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Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the Land Title Act

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INDEFEASIBLE TITLE IN BRITISH COLUMBIA: A COMMENT ON THE NOVEMBER 2005 AMENDMENTS TO THE *LAND TITLE ACT*

*By Douglas C. Harris**

In November 2005, as part of an omnibus statute to amend 11 different Acts, the British Columbia government made several significant changes to the *Land Title Act* (the November 2005 amendments).[1] The government announced that the changes to the title registration system would "ensure immediate legal 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".[2] In an effort to assuage fears of those who had acquired interests in a system that, if it needed to be fixed, had been somehow less than secure, the government's information bulletin assured the public that British Columbia's registration system was "already highly regarded" and "considered world-class". The changes, then, were to be understood as improvements to what was already a good title registration system.

Whatever its quality, the title registration system laboured with uncertainty over its central organizing principle. Did title registration in British Columbia operate on the basis of immediate or deferred indefeasibility? The difference between the two principles lies in the security they provide to the person who in good faith acquires an interest in land based on a void document such as a forged transfer instrument. Put simply, under immediate indefeasibility the registered owner of a fee simple interest is immune to a challenge that the registered owner acquired the interest on the basis of a void instrument.[3] Under a deferred system the registered owner of a fee simple interest only holds indefeasible title if he or she is one step away from the fraudulent activity. A person who acquires an interest on the basis of a void instrument remains vulnerable to the claim of the person who has been wrongfully deprived of his or her interest.[4]

The language in the government's information bulletin—"immediate legal certainty"—suggests it intended to establish that British Columbia's title registration system rests on a foundation of immediate indefeasibility. If that were the intent, is that what the November 2005 amendments have done? Is it now unequivocally clear that British Columbia operates on the basis of immediate

* I thank my colleagues who teach property law at the law faculties of the University of British Columbia and the University of Victoria. Any errors or omissions are mine alone.

indefeasibility? And if so, are property interests more secure as a result? This article reviews the previous sources of uncertainty in the *Land Title Act* (the "*LTA*"), outlines the changes to it, and suggests their effect on those whose property interests are affected by fraudulent activity. It begins with a brief description of the manner in which the common law treated forged instruments purporting to transfer an interest in land and then outlines the nature of, and different approaches to, indefeasible title in title registration systems.

COMMON LAW CONVEYANCING

Under the common law, the transfer of property interests could be a complex and risky undertaking in which the risk fell entirely on the purchaser. The foundational rule, captured in the Latin maxim *nemo dat quod non habet* (no one can give that which he or she does not have), placed the onus on the purchaser to confirm the vendor's title. This involved tracing the chain of title back through all prior transactions (commuted to all transactions in the preceding sixty years) in an effort to establish that the vendor did in fact have the interest that he or she was purporting to transfer. If any transaction in that chain were invalid, the result of a forged document or fraudulent activity, then the vendor's interest was subject to the claim of the person who because of the fraud had lost his or her interest. The purchaser's title would also be subject to the same cloud. Similarly, if a good-faith purchaser acquired a property interest from a rogue on the basis of a forged transfer instrument, at common law the purchaser acquired nothing except a cause of action against the rogue. In short, the common law protected settled interests in land over those acquired in good faith under a transfer.

INDEFEASIBLE TITLE

Whereas at common law a forged instrument in the chain of title might undermine an owner's interest, in a title registration system the principle of indefeasibility secures the registered owner's interest unless that person has participated in fraud to acquire that interest. Title registration systems do not protect rogues. Even if registered, the rogue's interest is always subject to the claim of the person wrongfully deprived of an interest in land. With this exception, title registration operates on the principle that the person named in the registry as the owner of an interest in land *is* the owner of that interest. As a result, prospective purchasers have to go no further than the registry to determine conclusively who holds title. The effect is to simplify the transfer of property interests and to reduce the risk for those acquiring interests. Title registration systems protect the sanctity of the transaction; they provide dynamic security.[5]

Within title registration systems there are two variations of the indefeasibility principle: immediate indefeasibility and deferred indefeasibility. Under the former, the person acquiring an interest in land holds indefeasible title even if that person acquires an interest, acting in good faith, on the basis of a forged instrument. In a deferred system, indefeasible title is delayed until the person

acquiring the interest does so from the person who is the registered owner and is, therefore, at least one step removed from the rogue and the forged transfer instrument. The following example provides an illustration of the differences.

B concludes a contract of purchase and sale with R for the fee simple interest in Blackacre. However, R is a rogue who represents herself as O, the registered owner of the fee simple interest in Blackacre. R forges O's signature on the transfer instrument, which B registers. In a system of immediate indefeasibility, the fact that B has dealt with a rogue does not matter. Once B registers the transfer instrument, he holds indefeasible title. O, who has been wrongfully deprived of an interest in land because of fraud and who now cannot reclaim an interest, would receive compensation. In a title registration system based on deferred indefeasibility, however, B's interest would be subject to O's claim to recover title. The purchaser who takes under a forged instrument does not acquire indefeasible title. To extend the example a little further, if B sold the fee simple interest in Blackacre to C and C became the registered owner before the fraud was discovered, then C, who has dealt with the registered owner and therefore has not acquired the interest on the basis of a forged transfer instrument, would hold indefeasible title even in a system based on deferred indefeasibility.

In terms of allocating risk, the principle of indefeasible title protects the person registered on title at the expense of the person wrongfully deprived of an interest in land. That protection might be deferred to encourage a purchaser to ensure that he or she is dealing with the person on title, but even so, title registration systems mark a clear departure from the common law where the person wrongfully deprived would recover the lost interest. It reflects a choice in jurisdictions with title registration systems to prefer the sanctity of the transaction over settled property interests. The person deprived of an interest in a title registration system, but who would have recovered that interest at common law, receives compensation from an assurance fund.[6] Compensation rather than rectification must suffice in a system designed to facilitate transfers.

IMMEDIATE OR DEFERRED INDEFEASIBILITY?

In British Columbia, where the colonial government introduced title registration in the 1860s,[7] it has not been clear whether that system operated on the basis of immediate or deferred indefeasibility. The source of confusion lay in the *Land Title Act,* which appeared to point in both directions.

The principle of indefeasibility is established in s. 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 persons, that the person named in the title *as the registered owner* is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following…[8] [emphasis added]

To hold a registered fee simple interest is to have "conclusive evidence at law and in equity" of ownership. The emphasized passage is part of the November 2005 amendments to the *LTA*. The added words do not change the meaning of the section, but they do appear to clarify that it is the person who holds the reg-

istered fee simple interest that has indefeasible title, not someone who holds a lesser estate or interest.

Fraud in which the registered owner has participated is one of the exceptions to indefeasible title. Before the November 2005 amendments, s. 23(2)(i) provided that indefeasible title was subject to

> the right of a person to show fraud, including forgery, in which the registered owner, or the person from or through whom the registered owner derived his or her right or title otherwise than in good faith and for value, has participated in any degree.[9]

If the person on title had participated in fraud, then that person's interest was vulnerable. But if he or she had acquired an interest "in good faith and for value", even if he or she dealt with the party committing fraud, then the person held indefeasible title. In short, the section appeared to establish the principle of immediate indefeasibility. Although simplified, the meaning of this section does not appear to have changed after the November 2005 amendments. The registered owner of a fee simple interest holds indefeasible title subject to

> the right of the person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree.[10]

Unless the person on title is a party to the fraud, the registered owner of a fee simple interest holds indefeasible title, whether or not that person acquired that interest on the basis of a forged document. This is immediate indefeasibility.

However, the *LTA* also contained another section that apparently pointed towards deferred indefeasibility. In establishing an assurance fund the *LTA* provided that a person who purports to acquire an interest on the basis of a void instrument, such as a forged document, does not acquire that interest:

> A person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument.[11]

This section, added in 1978, appeared to establish deferred indefeasibility as the overarching principle in the registration system.[12] The registered owner of a fee simple interest who had participated in fraud to acquire that interest did not hold indefeasible title (s. 23(2)(i)), and neither did the person who acquired from a rogue under a void instrument (s. 297(3)).

These two sections, in uneasy juxtaposition across many sections of the *LTA*, sent mixed if not conflicting signals. Section 23 appeared in the heart of the *LTA* close to the provisions that established the other key principles of a title registration system: an instrument purporting to transfer an interest in land does not transfer that interest until it is registered (s. 20); and notice of a prior unregistered interest does not affect a subsequent registered interest (s. 29). Section 297(3) appeared tucked away in the provisions on the assurance fund. Nonetheless, the section only made sense if it applied to the *LTA* as a whole, and the limited case law confirmed this reading. In law, British Columbia had a title registration system based on deferred indefeasibility.[13] In practice, however, the system appeared to operate on the principle of immediate indefeasibility: purchasers kept their newly acquired fee simple interest; wrongfully deprived owners received compensation.[14]

IMMEDIATE INDEFEASIBILITY IN BRITISH COLUMBIA?

A provincial task force report in 2001 on the state of title registration in British Columbia recommended changes.[15] Among other things, the report suggested that British Columbia should adopt immediate indefeasibility, at least with respect to fee simple interests, on the grounds that it would provide greater protection for the *bona fide* purchaser, reduce concerns about fraud, and generate greater public confidence in the title registration system. It also suggested, however, that the courts should retain some residual discretion to rectify the title of the person wrongfully deprived of an interest if to do otherwise was inequitable and unjust. In these circumstances, the innocent purchaser should receive compensation.

Four years later the government took a few tentative steps towards implementing some of the recommendations. In the November 2005 amendments the government repealed s. 297(3) and added s. 25.1. Eliminating s. 297(3), which provided that a person taking under a void instrument acquires no interest, seems to confirm immediate indefeasibility in British Columbia. Coupled with the renewed statement in s. 23(2)(i) that it is only the registered owner who has participated in fraud who does not hold indefeasible title, the new direction of the title registration system appears clear. However, the new s. 25.1 reintroduces a degree of uncertainty.

Section 25.1 begins with an assertion that registration does not assist the person who purports to acquire an interest in land, including a fee simple or lesser interest, based on a void instrument. However, that statement is immediately qualified for the registered owner of a fee simple interest. A person who acquires or has acquired a fee simple interest "in good faith and for valuable consideration" is "deemed to have acquired that estate" notwithstanding that the interest is based on a void instrument.

> 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.
>
> (2) 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 to have acquired* that estate on registration of that instrument.
>
> (3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who
>
> (a) is named in the instrument,
>
> (b) is, on the date that this section comes into force, the registered owner of the estate, and
>
> (c) in good faith and for valuable consideration, purported to acquire the estate,
>
> is *deemed to have acquired* that estate on registration of that instrument.[16] [emphasis added]

This addition to the *LTA* appears to establish immediate indefeasibility in British Columbia for those who acquire and register fee simple interests (subs. 2) or who already hold registered fee simple interests (subs. 3). The fact that indefeasibility applies only to the estate in fee simple coincides with other sections of the *LTA*, discussed below, that treat the estate in fee simple and other interests differently. However, unlike s. 23(2), which establishes that "indefeasible title…is conclusive evidence at law and in equity…that the registered owner is indefeasibly entitled to the estate in fee simple", under s. 25.1 the person acquiring on the basis of a void instrument is only "deemed to have acquired that estate". This is an important distinction that may weaken the protection for fee simple interests acquired under a void instrument.

"INDEFEASIBLY ENTITLED" AND "DEEMED TO HAVE ACQUIRED"

The fee simple interest acts as the cornerstone of the title registration system. Once the owner of a fee simple interest registers that interest, the holders of all other lesser interests register their interests as charges against the fee simple interest. The *LTA* defines "charges" broadly as "an estate or interest in land less than the fee simple".[17] Section 26(1) of the *LTA* describes the effect of registering a charge:

> A registered owner of a charge is *deemed to be entitled* to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered…[18]

The holders of registered property interests other than the estate in fee simple are "deemed to be entitled" to their interests; they are not "indefeasibly entitled" to those interests. Based on this distinction, the courts have treated registered fee simple interests and charges differently. So long as he or she is not a party to the fraud, the holder of a registered fee simple interest can successfully repel the claim of the person wrongfully deprived of that interest. This is the meaning of indefeasible title. However, the holder of a lesser interest such as a mortgage, which must be registered as a charge, will always hold that interest subject to the claim of the person wrongfully deprived of that interest.[19] In fact, the rule is somewhat narrower. If the registered owner of the charge acquired the interest on the basis of a void instrument, or if there were a void instrument in the chain of transactions between the person wrongfully deprived of their interest and the registered owner, then the registered owner of the charge would hold that interest subject to the claim of the person wrongfully deprived of it.[20] As a result, registering interests in land other than fee simple interests helps to secure their priority, but it does not confer indefeasibility, either immediate or deferred. In British Columbia, that status is reserved to the registered fee simple interest alone.

Does this use of "deemed" in s. 25.1—a word that was pivotal in the interpretation of s. 26—mean that the registered owner of a fee simple interest acquired on the basis of a void instrument holds something less than indefeasible title? If the government intended the system to confer indefeasible title on the purchaser who, acting in good faith, had acquired a fee simple interest on the basis of a forged document, then why did it not use that language?

One scholar of statutory drafting suggests that "deemed" is a useful word when it is used "to establish a legal fiction either positively by 'deeming' something to be something it is not or negatively by 'deeming' something not to be something which it is". However, it can also be "dangerous" by creating "ambiguity if the context raises a doubt whether the 'deemed' fact is to be accepted conclusively or is to be rebuttable by evidence".[21] This was the problem in the interpretation of s. 26. Did the statement that the registered owner of a charge was "deemed to be entitled" to that interest establish that fact conclusively or raise a rebuttable presumption that could be overturned with evidence that there was a void instrument somewhere between the person wrongfully deprived of their interest and the registered owner? Evaluating these words in the context of the *LTA* as a whole, which used the language of indefeasible title and "conclusive evidence" to describe fee simple interests, the courts have held that "deemed" only raises a rebuttable presumption.[22]

If "deemed" in s. 25.1 were to raise a rebuttable presumption that the owner of the fee simple interest held indefeasible title, then what evidence might be offered to rebut that presumption? With charges, evidence of a void instrument is sufficient. However, in s. 25.1 that evidence is expressly ruled out. Notwithstanding a void transfer instrument, the registered owner of a fee simple interest "is deemed to have acquired that estate". It seems, therefore, that there is less room for ambiguity. "Deemed" in the context of s. 25.1 comes close to establishing conclusively that the registered owner of a fee simple interest holds indefeasible title even if the owner acquired that interest, in good faith and for value, on the basis of a void instrument. In short, it moves British Columbia towards a title system based on the principle of immediate indefeasibility. Purchasers will be protected even if they deal, unwittingly, with a rogue; those wrongfully deprived of an interest in land will be compensated.

However, the government chose not to use the language of "indefeasible title" or "conclusive evidence", and given the judicial interpretation of s. 26, that choice must be considered meaningful. It means, in the author's view, that while the title registration system in British Columbia is certainly not based on deferred indefeasibility, it must be considered close to, but still approaching immediate indefeasibility for registered fee simple interests. The fact that a purchaser of a fee simple interest in good faith and for value is only "deemed" to have acquired that interest when the transfer instrument is void suggests that there may still be circumstances in which that purchaser will not acquire that interest. Although protected, his or her interest may not be so secure as to be indefeasible.

CONCLUSION

After the November 2005 amendments to the *Land Title Act*, immediate indefeasibility must now be recognized as the informing principle in British Columbia's title registration system. However, the distinction between fee simple interests and all other interests in land remains. The principle of indefeasibility still only applies to fee simple interests; charges remain defeasible if based on a void instrument. Moreover, while the move towards immediate indefeasibility is clear, the

changes stop just short of adopting it fully. The registered owner of a fee simple interest who has acquired that interest through a void instrument is only "deemed" to have acquired that interest. The *LTA* does not establish that registered ownership is "conclusive evidence at law and in equity" of the registered owner's interest. Given the past interpretation of "deemed" in the *LTA* in relation to charges, this is an important distinction. As a result, it still appears possible that in some circumstances a court might defer the indefeasibility of title for a registered owner who has acquired a fee simple interest in good faith and for value from a rogue.

In terms of overall security of the title registration system, the changes reallocate risk rather than increase the security of the system. Any additional security for the person acquiring the interest is offset by a loss of security for those who, because of fraud, are wrongfully deprived of their interest in land. However, given the structure of the assurance fund, which will compensate those who are wrongfully deprived of an interest in land but not the innocent purchaser who acquires an interest from a rogue, the principle of immediate indefeasibility means that the costs of fraud will be distributed throughout the system rather than falling exclusively on the victims of fraud.

ENDNOTES

1. *Miscellaneous Statutes Amendment Act (No. 2)*, S.B.C. 2005, c. 35, ss. 12–20.
2. B.C. Land Title & Survey Information Bulletin, "Land Title Act: Amendments to Assurance Fund Provisions", November 25, 2005, online: <http://www.ltsa.ca/ltsa_press.htm>.
3. See the frequently cited statement of immediate indefeasibility in *Frazer v. Walker*, [1967] 1 All E.R. 649.
4. The classic statement on deferred indefeasibility is found in *Gibbs v. Messer*, [1891] A.C. 248 (P.C.).
5. Thomas W. Mapp, *Torrens' Elusive Title: Basic Principles of an Efficient Torrens' System* (Edmonton: University of Alberta Faculty of Law, 1978), describes, at pages 59–60, title registration systems as establishing "a new relationship between security of ownership and facility of transfer, in favour of the latter".
6. See H.L. Robinson, "The Assurance Fund in British Columbia" (1952) 30 Can. Bar Rev. 445.
7. The Legislative Assembly of Vancouver Island introduced key elements of a title registration system with the *Vancouver Island Land Registry Act* in 1861.
8. *Land Title Act*, R.S.B.C. 1996, c. 250, s. 23(2), as am. by S.B.C. 2005, c. 35, s. 12(a).
9. *Ibid.*, s. 23(2)(i).
10. *Supra* note 8, s. 23(2)(i), as am. by S.B.C. 2005, c. 35, s. 12(b).
11. *Supra* note 8, s. 297(3), rep. by S.B.C. 2005, c. 35, s. 18(c).
12. *Land Title Act*, S.B.C. 1978, c. 25, s. 277(2).
13. *Kwan v. Kinsey*, [1979] B.C.J. No. 468 (S.C.), para. 10, citing *Gibbs v. Messer*: "the defendant Kinsey has no title against Mrs. Kwan, the true registered owner, he having obtained title under a forged deed of land." Although the case did not turn on a determination of immediate or deferred indefeasibility, Mr. Justice Sigurdson in *Vancouver City Savings Credit Union v. Hu* (2005) B.C.S.C. 712 at paras. 32–35, cited *Gibbs v. Messer* to describe the law in British Columbia.
14. Bob Reid, "Recovery under the Assurance Fund in BC" (2005) 14 The Scrivner 68.
15. 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" (2001) [unpublished].

16. *Supra* note 8, as am. by S.B.C. 2005, c. 35, s. 14.
17. *Ibid.*, s. 1.
18. *Ibid.*, s. 26(1).
19. In *Credit Foncier Franco-Canadien v. Bennett* (1963), 43 W.W.R. 545 (B.C.C.A.), the court held that the fraudulent mortgage, which had been assigned to one innocent party who had registered an interest and then assigned it to another (the plaintiff) who had also registered an interest, was subject to the claim of the person who had wrongfully been deprived of his interest in land. The void instrument was at the root of the plaintiff's registered mortgage.
20. In *Canadian Commercial Bank v. Island Park Realty Investments Ltd.* (1988), 23 B.C.L.R. (2d) 96 (C.A.), the court held that the registered owner of a mortgage had priority over a prior mortgagee whose mortgage had been fraudulently discharged and thus was no longer registered because the void instrument, the fraudulent discharge, did not lie in the chain of title. The registered owner of the mortgage had dealt directly with the registered owner of the fee simple interest. See also *VanCity v. Hu*, in which the court rectified the fraudulently discharged mortgage, distinguishing the ruling in *Island Park Realty* on the ground that the subsequent mortgagee in *VanCity v. Hu* had not relied on the state of title reflected in the registry to advance the funds under the mortgage.
21. G.C. Thorton, *Legislative Drafting* (Toronto: Butterworths, 1987) at 86–87.
22. See *Credit Foncier*, *supra* note 19.