BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall
University of British Columbia
Vancouver, British Columbia
Canada V6T 1Z1
Voice: (604) 822 0142
Fax: (604) 822 0144
E-mail: bcli@bcli.org
Website: http://www.bcli.org

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

Prepared by the Real Property Reform (Phase 2) Project Committee

November 2009

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: http://www.bcli.org

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Real Property Reform (Phase 2) Project Committee

The members of the committee are:

Dr. A.J. McClean, Q.C. - Chair
Fasken Martineau DuMoulin LLP
Dean Emeritus, Faculty of Law
University of British Columbia

Susan Mercer
Society of Notaries Public

Ian W. Cassie
Fasken Martineau DuMoulin LLP

Peter Mueller
Association of B.C. Land Surveyors

Christine Elliott
Sole Practitioner
Former member of Board of Directors,
Land Title and Survey Authority

Calvin Ross
Real Estate Institute of British Columbia

Prof. Robert G. Howell
University of Victoria Faculty of Law
Director, British Columbia Law Institute

Paul G. Scambler, Q.C.
Clay & Co.

Kenneth Jacques
Sole Practitioner
Former Registrar, Victoria L.R.D.

Prof. Tony Sheppard
Faculty of Law
University of British Columbia

Ross Langford
Farris, Vaughan, Wills & Murphy LLP

Lisa Vogt
McCarthy Tetrault LLP

Greg Blue (senior staff lawyer, British Columbia Law Institute) is the project manager.

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Call for Responses

We are interested in your response to this consultation paper. The tentative recommendations are those of the Project Committee and have not yet been formally adopted by the Board of Directors of the British Columbia Law Institute. The tentative recommendations in this consultation paper may be subject to revision following consideration of responses received.

How to Respond

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC V6T 1Z1

Attention: Greg Blue

by fax: (604) 822-0144

by email: gblue@bcli.org

Please forward your response before **March 31, 2010**.

Your response will be used in connection with the Real Property Reform Project. It may also be used as part of future law reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <http://www.bcli.org/privacy>.

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EXECUTIVE SUMMARY

This is the first consultation paper 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. 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 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, charge, assignment of a charge, or 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 contain an additional subsection declaring that knowledge of an unregistered interest cannot be imputed as fraud in itself. This has re-

sulted 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 the subsection, 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 titles 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 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.

The Project Committee considered several possible solutions before concluding that British Columbia's land title system is a unique blend of equity and Torrens princi-

ples. This unique blend of principles would be overturned if considerations of fairness were subordinated completely to conclusiveness of the register.

Instead of entrenching one or the other line of authority, the Phase 2 Project Committee recommends amending the *Land Title Act* to provide that knowledge of an unregistered interest cannot in itself be treated as fraud. This amendment, however, would be accompanied by 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 received actual notice (i.e. express or implied, but not constructive, notice) 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 received actual notice 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 consultation paper 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 that were considered, sets out the tentative recommendations of the Project Committee summarized above, and explains the reasons for them. Chapter V contains a list of the tentative recommendations.

The recommendations contained here are tentative only and are presented for purposes of consultation. Final recommendations will be formulated with the benefit of comments received on this paper.

I. INTRODUCTION

A. Certainty: The Cornerstone of the Land Title System

British Columbia has an impressive land title system. In each of 2007 and 2008, over 1.3 million registrations were processed with an average turnaround time of 4.3 days from deposit of the documents at the land title office to full registration.[1] More important than the volume of registered transactions and processing speed, however, is the element of certainty in 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).[2] 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 areas of land law in British Columbia that are not currently under review by other bodies and which are in need of reform. The objective of the Project is to develop concrete recommendations for legislative reform in these areas, based on extensive research and consultation. The final recommendations will be embodied in published reports, which will be forwarded to the provincial Ministries, the Land Title and Survey Authority, and other bodies responsible for the matters in question.

Phase 1 of the Real Property Reform 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 document.

1. Land Title and Survey Authority, *Annual Report 2008*, p. 9.
2. R.S.B.C. 1996, c. 250.

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

One of the areas of the law of real property identified during Phase 1 as being surrounded by significant uncertainty and appropriate for attention in Phase 2 is the interpretation and application of section 29(2) of the LTA. 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. Terminology of Notice

This consultation paper 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.[3] 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.[4] A person has actual notice of facts actually known to that person, regardless of how the knowledge is obtained.[5] This term is

3. Robert Megarry and William Wade, *The Law of Real Property*, 6th ed. (London: Sweet and Maxwell, 2000) at 144. See also *Black's Law Dictionary*, 9thth ed. (St. Paul: West, 2009) at 1164, "notice".

4. *Rose v. Peterkin* (1885), 13 S.C.R. 677 at 694.

5. Megarry and Wade, *supra*, note 3 at 144.

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.[6] The meaning of these terms is discussed below.

Express notice is a term sometimes used interchangeably with actual notice.[7] 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.[8] 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 has knowledge of the fact in question. In those senses, implied notice is considered to be a form of actual notice.[9]

Constructive notice is knowledge of facts that a person is conclusively presumed to have, whether the person actually has the knowledge or not. If a person 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.[10]

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6. *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.).

7. *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.).

8. *Consolidated Trust Company v. Naylor* (1936), 55 C.L.R. 423 at 436 (H.C.A.); *Re Scott*, *supra*, note 6; *R. v. Payton*, [2005] 2 W.W.R. 275 (Alta. Prov. Ct.) at 298-299.

9. *Rolland v. Hart* (1871), L.R. 6 Ch. 677; *Greveling v. Greveling*, [1950] 1 W.W.R. 574 (B.C.C.A.) at 596-597 and 607-608. 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, a difference in meaning was evidently intended for the purposes of the Act.

10. *Rose v. Peterkin*, *supra*, note 4; *Jones v. Smith* (1841), 1 Hare 43 at 55, 66 E.R. 943 at 948.

E. This Consultation Paper

This is the first consultation paper to be issued in Phase 2. In it, the Project Committee has made several tentative recommendations aimed at resolving the uncertainty created by divergent lines of case law surrounding section 29 of the LTA and its predecessor provisions. These tentative recommendations have not been formally adopted by the Board of Directors of the British Columbia Law Institute and are subject to change in light of the results of this consultation and further deliberations of the Project Committee and Board.

Final recommendations on the subject-matter of this consultation paper will be formulated after reviewing all responses received.

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.[11] It was introduced in the Crown Colony of Vancouver Island in 1861[12] and in 1870 extended to the united colony of British Columbia.[13]

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.[14] 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 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.[15] 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,[16] but did not result in certainty of ownership. The risk was entirely on the purchaser in the absence of the vendor's

11. *Real Property Act 1858*, No. 15. (S.A.).
12. *Land Registry Act, 1860* (Van. Is.).
13. *Land Registry Ordinance, 1870* (B.C.).
14. *Fels v. Knowles* (1906), 26 N.Z.L.R. 604 at 620.
15. Megarry & Wade, *supra,* note 3 at 691.
16. *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 3 at 148.

fraud or misrepresentation. The common law principle in the sale of land or interests in land was *caveat emptor* (let the buyer beware).[17] 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.[18] 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.[19] 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.[20] The effect of constructive notice was the same as if the purchaser had actual notice.[21]

A purchaser who accepted the title without having made the inquiries that might be found reasonable with the benefit of judicial hindsight 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.

17. *Supra*, note 3 at 145.

18. 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).

19. 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.

20. *Supra*, note 3 at 145.

21. *Supra*, note 3 at 144, citing *Lloyd v. Banks* (1868), 3 Ch. App. 488.

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.[22] 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 section 23(2) and (4) of the LTA. These include reservations or restrictions in the original Crown grant covering the land in question, leases of less than three years' duration where there is actual occupancy under the lease, and statutory rights of expropriation and escheat.[23] 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."

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

23. *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 registered owner's 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.[24]

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.

This feature distinguishes Torrens registration legislation from the English registry Acts and the examples imitating them in a number of Commonwealth jurisdictions. The registry Acts provided for the recording of deeds and instruments affecting land, but did not succeed in eliminating the need to investigate title because they were interpreted as not excluding the application of the doctrine of notice.[25]

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.

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

25. *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135 at 147; *Le Neve v. Le Neve* (1748), 3 Atk. 646, 26 E.R. 1172; *Blades v. Blades* (1727), 1 Eq. Ca. Abr. 358, 21 E.R. 1100; *Rose v. Peterkin*, *supra*, note 4. The reason for continuing to apply the doctrine of notice in the face of the deed registry statutes, as enunciated in *Blades v. Blades* and subsequent cases, was that the purpose of the registration statute was to protect purchasers against secret encumbrances, and there was no point in extending the protection of the statute to purchasers who already knew of unregistered interests when they acquired their properties.

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.[26] The third party is then entitled to the benefit of the "mirror" and "curtain" principles. 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 owners 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

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.

would lose the title and would be left with a claim against the assurance fund.[27] This view of the outcome is sometimes called "immediate indefeasibility."[28]

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."[29]

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.

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.

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.

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.[30] In 2005, the LTA was amended in a manner evidently designed to entrench immediate indefeasibility.[31]

(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.[32]

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.[33] The registrar could not correct the error to enter the reserva-

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

tion 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 statutes do not displace the rules of common law and equity regarding real property beyond the precise extent necessary to give effect to their provisions.[34] The older law has sometimes been applied uncritically where the land title statute is silent or less than fully explicit.[35] 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.[36] 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 made later in this consultation paper are intended to remove.

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.

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 9; *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. Aceman* (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.

III. A CURTAIN PARTIALLY DRAWN: SECTION 29(2) OF THE *LAND TITLE ACT*

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

This consultation paper 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.[37] 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
>
> (c) an interest, the registration of which is pending,

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.

> (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.

Section 29(2) states that the only ways in which a purchaser or chargeholder who acquires the land or charge from a registered owner can be affected by express, implied or constructive notice of an unregistered interest are if:

(a) the unregistered interest is one referred to in ss. 29(2)(c), (d), (e); or

(b) the purchaser or chargeholder has participated in fraud.

Section 29(2)(c) makes the purchaser's title or the charge subject to interests that are already the subject of pending applications 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.[38]

Section 29(2)(d) makes an existing unregistered lease of less than 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) makes notice effective to subordinate 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 on the common law doctrine of

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

adverse possession, referred to popularly as "squatter's rights."[39] The amount of time that has passed since most privately owned land was brought under the land title system results in this exception having little practical effect today.

The remaining exception to the abolition of the doctrine of notice under section 29(2) is 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.[40] 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.[41]

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-

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 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 & Maxwell Limited, 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.[42]

As noted above, when non-Torrens registry Acts were introduced in England these principles continued to be applied, so that if someone having actual notice of an earlier unregistered interest registered a deed or other instrument despite such knowledge, that person was not allowed to obtain the benefit of the Act. The earlier unregistered interest was held to have priority.[43]

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 had notice of an unregistered interest affecting the land that arose earlier than the transfer or creation of the charge, and whether the transferee or chargeholder enjoys priority over the unregistered interest in these 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.[44] 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.[45] The two divergent lines of authority are summarized in the next two sections.

42 . *Rose v. Peterkin*, *supra*, note 4; *Blades v. Blades*, *supra*, note 25.

43. See note 25, *supra.*

44. *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)."

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

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*,[46] 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 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."[47]

In *The Hudson's Bay Co. v. Kearns & Rowling*[48] 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*.[49] 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….[50]

46. *Supra*, note 24 per Davies, C.J. at 556-557 in *obiter dicta*.

47. 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 per Lord Westbury at 97.

48. *Supra,* note 24.

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

50. *Supra*, note 24 at 551-552.

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 that the title or charge of the party registering with actual notice was held to be subject to the unregistered interest.[51]

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.[52]

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

51. 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 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.

52. *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.

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.[53]

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.[54] This line of cases is in accord with the Privy Council's decision in *Assets Co. v. Mere Roihi*,[55] 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…[56]

This view prevails in many other Torrens jurisdictions.[57] Some support for it may paradoxically be found in *Hudson's Bay Co v. Kearns and Rowling*, the very case on

53. 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.); *Palfenier v. Cech*, [1982] B.C.J. No. 1016 (S.C.) (QL).

54. 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.

55. [1905] A.C. 176 (P.C.) (N.Z.).

56. *Ibid.*, at 210.

57. 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; *Tara Shire Council v. Garner & Ors*, [2002] QCA 232. 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 ab-

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:

> [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…"[58]

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.[59] 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.[60]

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sence 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.

58. *Supra*, note 24, per Davies, C.J. at 556-557. (Italics added.)

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

60. *1198952 Alberta Ltd. v. 1356472 Alberta Ltd.*, 2008 ABQB 386; *Allarco Group Ltd. v. Suncor Inc.*

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[61] 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.[62]

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.[63] 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.[64]

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.

61. A caveat under the Alberta *Land Titles Act*, *supra*, note 44 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."

62. *Alberta (Minister of Forests, Lands and Wildlife) v. McCulloch*, [1992] 1 W.W.R. 747 (Alta. C.A.).

63. *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.).

64. *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 51 at para. 41 (S.C.). *March v. Drab*, *supra* note 51 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

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*[65] 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.*[66] 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.[67] 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

9 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 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.

65. *Supra*, note 51.

66. *Supra*, note 54.

67. (2008), 74 B.C.L.R. (4th) 32 (C.A.).

lender is aware of unregistered instruments affecting title, it is not possible to give a conclusive opinion on the priority of the mortgage.

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.

IV. REFORM

A. Various Solutions Examined

1. GENERAL

The Project Committee has considered various means of removing the uncertainty in the law that arises from the conflicting lines of authority on the effect of section 29(2) of the LTA described in Chapter III. The legislation and case law of other jurisdictions employing the Torrens system were reviewed and compared to determine if they offered solutions adaptable to British Columbia's land title system. Alternatives were weighed in light of the particular features of the LTA and British Columbia land titles practice. The Project Committee's conclusions and the considerations that led to them are set out in this chapter.

2. ENACTING THAT KNOWLEDGE OF AN UNREGISTERED INTEREST 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 that knowledge of an unregistered interest or instrument on the part of a person transacting with a registered owner is not fraud.[68] The land title statutes of Alberta, Saskatchewan, Manitoba, and New Brunswick have this feature, as do those of New Zealand and several Australian states. Section 203(3) of the Alberta *Land Titles Act*[69] 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 to the LTA would have the effect of overturning the line of British Columbia cases holding that it amounts to fraud to register a transfer or charge in the face of actual notice of unregistered interests that will be defeated by doing so. It would likely tend to entrench instead the other line of British Columbia cases holding that fraud sufficient to deprive a person acquiring an interest in land

68. See *Land Titles Act*, *supra*, note 44; *Land Titles Act, 2000*, *supra*, note 27; *Real Property Act*, *supra*, note 44; *Land Titles Act*, *supra*, note 44. As noted *supra*, note 44, 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 44, s. 47.

69. R.S.A. 2000, c. L-4.

from a registered owner of the benefit of the Act requires more than merely being the first of two holders of competing interests to register, with knowledge of the other. Consistent with the jurisprudence in the other western provinces, these cases require an additional "participatory" element of dishonest conduct for a finding of fraud.[70]

Despite the attraction of certainty, the Project Committee is reluctant to adopt a solution based exclusively on an amendment like s. 203(3) of the Alberta *Land Titles Act*. It is 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.

Reliance on such an amendment as an entire solution also raises concerns in relation to long-term commercial leases.[71] Frequently these are not registered because of the expense involved. Property transfer tax is also payable on registration. Leases also contain information that is commercially sensitive from both the landlord's and tenant's point of view. This information becomes available to competitors if a lease is registered in the land title office. Landlords fear that if leases are registered more frequently, the registrations will not necessarily be voluntarily discharged by lessees at the end of the term and it will be necessary to go to court more often to have them removed from the title. A greater number of registered charges may decrease the marketability of land. The reality of the rental marketplace is that in some localities most 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.

Beneficiaries of trusts are often concerned to preserve confidentiality surrounding the existence and extent of the trust. They may also perceive a solution that makes

70. See cases cited *supra* at note 54.

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.

registration the only means of protection against a purchaser who has knowledge of the trust as being detrimental to their privacy interests.

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.[72] 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 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.[73]

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.[74]

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 ti-

72. *Land Titles Act*, *supra,* note 44; *Real Property Act*, *supra*, note 44; *Land Titles Act*, *supra*, at note 44. 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.

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.

tle 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 or proposing to take an interest under a transaction with a registered owner with knowledge of unregistered interests that would be prejudiced by the operation of the land title statute.[75]

The Joint Land Title Committee's *Model Land Recording and Registration Act* provided that a person transacting with a registered owner was not 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) [i.e., 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.[76]

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.

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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).

The Project Committee considered this definition of fraud in connection with dealings with land, 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.[77]

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 favour the Joint Land Title Committee's approach.

5. The Preferred Approach: Creation of a New Exception in Section 29(2)

(a) General comment

Having rejected both the status quo for its uncertainty, and reform options that would completely negate any effect of actual notice of an unregistered interest in the British Columbia land title system for their perceived inconsistency with values of fairness and honest dealing, the Project Committee sought middle ground.

The approach favoured by the Project Committee was to attempt to identify the circumstances in which it would be unfair or unconscionable for a registering purchaser, chargeholder, or assignee of a charge who actually knows of an unregistered interest to obtain priority over it, and to provide that in those circumstances the registering party should be bound by the unregistered interest.

Constructive notice would be precluded from having effect as being fundamentally inconsistent with the Torrens principles on which the LTA is predicated. Constructive notice imposes a duty on a prospective purchaser or chargeholder to look behind the register to inquire into the title or interest being acquired, while the "curtain" principle, one of the cornerstones of the Torrens system, was meant to relieve against having to do exactly that.

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 Registration 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.

This approach was seen as a balance between the need for greater predictability in the outcome of priority contests and 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 consentaneous 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.[78]

(b) Significance of the time at which actual notice is obtained

In the view of the Project Committee, the factor that distinguishes between a situation in which a registering purchaser, chargeholder, or assignee of a charge who knows of a competing unregistered interest should be bound by that unregistered interest and when not is the time at which the knowledge is acquired.

The following examples illustrate the significance of the timing of actual notice of the competing unregistered interest:

Example 1

O, the registered owner, sells the land to P_1. Before completion of the sale, P_2 offers O a better price. O informs P_2 of the previous sale. O nevertheless sells again to P_2 and gives P_2 a signed transfer. P_2 then registers the transfer.

In Example 1, P_2 is obviously complicit in O's repudiation of the first sale. P_2 knew of P_1'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_2 from the start to defeat the pre-existing valid interest of P_1 as purchaser.

It would have a detrimental effect on the integrity of the land title system if P_2, 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_1. P_2 should not be able to shelter behind the LTA and claim not to be bound by the unregistered interest of P_1 as purchaser.

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

Example 2

O, the registered owner, sells the land to P_3 and provides a transfer. O then sells to P_4. After signing the agreement of purchase and sale, P_4 learns that an earlier sale took place and another unregistered transfer may be in existence. P_4 completes the sale rather than lose a deposit and applies for registration of the transfer from O to P_4. As it turns out, P_4's application for registration is made earlier than P_3's and P_4 becomes the registered owner. P_3's application is then rejected.

In Example 2, P_4 purchased in good faith, and learned of a possibly conflicting unregistered transfer only after becoming contractually bound to O to complete the purchase. P_4 does not know whether O is acting dishonestly or not. P_4 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_4 is not acting unconscionably in avoiding liability to O for breach of the contract of purchase and sale and registering to preserve P_4's own position to the extent possible. The priority contest that may ensue is not of P_4's making.

In Example 2, both purchasers are innocent. It would be unjust to visit the effects of O's duplicity on P_4 merely because P_4 was the first to register. As P_4 has acted in good faith, P_4 should be able to rely on the LTA and claim priority over the unregistered transfer to P_3.

The importance of the timing of notice is recognized in some of the decisions that hold registration with actual notice results in loss of priority over the 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."[79] The inconsistency is highlighted by the divergent views in the Court of Appeal in *Greveling v. Greveling*.[80] 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

79. *Supra*, note 35.

80. *Supra*, note 9.

shows that more often than not, actual notice was obtained before the registering party entered into a legally binding arrangement with a registered owner.[81] 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 exchanged.[82] 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 of an existing interest before becoming vested with the legal title by the execution of a deed.[83] 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.[84]

(c) Actual notice before contract

The Project Committee believes that if actual notice is obtained before any legally binding arrangement is made with the registered owner, a person who proceeds in the face of the actual notice 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 notice 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

81. See *Phipps v. Pickering* (1978), 8 B.C.L.R. 101 (S.C.); *Palfenier v. Cech*, *supra*, note 53; *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, *supra*, note 51; *Danica Enterprises Ltd. v. Curd*, *supra*, note 51; *Gyper v. L'Arrivee and Vince*, *supra*, note 35.

82. *March v. Drab*, *supra*, note 51; *Willoughby Residential Development Corporation* v. *Bradley* (2002), 1 B.C.L.R. (4th) 309 at para. 20 (C.A.). The statement to this effect in *Willoughby* is *obiter*.

83. *Wigg v. Wigg* (1739), 1 Atk. 382 at 384, 26 E.R. 244 at 245; Megarry & Wade, *supra*, note 3 at 140-141.

84. 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 53. 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 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 actual notice to have binding effect should be prior to contract, not prior to completion.

The Project Committee therefore favours an amendment to the LTA 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 notice 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).

"Actual notice" in this context should be understood as comprising "express" and "implied" notice as referred to in section 29(2), but not constructive notice.

The remarks above are in 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. Gratuitous transferees and assignees are discussed later in this chapter.

(d) Actual notice after contract

If actual notice of an unregistered interest is obtained only after a binding contract with the registered owner has been made, the unregistered interest cannot be said to have been 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.

If actual notice 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, in the absence of the purchaser's own knowing participation in fraud.[85]

85. 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 Project Committee tentatively recommends:

1. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that*

   (a) if a person contracting or dealing with or taking or proposing to take from a registered owner

      (i) a transfer of land, or

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

   for value has actual notice of an earlier unregistered interest before entering into a legally binding agreement with the registered owner to acquire the transfer, charge, or transfer or assignment or subcharge of the charge, that person will acquire title to the land, charge or subcharge subject to the earlier unregistered interest;

(b) if a person contracting or dealing with or taking or proposing to take from a registered owner

      (i) a transfer of land, or

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

   for value receives actual notice of an unregistered interest only after entering into a legally binding agreement with a registered owner, that person is unaffected by the actual notice and unless the unregistered interest is one referred to in sections 29(2)(c), (d) and (e), will acquire the title to the land, charge or subcharge in priority to the unregistered interest, in the absence of fraud in which that person participates.

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the interest, and repudiates 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 59.

B. Gratuitous Transferees

Recommendation 1 above addresses the usual situation in which parties are dealing at arm's length and interests in land change hands for a price. 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.[86] They have tended to treat gratuitous transferees differently from purchasers for value and subject the titles they acquire to interests 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.[87]

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.[88] 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 Registration Act* makes no distinction in terms of indefeasibility of title between reg-

86. *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.

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

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

istered owners who acquired the title for value and those who acquired it through a gratuitous transfer.[89]

The Project Committee sees no reason why the same principles governing the effect of actual notice 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 notice 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*[90] as well as to gratuitous transfers made in the transferor's lifetime.[91]

The Project Committee therefore tentatively recommends:

2. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to clarify that if a person taking or proposing to take gratuitously from a registered owner*

   (a) a transfer of land, or

89. *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.

90. 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.

91. Tentative Recommendation 2 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.

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

has actual notice of an earlier unregistered interest

(c) before registration of title to the land or the charge or subcharge in the name of that person, that person acquires title to the land, charge or subcharge subject to the earlier unregistered interest, whether or not the earlier unregistered interest was acquired for value;

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

3. Recommendation 2 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 gratuitously from a registered owner

(a) a transfer of land, or

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

It should be noted that to implement Recommendations 2 and 3, a consequential amendment would be needed to section 25.1 of the LTA, which restricts the protection given to persons acting in good faith but who take an interest in land under a void instrument to cases where value has changed hands.

Similar consequential amendments might be needed to sections 294.21 and 297 relating to the availability of assurance fund compensation. Currently those sections require that claimants against the assurance fund must have given value for any interest they may have lost through the operation of the Act. The question of whether persons acquiring an interest in land gratuitously should be entitled to claim against the assurance fund if they subsequently lose it through the operation of the LTA may involve policy considerations going beyond the scope of this consultation paper. The Project Committee makes no recommendation as to whether consequential amendments to those provisions are necessary or desirable.

C. Definition of Actual Notice

As mentioned in Chapter I, the meaning that has been given to "actual notice" in the law of real property is "actual knowledge however acquired."[92] Knowledge of facts that unequivocally show the existence of an interest in land that does not appear on the register can be derived from an infinite variety of means. The Project Committee does not believe anything is to be gained by attempting to give "actual notice" a statutory definition for the purposes of implementing Tentative Recommendations 1 and 2 and introducing it as a new term into section 29(2). Instead, the recommended amendments should refer to the terms "express" and "implied" notice, which are already present in section 29(2). As stated in Chapter I, these two forms of notice are encompassed by the usual meaning of "actual notice."

The Project Committee tentatively recommends:

4. *The term "actual notice" should not be defined for the purposes of the amendments to section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 contemplated by Recommendations 1 and 2.*

D. Knowledge of An Unregistered Interest Not Amounting to Fraud

The Project Committee believes that the amendments recommended above to section 29(2) providing for the exceptions in relation to actual notice of an existing unregistered interest before the formation of a binding agreement with the registered owner, or prior to registration in the case of gratuitous transferees and assignees, adequately 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 these two additional exceptions and those already found 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.

The Project Committee tentatively recommends:

92. Megarry & Wade, *supra*, note 3 at 144.

5. *Subject to Recommendations 1 and 2, the Land Title Act 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 from a registered owner*

   (a) a transfer of land, or

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

   must not of itself be imputed as fraud.

V. LIST OF TENTATIVE RECOMMENDATIONS

1. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to provide that*

   (a) if a person contracting or dealing with or taking or proposing to take from a registered owner

      (i) a transfer of land, or

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

   for value has actual notice of an earlier unregistered interest before entering into a legally binding agreement with the registered owner to acquire the transfer, charge, or transfer or assignment or subcharge of the charge, that person will acquire title to the land, charge or subcharge subject to the earlier unregistered interest;

(b) if a person contracting or dealing with or taking or proposing to take from a registered owner

      (i) a transfer of land, or

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

   for value receives actual notice of an unregistered interest only after entering into a legally binding agreement with a registered owner, that person is unaffected by the actual notice and unless the unregistered interest is one referred to in sections 29(2)(c), (d) and (e), will acquire the title to the land, charge or subcharge in priority to the unregistered interest, in the absence of fraud in which that person participates.

(p. 33)

2. *Section 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 should be amended to clarify that if a person taking or proposing to take gratuitously from a registered owner*

   (a) a transfer of land, or

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

has actual notice of an earlier unregistered interest

(c) before registration of title to the land or the charge or subcharge in the name of that person, that person acquires title to the land, charge or subcharge subject to the earlier unregistered interest, whether or not the earlier unregistered interest was acquired for value;

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

(pp. 35-36)

3. Recommendation 2 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 gratuitously from a registered owner

(a) a transfer of land, or

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

(p. 36)

*4. The term "actual notice" should not be defined for the purposes of the amendments to section 29 of the Land Title Act, R.S.B.C. 1996, c. 250 contemplated by Recommendation**s** 1 and 2.*

(p. 37)

5. Subject to Recommendations 1 and 2, the Land Title Act 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 from a registered owner

(a) a transfer of land, or

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

must not of itself be imputed as fraud.

(p. 38)

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