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Finding Nemo Dat in the Land Title Act: A Comment on Gill v. Bucholtz

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CASE COMMENT

FINDING *NEMO DAT* IN THE *LAND TITLE ACT*: A COMMENT ON *GILL V BUCHOLTZ*

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The case of *Gill v Bucholtz* is one that perhaps only a property law professor could love. The facts, suggests Madam Justice Newbury of the British Columbia Court of Appeal (BCCA), are "reminiscent of a law-school examination", not only because they place two innocent parties on either side of a rogue and ask who should prevail, but also because they raise unanswered questions about the fundamental nature of British Columbia's title registration system.[1] In a clear and concise judgment, the BCCA answered those questions by re-asserting the common law principle of *nemo dat quod non habet* for interests in land less than the fee simple.

Gill rose to the Court of Appeal as a test case involving interests beyond just those of the parties.[2] In fact, the parties were largely uninterested because

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1 *Gill v Bucholtz*, 2009 BCCA 137 at para 1, 310 DLR (4th) 278 [*Gill*]. A property law professor could not ask for more, except perhaps that the reasons not be released during the last week of classes when students are scrambling to prepare for exams and not wanting to accommodate a significant statement from an appellate court on the foundations of the province's title registration system.

2 It was joined by *Re Oehlerking Estate*, 2009 BCCA 138, 92 BCLR (4th) 234 [*Oehlerking* (BCCA)] which was based on very similar facts, argued by the same counsel, and decided for the same reasons and at the same time as *Gill*.

the potential losses were solely financial and the loser would be compensated regardless of the outcome. At issue was whether title insurers of two mortgagees would pay out the value of two fraudulent mortgages, or whether the title registration system's assurance fund would compensate the holder of the fee simple interest for mortgages that, because of fraud, had been registered against the fee simple interest. As a result, it was the title insurance industry and the provincial Land Title and Survey Authority (LTSA) (which manages the title registration system in British Columbia) that were most interested in the outcome and that carried the case to the Court of Appeal.

The facts, at least insofar as they were massaged to bring the central issue to the fore, were these. In November 2005, a rogue forged the transfer of Mr. Amritpal Singh Gill's fee simple interest in a city lot in Surrey to Ms. Gurjeet Gill. Ms. Gill, who, as the Court noted, "was working in concert with" the rogue, then granted a mortgage to Mr. and Mrs. Bucholtz to secure a $40,000 loan.[3] Both the transfer of the fee simple interest and the grant of the mortgage were registered with the Land Title Office. The following month, Ms. Gill granted another mortgage to the corporate defendant, 4337 Investments Ltd, to secure a $55,000 loan. The company filed to register its mortgage against title, but before it was registered the plaintiff, Mr. Gill, filed a caveat, stopping any further action on the title. The second mortgage to 4337 Investments Ltd remained unregistered, but the case proceeded on the basis that both mortgages, secured by innocent mortgagees from the registered (although fraudulent) holder of title, were registered.

The questions for the court were these: where the holder of the fee simple is a rogue and registered on title because of forgery or other fraud, do innocent mortgagees, who take their mortgages from the registered title holder (the rogue), hold interests that are impervious to the claim of the person wrongfully deprived of his or her title because of fraud? Or, are the mortgages invalid because the mortgagees dealt with a rogue who, under the

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3 *Gill*, *supra* note 1 at para 2. Incidentally, the forgery occurred in the same month the province amended the *Land Title Act* to establish immediate indefeasibility as the organizing principle of the title registration system, at least in respect of fee simple interests.

common law doctrine of *nemo dat quod non habet*, had nothing to give? The Court answered thus:

> The Act preserves the *nemo dat* rule with respect to charges – even where the holder has relied on the register and dealt *bona fide* with a non-fictitious registered owner. The mortgagees in this case did not acquire any estate or interest in Lot 4 on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void, both at common law and under s. 25.1(1) [of the *Land Title Act*].[4]

In effect, the Court ruled that registering a charge, defined in British Columbia's *Land Title Act* (*LTA*) as any property interest less than a fee simple,[5] does not, to use a common metaphor, cure a defect in the charge. This was established in *Credit Foncier Franco-Canadien v Bennett* when the defect lay in the instrument creating the charge.[6] The holder of a mortgage created with a forged instrument is always subject to the claim of the person deprived of his or her interest no matter how many times that mortgage is transferred to *bona fide* purchasers. Now, after *Gill*, even when the instrument creating the mortgage is apparently valid (where it has been executed by the person registered as the holder of the fee simple interest) the mortgage will be invalid if the registered title holder is fraudulently on title. Hence the resurrection, if it were ever dead, of *nemo dat* with respect to charges. Title holders can give only that which they validly hold; if they hold because of fraud, then they have nothing to give.

The lack of protection for purchasers of charges stands in contrast to the security that purchasers of fee simple interests enjoy. Amendments to the *LTA* in 2005 made it clear that an innocent purchaser of a fee simple interest will, by registration of the instrument purporting to transfer the fee simple

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4 *Ibid* at para 26.

5 *Land Title Act,* RSBC 1996, c 250, s 1 [*LTA*].

6 *Credit Foncier Franco-Canadien v Bennett* (1964), 44 DLR (2d) 186, 47 WWR 369 (BCCA) [*Credit Foncier*].

interest, acquire that interest, even if the vendor is a rogue.[7] The *bona fide* purchaser of a fee simple interest will, by registration, hold indefeasible title. The holder of a charge will not. How did the court arrive at this conclusion? Is it a correct interpretation of the *LTA* and prior case law? And finally, what might result if this should remain the rule? We offer our assessment in the discussion that follows.

I. INDEFEASIBILITY AND CHARGES

British Columbia's title registration system is constructed around the fee simple interest. Subject to few exceptions, the holder of a fee simple interest will, on registration of that interest, acquire indefeasible title. Indefeasibility amounts to "conclusive evidence at law and in equity" that the registered holder of a fee simple interest *is* the holder of that interest.[8] Any defects in the fee simple interest are cured on registration.

Until 2005, British Columbia's title registration system laboured with uncertainty over whether it provided immediate or deferred indefeasibility. In a system of immediate indefeasibility, *bona fide* purchasers for value of the fee simple interest acquire indefeasible title on registration of their interest, even if acquired from a rogue on the basis of a forged instrument. In a system of deferred indefeasibility, the moment of indefeasibility is delayed until the holder of the interest is at least one step removed from the void instrument. Thus, if a *bona fide* purchaser acquires a fee simple interest from a rogue and then transfers that interest to another *bona fide* purchaser, the second purchaser would acquire indefeasible title, but the first would not.[9] In 2005, amendments to the *LTA* made it clear that, so far as fee simple interests were concerned, British Columbia's title registration system operated on the basis

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7 *Miscellaneous Statutes Amendment Act (No 2)*, SBC 2005, c 35, ss 12–20. On the amendments, 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.

8 *LTA*, *supra* note 5 at s 23(2).

9 The classic articulation of deferred indefeasibility is *Gibbs v Messer* (1890), [1891] AC 248 (PC) [*Gibbs*].

of immediate indefeasibility.[10] The amendments reiterated the *nemo dat* principle that a void instrument confers nothing, but then carved out exceptions for fee simple interests acquired in good faith and for valuable consideration (subsection 2) as well as those already registered (subsection 3):

> 25.1(1) Subject to this section, 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.
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> (2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who
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> (a) is named in the instrument, and
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> (b) in good faith and for valuable consideration, purports to acquire the estate,
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> is deemed to have acquired that estate on registration of that instrument.
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> (3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who
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> (a) is named in the instrument,
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> (b) is, on the date that this section comes into force, the registered owner of the estate, and
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> (c) in good faith and for valuable consideration, purported to acquire the estate,
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> is deemed to have acquired that estate on registration of that instrument.[11]

The exceptions to the *nemo dat* rule set out in subsections 25.1(2) and (3) apply only to fee simple interests, not to charges. This continues the longstanding approach in British Columbia to treat fee simple interests and charges differently. Most importantly, the registration of a charge does not, under British Columbia's title registration system, confer indefeasibility.

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[10] See Harris, *supra* note 7.

[11] *LTA, supra* note 5 at s 25.1.

Instead of being "indefeasibly entitled," the *LTA* provides that the registered holder of a charge is "deemed to be entitled" to that interest.[12] Since the 1963 decision of the BCCA in *Credit Foncier*, "deemed to be entitled" raises only a rebuttable presumption in favour of the registered holder of the charge.[13] Charges will be subject to the claim of the person who, because of fraud, has been wrongfully deprived of his or her interest. Registration, in other words, does not cure a defect in a charge.

In *Credit Foncier*, a rogue forged a mortgage, registered it, and then assigned it to a third party who had no knowledge of the fraud. The new holder of the mortgage registered its interest and then assigned it to another *bona fide* purchaser who also secured registration. If the concept of indefeasibility applied to charges, then the mortgage would have been valid under both immediate and deferred approaches. The final holder of the charge, having dealt with another *bona fide* purchaser, was one step removed from the void instrument and the rogue. However, the BCCA ruled that the concept of indefeasibility did not apply to charges and, because the mortgage had been created with a void instrument, the interest was subject to the claim of the person wrongfully deprived of that interest.[14]

In 1988, in *Canadian Commercial Bank v Island Realty Investments*, the BCCA revisited and refined the nature of the presumption in favour of a registered charge.[15] In this case, the forged instrument did not create a mortgage. Instead, the rogue forged the discharge of a second mortgage, enabling a *bona fide* third mortgagee to assume the status of second mortgagee.[16] When the mortgagor went bankrupt, and there were insufficient funds to cover the loans secured by the mortgages, the original second mortgagee sought to resume its prior status. At trial, Lander J,

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12 *LTA*, *supra* note 5, s 26(1).

13 *Credit Foncier*, *supra* note 6.

14 *Ibid*.

15 *Canadian Commercial Bank v Island Realty Investments Ltd*, [1988] 3 WWR 376, 23 BCLR (2d) 96 (BCCA) [*Canadian Commercial Bank* cited to WWR].

16 The third mortgagee initially registered its mortgage in third, but did not advance any funds until it assumed second spot.

applying *Credit Foncier*, framed the issue as whether the original second mortgagee would have succeeded at common law. He concluded that it would: the forged discharge was a nullity at common law and therefore of no effect.[17] The original second mortgagee should resume its position. However, Justice Wallace, writing for the BCCA, ruled that "such conclusion would be to remove the protection provided by the Land Title Act for mortgagees who acquired their interest bona fide and for value from the registered owner, a result which I consider runs counter to the whole purpose and effect of the Land Title Act."[18] He distinguished *Canadian Commercial Bank* from *Credit Foncier* on the grounds that in the latter case, the defect lay in the instrument creating the charge. In *Credit Foncier* the mortgagees had not dealt with the registered holder of the fee simple interest, whereas in *Canadian Commercial Bank* they had.

In the aftermath of *Canadian Commercial Bank*, then, the law relating to indefeasibility and charges in British Columbia seemed relatively straightforward. While *Credit Foncier* established a fundamental distinction between the way the title registration system deals with fee simple interests and charges (according more protection to the former and less protection to the latter), *Canadian Commercial Bank* made it clear that so long as the registered holder of the charge dealt with the registered holder of the fee simple interest, the courts would uphold the presumption in favour of the charge's validity.

But what if the registered holder of the fee simple interest did not, because of fraud, enjoy indefeasible title? That is, what if the registered holder of the fee simple interest were a rogue, and therefore subject to the exception to indefeasibility which prevented him or her from acquiring indefeasible title when registering a fraudulently acquired fee simple interest? That exception is set out below:

> 23(2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other

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17 *Canadian Commercial Bank v Island Realty Investments Ltd* (1986), 2 BCLR (2d) 55 at 63 (available on QL) (BCSC).

18 *Canadian Commercial Bank*, *supra* note 15 at 380.

> persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following: . . .
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> > (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree.[19]

Neither *Credit Foncier* nor *Canadian Commercial Bank* involved a deficiency in the fee simple interest. However, in *Canadian Commercial Bank* the BCCA seemed to assume that even if there were a defect in the fee simple interest, this defect would not affect the holder of a charge who had dealt in good faith with the registered holder of the fee simple interest:

> An important exception to the general principle is provided by [section 23(2)(i)] where the document of title relied upon is a fraudulent transfer. In such circumstance the transferee cannot obtain title although he can, by a subsequent transfer or charge, create a valid title in favour of the bona fide transferee or mortgagee.[20]

This suggestion was consistent with an earlier British Columbia Supreme Court (BCSC) decision in *Kwan v Kinsey*, where, as in *Gill*, the rogue held the fee simple interest and therefore did not hold indefeasible title. In considering the validity of the mortgage granted by the registered holder of the fee simple interest (the rogue), Munroe J concluded that the mortgage was valid because the mortgagee had dealt for value and in good faith with the registered holder of title.[21]

By the time *Gill* came to the courts a number of things were clear. First, and most importantly, charges are not indefeasible, whatever their pedigree. The holders of charges simply enjoy a presumption that they are valid. Second, this presumption can be rebutted if the charge is created with a void instrument. It does not matter if the current holder of the charge is one or many transactions removed from the void instrument; the charge remains

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19 *LTA*, *supra* note 5 at s 23(2).

20 *Canadian Commercial Bank*, *supra* note 15 at 380 [emphasis in original].

21 *Kwan v Kinsey* (1979), 15 BCLR 31at 53, 10 RPR 44 (BCSC) [*Kwan*]. Munroe J provided no further explanation.

susceptible to the claim of the person wrongfully deprived of that interest. Finally, a charge will remain presumptively valid even if its status depends on a void instrument so long as the void instrument did not create the charge.

However, it was less clear, particularly in the aftermath of the 2005 *LTA* amendments, whether the presumption in favour of the validity of a registered charge could withstand the inability of the registered holder of the fee simple interest to establish indefeasible title because he or she had participated in fraud. This was the situation that presented itself in *Gill*.

II. THE DECISIONS IN *GILL V BUCHOLTZ*

Justice Barrow's trial court decision in *Gill v Bucholtz* offered the first sustained judicial analysis of the status of a charge derived from the registered holder of a fee simple interest who is on title because of fraud and therefore does not enjoy indefeasible title.[22] Barrow J understood that he was bound to follow *Kwan*, but also explained why he thought it was properly decided. He acknowledged that the *LTA* conferred indefeasibility on fee simple interests while preserving the *nemo dat* rule for charges, but characterized the tension between the different treatment of fee simple interests and charges as "more apparent than real."[23] He elaborated further:

> That is so because while the *Act* clearly preserves the principle in relation to charges, at the same time it clothes the registered title holder with an indefeasible right to deal with the property. Thus from the perspective of a mortgagee dealing with the registered title holder *bona fide* and for value, the title holder owns that which is transferred. Viewed from that perspective, it is not inconsistent with the provisions of the *Act* which preserve the *nemo dat quod non hab[e]t* principle to find that a registered owner who acquired title through fraud can still grant a valid charge on the property.[24]

Barrow J also rejected the argument from the LTSA that the risk associated with fraud should fall on the mortgagee because it was the party

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22 *Gill v Bucholtz*, 2008 BCSC 758, 294 DLR (4th) 688.

23 *Ibid* at para 39.

24 *Ibid*.

dealing with the fraudster. The mortgagee is in the best position to detect the fraud, suggested the LTSA, and the title registration system should create incentives for mortgagees to act with utmost care. Barrow J responded:

> While there is an attraction to the argument that the mortgagee, who deals with the fraudster, is in a better position to detect fraud, that ability is, it seems to me, more apparent than real. The fraudster appears before the mortgagee as the registered owner. In this case, the fraudster is not impersonating someone other than the registered owner. The ability of the mortgagee to detect the underlying fraud is thus limited. Moreover, to require a mortgagee to do so, would undermine the very purpose of the land title system, a system whose object is, in the words of Lord Watson,
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> > to save persons dealing with the 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. [25]

Barrow J's appeal to the general principle animating title registration, as famously articulated by Lord Watson in *Gibbs v Messer*—that a purchaser should be able to rely on the state of title as depicted in the land registry—revealed his preference for a robust title registration system that operates to secure the interests of *bona fide* purchasers.[26] On appeal, the LTSA challenged the decision on the grounds that while the general principle might be important, British Columbia's title registration system modified it in important respects:

> The Court below erred by falling into the trap of taking a broad statement concerning the purpose and intent of Torrens systems of land title registration generally and using it to arrive at an interpretation of how British Columbia's land title system has been implemented by the legislature. In doing so the Court altered the legislatively chosen balance between the protection of innocent land owners, the protection of innocent charge

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25 *Ibid* at para 49 citing *Gibbs*, *supra* note 9 at 254.

26 Several months later, Barrow J decided *Oehlerking Estate*, 2008 BCSC 1648, [2009] BCWLD 1192, which was based on very similar facts for the same reasons he had set out in *Gill*.

> holders and the degree to which the public would assume responsibility for such fraud through the Assurance Fund.[27]

By contrast, the respondent mortgagees emphasized the general policy rationale underlying title registration. They suggested that the LTSA was asking the Court "to turn the clock back to an earlier time, a time predating the Torrens system when title was not assured."[28] Furthermore, they characterized the LTSA's approach as inconsistent with the general framework of the *LTA*, and asserted that its proposed interpretation "would defeat the intention of the Act and cripple the carefully thought-out scheme crafted by the legislature."[29]

Newbury JA, writing for a unanimous BCCA bench, began by highlighting the uncertain extent of indefeasibility in British Columbia and asserting that the 2005 amendments "have added to the jigsaw puzzle of provisions and case authority without stating a unifying principle."[30] Disinclined to engage in an analysis of the general policy of title registration systems, Newbury JA emphasized that not all Torrens systems are the same and, therefore, that the analysis should "focus on the 'grammatical and ordinary sense' of the words of the Act rather than on broad public conceptions or expressions of the policy underlying Torrens systems in other jurisdictions or other times."[31]

For Newbury JA, the language of the *LTA* revealed a fundamentally different approach to fee simple interests and charges. British Columbia's title registration confers indefeasibility on the fee simple, but maintains the common law *nemo dat* rule for charges. Whether the mortgage itself is forged, as in *Credit Foncier*, or the underlying fee simple from which the mortgage is granted is invalid, as in *Gill*, "in both situations, the mortgage is

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27 *Gill, supra* note 1 (Factum of the Appellant at page ii).

28 *Ibid* (Factum of the Respondent at page ii).

29 *Ibid* (Factum of the Respondent at para 5).

30 *Gill*, *supra* note 1 at para 1.

31 *Ibid* at para 17.

ineffective at common law to pass any interest: *nemo dat*."[32] This has become clearer, she concluded, after the new section 25.1(1) which "reinforces the point that the mortgage remains void notwithstanding registration."[33] She distinguished *Kwan*, where the BCSC upheld the validity of a mortgage granted by the holder of the fee simple on title because of fraud, on the grounds that it was decided before the amendments which clarified that fee simple interests and charges would be treated differently.[34] Finally, Newbury JA concluded by emphasizing the appropriate institutional role of the courts:

> It may be that in a perfect Torrens system, any person lending money *bona fide* on the security of a mortgage granted by the registered owner, would have a valid charge. But there are sound policy arguments on both sides of the question. The Legislature of British Columbia would appear to have adopted the policy that the cost of frauds perpetrated against mortgagees and other chargeholders should be borne not by the public (as the funders of the Assurance Fund) but by lenders and other chargeholders themselves. Whether this policy choice is a good one or not is not for us to decide. We must give effect to the language of the statute in its ordinary and grammatical meaning.[35]

The respondent mortgagees sought leave to appeal to the Supreme Court of Canada (SCC). They chose the companion case of *Re Oehlerking Estate*, which involved similar facts to those in *Gill* and was decided for the same reasons, as the vehicle for appeal.[36] In seeking leave, which the SCC denied, counsel for the mortgagees suggested that the decision of the BCCA was "a radical break with established law and practice," and that there was considerable irony in interpreting the 2005 amendments, which were

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32 *Ibid* at para 21.

33 *Ibid*.

34 *Ibid* at para 24. Newbury JA also expressed a number of other concerns regarding *Kwan*.

35 *Ibid* at para 27.

36 *Oehlerking* BCCA, *supra* note 2.

"intended to strengthen indefeasibility, not undermine it," as the basis for weakening the protection for *bona fide* holders of mortgages.[37]

The earlier pre-amendment decisions which considered the issue did suggest the holder of a mortgage who took the charge from the registered holder of the fee simple held a valid charge even if the holder of the fee simple interest was on title because of his or her fraud.[38] It is also clear that the concept of indefeasibility does not (at least since *Credit Foncier*) apply to charges, so the amendments to establish a system of immediate indefeasibility for the fee simple interest had little bearing on charges. However, the statement in section 25.1(1) that registration of a void instrument does not confer any interest was a clearer and more emphatic articulation of the *nemo dat* principle than the *LTA* provided before 2005. Moreover, an instrument purporting to transfer a property interest that is signed by a person who is on title because of her fraud, as in *Gill*, is void at common law and would therefore appear to fall within the language of section 25.1(1). The decision that the mortgages in *Gill* and *Re Oehlerking Estate* were invalid may not have been anticipated by the drafters of the amendments, but it is a reasonable reading of the amended *LTA*. Now that the courts have spoken, the question remains whether the legislature should respond to undo the *nemo dat* rule when the purchaser of a charge deals in good faith with the registered holder of the fee simple interest who is on title because of fraud.

III. TITLE REGISTRATION AND RISK

Title registration systems are designed and implemented to facilitate transfers of interests in land. They emerged in the nineteenth century as a result of an explicit policy choice in a number of common law jurisdictions to provide purchasers of interests in land with greater security than existed at

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37 *Oehlerking* (BCCA), *supra* note 2, leave to appeal to SCC refused, [2009] SCCA No 228 (QL) (Memorandum of Argument of GET Acceptance Corporation and Pacific Asset Fund Inc, 3 June 2009, paras 1, 3).

38 See e.g. *Kwan*, *supra* note 21 at 53; *Canadian Commercial Bank, supra* note 15 at 380.

common law.[39] Most importantly, title registration systems include state guarantees of title so that a purchaser of an interest in land can rely on the state of title as reflected in the land registry; beyond a title search in the land registry, there is no further need to investigate the veracity of the registered title holder's claim.

However, there are a number of important variations in title registration systems. These variations reflect policy choices about the allocation of risk. For example, should a purchaser who has dealt with a rogue or acquired their interest on the basis of a void instrument acquire indefeasible title on registration of that interest (immediate indefeasibility) or should the system require that a purchaser be at least one transaction removed from the rogue or void instrument (deferred indefeasibility)? Should the principle of indefeasibility, whether deferred or immediate, extend only to the fee simple interest or to all interests in property? Should those wrongfully deprived of an interest in land under title registration receive compensation for their loss?

In 2001, a joint task force of the provincial government and Law Society of British Columbia issued a report addressing some of these questions in relation to the province's title registration system.[40] Its principal recommendation was that the province should implement immediate indefeasibility for fee simple interests. Registration should be, as section 23(2) of the *LTA* suggests, conclusive evidence at law and in equity of ownership. To delay indefeasibility until an innocent purchaser is at least one step removed from the void instrument undermines public confidence in the system. Innocent purchasers of the fee simple interest should hold indefeasible title even if they acquired the fee simple interest on the basis of a void instrument. In 2005, British Columbia followed the task force recommendation and established immediate indefeasibility as the organizing

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39 On the introduction of title registration in Canada, see Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2008).

40 Ministry of Sustainable Resource Management Land Title Branch, Report of the Joint Task Force, "Compensation for Systems and Administrative Error Under the Land Title Act," (December 2001) [Task Force].

principle for the title registration system so far as fee simple interests were concerned.[41]

In the case of mortgages and other interests in land less than the fee simple, the task force suggested that the concept of indefeasibility was inappropriate. There were too many ways in which instruments purporting to create these interests might be invalid for the system to guarantee their validity. Registration of a mortgage, therefore, should not be expected to cure any defects in the interest. However, the task force did suggest that where a mortgage was invalid because the instrument creating the mortgage was forged, the title registration system should compensate the innocent mortgagee. Similarly, the innocent assignee of a forged mortgage should also be entitled to compensation. In effect, the task force recommended reversing the decision in *Credit Foncier*, but only with respect to compensation. The holder of a mortgage would still, under section 26(1) of the *LTA*, only be deemed to be entitled rather than indefeasibly entitled to the interest, but it should receive compensation if deprived of that interest because of fraud.[42]

In the 2005 amendments to the *LTA*, the legislature did not extend indefeasibility to mortgages, nor did it follow the task force recommendation to extend compensation for those deprived of their charge because of fraud. Those drafting the amendments may have assumed, as the task force appears to have done (on the basis of *Kwan*), that mortgagees who dealt with the registered holder of the fee simple interest, even if the holder of the fee simple interest was on title because of its fraud, held a valid mortgage. After *Gill*, this is no longer correct. A mortgagee who does not deal with a fee simple owner with indefeasible title does not hold a valid interest and will not receive compensation.

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41 *LTA*, *supra* note 5, s 25.1(2). See also Harris, *supra* note 7.

42 Task Force, *supra* note 40 at 11:

> The Joint Task Force recommends that the LTA assurance fund provisions be amended to provide compensation to an innocent mortgagee who takes under a forged mortgage, and to an innocent assignee who takes an assignment of a forged mortgage or a valid mortgage by way of a forged assignment. . . . Specifically, LTA should not be amended in a way that purports to confer "immediate" indefeasibility on the charge holder's interest.

The fact that each of the mortgagees in *Gill* held title insurance revealed that some commercial lenders were not prepared to rely on the title registration system or its assurance fund to protect the security for their loans even before the ruling in that case. We suspect that one result of the decision will be to increase the use of title insurance, and therefore increase costs for transactions in land involving charges. In fact, the case appeared to be a no-lose proposition for the title insurance industry: win the case and the losses would be covered by the title registration system; lose the case and make a small pay out to the insured lenders, but gain valuable publicity about the need for title insurance. A review of the publicly available client bulletins from law firms after the BCCA decision reveals a sense of increased risk for lenders who take mortgages as security for loans, and a number of law firms explicitly recommended that their clients consider title insurance.[43]

The question of whether lenders have increased their use of title insurance after *Gill* deserves empirical investigation. Whether increased use of title insurance is a problem, or whether it reveals a problem in British Columbia's title registration system, however, is a different matter.[44] Is it important that the title registration system provide certainty for charge holders? The answer depends on the importance one attaches to the goals of title registration. The overarching goal of title registration systems is to facilitate transfers of interests in land. Achieving that goal depends on public confidence in the title registration system, which is established primarily by

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[43] Financial Services Group, "Client Alert: Fraud Decision Impact on Lenders" Newsletter (April 2009), online: Owen Bird Law Corporation <http://www.owenbird.com> ("[L]enders may consider requiring title insurance coverage for all mortgage loans" at 2); Brenda Lightbody & Mark Baron, "MIABC Annual Legal Report: Annual General Meeting, 2009" Newsletter (2009), online: Richards Buell Sutton LLP <http://www.rbs.ca> ("Title insurance may also be a practical option" at 5); Borden Ladner Gervais Commercial Real Estate Law Group, "Gill v. Bucholtz: The British Columbia Court of Appeal and Mortgage Fraud" Newsletter (May 2009), online: Borden Ladner Gervais <http://www.blg.com> ("Although title insurance is no substitute for a thorough fraud prevention process and appropriate due diligence investigations, it may provide some additional comfort to lenders" at 2).

[44] On title insurance in Canada see Bruce Ziff, "Title Insurance: The Big Print Giveth, But Does the Small Print Taketh Away?" in David P Grinlinton, ed, *Torrens in the Twenty-First Century* (Wellington, NZ: LexisNexis, 2003) 371.

the state guarantee of title. In British Columbia, that state guarantee does not extend to charges. However, the holders of charges have had the benefit of that guarantee when they dealt with the registered holder of the fee simple interest. Charges are not indefeasible, but, having acquired their interest from the person on title, the holder of a charge could be confident that it had acquired the interest from the person with the capacity to transfer that interest. After *Gill*, charge holders cannot have the same confidence. Whether this will not only increase the use of title insurance, but also have a larger destabilizing effect on the title registration system remains to be seen. However, it is something to be monitored if the title registration system is to do effectively what it was designed to do—facilitate transfers of interests in land.

One alternative would be to amend the *LTA* to enhance protections for charge holders. That protection might come by extending indefeasible title to mortgages,[45] or, as the 2001 task force suggested, by compensating mortgagees for the loss of their interest because of fraud. This could include circumstances where the forgery occurred in the instrument creating the charge (as in *Credit Foncier*) and where the holder of the fee simple interest was on title because of fraud and therefore did not enjoy indefeasible title (as in *Gill*). Where a mortgage is invalid because of fraud, it probably does not matter how that fraud was perpetrated if compensation for loss because of fraud is an important element in establishing public confidence in the title registration system. However, if the nature of the fraud is important, then the mortgagee who holds an invalid mortgage because he or she dealt with the registered, albeit fraudulent, holder of the fee simple interest is a more sympathetic figure than the mortgagee who dealt with someone masquerading as the holder of the fee simple interest. In the latter case, one might place some responsibility on the mortgagee for not confirming the identity of the person with whom they were dealing. In the former case, the rogue is on title, so no amount of investigation into his or her identity would uncover the fraud.

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[45] See the argument in favour of this approach in Bob Reid, "Recovery under the Assurance Fund in BC" (2005) 14:2 Scrivener 68 at 73.

Justice Newbury's metaphor of the jigsaw-puzzle to describe the interlocking statutory provisions and case authority that makes up British Columbia's title registration system is certainly apt.[46] An early adopter of title registration, British Columbia has never embraced pure versions of the principles that animate this system of recording interests in land. The guarantee of indefeasible title that comes with registering interests within the system has always been limited in scope and modified in application. Nevertheless, the question of how far a title registration system can stray from core Torrens principles, while retaining public confidence in the system, is an important one. Without clear statutory guidance, common law courts will return to common law principles and, in this instance, to a system designed to secure established interests in land rather than one designed to reduce the risks in transferring interests. If purchasers, including purchasers of charges, are uncomfortable with the levels of risk in the title registration system, then they will turn to other mechanisms such as title insurance to reduce those risks. The extent to which this is happening after *Gill*, and the extent to which this activity creates concerns about the capacity of the title registration system to deliver on its promise to simplify the transfer of interests in land, deserve further study. In the meantime, law professors will continue to explain to their students the interplay of common law and title registration principles that characterizes British Columbia's land law, lawyers will continue to advise their clients of the particular risks associated with charges, and the purchasers of charges will have to decide whether to manage their risk with title insurance.

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[46] *Gill*, *supra* note 1 at para 1. For a recent effort to fuse some of the pieces of the puzzle and establish a coherent approach on the effect of notice on prior unregistered interests see the report of the British Columbia Law Institute, "Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests" BCLI Report No 58 (January 2011), online: British Columbia Law Institute <http://www.bcli.org>.