

# **Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests**

**A Report prepared for the British Columbia  
Law Institute by the Members of the Real  
Property Reform (Phase 2) Project Committee**

# British Columbia Law Institute

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## INTRODUCTORY NOTE

### Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests

This is the first in a series of reports that BCLI will publish in connection with the Real Property Reform Project (Phase 2). Each report will deal with a different aspect of the law of real property in British Columbia requiring reform.

British Columbia was among the first jurisdictions in the world to adopt the Torrens system of land title registration. The Torrens system was devised in order to simplify the law relating to land ownership and to minimize risk in the transfer of land by removing the need for complex and costly investigation of the title. The main feature of the Torrens system is the public title register, which in theory should relieve prospective purchasers, mortgagees, and others transacting with a registered owner of land of the need to look behind what is shown on the register to determine the state of the title.

This ideal has not been achieved in British Columbia because of differing judicial interpretations of a key provision of the *Land Title Act* that have not been resolved in over a century. One line of cases supports an interpretation in keeping with the position in other western provinces, namely that notice of an unregistered interest is irrelevant and has no effect on the priority of a registered title or charge over an unregistered interest. Another line of cases holds that it amounts to fraud to register one's interest and claim priority based on the registration if one had actual notice of a competing unregistered interest beforehand. Under this interpretation, the unregistered interest is allowed to prevail despite the wording of section 29(2) of the Act that seems to dictate an opposite result.

The competing interpretations result in uncertainty in dealings with land. Purchasers cannot be certain that their titles will not be clouded by unregistered interests, nor can lenders be assured of the priority of a mortgage, if there is an issue of any knowledge prior to registration of the existence of a conflicting unregistered interest. This uncertainty can increase legal expenses and hold up the release of mortgage funds, slowing or preventing the completion of real estate transactions.

This report recommends amendments to the *Land Title Act* to resolve the century-old controversy and increase the level of certainty in real estate transactions in British Columbia. BCLI encourages their enactment.

D. Peter Ramsay, Q.C.  
Chair,  
British Columbia Law Institute  
January 2011



## Real Property Reform (Phase 2) Project Committee

The Real Property Reform (Phase 2) Project Committee was formed in August 2008 to make recommendations for the reform of several distinct areas of real property law. The members of the committee are:

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## Acknowledgments

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The Institute also extends its gratitude to the Law Foundation of British Columbia, the Notary Foundation, and the Real Estate Foundation, for their financial support of Phase 2 of the Real Property Law Reform Project.

The Institute extends its thanks to all those individuals and organizations who responded to the consultation paper that preceded this report. The comments they provided were of great assistance to the Project Committee in reviewing and refining the recommendations reflected in the report.

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## EXECUTIVE SUMMARY

This is the first report issued by the British Columbia Law Institute (BCLI) in connection with Phase 2 of the Real Property Reform Project, a law reform initiative funded by The Law Foundation of British Columbia, the Notary Foundation, and the Real Estate Foundation of British Columbia. In Phase 1, a preliminary scoping study conducted with the aid of an advisory committee, BCLI identified a number of aspects of real property law in British Columbia in need of reform. One of these was the uncertainty arising from conflicting interpretations of section 29(2) of the *Land Title Act*. Uncertainty surrounding the effect of section 29(2) complicates dealings with land in British Columbia and raises the level of risk and expense associated with them.

British Columbia was among the first jurisdictions to adopt the Torrens system of land title registration. The Torrens system was conceived to overcome the anachronisms, expense, and risk of the common law system of conveyancing, which required purchasers to investigate the chain of title. Under the common law system, the rights acquired by purchasers and encumbrancers were subject to pre-existing legal interests, whether or not they knew of them. Purchasers and encumbrancers were also subject to the vagaries of the doctrine of constructive notice, under which they were deemed to know the details of equitable interests they could have discovered by whatever inquiries that a court, with the benefit of hindsight, considered to be reasonable.

The cardinal feature of the Torrens system is the public title register, ideally intended to reflect the state of the title to land (the “mirror” principle) and relieve those dealing with a registered owner of the need to look behind it for the purpose of uncovering unregistered interests (the “curtain” principle).

In the *Land Title Act*, the “curtain principle” is implemented primarily by section 29(2). Section 29(2) provides that someone dealing with a registered owner in order to acquire a transfer of land, a charge, an assignment of a charge, or a subcharge is not affected by express, implied or constructive notice of an unregistered interest affecting the land or charge, apart from a very few specified exceptions. Fraud in which the person dealing with the registered owner has personally participated is one of the exceptions. The fraud exception has proven to be a fertile source of difficulty in the interpretation of section 29(2).

Unlike its counterparts in the land title legislation of numerous other Torrens jurisdictions, section 29 does not state that knowledge of an unregistered interest cannot be imputed as fraud in itself. This has resulted in two competing lines of case authority in British Columbia on the effect of section 29(2).

The first line of cases is based on portions of the judgments in the 1896 case *The Hudson's Bay Company v. Kearns and Rowling*. This line of authority holds that, despite the wording of section 29(2), someone purchasing or taking a charge from a registered owner with actual notice (knowledge) of an existing unregistered interest will acquire the title or charge subject to that unregistered interest. The reasoning used to justify this result, which appears to fly in the face of section 29(2), is that it amounts to fraud to claim priority on the basis of the Act after registering with actual notice of a competing unregistered interest, and a court of equity will not allow a statute to be used as an instrument of fraud.

The second line of cases interprets section 29(2) more literally. They require some element of dishonesty in addition to mere knowledge of a competing interest in order to deprive a person dealing with a registered owner of the protection of the Act. For example, if a purchaser of leased property accepted an assignment of the lessor's interest from the vendor as part of the sale transaction, and then attempted to rely on the Act to repudiate the unregistered lease after accepting rent, the purchaser might be held to have acted in a clearly deceitful manner amounting to fraud, and therefore would be bound by the lease. This view of fraud under the land title system is similar to the view taken in most other Torrens jurisdictions, including the neighbouring western provinces.

British Columbia courts continue to go in separate ways on the question of the effect of section 29(2). In 2008, the Court of Appeal left the question open in *Lee v. Ling*, as the facts did not compel the court to rule in favour of one interpretation over the other.

As a result of the unsettled case law, it is not possible to give an unqualified title opinion when a purchaser has received some indication of the existence of an unregistered interest, or an unqualified opinion on the priority of a mortgage if the lender is aware of earlier unregistered interests affecting the title. This state of the law is unsatisfactory. The *Land Title Act* was intended to create certainty in relation to the ownership of land and interests in land. Without legislative intervention, resolution of the conflicting case law surrounding section 29(2) appears unlikely in the foreseeable future.

This report recommends that the fraud exception be retained, but that the *Land Title Act* be amended to provide that mere knowledge of an unregistered interest cannot in itself be treated as fraud. British Columbia's land title system is a unique blend of equity and Torrens principles, however. This unique blend of principles would be overturned if considerations of fairness were subordinated completely to conclusiveness of the register. The report also recommends amending the *Land Title Act* to

include two new exceptions to the general rule in section 29(2). As specific exceptions, they would not require a finding of fraud for their operation.

The additional exceptions would be as follows:

- someone acquiring a transfer or other interest referred to in section 29(2) from a registered owner *for value* who obtained actual knowledge of an earlier unregistered interest *before entering into a legally binding agreement* with the registered owner would acquire the title or other interest subject to the unregistered interest;
- someone obtaining a transfer or other interest referred to in section 29(2) from a registered owner *gratuitously* (e.g., by gift, under a will, or pursuant to an order under the *Wills Variation Act*), and who obtained actual knowledge of an earlier unregistered interest *before registration* of the transfer or other interest obtained from the registered owner, would acquire the title or other interest subject to the unregistered interest.

The report is divided into five chapters. Chapter I is a general introduction. Chapter II explains the fundamentals of British Columbia's Torrens system. Chapter III analyzes section 29(2) of the *Land Title Act* and the competing lines of case authority concerning that provision. Chapter IV describes the various alternatives for reform that were considered, sets out the recommendations summarized above, and explains the reasons for them. Chapter V contains a list of the recommendations.



## ABBREVIATIONS

BCLI	British Columbia Law Institute
LTA	Land Title Act



## PART ONE

### I. INTRODUCTION

#### A. Certainty: The Cornerstone of the Land Title System

British Columbia has an impressive land title system. Well over a million registrations were processed in the fiscal year 2009-2010 with an average turnaround time of 4.7 days from deposit of the documents at the land title office to full registration.<sup>1</sup> More important than the volume of registered transactions that a land title system can handle and its processing speed, however, is the degree of certainty that it can provide with respect to land ownership. The integrity of the land title system is crucial to the financial security of individuals and businesses. It is a key element in creating a beneficial environment for commerce, and stability in society generally.

Underlying the daily operation of the land title system is its governing legislation, principally the *Land Title Act* (LTA).<sup>2</sup> Clarity and certainty regarding the effect of this important Act is what makes the results of dealing with land predictable. Predictability in the outcomes of dealings with land and interests in land make it possible in turn for money to be invested on the security of land. The significance of this key piece of legislation to a healthy economy requires no demonstration.

#### B. The BCLI Real Property Reform Project

The Real Property Reform Project is a multi-year initiative funded by the Law Foundation of British Columbia, the Notary Foundation, and the Real Estate Foundation. It will examine certain areas of land law in British Columbia that are not currently under review by other bodies and which are in need of reform. Phase 1 of the project was a preliminary scoping study completed in 2007. It was conducted with the aid of an Advisory Committee. Phase 2 began in 2008 and is being conducted with the aid of a Project Committee. The members of the Project Committee are listed at the beginning of this report.

The objective of Phase 2 of the Real Property Reform Project is to develop concrete recommendations for legislative reform in the areas of law under review, based on extensive research and consultation. The final recommendations will be embodied in several published reports. BCLI will provide the reports to provincial ministries,

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1. Land Title and Survey Authority, *Annual Report 2010*, p. 4.

2. R.S.B.C. 1996, c. 250.

the Land Title and Survey Authority, and other bodies responsible for the matters in question. This is the first report to be issued in Phase 2.

### **C. Section 29(2) of the *Land Title Act***

The interpretation and application of section 29(2) of the LTA was one of the areas of the law of real property identified in Phase 1 of this project as being surrounded by a significant amount of uncertainty and therefore appropriate for attention in Phase 2.<sup>3</sup> Section 29(2) has to do with the effect of unregistered interests under the system of land title registration created by the LTA. It is a key provision in the scheme of the Act for reasons explained in Chapters II and III.

There are conflicting lines of judicial interpretation in British Columbia regarding the result that should flow from section 29(2) when someone purchases land or is granted a charge on it, such as a mortgage or easement, and proceeds to register the transfer or charge despite having knowledge that a conflicting unregistered interest already exists.

Uncertainty regarding the effect of unregistered interests means that persons dealing with land cannot be certain what they will acquire on completion of a transaction. This can add to the legal expenses of a real estate transaction, impede the release of mortgage funding, and slow down the completion or cause the abandonment of real estate transactions, both simple and complex. It is in the interests of all residential and commercial owners of real estate, prospective purchasers, lending institutions, and the real estate industry that the uncertainty resulting from conflicting case law about the effect of section 29(2) be resolved.

### **D. The Consultation Paper**

This report was preceded by the publication of a consultation paper containing tentative recommendations aimed at resolving the uncertainty created by divergent lines of case law surrounding section 29 of the LTA and its predecessor provisions. BCLI received comments on the consultation paper from the Land Title and Survey Authority, the Ministry of Agriculture and Lands, the Ministry of Attorney General, the financial sector, the real estate industry, the Association of British Columbia Land Surveyors, and individual members of the legal community. The Project Committee carefully considered all responses in arriving at the recommendations contained in this report.

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3. Section 29(2) is reproduced on pp. 13-14 below.



**E. Terminology of Notice**

This report contains frequent references to “notice” and to various forms of notice. In the law of real property, and in some other legal contexts, the term “notice” means knowledge of a fact.<sup>4</sup> There are several distinct forms of notice. The terminology associated with them is not used in a fully consistent manner in case law and legislation, but the meanings given below are drawn from leading authorities and reflect generally accepted usage.

*Actual notice* means knowledge of a fact that is actually brought home to someone, as opposed to presumed knowledge.<sup>5</sup> A person has actual notice of facts actually known to that person, regardless of how the knowledge is obtained.<sup>6</sup> This term is employed extensively in case law relating to section 29(2) of the LTA, although it does not appear in section 29(2) itself.

Actual notice has been said to comprise both express and implied notice.<sup>7</sup> The meaning of these terms is discussed below.

*Express notice* is a term sometimes used interchangeably with actual notice.<sup>8</sup> It has also been given a slightly narrower meaning as denoting actual notice in which knowledge of the facts in question is acquired directly rather than from inference.<sup>9</sup> This term is far less common in case law than “actual notice,” but it appears in section 29(2).

*Implied notice* does not have a particularly settled meaning, but may include knowledge that the law imputes to a person because of that person’s knowledge of other facts from which the fact in question can be inferred, or because that person’s agent

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4. Robert Megarry and William Wade, *The Law of Real Property*, 7th ed. (London: Sweet and Maxwell, 2008) at 261-262. See also *Black’s Law Dictionary*, 9th ed. (St. Paul: West, 2009) at 1164, s.v. “notice”.
  5. *Rose v. Peterkin* (1885), 13 S.C.R. 677 at 694.
  6. Megarry and Wade, *supra*, note 4 at 261-262.
  7. *McFall v. Vancouver Exhibition Association (No. 2)* (1942), 58 B.C.R. 168 at 172 (S.C.); *Re Scott* (1963), 40 D.L.R. (2d) 328 at 336 (N.S.S.C.).
  8. *Syndicat Lyonnais du Klondyke v. McGrade* (1905), 36 S.C.R. 251 at 262; *Nelson v. Charleson* (1914), 19 B.C.R. 100 at 102 (S.C.); *Re Stoimenov* (1985), 50 O.R. (2d) 1 at 7 (C.A.).
  9. *Consolidated Trust Company v. Naylor* (1936), 55 C.L.R. 423 at 436 (H.C.A.); *Re Scott, supra*, note 7; *R. v. Payton*, [2005] 2 W.W.R. 275 at 298-299 (Alta. Prov. Ct.).
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has knowledge of the fact in question. In those senses, implied notice is considered to be a form of actual notice.<sup>10</sup>

*Constructive notice* is knowledge of facts that a person is conclusively presumed to have, whether the person actually has the knowledge or not. If someone is aware of information or circumstances that should put him or her on inquiry, and either neglects to carry out reasonable inquiries or deliberately holds back from making them to avoid discovering the facts, that person is considered to have constructive notice of facts that could have been discovered by reasonable diligence.<sup>11</sup>

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10. *Rolland v. Hart* (1871), L.R. 6 Ch. 677; *Greveling v. Greveling*, [1950] 1 W.W.R. 574 at 596-597 and 607-608 (B.C.C.A.). Implied notice was also said to be a form of actual notice in *Health Employees Association of British Columbia and Nurses' Bargaining Association* (2002), 85 C.L.R.B.R. (2d) 116 at 122 (B.C.L.R.B.), but was defined there in terms more descriptive of constructive notice. Judges have sometimes employed the term "implied notice" almost interchangeably with "constructive notice." As implied and constructive notice are mentioned separately ("is not... affected by a notice, express, implied, or constructive...") in section 29(2) of the LTA, however, it is arguable that a difference in meaning was intended for the purposes of the Act.

11. *Rose v. Peterkin*, *supra*, note 5; *Jones v. Smith* (1841), 1 Hare 43 at 55, 66 E.R. 943 at 948.

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## II. BRITISH COLUMBIA'S TORRENS-BASED LAND TITLE SYSTEM

### A. Origins

British Columbia's land title system is the second oldest Torrens system in existence. The Torrens system was first introduced in South Australia in 1858.<sup>12</sup> It was introduced in the Crown Colony of Vancouver Island in 1861<sup>13</sup> and in 1870 extended to the united colony of British Columbia.<sup>14</sup>

### B. Why the Torrens System Came Into Being

One of the principal purposes of the Torrens system is to create certainty surrounding the ownership of land through public registration of title.<sup>15</sup> Another principal purpose is to simplify the transfer of land by removing the need to investigate the whole chain of title in order to determine whether the present owner actually owns the land and to uncover the encumbrances affecting it.

At common law, the rule that no one can transfer what he or she does not own (*nemo dat quod non habet*) meant that the chain of title had to be investigated back to the Crown grant or other root of title to confirm that the vendor actually had the interest that was purportedly being transferred. It meant examining the record of all transactions that could affect the title, *e.g.*, sales, mortgages, deaths and probates of wills.<sup>16</sup> If any transaction earlier in the chain was void because of fraud, forgery, mistake or some other reason, the vendor's title was defective and void against anyone who had been wrongly deprived of the land or interest in question, and the purchaser's title would be similarly vulnerable. Searches were expensive and slow. Any gaps in the documentary record would cast doubt on a title and reduce the marketability of the land.

Conventions of due diligence reduced the length of required title searches to a minimum of 60 years back to a good root of title,<sup>17</sup> but did not result in certainty of ownership. The risk was entirely on the purchaser in the absence of the vendor's

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12. *Real Property Act 1858*, No. 15. (S.A.).

13. *Land Registry Act, 1860* (Van. Is.).

14. *Land Registry Ordinance, 1870* (B.C.).

15. *Fels v. Knowles* (1906), 26 N.Z.L.R. 604 at 620.

16. Megarry & Wade, *supra*, note 4 at 661.

17. *Barnwell v. Harris* (1809), 1 Taunt. 430, 127 E.R. 901. In England, the title search period was reduced to 40 years, later 30, and finally 15 years by statute: *supra*, note 4 at 265.

fraud or misrepresentation. The common law principle in the sale of land or interests in land was *caveat emptor* (let the buyer beware).<sup>18</sup> Pre-existing legal interests such as life estates, mortgages, leases and easements were effective against the purchaser whether or not the purchaser learned of them.<sup>19</sup> The vendor was obliged to produce title deeds, mortgages, etc. in the vendor's possession, but the purchaser was responsible for investigating title beyond this and accepted the risk of defects in the title stemming from undisclosed legal interests belonging to third parties.

The purchaser also ran the risk of pre-existing equitable interests such as trusts, restrictive covenants, and specifically enforceable contracts concerning the land, unless he or she made all reasonable inquiries regarding possible interests.<sup>20</sup> If the purchaser failed to make all inquiries a court considered reasonable, the purchaser was considered to have had constructive notice of all equitable interests that reasonable inquiries would have revealed.<sup>21</sup> The effect of constructive notice was the same as if the purchaser had actual notice.<sup>22</sup>

A purchaser who accepted the title without having made the inquiries that a court might later find reasonable in the circumstances was therefore considered to have accepted it subject to all the pre-existing equitable interests that could have been asserted against the vendor or the vendor's predecessors in title. Gratuitous transferees of land took subject to all legal and equitable interests in any case, whether or not they had notice of them beforehand. Only those purchasers who could justly claim to be "*bona fide* (good faith) purchasers for value without notice," namely ones who paid for the land without having either actual or constructive notice of other interests, could be relatively confident of the titles they were acquiring, but even they were bound by valid legal interests that might come to light after they purchased.

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18. *Supra*, note 4 at 262. The *caveat emptor* principle is still applicable in the sale of land to the extent that it has not been modified by modern legislation: see *Cardwell v. Perthen* (2007), 68 B.C.L.R. (4th) 117 (C.A.); *Wescan Enterprises Ltd. v. Burnaby (City)*, 2007 BCCA 517.

19. Legal interests were those interests in land that the common law courts would recognize. They comprised the basic freehold estates, namely the fee simple (an estate that could be transferred to anyone), fee tail (an estate that could only pass to the descendants of the owner), and the life estate. They also included mortgages, leases, easements, reversions (interest in the land retained by a lessor during the term of the lease) and remainders (right to the fee simple after the end of a previous limited estate).

20. Equitable interests were rights relating to property not recognized at common law, but which were enforced by the Court of Chancery against purchasers and other successors in title who had notice of them.

21. *Supra*, note 4 at 262-263.

22. *Supra*, note 4 at 263.

The rules concerning actual and constructive notice protected holders of equitable rights who did not hold the title deeds and thus could not prove their interests directly. It also served to curb fraudulent transactions aimed at defeating equitable rights by those who did hold title deeds.<sup>23</sup> While the land transfer system based on inspection of title deeds and the doctrine of notice protected rights to land acquired earlier in time, it was onerous and expensive for purchasers and gave them only qualified assurance that their titles would be secure.

By the mid-nineteenth century, when Sir Robert Torrens (1814-1884) was actively promoting his ideas for reform in South Australia, the common law system for transfer of land was regarded as anachronistic and unsustainable because of its expense, slowness, and uncertainty. The Torrens system was designed to overcome these drawbacks.

### **C. Torrens Land Title Systems – Governing Principles**

#### **1. THE MIRROR PRINCIPLE: PRIMACY OF THE REGISTER**

All Torrens systems provide for what is a form of state-guaranteed title created by registration. This title is said to be “indefeasible” in the sense that it is immune from challenge on the basis of earlier transactions, except for a small number of statutory exceptions. In British Columbia, the statutory exceptions to indefeasibility are listed in sections 23(2) and (4) of the LTA. These include reservations or restrictions in the original Crown grant covering the land in question, leases of three years’ duration or less where there is actual occupancy under the lease, and statutory rights of expropriation and escheat.<sup>24</sup> The statutory exceptions also include the right of someone deprived of land through fraud or forgery in which the current registered owner participated to challenge the registered owner’s title on that ground.

The public register is intended to reflect the true state of the title to land, showing all mortgages, leases, easements, and other interests that will affect a prospective purchaser or anyone proposing to acquire an interest in the land from the registered owner. It also shows the priority of interests affecting the same parcel of land, based on their order of registration. The primacy that the Torrens system gives to the register in defining the state of the title to a given parcel of land is sometimes called the “mirror principle.”

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23. H.L. Robinson, “Registration and the Doctrine of Notice” (1953) 2 U.B.C. L.N. 5 at 9.

24. *Supra*, note 2, ss. 23(a),(d),(f).

### 2. THE CURTAIN PRINCIPLE

Under the so-called “curtain principle,” anyone acquiring or proposing to acquire land or an interest in it from the registered owner is relieved from having to look behind the register to determine the state of the title. Under this principle, the prospective purchaser does not need to be concerned about unregistered interests, whether they be legal or equitable, apart from a few statutory exceptions.<sup>25</sup>

The curtain principle is directly contrary to the principles of common law and equity that left purchasers subject to legal interests without notice and to equitable interests that might have been discovered by reasonable investigation. Torrens land title legislation includes provisions declaring that persons dealing with a registered owner are not affected by unregistered interests, including unregistered interests of which the person dealing with the registered owner has notice. In the LTA, this provision is found in section 29(2), discussed in detail below. Section 29(2) does not distinguish between legal and equitable interests in excluding the effect of notice.

### 3. THE INSURANCE PRINCIPLE

#### (a) General

While the conclusiveness of the register under the Torrens system facilitates the transfer of land, it occasionally gives rise to problems in connection with fraudulent registrations or errors made in the land title office.

If someone is registered as the owner of land or an interest in land as a result of fraud in which that person is implicated, or through an error occurring in the land title office and no intervening rights have arisen in a third party, the true owner can be restored to the register. Nothing has occurred to trigger the operation of the “mirror” and “curtain” principles.

The picture is more complicated if, subsequent to the fraudulent registration or error, a third party acting in good faith acquires the land or interest in question in reliance on the information in the register and becomes registered as its owner.<sup>26</sup> The third party is then entitled to the benefit of the “mirror” and “curtain” principles.

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25. “The protection which was meant to be afforded was a protection against secret incumbrances...”: *The Hudson’s Bay Co. v. Kearns and Rowling* (1896), 4 B.C.R. 536 at 555 (S.C. *en banc*) per Davie, C.J. The statutory exceptions are found in s. 23(2) of the LTA.

26. It is not necessary for the transferee to have actually searched the register in order to obtain the benefit of the “mirror” and “curtain” principles. They apply by virtue of the land title legislation itself in favour of a person who acquires the title in good faith from the current registered owner.

Through their operation, another innocent party, namely the original “true” registered owner, is deprived of the title or lesser interest in land.

Legislation nevertheless establishes an assurance fund typically financed from land title office registration fees. The assurance fund compensates holders of registered interests who lose their interests through the operation of the land title legislation. This feature of the Torrens system is sometimes called the “insurance principle.”

*(b) Effect of fraud and the right to compensation from the assurance fund*

In cases of fraud, the exact manner in which Torrens land title legislation should function has long been a matter of debate. It is not in dispute that if a fraudulent instrument is registered, it can still become the root of an indefeasible title in the name of an innocent party, and that a former registered owner who is deprived of an interest in land as a result may have a valid claim against the assurance fund for compensation. The stage at which this result occurs, however, is a matter of some controversy. Much turns on the wording of the particular land title statute and the view of its effect that is taken by the courts of the jurisdiction in question.

For example: A is a registered owner. B, impersonating A, forges a transfer from A to C. C thinks B is A. C pays B the purchase money and registers the transfer in good faith. Title issues to C.

On one view, C has an indefeasible title because the register showed A as the owner at the time C purchased and took the transfer without knowing it was forged. A would lose the title and would be left with a claim against the assurance fund.<sup>27</sup> This

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27. Depending on the jurisdiction, A may have to exhaust possibilities of recovery of damages from B before being able to claim against the assurance fund. This would be the case in British Columbia unless B is dead or cannot be found in the province: *supra*, note 2, ss. 294.2, 296. In Saskatchewan, however, A would have the option of claiming directly against the assurance fund without having to sue B first: *Land Titles Act, 2000*, S.S. 2000, c. L-5.1, ss. 89, 95. Some newer Torrens land title statutes would allow A, the innocent true owner, to retain the land instead and give C, the innocent purchaser, the right to compensation from the assurance fund. The Joint Land Titles Committee recommended that the usual result in this type of situation be that the party deprived of an interest would be restored as the registered owner of it, and the purchaser would be allowed to claim against the assurance fund. The superior court would retain the discretion to order the opposite, or in other words the classic Torrens model result, if it would effect better justice in the case: Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) at 24-26 and 108-09.

view of what the appropriate outcome should be is sometimes called “immediate indefeasibility.”<sup>28</sup>

Another view is that as C did not deal with the registered owner, C has not “relied on the register.” C’s title is therefore not indefeasible and open to challenge by A, the true owner, who has a right to be restored to the register. C would have no claim against the assurance fund, however, because C did not lose the title as a result of the operation of the land title legislation. Instead, C’s loss resulted from the fact that the transfer was fraudulent and legally void. This view of the outcome is known as “deferred indefeasibility.”<sup>29</sup>

Under deferred indefeasibility, the true owner can defeat the title of an innocent transferee who was registered on the strength of a fraudulent or forged transfer because the transfer is void. It is only when the first transferee who accepted the void instrument from a forger or fraudster transfers in turn to another innocent party who becomes the registered owner that the void transfer becomes the root of an indefeasible title. The “curtain” closes in favour of an innocent transferee only at that point. Thus, under deferred indefeasibility, A as the true owner would be defeated if C had transferred the title to D, another innocent purchaser, and D became the registered owner before A took steps to be restored to the register.

The competing theories of immediate and deferred indefeasibility continue to be represented among the jurisdictions that have implemented the Torrens system. Immediate indefeasibility emphasizes ease of marketability of land by favouring the innocent purchaser relying on the apparent good title of the vendor. Deferred indefeasibility emphasizes safety of title by favouring the rightful owner who has been deprived of title due to a wrongful registration, unless another innocent third party has acquired rights in the meantime in reliance on the state of the register.

Prior to 2005, the wording of certain provisions in British Columbia’s LTA leaned towards deferred indefeasibility, and this interpretation was followed in a number of decisions.<sup>30</sup> In 2005, the LTA was amended in a manner evidently designed to entrench immediate indefeasibility.<sup>31</sup>

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28. *Frazer v. Walker*, [1967] A.C. 569 (P.C.) (N.Z.) is most commonly cited as authority for this approach. See also *Hermanson v. Martin*, [1987] 1 W.W.R. 439 (Sask. C.A.), aff’g [1982] 6 W.W.R. 312 (Sask. Q.B.).

29. *Gibbs v. Messer*, [1891] A.C. 248 (P.C.) (Victoria) is the foundation of the theory of deferred indefeasibility.

30. *Supra*, note 2, s. 297(3), rep. by S.B.C. 2005, c. 35, s. 18(c). See *Kwan v. Kinsey* (1979), 15 B.C.L.R. 31 (S.C.). See also *Vancouver Canadian Commercial Bank v. Almont Holdings Ltd.* (1988), 23



*(c) Error originating in the land title office and the assurance fund*

An error occurring in the land title office that results in someone other than the true owner being shown as the registered owner can operate much in the same way as a fraudulent registration in becoming the root of a valid indefeasible title in favour of a transferee relying in good faith on the state of the title. The power of the registrar to correct errors in the register is limited to cases where the correction would not prejudice rights acquired in good faith for value.<sup>32</sup>

For example: A transfers land to B, reserving all minerals. Title is issued in the name of B without an endorsement indicating that minerals are excepted. B transfers for value to C, who purchases while the register shows B as owning the entirety of the land, without any exceptions appearing on the title.

In this example, C has acquired an indefeasible title including the minerals along with the rest of the land, because of having relied on the state of B's title appearing from the register.<sup>33</sup> The registrar could not correct the error to enter the reservation on C's title without prejudicing rights that C acquired in good faith for value. A would have a claim against the assurance fund because an error in the system had the effect under the land title legislation to deprive A of an interest in land, namely the reserved minerals.

#### 4. GENERAL COMMENT

Torrens land title systems vary among jurisdictions, but the principles described above are common to all of them. A common theme running through the interpretation of Torrens land title statutes by courts, however, is the thinking that these stat-

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B.C.L.R. (2d) 96 at 100 (C.A.); *Vancouver City Savings Credit Union v. Hu* (2005), 42 B.C.L.R. (4th) 154 at 162 (S.C.).

31. *Supra*, note 2, s. 25.1, enacted by S.B.C. 2005, c. 35, s. 14. Doubt has been expressed regarding the extent to which s. 25.1 is effective in achieving the aim of introducing immediate indefeasibility: see Douglas C. Harris, "Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the *Land Title Act*" (2006) 64 *Advocate* 529.
32. This limitation on the power of the registrar to correct errors is made clear in the LTA by the express wording of s. 383(1). See also *Heller v. Registrar, Vancouver Land Registration District*, [1963] S.C.R. 229.
33. *C.P.R. v. Turta*, [1954] S.C.R. 427. If B did not give value for the transfer from A in this example, it is possible that the registrar could have endorsed the mineral reservation on B's title while B still remained the registered owner. The registrar would not then be exercising the power to correct the register in a way that would prejudice rights acquired for value in reliance on the register: *Kaup v. Imperial Oil Limited*, [1962] S.C.R. 170.

utes do not displace the rules of common law and equity regarding real property beyond the precise extent necessary to give effect to their provisions.<sup>34</sup> The older law has sometimes been applied uncritically where the land title statute is silent or less than fully explicit.<sup>35</sup> At other times the statute has been interpreted in a manner more strictly in keeping with the objectives and principles of the Torrens system mentioned above.<sup>36</sup> In British Columbia, these differences in interpretation are apparent in the case law under the present section 29(2) of the LTA and its earlier counterparts. This is the source of the uncertainty in the law that the recommendations in this report are intended to remove.

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34. *Stonehouse v. Attorney General of B.C.* (1960), 33 W.W.R. 625 at 628 (B.C.C.A.), aff'd [1962] S.C.R. 103; *Barry v. Heider* (1914), 19 C.L.R. 197 at 213.
35. Examples of this approach may be found in: *Greveling v. Greveling*, *supra*, note 10; *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, [1982] 6 W.W.R. 624 at 629 (B.C.S.C.); *Gyper v. L'Arrivee and Vince* (1977), 3 B.C.L.R. 384 at 392 (S.C.).
36. Examples of a more literal application of the Act precluding the operation of equitable principles capable of producing a result different from that arising from the plain wording of the statute are: *Re Saville Row Properties Ltd.* (1969), 7 D.L.R. (3d) 644 (B.C.S.C.); *Granco Hotel Ltd. v. Ace-man* (1973), 37 D.L.R. (3d) 632 (B.C.S.C.). Recently the British Columbia Court of Appeal has preferred an approach to interpretation of the LTA that concentrates on the “grammatical and ordinary sense” of the wording of the Act, read without any preliminary assumptions regarding the policy of the legislation or the general principles of Torrens land title systems: see *Gill v. Bucholtz* (2009), 90 B.C.L.R. (4th) 276 at 286 (C.A.); *Smith v. Graham*, 2009 BCCA 192 at para. 18.
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### III. A CURTAIN PARTIALLY DRAWN: SECTION 29(2) OF THE *LAND TITLE ACT*

#### A. Section 29(2): The Curtain Principle Legislatively Expressed

This report is concerned chiefly with the “curtain” principle as embodied in section 29 of the LTA. In Chapter II it was noted that Torrens title registration gives some precedence to ease of transfer and marketability of land over security of ownership. The position of a purchaser relying on the register is preferred over that of a holder of an unregistered interest. The benefits of certainty in dealings with land flowing from the conclusiveness of the register are considered to outweigh the loss of protection for unregistered interests that would have been available under common law and equity.

Torrens land title statutes implement these policy values in part by providing that the priority of interests in land is determined by the order of registration and by declaring that, with very few exceptions, a person proposing to acquire an interest in land from a registered owner is unaffected by having actual or constructive notice of unregistered interests.<sup>37</sup> In the British Columbia LTA, the declaration abrogating the effect of actual or constructive notice of unregistered instruments is found in section 29(2), which is reproduced below:

#### **Effect of notice of unregistered interest**

29 .....

(2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

(a) a transfer of land, or

(b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

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37. This chapter is not concerned with the statutory exceptions listed in s. 23(2) of the LTA, *supra*, note 2, to which all indefeasible titles are subject. The effect of the exceptions listed in s. 23(2) does not depend on notice.

- (c) an interest, the registration of which is pending,
- (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
- (e) the title of a person against which the indefeasible title is void under section 23 (4).

Read literally, section 29(2) provides that notice of an unregistered interest is ineffective, whether the notice is “express, implied or constructive.” Legal and equitable unregistered interests are treated in the same manner.

Paragraphs (c), (d) and (e) each set up an exception to the general rule created by section 29(2). The exceptions under paragraphs (c), (d) and (e) do not depend on notice for their operation.

Section 29(2)(c) makes a purchaser’s title or a charge subject to interests that are already the subject of pending applications for registration when the purchaser or chargeholder applies for registration. This is in keeping with the general scheme of the LTA, under which priority depends on the order of registration, and the priority relates back to the date and time when the application for registration was received by the land title office.<sup>38</sup>

Section 29(2)(d) makes an existing unregistered lease not exceeding three years’ duration binding on a purchaser or chargeholder if the tenant is in occupation. Short-term leases are seldom registered, so paragraph (d) protects the rights of a tenant in occupation when the land is sold or encumbered.

Section 29(2)(e) subordinates the interest that the purchaser or chargeholder would acquire from the registered owner to the claim of a person who is entitled to assert ownership of the land against the registered owner under section 23(4) of the LTA. Section 23(4) relates to the situation existing at the time of the first registration of title when the land was brought under the land title system. It declares that the first indefeasible title issued for the land is subject to the claim of someone who could have asserted a right of ownership against the first registered owner at the time of registration on the basis of the common law doctrine of adverse possession, referred to popularly as “squatter’s rights.”<sup>39</sup> The amount of time that has passed since most

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38. *Supra*, note 2, ss. 28, 37(1)-(3).

39. The relevant provisions of the LTA are ss. 23(3) and (4). Section 23(3) provides that after an indefeasible title is issued, it is no longer possible to acquire land by adverse possession. Section

privately owned land was brought under the land title system results in this exception having little practical effect today.

This report is not concerned with the operation of paragraphs (c), (d), and (e) of section 29(2). It is concerned with the operation of the remaining exception to the general rule established by section 29(2) that a person dealing with a registered owner is unaffected by unregistered interests, namely the exception for fraud. A person dealing with the registered owner who participates in defrauding the holder of an unregistered interest will take title subject to that interest. The meaning of “fraud” for the purposes of section 29(2) is discussed in the next section.

## **B. Fraud Under Section 29(2) of the LTA: Competing Interpretations**

### **1. GENERAL**

The concept of “fraud” has perplexed the courts here and elsewhere over the last 120 years possibly more than any other question relating to Torrens system land title legislation.

In order to follow the threads of the case law on this subject, an understanding of the difference between the legal and equitable concepts of fraud is necessary. Fraud at common law required the intentional or reckless making of a false representation of fact with the intention that the representation be acted upon, and reliance on the false representation by the person to whom it was made to the detriment of that person.<sup>40</sup> In equity, the term “fraud” was applied, not only to common law fraud, but to a much broader range of conduct that a court would consider to be in breach of the obligations of conscience. An intent to deceive was not required.<sup>41</sup>

Before the Torrens system or other systems of land registration were created by statute, a court of equity would have considered a purchaser who had actual notice (knowledge) of a pre-existing equitable interest and yet pressed ahead to perfect the transfer to him or her of the legal title to have acted contrary to conscience. The re-

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23(4) makes an exception in the case of the first indefeasible title to be issued. The first indefeasible title is open to challenge by someone who was “adversely in actual occupation of and rightly entitled to the land included in the indefeasible title” at the time of the initial application for registration.

40. *Derry v. Peek* (1889), 14 App. Cas. 337.

41. *Nocton v. Lord Ashburton*, [1914] A.C. 934 at 954 (H.L.); John McGhee, ed. *Snell's Equity*, 31st ed. (London: Sweet and Maxwell, 2005) at 197. See also *BCorp Holdings Ltd. v. Goldstream Place Holdings Ltd.*, 1991 CanLII 1737 (B.C.S.C.).

sult in equity was that the purchaser acquired the title subject to the prior equitable interest.<sup>42</sup>

Many of the decisions dealing with fraud under Torrens land title legislation concern registration of a title or a charge in the name of someone who, prior to registration, had notice of an unregistered interest affecting the land. The common issue in these cases is whether the registered title or charge enjoys priority over the unregistered interest in the circumstances.

The LTA lacks the provision found in the land title legislation of some other jurisdictions, notably Alberta, Saskatchewan, Manitoba, and New Brunswick, that expressly states knowledge of an unregistered interest or another instrument affecting the land does not in itself amount to fraud.<sup>43</sup> As a result, British Columbia courts have wavered back and forth since the nineteenth century on whether the mere act of registering with such knowledge is fraud for the purpose of the LTA, disentitling the registering party to the priority over the unregistered interest that the Act would normally confer.<sup>44</sup> The two divergent lines of authority are summarized in the next two sections.

### 2. FIRST LINE OF AUTHORITY: REGISTRATION WITH ACTUAL NOTICE OF AN UNREGISTERED INTEREST AMOUNTS TO FRAUD

In a lengthy line of cases beginning in 1896 with *The Hudson's Bay Co. v. Kearns & Rowling*,<sup>45</sup> British Columbia courts have declared that proceeding to register with actual knowledge of an unregistered interest inconsistent with one's own can amount to fraud.

This interpretation giving effect to principles of equitable fraud based on the fact of notice seems to run directly contrary to the wording in section 29(2) stating that a person dealing with a registered owner "is not, *despite a rule of law or equity to the*

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42. *Rose v. Peterkin*, *supra*, note 5; *Blades v. Blades* (1727), 1 Eq. Ca. Abr. 358, 21 E.R.1100.

43. *Land Titles Act*, R.S.A. 2000, c. L-4, s. 203(3); *Land Titles Act, 2000*, *supra*, note 27, s. 23(2); *Real Property Act*, C.C.S.M. c. R30, s. 80; *Land Titles Act*, S.N.B. 1981, c. L-1.1, s. 61(2). It may be noted, however, that s. 29(4) of British Columbia's LTA is a quite similar but narrower provision restricted to the effect of knowledge of the existence of a financing statement registered under the *Personal Property Security Act*, R.S.B.C. 1996, c. 359. Section 29(4) declares that knowledge of such a financing statement "is not evidence of fraud or bad faith for the purposes of subsection (2)."

44. See Gerald W. Ghikas, "The Effect of Actual Notice Under The British Columbia Torrens System" (1980) 38 *Advocate* 207.

45. *Supra*, note 25 per Davies, C.J. at 556-557 in *obiter dicta*.

*contrary*, affected by a notice, express, implied, or constructive, of an unregistered interest....” Until 1978, however, the predecessor provisions to the present section 29(2) did not contain the express exception for fraud now found in its opening words “Except in the case of fraud in which he or she has participated....” The abolition of the doctrine of notice without an express exception for fraud led to concern on the part of the courts to prevent the Act from becoming an “instrument for fraud.”<sup>46</sup>

In *The Hudson’s Bay Co. v. Kearns & Rowling*<sup>47</sup> the full bench of the British Columbia Supreme Court read an implicit exception for fraud into the provision then in force that corresponds to the present section 29(2). The court followed an approach that had been applied to the English registry Acts, although these were based on different principles than the Torrens-based British Columbia *Land Registry Act*.<sup>48</sup> Chief Justice Davie stated:

The principle which has repeatedly been held to apply to the different Register Acts of England and some of the colonies, applies equally I take it to our Act, and that is that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party so committing a fraud to avail himself of the provisions of a statute itself enacted for the prevention of fraud....<sup>49</sup>

While the full bench decided in *The Hudson’s Bay Co. v. Kearns & Rowling* that the purchaser had bought without actual notice of the unregistered interest (an equitable mortgage), the words of Chief Justice Davie have been repeatedly cited in subsequent cases in support of the view that it amounts to fraud to take advantage of the Act by registering when one has actual notice of an earlier unregistered interest. In numerous decisions, fraud has been found in these circumstances, with the result that the title or charge of the party registering with actual notice was held to be subject to the unregistered interest.<sup>50</sup>

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46. The Court of Chancery resisted attempts to allow the *Statute of Frauds* to be used to defeat legitimate land transactions that were defectively recorded in writing. This led to the later enunciation of a general principle that equity would prevent a party from setting up an Act of Parliament to defeat rights properly binding on the party’s conscience: *McCormick v. Grogan* (1869), L.R. 4 H.L. 82 at 97 per Lord Westbury.

47. *Supra*, note 25.

48. Consolidated Acts of B.C. 1888, c. 67.

49. *Supra*, note 25 at 551-552.

50. See *Chapman v. Edwards* (1911), 16 B.C.R. 334 (C.A.); *Attorney-General of British Columbia v. Parker*, [1937] 4 D.L.R. 242 (B.C.C.A.); *Danica Enterprises Ltd. v. Curd*, [1976] 5 W.W.R. 193 (B.C.S.C.); *March v. Drab* (1977), 5 B.C.L.R. 396 (S.C.); *Central Station Ltd. v. Shangri-La Estates*

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In 1979, a British Columbia Supreme Court judge acknowledged the authority of decisions holding that registration with notice of an unregistered interest could amount to fraud, but expressed doubt whether this result would flow in every instance:

A consideration of the authorities cited shows clearly that under the British Columbia land registry system a purchaser who takes with knowledge of an unregistered interest *may* be guilty of fraud if he were thereafter to seek protection of the Land Registry Act so as to defeat the claim of the holder of that interest. But I do not accept the proposition that this result *must* follow in every case so that, in effect, the courts have repealed s. 44 of the Land Registry Act. The various decisions in which it is stated, even in unqualified terms, that notice of an unregistered interest before closing bars the purchaser from protection of the Act, like all other decisions of the courts, are authorities only in relation to the facts of a particular case. While the language may in some cases be broad, I do not think that they can be said to lay down a rule of universal application. The question in every case must be whether a fraud would *in fact* be committed if the purchaser were to claim the protection of the Act; fraud, which is never lightly to be inferred, must, I think be established by the particular facts of the case and cannot be presumed.<sup>51</sup>

In that case, the court declined to hold that as a matter of law, actual notice of an unregistered lease obtained before the transfer of title was sufficient in itself to deprive a purchaser of the freehold of the benefit of the predecessor of section 29 then in force. The court insisted that evidence of the nature of the notice received and the circumstances surrounding the transaction be led before a finding of fraud could be made that would lead to loss of the benefit of the section.

Nevertheless, there are clear statements in subsequent decisions that registering with actual notice of an unregistered interest is in itself sufficient to deprive a transferee or chargeholder of priority under the LTA.<sup>52</sup>

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*Ltd.* (1979), 98 D.L.R. (3d) 316 (B.C.S.C.); *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, *supra*, note 35; *Konsap v. Grattan*, 2003 BCSC 1880; *Deschamps v. Wloka*, 2006 BCSC 261.

51. *Jager the Cleaner v. Li's Investments Co. Ltd.* (1979), 11 B.C.L.R. 311 per Taylor, J. (as he then was) at 316 (S.C.). (Italics in original.) Section 44 of the *Land Registry Act*, R.S.B.C. 1960, c. 208, referred to in this quotation, corresponded to the present s. 29 of the LTA.

52. See *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, *supra*, note 35 at 629; *Anglican Synod of the Diocese of British Columbia v. Tapanainen*, [1990] B.C.J. No. 1164 (S.C.) (QL); *Palfenier v. Cech*, [1982] B.C.J. No. 1016 (S.C.) (QL).

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### 3. SECOND LINE OF AUTHORITY: FRAUD REQUIRES DISHONESTY IN ADDITION TO MERE REGISTRATION WITH ACTUAL NOTICE

A second line of cases in British Columbia dealing with the effect of the provision that now appears as section 29(2) holds that taking advantage of the land title statute in the sense of protecting one's position through registration when one has actual notice of unregistered interests is insufficient for a finding of fraud. An additional element of dishonest conduct or intention is required.<sup>53</sup> This line of cases is in accord with the Privy Council's decision in *Assets Co. v. Mere Roihi*,<sup>54</sup> where fraud in the context of a Torrens land title statute is said to be:

[a]ctual fraud – that is, dishonesty of some sort; not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud...<sup>55</sup>

This view of fraud prevails in many other Torrens jurisdictions.<sup>56</sup> Some support for it may paradoxically be found in *The Hudson's Bay Co v. Kearns and Rowling*, the very case on which the opposing line of authority in British Columbia is based to the effect that knowledge alone coupled with registration amounts to fraud. In the same judgment in which he assimilated the proper interpretation of the British Columbia land title legislation with that applied to English registry Acts, Chief Justice Davie also stated:

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53. See, for example *Re Pacific United Developers (1962) Ltd.* (1965), 51 D.L.R. (2d) 93 (B.C.S.C.); *Re Saville Row Properties Ltd.*, *supra*, note 36; *Vancouver Key Machines Ltd. v. Teja* (1975), 57 D.L.R. (3d) 464 (B.C.S.C.); *Nicholson v. Riach* (1997), 34 B.C.L.R. (3d) 381 (S.C.); *Garbutt v. Burbank*, 2000 BCSC 14; *Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502.

54. [1905] A.C. 176 (P.C.) (N.Z.).

55. *Ibid.*, at 210.

56. See *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101 (P.C.) (N.Z.); *Kopec v. Pyret*, [1987] 3 W.W.R. 449 (Sask. C.A.); *Canadian Superior Oil of California Ltd. v. Cugnet* (1954), 12 W.W.R. (N.S.) 174 (Sask. Q.B.); *Holt, Renfrew & Co. v. Henry Singer Ltd.* (1982), 135 D.L.R. (3d) 391 (Alta. C.A.); *Scandia Meat Market Ltd. v. KDS Investment Co. Ltd.*, [1977] 1 W.W.R. 542 (Alta. Q.B.); *Bahr v. Nicolay* (1988), 164 C.L.R. 604; *Mills v. Stokman* (1967), 116 C.L.R. 61. This view of fraud under land title legislation as requiring dishonest conduct was recently endorsed by the New Zealand Law Commission in a major report on the revision of New Zealand's land title legislation: *A New Land Transfer Act* (NZLC Report 116, Wellington, 2010) at 21. As mentioned earlier, some land title statutes expressly declare that mere knowledge of an unregistered interest or trust may not be treated as fraud and statements in the judgments on the meaning of fraud must be read accordingly. The absence of an express declaration of this kind in the Queensland legislation nevertheless did not prevent the court in *Friedman v. Barrett*, [1962] Qd. R. 498 from reaching the conclusion that registering with actual notice was not fraud in itself.

[t]he effect of section 35 of the *Land Registry Act* [corresponding to s. 29 of the LTA] must be taken as absolutely protecting a purchaser for value against attack *on the ground of notice of any character or nature whatsoever*; but its otherwise absolute effect must be held to be subject to this qualification, that a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, *as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title*, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment, under the inflexible rule that an Act of Parliament shall not be used as an instrument of, or in defence of, actual fraud...<sup>57</sup>

[Italics added.]

The italicized words suggest that what is required to take a purchaser or encumbrancer with actual notice out of the protection of the LTA and render the title subject to the unregistered interest is not mere registration, which would be in “the natural course of any pending dealing or transaction,” but acts that are not in the ordinary course of business and which are calculated to defeat unregistered interests known to the registering party.

In a British Columbia case following this approach, the additional element of dishonesty or deceit was supplied by the purchaser’s acceptance of rent after completion of the transfer and assignment of its interest as lessor to a bank as security, and subsequent repudiation of the unregistered lease. The repudiation after the purchaser’s acknowledgment of the lease through these positive steps was held to be fraudulent, with the result that the purchaser was bound by the unregistered lease.<sup>58</sup> Similarly, it has been held in Alberta that contracting for the sale of the land on the basis that existing leases will be honoured and then repudiating them after the transfer of title on the basis that they were not registered at the time the title was acquired is a sufficient element of dishonesty to support a finding of fraud for the purposes of the land title statute.<sup>59</sup>

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57. *Supra*, note 25, per Davies, C.J. at 556-557. (Italics added.)

58. *Me-n-ed’s Pizza Parlour Ltd. v. Franterra Developments Ltd.*, [1975] 6 W.W.R. 752 (B.C.S.C.).

59. *1198952 Alberta Ltd. v. 1356472 Alberta Ltd.*, 2008 ABQB 386; *Allarco Group Ltd. v. Suncor Inc. Resources Group* (1987), 53 Alta. L.R. (2d) 107 (Q.B.). See also *Loke Yew v. Port Swettenham Public Co. Limited*, [1913] A.C. 491 (P.C.). But see *Munro v. Stuart* (1924), 41 S.R. (N.S.W.) 203, where a purchaser who had seen copies of existing unregistered leases was still able to repudiate them after becoming registered as owner. While *Munro v. Stuart* has been referred to as an extreme example of the literal application of the Torrens land title legislation, it may have turned on the construction of the contract of purchase and sale. The court was not satisfied that the purchaser had actually covenanted to take the title subject to existing tenancies.

Another form of dishonest conduct supplying the necessary participatory element for a finding of fraud is collusion between the purchaser and the vendor to defeat an unregistered interest. In one Alberta case, a caveat<sup>60</sup> had been discharged in error and in order to defeat the caveated interest, the registered owner of the land transferred the title to a numbered company of which he was a director and principal shareholder. This was held to be fraud, and the caveator was in a position to file another caveat against the title held by the numbered company.<sup>61</sup>

#### 4. AN OPEN QUESTION STILL

In 2000, a British Columbia Supreme Court judge stated with evident confidence that the equitable doctrine of notice no longer plays a role in the land registration system, citing section 29 of the LTA.<sup>62</sup> In that year and in 2003, however, the opposing view that registering with notice of a prior unregistered interest is tantamount to fraud was expressed in two other decisions handed down in the Supreme Court. Somewhat anomalously, those decisions contain a suggestion that even constructive notice may be sufficient to deprive the registering party of the priority that the LTA would confer over the holder of an unregistered interest.<sup>63</sup>

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60. A caveat under the Alberta *Land Titles Act*, *supra*, note 43 serves as a notice of a claim to an interest described in the caveat in the land covered by the title against which the caveat is registered. While a caveat is in effect, any instrument registered after the caveat against the title is subject to the claim of the caveator: s. 135. The LTA also provides for caveats serving the purposes of giving notice of the caveator's interest and protecting its priority against subsequent registrations: *supra*, note 2, ss. 282-294. In contrast to the Alberta caveat and those provided for by most other Canadian Torrens land title statutes, however, a caveat in British Columbia gives only temporary protection. See further, *infra*, under the heading "Caveats with Indefinite Duration."
61. *Alberta (Minister of Forests, Lands and Wildlife) v. McCulloch*, [1992] 1 W.W.R. 747 (Alta. C.A.).
62. *Skeetchestn Indian Band v. Registrar of Land Titles, Kamloops L.R.D.*, 2000 BCSC 118 at para. 39, *aff'd* on other grounds (2000), 80 B.C.L.R. (3d) 233 (C.A.).
63. *Vancouver City Savings Credit Union v. Alda Wholesale Ltd.* (2000), 76 B.C.L.R. (3d) 179 at para. 34 (S.C.); *Konsap v. Grattan*, *supra*, note 50 at para. 41. *March v. Drab*, *supra*, note 50 also contains a suggestion that either actual or constructive notice could result in a loss of priority over an unregistered interest. These remarks are inconsistent with the historical position that a finding of fraud resulting in loss of priority for a registered instrument under the English registry Acts had to be based on actual notice of an unregistered interest: *Rolland v. Hart*, *supra*, note 10 at 680; *Hine v. Dodd* (1741), 2 Atk. 275, 26 E.R. 569; *Wyatt v. Barwell* (1815), 19 Ves. 435, 34 E.R. 578. Neither the *Vancouver City Savings Credit Union* nor the *Konsap* case is strong authority for the proposition that constructive notice is sufficient to deprive a registering party of priority over an unregistered interest. In each of those two cases, there were grounds for denying relief to the party relying on s. 29 apart from the extent of that party's knowledge and the failure to investigate the existence and nature of an unregistered interest. In *Vancouver City Savings Credit*

Other examples of inconsistency in the interpretation of section 29(2) continue to appear. In 2006 British Columbia courts went in opposite ways again. In *Deschamps v. Wloka*<sup>64</sup> the court clearly assumed it was arguable that relying on section 29(2) to defeat an unregistered interest when the registered owner had been aware of the interest before acquiring title was fraud within the meaning of the section. In *Szabo v. Janeil Enterprises Ltd.*<sup>65</sup> the court followed the opposite line of authorities and held that fraud within the meaning of section 29(2) required an element of dishonesty in addition to registering with knowledge of an unregistered interest.

In 2008 the Court of Appeal referred in passing to the authorities equating actual notice with fraud in *Lee v. Ling*, and rejected the argument that a prospective purchaser should be required to investigate a lapsed caveat to determine whether the caveated interest had really been abandoned.<sup>66</sup> The Court of Appeal did not need to rule in that case on the correctness of one or the other school of thought, however, and so the question of what effect actual notice of a competing unregistered interest has in the face of section 29(2) remains open.

### C. Conclusion

At the present time, the “curtain” that section 29(2) ostensibly creates to keep unregistered interests from clouding the title to land is only partially drawn. As a result of the unsettled case law, it is not possible to give an unqualified opinion on whether a purchaser with knowledge of an unregistered interest or instrument, such as a prior transfer or an unexercised legally binding option to purchase, will acquire title free of that interest on becoming the registered owner. Similarly, if a mortgage lender is aware of unregistered instruments affecting title, it is not possible to give a conclusive opinion on the priority of the mortgage.

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*Union* the contest was actually between two registered mortgages, not between a registered and unregistered interest. One of the unsuccessful arguments raised by the second mortgagee was that the registration of the first mortgage was defective and the first mortgage was therefore void against subsequent encumbrances. *Konsap v. Grattan* did not involve a final order on the merits, but merely a determination that the factual issue as to the extent of the registering party’s knowledge needed to be tried. Moreover, in both judgments the distinction between constructive and actual notice appears to be obscured, as the court also declared the receipt of information that would lead a reasonable person to inquire into the existence and extent of a possible unregistered interest amounted to actual notice.

64. *Supra*, note 50.

65. *Supra*, note 53.

66. (2008), 74 B.C.L.R. (4th) 32 (C.A.).

## **Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests**

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The divergence of judicial opinion on the effect of section 29(2) preserves conditions the Torrens system was meant to overcome. Uncertainty in the law and consequent uncertainty in the state of the title interferes with the timely completion of real estate transactions and adds to the legal expense and the cost of financing them.

The uncertainty surrounding the interpretation of section 29(2) of the LTA should be removed to the extent possible without impairing values of fairness and honesty that are reflected in the law and customary practice surrounding dealings with land. The following chapter contains recommendations to accomplish this objective.



## IV. REFORM

### A. Introduction

The uncertainty arising from the conflicting lines of authority in British Columbia on the effect of section 29(2) of the LTA could be removed by choosing one interpretation or the other and entrenching it by legislative amendment. The recommendations in this report do not represent a direct choice of that kind between the two lines of cases, however. This is because neither line of cases provides an entirely satisfactory answer.

The line of cases beginning with *The Hudson's Bay Co v. Kearns and Rowling*, which treats registration with actual notice of an unregistered interest as fraud in contradiction to the express terms of section 29(2), arguably undermines the intent of the LTA.<sup>67</sup> The opposing line of cases, which denies any effect to pre-registration knowledge of a competing unregistered interest unless coupled with a dishonest design, represents a purist application of Torrens principles that upholds the conclusiveness of the register, even when priority is gained in what might be considered unconscionable circumstances.

### B. Possible Solutions from Other Land Title Systems

#### 1. GENERAL

In developing the recommendations in this report, the Project Committee examined the land title legislation and case law of other jurisdictions using the Torrens system, and law reform activity elsewhere to determine if they revealed solutions adaptable to British Columbia's land title system. Various alternatives stemming from this review were weighed in light of the features of the LTA and British Columbia land titles practice.

#### 2. STRICT TORRENS APPROACH: ENACTING THAT KNOWLEDGE ALONE IS NOT FRAUD

One means of removing uncertainty about the effect of actual notice of an unregistered instrument would be to amend the LTA to provide expressly that knowledge of an unregistered interest or instrument on the part of a person transacting with a registered owner is not fraud. The land title statutes of Alberta, Saskatchewan, Manitoba, and New Brunswick have this feature, as do those of New Zealand and

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67. Victor DiCatri, *Registration of Title to Land*, looseleaf (Toronto: Carswell, 1987) at para. 879.

several Australian states.<sup>68</sup> Section 203(3) of the Alberta *Land Titles Act*<sup>69</sup> is a typical provision of this kind:

- (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

Adding a provision like this would overturn the line of British Columbia cases holding that it amounts to fraud in itself to register a transfer or charge in the face of actual notice of unregistered interests that could be defeated by the registration. It would entrench the other line of British Columbia cases holding that in addition to notice there must be a “participatory” element of dishonest conduct for a finding of fraud.<sup>70</sup> This would have the effect of aligning the law in British Columbia with that in the other western provinces.

An important stakeholder body favoured this approach to reform in its response to the consultation paper, urging that British Columbia’s land title legislation be harmonized in this regard with that of other Torrens jurisdictions in Canada. It took the position, consistent with the state of the law in the other western provinces, that an unregistered interest should prevail “only where it can be demonstrated that there has been some positive and intentional dishonest action on the part of the registered interest holder towards the unregistered interest holder.” Another influential stakeholder body also supported this submission.

Despite the attraction of certainty that could be derived from strict application of Torrens system principles, the Project Committee was reluctant to adopt a solution based *exclusively* on a provision like 203(3) of the Alberta *Land Titles Act*. As will be seen later, introduction of a provision in British Columbia preventing a finding of fraud based on mere knowledge of an unregistered interest is included among the

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68. See *Land Titles Act* (Alta.), *supra*, note 43; *Land Titles Act, 2000* (Sask.), *supra*, note 27; *Real Property Act* (Man.), *supra*, note 43; *Land Titles Act* (N.B.), *supra*, note 43; *Land Transfer Act 1952* (N.Z.), 1952/52, s. 182; *Land Titles Act 1925* (A.C.T.), s. 59; *Real Property Act 1900* (N.S.W.), s. 43(1); *Real Property Act 1886* (S.A.), s. 72; *Land Titles Act 1980* (Tas.), s. 41(2); *Transfer of Land Act 1958* (Vic.), s. 43; *Transfer of Land Act 1893* (W.A.), s. 134(b). As noted *supra*, note 43, s. 29(4) of the LTA is similar to these provisions, but it deals only with the effect of knowledge of a financing statement registered under the *Personal Property Security Act*. Unlike registration of title or a charge in the land title office, registration of a financing statement in the Personal Property Registry does not amount to express, implied or constructive notice of the financing statement, its contents, or the security interest to which it relates: *Personal Property Security Act, supra*, note 43, s. 47.

69. *Supra*, note 43.

70. See cases cited *supra* at note 53.



recommendations of this report. Introducing such a provision without more, however, was seen as too great a departure from the place that considerations of fairness and equity have been accorded in the land title system of British Columbia and the practice that surrounds it. In other words, British Columbia's system is seen as a unique blend of equity and Torrens principles that would be overturned if fairness considerations based on facts known to the person claiming the protection of the LTA were subordinated completely to conclusiveness of the register.

Other reasons for reluctance to follow the strict Torrens approach were concerns for the effect on the rental market. It is common for long-term commercial leases not to be registered because of the expense involved in preparing and submitting the application for registration.<sup>71</sup> Property transfer tax is also payable on registration. Landlords resist registration because registered charges can diminish the marketability of land, and they also do not wish to face the prospect of having to apply to court to clear expired leases from the title when tenants with no further interest in the property omit to discharge them voluntarily. In some localities the majority of commercial landlords are unwilling to grant a lease unless the tenant covenants that the lease will not be registered. In light of these considerations, the Project Committee believes that forcing tenants towards registration could have negative effects on the commercial rental market, and actually be detrimental to the competitive interests of commercial tenants.

A solution making registration the sole means of protection against a purchaser who has knowledge of the trust would also be detrimental to the privacy interests of trust beneficiaries, who are often concerned to preserve confidentiality surrounding the existence and extent of the trust.

### 3. CAVEATS WITH INDEFINITE DURATION

In Alberta, Manitoba and New Brunswick, a caveat with indefinite duration can be registered against a title by anyone with an interest in the land.<sup>72</sup> The caveat remains in effect to serve as notice of the caveator's interest and preserve priority over subsequent registrations, unless it is withdrawn, removed by court order or

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71. "Long term" as used here refers to leases having terms longer than three years. Leases with a term shorter than three years are protected against purchasers of the freehold and holders of charges because such leases are statutory exceptions to an indefeasible title under s. 23(2)(d) of the LTA if there is actual occupation of the leased premises pursuant to the lease.

72. *Land Titles Act* (Alta.), *supra*, note 43; *Real Property Act* (Man.), *supra*, note 43; *Land Titles Act* (N.B.), *supra*, at note 43. Saskatchewan's former *Land Titles Act*, R.S.S. 1978, c. L-5 provided for caveats like the ones described here, but its present legislation specifies other means of registering non-title interests in land.

lapses due to failure to respond to a notice to lapse issued by the land titles registrar at the request of the registered owner or anyone interested in the land.

Caveats in these provinces provide a fast and inexpensive means of protecting the priority of most categories of interests other than the fee simple itself, such as leases, options, rights to purchase under long-term agreements for sale, easements, restrictive covenants, equitable mortgages by deposit of duplicate certificates of title, and assignments of those rights.<sup>73</sup>

In British Columbia, a caveat confers only temporary protection. Unless it is one filed by the registrar, the caveat has a duration of only two months.<sup>74</sup>

The Project Committee considered recommending the introduction of caveats with indefinite duration into the LTA as a means of facilitating the entry of non-title interests on the register and making it unnecessary to invoke the equitable principles relating to actual notice as a source of protection for unregistered or unregistrable interests. It was suggested that a more protective caveat mechanism would render more palatable the harmonization of the LTA with other Torrens land title statutes in western Canada through an amendment declaring that fraud may not be imputed on the sole basis of knowledge of an unregistered interest.

Allowing a charge to appear on the register by way of caveat for an indefinite period differs considerably from the way charges are registered in British Columbia land title offices, however. Altering the mechanics of registration was seen as venturing beyond the Project Committee's terms of reference. For these reasons, and in light of concerns about caveats remaining on titles far longer than necessary and possibly interfering with ease of transfer of land, the Project Committee did not settle on this option. The possible introduction of a caveat with indefinite duration would be an appropriate matter to consider in a more comprehensive review of the LTA.

#### 4. THE JOINT LAND TITLES COMMITTEE DEFINITION OF "FRAUD"

In its 1990 report, the interprovincial Joint Land Titles Committee proposed a definition of fraud on the part of persons taking an interest under a transaction with a reg-

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73. Caveats can also be used to protect the priority of unregistered transfers or mortgages as well, although in these cases the usual value-based registration fees will apply.

74. *Supra*, note 2, s. 293(1). In order to extend the protection that a caveat confers beyond two months from the date it was lodged, the caveator must commence a legal proceeding to establish the validity of the interest the caveator claims and file a certificate of pending litigation.

istered owner with knowledge of unregistered interests that would be prejudiced by the operation of the land title statute.<sup>75</sup>

The Joint Land Title Committee's *Model Land Recording and Registration Act* provided that a person transacting with a registered owner would not be affected by actual knowledge of an unregistered interest. It also stated that the person could assume without inquiry that the owner of the unregistered interest had authorized the transaction that the person was about to enter into with the registered owner, and that the transaction would not prejudice the unregistered interest.

If the person transacting with the registered owner actually knew the contrary was true, however, and proceeded to acquire an interest under the transaction with this knowledge, this would be fraud. The definition of fraud is contained in the following subsection from the *Model Land Recording and Registration Act*:

- (4) The person referred to in subsection (3) [the person transacting with the registered owner] obtains the interest acquired under the transaction through his fraud if he had actual knowledge that the transaction
  - (a) was not authorized by the owner of the interest which was neither recorded nor registered, and
  - (b) will prejudice that interest.<sup>76</sup>

Thus, fraud would be found only if the person taking a transfer or assignment from the registered owner actually knew that the owner of the unregistered interest was not acquiescing in the subsequent transaction and would be prejudiced by it.

The Project Committee gave consideration to this definition of fraud, but ultimately concluded it was too broad in one sense and too narrow in another. It was seen as too broad because actual knowledge of the unregistered interest might be acquired only after a binding contract had been made with the registered owner, imposing obligations to complete. It would be unfair to the purchaser or assignee if completion under those circumstances were treated as fraudulent, with the result being loss of priority over the unregistered interest even though the purchaser could not retreat from the contract.<sup>77</sup>

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75. *Supra*, note 27 at 34-36.

76. *Supra*, note 27 at 49; *Model Land Recording and Registration Act*, s. 1.2(4).

77. Section 4(4) of the Nova Scotia *Land Registration Act*, S.N.S. 2001, c. 6 contains a definition of fraud that is closely based on s. 1.2(4) of the Joint Land Titles Committee's *Model Land Registra-*

It was also thought to be too narrow in the sense that a prospective purchaser or mortgagee could only very rarely have direct knowledge that the holder of the unregistered interest had not authorized the subsequent transaction. The Project Committee therefore did not follow the Joint Land Title Committee's approach.

### C. A Different Approach: Adding a New Exception to Section 29(2)

#### 1. GENERAL

Three alternatives have been rejected in this report. The first is the status quo, rejected because the law is unclear. The second is the approach equating actual notice with fraud, rejected for its inconsistency with the fundamental principles of the LTA. The third is the strict Torrens approach that would deny any effect whatsoever to knowledge of a competing unregistered interest, rejected for its inconsistency with values of fairness and honest dealing. A solution lying between the second and third of these approaches needs to be chosen.

In general terms, the solution recommended in this report involves adding a further exception to the four existing exceptions contained in section 29(2),<sup>78</sup> including the exception for "fraud," but also clarifying that mere knowledge of an unregistered interest cannot in itself amount to fraud. The new exception would deal with the effect of knowledge of an unregistered interest in two specific situations, and would not depend upon a finding of fraud.

In order to preserve a functioning Torrens system in British Columbia, the new exception cannot be so broad as to cover every instance in which someone registers a transfer or charge with knowledge of a pre-existing unregistered interest. The exception must be confined to circumstances in which the acquisition of priority through registration would amount to an abuse of the land title system. For reasons discussed below, the exception should be confined to cases in which someone seeks to obtain priority through registration while ignoring knowledge of an unregistered interest, if that knowledge was gained

- (a) before entering into a binding contract with the registered owner in the case of transactions where value is exchanged for an interest in land, or

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*tion and Recording Act*, but adds the requirement that the actual knowledge required by the subsection on the part of the party dealing with the registered owner must be present at the time of the transaction.

78. The exceptions are fraud in which the person dealing with the registered owner has participated and those listed in paragraphs (c), (d) and (e) of s. 29(2). See Chapter III, "A. Section 29(2): The Curtain Principle Legislatively Expressed."

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- (b) before a title or interest obtained through a gratuitous transfer or assignment from the registered owner is registered.

With respect to both the existing “fraud” exception and the recommended new exception, only *actual* knowledge of an unregistered interest at a relevant point in time should suffice to affect the priority of a registered interest under the new exception. A provision open to an interpretation having the effect of restoring the doctrine of constructive notice would definitely negate one of the principal objectives of the LTA.

Section 29(2) and its predecessor provisions did not prevent survival of the equitable doctrine of notice by stating merely that persons dealing with registered owners are not “affected by a notice express, implied, or constructive of an unregistered interest...” More forceful language is needed in the LTA to preclude constructive notice from rearing its head. The LTA should be amended to expressly abolish the equitable doctrines of constructive notice for determining any question of priority or fraud between a person dealing with a registered owner and the holder of an unregistered interest.<sup>79</sup>

The new exception would balance the need for greater predictability in the outcome of priority contests with the ethical concerns summarized in the following quotation from a New Zealand decision:

In many instances the rule of equity that notice is fraud, must be recognized as contemporaneous with the principles of common morality; for it may be an act of downright dishonesty knowingly to accept from the registered owner a transfer of property which he has no right to dispose of.<sup>80</sup>

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79. See s. 4(2) of the Nova Scotia *Land Registration Act*, *supra*, note 77, which provides that the equitable doctrines of “notice” and “constructive notice” are abolished for the purpose of determining if conduct is fraudulent within the meaning of the Act. As noted *supra* at note 77, the *Land Registration Act* contains a definition of fraud for the purpose of that Act. This report does not suggest the LTA be amended to include a definition of fraud, but the amendment that it does recommend to expressly abolish constructive notice for the purpose of determining questions of priority or fraud would have essentially the same effect as s. 4(2) of the Nova Scotia statute. In other words, constructive notice could not operate to deprive anyone of priority based upon registration.

80. *National Bank v. National Mortgage and Agency Co.* (1885), N.Z.L.R. 3 S.C. 257 at 263-264 per Richmond, J.

### 2. WHEN SHOULD THE NEW EXCEPTION APPLY?

#### *(a) General*

In this section the application of the proposed new exception is discussed with reference to persons dealing with a registered owner in order to obtain a transfer or assignment of an interest in the land in exchange for value. Its application to gratuitous transferees and assignees is discussed later in this chapter.<sup>81</sup>

#### *(b) Significance of the time at which knowledge is obtained*

The following examples illustrate the significance of the timing at which knowledge of a competing unregistered interest is obtained:

##### *Example 1*

O, the registered owner, sells the land to P<sub>1</sub>. Before completion of the sale, P<sub>2</sub> finds out about the sale and offers O a better price. O sells again to P<sub>2</sub> and gives P<sub>2</sub> a signed transfer. P<sub>2</sub> then immediately registers the transfer.

In Example 1, P<sub>2</sub> is obviously complicit in O's repudiation of the first sale. P<sub>2</sub> knew of P<sub>1</sub>'s rights as purchaser before entering into an agreement of purchase and sale with O. The second sale, therefore, can only be seen as an arrangement intended by P<sub>2</sub> from the start to defeat the pre-existing valid interest of P<sub>1</sub> as purchaser.

It would have a detrimental effect on the integrity of the land title system if P<sub>2</sub>, who has consciously entered into a transaction with O designed to defeat the first sale, is allowed to take advantage of the LTA to defeat the legitimate pre-existing interest of P<sub>1</sub>. P<sub>2</sub> should not be able to shelter behind the LTA and claim not to be bound by the unregistered interest of P<sub>1</sub> as purchaser.

##### *Example 2*

O, the registered owner, sells the land to P<sub>3</sub> and provides a transfer. O then sells to P<sub>4</sub>. After signing the agreement of purchase and sale, P<sub>4</sub> learns that an earlier sale took place and another unregistered transfer may be in existence. P<sub>4</sub> completes the sale rather than lose a deposit and applies for registration of the transfer from O to P<sub>4</sub>. As it turns out, P<sub>4</sub>'s application for registration is made earlier than P<sub>3</sub>'s and P<sub>4</sub> becomes the registered owner. P<sub>3</sub>'s application is then rejected.

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81. See below under the heading "D. Gratuitous Transferees."

In Example 2, P<sub>4</sub> purchased in good faith, and learned of a possibly conflicting unregistered transfer only after becoming contractually bound to O to complete the purchase. P<sub>4</sub> does not know whether O is acting dishonestly or not. P<sub>4</sub> did not have the opportunity to withdraw from the transaction with O upon learning of the existing unregistered interest without incurring liability to O for breach of contract. P<sub>4</sub> is not acting unconscionably in avoiding liability to O for breach of the contract of purchase and sale and registering to preserve P<sub>4</sub>'s own position to the extent possible. The priority contest that may ensue is not of P<sub>4</sub>'s making.

In Example 2, both purchasers are innocent. It would be unjust to visit the effects of O's duplicity on P<sub>4</sub> merely because P<sub>4</sub> was the first to register. As P<sub>4</sub> has acted in good faith, P<sub>4</sub> should be able to rely on the LTA and claim priority over the unregistered transfer to P<sub>3</sub>.

The importance of when knowledge of the unregistered interest is acquired is recognized in some of the decisions holding that registration with actual notice results in loss of priority over an unregistered interest. In *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.* the trial judge stated: "[t]he authorities suggest that there is a point in time prior to the registration of the transferee's interest after which actual notice will have no effect, but are inconsistent in fixing the relevant time."<sup>82</sup> The inconsistency is highlighted by the divergent views in the Court of Appeal in *Greveling v. Greveling*.<sup>83</sup> One of the judgments suggests that if actual notice is acquired at any time before registration, there is fraud. Another suggests that actual notice must come before completion of the real estate transaction, *i.e.*, the stage at which the purchase money and the signed transfer change hands.

An analysis of the cases in which registration with actual notice of an earlier unregistered interest has been held to result in the unregistered interest having priority shows that more often than not, the registering party acquired the knowledge before entering into a legally binding arrangement with a registered owner.<sup>84</sup> Some decisions state that the point after which actual notice will have no effect on priority is the date of completion, *i.e.*, when the purchase money and the transfer are ex-

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82. *Supra*, note 35.

83. *Supra*, note 10.

84. See *Phipps v. Pickering* (1978), 8 B.C.L.R. 101 (S.C.); *Palfenier v. Cech*, *supra*, note 52; *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, *supra*, note 35; *Danica Enterprises Ltd. v. Curd*, *supra*, note 50; *Gyper v. L'Arrivee and Vince*, *supra*, note 35.

changed.<sup>85</sup> The view that the completion date is the critical point in time is possibly closer to the traditional rule of equity that in order to be considered a purchaser for value in good faith and thus unaffected by prior equitable interests, a purchaser must not have had notice, before becoming vested with the legal title by the execution of a deed, of an equitable interest that arose before the purchaser's contract with the owner.<sup>86</sup> There are, however, very few instances in British Columbia in which actual notice obtained after execution of a binding legal agreement with a registered owner has been held to affect the priority of an unregistered interest.<sup>87</sup>

### *(c) Knowledge of an unregistered interest before contract*

The Project Committee believes that if actual knowledge of a prior unregistered interest is obtained before any legally binding arrangement is made with the registered owner, a person who proceeds in the face of that knowledge to transact with the registered owner may legitimately be considered either to do so with implicit acceptance of the pre-existing unregistered interest, or else to be acting intentionally to defeat the unregistered interest through the operation of the LTA. In either case, the result should be the same. The person dealing with the registered owner (referred to below as "purchaser" for the sake of brevity) should not be able to assert priority over the holder of the unregistered interest on the basis of the LTA.

If actual knowledge is acquired after contractual obligations towards the registered owner have arisen, the purchaser should not be bound by the unregistered interest because the purchaser has not had the opportunity to freely choose whether to accept the unregistered interest, take a chance in a priority contest, or walk away from the transaction. Undue prejudice would flow if a purchaser were compelled either to accept the burden of the unregistered interest (which might cause the purchaser to lose all the benefits of the bargain made) or else breach the obligation to the registered owner to complete the purchase. For these reasons, the crucial time for knowledge of an unregistered interest to have effect should be prior to contract, not prior to completion.

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85. *March v. Drab*, *supra*, note 50; *Willoughby Residential Development Corp. v. Bradley* (2002), 1 B.C.L.R. (4th) 309 at para. 20 (C.A.). The statement to this effect in *Willoughby* is *obiter*.

86. *Wigg v. Wigg* (1739), 1 Atk. 382 at 384, 26 E.R. 244 at 245; Megarry & Wade, *supra*, note 4 at 258-259.

87. One instance where notice may have been obtained after the date of the contract, and yet was treated as binding on the purchaser was *Anglican Synod of the Diocese of British Columbia v. Tapanainen*, *supra*, note 52. While there was a conflict in the evidence as to when a subsisting lease was disclosed to the purchaser, the court said it was sufficient that the purchaser had notice prior to registration.



The LTA should be amended to provide that entering into a contractual arrangement with a registered owner for the transfer of the title or a lesser interest in the land after obtaining actual knowledge of an unregistered interest results in the purchaser taking the title or lesser interest in question subject to the rights of the holder of the unregistered interest. This provision could form an enumerated exception under section 29(2) of the LTA in addition to those in section 29(2)(c), (d) and (e).

It is important to note that the operation of this special priority rule would not depend on the presence of a dishonest intention on the part of the purchaser or assignee to defraud or defeat the holder of the unregistered interest.<sup>88</sup>

*(d) Knowledge acquired after contract*

If knowledge of an unregistered interest is obtained only after a binding contract with the registered owner has been made, it cannot be said that the unregistered interest was voluntarily assumed. The purchaser has not had an opportunity to withdraw from the transaction because of the unregistered interest coming to light without risk of liability towards the registered owner. Such liability could arise if the purchaser repudiated the contract and the unregistered interest later proved to be invalid or the registered owner succeeded in refuting allegations of fraud. There is little basis on which the notice could be said to bind the purchaser's conscience.<sup>89</sup> The new exception should not apply in that case.

If actual knowledge of an unregistered interest is obtained only after a binding contract comes into existence between a registered owner and a purchaser, the purchaser should therefore acquire the title or other lesser interest that is the subject of the contract free of the unregistered interest, unless the purchaser or the pur-

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88. In this respect the new exception proposed here differs from the solution proposed by the New Zealand Law Commission in its recent report *A New Land Transfer Act*, *supra*, note 56 at 21, para. 2.35. The corresponding provision (s. 8(4) of the draft Land Transfer Bill in the Commission's report) would treat the acquisition of an estate or interest in land as fraudulent if the person acquiring it had actual knowledge of, or was willfully blind to, the existence of an unregistered interest and intended at the time of registration to defeat it through registration of his or her own.

89. An example of conduct arguably amounting to fraud on the part of a purchaser who receives notice of a pre-existing unregistered interest only after the formation of a binding contract with the registered owner might be for the purchaser to dissuade the holder of the unregistered interest from registering with verbal assurances or actions indicating the purchaser intends to honour the interest, and to repudiate the unregistered interest after title has issued in the purchaser's name because it did not appear on the register when title was acquired. See *Me-n-ed's Pizza Parlour Ltd. v. Franterra Developments Ltd.*, *supra*, note 58.

chaser's agent knowingly participated in fraud or one of the other exceptions recognized by s. 29(2) applies.<sup>90</sup>

BCLI therefore recommends:<sup>91</sup>

1. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that if a person contracting or dealing with or taking or proposing to take a transfer of land or a charge on land or a transfer of a charge from a registered owner for value*

*(a) has actual knowledge of an existing unregistered interest in the land before entering into a legally binding agreement with the registered owner to acquire the transfer or charge, that person will acquire title to the land or the charge subject to the earlier unregistered interest;*

*(b) obtains actual knowledge of an existing unregistered interest in the land only after entering into a legally binding agreement with a registered owner, that person will acquire the title to the land or the charge in priority to the unregistered interest unless*

*(i) the unregistered interest is one referred to in sections 29(2)(c), (d) and (e), or*

*(ii) that person or the agent of that person participates in fraud in relation to the acquisition of the title or charge.*

2. *The Land Title Act should be amended to expressly abolish the doctrine of constructive notice for the purpose of determining any question of priority between a person*

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90. Fraud on the part of an agent of a person dealing with a registered owner will be imputed to the principal and may render a title or interest acquired by the principal void against the defrauded party: *Assets Co. v. Mere Roihi*, *supra*, note 54 at 210; *Frostad v. Libek*, [1927] 2 W.W.R. 550 (Sask. C.A.). The opening words of s. 29(2) "Except in the case of fraud in which that person participates" might be interpreted as preventing imputation of fraud by an agent to the principal, however. In the draft amended version of s. 29(2) in the Appendix, the words "or the agent of that person" are added to clarify that fraud on the part of an agent may taint the title or interest acquired by the principal.

91. Recommendations 1 and 3 and the draft amended version of s. 29(2) of the LTA in Part Two of this report do not reproduce the present unwieldy wording of s. 29(2) referring to "a transfer of land, or a charge on land, or a transfer or assignment or subcharge of the charge," because the definition of "transfer" in s. 1 of the LTA includes an assignment, and the definition of "charge" would probably include a subcharge of a charge on land.

*dealing with a registered owner and the holder of an unregistered interest or as a basis for a finding of fraud for the purposes of the Act.*

#### D. Gratuitous Transferees

Recommendation 1 above addresses the usual situation in which parties are dealing at arm's length and for value. What rules should apply when land or an interest in land is transferred gratuitously?

Torrens land title legislation generally does not distinguish expressly between purchasers and gratuitous transferees ("volunteers"), but since an early point in time courts have interpreted the legislation, including British Columbia's LTA, as having been intended to protect purchasers for value acting in good faith.<sup>92</sup> They have tended to treat gratuitous transferees differently from purchasers for value and subject the titles they acquire to interests that are in existence but unregistered at the time of transfer, whether or not the gratuitous transferees had notice of them. The justification for this has sometimes been said to be that gratuitous transferees do not rely on the register in accepting a gift or inheritance of land from the registered owner and are content to take the registered owner's property as it is.<sup>93</sup>

While this rationale for withholding the full protection of land title statutes from gratuitous transferees is supported by high authority, it has also been criticized as unrealistic.<sup>94</sup> Gratuitous transferees may be equally as concerned with the state of a transferor's title as they would be if purchasing. Charities that accept donations of land, for example, may be very reluctant to accept encumbered property. They will search the donor's title before accepting a transfer from a donor or the donor's executor as carefully as would any prospective purchaser.

The Joint Land Titles Committee concluded that gratuitous transferees should receive equal protection under land title legislation, and its *Model Land Recording and*

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92. *Gibbs v. Messer*, *supra*, note 29 at 254; *Kaup v. Imperial Oil Limited*, *supra*, note 33; *Pacific Savings and Mortgage Corporation v. Can-Corp Development Ltd.* (1982), 37 B.C.L.R. 42 (C.A.); *Clayton v. Garrett* (7 January 1994) Vancouver C931162 (B.C.S.C.). This is a curious thing, because both purchasers for value and gratuitous transferees were bound by legal interests before the introduction of the Torrens system whether they knew of them or not. As both purchasers and gratuitous transferees acting in good faith were equally in need of protection from unregistered legal interests, and purchasers for value in good faith already had protection against unregistered equitable interests, it is difficult to grasp why the full benefit of the Torrens land title legislation has largely been confined by judicial interpretation to purchasers for value in good faith.

93. *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.*, [1984] 4 W.W.R. 14 at 20-21 (Alta. C.A.).

94. *Darnley v. Tennant* (2006), 46 R.P.R. (4th) 212 at 222-223 (Alta. Q.B.).

*Registration Act* makes no distinction in terms of indefeasibility of title between registered owners who acquired the title for value and those who acquired it through a gratuitous transfer.<sup>95</sup>

There appears to be no reason why the same principles governing the effect of actual knowledge of an unregistered interest should not apply to both gratuitous transferees and those who transact with the registered owner for value. In either case, the test should be whether the person obtaining the knowledge had the opportunity to freely withdraw from the transaction on learning of the unregistered interest without incurring liability to the registered owner or other form of detriment.

The two kinds of transactions, gratuitous transfer and transfer for value, differ nevertheless in relation to the point at which this opportunity to withdraw without detriment ceases. In a transaction in which value changes hands, it is the point at which a legally binding contract is formed. In a gratuitous transfer, it is arguably not until registration actually takes place, because until that time the title has not been transferred and the transferee can refuse to take the gift. This applies to inheritances of land and transfers that may take place as a result of an order under the *Wills Variation Act*<sup>96</sup> as well as to gratuitous transfers made in the transferor's lifetime.<sup>97</sup>

BCLI therefore recommends:

3. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that if a person taking or proposing to take (beneficially or as a trustee) a transfer of land or a charge on land or a transfer of a charge gratuitously from a registered owner has actual knowledge of an earlier unregistered interest*

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95. *Supra*, note 27. The giving of value would still be relevant under the Model Act in relation to the priority between interests less than the fee simple title.

96. R.S.B.C. 1996, c. 490. Section 2 of the *Wills Variation Act* gives discretion to the Supreme Court of British Columbia to order that "adequate, just and equitable provision" be made out of an estate for the proper maintenance and support of the spouse or children of a testator if the court finds that the testator's will fails to make adequate provision for them. Transfers of land forming part of an estate to a spouse or child of a testator or to a trustee for them could be ordered under this section. Section 2 of the *Wills Variation Act* will be repealed when Part 4, Division 6 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 is brought into force, but s. 60 of the *Wills, Estates and Succession Act* is to the same effect.

97. Recommendation 3 is not meant to change the rule that unpaid creditors of an estate can follow and attach real property formerly belonging to the estate that has been distributed to gratuitous transferees such as the deceased debtor's beneficiaries or successors in intestacy. It is meant to operate only in favour of a gratuitous transferee in respect of unregistered proprietary interests in the land existing at the time of transfer.

- (a) *before registration of title to the land or charge in the name of that person, that person acquires title to the land or charge subject to the earlier unregistered interest, whether or not the earlier unregistered interest was acquired for value;*
- (b) *only after registration in the name of that person of title to the land or charge, that person acquires title to the land or charge free of the earlier unregistered interest.*
4. *Recommendation 3 should apply to a person who is entitled to land under a will or as a successor in intestacy or as a result of an order under the Wills Variation Act, R.S.B.C. 1996, c. 490 in the same manner as it would apply to a person taking or proposing to take a transfer of land or a charge gratuitously from a registered owner.*

Implementation of Recommendations 3 and 4 could involve consequential amendments to sections 294.21 and 297 of the LTA relating to the availability of assurance fund compensation, depending on what policy choices are made regarding eligibility to claim against the assurance fund. Currently those sections require that claimants must have given value for an interest lost through the operation of the Act in order to recover compensation from the assurance fund. The question whether persons acquiring an interest in land gratuitously should be eligible to claim against the assurance fund if they lose the interest through the operation of the LTA, rather than only persons who have given value, is nevertheless beyond the scope of this report.

#### **E. What's in a Name? "Knowledge" vs. "Actual Notice"**

The tentative versions of Recommendations 1 and 2 that appeared in the consultation paper employed the term "actual notice". The consultation paper expressed the view that the term had been adequately defined by judicial interpretation, which could be summarized as "actual knowledge however acquired."<sup>98</sup> The consultation paper advanced the view that a statutory definition would inevitably tend to narrow the ways in which actual knowledge could arise and thus unduly confine the operation of the new exception. Several responses to the consultation paper nevertheless expressed concern that leaving "actual notice" undefined would create too much uncertainty.

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98. Megarry & Wade, *supra*, note 4 at 261, citing *Lloyd v. Banks* (1868), 3 Ch. App. 488.

In light of these responses the earlier position was reconsidered, but for reasons of clarity and simplicity, the definition set out below is of “actual knowledge” instead of “notice.” “Knowledge” is the irreducible essence of the legal concept of notice, and is a more readily comprehensible term. References to “notice” appear later in this report only when it is necessary to refer to the name of an equitable doctrine associated with the concept of notice, such as in the draft provision to abolish constructive notice in Part Two.

### **F. Defining Actual Knowledge for the Purpose of Section 29(2)**

A person engaging in a land transaction would most likely become aware of an unregistered interest held by a third party in one or the other of two ways: through a document creating the interest or through receipt of information that taken as a whole points to the existence of the interest. In order for such knowledge to have an effect on priorities as against a registered interest, the levels of certainty and specificity of the information or document should be relatively high. They should be high enough that the information or document does not merely point to the existence of an unregistered interest, but does so unequivocally without need for any further inquiry.

BCLI recommends that

5. *A person should be considered to have actual knowledge of an interest in land for the purposes of any new provisions of the Land Title Act, R.S.B.C. 1996, c. 250 implementing Recommendations 1 and 3 if*
  - (a) *an instrument creating the interest in the land comes to the attention of the person, or*
  - (b) *information comes to the attention of that person that is sufficient, without any further inquiry, to unequivocally denote the existence of the interest in the land.*

### **G. Trusts of Land: Whether Knowledge of Trustee or Beneficiary is Operative Regarding Priority**

If the person acquiring an interest in land from a registered owner is or will be a trustee, a question arises as to whether actual knowledge of a competing unregistered interest on the part of the beneficiary, but not the trustee, should affect the priority of the trustee’s title.

The beneficiary has no power to carry out the transaction or register the transfer from the registered owner and thus is not in a position to affect the position of the holder of the unregistered interest. These powers rest with the trustee. Thus, knowledge on the part of the beneficiary should be immaterial. Only actual knowledge on the part of the trustee before the formation of the contract with the registered owner (or before registration in the case of a gratuitous transfer) should bring the case within the new exceptions recommended above.

BCLI recommends that:

6. *If a person dealing with a registered owner for an interest in land acquires the interest in trust, only actual knowledge of an existing unregistered interest on the part of the trustee should be relevant for the purposes of determining priority as between the holder of the unregistered interest and the trustee according to Recommendations 1 and 3.*

#### **H. Knowledge of an Unregistered Interest Not Amounting to Fraud**

Recommendations 1 and 3 should meet the concerns about unfairness and inequity that have produced judicial resistance to the literal application of section 29(2) or its predecessors. Apart from the circumstances addressed by the new exceptions contemplated by those recommendations and the existing exceptions in sections 29(2)(c), (d) and (e), registration with knowledge of an unregistered interest, however derived, should not in itself affect the priority of interests in registered land.

If fraud is to be found in a particular case, it should be based on more than knowledge that an unregistered interest is in existence. For the sake of certainty and clarity in relation to the effect of registration and priority among interests in land, this proposition should be clearly stated in the LTA as it is in numerous other Torrens-based land title statutes. Reinforcing the concept of indefeasibility under the LTA in this manner would maintain the integrity and authority of the register without precluding the possibility of relief based on a personal cause of action recognized in law or equity.<sup>99</sup>

BCLI recommends that:

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99. The possibility that a holder of an unregistered interest in land whose interest has been defeated by the registration of title in the name of another could obtain relief through personal remedies, even though the registered title itself is indefeasible, was mentioned expressly by the Privy Council in *Frazer v. Walker*, *supra*, note 28 at 585. See also *LHK Nominees Pty. Ltd. v. Kenworthy*, [2002] WASCA 291, 26 W.A.R. 517 at paras. 194-196.

7. *The Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that knowledge that an unregistered interest is in existence on the part of a person contracting or dealing with or taking or proposing to take a transfer of land or charge from a registered owner must not of itself be imputed as fraud.*

## **I. Conclusion**

The divergent case law on the effect of registration with knowledge of a competing unregistered interest has persisted for nearly as long as the Torrens land title system has been in effect in British Columbia. As long as it remains, the rift in judicial opinion will create uncertainty in dealings with land. It is a rift that should be closed by legislative reform. That is the purpose of the recommendations contained in this report, which draw from both sides of the debate but have a single aim of allowing the land title system to better fulfil the purposes for which it was originally designed.



## V. LIST OF RECOMMENDATIONS

1. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that if a person contracting or dealing with or taking or proposing to take a transfer of land or a charge on land or a transfer of a charge from a registered owner for value*
  - (a) *has actual knowledge of an existing unregistered interest in the land before entering into a legally binding agreement with the registered owner to acquire the transfer or charge, that person will acquire title to the land or the charge subject to the earlier unregistered interest;*
  - (b) *obtains actual knowledge of an existing unregistered interest in the land only after entering into a legally binding agreement with a registered owner, that person will acquire the title to the land or the charge in priority to the unregistered interest unless*
    - (i) *the unregistered interest is one referred to in sections 29(2)(c), (d) and (e), or*
    - (ii) *that person or the agent of that person participates in fraud in relation to the acquisition of the title or charge.*

**(p. 36)**

2. *The Land Title Act should be amended to expressly abolish the doctrine of constructive notice for the purpose of determining any question of priority between a person dealing with a registered owner and the holder of an unregistered interest or as a basis for a finding of fraud for the purposes of the Act.*

**(pp. 36-37)**

3. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that if a person taking or proposing to take (beneficially or as a trustee) a transfer of land or a charge on land or a transfer of a charge gratuitously from a registered owner, has actual knowledge of an earlier unregistered interest*
  - (a) *before registration of title to the land or charge in the name of that person, that person acquires title to the land or charge subject to the earlier unregistered interest, whether or not the earlier unregistered interest was acquired for value;*

- (b) *only after registration in the name of that person of title to the land or charge, that person acquires title to the land or charge free of the earlier unregistered interest.*

**(p. 38-39)**

4. *Recommendation 3 should apply to a person who is entitled to land under a will or as a successor in intestacy or as a result of an order under the Wills Variation Act, R.S.B.C. 1996, c. 490 in the same manner as it would apply to a person taking or proposing to take a transfer of land or a charge gratuitously from a registered owner.*

**(p. 39)**

5. *A person should be considered to have actual knowledge of an interest in land for the purposes of any new provisions of the Land Title Act, R.S.B.C. 1996, c. 250 implementing Recommendations 1 and 3 if*

- (a) *an instrument creating the interest in the land comes to the attention of the person, or*
- (b) *information comes to the attention of that person that is sufficient, without any further inquiry, to unequivocally denote the existence of the interest in the land.*

**(p. 40)**

6. *If a person dealing with a registered owner for an interest in land acquires the interest in trust, only actual knowledge of an existing unregistered interest on the part of the trustee should be relevant for the purposes of determining priority as between the holder of the unregistered interest and the trustee according to Recommendations 1 and 3.*

**(p. 41)**

7. *The Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that knowledge that an unregistered interest is in existence on the part of a person contracting or dealing with or taking or proposing to take a transfer of land or charge from a registered owner must not of itself be imputed as fraud.*

**(p. 42)**



## PART TWO – DRAFT LEGISLATION

The following draft of an amended section 29 of the LTA is intended only as an illustration of how the recommendations in this report might be implemented. It is not intended to be an exclusive means of legislative expression of the recommendations, nor to constrain legislative drafters. It does not itself form part of the recommendations.

Italics in the draft provisions below represent new or revised language intended to reflect the recommendations in this report.

- 29 (1) For the purposes of this section, "**registered owner**" includes a person who has made an application for registration and becomes a registered owner as a result of that application.
- (2) *Except in the case of fraud in which a person, or the agent of a person, contracting or dealing with or taking or proposing to take*
- (a) a transfer of land, or*
  - (b) a charge on land, or a transfer of the charge,*
- from a registered owner has participated, that person is not, despite a rule of law or equity to the contrary, affected by knowledge of an unregistered interest affecting the land or charge other than*
- (c) an interest, the registration of which is pending,
  - (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement,
  - (e) the title of a person against which the indefeasible title is void under section 23 (4),
  - (f) if the transfer, charge, or transfer of the charge is for value, an unregistered interest of which the person has actual knowl-*

*edge before or at the time at which the person enters into a binding contract<sup>100</sup> with the registered owner, or*

*(g) if the transfer, charge, or transfer of the charge is not for value, including but not limited to*

*(i) a gift under a will,*

*(ii) a distribution in an intestacy,*

*(iii) a disposition pursuant to an order under section 2 of the Wills Variation Act,*

*(iv) a transfer to a trustee,*

*an unregistered interest, whether or not acquired for value, of which the person has actual knowledge before registration of title to the land or ownership of the charge in the name of that person.*

*(2.1) A person has actual knowledge of an interest in land for the purpose of subsection (2) if*

*(a) information comes to the attention of that person that is sufficient, without any further inquiry, to unequivocally denote the existence of the interest in the land, or*

*(b) a document creating an interest in the land comes to the attention of the person.*

*(2.2) If a person contracting or dealing with or taking or proposing to take*

*(a) a transfer of land, or*

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100. The phrase “binding contract” is employed in s. 32 of the *Land Title Act* and is used here for the sake of consistency.

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*(b) a charge on land, or a transfer of the charge,*

*from a registered owner acquires the land or charge in trust, the knowledge relevant for the purposes of subsection (2) is the knowledge of the trustee or prospective trustee and not the knowledge of the beneficiary.*

*(2.3) The equitable doctrines of “notice” and “constructive notice” are abolished for the purpose of determining the rights, as against the holder of an unregistered interest in land, of a person contracting or dealing with or taking or proposing to take*

*(a) a transfer of land, or*

*(b) a charge on land, or a transfer of the charge,*

*from a registered owner.*

*(2.4) Subject to paragraphs 2(f) and 2(g), knowledge by a person contracting or dealing with or taking or proposing to take*

*(a) a transfer of land, or*

*(b) a charge on land, or a transfer of the charge,*

*from a registered owner that an unregistered interest is in existence must not of itself be imputed as fraud.*

*(3) Subject to section 49 of the Personal Property Security Act, a person contracting or dealing with, taking from or proposing to take from a registered owner, an estate or interest in land, or a transfer or assignment of an estate or interest in land, is not affected by a financing statement registered under that Act whether or not the person had express, constructive or implied notice or knowledge of the registration.*

- (4) The fact that the person who is contracting with, dealing with, taking from or proposing to take from a registered owner under subsection (2) had knowledge of a financing statement registered under the *Personal Property Security Act*, or that the person could have obtained knowledge of the financing statement by searching the personal property registry established under that Act, is not evidence of fraud or bad faith for the purposes of subsection (2).



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