often an insufficient motivator to enact transformative change. The intention of this article is not to discourage well-meaning individuals pursuing racial equality, but to encourage them to interrogate their own reasons for doing so. In that regard, this article embraces the philosophy of Carol Aylward and aims to educate for critical consciousness not condemnation (see Carol Aylward, "Adding colour—a Critique of: 'An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School.'" (1995) 8:2 CJWL 470 at 473).

11. Derrick A Bell Jr., "Brown v Board of Education and the Interest-Convergence Dilemma" (1980) 93:3 Harv L Rev 518 at 533, DOI: <10.2307/1340546> [Bell, "Interest-Convergence Dilemma"]: "awareness is always the first step toward overcoming still another barrier in the struggle for racial equality."

equip racial justice advocates with the requisite knowledge to prepare and strategize more effectively.

To demonstrate these assertions, this article critically examines the statutory enactment and evolution of the *LTCA* from a race-conscious perspective, not for its perceived value to African Nova Scotians, but for its perceived value to White policymakers. The idea that racially progressive measures, such as the *LTCA*, stem from something more than morality or humanitarianism towards Black suffering is rooted in interest-convergence theory.[12] Part I of this article provides an overview of interest-convergence theory, being a core tenet of critical race theory. Part II provides an overview of the *LTCA*, followed by a critical race analysis in Part III of the converging interests that gave rise to the adoption of *LTCA*. Lastly, Part IV illuminates the consequential harms of racial remedies which are rooted in interest convergence, by examining the stalled progress of the *LTCA* shortly after its enactment and the subsequent cycle of revival and repression as the White-serving interests converged and diverged with African Nova Scotian interests over the last 60 years. The conclusion is that if government support for the *LTCA* is motivated by any interests other than African Nova Scotian-serving interests alone, the promise of the *LTCA* to African Nova Scotians will never be achieved.[13] This sobering reality merits attention if the government wants to achieve racial equality, otherwise the barriers to African Nova Scotians' prosperity will persist.[14]

---

12. Interest-convergence theory is a critical race analytical framework formulated by the late Derrick A Bell Jr. Bell was, among many things, a pioneering civil rights attorney and the first tenured Black professor at Harvard Law School. For more information about Derrick A Bell Jr. see Janet Dewart Bell, "In Memory of Professor Derrick Bell" (2013) Seattle U L Rev 36:1, online (pdf): <digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2180&context=sulr> [perma.cc/8JG4-KCHB]. For interest-convergence theory see Bell, "Interest-Convergence Dilemma," *supra* note 11. See also Derrick A Bell, *Silent Covenants: Brown v Board of Education and the Unfulfilled Holes for Racial Reform* (USA: Oxford University Press, 2005) [Bell, *Silent Covenants*]. For a chronological overview of Bell's articulation of the interest-convergence theory, see Stephen Feldman, "Do the Right Thing: Understanding the Interest-Convergence Thesis" (2015) NW U L Rev Colloquy 106 248 at 250, online (pdf): <scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1125&context=faculty_articles> [perma.cc/U2TH-QCEY] [Feldman, "Do the Right Thing"]. For a scholarly debate on Derrick Bell's interest-convergence theory see Justin Driver "Rethinking the Interest-Convergence Thesis" (2011) 105 Nw UL Rev 149 [Driver, "Rethinking the Interest-Convergence Thesis"]; Brandon Hogan, "Derrick Bell's Dilemma" (2018) 20:1 Berkeley J Afr-Am L & Pol'y 1 [Hogan, "Derrick Bell's Dilemma"]. While Derrick Bell initially used the term "dilemma," in subsequent scholarship he uses the term "theory" and so this article adopts the latter terminology.

13. A notable exception to this statement is the interests of the Mi'kmaq.

14. Bell, "Interest-Convergence Dilemma," *supra* note 11 at 533: "If the decision that was at least a catalyst for that change is to remain viable, those who rely on it must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it."

I. *Interest-convergence theory*

The guiding theoretical approach to this article is interest-convergence theory, being a dimension of critical race theory.[15] Critical race theory is theoretical framework founded by racialized scholars to better reflect the realities of race and racism.[16] It situates race at the centre of legal analysis and presumes the pervasiveness of racism within our legal system.[17] Critical race theory critiques the foundational underpinnings of liberalism, including equality theory, colour blindness, meritocracy, and neutrality, and promotes a transformative approach to dismantling racially oppressive systems of law.[18] Critical race theorists insist on a contextual and historical analysis of the law and highlight the linkages between past and present inequalities.[19] While critical race theory emerged as a scholarly movement in the United States, similar scholarship exists in the Canadian context, including Nova Scotia, and its tenets reflect the long-standing practices and traditions of African Nova Scotians.[20]

Interest-convergence theory is a core tenet of critical race theory.[21] It facilitates scholarly critique of perceived racial progress, informed by the realization that advances in racial justice tend to coincide with the self-interest of White people and then subsequently erode over time through neglect, narrow interpretation and administrative delays.[22] Derrick Bell's

---

15. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed (New York, NY: New York University, 2017) at 8 [Delgado, *Critical Race Theory*] explain that interest-convergence or material determinism adds a further dimension to critical race theory, noting that because racism advances the interests of both white elites (materially) and working-class whites (psychically), large segments of society have little incentive to eradicate it.
16. Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement*, (New York: The New Press, 1995) [Crenshaw, *Key Writings*]; Delgado, *Critical Race Theory*, *supra* note 15 at 171.
17. Cornel West, "Forward" in Crenshaw, *Key Writings*, *supra* note 16; Delgado, *Critical Race Theory*, *supra* note 15 at 8, in explaining what critical race theorists believe, they write: "First, racism is ordinary, not aberrational—"normal science," the usual way society does business, the common, every-day experience of most people of color in this country. […] ordinariness, means that racism is difficult to address or cure because it is not acknowledged. Color-blind, or "formal," conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination."
18. Delgado, *Critical Race Theory*, *supra* note 15 at 3.
19. Mari J Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) at 6-7.
20. Michelle Y. Williams "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419 at 422, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol36/iss2/7/> [perma.cc/9KDR-LLY4] [Williams, "Change Has Gotta Come"]. For critical race theory in the Canadian context see Carol Aylward, *Canadian Critical Race Theory Racism and the Law* (Fernwood, 1999). Other critical race scholars in Canada include Constance Backhouse, Reem Bahdi, Maria Dugas, Joshua Sealy-Harrington, Sonia Lawrence, Joanne St Lewis, Esmeralda MA Thornhill, Barrington Walker, Michelle Y Williams. Vincent Wong, and Sujith Xavier.
21. Delgado, *Critical Race Theory*, *supra* note 15 at 177.
22. *Ibid* at 5.

flagship illustration of interest-convergence theory was the sudden shift in judicial support for desegrated schools demonstrated in *Brown v Board of Education*.[23] Through his ground-breaking scholarship published in the Harvard Law Review, Bell challenged the triumphant appearances of the *Brown* decision by reminding his readers that moral opposition to racially segregated schools, and the harm that it inflicted on Black learners, had been brought to the court's attention long before the *Brown* decision, to no avail.[24] Informed by this reality, Bell sought to explain the sudden shift in jurisprudence and thus reconsidered the *Brown* decision, not for its perceived value to Black people, but rather to understand its value to White people.[25]

Derrick Bell's reframed approach to *Brown* led him to theorize three alternative explanations for the shift in judicial opinion on segregated schools, specifically: (i) a desegregation decision legitimized democracy on the international stage; (ii) a desegregation decision promoted the appearance of freedom and equality; and (iii) a desegregation decision enabled industrialization in the southern states.[26] Pointing to these explanations, Bell concludes that the White actors who sought to end school desegregation through the *Brown* decision were influenced not by morality alone, but by these pragmatic reasons which served the interests of White people to a sufficient degree that motivated them to act. While some individuals can be motivated by morality to make change, Bell acknowledges, individual morality alone is often an insufficient motivator to enact transformative change.[27] Years after positing his interest-convergence theory, legal historian Mary Dudziak unearthed evidence supporting Bell's interest-convergence theory regarding the *Brown* decision.[28]

---

23. *Brown v Board of Education* 347 US 483 (1954) [*Brown*]. While Bell coined the phrase "interest-convergence theory" in Bell, "Interest-Convergence Dilemma," *supra* note 11, he first articulated the theory in "Racial Remediation: An Historical Perspective on Current Conditions" (1976) 52(1) Notre Dame L Rev 5 at 6, online (pdf): <scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2649&context=ndlr> [perma.cc/VW58-5QLE] [Bell, "Racial Remediation"].
24. Bell, "Interest-Convergence Dilemma," *supra* note 11.
25. *Ibid* at 524.
26. *Ibid*.
27. *Ibid* at 525: "Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform." Also, Delgado, *Critical Race Theory*, *supra* note 15 at 22 "[…] civil rights gains for communities of color coincide with the dictates of white self-interest. Little happens out of altruism alone."
28. Mary L Dudziak, "Desegregation as a Cold War Imperative" (1988) 41:1 Stan L Rev 61 at 66, <DOI: 10.2307/1228836>. See also Curtis A Bradley, "Foreign Affairs and Domestic Reform" (2001) 87(7) Va L Rev 1475 at 1476, <DOI: 10.2307/1073854>.

> Interest-convergence theory is a two-part analytical framework:
>
> > *Rule 1*. The interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by blacks or the character of proof offered to prove that harm.
> >
> > *Rule 2*. Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.[29]

The first part of interest-convergence theory perceives racially progressive measures as chance occurrences of alignment between Black-serving interests and White-serving interests.[30] It posits that remedial measures aimed at serving the interests of Black people will only be tolerated when those measures align with the interests of White people, and, notably, that these White-serving interests are more persuasive factors than the harm suffered by Black people or the evidence that proves such harm.[31] Again, interest-convergence theory does not suggest that some individuals cannot be motivated by morality, only that individual morality alone is not enough to enact sustained and significant change.

The second part of interest-convergence theory illuminates the problem. It argues that racially progressive measures which arise from interest convergence are not sustainable. Instead, notwithstanding the continued harm suffered by Black people which the remedial measures sought to resolve, White policymakers' support for such remedial measures will ultimately fade once those measures no longer serve or threaten White superiority.[32] In this regard, interest-convergence theory is grounded in the premise that there are rights, advantages, and privileges which are

---

29. Bell, *Silent Covenants*, *supra* note 12 at 69.

30. "Black-serving interests" and "White-serving interests" in this context are intended to be understood on a macro level, notwithstanding there may be nuances and variations on a micro level within each racial group. It has been argued that interest-convergence theory oversimplifies what constitutes "Black interests" and "White interests" and obscures the complexity within racial groups (Driver, "Rethinking the Interest-Convergence Thesis," *supra* note 12 at 165). However, other scholars disagree: Feldman, "Do the Right Thing," *supra* note 12 at 256; Hogan, "Derrick Bell's Dilemma," *supra* note 12 at 21; Tomar Pierson-Brown, "It's Not Irony, it's Interest Convergence: A CRT Perspective on Racism as Public Health Crisis Statements" (2022) 50 JL Med & Ethics 693 at 695, online: <ncbi.nlm.nih.gov/pmc/articles/PMC10009367/> [perma.cc/3M3T-2BPJ].

31. Delgado, *Critical Race Theory*, *supra* note 15 at 22: "Sympathy, mercy, and evolving standards of social decency and conscience amounted to little, if anything."

32. For discussion on interest divergence in the context of *Brown* see Lani Guinier, "From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma" (2004) 91(1) J Am History 92, DOI: <10.2307/3659616>.

conferred on some racial groups and not others. For example, critical race scholars assert that a White racial identity bestows on its possessors certain social, economic, and political value, and conveys to them a host of privileges and benefits which are not available to other racial groups.[33] Consequently, the White racial group enjoys a superior societal, political, and economic status relative to other racial groups, referred to as White superiority, to which their allegiance primarily motivates their actions.[34] With this in mind, part two of interest-convergence theory maintains that racial equality is expendable for large segments of society, to the extent it threatens the superior status of Whiteness.[35]

Since Derrick Bell first articulated his interest-convergence theory in 1980, it has been applied by many other scholars in a variety of contexts.[36] Yet, Bell's interest-convergence approach to the *Brown* decision was a profound departure from mainstream perceptions at the time and continues to ignite debate.[37] For example, Justin Driver criticized interest-convergence theory for, among other things, failing to acknowledge Black agency in the pursuit of racial justice.[38] He claims that interest-convergence

33. Delgado, *Critical Race Theory*, *supra* note 15 at 85-92 (Critical White Studies), at 89 (White Privilege), at 186 (Whiteness, Whiteness as Property), and at 182 (Property Interest in Whiteness). See also Richard Delgado & Jean Stefancic, *Critical White Studies: Looking Behind the Mirror* (Philadelphia, PA: Temple University Press, 1997) [Delgado & Stefancic, *Critical White Studies*] and Cheryl Harris, "Whiteness as Property" (1993) 106 Harv L Rev 1707, DOI: <10.2307/1341787>.

34. Bell, "Racial Remediation," *supra* note 23 at 6: "There is, I suggest, evidence in the past and indications in the present that the drive of whites to satisfy and justify feelings of racial superiority will result in policies, private and public, that have the effect of retaining dominance over non-whites for many generations to come." See also Derrick A Bell Jr., "White Superiority in America: Its Legal Legacy, Its Economic Costs" in Delgado & Stefancic, *supra* note 33, at 596: "[E]ven those whites who lack wealth and power are sustained in their sense of racial superiority and more willing to accept a lesser share, by an unspoken but no less certain property right in their "whiteness."

35. Bell, "Interest-Convergence Dilemma," *supra* note 11 at 523: "it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites."

36. Delgado, *Critical Race Theory*, *supra* note 15 at 24. Driver, "Rethinking the Interest-Convergence Thesis," *supra* note 12 at 152; at 153: "Scholars particularly concerned with the plight of blacks, furthermore, continue to find vitality in the interest-convergence thesis. In addition, scholars have applied the interest-convergence theory to explain legal developments among nonblack racial groups, including Latinos and Asian-Americans"; and at 155: "The interest-convergence theory's strategic implications have also been adopted by the popular press, and the theory has been cited approvingly in federal judicial decisions." Feldman, "Do the Right Thing," *supra* note 12 at 248: "many scholars not only accept the validity of Bell's thesis but also extend its application to other contexts." Hogan, "Derrick Bell's Dilemma," *supra* note 12 at 1, n 2: "[…] many critical race theorists take Bell's interest convergence principle and racial realism thesis as starting points for their scholarship."

37. Delgado, *Critical Race Theory*, *supra* note 15 at 23. For scholarly debate see Driver, "Rethinking the Interest-Convergence Thesis," *supra* note 12; Feldman, "Do the Right Thing," *supra* note 12; and Hogan, "Derrick Bell's Dilemma," *supra* note 12.

38. Driver, "Rethinking the Interest-Convergence Thesis," *supra* note 12 at 156. Black agency refers to the idea that Black liberation is not something conferred on Black people but rather something they actively pursued and attained for themselves. Daniel G Hill, *The Freedom-Seekers: Blacks in Early*

theory depicts Black actors in the racial progress movement as passive participants in the pursuit for racial justice and, by extension, asserts that interest-convergence theory accords insufficient agency to Black people and may be falsely interpreted as permission for Black people to passively wait for fortuitous moments of convergence rather than actively create change.[39] Other scholars offer alterative perspectives on the relationship between interest convergence and Black agency by examining Bell's underlying message throughout his entire scholarship. They point out that throughout his scholarship Bell not only acknowledges Black agency in the struggle for racial equality but also encourages it.[40]

For the purposes of this article, the fact that there is debate surrounding interest-convergence theory is not itself determinative of whether the theory is a valid methodological approach to legal scholarship. Interest-convergence theory is a valuable analytical framework within which critical race scholars find the tools to critically challenge prevailing assumptions about racism and perceived racial progress. The assertion that White policymakers will only support racial equality if doing so will maintain, advance, or at least not harm the interests of White people, is one that cannot be ignored. Nor can we ignore the consequences of the veracity of that assertion. It is with this understanding that interest-convergence theory aims to expose the risks associated with mischaracterizing or obscuring policymakers' primary intentions behind race-based remedial action. Efforts towards racial equality which are rooted in White-serving interests are less likely to succeed. Therefore, if advocates for racial equality are not aware of the underlying White-serving motivations that support it, they cannot prepare for the stalled progress that tends to follow. Interest-convergence theory is the key to exposing those underlying White-serving interests.

II. Land Titles Clarification Act

The *LTCA* is silent about race but its connection to the African Nova Scotian community is undeniable. The *LTCA* was created by the Interdepartmental Committee on Human Rights ("ICHR"), which was a special committee

---

Canada (Toronto: Stoddart, 1992).

39. Driver, "Rethinking the Interest-Convergence Thesis," *supra* note 12 at 165, 175-176.

40. Hogan, "Derrick Bell's Dilemma," *supra* note 12 at 2. Feldman, "Do the Right Thing," *supra* note 12 at 256. A concern for Black agency, albeit misplaced in this context, does serve as an important reminder that even in situations of racial progress by converging interests in Nova Scotia, there have been African Nova Scotians working tirelessly throughout the peaks and valleys of perceived racial progress in Nova Scotia that enabled these moments of convergence to arise. Williams, "Change Has Gotta Come," *supra* note 2 at 436 writes: "African Nova Scotians have always actively resisted our oppression, worked collectively, and built community organizations including educational organizations."

of senior government officials whose terms of reference were to, among other things, give immediate attention to the problems afflicting African Nova Scotians and make recommendations to improve race relations in the province.[41] The ICHR was chaired by the minister of public welfare, who introduced the *LTCA* into the House of Assembly on 27 February 1964, as *Bill 69 Land Titles Within Municipalities.*[42] The Bill proceeded to second reading on 4 March 1964, accompanied by the following remarks:

> The purpose of this legislation is to provide a simpler and less expensive machinery for the clarification of titles within areas or communities. […] [T]he bill provides that the Governor-in-council may define an area for consideration under the Act, if there is a lack of development which can be traced to confusion or obscurity in titles. […]. The act will be of particular use in communities such as New Roads within the county of Halifax, and it has, of course, general application in many areas throughout the province.[43]

The reference to New Roads, an African Nova Scotian community known as North Preston, and the ICHR's terms of reference, confirm the intended relationship between the *LTCA* and the African Nova Scotian community.[44] The legislation continues to be depicted as having been enacted to address racial injustices inflicted upon African Nova Scotians.[45]

---

41. WA MacKay, "Equality of Opportunity: Recent Developments in the Field of Human Rights in Nova Scotia" (1967) 17 UTLJ 167 at 180, DOI: <10.2307/825367> [MacKay, "Human Rights in Nova Scotia"]. Bridglal Pachai, "Editorial Introduction by the Executive Director and Deputy Head" in Bridglal Pachai, ed, *Nova Scotia Human Rights Commissions 25th Anniversary* (Halifax: Nova Scotia Human Rights Commission, 1992) 28 at 28 [Pachai, *Human Rights*]. The ICHR was chaired by the minister of welfare and included the ministers of education and labour, the deputy ministers of public health, public welfare, labour, and education, the deputy attorney general, the chairman of the Nova Scotia Housing Commission and other ad hoc government representatives. Notably, this historical interdepartmental government approach resembles the contemporary interdepartmental government approach adopted for the Land Titles Initiative under Part 1 of the *LTCA* (discussed below).

42. The legislation was introduced by the ICHR, but the responsible minister was the minister of lands and forests. This division of responsibility resembles the present-day structure in that the responsible minister for the *LTCA* is the minister of lands and forestry, except between 9 November 2021 to 23 May 2023, applications pertaining to the Land Titles Initiative areas under Part 1 of the *LTCA* (discussed below) were submitted to the minister responsible for the office of equity and anti-racism initiatives (OC 2021-255 (*Public Services Act*)), and effective 23 May 2023, all matters pertaining to the Land Titles Initiative under Part 1 of the LTCA have been assigned to the minister responsible for African Nova Scotian affairs (OC 2023-141 (*Public Services Act*))

43. *Nova Scotia House of Assembly Debates*, 48-1 (4 March 1964) at 887-888 (Hon W S Kennedy Jones).

44. The relationship between the *LTCA* and the African Nova Scotian community was also acknowledged in *Beals, supra* note 2 and in *Downey*, *supra* note 2.

45. *Beals, supra* note 2 at para 66; *Downey, supra* note 2 at para 37; "Bill No. 28 - Land Titles Initiative Acceleration Act," 2nd reading, *Nova Scotia House of Assembly Debates*, 21-06 (25 March 2021) at 539 (Hon Randy Delorey, minister of justice): "The absence of clear title to land, because of historical disparities and systemic racism, continues to be a significant barrier to economic prosperity in these and other historical African Nova Scotian communities, Mr. Speaker. This is just unacceptable."

Nova Scotia's *Bill 69 Land Titles Within Municipalities* passed through the Nova Scotia House of Assembly and received royal assent as the *Community Land Titles Clarification Act* on 18 March 1964.[46] With some amendments over the last 60 years, the legislation evolved into what is now the *LTCA*. The *LTCA* provides a statutory mechanism through which claimants in designated areas can obtain a government-issued certificate of title upon successfully demonstrating their entitlement to their land.[47] It was enacted as remedial legislation intended to provide select communities with a simplified and less expensive alternative to traditional property law mechanisms for resolving title problems, such as the *Quieting Titles Act*.[48] The *LTCA*-designated areas are determined by the provincial government and subject to the approval of the applicable municipality in which the land is located. To be eligible as a designated area under the statute, the residents must be in necessitous circumstances as a result of a lack of property development that can be traced to confusion or obscurity in titles.[49] Between 1964 and 1990, thirteen *LTCA*-areas were designated, being the only designated areas to date.[50]

The process for obtaining a certificate of title under the *LTCA* requires a claimant to file an application for a certificate of claim to the applicable government department, demonstrating apparent entitlement to the land. The application must include a description of the land that is sufficient to identify and distinguish it from other lands, a concise statement of the facts on which the applicant bases their claim to ownership of the lot of land, and the names of the persons other than the applicant who have occupied the lot of land or who have at any time claimed ownership of the lost or any interest in it.[51] The application must also be accompanied by an abstract of title, a statutory declaration attesting to the history of the occupation, a statement identifying anyone who holds a lien or encumbrance against the land, and any other information or material requested by the department.[52] When it appears from the application that the applicant is entitled to the

46. *Community Land Titles Clarification Act*, SNS 1964, c 3, s 3(1).
47. As originally enacted, eligibility under the *LTCA* was restricted to Nova Scotian residents. This restriction was repealed in 2021.
48. *Quieting Titles Act*, RSNS 1989, c 382. One of the issues in *Downey* was the extent to which the *LTCA* process is more expedited than the *Quieting Titles Act* to achieve its remedial purpose (*Downey*, *supra* note 2 at para 7). In that case the court held that the government's policy which required applicants to establish adverse possession for a period of 20 years to prove apparent entitlement in support of a certificate of claim is not consistent with the purpose of the legislation. (*Downey*, *supra* note 2 at para 2).
49. *LTCA*, *supra* note 6 s 3(1); *Beals*, *supra* note 2 at para 21.
50. *Beals*, *supra* note 2 at 42.
51. *LTCA*, *supra* note 6, s 4(2).
52. *Ibid,* ss 4(3), 4(4).

lot of land, the minister may issue a certificate of claim to the applicant.[53] The statute does not define "entitlement," nor does it prescribe the criteria through which the minister can determine the appearance of entitlement. The minister has discretion in making those determinations, although is constrained by the governing statute in doing so.[54] The applicable standard for determining entitlement was one of the issues in *Downey*. In that case, while the court did not define what "entitled" meant in the context of the *LTCA*, it held that a departmental policy requiring applicants to establish adverse possession for a period of 20 years to show apparent entitlement for a certificate of claim is not consistent with the purposes of the legislation.[55] Adverse possession may be a factor in determining apparent entitlement, the court held, but the absence of proof of adverse possession cannot be a barrier to considering an application for a certificate of claim.[56]

The issuance of a certificate of claim is only the initial step toward obtaining a certificate of title under the *LTCA*. It creates a rebuttable presumption that the claimant is entitled to a certificate of title. The burden to rebut that presumption rests with anyone who claims a competing interest, who then must take action to either enforce their security interest in the land or seek a legal declaration of their own interest in the land, as applicable.[57] In situations involving the latter, there is a 60-day period within which a third party can file an objection.[58] The objecting party then has an additional 60-day period to commence an action in the Supreme Court of Nova Scotia for a declaration validating their claimed interest.[59] If no third-party competing claims are advanced or, if a third-party claimant does not pursue a formal declaration of their interest within the statutory timeframes, the government is statutorily required to grant the certificate of title to the applicant.[60] A certificate of title, once registered, vests in the applicant fee simple interest in the land, subject to any noted encumbrances mentioned in the certificate.[61]

As originally enacted, the *LTCA* process effectively ended at the certificate of claim stage if a third party objected to an applicant's claim

53. *LTCA*, *supra* note 6, s 5(1).
54. *Downey*, *supra* note 2 at para 26.
55. *Ibid* at para 2. Adverse possession is a legal doctrine by which an owner's title to an estate in fee simple may be displaced by a trespasser whose possession of the land goes unchallenged for a prescribed period of time (CW MacIntosh, *Nova Scotia Real Property Practice Manual* (Toronto: Butterworths, 1998) (loose-leaf updated 2021) at 7-1).
56. *Downey*, *supra* note 2 at para 2.
57. *LTCA*, *supra* note 6, s 7. *Beals*, *supra* note 2 at para 68.
58. *LTCA*, *supra* note 6, s 7(1).
59. *Ibid,* s 7(3A).
60. *Ibid,* s 7(3B).
61. *Ibid,* s 7(5).

within the 60-day timeframe. In such instances, the government was statutorily required to revoke the certificate of claim unless the objection was removed, which, due to the absence of a statutory mechanism for resolving such competing claims, often meant the application was halted indefinitely. The onus for resolving third-party objections shifted from the claimant to the objecting party in 1992 through legislative amendments, which included the introduction of an optional dispute resolution process through the Nova Scotia Supreme Court.[62] In addition to these amendments, the *LTCA* was further amended in 2001 when Nova Scotia introduced a new land registration system through the adoption of the *Land Registration Act*.[63] This amendment excluded *LRA*-registered parcels from eligibility under the *LTCA* which meant that any title claims (including competing claims) to parcels of land that had been migrated under the *LRA* could not be processed under the *LCTA*.[64] The *LTCA* was further amended in 2006, which introduced Part II of the Act dealing with the process to release Crown interests in Crown lands,[65] and again, in 2010, when the adverse affection provisions in the Act were amended.[66]

1. *Land Titles Initiative*

The most significant amendment to the *LTCA* occurred in 2021, when the provincial government embedded into this remedial legislation a remedial boost for clarifying land titles in African Nova Scotian communities, referred to as the Land Titles Initiative ("LTI").[67] On 5 March 2021, the provincial government announced the establishment of a $3 million compensation fund and the appointment of two land titles commissioners to adjudicate disputes in support the LTI.[68] Two weeks later, the provincial government introduced into the House of Assembly *Bill 28 Land Titles*

62. *Ibid,* s 1.
63. *Land Registration Act*, SNS 2001, c 6 [*LRA*].
64. *Ibid*, s 114; *LTCA*, *supra* note 6, s 2A.
65. SNS 2006 c 15 ss 11-14.
66. SNS 2010, c 55.
67. The Land Titles Initiative was initiated as the pilot project in 2015 and then launched in 2017. Province of Nova Scotia, News Release, "Government Helping Communities Get Clear Title to Land" (27 September 2017), online <https://novascotia.ca/news/release/?id=20170927001> [perma.cc/E3A5-3LAB] [Province of Nova Scotia, "Clear Title"].
68. The Land Titles Initiative is government-led commitment that was launched in 2017 (stemming from a pilot project in 2015) to assist residents in the African Nova Scotian communities of North Preston, East Preston, Cherry Brook/Lake Loon, Lincolnville and Sunnyville acquire legal title to their land. It is an interdepartmental collaboration involving communities culture & heritage/African Nova Scotian affairs, department of lands and forestry, department of justice, service Nova Scotia and internal services, and municipal affairs (Province of Nova Scotia, News Release, "Investments in Land Titles Initiative to Speed Up Claims" (5 March 5 2021), online: <https://novascotia.ca/news/release/?id=20210305001> [perma.cc/H55T-8AF8]). The $3 million compensation is referred to as the Land Titles Initiative Trust Fund (*LTCA*, *supra* note 6, s 8A(b)).

Initiative Acceleration Act, which made four significant amendments to the *LTCA*. First, it removed the requirement for applicants to be resident in the Province of Nova Scotia. Second, it waived municipal approval requirements for subdivisions involving *LTCA* certificates of title. Third, it broadened the scope of authority for adopting regulations under the Act. Fourth, *Bill 28* entrenched into law the Land Titles Initiative, through the addition of sections 8A to 8I. These sections include the land titles compensation fund and the appointment of land titles commissioners who are empowered to recommend the issuance of a certificate of title and make compensation awards from the fund to resolve land title disputes. On 19 April 2021, the *Land Titles Acceleration Act* was enacted into law.

On 9 November 2021, all matters and affairs pertaining to the LTI under Part 1 of the *LTCA* were removed from the department of natural resources and assigned to the office of equity and anti-racism initiatives,[69] and on 5 July 2022, new regulations respecting the LTI were adopted.[70] In addition to outlining certain procedural issues pertaining to the work of the LTI commissioners, the regulations set out the required qualifications for LTI commissioners, which include a requirement to be from an African Nova Scotian community or knowledgeable about the unique nature of African Nova Scotian communities.[71]

III. *Interest convergence and the* Land Titles Clarification Act

The *LTCA* is often portrayed as an achievement in racial equality that was enacted in response to racial injustices afflicting African Nova Scotians.[72] However, through an interest-convergence lens, the *LTCA* can be reframed as a legal regime that was motivated primarily to advance White-serving interests in clarifying Black-owned land, more so than moral concerns for African Nova Scotians' suffering. A reframed interest-convergence perspective on the *LTCA* further explains why shortly after its enactment, government support for this remedial measure faded once the *LTCA* no longer served the White-serving interests to a sufficient degree, despite the continued African Nova Scotian suffering. This convergence of interest and subsequent retraction of support triggered a cycle of perceived, yet unsustainable, racial remedy such that the land titles issue in African Nova Scotian communities has been continuously revived and repressed over the last 60 years.

69. OC 2021-255 (*Public Services Act*). On 23 May 2023, those matters were assigned to the minister responsible for African Nova Scotian affairs (OC 2023-141 (*Public Services Act*)).
70. (OC 2022-176 (*Land Titles Clarification Act*)).
71. *Land Titles Initiative Regulations*, NS Reg 123/2022, s 3.
72. MacKay, "Human Rights in Nova Scotia," *supra* note 41.

To understand the White-serving interests underlying the *LTCA*, the decision must be understood in its racial and historical context: what was the value to White policymakers in clarifying African Nova Scotian land titles in the mid-twentieth century? First, the clarification of land titles in African Nova Scotian communities, particularly the expectation that it would alleviate financial impoverishment for African Nova Scotians, served the interests of White policymakers by maintaining perceptions of racial equality during the mid-twentieth century human rights movement. Second, the clarification of land titles in African Nova Scotian communities served the interests of White policymakers' by facilitating expropriation opportunities in African Nova Scotian communities during the height of Nova Scotia's post-war industrial development era, particularly after the lessons they learned from the Africville displacement.

In 1946, the United Nations established the commission on human rights, which led to the unanimous adoption by 48 states (including Canada) of the Universal Declaration of Human Rights on 10 December 1948.[73] This declaration laid the foundation on which human rights legislation evolved in Canada, including in Nova Scotia.[74] Human rights organizations such as the Nova Scotia Association for the Advancement of Coloured People had significant influence on the enactment of racial discrimination laws and by the 1950s the human rights movement gained momentum in Nova Scotia.[75] The racial injustices that were once ignored in Nova Scotia were being illuminated through profound and far-reaching methods.[76] The world became more aware of, and more concerned with, how marginalized groups were being treated, and governments sought to maintain the appearance of racial equality to preserve the image of democracy and liberalism. For Nova Scotia, this meant the rest of Canada paid closer attention to how the province treated Canada's largest Black population, African Nova Scotians, to ensure that Canada's emerging reputation as a human rights leader remained intact.[77]

---

73. Pachai, *Human Rights, supra* note 41 at 28.

74. *Ibid* at 28. For a discussion regarding the barriers to racial equality through Canada's human rights regime, see Michelle Y Williams, "Sisyphus's Ongoing Journey: Anti-Black Racism and the Myth of Racial Equality in Canada" in David Divine, ed, *Multiple Lenses: Voices from Diaspora located in Canada* (Newcastle, UK: Cambridge Scholars Publishing, 2007) [Williams, "Sisyphus"].

75. MacKay, "Human Rights in Nova Scotia," *supra* note 41.

76. Ian McKay, "Race, White Settler Liberalism, and the Nova Scotia Archives, 1931-1976" (2020) 49:2 Acadiensis 5 at 13, online: <id.erudit.org/iderudit/1075639ar> [perma.cc/T5ZJ-BCCB]: "[i]n the post-1945 period, racial injustices were not only protested but, thanks to the emergence of African Nova Scotian publications, publicized."

77. Williams, "Sisyphus," *supra* note 74 at 4. Notably, on 10 August 1960, the Parliament of Canada enacted the *Canadian Bill of Rights,* SC 1960, c 44.

In 1956, Robert Stanfield, leader of the provincial conservative party, was elected premier of Nova Scotia and served in that capacity until 1967. During that time, increased mainstream media attention was directed towards the racial oppression and neglect of African Nova Scotians.[78] The push for housing, education, and employment opportunities dominated the human rights discourse in Nova Scotia, which was guided by liberal ideals of progress based on racial equality through racial integration. The integration of Black people into White spaces was a prevailing assumption for the betterment of African Nova Scotians, who, for generations, were denied equal and equitable resources for their racially segregated communities. It is within this context that in 1962, Premier Stanfield established the ICHR to, among other things, give immediate attention to the problems of African Nova Scotians.[79] Tasked with improving interdepartmental communication and cooperation, particularly regarding social and economic issues,[80] the ICHR was instrumental in the development of the *LTCA*.[81]

In the spirit of racial equality, White policymakers were compelled to fix the societal and economic problems plaguing African Nova Scotians, or at least appear to be doing so.[82] White policymakers assumed that equal access to commercially-developed property would alleviate African Nova Scotians' poverty, and clarifying land titles furthered that ideology as a precursor to industrial development in African Nova Scotian communities. Through the clarification of land titles in African Nova Scotian communities and, by extension, creating perceived equal opportunities for African Nova Scotians to derive economic value from land, White policymakers sought to benefit from improved optics on racial equality, particularly equality of

78. Colter, "A State of Affairs," *supra* note 9 at 12: "When Stanfield came into power, the conditions of black Nova Scotians were beginning to gain national attention, and, as premier, he could not avoid the situation." Pachai, *Human Rights, supra* note 41 at 44: "the 1960s was a decade in which the media focused increasing attention on Nova Scotia's race problems."

79. Fred R MacKinnon, "Human Rights—The Early Years" in Pachai, *Human Rights, supra* note 41 at 37.

80. *Ibid* at 36: "It became evident to me as early as 1960 that one of the most serious shortcomings of government was the lack of interdepartmental cooperation at the ministerial level and indeed throughout every aspect of interdepartmental relationships. As government became more and more involved in social and economic issues affecting individuals, families and communities, these problems of interdepartmental communication and cooperation were becoming more serious and damaging to innovative and effective programs."

81. See discussion in Part II, *Land Titles Clarification Act*, for the role of the ICHR in the enactment of the *LTCA*.

82. It is possible that some policymakers were motivated to redress racial inequality as well as perceptions of racial inequality. However, from a critical race perspective which presumes the pervasiveness of racism, combined with the well documented and longstanding negative attitudes towards African Nova Scotians, the latter is most likely.

land-based economic opportunities.[83] Unfortunately, however, while equal access to land-based economic prosperity (perceived or otherwise) may underlie the *LTCA*, the racial disparities in wealth and poverty persists in Nova Scotia notwithstanding the clarification of title to hundreds of land parcels in African Nova Scotian communities.[84]

The mid-twentieth century was not only a pivotal time for human rights and racial equality, but also for industrial land development. During this period, Halifax was keen to commence a new era of economic growth and prosperity, and experienced a dramatic increase in property development.[85] Premier Stanfield was an outspoken supporter of industrial development.[86] With the increase in major construction projects under his helm, and the prevailing assumptions that industrial land development led to economic prosperity, the availability of land became integral to the government's plans for economic growth. The desire to develop land, however, was (and is) constrained by property law principles which, among other things, require certainty of land ownership. As the demand for land development increased, so too did the government's interest in clarifying land ownership.[87] Furthermore, with the limited amount of land available in Nova Scotia, all land held value, even land that was tucked away in remote, isolated, and neglected African Nova Scotian communities.[88] Consequently, the desire to develop land in African Nova Scotian communities, and the legal necessity to clarify land titles as a

83. The presumed relationship between land titles and poverty is reflected in *LTCA*, *supra* note 6, s 3(1). The assumptions around land titles and economic prosperity continue to dominate the *LTCA* discourse. For example, in debating amendments to the *LTCA* in 2009, the minister of natural resources remarked: "The Land Titles Clarification Act was enacted in 1964 because economic development was being adversely impacted by a lack of clarity in land titles […]." ("Bill No. 74 - Land Titles Clarification Act," 2nd reading, House of Assembly Debates, 10-35 (1 November 2010) at 2769 (Hon John MacDonell, minister of natural resources) [Hansard 10-35]). See also: "Without legal certainty of ownership, many resident in these communities have been unable to exercise any of the benefits of land ownership that the rest of us take for granted, such as obtaining a mortgage, dividing or selling their land, accessing housing grants, or building equity in their homes." ("Bill No. 28, Land Titles Initiative Acceleration Act Nova Scotia," 2nd reading, *House of Assembly Debates*, 21-06 (25 March 2021) at 539 (Hon Randy Delorey, minister of justice) [Hansard 21-06]).

84. *United Nations DPAD Report*, *supra* note 2 at 7 (see statistics at 54, 57).

85. Donald H Clairmont & Dennis William Magill, *Africville: the Life and Death of a Canadian Black Community,* 3rd ed (Toronto: Canadian Scholars Press, 1999) at 2 [Clairmont & Magill, *Africville Life and Death*]; Ted Rutland, *Displacing Blackness: Planning, Power, and Race in Twentieth-Century Halifax* (Toronto: University of Toronto Press, 2018) at 117 [Rutland, *Displacing Blackness*].

86. Colter, "A State of Affairs," *supra* note 9 at 85.

87. The government's desire for certainty around land ownership to facilitate land-based economic transactions is also reflected in Nova Scotia's *Land Registration Act*, SNS 2001, c 6, s 2.

88. Rutland, *Displacing Blackness*, *supra* note 85 documents the influence of racism in the government's land planning decisions; Ingrid RG Waldron, *There's Something in the Water: Environmental Racism in Indigenous and Black Communities* (Black Point, NS: Fernwood Publishing, 2018) documents the influence of racism in the government's placement of industrial sites.

precursor to that land development, motivated policymakers to finally act regarding obscure land titles in African Nova Scotian communities.

The interest in clarifying land titles in African Nova Scotian communities to promote the perception of racial equality and to facilitate industrial development in African Nova Scotian communities emerged most profoundly during the Africville displacement. In the 1960s, the government deceptively and forcibly removed residents from their homes in the historic African Nova Scotian community of Africville.[89] While the government could have relied on expropriation law to acquire the land,[90] if they had done so without first clarifying each individual property interest (and assigning fair value instead of "slum" value), then the formal application of expropriation law in Africville would have appeared racially discriminatory due to the complex property interests in that community.[91] In normal circumstances, an expropriated landowner is compensated for their loss in accordance with expropriation laws and procedures. However, when property interests are unclear or held by multiple interest-holders in familial or communal situations, the process can be complex, time consuming, and may result in perceived (or real) disadvantage to the individuals harmed by the expropriation but not owed adequate compensation for their loss under the law.[92] Ideally, the property interests are ascertained prior to an expropriation to ensure the correct interest holder is properly notified and compensated.[93] However, due to

89. Jennifer J Nelson, *Razing Africville: A Geography of Racism* (Toronto: University of Toronto Press, 2008); Tina Loo "Africville and the Dynamics of State Power in Postwar Canada." (2010) 39:2 Acadiensis 23. The Africville displacement took place over many years, however, a public announcement was made in the local newspaper on 1 August 1962 (see Donald H Clairmont & Dennis W Magill, *Africville Relocation Report* (Halifax: Institute of Public Affairs, Dalhousie University, 1971) at 159 [Clairmont & Magill, *Africville Relocation Report*]).

90. The 1954 *Expropriation Act* empowered the government to, subject to statutory compliance and procedures, expropriate land without the consent of the owner for any purpose relative to the use, construction, maintenance or repair of a public work, including for the purpose of encouraging and promoting the development of any industry within the Province (*Expropriation Act*, RSNS 1954, c 91, as amended by SNS 1955, s 25; SNS 1958, c 31; and SNS 1961, c 28, s 2(1), s 3(1)(b) ([1954 *Expropriation Act*]).

91. The 1954 *Expropriation Act*, *supra* note 90 outlined expropriation procedures, such as filing of expropriation plans (s 7) and expropriation obligations such as notice to the owner (s 12) and to the public (s 13), and, subject to the statutory timeframes in response to the notice requirements, compensation owed to the owner of land entered upon, taken or used, or injuriously affected by the expropriation (ss 11, 14). While the term "owner" was defined to include tenant, occupants and persons entitled to a limited estate or interest, it did not account for communal or shared property interests.

92. The expropriation laws in Nova Scotia were subsequently reformed in 1973, alongside sweeping reforms in other provinces after various expropriation reform commissions and reports such as the Royal Commission Inquiry into Civil Rights (Ontario, *Royal Commission Inquiry into Civil Rights*, by Hon JC McRuer, no 1, vol 3, (Toronto: Queens Printer, 1968) [McRuer Report]). These amendments transformed key aspects of expropriation laws, including procedural fairness and compensation.

93. For example, in 1974 the Province of Nova Scotia expropriated community-owned land in the

the property interest and surveying complexities surrounding many of the parcels in Africville, the government's ability to use a formal expropriation process without first clarifying land titles was disrupted, particularly since they also wanted to maintain the perception of racial equality at the height of the human rights movement. Therefore, to protect the perception of racial equality *and* take the land, the government either had to clarify the land titles before a formal expropriation process or ignore the expropriation laws and devise an alternative compulsory acquisition and compensation scheme. They chose the latter.

During the Africville displacement the government knew that while title clarification would be difficult, ownership could be proven in many instances. However, they determined that the expense of clarifying the titles outweighed the government's assessed value of the land, notwithstanding the acknowledged growth in value of the land.[94] Research also shows that the Africville community preferred a title clarification process through the appointment of a special judicial committee, but the government refused and, instead, redirected the community's attention away from title clarification and formal expropriation and toward a specialized expropriation and compensation scheme through the broader urban renewal plans.[95] The consequences of this informal expropriation and compensation scheme meant that rather than clarifying land titles and processing the compensation claims through the applicable expropriation laws and procedures (which would have included independent property valuations and appeals),[96] many residents were paid (if at all) through an informal and inadequate formula that was created specifically for the Africville residents.[97]

African Nova Scotian community of Upper Hammonds Plains [the "Melvin Lands"], in connection with a public watershed. The land was jointly owned by community members and subsequently transferred to a community-owned incorporated entity, the Melvin Land Tract Protection Society. Immediately prior to the expropriation, the government clarified title to the Melvin Lands through a court procedure to ensure there were no gaps in the chain of title prior to expropriation.

94. City of Halifax, Development Department, *Report on Africville* (23 July 1962) [Halifax Development, *Report on Africville*] (available in Clairmont & Magill, *Africville Relocation Report, supra* note 89, at Appendix A at A1): "Title to some of the land will be difficult to ascertain […] there will be families with squatters rights, and others with clear title to land which is now appreciating considerably in value." See also *ibid,* Appendix A at A3: "title to the Africville's properties is in a chaotic state. While ownership of sort could be proven in most instances, the expense of proving such title might be more than the property was worth." The report also references previous experiences by Nova Scotia Power and Canadian National Railway where similar land titles challenges were experienced during their respective expropriations in Africville.

95. Clairmont & Magill, *Africville Life and Death*, *supra* note 85 at 152.

96. The 1954 *Expropriation Act*, *supra* note 90, ss 16A, 19.

97. Clairmont & Magill, *Africville Life and Death*, *supra* note 85 at 187; Ted Rutland in Rutland, *Displacing Blackness*, *supra* note 85 at 147: "the terms of relocation offered to Africville residents

The lingering debate on whether Africville residents would have received more compensation under formal expropriations laws *after* clarifying title to the land is reflected in litigation concerning Africville residents.[98] However, for the purposes of this article, what is relevant is that unclear land titles in Africville caused challenges for White policymakers who wanted to expropriate African Nova Scotian land while maintaining perceptions of racial equality. These challenges, or the desire to avoid these challenges in the future, created a self-serving motivation to enact a simplified and less expensive regime for clarifying land titles in other African Nova Scotian communities as a precursor to potential expropriation opportunities in those communities.[99] It was this self-serving interest (combined with the overall interest in maintaining perceptions of racial equality) that motivated White policymakers to finally act regarding the land titles issues in African Nova Scotian communities These White-serving interests converged with the long-standing demands by African Nova Scotians for legal title to their ancestral land, which gave rise to the enactment of the *LTCA* in 1964.[100]

IV. *An unsustainable remedy*

While the interests finally converged in 1964 to produce the *LTCA*, the underlying White-serving interests which motivated policymakers to finally act were not enough to yield sustainable results. Once the need to maintain the appearance of racial equality started to fade, and it became apparent to policymakers that the full promise of the *LTCA* required extraordinary financial and other government resources, their support for clarifying land titles in African Nova Scotian communities started to decline. As early as 1965 (less than one year after its enactment), the *LTCA* fell short of its lofty aspirations and quickly encountered resistance. As the deputy minister of welfare expressed in his correspondence to the ICHR:

---

varied widely. Homeowners (with clear, legal title to their property) were offered an average of $7,847, while other residents received as little as $500." Clairmont & Magill, *Africville Life and Death*, *supra* note 85 at 140: "Residents without legal title would receive a gratuitous payment of $500 for a quit claim deed and vacant possession of their property. Residents with proof of legal title could claim compensation through the courts or in negotiation with the city." Clairmont and Magill do not indicate whether any Africville landowners pursued such compensation claims through the courts.

98. *Carvery v Halifax (City)*, 2018 NSSC 204 at para 23.

99. Notably, the first parcel to receive a certificate of title under the *LTCA* was in the African Nova Scotian community of North Preston, which was issued on 23 February 1965. Four years later, the parcel was partially expropriated. See County of Halifax, *Certificate of title dated 23 February 1965*, (deed), recorded on 28 May 1965, in book 2046, at 98, doc 12271; and County of Halifax, *Expropriation plan dated 22 October 1969*, recorded in the County of Halifax on 27 October 1969.

100. It did not take long to approve the *LTCA* despite its vague and problematic drafting. The decision to push through this vague legislation may also be an indication that policymakers were more concerned about the perception of racial equality than they were about actual racial equality.

> On the face of it specific and definite action in respect of land titles at New Road seems to be a simple matter which should not require a great amount of time. The same comment might be made regarding other items of business considered by the Committee. The facts are that any one of these problems requires many telephone calls, letters and follow-up, discussions, committee meetings and a considerable amount of time on the part of some senior official. Otherwise, they are likely to end in frustration, delay and perhaps ultimate failure.[101]

Due to this frustration and delay, the deputy minister recommended increasing the ICHR's commitment to the *LTCA* to help resolve title disputes and expedite the bureaucracy. However, the ICHR, notwithstanding its purported mandate to coordinate interdepartmental cooperation to resolve African Nova Scotian issues, chose to distance themselves from the individual claims.[102] At this point, the government's interest in clarifying African Nova Scotian land titles started to recede and the urgency that once motivated the enactment of the *LTCA* started to scale back in the face of escalating costs, increased level of effort required, and a strain on government resources. Remarkably, in the first 50 years of the *LTCA* only 435 certificates of title were issued in the 13 *LTCA* designated areas.[103] To put this number into perspective, in the four-year period between 2017 to 2020, title to 252 parcels in five LTI-areas were cleared.[104] Meaning, it took only four years to accomplish more than half of what was accomplished during the first 50 years of the *LTCA*.

Why did policymakers' support for the *LTCA* recede shortly after its enactment? Informed by interest-convergence theory, the fading support

---

101. Colter, "A State of Affairs," *supra* note 9 at 99.

102. *Ibid* at 100.

103. Information Note, Advice to Minister from Acting Executive Director Preston Area Land Titles Clarification Project (7 April 2017) available in Department of Natural Resources*, Access to Information Routine Disclosure 2017-04192-DLF,* (Halifax: Province of Nova Scotia, 23 August 2017) at 7, online: <openinformation.novascotia.ca> [perma.cc/W9T6-AVMR] ["DNR Disclosure 2017"].

104. Office of Equity and Anti-Racism Initiatives & Natural Resources and Renewables, News Release, "Changes Under Land Titles Clarification Act Will Help Resolve Claims Faster," (10 November 2021), online: <novascotia.ca> [https://perma.cc/JX4J-3KLJ]: "There are approximately 883 land parcels eligible to be cleared in the five Land Titles Initiative communities." Not all 252 parcels were cleared through the issuance of a certificate of title. Some were cleared through the migration process under the *Land Registration Act* or through probate, services for both of which are also available through the LTI. Since the LTI was announced in September 2017, up to 5 June 2020, a total of 11 certificates of title were issued in the five LTI areas: one in Cherry Brook/Lake Loon, three in East Preston, and seven in North Preston (see Information Note—Advice to Minister from Executive Director Land Services and Manager of Land Administration on the Land Titles Initiative (8 June 2020) in Department of Lands and Forestry, *Access to Information Routine Disclosure 2020-20199-DLF* (Halifax: Province of Nova Scotia, 6 January 2021) at 247 online: <openinformation.novascotia.ca> [perma.cc/SG6P-SS4C] ["DLF Disclosure 2020"]).

for the *LTCA* exemplifies the risks associated with racial progress that is motivated by White-serving interests instead of Black-serving interests. The land titles issue is merely a manifestation of centuries of anti-Black racism in this province.[105] Effective redress for the inter-generational impacts of anti-Black racism in this province will inevitability require significant financial resources, which will require White policymakers to relinquish a portion of their status, power, and wealth. When that demand for sacrifice is weighed against the specific White-serving interests that first motivated their support for a racially progressive measure, White policymakers often choose the larger interest of self-preservation over the relatively smaller interest that they expected to gain from the racially progressive measure, such as perceived racial equality particularly during times when few people are paying attention. Consequently, their support for the racially progressive measure that was motivated by those relatively minor White-serving interests will fade.

Derrick Bell's interest-convergence theory posits that racially progressive measures will be *accommodated* only when that interest converges with the interests of White policymakers.[106] Thus, even when the interests fortuitously align to produce perceived progress, the *tolerance* for full implementation has its limits. The remedial measure will proceed only up to the point that White policymakers fear the remedial measure threatens the superior societal status of Whiteness.[107] In the context of the *LTCA*, this means policymakers' support for clarifying land titles in African Nova Scotian communities recedes once doing so appears to threaten the superior societal status of Whiteness. That status may seem threatened in a myriad of ways, for example, if it appears to other Nova Scotians that African Nova Scotians are receiving preferential treatment in terms of financial resources or attention. However, regardless of the threat (real or perceived) once that point is reached, interest convergence informs us that White policymakers will scale back support for the African Nova Scotian remedial measure, notwithstanding continued African Nova Scotian suffering. Additionally, as critical race scholars point out, distraction and preoccupation exacerbate the fading support, as White allies, it is argued, move on to support other causes believing the race problem has been resolved.[108] Meaning, unless there is constant pressure and heightened attention on the racial injustices afflicting African Nova Scotians (with

105. *Downey*, *supra* note 2 at paras 4-5.
106. Bell, *Silent Covenants*, *supra* note 12 at 106.
107. *Ibid* at 106. For "Whiteness" see *supra* note 33.
108. Delgado & Stefancic, *Critical Race Theory*, *supra* note 15 at 30.

the support of White allies), the government is less concerned about racial inequality, real and perceived.

The dwindling support for the *LTCA* in the mid-twentieth century meant the land titles issue in African Nova Scotian communities quietly endured for another 25 years until it was revived in 1991 to, again, serve the interests of White policymakers. As in the 1960s, the White-serving interests, which motivated the government's renewed support for the *LTCA* in the 1990s, were to dissipate perceptions of racial inequality during a time of heightened racial tensions. Also, as in the 1960s, White policymakers acted on the assumption that clarifying land titles in African Nova Scotian communities would result in land-based economic prosperity for African Nova Scotians.

On 19 July 1991, only two years after the 1989 Royal Commission on the Donald Marshall, Jr. Prosecution,[109] a race-based incident at a Halifax nightclub triggered anti-racism protests in Halifax which prompted the formation of the Nova Scotia Advisory Group on Race Relations. The Advisory Group consisted of representatives from all three levels of government and select members of the African Nova Scotian community, who were tasked with developing a plan of action to deal with racism and racial discrimination.[110] Regarding land titles, the Advisory Group made the following recommendations:

> THAT the Government of Nova Scotia, through the Department of Natural Resources, make Land Title Clarification a priority in Black communities throughout Nova Scotia;
>
> THAT the Government of Nova Scotia make funds available to the Department of Natural Resources to hire more staff in order to facilitate the process of Land Title Clarification application by members of the Black community and that all such requests be completed by 1994.[111]

---

109. The 1989 Royal Commission on the Donald Marshall, Jr Prosecution investigated racism in the criminal justice system after Donald Marshall Jr., a Mi'kmaw adolescent, was wrongfully convicted of the murder of Sandy Seale, an African Nova Scotian adolescent, who was actually killed by Roy Ebsary, a White man who stabbed Seale in the stomach while shouting "This is for you, Black man." See *Royal Commission on the Donald Marshall Jr. Prosecution—Digest of Finding and Recommendations* (Halifax: Province of Nova Scotia, 1989) at 2.

110. *Report of the Nova Scotia Advisory Group on Race Relations*, 1 September 1991 [unpublished]. Interestingly, at the same time, the government was delaying the implementation of the recommendations in the Marshall Report and withholding funding for an African Nova Scotian and Mi'kmaq law school admissions program (Richard F Devlin & A Wayne MacKay, "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1991) 14:2 Dal Law Journal 296 at 330, n 50).

111. *Report of the Nova Scotia Advisory Group on Race Relations*, *supra* note 110 at 12 (Recommendation 13 and 14, respectively).

The Advisory Group's recommendations were embraced in the Nova Scotia House of Assembly during the legislative debates concerning amendments to the *Land Titles Clarification Act* in 1992.[112] These important amendments reversed the onus for third-party objections to a certificate of claim issued under the Act and established a dispute resolution mechanism in the Nova Scotia Supreme Court, thereby further simplifying the process to certify title to land in African Nova Scotian communities.[113] Not surprisingly, the 1991 *Race Relations Report* also recommended increased land development in Black communities, particularly "to promote long-term economic development" through initiatives with the Atlantic Canada Opportunities Agency, which again draws a connection between legal title to African Nova Scotian land as a precursor to broader economic development plans for the province.[114]

The renewed interest in African Nova Scotian land titles in 1991 did not last long. Once the racial tension eased, support for clarifying land titles in African Nova Scotian communities waned. The support regressed despite land titles in general being a dominant issue in Nova Scotia at the turn of the twenty-first century with the enactment of the *Land Registration Act* (LRA) in 2001. Aside from an amendment to the *LTCA* which excluded *LRA*-migrated parcels from *LTCA* eligibility, the African Nova Scotian land titles issue appears to have been largely ignored in the province-wide planning for the *LRA* land migration project.[115]

The government was incentivized again to revive the clarification of land titles in African Nova Scotian communities when, in 2009, ongoing discussions within the government revealed a backlog of land title clarification applications. Records show that in 2009, the department of natural resources conducted a review of all open files under the *Land Titles Clarification Act*. At the time, there were more than 300 open files, for which applicants or their lawyers were awaiting response. Inactive

112. "I note that the 13th recommendation of the Report of the Nova Scotia Advisory Group on Race Relations said that the Government of Nova Scotia through the Department of Natural Resources make land title clarification a priority in black communities throughout Nova Scotia" (Nova Scotia, *House of Assembly Debates and Proceedings*, 55-2, No 212 (22 June 1992) at 10448 (John Holm) online: <nslegislature.ca> [perma.cc/W4SY-L54A]).

113. For discussion on the 1992 amendments to the *LTCA*, see Part II: Land Titles Clarification Act, above.

114. *Report of the Nova Scotia Advisory Group on Race Relations*, *supra* note 110 at 9 (Recommendation 8).

115. Migration refers to the process of registering a parcel of land from the old paper-based registry system to the new online parcel-based registration system established by the *Land Registration Act*. The statutory exclusion meant that once a parcel is migrated under the *LRA* it is no longer eligible for relief under the *LTCA*. This could have adverse impacts for an *LTCA* applicant whose interest is ousted by a title holder's successful *LRA* migration.

files were subsequently closed and put into storage.[116] This inquiry prompted government in the subsequent year (2010) to amend the adverse affection compensation provisions in the *LTCA*, presumably in preparation for the influx of unresolved title claims.[117] In the context of race relations in 2010, the municipality of Halifax reached a settlement agreement with some members of the Africville community regarding the Africville displacement, which included an acknowledgement of loss and an apology.[118] Also at this time, the Province of Nova Scotia issued an official apology and pardon to the late Viola Desmond, an African Nova Scotian human rights activists who challenged racial segregation in a Nova Scotian movie theatre in 1946.[119] In each instance, the government was forced to confront its relationship with and treatment of the African Nova Scotian community under the scrutiny of public attention. However, despite this brief second revival, the land titles issue in African Nova Scotian communities continued to endure a while longer.

A few years after the 2010 amendments and the government's discovery of their *LTCA* application backlog, the African Nova Scotian land titles issue cycled back into relevance for White policymakers when publicity around racial inequalities peaked again in Nova Scotia, motivating the government to act. In 2014, then law student Angela Simmonds conducted community-based legal research regarding the land-related challenges confronting African Nova Scotian communities.[120] This research exposed, among other things, the severity of the land titles problem in African Nova Scotian communities, and the underutilization of the *LTCA* due to systemic barriers and racial discrimination within government departments. Simmonds' final report was brought to the attention of the Nova Scotia Barristers' Society's Equity & Access Officer, who approached a Nova Scotia Community College (NSCC) journalism instructor with the idea

116. See Province of Nova Scotia presentation materials dated 8 November 2016 in DNR Disclosure 2017, *supra* 103 at 89.

117. See above at 13. The minister of natural resources remarked in the House of Assembly "although applications for compensation made under Section 8 of the *Land Titles Clarification Act* are infrequent, our amendment will ensure a fair, simplified process for those who apply." (Hansard 10-35, *supra* note 83 at 2770).

118. *Williams v Halifax Regional Municipality* 2015 NSSC 228 at para 7.

119. For the apology, see Nova Scotia Premier's Office, News Release, "Late Viola Desmond Granted Apology, Free Pardon," (15 April 2010), online: <novascotia.ca> [perma.cc/S8DG-RZKQ]. For information about Viola Desmond see Constance Backhouse, *Colour-Coded, A Legal History of Racism in Canada, 1990-1950*, (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1999).

120. Angela Simmonds, "This Land is Our Land: African Nova Scotian Voices from the Preston Area Speak Up" (19 August 2014), [unpublished] [Simmonds, "This Land is Our Land"], referred to in *Beals supra* note 2.

of using the report for a student project in the college's Radio, Television and Journalism course.[121] The NSCC students produced a series of documentary videos regarding the land titles challenges in African Nova Scotian communities, which prompted renewed mainstream interest on the land titles issue.[122] Consequently, with renewed public attention on the racial inequalities afflicting African Nova Scotians, the provincial government commenced a two-year pilot project to support land title clarification applications for residents in three *LTCA* areas: East Preston, North Preston, and Cherry Brook.[123]

Then, in October 2016, a group of African Nova Scotians presented long-standing cross-sectoral concerns of anti-Black racism to the United Nations Working Group of Experts on People of African Descent during its fact-finding mission in Canada, including the land titles issue. Upon completion of its visit, the United Nations working group publicly condemned the provincial government for their lack of progress on the land titles notwithstanding the enactment of the *LTCA*.[124] A few months later, the provincial government announced dedicated funding (approximately $2.7 million over two years) for eligible fees and costs to help participants in five *LTCA* areas (Lincolnville, Sunnyville, East Preston, Lake Loon/ Cherry Brook, North Preston) acquire title to their land.[125] This program became known as the Land Titles Initiative ("LTI"), an inter-departmental government-led remedial program aimed at accelerating the clarification of land titles for residents in those five African Nova Scotian communities. The provincial government also partnered with Nova Scotia Legal Aid Commission to provide legal services to LTI participants at no cost to residents.[126] Despite these remedial measures aimed at boosting the

121. Nova Scotia Community College Radio, Television, Journalism Students (2016), "About Us" (2021), online: <northprestonland.ca> [perma.cc/F9SX-MEGP].
122. See *ibid* for documentary videos.
123. DLF Disclosure 2020, *supra* note 104 at 246; *United Nations DPAD Report*, *supra* note 2 at 13.
124. United Nations, Press Release, "Statement to the media by the United Nations' Working Group of Experts on People of African Descent, on the conclusion of its official visit to Canada, 17-21 October 2016" (21 October 2016), online: <ohchr.org/en/statements/2016/10/statement-media-united-nations-working-group-experts-people-african-descent>: "In Nova Scotia, the Working Group noted concerns about the lack of implementation of the Land Title Clarification Act (LTCA) which assists people of African descent in obtaining titles to the lands on which they live. The LTCA was enacted to create equity for communities who were affected by past historical wrongs." These concerns were reiterated in *United Nations DPAD Report*, *supra* note 2 at 13. See also *United Nations DPAD Report, supra* note 2 at 19 (recommendation 96(c)): "The Government of Canada should...Provide financial support for the implementation of the Land Title Clarification Act in Nova Scotia, which is aimed at resolving all outstanding land claim issues within historically Black communities. Amend the Act to respect the cultural traditions of African Nova Scotian communities."
125. Province of Nova Scotia, "Clear Title," *supra* note 67.
126. Nova Scotia, "Land Titles Initiative: A project to support land clarification within designated

60-year-old remedial legislation, many challenges and barriers continued to disrupt progress.[127] For example, in February 2017, a group of lawyers who were involved with the land titles project wrote to the deputy minister of natural resources expressing concerns with, among other things, the government's narrow interpretation of "entitlement" under the *LTCA*, noting:

> [T]he government's interpretation is that the test for proving entitlement to a lot of land to be the same as the test under the *Quieting Titles Act*, that is, either paper title or proof of adverse possession under what is now the *Real Property Limitations Act*. That in our view is too strict an interpretation.[128]

The government opted to wait an additional three years for judicial guidance on this issue before amending their standard practice, which was the primary issue in the *Downey* case where the court struck down that administrative policy.[129]

The land titles lawyers also raised concerns with the government's refusal to appoint commissioners as prescribed by the *LTCA*, to resolve the more complex or competing claims:

> Another example we have encountered is the Department's apparent view that if there is any doubt as to title, then the application is rejected, and the homeowner is left to take her claim to court. This in our respectful view pays insufficient heed to the provisions in s.5 of the Act to appoint commissioners to determine titles which the Minister cannot determine summarily, the mechanics of s.5 and s.7 which place the burden on competing claimants, not applicants, to bring court action, and the provisions for compensation for persons anticipated to be adversely affected by certificates of title in s.8.[130]

The government opted to wait an additional four years before it appointed land titles commissioners under the *LTCA*.

Despite the concerns raised by the lawyers involved in the land titles project, the government continued to operate the Land Titles Initiative for an additional three years using the more stringent standard which required proof of adverse possession for a period of at least 20 years and

areas" (LTI Community Newsletter) July 2022, (Halifax: Province of Nova Scotia, 2022), online: <novascotia.ca/land-titles> [perma.cc/Z2LZ-E8TA]).

127. Memorandum from Nova Scotia Barristers Society to the Deputy Minister Department of Natural Resources (14 February 2017) in DNR Disclosure 2017, *supra* note 103 at 40 ["NSBS Memorandum"].

128. *Ibid* at 41.

129. *Downey, supra* note 2.

130. NSBS Memorandum, *supra* note 127, at 41.

continued to reject less than perfect claims instead of appointing land title commissioners, while at the same time claiming the Land Titles Initiative sought to alleviate barriers and address disparities and systemic discrimination experienced by African Nova Scotians.[131] Then in 2020, momentum for racial justice arrived again in Nova Scotia.[132] First, in February 2020, the Nova Scotia Supreme Court released its decision in *Beals*. Supported by overwhelming evidence demonstrating anti-Black racism and racial discrimination inflicted on African Nova Scotians, the court articulated a minimum standard of knowledge about African Nova Scotians that is expected from a decision maker under the *LTCA*.[133] The Nova Scotia Supreme Court reiterated those messages a few months later in *Downey*, stating:

> African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates. That is a fundamental historical fact and an observation of present reality.
>
> That has real implications for things like land ownership. Residents in African Nova Scotian communities are more likely to have unclear title to land on which they may have lived for many generations. That is because in those communities, informal arrangements were more common. Financial and other obstacles made it less likely that people in those communities would retain lawyers and surveyors to research title, register deeds or wills, or to survey boundaries. People may have lived on land for generations without having title registered. No one else might claim it and it may be that no one in the community disputes their entitlement to it. But they still have no formal title.[134]

The *Downey* decision not only compelled the Nova Scotia government to change its longstanding devotion to adverse possession as the standard for determining entitlement to a certificate of claim, but it also forced government to, once again, confront its relationship with the African Nova Scotian community under public scrutiny. The *Downey* decision was heard

---

131. In their legal brief as quoted in *Beals*, *supra* note 2 at 37, the Province of Nova Scotia wrote: "In September 2017, the government announced an initiative to alleviate administrative, legislative, and financial barriers to clarification of land ownership and to address disparities and systemic discrimination that African Nova Scotians have faced in the enjoyment of their social, economic and cultural rights related to their land."

132. Thornhill notes how race, racism, and racial reckoning moved to the forefront of public consciousness in 2020 as a result racialized events which triggered renewed public outcry and outrage at the lack of value placed on Black lives (see Esmeralda MA Thornhill, "Re-thinking and Re-framing RDS: A Black Woman's Perspective" in Michele A Johnson & Funké Aladejebi, eds, *Unsettling the Great White North: Black Canadian History* (Toronto: University of Toronto Press, 2022)).

133. *Beals*, *supra* note 2 at paras 36-37.

134. *Downey*, *supra* note 2 at paras 4-5.

25 June 2020, and released 7 July 2020, less one month after the murder of George Floyd and the revival of the Black Lives Matter movement, during which the provincial government joined many others in messages of solidarity for racial justice.[135] Less than one year later, the province announced its most generous contribution to the clarification of land titles in African Nova Scotians, being a $3 million contribution toward a compensation fund to help resolve competing land claims through the appointment of land titles commissioners.[136]

While the most recent surge in clarifying land titles in African Nova Scotian communities appears to be stronger than in prior peaks of progress on this issue, the underlying motivations for this recent surge seem to be same. As the resurgence of the Black Lives Matter movement starts to recede in this province so too does the government's support for clarifying land titles in African Nova Scotian communities. For example, since 2021, the LTI was disrupted twice with departmental shuffles. On 9 November 2021, it was moved to the office of equity and anti-racism, and then on 23 May 2023, it was moved to African Nova Scotian affairs, which is only a division of the department of communities, culture, tourism and heritage, as opposed to a separate government department. Additionally, the province appears to have softened its resolve in clarifying land titles in the designated African Nova Scotian communities, by aligning LTI goals with the broader provincial rate of migrated properties under the *LRA*, which is approximately 70 per cent. Meaning, the government's goal for clarifying land titles in African Nova Scotian communities is not to fix *all* injustices, just 70 per cent of them. This type of formal equality approach to redressing unique historic wrongs is concerning. The extent to which African Nova Scotians should receive title to their ancestral lands which was denied for reasons of anti-Black racism is unrelated to whether other Nova Scotians are migrating their parcels under the *LRA*. Lastly, while the statutory framework and appointment of land titles commissioners have been in effect since March 2021, there appears to be a lack of progress in this area. These critiques are not intended to cast blame on the dedicated government employees who have worked tirelessly to advance this initiative, particularly the African Nova Scotian employees.

---

135. Nova Scotia Public Prosecution Service, News Release, "Fair Treatment of African Nova Scotians" (15 June 2020) online: <novascotia.ca [perma.cc/MCA8- JWZT]. See also Nova Scotia Premier's Office, News Release, "Premier Reflects on 2020's Tragedies and Graces" (31 December 2020), online: <novascotia.ca> [perma.cc/ YK8Z-MLPZ]: "The year saw an historic acknowledgement by government. The Black Lives Matter movement motivated us to look inward and confront difficult questions about racism in our province. We have made progress rooting out systemic racism, but we know there is much more to do."

136. See discussion above under Part II Land Titles Initiative.

Instead, the intention is to demonstrate that unless policymakers change their motivations for pursing racial equality, the cycle of perceived, yet temporary, progress on racial equality will persist.

The cyclical phenomenon that has surrounded the *LTCA* over the last sixty years is the result of a perpetually awakening, relaxing, and reawakening of inadequate government action that is motivated by White-serving interests more so than African Nova Scotian suffering. As a result, the perceived progress on African Nova Scotian justice ultimately recedes once it becomes apparent to policymakers that fulfillment of racial justice necessitates meaningful self-sacrifice and a relinquishment of social, political, and economic power. Despite its purported promise of prosperity to African Nova Scotians, the *LTCA* was not enacted because White policymakers felt morally compelled to address African Nova Scotian suffering with insecure land titles. No more so are the province's contemporary actions on land titles motivated by moral objections to historic wrongs or racial injustices.[137] The *LTCA* was enacted, and continues to be supported, primarily because doing so serves the pragmatic interests of White policymakers by easing racial tensions and facilitating land development in African Nova Scotian communities for White-serving interests. However, because the land titles issue—more importantly, the cycle of poverty that it triggered[138]—requires a significant financial investment and a relinquishment of racial power and privilege to truly effect beneficial change for African Nova Scotians, the promise of substantial and sustained racial justice cannot come to fruition through this measure because the White-serving interests underlying it are not enough to endure the bigger threat that actual racial justice would have on White superiority. A self-sacrifice of this magnitude far outweighs the benefit of any narrow White-serving interests that White policymakers hope to gain from Black-owned land and racial harmony, and thus their support for the *LTCA*—and its promise of financial prosperity for African Nova Scotians—inevitably fades. That is, until new government actors naïvely believe they can do things differently without truly examining and altering their motivations for racial justice.

137. Beals *supra* note 2 at para 66; Downey *supra* note 2 at para 37; Hansard 21-06, *supra* note 83, at 539, where the Minister of Justice stated: "The absence of clear title to land, because of historical disparities and systemic racism, continues to be a significant barrier to economic prosperity in these and other historical African Nova Scotian communities, Mr. Speaker. This is just unacceptable."
138. *Downey*, *supra* note 2 at para 37; *Beals*, *supra* note 2 at para 22.

Conclusion

While the *LTCA* may have helped some African Nova Scotians certify legal title to their land, the catalyst for government support was not and is not moral compulsion toward alleviating African Nova Scotian suffering. It was and remains primarily influenced by pragmatic government-serving interests which are insufficient motivators to enact sustained and transformative racial equality. This is why the *LTCA* continuously fails to achieve its promise to African Nova Scotians. While this conclusion may seem pessimistic, the objective is to raise awareness. Reflecting on the underlying motivations for racial progress can help racial justice advocates plan for the inevitable ebbs and flows that accompany racial reforms which are motivated by White-serving interests, and to strategize more effectively. If the promise of racial equality is to remain viable, then we must be aware of the considerations that influence the pursuit.