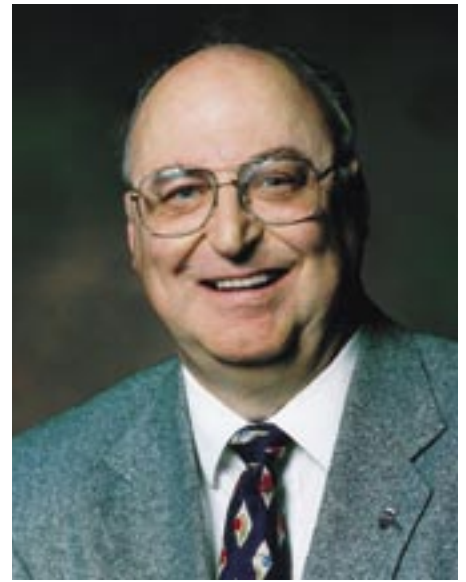


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# Recent Amendments to the *Land Title Act*: a Torrens System of *Immediate Fee Simple Title*



**O**n November 24, 2005, Royal Assent was granted to provisions amending the *Land Title Act*, R.S.B.C. 1996, C. 250, in Bill 16, the *Miscellaneous Statutes Amendment Act (No. 2), 2005*.

That changed the land title registration system in British Columbia to one in which a purchaser who acquires the fee simple interest in a property through a forged transfer and who becomes the registered owner will have “immediate indefeasibility,” provided he or she did not participate in the fraud.

“Indefeasible” is defined in *Black’s Legal Dictionary*, 4<sup>th</sup> ed., as “That which cannot be defeated, revoked, or made void. This term is usually applied to an estate or right which cannot be defeated.” Authorities have referred to its meaning as being “unimpeachable,” “unexaminable,” and “conclusive.” It means that once a title is registered, its validity is guaranteed and immune from attack.

Prior to the 2005 amendments, a *bona fide* purchaser in British Columbia who acquired his or her fee simple title through a forged transfer had only

“deferred indefeasibility,” even if he or she did not participate in the fraud.

The land title registration system is often referred to as the Torrens system, named after Robert Torrens who established the system in Australia in 1858. And although aspects of a Torrens system were introduced in the Colony of British Columbia, it was not until 1899 that the principle of indefeasibility was introduced.

**The land title registration system is often referred to as the Torrens system, named after Robert Torrens who established the system in Australia in 1858.**

This article will discuss the difference between the two systems—deferred and immediate indefeasibility—and will discuss a recent case from Saskatchewan, *CIBC v. Registrar of Titles [Saskatchewan]*, [2005] SKQB 470, in which the judge found the principle of immediate indefeasibility did not apply to a *bona fide* mortgagee who acquired its interest through a forged instrument, even though the Saskatchewan title registration system was considered to be an “immediate indefeasibility” jurisdiction.

This article also will discuss how the recent amendments have changed the British Columbia system of land title registrations and why a court in BC, in determining the effect of the recent amendments, should not adopt the reasoning in the Saskatchewan case.

## **What is the difference between the two systems?**

### **1. Deferred Indefeasibility**

The concept of deferred indefeasibility was enunciated by the Privy Council in a case from the State of Victoria in Australia, *Gibbs v. Messer*, [1891] A.C. 248, in which the registered mortgagees obtained their interest through a forged mortgage. Their Lordships made an important distinction between title and identity. They held that the purchasers/mortgagees must deal with the actual person registered on title to ensure they do not acquire their interest through a forged instrument.

**Note:** Although in many Torrens jurisdictions, the concept of indefeasibility applies to both registered fee simples and mortgages, that is not so in British Columbia because the Court of Appeal in *Credit Foncier Franco-Canadian v. Bennett* (1963), 43 W.W.R. 545, held that a forged mortgage is governed by the common law—it is a void instrument and does not confer

deferred indefeasibility even though registered on title. Not only is the forged mortgage not valid against the Real Owner's title, the fact that it is registered does not provide a "good root of title" to a *bona fide* assignee of the mortgage who relies on the fact it is registered.

The recent amendments do not affect the legal position of a lender who takes its interest in the property under a forged mortgage because the amendments affect only the fee simple title to a property. To avoid confusion when discussing cases from jurisdictions in which mortgages are indefeasible, however, mortgagees will be referred to in this article as purchasers.

In *Gibbs v. Messer*, the crook, Cresswell, a lawyer, committed two forgeries. First, he forged a transfer of the registered title in fee simple into the name of Hugh Cameron, a fictitious person. Then, second, he forged a mortgage document. The Privy Council found that Cresswell in his dealings with the McIntyres, the mortgagees, never claimed to be the person registered on title; he always represented himself as acting as the agent for the registered owner, Hugh Cameron. So when Cresswell signed the mortgage document as Hugh Cameron, he committed a forgery.

If he had claimed to be Hugh Cameron, then he would have been the person registered on title and the mortgage instrument would not have been a forgery and, if this had occurred, the Privy Council stated that the purchasers would have acquired indefeasible title even though a fraud would have been carried out on the original owner, Mrs. Messer.

But the Privy Council held that a forgery is a nullity at common law and it is the responsibility of the *bona fide* purchaser for value—a person who does not participate in any fraud and who relies on the register—to ensure that he or she deals with the "registered proprietor" on title. If he or she does not deal with the Real Owner, then he or she does not acquire an indefeasible title.

In a classic statement in *Gibbs v. Messer*, Lord Watson, in explaining the purpose of a land title registration system, stated that:

the main object of the Act and the legislative scheme for the attainment of that object...is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

### Their Lordships made an important distinction between title and identity.

In other words, the State "guarantees" title and the purchaser is not required to search all the title deeds for a "good, safe, and marketable" title—he or she needs only to search the register to determine who is the registered owner. This was the purpose for the development of the land title registration system or "Torrens," namely, to cut the costs of title searches and to expedite the process.

The Privy Council restricted the purchaser's right to obtain an indefeasible title to those *bona fide* purchasers who purchase from a "registered proprietor." Lord Watson stated that:

Everyone who purchases in *bona fide* and for value, from a **registered proprietor** [emphasis added] and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible title, notwithstanding the infirmity of his author's title. ...The protection the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor but with a forger who uses his name, do not transact on the faith of the register;

and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact that they are registered will enable them to pass a valid title to third parties who purchase from them in good faith and for onerous consideration.

It makes no difference that a purchaser is *bona fide* and is unaware of the fraud being carried out by the forger. A purchaser must acquire his or her title through a transfer signed by the person registered on title. On the other hand, the purchaser's registered title will be effective to allow a second purchaser, who has no knowledge of the fraud, who relies on the register, and who acquires title from the registered owner, to obtain an indefeasible title when registered. The second transfer is not a forgery.

This is why the first purchaser's interest acquired through a forged transfer is referred to when registered as a "deferred indefeasible" interest. Although the first purchaser's interest is void as against the real owner, he or she has the capability of passing an indefeasible title to a second *bona fide* purchaser. Lord Watson further stated:

Although a forged transfer or mortgage, which is void at common law, will when duly entered on the register, become the root of a valid title, in a *bona fide* purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed... [the purchasers] dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance on his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal rests with the mortgagees themselves; and if

they accept a forgery they must bear the consequences... .

Prior to the recent amendments to the *Land Title Act*, the courts in British Columbia have followed *Gibbs v. Messer*—see *Credit Foncier v. Bennett*, supra, and *Kwan v. Kinsey* (1979), 15 B.C.L.R. 31, 10 R.P.R. 44 (S.C.), *Vancouver City Savings Credit Union v. Hu* (2005), 31 R.P.R. (4<sup>th</sup>) 309 (B.C.S.C.).

Proponents of a “deferred” system of indefeasibility argue that a Torrens system only guarantees title and not the identity of the registered owner and that a purchaser must ensure he or she deals with the actual registered owner. A Torrens system is not intended to implicitly repeal the common law rules governing void instruments.

They argue that it is unfair and unreasonable to allow a purchaser to acquire indefeasible title and thereby possession of the property as against an innocent registered owner who had no knowledge of the sale or way to protect himself or herself from the fraud being carried out against him or her.

The purchaser, they argue, is involved in the transaction and thereby better placed to ensure that he or she is dealing with the person on title. Therefore, the purchaser should bear the responsibility and loss if he or she does not deal with the person on title. By placing this onus on the purchaser, it is expected that he or she will not become careless in checking the identity of the vendor.

Another argument against what is referred to as “immediate indefeasibility” system is that it is possible that an owner in possession of the property could lose it if a purchaser could establish that he or she acted *bona fide* when he or she purchased it from a crook. This is possible, but unlikely to occur if the real owner is in actual possession of the property.

On the other hand, critics of a deferred indefeasibility system argue that it is not possible for a *bona fide* purchaser to protect himself or herself from dealing

with an astute crook who obtains false identification documents. They claim that a Torrens system should protect the *bona fide* purchaser who relies on title even though he or she does not deal with the actual person on title because this maintains the public’s confidence and trust in the land title registration system.

A major problem eroding the public’s perception of the fairness of a deferred indefeasibility system is that a *bona fide* purchaser who takes all reasonable measures to ensure he or she deals with the registered owner but who, in fact, deals with an astute crook, is unable to recover his or her losses except from the crook and that is highly unlikely. Whereas, even though the “true” owner in an immediate indefeasibility system would lose his or her title to the property, he or she can recover compensation for his or her loss from the Assurance Fund.

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Here are some examples of how a deferred indefeasibility system applies to different fact patterns. Let us assume that the registered owner of Blackacre is Peter.

**Scenario 1:** Adam assumes the identity of Peter and sells the property to Brenda. When Adam, who obtains identification documentation claiming to be Peter, signs the transfer Form A as “Peter,” it is a forgery and, according to *Gibbs v. Messer*, Brenda does not acquire indefeasible title because she did not deal with Peter, but with a crook/Adam who impersonated Peter. She did not deal with the registered owner so the Form A is a forgery and has no effect to transfer title to her.

Peter is entitled to recover title to Blackacre from Brenda who not only loses title to Blackacre, she has no

recourse against the Assurance Fund in part 20 of the *Land Title Act* because claimants must have lost an interest as a result of the operation of the Torrens system. See section 296(2)(a)(i), which provides that the claimant must have been deprived of an estate or interest in land because of the conclusiveness of the register, in circumstances where, if the Act had not been passed, the claimant would have been entitled to recover the land from the present owner.

And at common law, a forged transfer is a nullity; it is a void instrument and a purchaser takes no interest under it.

As the registered owner in fee simple, however, Brenda has deferred indefeasibility. A second *bona fide* purchaser, Ida, who relies on the register and who deals with the registered owner, Brenda, will acquire indefeasibility when she registers title in her name and Peter will claim compensation for his loss of Blackacre from the Assurance Fund.

Of course, Peter must first seek to recover damages for his loss from Adam and only if Adam is unable to pay the damages or is dead or cannot be found in British Columbia will Peter be entitled to recovery damages and costs against the Attorney General who was named as a nominal defendant in the action against Adam.

Similarly, a mortgagee, Fraser Bank, who deals with Brenda and who becomes a registered charge holder, has a valid mortgage. When Peter recovers title from Brenda, he recovers it subject to the Fraser Bank mortgage, as Brenda did not commit a forgery when she signed it. Peter is entitled to seek damages against the Assurance Fund to discharge the Fraser Bank mortgage.

It is to be noted that Fraser Bank would be entitled to commence foreclosure proceedings against Blackacre to recover the amount it is owed under the mortgage; it probably would wait, however, for Peter to recover under the Assurance Fund. It could not, of course, sue Peter personally for the mortgage

debt because he did not receive the mortgage monies.

**Scenario 2:** Adam forges Peter's signature on a Form A and transfers the title to either his own name or to the name of an alias, say, Stewart Thirsk. Then when Adam transfers title to Brenda, either as Adam or as Stewart Thirsk, Brenda acquires her title from the actual registered owner to Blackacre and does not take title through a forged transfer. There is no forgery. Peter loses his title but can claim damages from the Assurance Fund.

Instead of transferring title to Brenda, if Adam executed a mortgage to Fraser Bank, either in his own name or that of his alias, Stewart Thirsk, he would not be committing a forgery when he signed the mortgage and Fraser Bank would obtain a valid mortgage. Peter would recover title subject to the mortgage, then claim damages for his loss against the Assurance Fund because the mortgage would have been void at common law.

The initial transfer into the name of either Adam or Stewart Thirsk was a forgery and therefore a nullity and nothing could flow from it, according to the common law doctrine of *nemo dat qui non habet*, "he who hath not cannot give." It would, however, provide a deferred indefeasible title so that a *bona fide* purchaser who relied on it would acquire a valid title under the BC Torrens system of land title registration because he or she dealt with the registered owner on title.

**Scenario 3:** Adam forges Peter's signature to a transfer form into the name of a real person, say, Harold Snepts, and assumes the identity of that person. In negotiations for the sale of Blackacre, Brenda asks Adam whether he is the retired hockey player who played defence for the Vancouver Canucks. If Adam answers yes, then when he signs the transfer form as Harold Snepts, it is a forgery and the results in Scenario 1 apply. Brenda has only deferred

indefeasibility and Peter will be entitled to recover his title.

If Adam says no, then the name Harold Snepts becomes his alias and when he signs as Harold Snepts, it is not a forgery and Brenda takes immediate indefeasible title. The results in Scenario 2 apply because Brenda dealt with the actual person on title even though he was a crook and committing a fraud against Peter.

**The trial judge held that the mortgage was a forgery and therefore a nullity and the mortgagee could not claim recovery under the Assurance Fund.**

The facts in Scenario 3 are similar to what occurred in *CIBC v. Registrar of Titles [Saskatchewan]*, where the crook forged title into the name of an actual person and then took out a mortgage signing that person's signature. The trial judge held that the mortgage was a forgery and therefore a nullity and the mortgagee could not claim recovery under the Assurance Fund.

## II: Immediate Indefeasibility

In 1967 the Privy Council had the opportunity to again review the operation of a Torrens system, this time from New Zealand, in *Frazer v. Walker*, [1967] A.C. 569, [1967] 1 All E.R. 649. In this case, one of two co-owners forged the signature of the other, namely, the wife forged her husband's signature to a mortgage.

The Privy Council chose to follow a line of authorities interpreting the effect of void instruments registered under the New Zealand title registration system that held that a registered owner who derived his or her title through a forged transfer is entitled to indefeasibility and immune from adverse claims, other than those specifically excepted in the Act.

The focus in these cases is not on whether the *bona fide* purchaser acquired

title through a forged transfer, but whether a *bona fide* for value purchaser is entitled to claim indefeasible title when registered. Lord Wilberforce explained the purpose of a Torrens system; it is registration, not its antecedents, that vests and divests title; it is registration that confers indefeasibility to a *bona fide* purchaser and protects the registered owner from adverse claims, other than those specifically excepted by the Act.

*Gibbs v. Messer* was distinguished by finding that "no question there arose as to the effect of such sections as corresponded (under the very similar Victorian Act) with sections 62 and 63 of the Act now under consideration." Lord Wilberforce stated that their Lordships could not accept the argument that a forged mortgage could not be validly registered because such an argument *was destructive of the whole system of registration and that registration once effected must attract the consequences which the Act attaches to registration* [emphasis added].

Moreover, it was found that in *Gibbs v. Messer*, the case involved a transfer from a "fictitious person" whereas in *Frazer v. Walker*, there was a real registered proprietor. The fact that *Gibbs v. Messer* was decided on the basis of a forgery was ignored. Presumably, therefore, a case with similar facts to *Gibbs v. Messer* would be governed by it and not by the reasoning in *Frazer v. Walker*.

The Saskatchewan Court of Appeal in *Hermanson v. Martin* (1986), 52 Sask. R. 164, 33 D.L.R. (4th) 12, [1987] 1 W.W.R. 439, considered both Privy Council decisions. In *Hermanson*, a husband, who was a co-owner with his wife, arranged for another woman to impersonate his wife and sign her signature to a transfer and thereby committed a forgery. The Court chose to follow the reasoning in *Frazer v. Walker*, and found that the innocent purchaser acquired "immediate" indefeasible title on registration.

### III: Effect of 2005 Amendments to British Columbia's *Land Title Act*

#### 1. Prior to the Amendments: Deferred Indefeasibility

In the past the authorities interpreting the effect of BC's Torrens system followed the reasoning in *Gibbs v. Messer*, namely, that of deferred indefeasibility. In *Kwan v. Kinsey*, supra, the registered owner was Pik Har Kwan. Her boyfriend [Morriseau] forged her signature to a mortgage in favour of Caledon Investment Ltd. He then forged a transfer of the fee simple to a purchaser, Kinsey, who in turn executed a second mortgage in favour of Morriseau.

The court restored Pik Har Kwan to title; she regained title, however, subject to the mortgage in favour of Morriseau. Caledon and Kinsey were removed from title and neither had a claim against the Assurance Fund because they acquired their interests from forged instruments. The mortgage to Morriseau was valid even though Kinsey's registered title was invalid; it was still the "root of good title" and Morriseau dealt "on the faith of the register" with the registered owner, Kinsey. Pik Har Kwan was entitled to claim damages from the Assurance Fund to discharge Morriseau's mortgage.

The *Kwan v. Kinsey* decision, however, did not mention *Frazer v. Walker* in the judge's reasoning.

In *Frazer v. Walker*, a *bona fide* for value purchaser who became registered obtained indefeasibility **unless the statute specifically excepted it**. In British Columbia, did the statute specifically except indefeasibility? In 1979 an amendment enacted the successor to section 297(3) of the *Land Title Act*, namely, that "a person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument." **Note:** Section 297(3) was repealed by the recent amendments.

The only sensible interpretation of section 297(3) was that it applied to the Act as a whole and therefore either (i) codified the principle of deferred

indefeasibility as set out in *Gibbs v. Messer*, i.e., deferred indefeasibility, or (ii) codified the common law principle of the null deed so that not even a second *bona fide* purchaser could acquire a valid indefeasible title. This latter interpretation may seem harsh; in *Credit Foncier v. Bennett*, however, the Court of Appeal applied similar reasoning to a forged mortgage even prior to the enactment of the successor to section 297(3).

Therefore, prior to the 2005 amendments, a *bona fide* purchaser who acquired title through a forged transfer in British Columbia did not acquire an immediate indefeasible title, but only a deferred indefeasible title. And, arguably not even a deferred indefeasible title, if section 297(3) were interpreted as codifying the common law principle of the null deed.

**The Task Force recommended that the system be changed to ensure that "immediate" indefeasibility was the law in BC...**

In an article in the December 1999 issue of *The Scrivener*, entitled "Who Keeps the Lot?" (Vol. 8, No. 4, pp. 52–57), I discussed whether the land title registration system in BC should be changed to an "immediate" indefeasibility system. See other articles in *The Scrivener* by me that discuss this issue—"Indefeasible Title. Do We Have a Torrens System of Title Registration in BC?" April 2000, Vol. 9, No. 1, pp. 64–71, and "The BC Torrens System of Land Registration: Recovery Under the Assurance Fund in BC," June 2005, Vol. 14, No. 2, pp. 68–73.

In 2000 the Director of Land Titles, the late Malcolm McAvity, established a Task Force (of which I was a member) to review the question of deferred vs. immediate indefeasibility and other issues concerning the BC Torrens system. The Task Force recommended that

the system be changed to ensure that "immediate" indefeasibility was the law in BC with respect to fee simple titles.

The Task Force also recommended two other changes be made: (i) that a *bona fide* mortgagee be entitled to recover its loss under a forged mortgage, and (ii) that the real registered owner of the property be allowed to retain possession of the property if he or she could establish a "substantial connection" to it.

If the Real Owner could establish such a connection, then he or she would retain ownership of the property and the purchaser would be compensated from the Assurance Fund. For example, the property could have been in the owner's family for a number of generations.

Even though these recommendations were not included in the recent amendments, they may be considered in a future review by a task force that the Director of Land Titles would like to organize to review these issues as well as other matters concerning the land title registration system.

#### 2. The 2005 Amendments Affecting Indefeasible Title

The change of the BC Torrens system to an immediate indefeasibility system will have a great beneficial effect on *bona fide* purchasers for value who take fee simple transfers under a forged transfer. In the past, such a purchaser lost his or her registered title to the property because the Real Owner was entitled to recover it and the purchaser was not eligible to be compensated from the Assurance Fund.

The Land Title and Survey Authority of British Columbia issued an information bulletin stating that the recent amendments "ensure immediate certainty of land title for a person acting in good faith, who unknowingly acquired a fee simple interest in the property through a forged transfer, provided the individual did not participate in the fraud."

The bulletin quotes the President of the Law Society of British Columbia, Ralston Alexander:

In summary, I note that the proposed changes will work to ensure legal fairness and protection to both owners and purchasers of property in British Columbia... . The Law Society supports these amendments, as they will increase public confidence in our land title system, which is highly regarded.

The Law Society of BC issued a “Practice and Ethics” bulletin stating that the recent amendments:

...provide greater certainty to BC homebuyers who, through no fault of their own, become entangled in a fraudulent transfer... . As lawyers know, the Assurance Fund has long provided compensation to individuals who are deprived of title to real property due to an error in the operation of the *Land Title Act* or the administration of the new land title system under the Registrar’s direction. With the most recent round of legislative amendments, this basic protection has been extended.

The effect of the amendments’ creating an immediate indefeasibility system on existing registered fee simple owners, however, is not quite so beneficial. The amendments benefit the *bona fide* purchaser who becomes registered through a forged transfer, whereas the Real Owner loses his or her title and possession of the property, even though he or she would be compensated from the Assurance Fund for the loss.

For this to occur, the purchaser, however, would have to establish that he or she acted *bona fide* and this may be difficult if the registered owner were in possession of the property and the purchaser bought without physically inspecting the property.

Under a system of deferred indefeasibility, a registered owner could lose his or her title and property only if there were two transfers. The forged transfer to the first purchaser would be void as against the Real Owner who could recover his or her title. If, however,

the first purchaser transferred to a second purchaser, then the Real Owner would lose his or her title.

In this regard, however, it is important to point out that the number of frauds carried out by crooks forging transfers has been extremely rare over a long period of time.

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### Is there an argument that the amendments do not establish a system of immediate indefeasibility for fee simple titles?

#### 1. Wording of section 25.1 of the *Land Title Act*

Could the word “deemed” in the new section 25.1 of the *Land Title Act* support an argument that the amendments do not establish a system of immediate indefeasibility in BC?

Subsection (1) of section 25.1 states that:

subject to this section, a person who purports to acquire land or an estate of interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the interest.

Then subsection (2) states that even though an instrument purporting to transfer a fee simple estate is void, a transferee who (a) is named in the instrument, and (b) in good faith and for valuable consideration, purports to acquire the estate, is **deemed** [emphasis added] to have acquired that estate on registration of that instrument. And subsection (3) does the same for existing registered owners who may have acquired their estates through a forged instrument. Also, section 297(3) is repealed.

The intent of section 25.1 is clear—only void transfers of the fee simple will be deemed valid. Mortgages will continue to be void. But the word “deemed” has distinct meanings in the British Columbia Torrens system. It does not have the same effect as the word “conclusive” or “indefeasible” in section 23(2) of the Act.

In *Credit Foncier v. Bennett*, the Court of Appeal contrasted the meaning of the word “deemed” in section 26 of the *Land Title Act* (then section 41 of the *Land Registry Act*) dealing with the “registration of a Charge,” with the words “shall be conclusive evidence” in section 23 of the Act (then section 38). The Court found that the omission of “conclusive” in section 26, together with the use of the word “deemed,” which is capable of meaning “rebuttably presumed,” implied that the Legislature intended such omission to be observed by assigning a meaning “not conclusive” and raising only a rebuttable presumption.

It would be difficult, however, to make this argument in light of the intent and wording of section 25.1. What would rebut the presumption? A forged transfer? The section expressly states that a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument. The section then excepts a transferee under a void instrument purporting to transfer a fee simple estate who (a) is named in the instrument and (b) in good faith and for valuable consideration purports to acquire the estate. How then does one rebut the presumption that such a transferee does not acquire an indefeasible estate in fee simple?

In my opinion, the amendments clearly establish immediate indefeasibility as the system of title registration in British Columbia.

## 2. Reliance by Courts on *Gibbs v. Messer*

A second concern raised is the apparent reluctance by judges to give up the distinction between title and identity established in *Gibbs v. Messer* that has been followed faithfully in past cases.

The recent case in Saskatchewan, *CIBC v. Registrar of Titles [Saskatchewan]*, is an example of a court's reluctance to apply the concept of immediate indefeasibility. The general consensus prior to this decision was that the land title registration system in Saskatchewan was an "immediate indefeasibility" system based on the *Hermanson* decision of the Saskatchewan Court of Appeal. It now appears that immediate indefeasibility will apply only in a situation where one of the co-owners of the property participates in the forged transfer.

In *CIBC v. Registrar of Titles [Saskatchewan]*, a crook whose real identity was never discovered forged the signatures of the registered owners, the Neumanns, to a transfer form authorizing the transfer of the fee simple in the property, located in Saskatoon, to a Mr. Trent Doerksen. Mr. Doerksen was a real person, but he had no knowledge of the transfer into his name or of the fact that he was the registered owner on title to the property.

The crook representing himself as Mr. Trent Doerksen then applied for a mortgage from CIBC through a mortgage broker in Calgary. In support of the application for the mortgage, the crook submitted a Revenue Canada statement of account in the name of Trent Doerksen. CIBC approved the mortgage application and retained a law firm in Saskatoon to handle the mortgage documentation.

The crook presented himself at the law firm as Trent Doerksen and produced two pieces of identification—a birth certificate and a Saskatchewan health card, both in the name of Trent Doerksen. The mortgage was signed and registered and a law firm trust cheque was issued in the name of Trent Doerksen to a branch of the Royal Bank

of Canada in Saskatoon. The lawyers later met with the real Trent Doerksen and confirmed he was not the person who attended at their law office.

According to Chief Justice J.R.D. Laing, the narrow issue in the case was whether a person who takes a mortgage interest in land, not from the registered owner, but from someone who forges the registered owner's name, is entitled to remain on title after the forgery is discovered.

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CIBC was seeking a declaratory order that it was entitled to be reimbursed by the Registrar under the Assurance Fund for the proceeds it advanced on the fraudulent mortgage registered in the land titles registry. The parties had agreed that the title should be restored to the rightful owners.

The Registrar based his argument not to compensate CIBC on the reasoning in *Gibbs v. Messer* and on provisions in the Saskatchewan *Land Titles Act, 2000*.

CIBC argued it had immediate indefeasible title because of the reasoning in *Hermanson* and it made no difference that it took its interest under a forged mortgage, as long as it took a mortgage in the name of the registered owner on title.

Laing C. J. reviewed the case law and publications concerning this important issue. He noted that Sigurdson J. in *Vancouver City Savings Credit Union v. Hu*, supra, cited the classic statement of Lord Watson in *Gibbs v. Messer* explaining the purpose of a Torrens system.

The Chief Justice referred to a decision rendered February 1, 1998, by the Deputy Director of Title for Ontario, Nancy Sills, in *In the Matter of Lorrie Risman*, appended to the article by Sidney H. Troister in his article "Fraud in

Real Estate Transactions: The Effects and the Remedies," contained in *The Law Society of Upper Canada Special Lectures 2002, Real Property Law: Conquering the Complexities* (Toronto: The Law Society of Upper Canada, 2003).

Chief Justice Laing noted that Ms. Mills, in her decision, observed that the only case in Canada to apply the doctrine of immediate indefeasibility was *Hermanson*. She refused to apply *Frazer v. Walker* or *Hermanson* to Ontario because of the differences in statutory provisions between the two jurisdictions—Ontario specifically excluding void instruments from the protection of indefeasibility. Moreover, a cursory examination by the Chief Justice of the case law in the other Western Canadian provinces did not disclose one case where a forged transfer or interest was upheld.

The Chief Justice also noted that although several jurisdictions specifically addressed in their legislation the effect of fraudulent and void documents, namely, section 297(3) in the *Land Title Act* of BC (repealed by the recent amendments) and section 155 of the *Land Titles Act*, R.S.O. 1990, c. L. 5, there was no similar provision in the *Saskatchewan Act*.

Chief Justice Laing disagreed with the argument by counsel for the Registrar that section 54(3) of the *Saskatchewan Act* is a limitation on the indefeasibility of title provisions in the Act. He found the indefeasibility provisions in the Act to be part of the law and, as such, section 54(3) is subject to them. He held that where the indefeasibility provisions in the statute apply, they prevail.

BUT—and it is a very big BUT—he concluded that "under the Act, before the indefeasibility sections of the Act apply, one must deal with a registered owner." In section 23 of the *Saskatchewan Act*, it is only a person "proposing to take from a registered owner a transfer or an interest in land" to whom the balance of the section has application. He stated that:

"section 23(1)(a) is simply a statutory affirmation of the classic statement on the purpose of the land

titles system articulated in *Gibbs v. Messer*...that stated “the object is to save persons dealing with registered proprietors... .”

The Chief Justice then proceeded to distinguish the decision of the Saskatchewan Court of Appeal in *Hermanson* by limiting its reasoning to its facts, namely, that the purchaser dealt with one of two co-owners on title. And, although he acknowledged that the decision is authority for the doctrine of immediate indefeasibility in Saskatchewan, his reasoning has left the scope of its application very limited.

According to Chief Justice Laing, the *Hermanson* decision is not opposed to the interpretation he has placed on section 23 of the Saskatchewan statute because the equivalent provision in effect at the time that *Hermanson* was decided also referred to the fact that a purchaser was required to deal with a registered owner.

And, he finds that in both *Hermanson* and *Frazer v. Walker*, the

purchaser dealt with one of the registered co-owners on title. In *Frazer v. Walker*, the forger/wife was one of the co-owners, whereas in *Hermanson*, the forger was a third person who impersonated one of the co-owners, namely, the wife, and who accompanied the other co-owner, the husband, who participated in the fraud, although he did not commit the forgery.

**...so long as a purchaser acts honestly and reasonably, he or she is entitled upon registration to the protection of the Act...**

Chief Justice Laing dismissed the application of CIBC because:

[I]t did not take its interest from the registered owner, and therefore does not gain the benefit of the “curtain” principle of the Torrens system articulated in section 23 of the Act. The result is the forged mortgage

that it received from the fraudster is a nullity at common law and is unenforceable against the title.

But surely this distinction is sophistical. The key issue in both *Hermanson* and *Frazer v. Walker* was whether a *bona fide* for value purchaser who happened to acquire his or her interest under a forged instrument was entitled to claim indefeasibility for his or her interest because **registration once effected must attract the consequences, which the Act attaches to registration** (emphasis added).

In his reasoning, Laing C. J. chose to ignore the rationale behind the reasoning in both cases, namely, that it is registration, not its antecedents, that vests and divests title and protects the registered proprietor from adverse claims, other than those specifically excepted by the statute. In *Frazer v. Walker*, the Privy Council found that so long as a purchaser acts honestly and reasonably, he or she is entitled upon registration to

the protection of the Act, unless there is a specific provision in the Act that takes away this protection.

How then does the immediate indefeasibility system operate in Saskatchewan? If *Hermanson* is still good law, as the Chief Justice claims, then it is limited to its facts, namely, it applies only in situations where one of the registered co-owners commits the forgery or participates in the fraud.

And, if the purchaser does not deal with a registered owner on title, then he or she takes deferred indefeasibility. This severely limits the operation of immediate indefeasibility in Saskatchewan and elsewhere, if followed by judges in other Torrens jurisdictions.

Is the reasoning of Chief Justice Laing in *CIBC v. Registrar of Titles [Saskatchewan]* applicable to the *Land Title Act* of BC? Is there a requirement in the Act that a purchaser of the fee simple title deal with a registered owner or proprietor?

Section 25.1(1) refers to a person who purports to acquire land or an estate or interest in land by registration...., it does not mention from whom the interest is acquired. Section 23(2) deals with the effect of an indefeasible title: “an indefeasible title, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title,” subject to specific exceptions, one of which is the recently amended subsection (i)—“the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree.”

Could it be argued that the effect of section 23 only becomes operative after the common law rule that a forgery is a nullity is applied? But the Act does incorporate the common law in section 25.1(1) and then specifically excepts it for *bona fide* purchasers of the fee simple in subsections (2) and (3). Moreover,

the amendments also repealed section 297(3)—the section that codified the common law by stating that a person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument.

Section 29(2) of the Act refers to “a person contracting or dealing with or proposing to take from a registered owner,” but it is concerned only with the effect of notice of an unregistered interest. And, even it is excepted by the phrase, “Except in the case of fraud in which he or she has participated.”

**In BC a forged mortgage is governed by the common law—it is void and its status is not changed by the fact it is registered.**

Therefore, the reasoning in the *CIBC v. Registrar of Titles, Saskatchewan* case should not be followed by a BC court because there is no statutory requirement in BC’s *Land Title Act* that a purchaser take title from a registered proprietor. Although in the past, the authorities in British Columbia and in other Canadian Torrens jurisdictions have adopted the classic statement by Lord Watson in *Gibbs v. Messer* that makes a distinction between title and identity, it should no longer be accepted as good law in BC now that section 25.1 is the law and section 297(3) has been repealed.

Better that judges in BC refer to the reasoning of Lord Wilberforce in *Frazer v. Walker*, namely, that the argument that a forged instrument could not be validly registered ***was destructive of the whole system of registration and that registration once effected must attract the consequences which the Act attaches to registration*** [emphasis added].

### Conclusion

In my opinion, the effect of the recent amendments to the *Land Title Act* is to create a system of immediate indefeasibility with respect to forged transfers of the fee

simple interest, notwithstanding the use of the word “deemed” in section 25.1 or the reasoning of Chief Justice Laing in the Saskatchewan decision.

But notwithstanding the recent amendments, forged mortgages remain a problem. How does a lender guarantee that it is dealing with the actual person who is the registered owner? The Saskatchewan case is an excellent example of identity theft where even the signature of the attesting lawyer to the forged signatures of the vendors on the transfer form was a forgery. Fortunately, this type of fraud is rare.

And, another problem is that it is now possible for a registered owner to lose his or her property to a *bona fide* purchaser who acquires title from a forged transfer. Even though the Real Owner will be compensated from the Assurance Fund, this may be small consolation for the loss of his or her property.

The Director of Land Titles is considering re-constituting a task force to evaluate proposed statutory changes to resolve these two problem issues.

### (i) The effect of a forged mortgage

According to the Court of Appeal in *Credit Foncier v. Bennett*, a forged mortgage is a nullity and is not valid against the Real Owner’s title. Nor does the fact it is registered provide a “good root of title” to a *bona fide* assignee of the mortgage. In BC a forged mortgage is governed by the common law—it is void and its status is not changed by the fact it is registered. The principle of deferred indefeasibility does not apply to mortgages in BC.

The mortgage will be struck off the Real Owner’s title and the mortgagee/lender will have no claim against the Assurance Fund because it did not lose its interest as a consequence of the operation of the Torrens system.

In BC the mortgage lender’s only recourse is against the crook/forgery—a hollow remedy at best. Future legislative changes to the *Land Title Act* may contain changes that either provide

immediate indefeasibility to forged mortgages or provide for compensation to *bona fide* mortgagees and assignees.

**(ii) The effect of immediate indefeasibility on existing registered owners**

Under the changes to the *Land Title Act*, an existing fee simple owner can lose his or her title to a *bona fide* purchaser who acquires title under a forged transfer. With respect to this issue, future legislative changes may adopt the recommendation of the previous Task Force that a registered owner who loses title as a consequence of the operation of immediate indefeasibility be allowed to argue that he or she should be entitled to have title returned on the basis that he or she has a “substantial connection” to the land. Or, the changes may adopt the New Brunswick model in which an owner in possession cannot lose title; instead the purchaser is compensated for its loss.

The possibility of a fraudulent transaction affecting a person’s title or interest to property is very slight. In fact, it is extremely slight. The track record of claims in the history of the BC Torrens system, which goes back well over a hundred years, demonstrates a very low ratio of claim compared with the volume of real estate transactions or the total number of active titles in the province. The average annual total value of claims paid by the Fund is approximately \$150,000 a year.

Therefore, property owners should not worry about the state of title to their ownership of land.

Moreover, changes to the land title registration system may occur through future amendments to legislation as the Land Title and Survey Authority in conjunction with the province continues to improve an already world-class Torrens system and further increase public confidence in it.

**Note:** There is an exception to a registered owner’s indefeasible title of which many are unaware. It involves the situation of the first indefeasible title registered. It is void as against the title of a person adversely in actual possession of and rightly entitled to the land included in the indefeasible title at the time registration was applied for and who continues in actual possession: section 23(4) of the *Land Title Act*. Could such a claim based on adverse possession arise today?

For a person to acquire title by adverse possession, he or she would have had to be in adverse possession for 60 years prior to 1970 on Crown land and for 20 years prior to 1975 on private, unregistered land. (See section 8, *Land Act*, R.S.B.C. 1996, c. 245 and sections 3(4)(j), 12, and 14 of the *Limitation Act*, R.S.B.C. 1996, c. 266.) It appears doubtful that a claim of adverse possession could arise today; recently, however, there was a decision in which the Canadian Pacific Railway obtained title under the doctrine of adverse possession. ▲

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