LAW REFORM COMMISSION OF BRITISH COLUMBIA

Consultation Paper No. 73

DRAFT REPORT FOR CONSULTATION ON

THE LEGAL CONSEQUENCES OF A TEMPORARY LAND TITLE OFFICE SHUTDOWN

"The Commission is to take and keep under review all the law of the Province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law...."

Law Reform Commission Act
Statutes of British Columbia 1969

This Draft Report is Distributed for Discussion and Consultation Purposes Only. It Does Not Represent the Final Views of the Commission

It would be appreciated if comments could be submitted by November 30, 1995. Comments we receive are treated as public documents, although you may request confidentiality.

July, 1995

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, Q.C., *Chairman*
LYMAN R. ROBINSON, Q.C.
THOMAS G. ANDERSON

Gregory G. Blue is Legal Research Officer to the Commission.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located at Suite 203, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2G3.

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Introductory Note

This paper discusses ideas and suggestions for changing the law.

Public consultation is an important part of preparing sound recommendations for changing the law. The Commission will not make its final recommendations for changes in the law in the topic under review in this paper until the public has a chance to comment.

We would like to have your views, criticism and advice. If the paper does not address your particular concerns, please tell us.

Public consultation ends November 30, 1995. If you wish to comment, you should do so as soon as possible.

Please direct your comments to the following address:

Law Reform Commission of British Columbia
Suite 203, Chancery Place
865 Hornby Street
Vancouver, British Columbia
V6Z 2G3

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CHAPTER I INTRODUCTION

A. General

In British Columbia, registration is necessary in order to transfer ownership of land effectively. Registration is also necessary in order to ensure that a charge, such as a mortgage, will have priority over subsequent dealings with the land. This is because long ago British Columbia, like other western provinces, adopted a form of the Torrens system for land registration. The aim of the Torrens system is to provide certainty in dealings with land and to eliminate the need for exhaustive investigation into the ostensible owner's title. The mechanism for achieving this is to make the register conclusive in regard to legal ownership. Someone intending to buy land or lend money on the security of land can rely on the register to be satisfied that the person shown there as the owner is indeed the true owner.

It follows that real estate transactions can only be completed properly when the Land Title Office is accepting and processing applications for registration in the usual manner and its records can be adequately searched to discover the status of titles. Fortunately, this is almost always the case on any given business day. Most contracts for the sale of land (called *contracts of purchase and sale*[1]) make no specific provision for interruptions in the operation of the Land Title Office because they occur so rarely. Inability to register documents at the proper time could seriously affect the position of one or more parties to a land transaction, nevertheless.

Computerization of the Land Title Office has given rise to expressions of concern about the continuity of registration functions and the preservation of records. In the case of *Norfolk* v. *Aikins*,[2] a computer shutdown in the Land Title Office that lasted for part of a day complicated an already troubled real estate transaction. In delivering judgment in the case, Madam Justice Southin made this observation:[3]

> I digress to suggest that the Law Reform Commission ought to address the difficulties which will be created not only by computer failure but also by any other event such as an earthquake which prevents the Land Title Office from functioning. If it does not, we shall someday have a British Columbia equivalent of the Coronation cases.[4]

The Law Society's Land Titles Computerization Committee also urged the matter be reviewed by the Commission. It noted that standard contracts of purchase and sale of land and solicitors' undertakings given in connection with them seldom provide for the contingency that a computer-related problem might interfere with completion of land sales.[5] It also recognized that similar problems could

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1. The term *interim agreement* is still frequently used in British Columbia to refer to the contract that comes into effect when a vendor of land accepts an offer from the purchaser, or when the purchaser accepts a counter-offer. The adjective "interim" relates to the interval between the acceptance of an offer and counter-offer and the completion of the transaction, not to any lack of finality in the agreement itself. It is potentially misleading because it suggests the agreement is something less than a fully enforceable contract in law. For this reason, the standard form contract for the sale of residential property used by most realtors in British Columbia is now titled "Contract of purchase and sale" rather than "interim agreement."

2. (1990) 41 B.C.L.R. (2d) 145 (C.A.).

3. *Ibid.*, at 152.

4. The "Coronation Cases" were a series of contractual disputes arising from the postponement of the coronation of Edward VII in 1902 due to the King's illness. The most famous of these is *Krell* v. *Henry*, [1903] 2 K.B. 740 (C.A.), a leading decision in connection with frustration of contracts. Frustration is discussed later in this Report.

5. Law Society of B.C., *Report of the Land Titles Computerization Committee* (October 1993), 5-6.

arise from any disruption of operations in Land Title Offices, regardless of the cause. Acting on the Committee's recommendation, the Law Society requested the Commission to consider the matter.

In response to these invitations, the Commission added a project on the legal consequences of a temporary interruption of Land Title Office operations to its program.

B. Computerization in the Land Title Offices

1. THE ALTOS 1 SYSTEM

An Automated Land Title Office System (ALTOS) has been in operation in British Columbia Land Title Offices since 1983. Its principal element is a database for storing and retrieving electronic information relating to ownership of, and charges on, land. Virtually all titles to land in the Vancouver, New Westminster and Victoria Land Registration Districts have been computerized, as well as titles to most other privately held land in the Province.

Once a title was converted to electronic form, the paper records that formerly related to it were no longer retained. Thus, the only way of obtaining information about computerized titles is through a computer search. The land title database may be searched by reference to the parcel identification number (P.I.D.)[6], the name of the registered owner, or the legal description of the land.

A printout of the title data shows the complete legal description of the land, the names of the registered owners, and notations of the charges and other interests already registered against the title as of the effective date of the search result. It will also indicate if there are any "pending applications," i.e., documents affecting the land covered by the title that have been received but not yet registered.[7]

The ALTOS database does not store the content of documents submitted for registration. Instead, each document is microfilmed and the microfilm records are made available for search and copying. The paper originals are stored in vaults for a limited period only.

A back-up system creates a separate daily log of Land Title Office computer activity. This means that if any loss of electronic data occurred, it would in the very worst case be confined to the transactions on one working day. Rights of access to alternate computing facilities exist to deal with the contingency of the central computer serving the ALTOS system being temporarily out of order.

2. THE ALTOS 2 PROJECT

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6. A 9-digit number assigned to the land covered by an indefeasible title. It is a unique identifier and does not change unless the land itself is subdivided or consolidated with other land parcels.

7. Under the "pending" system now used in all B.C. Land Title Offices, an application for registration is time and date-stamped on receipt and assigned a number. It will be noted as a "pending application" in the database almost immediately, but will not be fully registered until examined in detail. It may appear as "pending" for up to several weeks before full registration takes place. Under the "fast registration" system that was in use until recently in Land Title Offices other than Vancouver/New Westminster, Victoria, and Kamloops, the application was examined in detail for registrability before being stamped with the time and date of receipt. After this, the charge or other interest forming the subject of the application would be registered against the title. Registration relates back to the time of receipt by the Registrar: *Land Title Act*, R.S.B.C. 1979, c. 219, s. 37. *See also* Continuing Legal Education Society of B.C., *Land Title Practice Manual*, vol. I, p. 3-42.

The Land Title Branch is in the course of implementing the ALTOS 2 Project, which is described as a "re-engineering" of the way the Land Title Office operates.[8] Part of the project involves the replacement of the existing system with one using a more sophisticated database architecture. While ALTOS 1, used from 1983 to 1995, was designed only to store data in sequential form and respond to a limited range of inquiries, the relational database of ALTOS 2 creates links between groups of data and allows more complex searches.

The newer database system will be supplemented by technology that creates electronic images of documents. This image processing technology, scheduled for implementation by the end of 1995, will replace microfilm as the means of long-term storage and retrieval of documents.

The ALTOS 2 system is currently running in all British Columbia Land Title Offices. Together with the introduction of the imaging technology, it will permit a major reconfiguration of Land Title Offices. Registration, for example, should take place much faster. The objective is to ensure that full registration takes place within 24 hours after the application is submitted. Subscribers to the BC OnLine service will be able to retrieve images of land title documents from their own computer workstations. As scanning will take place at the time documents are received, users will be able to examine "pending applications" received almost to the very moment the search request is made. To relieve bottlenecks, it will be possible to allocate work between offices without physically moving documents.

ALTOS 2 will not make the Land Title Office completely paperless, however. Documents bearing original signatures will still have to be submitted in order to guard against fraud and forgery.

3. HAZARDS OF COMPUTERIZATION?

British Columbia Land Title Offices have become highly dependent on computers. The ALTOS 2 Project will increase that dependence. This does not mean that continuity of service or the integrity of records will be in greater danger.

On the contrary, back-up systems for storage of data and permanent laser imaging of documents should provide a degree of safety that is simply unattainable with paper and microfilm records. Complete loss of data would require a very improbable combination of events in widely separated geographical locations. The security systems in place are equivalent to those used to protect sophisticated commercial data operations.

A power failure, of course, may interrupt computer-based operations at the local level, but the risk can be reduced by using a dedicated power supply that lets the computer terminals run even when other electrical systems are not functioning. It is worth noting that a lengthy power failure is equally likely to disrupt the operations of even a non-computerized office to a substantial extent.

As computer systems go, ALTOS 1 proved highly reliable over the course of time. The longest single interruption in computer service since 1983 was the period of slightly less than half a day that figured in *Norfolk* v. *Aikens*. Most periods of "downtime" (intervals when access to computerized data is interrupted) experienced with ALTOS 1 were of less than 20 minutes in duration. This is in keeping with the service standard specified by the Land Title Branch when acquiring the system. The Commission is not aware of instances other than the circumstances that led to *Norfolk* v. *Aikens* in which computer downtime interfered with completion of a real estate transaction to a degree serious enough to result in litigation.

8. McAvity, "New Developments in the Land Title Office: A Report on the ALTOS 2 Project," (1993) 51 Advocate 371, 373.

By the time the ALTOS 2 system was implemented in Land Title Offices, its capabilities had undergone extensive testing. Periods of downtime lengthier than those experienced with ALTOS 1 will be unlikely.

C. Other Potential Causes of an Interruption in Land Title Office Operations

Disruption of normal operations in a Land Title Office for more than a day would most likely result from causes other than computer problems. The principal ones would be:

- labour disputes
- fire
- natural disaster
- criminal activity, *e.g.* vandalism
- war or civil disturbance.

Apart from the cases of labour disputes and war, the changes to be implemented under the ALTOS 2 Project should moderate the effects of these occurrences on Land Title operations. Since it will be possible to re-allocate work between offices, applications could be submitted and processed at an office that was unaffected. A natural occurrence on such a scale as to affect all Land Title Offices in the Province as well as the central computing facility would be truly monumental, and would no doubt bring many more difficulties in its wake besides interference with real estate transactions.

D. The Standard Residential Property Contract of Purchase and Sale

A standard form "Contract of purchase and sale" approved by local Real Estate Boards is used for most sales of residential property in British Columbia. It is reproduced in the Appendix. The form is filled in by a real estate agent in most cases and is used initially as an offer to purchase. When accepted, the offer is transformed into a binding contract. This Report focuses on the terms of the standard form contract because of its prevalence in real estate transactions. Specially prepared contracts of purchase and sale are used for individual transactions involving commercial property, and for some residential property as well. Some of them may contain terms that address the problems discussed in this Report. It is important to keep in mind that if the contract specifically provides what the parties agree to do under a particular set of circumstances, the contract itself will govern. This Report is aimed at situations in which there is no specific agreement addressing the unusual circumstance of an interruption of Land Title Office operations.

E. Summary

Increased computerization of the Land Title Office is likely to improve, rather than detract, from continuity of service. It will also enhance the security of land title data. Periods of "downtime" can still arise even with the most sophisticated systems, however. The possibility of disruption of Land Title Office operations due to computer failure and other causes is not directly addressed in law, nor is it often addressed as a matter of contract. The problem still bears investigating.

CHAPTER II IMPLICATIONS FOR A SALE OF LAND OF AN INTERRUPTION IN LAND TITLE OFFICE OPERATIONS

A. General

Whatever the cause of a temporary cessation of normal Land Title Office operations might be, the practical effect on the completion stage of a real estate transaction would be similar. The transaction would generally be stalled unless an arrangement could be worked out between all the parties involved, including lenders. This Chapter explains the reasons for this, and the effect such a delay would have on the legal positions of the parties.

B. Section 25 of the *Interpretation Act*

Two provisions in the *Interpretation Act*[1] are relevant to a particular type of situation in which the Land Title Office is not operating normally. Sections 25(1) and (3) state:

> **25.** (1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.
>
> (3) Where the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours the time is extended to the next day that the office is open.

Completion of a real estate transaction almost always involves depositing documents for registration in a Land Title Office, and in at least one case section 25(3) has been held to apply to the date of completion stipulated in a contract of purchase and sale.[2] It has also been held that "open" in section 25(3) is to be read as "open throughout regular business hours."[3] Thus, if the Land Title Office closed

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1. R.S.B.C. 1979, c. 206.

2. *Wiancko* v. *Caplette*, (1982) 36 B.C.L.R. 283, 286-286 (S.C.). While s. 25(3) refers only to the time for doing the act that requires the office be open, *i.e.* filing the transfer, *Wiancko* v. *Caplette* holds the completion date itself is postponed. This is significant, because the completion date is the temporal focal point for obligations on both sides: transfer of title by the vendor and payment by the purchaser. These are mutually dependent in the sense that one party need not perform unless the other shows an intention to do so as well: *Gross* v. *Cottier*, (1992) 26 R.P.R. (2d) 1 (B.C.C.A.); *Epp* v. *Yung*, (1993) 35 R.P.R. (2d) 1 (B.C.S.C.); *Burtini* v. *Sovilj*, (1975) 61 D.L.R. (3d) 505 (B.C.S.C.), *aff'd* (1976) 71 D.L.R. (3d) 765 (B.C.C.A.). If s. 25(3) operated to advance only the date for filing the application to register the transfer, a question would arise as to when the purchaser was required to pay the purchase money: on the original completion date or on the extended date for filing. The interpretation in *Wiancko* v. *Caplette* is in keeping with the mutually dependent character of the obligations and does not put the purchaser in the position of having to pay before knowing if the other side will perform its part of the bargain. The possible application of s. 25(3) does not appear to have been raised in *Norfolk* v. *Aikens*, (1990) 41 B.C.L.R. (2d) 145 (C.A.), and would have been irrelevant to the outcome because the parties were not ready, willing and able to complete even on a subsequent date which the vendor attempted to designate for completion. The Court of Appeal did not need to deal with the effect of the computer failure on the obligation of each party to tender performance.

3. *Re McDonald Supply Ltd. & Aico Developments Ltd.*, [1984] 1 W.W.R. 123 (B.C.S.C.). In this case, the office in question was that of the Registrar of Companies, which was closed due to a strike. The court held the time allowed for filing a conditional sale agreement had been extended by s. 25(3) until the next day the office was open throughout its regular hours. Section 25(3) therefore applies not only when the office is scheduled to be closed, but also when it is closed for reasons that are out of the ordinary. This view of the implications of

unexpectedly in the course of a business day, the time for completion of a land sale would be extended to the next day on which it was open throughout its regular business hours of 9:00 a.m. to 3:00 p.m., unless the contract specified otherwise.

It appears that section 25(3) would also extend the time for filing a document or notice required by an Act to be filed in the Land Title Office within a limited period to protect an interest or priority, if that period expires on a day when the Office is closed. Examples are the requirements:

- in the *Builders Lien Act* to file an affidavit of claim of builder's lien within 31 days after completion of the work to which it relates,[4]
- in the *Court Order Enforcement Act* to renew the registration of a judgment against the land of the judgment debtor every two years,[5] and
- in the *Personal Property Security Act*[6] for a holder of a purchase money security interest in goods that become fixtures to file a section 49 notice in the Land Title Office within 15 days after they are affixed to land, in order to retain the priority that section 36(7) of the Act confers.

Section 25(3) of the *Interpretation Act* covers situations in which the office is simply closed on a day when it would normally be open, but it may not cover every eventuality in which there is some disruption of normal operations. A Land Title Office might conceivably be "open" even though the computer system is temporarily out of service. Its doors may be open and it may be receiving applications, although nothing can be registered against computerized titles for the time being. It may be "open" for some time during a strike while the computer system is still running and users are being permitted to carry out searches, even though no processing of applications for registration is taking place. As far as the Commission is aware, there has been no ruling yet that "open" in section 25(3) means "open and operating normally in every respect."

The *Land Title Act* contains no provision like section 42(5) of the *Personal Property Security Act*, which expressly authorizes the Registrar to suspend one or more operations and maintain others as conditions permit.[7] If it did, it would be easier to argue that the office was open in relation to the functions that are

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the *McDonald Supply* decision is supported by the presence of s. 25(2), which deals separately with holidays:

> (2) Where the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.

4. *Builders Lien Act*, R.S.B.C. 1979, c. 40, s. 22(1), (2). A claim of lien by a worker in relation to work performed at a mine or quarry may be filed within 60 days after completion of the work: s. 22(3).

5. *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 83(1).

6. S.B.C. 1989, c. 36.

7. S. 42(5) states:

> (5) Notwithstanding any regulation made under section 76, when in the opinion of the registrar the circumstances are such that it is not practicable to provide one or more registry services, the registrar may

being performed, and not in relation to others. Section 25(3) would presumably apply or not, depending on whether or not a particular function was necessary for the purpose of the transaction in question. The *Land Title Act* merely requires the Offices to be open to the public from 9:00 a.m. to 3:00 p.m. on each business day, without providing expressly for any contingencies leading to reduced operation.

It is still necessary, therefore, to examine situations s. 25(3) may not cover. These are ones in which the Land Title Office is "open" in the sense of not being physically closed, but in which the continuity of its operations is interrupted in some way.

C. Effect on Contractual Obligations of Interrupted Access to Land Title Office Registration and Search Functions

1. Mechanics of Completing Sales of Land

The standard form contract of purchase and sale calls for completion on or before a specified date "at the appropriate Land Title Office." Completion involves exchanging a registrable transfer and any discharges necessary to clear the title in return for payment of the purchase price. Frequently, some portion of the purchase moneys must be used to discharge pre-existing encumbrances so that the purchaser receives clear title. Usually some portion of the purchase price must be met from the proceeds of a new mortgage arranged by the purchaser, unless the purchaser is assuming the vendor's existing mortgage. A new mortgage will be registered at the same time as the transfer. The parties' legal representatives will usually exchange undertakings in order that documents and payments can change hands without putting either party at risk. If one side refuses to complete on the basis of undertakings, the literal terms of the contract of purchase and sale govern.[8]

The accepted practice is to conduct computer searches before and after the transfer and other completion documents are deposited for registration ("lodged") and posted as "pending applications." These are referred to as pre- and post-application searches.[9] They are done in order to ensure that the new title will issue in the name of the purchaser and any charges against it will have the correct priority.

2. Stalled Computers and Stalled Contracts

It is unlikely, but not inconceivable, that ALTOS might be out of operation for more than a few days. As long as the Land Title Office is "open," whatever that may mean, section 25(3) of the *Interpretation Act* would not come into play.

(a) refuse to register financing statements,

(b) refuse to accept requests for search results, and

(c) otherwise suspend one or more of the functions of the registry

for the period of time during which, in the opinion of the registrar, those circumstances prevail.

8. *Norfolk* v. *Aikens*, *supra*, n. 2.

9. The search done after the completion documents appear on the computerized title as pending applications is often referred to as a "post-registration search" even though actual registration may not take place for several weeks. See Chapter I, n. 7.

When the ALTOS system is not operating, the Land Title Office cannot register transfers and interests against computerized titles. Until registration of the transfer takes place, there is no change of ownership of land insofar as the world in general is concerned. Unregistered transfers, mortgages and other documents affecting interests in land only have effect between the parties to them.[10] Once registration takes place, they become effective in relation to the world in general.[11] This is the hallmark of full legal ownership. It is the full legal title that is the substance of the bargain made between vendor

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10. S. 20(1) of the *Land Title Act* states:

> **20.** (1) Except as against the person making it, no instrument purporting to transfer, charge, deal with or affect land or an estate or interest in it is operative to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
>
> (2) Every instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the instrument registered, and, in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.
>
> (3) Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years where there is actual occupation under the lease or agreement.

Case law has placed significant qualifications on the operation of this section. Sometimes the interest of a purchaser under a contract of purchase and sale or an unregistered transfer may be asserted successfully against third parties having inferior interests: *Forrest* v. *Howe*, [1952] 1 D.L.R. 717 (B.C.C.A.). It may also prevail over subsequent purchasers having actual notice of it who try to gain the benefit of registration in order to defeat it: *Greveling* v. *Greveling*, [1950] 1 W.W.R. 574 (B.C.C.A.); *Dhaliwal* v. *Jaswal*, (1986) 6 B.C.L.R. (2d) 180 (S.C.); Ghikas, "The Effect of Actual Notice Under The British Columbia Torrens System," (1980) 38 Advocate 207. This is because such conduct on the part of someone who has actual notice of the earlier-acquired interest is occasionally equated with fraud, something that is said to stem from *Hudson's Bay Co.* v. *Kearns*, (1895) 4 B.C.R. 536 (C.A.). Despite the long history of the Torrens system in British Columbia, this is still an unsettled area: see *Danica Enterprises Ltd.* v. *Curd*, [1976] 5 W.W.R. 193 (B.C.S.C.); *Jager the Cleaner Ltd.* v. *Li's Investment Co.*, [1979] 4 W.W.R. 84 (B.C.S.C.); *Woodwest Developments Ltd.* v. *Met-Tec Installations Ltd.*, [1982] 6 W.W.R. 624 (B.C.S.C.); *Yorkshire Trust Co.* v. *Finlayson Arm Tree Farm Ltd.*, (1979) 16 B.C.L.R. 253 (S.C.) and di Castri, *Registration of Title to Land* (1987), vol. 2, para. 879. As a practical matter, the cases that give effect to unregistered interests as against third parties under some circumstances are immaterial for the purpose of this Report. The fact that the Land Title Office is temporarily dysfunctional does not have the effect of repealing the *Land Title Act*. Lenders will insist on registration as a prerequisite to release of mortgage funds in order to protect their priority, and most real estate transactions require financing.

11. *Land Title Act*, ss. 20(1), 22.

and purchaser. If registration cannot take place, a vendor is unable to transfer the full ownership rights in the land that the purchaser is entitled to obtain.[12]

The ability to search the electronic title register is now central to the method of transferring titles and dealing with other interests in land in British Columbia. If its computer system is not functioning, the Land Title Office would be unable to provide the current title information that purchasers and mortgage lenders need in order to verify the vendor's ownership, the existence of prior charges on the title, and the priority of documents lodged for registration. This information is essential to determine if a transaction will conclude in the way the parties intend. Without a satisfactory post-application search showing lender security in place with the proper priority, the lender will not authorize release of mortgage funds.[13] This means, of course, that more often than not the purchaser would be unable to complete.

Once it becomes evident that an episode of downtime will exceed normal limits, an unofficial temporary index of pending applications would be set up using a desktop computer. Land descriptions, P.I.D. numbers, and the general nature of the transaction to which the application relates (transfer, mortgage, etc.) would be provided by applicants at the time they file their applications.[14] The index would cross-reference P.I.D. numbers with applications received. Searchers would be able to tell from the index if any applications affecting the same land have been received ahead of their own since the last information was recorded on the main system.

The state of the title immediately before the system malfunction could not be determined, however, as this would require access to the ALTOS database. This would mean that the purchaser could not be certain that the title will be clear of any encumbrances that are to be removed, with any new ones showing in the correct priority.[15] This, plus the uncertain legal status of the temporary index, would probably lead lawyers and institutional lenders to be very hesitant about releasing funds before ALTOS was operating

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12. In *Burtini* v. *Sovilj*, *supra*, n. 2, Bouck J. noted at 61 D.L.R. (3d) 513 that on the completion date, the purchaser has a right to a marketable title, not merely a promise of one.

13. The purchaser's legal representative may actually hold the mortgage funds by this point, but the lender's interests will be protected by a trust condition that prevents release of the funds without a satisfactory post-application search.

14. Conversation between Commission staff and Land Title Branch official, 3 March 1995.

15. In Land Title Districts where a "pending" system has been used for some time (Vancouver Island and the Lower Mainland), it is usual to release mortgage funds and purchase money on the strength of a post-application search showing the transfer, discharges of existing encumbrances, and any new mortgage as pending applications with the correct priority. This is because a post-application search shows the status of the title as of the last registration, plus applications received that may affect it. The difference between reliance on a regular post-application search and reliance on the temporary index envisioned by the Land Title Branch contingency plan is that only part of this information would be available from the temporary index. The state of the title as at the last full registration immediately before the system malfunction could not be verified.

satisfactorily once again.[16] While some transactions might be completed on the strength of post-application searches using the temporary index, a good many probably would not.[17]

If the Land Title Office computer system is out of service on the completion date, therefore, purchasers who must borrow would likely be unable to gain control of all the funds needed to meet the purchase price. The vendor would be unable to transfer clear title, or even an encumbered title, while the process of registration is temporarily suspended.

In other words, each party would be prevented for the time being from fulfilling obligations owed to the other. The legal situation produced by this stalemate is best examined after first looking at certain principles surrounding stipulations about time in contracts for the sale of land. These are explained in the next section.

3. TIME STIPULATIONS IN AGREEMENTS OF PURCHASE AND SALE

Invariably, the parties to a contract of purchase and sale specify a date by which completion is to take place. The parties usually agree in addition that time will be "of the essence" of the contract. Such a statement appears, for example, in the standard form contract of purchase and sale approved by the Real Estate Board of Greater Vancouver and counterpart bodies throughout the Province.[18] The effect of the "time is of the essence" clause is that failure to perform an obligation by the completion date will amount to a breach going to the root of the contract.[19] This will normally entitle the other party to treat

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16. The temporary index would only be a convenience, not something mandated by the *Land Title Act*. Reliance on it would probably not give rise to a tenable claim against the assurance fund established by the Act to compensate persons who incur losses as a result of an error or omission in land title records. See *Land Title Act*, ss. 275-287.

17. The experience of the Saskatchewan government, which instituted a similar contingency plan in its land title system in late 1985 and early 1986, was that the Bar and the banking community were hesitant to rely on the desktop-computer-based index until they were reassured that losses flowing from reliance on errors or omissions in it would be compensated by the assurance fund.

18. *See* Appendix. Clause 2(c) states:

> Time shall be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Vendor may at the Vendor's option terminate this Contract and in such event the amount paid by the Purchaser [*i.e.*, the deposit] will be absolutely forfeited to the Vendor on account of damages, without prejudice to the Vendor's other remedies.

19. The common law considered stipulations relating to the time for performance of obligations to be "of the essence" of the contract, whether or not it was stated expressly: *Parkin* v. *Thorold*, (1852) 16 Beav. 59, 51 E.R. 698; *Stickney* v. *Keeble*, [1915] A.C. 386 (H.L.). Equity took a more lenient view of time stipulations, and allowed parties to complete within a reasonable time after the original completion date unless there was something in the circumstances to show that the parties seriously intended that time should be "of the essence." When the parties expressly agreed that time would be of the essence, however,

the contract as at an end, excusing further performance by the other party and also allowing a claim for damages.[20] Alternatively, the other party could sue for *specific performance*: an order that the party in breach carry out the contract.[21] To obtain specific performance, a party must have been ready, willing and able to complete at the proper time.[22]

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equity would not interfere unless the stipulation had been waived: *Steedman* v. *Drinkle*, [1916] 1 A.C. 275 (P.C.) (Sask.); *Brickles* v. *Snell*, [1916] 2 A.C. 599 (P.C.) (Ont.); *Salama Enterprises (1988) Inc.* v. *Grewal*, (1992) 66 B.C.L.R. (2d) 39 (B.C.C.A.). Where equitable rules conflict with those of the common law, the equitable rule prevails: *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 41.

20. *Brickles* v. *Snell*, *supra*, n. 19; *Williams Lake Realty (1978) Ltd.* v. *Symynuk*, (1982) B.C.L.R. 313 (C.A.); *Norfolk* v. *Aikens*, *supra*, n. 2.

21. *McCauley* v. *McVey*, [1980] 1 S.C.R. 165, 171; *Norfolk* v. *Aikens*, *supra*, n. 2; *Danforth Heights Ltd.* v. *McDermid Bros.*, (1922) 52 O.L.R. 412 (H.C.).

22. *Norfolk* v. *Aikens*, *supra*, n. 2; *Shaw Industries Ltd.* v. *Greenland Enterprises Ltd.,* (1991) 54 B.C.L.R. (2d) 264 (C.A.). *Norfolk* v. *Aikens* made it clear that a party is not "ready, willing and able" if the obligations of that party cannot be carried out without assistance from the other party. For example, a vendor who must transfer clear title is not "ready, willing and able" to complete if the purchase money is needed to discharge encumbrances and the purchaser is unwilling to release the purchase funds until the title is clear. Similarly, a purchaser is not "ready, willing and able" if the transfer must be registered before funds needed to complete the purchase will be advanced under a new mortgage. The basic form of the standard contract of purchase and sale remains as it was before the case was decided, but a modification called the "*Norfolk* v. *Aikens* addendum" is usually incorporated to allow the use of purchase funds to clear the title. It also permits registration of the transfer to take place prior to payment of the portion of the purchase price that must come from an advance under a new mortgage. The vendor and purchaser are asked to sign the addendum on a separate page. It reads:

> Paragraphs 1 (Title) and 2 (Completion) are amended by adding the following: if the vendor has existing financial charges to be cleared from title the vendor, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the purchase price, but in this event, the purchaser may pay the purchase price to a lawyer or notary in trust, on undertakings to pay and discharge the financial charges, and remit the balance, if any, to the vendor.
>
> Paragraph 2 (Completion) is amended by adding the following: if the purchaser is relying upon a new mortgage to finance the purchase price the purchaser, while still required to pay the purchase price on completion date, may wait to pay the purchase price to the vendor until after the transfer and new mortgage documents have been lodged for registration in the appropriate land title office, but only if, before such lodging, the purchaser has: (a) made available for tender to the vendor that portion of the purchase price not secured by the new mortgage, and (b) fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and (c) made available to the vendor, a lawyer's or notary's undertaking to pay the

If the date for completion goes by without either party moving to carry out the transaction, time ceases to be of the essence, but in other respects the contract is still in effect.[23] Neither party could rely on the other's non-performance as a repudiation that will excuse his or her own non-performance. The original stipulation regarding the time of completion is simply replaced with an obligation on both parties to complete within a reasonable time. A party can reinstate time as being of the essence by giving notice of a new, reasonable completion date.[24]

4. DEEMED ABANDONMENT

If neither party does anything to set a new completion date or indicate an intention to proceed with the transaction, a court may eventually conclude that the contract has been abandoned by both sides.[25] If a finding of abandonment is made, the contract will not be enforced. A court would be reluctant to make such a finding unless the subsequent conduct of both parties was entirely inconsistent with the continuation of the contract, or unless a very lengthy period of inaction had elapsed, possibly as long as several years.

5. FORCE MAJEURE

Normally, the parties to a contract are not relieved from their obligations simply because they become difficult to perform in light of subsequent events. But sometimes an extraordinary, unexpected event beyond the parties' control like a strike, lockout, or governmental action prevents the performance

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purchase price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds.

While the addendum circumvents the stalemate resulting from the vendor being able to insist on payment before transfer, while the purchaser is insisting on clear title before payment, it does not address a situation in which the mortgage advance necessary to fulfil the obligation to pay the purchase price on the completion date is unobtainable because documents cannot be lodged for registration, or a proper post-application search conducted.

23. *Shaw Industries Ltd.* v. *Greenland Enterprises Ltd.*, *supra*, n. 22; *King* v. *Urban & Country Transport Ltd.*, (1973) 40 D.L.R. (3d) 641 (Ont. C.A.).

24. *Ibid.* Formerly, it was thought that giving an extension took the "time of the essence" clause out of play completely: *see Whittal* v. *Kour*, (1969) 71 W.W.R. 733 (B.C.C.A.); *Howren* v. *J. Heathcote & Co.*, (1982) 37 B.C.L.R. 279 (S.C.). This is no longer the law in British Columbia. The effect of an extension is simply to substitute a new completion date: *Salama*, *supra*, n. 19. *See also* Perell, "Putting Together the Puzzle of Time of the Essence," (1990) 69 Can. B. Rev. 417, 436-437. The precise effect of the "time of the essence" clause vis-a-vis the extended completion date depends on the circumstances: *ibid.* *Salama* indicates there may be some situations in which it would be inequitable to allow a party to rely on the clause.

25. *Chapman* v. *Ginter*, [1968] S.C.R. 560; varied 568. The court might also refuse specific performance on the ground of *laches*, a doctrine that disallows equitable relief when the party seeking it waits too long in doing so and the positions of the parties have altered in the meantime, so that the other party would be prejudiced if the relief were granted.

of a contract. An event of this kind is called *force majeure*.[26] If the parties provide in their contract for the consequences such an event should have, the terms they agree upon will be allowed to govern. It is common for international commercial contracts to contain *force majeure* clauses referring to war, civil disturbances, strikes, embargoes, blockades and other acts of sovereign authorities that might interfere with a party's ability to carry out its part of the bargain.

If nothing is said in the contract about *force majeure*, the usual consequences of non-performance take their course.[27] It is not common for contracts of purchase and sale for residential property to contain *force majeure* clauses, and the standard form contract under which most residential land is bought and sold does not do so. The doctrine, therefore, has little significance in the majority of real estate transactions.

6. FRUSTRATION

(a) General

Frustration is a broader doctrine than *force majeure*. It is not dependent on an express term of the contract, but is part of the general law and is applied when the circumstances justify it. A contract is said to be frustrated when a supervening event not contemplated by the parties makes performance impossible or changes the situation on which the contract is predicated to such an extent that performance of its literal terms would result in something radically different from what the parties intended.[28] When frustration occurs, the contract is at an end from the time of the frustrating event. Each party is discharged from performing obligations that were not required by the contract to be performed before that event.[29]

In general, four requirements must be satisfied before the doctrine of frustration will be applied:[30]

1. A supervening event, the occurrence of which is not expressly provided for in the contract;

2. The supervening event must not have been caused by the fault of either party to the contract:

3. The supervening event must have resulted in a radical alteration in the obligations of the parties; and

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26. *Atlantic Paper Stock Ltd.* v. *St. Anne-Nackawic Pulp & Paper Co.*, [1976] 1 S.C.R. 580.

27. *World Land Ltd.* v. *Daon Development Corp.*, [1982] 4 W.W.R. 577 (Alta. Q.B.).

28. *Krell* v. *Henry*, [1903] 2 K.B. 740 (C.A.); *Davis Contractors Ltd.* v. *Fareham Urban District Council*, [1956] A.C. 696 (H.L.); *Peter Kiewit Sons Co.* v. *Eakins Construction Ltd.*, [1961] S.C.R. 361, 368.

29. In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 the House of Lords held that payments made before the frustrating event could be recovered if there had been a complete failure of consideration, *i.e.* a total deprivation of the benefit of the contract. The *Frustrated Contract Act*, R.S.B.C. 1979, c. 144 now allows a court to sort out the effects on the parties by awarding restitution and apportioning losses in order to guard against the harsh and unfair results that sometimes flow from frustration. *See* Law Reform Commission of British Columbia, *Report on the need for Frustrated Contracts Legislation in British Columbia* (LRC 3, 1971).

30. LRC 3, *supra*, n. 29 at 11.

4. There must be more than just hardship, inconvenience, or material loss to the party seeking relief.

One kind of situation in which frustration may take place involves the accidental destruction of the subject-matter of the contract, without either of the parties being at fault.[31] A contract for the sale of a boat might be frustrated if the boat is destroyed before the risk has passed to the purchaser, since the contract cannot be performed unless the thing being sold continues in existence. Another situation that may amount to frustration is one in which performance, or further performance, becomes illegal after the contract is formed.

An enforced delay in performance can result in frustration as long as it is caused by a supervening event beyond the parties' control and the benefit of the contract is essentially wiped out.[32] The delay would usually have to be inordinately long or indefinite, such as one produced by war conditions.[33] In a contract where timing is crucial, however, a shorter delay might suffice. Whatever the duration of the delay, further performance must have become pointless in order for the contract to be considered frustrated.

(b) Sale of Land

(i) General

The doctrine of frustration is occasionally applied to sales of land. This is true even though a change in circumstances seldom destroys the foundation of the contract: transfer of ownership. Even with a commodity as seemingly indestructible as land, however, unexpected events may interfere with performance and remove the benefit intended to flow from the contract. Expropriation before the contract is completed might be one such event.[34] A natural disaster that produces a change in topography, such as an earthquake or breach of a dike that causes land to disappear in a slide or be washed away, might be another.[35] Destruction of a building, however, would not usually be sufficient in itself to frustrate a sale of the land on which it was situated. The law considers the building to be a part of the land, ownership of which could still be transferred. The contract would simply be less beneficial to the purchaser.

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31. *Kerrigan* v. *Harrison*, (1921) 62 S.C.R. 374 (erosion of land crossed by road frustrating contract to maintain road); *McDonald Aviation Co. Ltd.* v. *Queen Charlotte Aviation Ltd.*, [1951] 1 D.L.R. 195 and 582 (B.C.S.C.) (destruction of leased aircraft excusing charterer from further rental payments).

32. *Scottish Navigation Co. Ltd.* v. *Souter & Co.*, [1917] 1 K.B. 222 (C.A.); *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119 (H.L.).

33. *Scottish Navigation Co. Ltd.* v. *Souter*, *ibid.*

34. *Goulding* v. *Rabinovitch*, [1927] 3 D.L.R. 820 (Ont. C.A.).

35. In *Cahan* v. *Fraser*, [1951] 4 D.L.R. 112 the British Columbia Court of Appeal found that an extension of an option to purchase land had been frustrated by a flood that prevented the purchaser from inspecting the property to determine its condition.

Frustration is also potentially relevant if performance depends on subdivision or zoning approvals that prove to be unobtainable.[36] When the title to a particular parcel of land cannot be transferred without a subdivision approval, the situation is really one of impossibility of performance,[37] but in a few cases contracts have been held to be frustrated even when transfer of ownership was still technically possible and only the desired use of the land was affected.[38] Where frustration has been found to occur, the contract has usually involved something more than a straightforward sale of land. In such cases, the parties' expectations regarding the ultimate use of the land have played a major part in the course of dealings between them. Non-fulfilment of the preconditions for that use substantially prevented the benefit that the contract was intended to bring.

(ii) Delay

In one prominent Ontario case, a five-year delay by a planning authority in ruling on an application for subdivision approval was found to result in frustration of a contract for a sale of land that was an integral part of a joint venture scheme for residential development.[39] This, however, was a relatively exceptional situation in which the parties had based their joint venture on a reasonable expectation that subdivision plans would be approved within the lengthy interval they had allowed for it. Enforced delay in completion will seldom result in frustration of a sale of land if the transfer can still be carried out.[40]

7. PROBABLE OUTCOME WHEN NEITHER PARTY IS ABLE TO COMPLETE

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36. In *B.C.* v. *Cressey Development Corporation*, (1992) 66 B.C.L.R. (2d) 146 (S.C.) a large amount of vacant land was sold specifically for residential development. The contract prevented the purchaser from reselling the land in any other manner than as serviced lots. The parties expected the land to be rezoned within a particular period of time. When this did not occur, it was held to be a supervening event, unforeseen by the parties, that destroyed the foundation of the contract. Similarly, in *Capital Quality Homes Ltd.* v. *Colwyn Construction Ltd.*, (1975) 9 O.R. (2d) 617 (C.A.) the contract provided for 26 separate transfers of building lots. Shortly before the completion date, Ontario legislation was changed to prevent transfer in this manner without planning approval. This could not be obtained in time to close under the contract. The Ontario Court of Appeal held there had been a frustration of the common venture. Both parties were discharged from further performance, and the purchaser was entitled to a refund of the deposit.

37. *E.g., Britton* v. *Buhr*, [1994] B.C.D. Civ. 2251-01 (S.C.).

38. This seems to be inconsistent with principle. The fact that a contract ultimately proves less advantageous than originally anticipated is not recognized to be in itself a ground for applying the doctrine: *Amalgamated Investment and Property Co. Ltd.* v. *J. Walker & Sons Limited*, [1976] 3 All E.R. 509 (C.A.); *Victoria Wood Development Inc.* v. *Ondrey*, (1978) 7 R.P.R. 60 (C.A.), leave to appeal refused 7 R.P.R. 60n (S.C.C.).

39. *Focal Properties Ltd.* v. *George Wimpey Canada Ltd.*, (1975) 73 D.L.R. (3d) 387 (Ont. C.A.); *aff'd* on other grounds (*sub nom. George Wimpey Properties Ltd.* v. *Focal Properties Ltd.*), (1977) 78 D.L.R. (3d) 129 (S.C.C.).

40. *Victoria Wood Development Corp.* v. *Ondrey*, *supra*., n. 38. The approving authority's delay is irrelevant if time is not of the essence: *Allen Heights Development Ltd.* v. *Ralph Mitchell Ltd.*, (1974) 17 N.S.R. (2d) 667 (S.C.).

The standard contract of purchase and sale says little about the mechanics of completion. The transaction is to close "at the appropriate Land Title Office."[41] Documents required to complete the transaction shall be delivered in registrable form[42] and are to be "lodged for registration in the appropriate Land Title Office on or before the Completion Date."[43] It does not specify who is to lodge them, nor does it expressly link the purchaser's obligation to pay the purchase price with any concurrent ability on the part of the purchaser to submit the transfer for registration. One interpretation of these terms might be that the vendor only needs to deliver a signed transfer to the purchaser inside the front door of the Land Title Office, or possibly on the steps, and the purchaser is then required to turn over the purchase-money whether or not the Land Title Office is operational at that point.

If this interpretation holds, a purchaser would be compelled to pay without being able to determine what he or she is getting. The purchaser needs to know, at a minimum, that the vendor is still the registered owner at the time of completion and that after the completion documents are registered, the title will be clear of all charges that are to be removed under the terms of the contract. Even if recent search results show the vendor as the registered owner with clear title, they are no substitute for up-to-date searches carried out at the time of completion.

Similarly, if the purchaser is forced to pay the vendor without being able to initiate the registration process immediately, there is a risk of loss of priority to another interest holder who manages later to register ahead of the purchaser. In most cases other than mortgage assumptions, the purchaser will need mortgage funds in order to meet the purchase price. These will not be released until the lender can be assured of its position. The lender can only ascertain its position when the land title system is in operation again. Compelling the purchaser to complete without benefit of registration solely on the basis of the literal wording, therefore, would more often than not put the purchaser in breach of the obligation to pay.

This is not the only interpretation that can be placed on the contract of purchase and sale, however. Real estate transactions do not arise in a legal vacuum, but in a general context of land ownership that incorporates the system established under the *Land Title Act*. The terms of the standard contract of purchase and sale, which speak of lodging documents for registration, are clearly predicated on a functioning land title system. In addition, the law implies an obligation on the vendor to provide good title on the completion date whether the contract says so expressly or not.[44] Under a Torrens system, the vendor cannot transfer the full benefit of legal ownership except through registration.

Norfolk v. *Aikens* and later decisions hold that conveyancing expedients giving rise to risk for one party or another, such as allowing clearance of the title with the purchase money, cannot supersede the literal terms of the contract of purchase and sale if one or both parties insist those terms be met strictly.[45] It

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41. Clause 2(a). *See* Appendix.

42. Clause 2(b).

43. Clause 2(b).

44. *McCauley* v. *McVey*, [1980] 1 S.C.R. 165, 168; *Drake* v. *Galata*, (1992) 29 R.P.R. (2d) 262, 269 (B.C.S.C.).

45. *Norfolk* v. *Aikens*, supra, n. 2; *Pulvers* v. *Shen*, (1990) 43 B.C.L.R. (2d) 222 (C.A.). The only kinds of situations in which completion can take place strictly in accordance with the terms of the standard contract of purchase and sale are where the purchaser has the full cash price and the vendor has clear title, or where the purchaser is assuming an existing mortgage and pays the rest in cash. The so-called *Norfolk* v. *Aikens* addendum was developed to take

flows from this that one party cannot be forced into a non-contractual method of completion. Despite the cryptic terms of the standard contract, it is certainly arguable that having to hand over the purchase price without benefit of registration would be irregular, and outside the contract. The object of the contract, transfer of legal ownership, is only obtainable with the involvement of the Land Title Office. An interpretation of the standard contract more in keeping with this object is that the parties' obligations are suspended at least while the registration function of the Land Title Office is unavailable.

An analogy can be made between a situation in which the parties are temporarily unable to complete in the normal way for reasons beyond their control, and one in which both parties let the completion date go by without moving to carry out the contract. It is well-established that a party in default cannot use the other party's default as a pretext for repudiating the contract.[46] If neither party attempts to perform on the completion date, both parties are in breach, but the contract still exists and neither can proceed as if the other had repudiated it.

Obligations under a contract of purchase and sale, therefore, would likely survive a temporary interruption of services in Land Title Offices.[47] Refusal by one party to grant an extension when the Land Title Office is not in operation would probably not bring the contract to an immediate end, nor would it allow the vendor to claim against the purchaser for not completing on time. The contract would remain in existence without a specified completion date. The general law would imply a duty on both parties to complete within a reasonable time. Either party could make time of the essence again by moving to set a new completion date. The alternative of holding the purchaser in breach for not handing over the purchase price without the security of registration would let a vendor use what might amount to only a half-day episode of computer downtime to repudiate a sale in favour of a better offer.

The result would be similar to a case in which the office was unexpectedly closed, and to which section 25(3) of the *Interpretation Act* would clearly apply. Owing to the cursory way in which the standard

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account of other situations. *See* note 22, *supra*.

46. *Norfolk* v. *Aikens*, *supra*, n. 2; *Shaw Industries Ltd. et al.* v. *Greenland Ent. Ltd. et al.*, *supra*, n. 22; *Pulvers* v. *Shen*, *supra*, n. 45; *Epp* v. *Yung*, *supra*, n. 2; *King* v. *Urban & Country Transport Ltd.*, *supra*, n. 23. There are also strong indications in *Salama*, *supra*, n. 19 and *Drake*, *supra*, n. 44, that administrative delays for which neither party is at fault will not be allowed to bring the contract to an end. *Salama* and *Drake* also suggest that the court may imply an obligation to agree to a short extension of the time for completion when needed to overcome a minor administrative obstacle. In such a case a court will not allow a party to rely on the "time of the essence" clause if the circumstances would make it inequitable.

47. Support for this view of the probable effect of a temporary shutdown of Land Title Office functions can be found in *F.A. Tamplin S.S. Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited*, [1916] 2 A.C. 397 (H.L.), in which the requisitioning of a tanker during wartime was found only to suspend performance of a time charter, rather than frustrating it. Lord Haldane said at 407:

> And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. The question must always turn mainly on the facts.

contract deals with completion procedures, however, some degree of uncertainty about the accuracy of this conclusion will linger until it is confirmed by an authoritative pronouncement from the courts, modification of the standard contract to specify completion procedures in more detail, or legislation.

D. Deemed Extension of the Completion Date - A Universal Cure?

1. GENERAL

Extension of the time for completion until the land title system is again functional would preserve confidence in contractual relations. There is no more benefit to be gained from allowing a vendor to exploit a minor computer problem in order to repudiate a sale in favour of a better offer than there is in letting a purchaser who is buying a property for speculative reasons call off the deal because a change in land value since the contract was signed might cut into the expected profit. There is benefit to be had in discouraging opportunistic repudiation of agreements freely made. Simple extension would be a sensible answer for most instances. But what of lengthy interruptions of Land Title Office operations?

2. SEVERAL SCENARIOS

(a) The Parties Wish to Proceed in the Interim

The parties may wish to close their sale quickly, regardless of the situation in the Land Title Office. They are, of course, free to do so despite any legally imposed extension of the date for completion.

One way of protecting both parties would be to enter into an escrow arrangement in which a legal representative of one of the parties, or a neutral third party, holds the purchase funds and completion documents in abeyance (escrow) until normal conditions return. In the meantime, the purchaser will be allowed into possession of the property once it is clear that all necessary funds are available and the only obstacle remaining is registration of the transfer and mortgage documents. As escrow arrangements add to the overall cost of the transaction and depend on the vendor being willing to wait for the purchase money, however, they would not be desirable or feasible in many sales of residential property.

Another means of facilitating an interim arrangement that would allow the purchaser into possession and the vendor the purchase money might be to use some form of private title insurance. This would also add to the overall cost.

(b) The Purchaser Wishes to Proceed in the Interim Despite the Risk

(i) General

It is the purchaser who is primarily at risk when the searching and registration functions of the land title system are unavailable. But purchasers who do not need mortgage financing, or who are assuming existing mortgages, may occasionally be willing to run the risk of handing over the balance of the purchase money due on completion rather than wait an indeterminate length of time to be able to complete a satisfactory post-application search.

Many vendors, if faced with a purchaser impatient to complete despite the dangers of not waiting until registration resumes and a proper search is possible, would be more than happy to take the money and let the purchaser take possession. Apart from the case of vendor-financed sales, which are discussed later, there seems to be little reason to prevent an eager purchaser, conscious of the risks, from being able to insist on completion in the meantime.

Norfolk v. *Aikens* and other decisions of the Court of Appeal nevertheless make it clear that the actual wording of the contract of purchase and sale will govern, if insisted upon. Methods of completion that fall outside it cannot be forced on an unwilling party. A vendor might conceivably insist that the terms

in the standard contract referring to completion and lodging of documents in the Land Title Office be followed strictly. This would delay completion until normal conditions were restored. While the delay would seldom be advantageous from the vendor's point of view, there may be exceptions:

> V agrees to sell a condominium to P, who has just sold a house. P thus has the cash on hand to buy the condominium without a mortgage. After the time at which the contract of purchase and sale is signed, Land Title Office employees go on strike. The strike is still in progress on the completion date. No applications are being received for registration, the computer system has stopped running without software maintenance, and so the doors of the Land Title Office have been locked for security reasons pending the return of full staff. P wants to hand over the purchase price and take possession of the condominium in the meantime. V is hoping to get a better price, and wants to stall for time in anticipation that P will become exasperated and repudiate the contract before the Land Title Office reopens. V will then be able to retain the deposit and find another buyer at a better price.

Simple extension of the completion date for an indefinite length of time, without provision for purchasers to require that the transaction go ahead, could therefore play into the hands of a vendor looking for an "out."

(ii) Waiver of Completion Terms Relating to the Land Title Office

A contractual obligation that benefits only one party can usually be waived by the party benefited. The benefited party can then insist on performance of the rest of the other party's obligations. Do the terms of the standard contract of purchase and sale relating to the Land Title Office benefit only the purchaser, or do they benefit both parties? If the vendor resists when the purchaser wants to go ahead and complete the transaction before the Land Title Office returns to normal, the question whether the vendor could be compelled to complete in the meantime revolves around this distinction.

Terms that are essential to the purpose of a contract are unlikely to be waivable unilaterally.[48] Under the *Land Title Act*, it is only through registration that the vendor can transfer and the purchaser obtain a title good against the rest of the world. Registration is central to the transaction.[49]

The standard contract specifies that "each condition, if so indicated, is for the sole benefit of the party indicated." This appears below the space where real estate agents insert any special terms agreed upon. It is not clear if this refers only to the terms inserted above it, or also to the pre-printed terms appearing below it. The pre-printed terms referring to completion and lodging of documents at the Land Title Office are not expressed to be for the sole benefit of one party.

It is hard to see why a vendor who would receive full payment under a provisional completion arrangement needs to be protected by the terms relating to the Land Title Office, however. The vendor would remain the registered owner until the transfer was registered, regardless of any provisional arrangement with the purchaser. As far as the rest of the world is concerned, the state of the title would

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48. A party cannot unilaterally rewrite a contract by waiver of a term: *Bonaventure Construction Ltd.* v. *Baldassi*, [1975] W.W.D. 97 (B.C.S.C.). Although it does not apply to the terms of the standard contract of purchase and sale referring to the Land Title Office, s. 49 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 illustrates the importance attached to severability of the term being waived from the remaining terms of the contract. S. 49 allows waiver of a condition precedent (a condition that must be satisfied before performance of the contract becomes obligatory) by a party solely benefited by it, but only if the rest of the contract is still capable of performance without satisfaction of the condition.

49. S. 6 of the *Property Law Act*, R.S.B.C. 1979, c. 340 prevents a vendor from suing on a contract of purchase and sale unless the vendor is registered as the owner. *Cf. Taylor* v. *Aramenko*, [1995] B.C.D. Civ. 2268-01 (C.A.).

remain the same.[50] The degree of benefit the purchaser receives in the form of relief from risk from being able to rely on the title register is more significant than the benefit to the vendor of being able to make out a good and marketable title. It is arguable, therefore, that the terms are for the purchaser's benefit.[51]

It is difficult to say as a matter of contract law whether the terms referring to the Land Title Office can be waived by the purchaser, and the vendor forced to complete, before normal operations are restored. Arguments can be made for and against this possibility. Simple extension of the time for completion will not produce a sensible result, however, if a purchaser willing to take on the risk of turning over the purchase money without the benefit of registration is forced to wait.

(c) The Vendor Takes a Mortgage Back

Sometimes a vendor will provide part of the purchaser's financing by taking back a first or second mortgage from the purchaser for a portion of the price. Since the priority of the vendor's security depends on registration, the vendor could be prejudiced if the purchaser could obtain possession and a signed transfer evidencing ownership merely on the strength of a down payment, without registration of the mortgage back to the vendor. A vendor-mortgagee who resisted pressure from the purchaser to accept the down payment and turn over possession before the Land Title Office returned to normal would be acting rationally.

In this scenario, simple extension of the completion date is an appropriate solution, even if it turns out to be lengthy.

(d) Cancellation or Expiry of the Lender's Commitment

Mortgage loan commitments are usually time-limited. The commitment letter given to the borrower usually specifies that the commitment will lapse if the mortgage is not registered, or the loan funds not drawn upon, by a certain date. The date will be no sooner than the completion date, of course, but how much later will depend on institutional lending guidelines and an assessment of the likelihood of change in financial conditions between the time the commitment is made and the time when the funds are likely to be disbursed. The duration of loan commitments varies among lenders.

A lengthy shutdown in the Land Title Office could be accompanied by expiration or cancellation of mortgage loan commitments made to purchasers, putting the completion of many real estate transactions in doubt. Where the purchaser's mortgage has not been pre-approved, it is standard practice

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50. A purchaser who takes effective possession of the property prior to the transfer of title would be an "occupier" for the purpose of the *Occupiers Liability Act*, R.S.B.C. 1979, c. 303, s. 1. While remaining the registered owner, the vendor may or may not continue to be subject to the Act, depending on the degree of control the owner retains over the property pending the transfer of ownership. As far as taxing authorities are concerned, the vendor will remain liable to pay property taxes as the registered owner, but as the vendor has already been paid for the property, it is the purchaser who stands to lose if the taxes are not paid. (The standard contract states that the purchaser assumes responsibility for taxes as of the "adjustment date" specified by the parties.)

51. In *Jordan River Development Corporation Ltd.* v. *Barwell Development Ltd.*, [1975] W.W.D. 157 (B.C.S.C.) a vendor was not allowed to rely upon a real estate agent's non-compliance with the requirement to provide a statement of profit and loss for the benefit of the purchaser of commercial property under s. 29 of the *Real Estate Act*, R.S.B.C., 1979, c. 356 as a ground for repudiating a contract of purchase and sale. The requirement was obviously for the protection of purchasers.

to make the offer conditional on mortgage financing being made available to the purchaser on specified terms, which will frequently include a maximum interest rate. The terms of acceptance usually stipulate that the purchaser must give notice that this condition has been "removed," *i.e.* fulfilled, within a very short time, however. By the time the problem with the Land Title Office arose, the purchaser would probably be unconditionally bound to meet the contract price.

Once notice of removal of a "subject to financing" condition has been given to the vendor, subsequent inability to obtain funds, or reluctance by a lender to advance them, does not affect the purchaser's obligation to come up with the purchase price on the completion date.[52] A purchaser who has been diligent in arranging a mortgage might still be left high and dry when normal Land Title Office functions resume if the loan commitment has lapsed or been withdrawn and there is insufficient time to obtain the loan elsewhere. It may be asked whether a purchaser in this situation should have to face a possible claim for damages as well as lose the chance to buy the property, and at the very least lose the deposit.

If the delay is so prolonged as to cause the expiry or loss of the purchaser's financing, simply extending the time for completion may work hardship on a purchaser who has acted in good faith throughout,

E. Summary

Section 25(3) of the *Interpretation Act* would operate to extend the completion date under a contract of purchase and sale when the Land Title Office is not "open," but might not cover every situation in which there is some interruption in Land Title Office functions. A malfunction of the computer system that persisted over a period of more than a day might not close the Land Title Office, but would interfere with land transactions. Inability to obtain registration of the transfer, coupled with inability to obtain the release of mortgage funds due to the lack of access to current title information, would mean that vendors and purchasers would often be unable to fully discharge their obligations while the computer system is "down." Most contracts of purchase and sale for residential property are in a standard form which does not provide for this contingency.

If neither party is able to complete on the originally scheduled completion date, the result probably is that the contract remains in force but time ceases to be of the essence. The general law then substitutes an obligation to complete within a reasonable time. One party may set a new completion date by giving notice to the other, provided the new date is reasonable. For many cases, perhaps the majority, this would be all that is required to resolve the complications caused by the events in the Land Title Office.

In other cases, however, simple extension is not a satisfactory solution. Timing is very important in land transactions, which often follow a sequence in which one transaction is dependent on completion of the previous one. Sometimes the parties may wish to complete the transaction to the extent possible under the circumstances, without the help of the Land Title Office. They are, of course, free to do this, with or without escrow. Occasionally, a purchaser may be willing and able to pay the entire purchase price in the interim and the vendor would not be at any risk in accepting it and allowing the purchaser into possession of the property. If the vendor refuses, and the contract is silent on what should happen if the transaction is held up by events in the Land Title Office, the purchaser willing to take on the risk may still have to wait.

Simple extension may also have a harsh effect on a purchaser whose mortgage loan commitment lapses or is withdrawn in the course of a prolonged interruption of Land Title Office operations.

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52. *Williams Lake Realty (1978) Ltd.* v. *Symynuk*, *supra*, n. 20.

CHAPTER III REFORM

A. General

This Chapter contains recommendations to clarify the legal effect of a temporary cessation of normal operations in the Land Title Office, and to facilitate reasonable courses of action that are, or should be, available to the parties to a land transaction in such a case.

B. Preventing the Transaction from Falling Through

1. PRESERVING THE CONTRACT

Temporary conditions in the Land Title Office should not become a means of easy exit from contractual obligations freely agreed upon between vendor and purchaser. Chapter II explains why this would probably not be the result under present law, but this conclusion is based on analogy from principles expressed in cases arising in a different factual context, and on one reported decision that dealt in passing with the applicability of section 25(3) of the *Interpretation Act*.[1] A degree of uncertainty surrounds it. The law should be clear enough to leave no doubt that essential obligations under a contract of purchase and sale do not evaporate merely because an interruption of services in the land title system prevents completion in the usual way on the original completion date.

2. THE UNCERTAIN SCOPE OF SECTION 25(3) OF THE *INTERPRETATION ACT*

In its present form, the applicability of section 25(3) of the *Interpretation Act* may be limited to cases in which the office where a filing must take place is actually closed, rather than merely being incapable for a short time of handling the material filed. In *Wiancko* v. *Caplette*,[2] where section 25(3) was applied to the completion of a contract of purchase and sale, the completion date was a day on which the Land Title Office was physically closed. It did not address a situation in which the Land Title Office is physically "open" but unable to operate normally.

To be truly useful in connection with filings that must be made in the Land Title Office, a provision like section 25(3) should have a uniform effect in the two kinds of situations. There is little to distinguish between them in terms of their effect on a land transaction.

3. ONE OPTION: FIXING SECTION 25(3)

It would be simple enough to clarify that "open" in section 25(3) means "open and functioning."[3] Widening the scope of section 25(3) in this manner could have unforeseen effects, however. The provision is not limited to land contracts. It has general application. Land is a rather stable commodity, even though its price may be volatile. For other kinds of contracts, extension of the time for performance may be an inappropriate solution.

4. A SOLUTION SPECIFIC TO EVENTS IN LAND TITLE OFFICES: TWO ALTERNATIVES

(a) Extension Clause in the Contract of Purchase and Sale

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1. R.S.B.C. 1979, c. 206.

2. (1982) 36 B.C.L.R. 283 (S.C.).

3. An amended version of s. 25(3) might read:

> (3) Where the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours *or at a time when the office is not operating in a manner that allows the act to be accomplished*, the time is extended to the next day that the office is open. [Italics added.]

A clause could be added to contracts of purchase and sale to extend the completion date to the next day on which the registration and search functions of the Land Title Office are continuously available, if they are not available on the original date specified for completion. The "time of the essence" clause would have to be made subject to this exception.

The parties should be free to agree that there should be no extension, but if they do, they should also state what is to happen if an interruption of Land Title Office operations prevents completion on the original date. For example, is the contract to be terminated and the deposit returned? Will the purchaser want to pay the vendor and take possession anyway on the original date, despite the risk involved in this? Allowing the parties to simply strike out a pre-printed extension clause, without more, would only preserve the present uncertainty and increase the likelihood of litigation.

To warrant extension of time, the interruption of services should have to last long enough to make completion in the regular manner a practical impossibility on the date originally agreed upon. Postponing completion to the next or a subsequent day may result in more inconvenience than having to wait to see if the problem in the Land Title Office will last beyond the point at which it is no longer feasible to complete on the original date.[4] We think that an interruption of services should not result in an extension of time for completion if the services are restored more than two hours before the close of public business hours on the day on which the interruption commenced. We invite comment from the Land Title Branch and real estate practitioners as to the average length of time within which it is reasonable to expect the backlog resulting from a half-day of downtime to be cleared.

An illustration of what an extension clause might look like is set out below, although the Commission does not recommend any particular form of wording:

(x) Subject to paragraph (y), time shall be of the essence under this agreement...

(y) If, on the Completion Date, the Land Title Office is or becomes unable to accept applications for registration, or provide access to computerized title information, until at least two hours before the time at which the Land Title Office normally closes to the public, the Completion Date is extended to the end of public business hours on the next day throughout which those services are continuously available.

4. If a paperless registration procedure is ever introduced, the need for extensions will diminish, as electronic registrations and searches could resume immediately after the system is restored to normal function. Backlogs will be a less serious problem.

(b) Amendment to the Property Law Act

The second alternative is to imply a similar extension term into contracts of purchase and sale through legislation. A provision that would accomplish this need not be limited to documents associated with land sales: it could, and should, apply to the filing for registration of any document affecting land ("instrument" in the terminology of the *Land Title Act*[5]). If the time for completion of a contract of purchase and sale, or for filing an application for registration of a particular type of instrument, expired on a day on which the Land Title Office became unable to accept applications for registration, or to provide access to computerized title information, time would be extended on the same basis as under the contractual solution discussed above.

As with section 25(3) of the *Interpretation Act* and the contractual alternative, the extension should be subject to express agreement to the contrary. Nothing would be served by forcing an extension on the parties if they do not wish it.

There might be room for conflict between such an amendment and section 25(3) of the *Interpretation Act*. The conflict would stem from the uncertain meaning of "open" in section 25(3). The next day on which a Land Title Office is physically "open" may not be one on which the registration and search functions are fully operational throughout the day. As the amendment proposed is specific to the functions of the Land Title Office, we believe that in the event of any conflict between the two provisions, the proposed amendment should prevail.

The most appropriate location for the provision would be the *Property Law Act*,[6] a statute that deals with other aspects of contractual relations between vendors and purchasers.[7]

(c) Recommendation

The Commission recommends:

1. (1) The Property Law Act should be amended to provide that if the time specified in an enactment for applying for registration of, depositing, lodging or filing an "instrument" within the meaning of the Land Title Act expires while the Land Title Office has ceased, or is unable, to accept applications for registration or provide access to computerized title information, the time is extended to the end of public business hours on the next day throughout which those services are continuously available.

(2) The extension of time under Recommendation 1(1) should not apply if the cessation, or inability, of the Land Title Office to accept applications for registration or provide access to computerized title information commences during the day on which the time specified in the enactment expires, and ends on the same day more than two hours before the time at which the Land Title Office normally closes to the public.

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5. R.S.B.C. 1979, c. 219, s. 1.

6. R.S.B.C. 1979, c. 340.

7. A consequential amendment to the *Builders Lien Act*, R.S.B.C. 1979, c. 40, should provide that if the time for filing an affidavit of claim of lien is extended due to an interruption of Land Title Office services, the holdback period under s. 20 is extended by an equivalent length of time. This is to prevent situations in which the owner might be required by the *Builders Lien Act* to pay out a holdback while it is still possible for claims of lien to be lodged. This problem is already present under s. 25(3) of the *Interpretation Act*. It is also present in connection with lien claims affecting a mine or quarry filed by material suppliers or workers, which can be filed up to 60 days after the work is done or materials supplied: see *Report on the Mechanic's Lien Act: Improvements on Land* (LRC 7, 1972) 55-56.

(3) In relation to time limits specified in contracts of purchase and sale of land for the lodging in the Land Title Office of registrable instruments required to complete the contract, one of two alternatives should be adopted:

(a) insertion in contracts of purchase and sale of land of a clause having the same effect as Recommendations 1(1) and 1(2);

(b) extension of the scope of the amendment to the Property Law Act described in Recommendations 1(1) and 1(2) to those contractual time limits.

(4) In the event of a conflict between the proposed amendment to the Property Law Act and section 25(3) of the Interpretation Act, the proposed amendment to the Property Law Act should prevail.

The Commission especially invites comment on which of the two alternative methods of reform set out in Recommendation 1(2) is the preferable one.

C. Where Extension of the Completion Date is not a Sufficient Solution

1. WHERE THE PURCHASER IS WILLING TO ASSUME THE RISK OF COMPLETING WITHOUT REGISTRATION

Chapter II explained that in the few cases where a purchaser would be willing to hand over the purchase money during the period of interrupted services and retain the signed transfer until it can be registered, it is not clear that the vendor would be obliged to co-operate if the contract terms expressly involved the Land Title Office in the mechanics of completion. As a practical matter, there ought to be a means of overcoming a vendor's opposition to a provisional completion of this kind where there is no real possibility of detriment to the vendor. If the vendor receives the full amount due on completion and has no continuing interest in the property that needs to be protected by registration (such as a mortgage back), the scope for prejudice to the vendor is nearly eliminated.[8]

This situation is not sufficiently common that it should be the subject of a clause in the standard form contract. There is also a danger that such a clause might attract the attention of purchasers eager to get possession but unaware of the hazards of doing so on the strength of an unregistered transfer. For these reasons, the solution should be a legislative rather than a contractual one.

The Commission recommends:

2. The Property Law Act should be amended to provide that unless the parties expressly agree otherwise, a term is implied in every contract of purchase and sale of land that if, on the date specified in the contract for completion,

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8. Under s. 20.1 of the *Property Law Act*, a previous owner of land subject to a residential mortgage remains liable on the personal covenant in the mortgage for a three-month period following the "transfer." "Transfer" is undefined, and the period may or may not start to run until registration. In any case, the vendor cannot be discharged from liability under the personal covenant any later by relinquishing possession prior to the return to normal conditions in the Land Title Office. Under Part 3.1 of the *Waste Management Act*, S.B.C. 1982, c. 41, as am. by S.B.C. 1993, c. 25, s. 2 (not in force at the time of writing) a previous owner of a contaminated site, or one from which a contaminated substance has escaped, would remain jointly and severally liable for the cost of remediation along with the current owner, subject to numerous exceptions. A vendor would be in the same position vis-à-vis this legislation whether or not the purchaser was allowed into possession of the property before registration of the change in ownership. *See also* Chapter II, n. 50 regarding occupier's liability and municipal taxation.

(a) the operations of the Land Title Office are interrupted so as to prevent the receipt of applications to register the instruments needed to complete the contract, or perform any necessary or customary searches incidental to its completion, and

(b) the purchaser is ready, willing and able to fulfil all obligations owed to the vendor under the contract on or before the date specified in the contract for completion, including payment of the full amount due to the vendor on completion,

the purchaser may waive a term of the contract relating to anything to be done at or in the Land Title Office that does not benefit or otherwise affect the vendor, and require the vendor to fulfil obligations owed to the purchaser under the contract.

2. WHERE EXTENSION RESULTS IN PREJUDICE TO ONE OR BOTH PARTIES

(a) Concurrent or Intervening Events Resulting in Frustration

Disruption or destruction of the Land Title Office might conceivably coincide with an event that would likely lead to frustration of a land sale. For example:

> A developer enters into a contract with a holding company for the sale of a large tract of land along the crest of a ridge. The parties intend that the land will be used for a residential subdivision consisting of view lots. The sale is in the context of a joint venture, with the vendor holding company having a continuing role. The sale and development is partly vendor-financed, with a portion of the price being paid in instalments over a period of several years from proceeds of the sale of the developed lots. The holding company is taking back a mortgage to secure the instalments. On the date on which title to the land and the down payment is to change hands, the ridge disappears in a slide. On the same day, the Land Title Office goes on strike. The vendor company still wants to hold the purchaser to the contract, even though all it can transfer to the purchaser now is a lot of mud and gravel instead of prime residential land, and any prospect of a residential subdivision is ruled out.

The vendor might maintain that the deemed extension of the completion date flowing from the shutdown of the Land Title Office kept the sale element of the contract in effect, even though the joint venture of which it was an integral part is in shambles.[9] The purpose of the extension, however, is not to save contracts that are overtaken by events of a potentially frustrating nature.[10]

An event producing a fundamental change in the effect of the contract might also occur *during* an extension. If, for example, the slide occurred a week after the strike began, the fact of the extension should not prevent the doctrine of frustration from being applied.

The Commission recommends:

3. An extension of the completion date under Recommendation 1(3) should not prevent application of the Frustrated Contract Act and the general law as it relates to frustration of contracts, if it would otherwise be applicable in the particular circumstances of the case.

(b) Delay Leading to Withdrawal of Financing and other Cases

The longer the contract is extended, the more room there is for the possibility that the delay may impose a hardship on one or more parties. Circumstances may change during a lengthy interruption of

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9. At common law, the purchaser bears any risk to the property after the contract of purchase and sale is made. This is subject to agreement, however. Clause 6 of the standard form contract for residential property appears to allocate risk to the vendor pending completion, although there may be some room for doubt as to whether this may apply to buildings only, rather than the land itself.

10. *See B.C.* v. *Cressey Development Corporation*, (1992) 66 B.C.L.R. (2d) 146 (S.C.); *Britton* v. *Buhr*, [1994] B.C.D. Civ. 2251-01.

Land Title Office services in ways that would fall short of frustration, but which could still lead to a good deal of unfairness if vendors or purchasers were held to the original bargain without regard to them.

An obvious example of a change in circumstances leading to a potentially unfair situation is the cancellation or lapse of a mortgage loan commitment due to intervening changes in lending policy related to interest rate changes and other financial market influences. An intervening change in property values might also trigger revocation of a loan offer. All purchasers of land who must borrow from an institutional lender in order to meet the purchase price bear some risk that their financing will fall through before the completion date originally agreed upon. Should they have to bear an increased risk of this happening for an indefinite period as a result of problems in the land title system?

As time drags on, vendors would be increasingly likely to be affected also. They may be in a hurry for the purchase money in order to be able to complete purchases of their own. These transactions will fall through in turn if the purchase money does not come. Some vendors may find it more advantageous to try to return the deposit and abandon the sale, rather than continue to wait for the transaction to go through the Land Title Office.

The extent of confidence that must be placed on the land title system raises the question whether some form of relief should be available in circumstances falling short of frustration, if a lapse in service leads to harsh and inequitable consequences. The remedy of *rescission*, under which courts restore parties to a contract to their original position and release them from obligations under the contract, is usually available only where there has been fraud, misrepresentation, or mistake. It seems, however, to be well-adapted to relieving against unfortunate consequences of very lengthy periods of interruption of Land Title Office operations.

Such a drastic intervention in the relations between the vendor and purchaser should not take place unless the contract can be set aside without loss to either party and the interruption is long enough to be considered a serious departure from normal conditions. We think 30 days of continuous non-availability of Land Title Office services is a realistic threshold for the granting of rescission of contracts of purchase and sale, when a case can be made for this form of relief.

The Commission recommends:

4. An amendment to the Property Law Act should empower the Supreme Court to rescind a contract of purchase and sale of land if

(a) the contract has not been completed because

(i) on the date stipulated in the contract for its completion, the Land Title Office had ceased, or was unable, to accept applications for registration or provide access to computerized title information,

(ii) the services mentioned in paragraph (i) were not continuously available throughout any one of the 30 consecutive days following that date,

and

(b) it appears just and equitable to grant the relief.

D. Statutory Authorization for Reduced Operations in Land Title Offices

In Chapter II we noted the lack of clear authority for land title registrars to maintain a reduced level of operations if circumstances require, and contrasted the express power given to the registrar of the personal property registry to do this under section 42(5) of the *Personal Property Security Act*. The absence of a corresponding provision in the *Land Title Act* leaves room for unproductive arguments about the legality

of laudatory efforts to maintain some level of service under abnormal conditions. It should be corrected by the addition to the *Land Title Act* of a similar empowering provision. As there is only one Personal Property Registry and several Land Title Offices, however, the matter of uniformity between the Land Title Offices that are affected needs to be addressed in some way. One means of standardizing the practice would be to require the prior approval of the Director of Land Titles before any measures are taken under the provision.

It is equally important that statutory authorization of temporary measures for the convenience of users of the land title system, or efforts to maintain some level of service under abnormal conditions, should not result in an expansion of liability. The assurance fund is intended only to support the guarantee of title flowing from the official register. While abnormal conditions persist, it may not be possible to ensure the accuracy of any temporary substitutes for the register. It should not be possible, therefore, to claim against the assurance fund for losses caused by reliance on them.

The Commission recommends:

5. (1) The Land Title Act should be amended to expressly authorize the Registrar, with the approval of the Director of Land Titles, to suspend, or carry on in a provisional fashion, one or more of the operations of a Land Title Office prescribed by the Act if circumstances make it impracticable to continue them for the time being, and to continue any remaining operations that may still be carried on normally.

(2) A loss occurring as a result of a measure taken under the amendment to the Land Title Act referred to in Recommendation 5(1) should not give rise to a cause of action or claim against the assurance fund, the Crown, the Attorney General, or a Crown employee.

E. Summary

As section 25(3) of the *Interpretation Act* does not address all potential situations in which Land Title Offices services are somehow disrupted, it should be supplemented by a specific amendment to the *Property Law Act*. The amendment would extend the time for filing documents in the Land Title Office and for completion of contracts of purchase and sale until normal operations were restored. Alternatively, the amendment could be limited to time limits for filing set out in an enactment, and an extension clause having similar effect could be inserted in contracts of purchase and sale to deal with contractual completion dates. A purchaser willing to assume the risk of paying the vendor in full before the restoration of normal operations and holding an unregistered transfer should be entitled to gain possession regardless of the extension, as long as the vendor retains no interest that needs to be protected by registration, such as a mortgage back from the purchaser.

Extension of time may not meet the requirements of every situation. If the interruption of services is prolonged, the Supreme Court should be able to rescind the contract where this would be a fair and equitable solution in particular cases. This would not prevent application of the principles relating to frustration of contracts, though circumstances bringing the law of frustration into play will rarely occur.

Land title registrars should have powers similar to those of the registrar of the Personal Property Registry to carry on, with the approval of the Director of Land Titles, a reduced level of operations in an emergency or under other unusual circumstances.

CHAPTER IV CONCLUSION

A. General

The uninterrupted functioning of the land title system of the Province is taken for granted much of the time. The fact that a vital system works well should not prevent safeguards against the effects of its possible disruption from being put in place. The recommendations set out below are intended to increase the high degree of confidence the land title system has long enjoyed.

B. List of Recommendations

1. (1) The Property Law Act should be amended to provide that if the time specified in an enactment for applying for registration of, depositing, lodging or filing an "instrument" within the meaning of the Land Title Act expires while the Land Title Office has ceased, or is unable, to accept applications for registration or provide access to computerized title information, the time is extended to the end of public business hours on the next day throughout which those services are continuously available.

(2) The extension of time under Recommendation 1(1) should not apply if the cessation, or inability, of the Land Title Office to accept applications for registration or provide access to computerized title information commences during the day on which the time specified in the enactment expires, and ends on the same day more than two hours before the time at which the Land Title Office normally closes to the public.

(3) In relation to time limits specified in contracts of purchase and sale of land for the lodging in the Land Title Office of registrable instruments required to complete the contract, one of two alternatives should be adopted:

(a) insertion in contracts of purchase and sale of land of a clause having the same effect as Recommendations 1(1) and 1(2);

(b) extension of the scope of the amendment to the Property Law Act described in Recommendations 1(1) and 1(2) to those contractual time limits.

(4) In the event of a conflict between the proposed amendment to the Property Law Act and section 25(3) of the Interpretation Act, the proposed amendment to the Property Law Act should prevail. **[pages 25-26]**

2. The Property Law Act should be amended to provide that unless the parties expressly agree otherwise, a term is implied in every contract of purchase and sale of land that if, on the date specified in the contract for completion,

(a) the operations of the Land Title Office are interrupted so as to prevent the receipt of applications to register the instruments needed to complete the contract, or perform any necessary or customary searches incidental to its completion, and

(b) the purchaser is ready, willing and able to fulfil all obligations owed to the vendor under the contract on or before the date specified in the contract for completion, including payment of the full amount due to the vendor on completion,

the purchaser may waive a term of the contract relating to anything to be done at or in the Land Title Office that does not benefit or otherwise affect the vendor, and require the vendor to fulfil obligations owed to the purchaser under the contract. **[page 27]**

3. An extension of the completion date under Recommendation 1(3) should not prevent application of the Frustrated Contract Act and the general law as it relates to frustration of contracts, if it would otherwise be applicable in the particular circumstances of the case. **[page 28]**

4. An amendment to the Property Law Act should empower the Supreme Court to rescind a contract of purchase and sale of land if

(a) the contract has not been completed because

(i) on the date stipulated in the contract for its completion, the Land Title Office had ceased, or was unable, to accept applications for registration or provide access to computerized title information,

(ii) the services mentioned in paragraph (i) were not continuously available throughout any one of the 30 consecutive days following that date,

and

(b) it appears just and equitable to grant the relief. **[page 29]**

5. (1) The Land Title Act should be amended to expressly authorize the Registrar, with the approval of the Director of Land Titles, to suspend, or carry on in a provisional fashion, one or more of the operations of a Land Title Office prescribed by the Act if circumstances make it impracticable to continue them for the time being, and to continue any remaining operations that may still be carried on normally.

(2) A loss occurring as a result of a measure taken under the amendment to the Land Title Act referred to in Recommendation 5(1) should not give rise to a cause of action or claim against the assurance fund, the Crown, the Attorney General, or a Crown employee. **[page 30]**

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APPENDIX

Standard Form Contract of Purchase and Sale[1]

REAL ESTATE BOARD **MULTIPLE LISTING SERVICE**
OF

PREPARED BY _____ DATE OF OFFER _____
(AGENCY - PLEASE PRINT)

PER: _____ M.L.S. NO. _____

RECEIVED FROM _____ (the Purchaser)

ADDRESS _____ PHONE _____

THE SUM OF _____ DOLLARS cash ☐ cheque ☐

Being deposit on account of the proposed purchase of Legal Description _____

STREET ADDRESS CITY OF MUNICIP OF REGION OF (the Property)

FOR THE PRICE OF _____ DOLLARS $ (of which the deposit will form a part) PAYABLE ON THE FOLLOWING TERMS AND CONDITIONS, IF ANY

EACH CONDITION IF SO INDICATED, IS FOR THE SOLE BENEFIT OF THE PARTY INDICATED. UNLESS EACH CONDITION IS WAIVED OR DECLARED FULFILLED BY WRITTEN NOTICE GIVEN BY THE BENEFITING PARTY TO THE OTHER PARTY ON OR BEFORE THE DATE SPECIFIED FOR EACH CONDITION, THIS CONTRACT WILL THEREUPON BE TERMINATED AND THE DEPOSIT RETURNABLE IN ACCORDANCE WITH THE REAL ESTATE ACT.

THE PURCHASER OFFERS TO PURCHASE THE PROPERTY FOR THE PRICE AND ON THE TERMS AND SUBJECT TO THE CONDITIONS HEREIN SET FORTH.

1 TITLE: Free and clear of all encumbrances except: subsisting conditions, provisos, restrictions, exceptions and reservations including royalties, contained in the original grant or contained in any other grant or disposition from the Crown; registered or pending restrictive covenants and rights-of-way, in favour of utilities and public authorities, existing tenancies set out below, if any, and except as otherwise set out herein.

2 COMPLETION: The sale will be completed on or before _____ 19___(Completion Date) at the appropriate Land Title Office.

(a) Tender or payment of monies by the Purchaser to the Vendor will be by certified cheque, bank draft, cash or Lawyer's/Notary's trust cheque.

(b) All documents required to give effect to this Contract will be delivered in registrable form where necessary and shall be lodged for registration in the appropriate Land Title Office on or before Completion Date.

(c) Time shall be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Vendor may at the Vendor's option terminate the Contract and in such event the amount paid by the Purchaser will be absolutely forfeited to the Vendor on account of damages, without prejudice to the Vendor's other remedies.

3 COSTS: The Purchaser will bear all costs of the conveyance and if applicable, any costs related to arranging a mortgage and the Vendor will bear all costs of clearing title.

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4 POSSESSION: The Purchaser will have vacant possession of the Property at 12 noon, on _____, 19__ (Possession Date) OR subject to the following existing tenancies, if any: _____

_____

5 ADJUSTMENTS: The Purchaser will assume and pay all taxes, rates, local improvement assessments, fuel, utilities and other charges from, and including the date set for adjustments, and all adjustments both incoming and outgoing of whatoever nature will be made as of _____, 19__ (Adjustment Date)

6 RISK: All buildings on the Property and all other items included in the purchase and sale will be and remain at the risk of the Vendor until 12:01 a.m. on Completion Date. After that time, the Property and all included will be at the risk of the Purchaser.

7 INCLUDED ITEMS: THE PURCHASE PRICE INCLUDES any buildings, improvements, fixtures, appurtenances and attachments thereto and all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Purchaser at the date of inspection,

INCLUDING: _____ BUT EXCLUDING: _____

_____ The property and all included items will be in substantially the same condition at possession date as when viewed by the purchaser on _____, 19_____

8 In this Contract any reference to a party includes that party's heirs, executors, administrators, successors & assigns; singular includes plural and masculine includes feminine.

9 THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT ABOVE, ALL OF WHICH WILL SURVIVE THE COMPLETION OF THE SALE.

THIS OFFER IF ACCEPTED IS A LEGAL AND BINDING CONTRACT. SEE INFORMATION ON BACK. READ IT ALL BEFORE YOU SIGN.

10 ACCEPTANCE: This offer or counter-offer will be open for acceptance until _____ o'clock _m on _____ _____, 19__ and upon acceptance of the offer, or counter-offer, by accepting in writing and notifying the other party of such acceptance there shall be a binding Contract of Purchase and Sale on the terms and conditions set forth.

X _____ ▪ _____ _____ (witness)
(purchaser) occupation

X _____ ▪ _____ _____ (witness)
(purchaser) occupation

11 Receipt of the above mentioned deposit is hereby acknowledged by the undersigned selling Agent

SELLING AGENT _____ Per SALES REPRESENTATIVE _____ Agent's address _____

_____ Phone (Office) _____ Home _____

12 The VENDOR (a) hereby accepts the above offer and agrees to complete the sale upon the terms and conditions set out above (b) declares and represents that the Vendor is: RESIDENT OF CANADA ☐ NON-RESIDENT OF CANADA ☐ as defined under the Income Tax Act (c) agrees to pay a commission as per the listing contract on completion of the sale and (d) authorizes and instructs the Purchaser and anyone acting on behalf of the Purchaser or Vendor to pay the commission out of the cash proceeds of sale and forward copies of the Vendor's Statement of Adjustments to the Selling/Listing Agent, as requested, forthwith after completion.

Vendor's acceptance is dated _____, 19__. LISTING OR SUBAGENT: _____

X _____ ▪ _____ _____(WITNESS)
(VENDOR) (PRINT NAME)

X _____ ▪ _____ _____ (WITNESS)
(VENDOR) (PRINT NAME)

Vendor's address Phone: (Home) (Work)