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# Title Registration and the Abolition of Notice in British Columbia

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# TITLE REGISTRATION AND THE ABOLITION OF NOTICE IN BRITISH COLUMBIA

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## I. INTRODUCTION

> "The central dilemma of land law is how to reconcile security of title with ease of transfer."[1]

The equitable doctrine of notice cuts an illustrious figure in the common law tradition as one of the principal mechanisms for balancing the competing goals of securing title for existing interests in land with facilitating their transfer.[2] Considered "the polar star of equity",[3] the doctrine of notice provides that purchasers of legal interests in land take those interests subject to prior and competing equitable interests if they have notice of the prior interests. With notice, prior equitable interests remain as burdens on subsequent legal interests; without notice, purchasers acquire unencumbered title. In this way, the doctrine of notice balances protection

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1 Rt Hon Sir Robert Megarry & Sir William Wade, *The Law of Real Property*, 8th ed (London, UK: Sweet & Maxwell, 2012) at para 8-002.

2 Alison Clarke & Paul Kohler, *Property Law: Commentary and Materials* (Cambridge: Cambridge University Press, 2005) at 516.

3 *Stanhope v Earl Verney* (1761), 2 Eden 81 at 85, 28 ER 826 (Ch), Lord Henley LC, cited in Megarry & Wade, *supra* note 1 at para 5-102.

for existing interests in land, something the French legal philosopher René Demogue described as a desire for "static security", with protection for those transacting for interests in land, characterized by Demogue as "dynamic security".[4] Sometimes existing interests are secure, other times the transaction. At equity, the extent to which purchasers have notice of prior competing interests determines the outcome.

Notice includes more than just knowledge of a prior equitable interest. Notice can be actual, imputed, or constructive, meaning that courts exercising equitable jurisdiction may find notice where there is actual knowledge, where knowledge can be imputed or implied through an agent, or where the person acquiring the interest ought to know of the prior competing interest. To attempt to defeat a prior interest of which one has notice is to perpetrate a fraud.[5] This is equitable fraud, and distinguishable from common law or *actual* fraud, which requires "dishonesty" and "deprivation", or, put slightly differently, the making of a false representation with the intention that another party will rely on the representation to his or her detriment.[6] At equity, the attempt to defeat a prior, competing interest of which one has notice constitutes fraud.

Statute-based land title registration systems must also find a balance between defending existing interests in land and facilitating transfers. In general, they reflect a policy choice in systems of land law to provide greater certainty for purchasers of interests in land at the expense of those holding existing interests. They give effect to a preference for dynamic security by providing a state guarantee of title that operates through the principle of

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4 René Demogue, "Security" in A Fouilleé et al, eds, *Modern French Legal Philosophy* (Boston: Boston Book Company, 1916) 418 at 427–31 [translated by Mrs Franklin W Scott and Joseph P Chamberlain]. This work came to the attention of common law property scholars through Morris Cohen, "Property and Sovereignty" (1927) 13 Cornell Law Quarterly 8 at 18.

5 See Kevin Gray & Susan Francis Gray, *Elements of Land Law,* 5th ed (Oxford: Oxford University Press, 2009) at paras 8.3.19–29; Bruce Ziff, *Principles of Property Law,* 6th ed (Toronto: Thomson Reuters Canada, 2014) at 469–71; Peter Butt, *Land Law,* 6th ed (Sydney: Thomson Reuters, 2010) at paras 19.65–68, 19.73–82 [Butt, *Land Law*].

6 *R v Olan*, [1978] 2 SCR 1175 at 1182, 86 DLR (3d) 212, cited in Gray & Gray, *supra* note 5 at 8.2.29.

indefeasibility (registration of an interest in land is conclusive proof that the person named as the holder of an interest is the holder of that interest) and the registration principle (no interest transfers until the transferring instrument is registered).[7] In addition, most title registration jurisdictions abolish the doctrine of notice—notice of a prior unregistered interest does not affect the holder of a registered interest. In jurisdictions that abolish notice, a person acquiring and registering an interest in land can rely on the state of title as reflected in the land registry and can ignore unregistered interests whether he or she has notice of those interests or not.

Title registration systems rely on the principles of indefeasibility, registration, and the abolition of notice, but apply them in differing degrees. In the case of notice, its abolition has occurred unevenly across title registration jurisdictions. The systems that emulate the Torrens title system developed in South Australia in the mid-19th century use the concept of fraud to draw a boundary between the circumstances in which notice of prior unregistered interests matters and those where it does not.[8] These systems abolish the doctrine of notice, except in the case of fraud. For the most part, they also provide that notice of a prior unregistered interest does not, by itself, amount to fraud. In doing so, they discard the doctrine of equitable fraud; fraud, in the frequently cited language of the courts, requires "moral turpitude",[9] not simply mere notice. Defeating a prior and competing unregistered interest of which one has notice only by registering a later interest does not amount to fraud.

In this article on the place of the equitable doctrine of notice in title registration systems, we describe, in Part II, the evolution of statutory provisions dealing with notice. In doing so, we pay particular attention to the title registration systems that emulated South Australia's Torrens title. These systems, unlike those modeled on title registration as developed in England,

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7 See Thomas W Mapp, *Torrens' Elusive Title: Basic Principles of an Efficient Torrens' System* (Edmonton: Alberta Institute for Law Research and Reform, 1978) at 59–60.

8 Other title registration systems, including that developed in England, do not use the concept of fraud, but instead rely on a statutory statement of priorities. But see Gray & Gray, *supra* note 5 for a discussion of the continuing relevance of fraud (*ibid* at paras 8.2.24–40).

9 *Butler v Fairclough*, (1917) 23 CLR 78 at 90, 97, [1917] HCA 9 (AustLII) [*Butler*].

make explicit use of the concept of fraud in the provisions purporting to abolish notice. Within this Torrens lineage, we identify three statutory variations on the provision abolishing notice (the first of which appeared in the Colony of Vancouver Island) and note the differing degrees to which they actually abolish the doctrine of notice.

We then turn, in Part III, to focus on the doctrine of notice in British Columbia. In doing so, we chronicle the changes in the statutory notice provision and we survey its judicial interpretation. Our treatment of the cases is brief, but we include all reported decisions that deal directly with the extent to which the provision addressing notice in British Columbia —subsection 29(2) of the *Land Title Act*[10] (or its predecessors)—abolish notice. Furthermore, we divide this set of cases between those that appear to equate notice with fraud and thus retain the equitable doctrine of notice, and those that require something more than mere notice to establish fraud. This analysis suggests that the "hopeless confusion" over the abolition of notice that confronted the registrar of land titles in the 1950s remains an appropriate description of the law.[11] However, we offer a number of generalizations about likely outcomes when courts are asked to rule on the status of a prior unregistered interest where the holder of the registered interest has notice of the unregistered interest.

Finally, in Part IV, we attribute uncertainty over the abolition of notice in British Columbia to an ambiguous relationship between statutory and common law rules and, ultimately, to indecision about whether land law should prioritize securing title or facilitating transfers of interests in land. Abolishing the doctrine of notice establishes greater certainty for purchasers and, in doing so, facilitates transfers of interests in land; the cost of this certainty is that some existing interests will be lost because of a failure to register. British Columbia has not yet decided whether this is what it wants.

While the uncertainty may be most acute in British Columbia, it is not the only jurisdiction grappling with ambiguity over the continuing salience of the doctrine of notice in its title registration system. We consider three proposals for reform: a report from the British Columbia Law Institute

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10 *Land Title Act*, RSBC 1996, c 250, s 29(2).

11 HL Robinson, "Registration and the Doctrine of Notice" (1953) 2:1 UBC Legal Notes 5 at 10.

(BCLI) that recommends the province retain its particular balance of equitable principles within a title registration system,[12] a report from the New Zealand Law Commission (NZLC),[13] and a model proposed by the Joint Land Titles Committee (composed of representatives from the common law jurisdiction in Canada; JLTC).[14] Each of these proposals includes a continuing role for the notion of fraud in determining the relevance of the doctrine of notice, and they reveal the difficulty of retaining a limited version of notice within title registration systems. This difficulty may partly explain why most title registration jurisdictions have decided to abolish the doctrine of notice and, with it, equitable understandings of fraud. Beyond this difficulty, however, is a policy decision about how title registration systems should balance competing desires for static and dynamic security. In British Columbia, that decision needs to be made by either the province's Court of Appeal in a definitive interpretation of the notice provision in the *Land Title Act*[15] or, more probably, by the legislature in a statutory amendment that clarifies the place of notice in British Columbia's title registration system.

## II. TITLE REGISTRATION, NOTICE, AND FRAUD

At common law, title to land passed with the transfer of a title deed. The responsibility of the purchaser's lawyer was to provide an opinion on the veracity of the vendor's title. This involved reviewing the title deed that gave rise to the vendor's title and all prior title deeds in the chain of title that led to the vendor's deed. As chains of title grew, and so too the difficulty and cost of a title opinion, legislatures used limitation periods to close the window in

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12 Real Property Reform (Phase 2) Project Committee, *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests* (Vancouver: British Columbia Law Institute, 2011), online: <http://www.bcli.org> [BCLI Report].

13 New Zealand Law Commission in conjunction with Land Information New Zealand, *A New Land Transfer Act* (Wellington: Law Commission of New Zealand, 2010) [NZLC Report].

14 Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton: Alberta Law Reform Institute, 1990) [JLTC Proposals].

15 *Supra* note 10, s 29(2).

which a purchaser had to establish valid title. They also established deeds registries—physical locations where title deeds were lodged. Unlike later title registration systems, these deeds registries did not guarantee title, but they did make the chain of title easier to trace.

Although deeds registries provided no guarantee of title, they might affect the priority of interests if priority were based on the date of registration. In these "race" systems, date of registration established priority; a purchaser's notice of a prior unregistered deed was irrelevant. Pure race systems drew the attention of the courts of equity where it appeared unjust that a prior interest might be defeated simply because its holder had failed to register his or her interest. Property scholar Carol Rose has suggested that "our sympathies for the luckless unrecorded owner indeed put pressure on the recording system that would divest him in favor of the later-arriving outsider", particularly when the subsequent purchaser had full knowledge of the prior interest.[16] In these circumstances, the courts of equity read into deed registry statutes a fraud exception: date of registration established priority except where it perpetrated a fraud not to recognize the prior interests.[17] In effect, the equitable courts were reviving the doctrine of notice; if the holder of the first registered deed had notice of the prior unregistered deed, then it would be against conscience, and thus fraudulent at equity, to allow the act of registration to defeat the prior interest. These decisions constructed deeds registries as "notice" systems, making registries little more than central repositories that increased the convenience of title searches. Lodging an interest in the registry would assure that any subsequent purchaser had notice of the interest (most deeds registry statutes provided expressly that registration was conclusive evidence of notice whether the purchaser had actual notice or not), but notice of unregistered interests still mattered and could affect the priority of interests.

Some legislatures responded by attempting to confine the reach of fraud. The fraud exception was to apply only to "actual fraud" or to fraud as

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16 Carol M Rose, "Crystals and Mud in Property Law" in *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, Colo: Westview Press, 1994) 199 at 206–07.

17 *Le Neve v Le Neve* (1747), Amb 436, 27 ER 291 (Ch), Lord Harwicke LC, cited in James Edward Hogg, "Notice and Fraud in Land Registries" (1913) 29 Law Q Rev 434.

understood by the common law courts, not by the equitable courts.[18] In these systems, mere notice of a prior unregistered interest would not trigger the fraud exception; priority by date of registration would not be disrupted by notice alone.

When legislatures in the common law world began to consider title registration systems to replace deeds registries, they faced the same question about the place of notice: To what extent should title registration abolish the doctrine of notice? Put another way, if a registered owner had notice of a prior unregistered interest, then what were the circumstances in which that prior interest would remain a burden on a subsequent registered interest? As with deeds registries, legislatures and courts in some jurisdictions turned to the concept of fraud.

The Colony of Vancouver Island, the second jurisdiction in the common law world (after South Australia) to introduce a version of title registration, was the first to address explicitly the effect of notice of a prior unregistered interest. The earlier South Australian statute of 1858 indicated that as between registered interests in land, date of registration established priority,[19] but did not mention the effect of notice of a prior unregistered interest. Legislators on Vancouver Island in 1860 included the following general provision dealing with notice of prior unregistered interests:

> No purchaser for valuable consideration of any registered Real Estate, or registered interest in Real Estate, shall be affected by any notice express, implied or constructive of any unregistered title, interest, or disposition affecting such Real Estate, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity notwithstanding.[20]

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18 Hogg, *ibid* at 435. See also GJ Davies's discussion of the 1830 Report of the Commission on Real Property in the United Kingdom, which grappled with the place of notice in a deeds registry: GJ Davies, "Equity, Notice and Fraud in the Torrens System" (1972) 10 Alta L Rev 106 at 119–22.

19 *Real Property Act 1858* (SA), s 59.

20 *Land Registry Act, 1860* (Colony of Vancouver Island), s 24, reproduced as No 3 in the Appendix to the RSBC 1871. New Zealand's deeds registration statute of the same year included a similar provision, that "no purchaser for valuable consideration of any registered land or registered interest in land shall be affected by any notice express, implied, or constructive of an unregistered disposition": *Land Registry Act, 1860* (NZ), 1860/27, s 57.

Although the first explicit provision in a title registration system to abolish notice, it was not emulated elsewhere. South Australia, already the leader in title registration under the guidance of Robert Torrens, undertook two extensive revisions to its registration system in 1860 and again in 1861.[21] In the second round of revisions, legislators added the following general provision abolishing notice:

> Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest, shall be required, or in any manner concerned to inquire or ascertain the circumstances in, or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is, or was registered, or to see to the application of the purchase-money, or of any part thereof, or shall be affected by notice direct or constructive of any trust of unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.[22]

Unlike Vancouver Island's statute, the South Australian act included an explicit exception for fraud: notice of a prior unregistered interest did not affect the holder of the registered interest "[e]xcept in the case of fraud".[23] Although this fraud exception might be read into the Vancouver Island statute on the grounds that title registration systems were not intended to shield those who committed fraud, the South Australian legislation made it clear that fraud would continue to have a role in determining priorities between registered and unregistered interests. A registered interest would not have priority if its priority status were acquired fraudulently. In addition, the South Australian statute provided direction regarding the fraud exception: knowledge alone of prior unregistered interests "shall not of itself be imputed as fraud."[24] In effect, the fraud exception did not include equitable

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21 See WN Harrison, "The Transformation of Torren's System into the Torrens System" (1962) 4:2 UQLJ 126. See also Greg Taylor, *Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 26.

22 *Real Property Act of 1861* (SA), s 114.

23 *Ibid.*

24 *Ibid.*

fraud in which the attempt to defeat a prior interest of which one had notice would, by itself, amount to fraud.

Most other Australian states quickly adopted the South Australian provision abolishing notice.[25] New Zealand followed suit when it introduced title registration in 1870,[26] and so would Canada in 1886 when it extended title registration to the territory that would become the provinces of Alberta, Saskatchewan, and most of Manitoba.[27] Several years later, the province of Manitoba, which had a title registration system, amended its statute to include South Australia's notice provision.[28]

Vancouver Island's statute, which the united colony of British Columbia (Vancouver Island and mainland British Columbia) adopted in 1870 on the eve of joining the Canadian confederation, was an outlier in its expression of the abolition of notice principle. Queensland was the other outlier among title registration jurisdictions with their roots in the South Australian Torrens system. It had introduced a title registration system in 1861, using the South Australian act of 1860 as its model.[29] To that act, which did not include a general abolition of notice provision, the Queensland legislators added an explicit fraud exception, but not a provision that knowledge alone would not amount to fraud.[30]

Thus, within the family of title registration systems that emerged out of the South Australian model, there were three basic variations on the statutory provision abolishing notice. All jurisdictions included the foundational statement that no purchaser was affected by notice of a prior unregistered

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25 *Real Property Act 1862* (Vic), s 111; *The Real Property Act 1861* (Tas), s 114; *Real Property Act 1862* (NSW), s 111.

26 *The Land Transfer Act 1870* (NZ), 1870/51, s 119.

27 *The Territories Real Property Act*, SC 1886, c 26, s 126.

28 *The Real Property Act of 1885*, SM 1885, c 28, as amended by *The Real Property Act of 1889*, SM 1889, c 16. When the federal government carved the provinces of Alberta and Saskatchewan out of the Northwest Territory, the provincial title registration acts maintained the same provisions: *The Land Titles Act*, SA 1906, c 24 s 135; *The Land Titles Act*, SS 1906, c 24, s 173.

29 See Harrison, *supra* note 21 at 131–32 (referring to South Australia's *Real Property Act of 1860* (SA)).

30 *Real Property Act of 1861* (Qld), s 44.

interest. The first variation, introduced on Vancouver Island and then adopted across British Columbia, stopped there. The second variation, introduced and quickly abandoned by South Australia but emulated in Queensland in 1861, added an explicit qualification that no one taking an interest in land was affected by notice except in the case of fraud. This provision remains in place in Queensland.[31] British Columbia would follow suit with an explicit fraud exception, although not until 1978.[32] The third and most widely adopted variation was South Australia's explicit fraud exception—except in the case of fraud a person acquiring an interest in land was not affected by notice of an unregistered interest—and a further statement that knowledge of a prior unregistered interest did not amount to fraud.[33]

Although the abolition of the notice principle is expressed differently in statutes across Torrens-title jurisdictions, courts in those jurisdictions have grappled with the problem of when to apply the fraud exception. Two basic approaches have emerged. One acknowledges that title registration eliminates the equitable doctrine of notice; a person who acquires an interest with notice of a prior unregistered interest and attempts to defeat that prior interest simply by registering their interest does not commit fraud. The Privy Council's 1905 decision in *Assets Company, Limited v Mere Roihi*[34] on the meaning of fraud in New Zealand's title registration system is the frequently cited standard-bearer of this approach:

> [B]y fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better

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31 *Land Title Act 1994* (Qld), ss 178, 184, 185.

32 *Land Titles Act*, SBC 1978, c 25, s 29.

33 See e.g. *Land Titles Act*, RSA 2000, c L-4, s 203(3); *Land Titles Act*, SS 2000, c L-5.1, s 23(2); *The Real Property Act*, CCSM c R30, s 80(3); *Transfer of Land Act 1958* (Vic), s 43; *Real Property Act 1900* (NSW), s 43(1); *Real Property Act 1886* (SA), ss 72, 186–87; *Land Title Act 2000* (NT), s 188; *Land Titles Act 1980* (Tas), s 41; *Transfer of Land Act 1893* (WA), s 134.

34 [1905] AC 176, [1905] UKPC 10 (BAILII) [cited to AC].

> term, to denote transactions having consequences in equity similar to those which flow from fraud.[35]

In another widely-cited decision, *Butler v Fairclough*, the Australian High Court ruled in 1917 that the fraud exception in the title registration system required "actual fraud, moral turpitude", declaring it "settled that the term 'fraud' as used in that section imports personal dishonesty or moral turpitude."[36] Reviewing the evidence in that case, the High Court concluded that it was "impossible to say that the testimony discloses conduct on the part of the respondent or his agent so indefensible morally, or an explanation so frail, as to practically demonstrate a dishonest mind."[37] Mere notice of a prior unregistered interest, therefore, did not amount to fraud.

However, equitable fraud was not to disappear so quietly and completely from title registration systems. In a 1913 decision arising from the Federated Malay States, *Loke Yew v Port Swettenham Rubber Company, Limited*, the Privy Council ruled that a purchaser who sought to defeat a prior unregistered interest of which he had notice committed fraud.[38] The abolition of notice provision in the Malay title registration statute was expressed through a statement of priorities rather than the explicit use of the concept of fraud, so the decision had limited application to the statutes modeled on South Australia's. Nevertheless, the decision raised the prospect that equitable fraud might return.[39] James Hogg, in a critical

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35 *Ibid* at 210, Lord Lindley. Beyond the definition of fraud, this case is also cited widely as the authority for the doctrine of indefeasibility: that the interests as listed in the registry establish ownership unless the holder of the interest has participated in fraud. The original interests in this case were Maori interests, and Brian Gilling, "'Vexatious and an Abuse of the Process of the Court': The *Assets Company v Mere Roihi* Cases" (2004) 35 VUWLR 145, discusses the impact of this case and the title registration system more generally on Maori land holdings.

36 *Butler*, *supra* note 9 at 90, 97.

37 *Ibid* at 98.

38 *Loke Yew v Port Swettenham Rubber Company, Limited*, [1913] AC 491 at 505–06, [1913] UKPC 17 (BAILII) [*Loke Yew*].

39 JR Innes, "Notice and Fraud in Registration of Title to Land" (1915) 31 Law Q Rev 397 at 399.

commentary shortly after the *Loke Yew* decision, characterized the different approaches as reflecting a rivalry between legislators who sought certainty and judges who would not let go of the equitable doctrine when confronted with parties who stood to lose their interests because of a failure to register them. Moreover, the rivalry was not new; rather, it was an extension of the earlier clash between legislators and judges over whether deeds registries should be race or notice systems. The result of the rivalry, wrote Hogg, "has been that the law on the subject of notice cannot be said to be completely settled."[40]

In Canada, the rivalry between those who would and would not abolish notice rose from the Ontario courts to the Supreme Court of Canada in the 1970s in *United Trust v Dominion Stores et al.*[41] Ontario, a relative latecomer to title registration, drew inspiration from English rather than Australian models.[42] Its version of the abolition of notice principle, which did not appear until 1960, was expressed in a statement of priorities rather than in a general statement abolishing notice.[43] In his dissenting interpretation of the degree to which the Ontario title registration statute abolished notice, Chief Justice Laskin wrote: "To import actual notice in a title registration system without its express preservation is to change the basic character of the system. It is impossible, in my view, to adhere to the principle of the primacy of the register and at the same time to make it yield to a doctrine of notice."[44] However, the majority ruled that notice of a prior unregistered interest did matter. They held that the equitable doctrine of notice was so important that

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40 Hogg, *supra* note 17 at 436. This disquiet about the rule reappeared in the contradictory signals from the courts in another New Zealand case, *Waimiha Sawmilling Co v Waione Timber Co*, [1926] AC 101, [1926] UKPC 55 (BAILII). See Rt Hon Justice Peter Blanchard, "Indefeasibility under the Torrens System in New Zealand" in David Grinlinton, ed, *Proceedings from the Taking Torrens into the 21st Century Conference, Auckland, 2003* (Wellington: LexisNexis NZ, 2003) 29.

41 [1977] 2 SCR 915, 71 DLR 3d 72 [*United Trust* cited to SCR].

42 Sydney Smith, "Registration of Titles in Ontario and the Prairie Provinces—A Few of the Salient Points of Difference" (1965) 30 Sask Bar Rev 275 at 276-77; M Neave, "The Concept of Notice and the Ontario Land Titles Act" (1976) 54 Can Bar Rev 132 at 134.

43 *Land Titles Act*, SO 1960, c 56, s 11, currently RSO 1990, c L 5 s 78(5).

44 *United Trust, supra* note 41 at 936, Laskin CJ, dissenting.

it needed to be expressly abolished, and that the creation of a title registration system and statements about the primacy of the register were insufficient to abolish it.[45] As a result, notice remains a feature of Ontario's title registration system: a party acquiring an interest of land with notice of a prior unregistered takes the interest subject to that prior unregistered interest.

In almost all other title registration jurisdictions, whether built on the South Australian Torrens model (i.e., that abolish notice except in the case of fraud, and indicate that notice alone does not amount to fraud), or the English model (that uses a statement of priorities rather than the concept of fraud), courts have generally come to the opposite conclusion: the equitable doctrine of notice cannot coexist with title registration. This is the case in Australia where the desire to abolish notice appears to have provided Torrens with much of the impetus to create the system that bears his name.[46] The same is true in the western Canadian provinces of Alberta,[47] Saskatchewan,[48] and Manitoba.[49] In England, the 1925 property legislation made the doctrine of notice irrelevant in all but a "twilight zone" that included a small cluster of equitable interests,[50] and its residual effect was abandoned in the *Land Registration Act* of 2002.[51] Moreover, most commentators across title

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45 *Ibid* at 952, Spence J, writing for the majority.

46 P Moerlin Fox, "The Story Behind the Torrens System" (1950) 23 ALJ 489; Les A McCrimmon, "Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title" (1994) 20 Monash UL Rev 300 at 301.

47 See *Holt, Renfrew v Henry Singer* (1982), 37 AR 90, 135 DLR (3d) 391 (CA). But see *Alberta v McCulloch* (1991), 120 AR 5, [1992] 1 WWR 747 (CA); *1198952 Alberta Ltd v 1356472 Alberta Ltd*, 2010 ABCA 42, 474 AR 274. In these latter two cases, the Alberta Court of Appeal determined that the actions of the purchaser, who had notice of a prior unregistered interest, crossed over what Bruce Ziff has described as the "fine line" between no fraud and fraud: Ziff, *supra* note 5 at 488.

48 *Hackworth v Baker*, [1936] 1 WWR 321, [1936] SJ no 10 (QL) (CA).

49 *Ruthenian Greek Catholic Church v Fetsyk*, [1922] 3 WWR 872, 32 Man R 452 (KB).

50 Gray & Gray, *supra* note 5 at para 8.3.18.

51 See UK Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (London, UK: Stationary Office, 2001) ("[a]s a

registration jurisdictions advocate abolishing the equitable doctrine of notice,[52] or declare their thankfulness that it has been abolished.[53] Most recently, the call has been loudest among commentators in New Zealand for the greater certainty of the Australian approach.[54]

Relative certainty exists at the two poles: the doctrine of notice is abolished in England, Australia, and most of the provinces in western Canada, but remains in place in Ontario. In New Zealand, which adopted the South Australian model, there is enough uncertainty to warrant extensive comment and recommendations in a recent report,[55] but the uncertainty appears to reside mostly in the language of the judicial rulings rather than the results. According to Peter Blanchard, a former justice of the New Zealand Court of Appeal, the courts consistently rule that the holder of the registered interest is not affected by notice of a prior unregistered interest.[56] However, if there is a degree of uncertainty in New Zealand, the choice of whether to embrace or abolish notice is entirely unresolved in British Columbia.

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general principle, the doctrine of notice, which still has a residual role in relation to the priority of certain interests in unregistered land, has no application whatever in determining the priority of interests in registered land" at para 5.16 [citation omitted]).

52 Innes, *supra* note 39 at 398; Robinson, *supra* note 11; Jeremy Walsh, "Fraud and Personal Equities Under the Queensland Torrens System" (1992) 4:2 Bond Law Review 228 at 234; Peter Butt, "Notice and Fraud in the Torrens System: A Comparative Analysis" (1978) 13:3 UWA L Rev 354 at 375–76 [Butt, "Notice"]; Blanchard, *supra* note 40; Davies, *supra* note 18 at 124–25.

53 Martin Dixon states that "[u]nfortunately, such were (and are) the vagaries of the doctrine of notice that neither the transferee of the land nor the owner of the equitable right that was alleged to bind the land could ever be sure whether his land or his right (as the case may have been) was secure": Martin Dixon, *Modern Land Law*, 8th ed (Abingdon, UK: Routledge, 2012) at 17.

54 New Zealand Law Commission, *Review of Land Transfer Act 1952* (Wellington: Law Commission of New Zealand, 2008) at 42; Blanchard, *supra* note 40 at 43; RP Thomas, "Land Transfer Fraud and Unregistered Interests" (1994) NZL Rev 218 at 227. See also Butt, "Notice", *supra* note 52.

55 NZLC Report, *supra* note 13.

56 Blanchard, *supra* note 40 at 43.

## III. TITLE REGISTRATION, NOTICE, AND FRAUD IN BRITISH COLUMBIA

In 1860, the Colony of Vancouver Island was the first title registration jurisdiction to abolish notice expressly. It did so simply and clearly: "No purchaser for valuable consideration of any registered Real Estate, or registered interest in Real Estate, shall be affected by any notice express, implied or constructive of any unregistered title, interest, or disposition affecting such Real Estate".[57] However, as with the earlier deeds registry systems, this statement left the courts room to sustain the doctrine of notice.

In the 1896 case of *Hudson's Bay Co v Kearns and Rowling*, the British Columbia Supreme Court, sitting as an appellate court, confronted the question of whether the purchaser of a fee simple interest who had registered that interest took it subject to a prior unregistered mortgage of which he had constructive notice.[58] A majority of the Court, led by Chief Justice Davie, ruled that British Columbia's title registration system abolished notice and, therefore, that the purchaser of the fee simple interest was not encumbered by the prior unregistered interest. However, it did so on the basis that the purchaser only had constructive notice, not express notice. If the registered holder of the fee simple interest were to have had express notice of the prior unregistered mortgage, then he would have taken the fee simple subject to that prior interest. To do otherwise would be to condone fraud:

> The principle which has repeatedly been held to apply to the different Register Acts of England and some of the colonies, applies equally I take it to our Act, and that is that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party so committing a fraud to avail himself of the provisions of a statute itself enacted for the prevention of fraud.[59]

Davie CJ went on to hold that "as fraud is never presumed, it is perfectly clear that it will not be imputed in the absence of express notice".[60] In so ruling, Davie CJ introduced a distinction between the treatment of express

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[57] *Land Registry Act, 1860*, *supra* note 20.

[58] (1896), 4 BCR 536, 1896 CarswellBC 30 (WL Can) (SC) [*Hudson's Bay Co*].

[59] *Ibid* at 551–52, Davie CJ.

[60] *Ibid* at 552 [citation omitted].

and constructive notice that did not appear in the statute. On its face, the statute abolished express, implied, and constructive notice. However, where the holder of the registered interest had express notice of a prior unregistered interest, Davie CJ revived the doctrine of notice by importing the equitable understanding of fraud—to defeat a prior interest of which one had express notice was to commit fraud. This was indefensible in "a statute itself enacted for the prevention of fraud."[61]

However, other passages in the ruling suggest that to defeat a prior unregistered interest of which the registered purchaser had express notice would not always amount to fraud. If the purchaser did no more than act in the usual course of business, which included registering its interest and thus defeating the prior interest, then that was not fraud. Some additional fraudulent act beyond registering the interest was required if the purchaser were to take the interest subject to the prior unregistered interest. Davie CJ put it this way:

> In conclusion, therefore, I am of [the] opinion that the effect of section 35 of the Land Registry Act must be taken as absolutely protecting a purchaser for value against attack on the ground of notice of any character or nature whatsoever; but its otherwise absolute effect must be held to be subject to this qualification, that a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment, under the inflexible rule that an Act of Parliament shall not be used as an instrument of, or in defence of, actual fraud.[62]

Construed narrowly, *Hudson's Bay Co* stands for the proposition that British Columbia's *Land Registry Act*[63] abolished constructive notice. More broadly, it appears to resuscitate the relevance of express or actual notice, although some passages of the judgment suggest that to defeat a prior

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61 *Ibid.*

62 *Ibid* at 556–57.

63 *Land Registry Act*, RSBC 1888, c 67, s 35.

unregistered interest of which one has express notice might not always amount to fraud if the purchaser were simply acting in the "ordinary course of business."[64] This case looms large in the interpretation of later provisions that purport to abolish notice in British Columbia's title registration system.[65]

In 1921, British Columbia amended its provision abolishing notice, expanding the scope to include anyone taking an interest in land, not just purchasers, but otherwise leaving the section intact, and with it the confusion that *Hudson's Bay Co* had spawned.[66] Most notably, legislators did not include the fraud exception that was common in other title registration jurisdictions, although the courts had already read that exception into their interpretation of the section. Thirty years later, H.L. Robinson, the registrar of titles in British Columbia, noted that "the case law leads to no certainty of conclusion",[67] and decried the "hopeless confusion" over the extent to which the title registration system abolished notice.[68]

The confusion continued in the 1970s. In some cases, the attempt to defeat a prior interest of which one had notice was not fraud;[69] in other cases, the courts construed notice as amounting to fraud.[70] This division of cases is overly simplistic given the different types of notice, the variable timing of

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64 *Hudson's Bay Co*, *supra* note 58 at 557.

65 See Gerald W Ghikas, "The Effect of Actual Notice Under The British Columbia Torrens System" (1980) 38 Advocate 207; BCLI Report, *supra* note 12.

66 *Land Registry Act*, SBC 1921 (1st Sess), c 26, s 43.

67 Robinson, *supra* note 11 at 17.

68 *Ibid* at 10.

69 *Re Pacific United Developers (1962) Ltd* (1965), 51 DLR (2d) 93, [1965] BCJ no 127 (QL) (SC) [*Re Pacific*]; *Re Saville Row Properties Ltd* (1969), 7 DLR (3d) 644, [1969] BCJ no 31 (QL) (SC) [*Saville Row* cited to DLR]; *Granco Hotel Ltd v Aceman* (1973), 37 DLR (3d) 632, [1973] BCJ no 572 (QL) (SC); *Vancouver Key Business Machines Ltd v Teja* (1975), 57 DLR (3d) 464, [1975] 5 WWR 104 (BCSC); *March v Drab* (1977), 5 BCLR 396, [1977] BCJ no 1078 (QL) (SC) [*March*].

70 *Me-N-Ed's Pizza Parlour Ltd v Franterra Developments Ltd* (1975), 62 DLR (3d) 148, [1975] 6 WWR 752 (BCSC) [*Me-N-Ed's*]; *Danica Enterprises Ltd v Curd*, [1976] 5 WWR 193, [1976] BCJ no 1212 (QL) (SC) [*Danica* cited to WWR]; *Toy v Sevigny* (1977), 5 BCLR 128, [1977] BCJ no 1068 (QL) (Co Ct) [*Toy*].

notice, the different property interests, and the particular behavior of the parties involved in the disputes, but it does expose the degree to which the issue of notice was unresolved.[71]

The problem is revealed by two of the most widely-cited authorities from this era. In *Re Saville Row Properties Ltd*, the registered holder of the fee simple interest in a parcel of land transferred an option to purchase the fee simple to one party and then transferred the fee simple interest to another party, Saville Row, who registered its interest. Saville Row knew of the prior unregistered option before purchasing the fee simple interest, but McIntyre J of the British Columbia Supreme Court held that it had not acted "in bad faith merely because it relie[d] upon the provisions of the statute", and therefore was not affected by its notice of the unregistered interest.[72] Conversely, *Danica Enterprise Ltd v Curd* involved a purchaser of a fee simple in a residential lot who sought to defeat a prior unregistered fee simple interest of which he "knew or should have known".[73] Chief Justice Nemetz of the British Columbia Supreme Court, in finding for the holders of the unregistered fee simple interest, cited with approval a statement from the New Zealand Supreme Court that if one had notice of a prior interest, then an attempt to defeat that prior interest amounted to fraud: "In many instances the rule of equity that notice is fraud, must be recognised as consentaneous with the principles of common morality; for it may be an act of downright dishonesty knowingly to accept from the registered owner a transfer of property which he has no right to dispose of."[74]

In 1978, British Columbia rewrote the provision abolishing notice. This revision, which remains in force, added an explicit fraud exception, but did not include the common provision that notice alone would not amount to fraud. It did not resolve the confusion:

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71 See the review of the divergent case law in Ghikas, *supra* note 65.

72 *Saville Row*, *supra* note 69 at 647.

73 *Danica*, *supra* note 70 at 203.

74 *Ibid*, Nemetz CJ, citing *National Bank v National Mortgage and Agency Co*, (1885) 3 NZLR 257 (available on QL) (SC) at 263–64.

> 29(2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
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> (a) a transfer of land, or
>
> (b) a charge on land, or a transfer or assignment or subcharge of the charge, is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge.[75]

The following year the British Columbia Supreme Court ruled in *Jager the Cleaner Ltd v Li's Investment Co Ltd*, a case involving an attempt by the purchaser of a fee simple interest to defeat a prior unregistered lease of which it had actual notice, that notice alone would not amount to fraud.[76] In doing so, Taylor J noted that "under the British Columbia land registry system a purchaser who takes with knowledge of an unregistered interest *may* be guilty of fraud if he were thereafter to seek protection of the Land Registry Act so as to defeat the claim of the holder of that interest."[77] However, "[t]he question in every case must be whether a fraud would *in fact* be committed if the purchaser were to claim the protection of the Act; fraud, which is never lightly to be inferred, must, I think, be established by the particular facts of the case and cannot be presumed."[78] Several weeks later, in *Central Station Enterprises Ltd v Shangri-La Estates Ltd*, another case involving a prior unregistered lease, McKenzie J came to a similar conclusion: "[N]otice of an unregistered, competing interest can, under special circumstances only, disentitle a person to the protection of s. 44 [now subsection 29(2)]."[79] In this case, the holder of the registered fee simple interest had notice of the prior unregistered lease only after it entered an agreement to acquire the fee simple interest, and therefore did not fall within the "special circumstances" that would make it subject to the prior unregistered lease.[80]

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75 *Land Title Act*, RSBC 1996, c 250, s 29(2).

76 [1979] 4 WWR 84 at 86, 11 BCLR 311 (SC) [*Jager the Cleaner*].

77 *Ibid* at 88 [emphasis in original].

78 *Ibid* at 89 [emphasis in original].

79 (1979), 98 DLR (3d) 316 at 321, 14 BCLR 1 (SC).

80 *Ibid*.

However, if in 1979 the British Columbia Supreme Court appeared to be narrowing the scope of fraud, its 1982 decision in *Woodwest Developments Ltd v Met-Tec Installations Ltd*[81] revived the proposition that it was fraudulent to attempt to defeat a prior interest of which one had notice. The case also involved a purchaser of the fee simple interest who had notice of a prior unregistered lease. Davies J rejected the proposition that section 29 had narrowed the test for fraud.[82] The purchaser had notice of the prior lease and was therefore bound by it; to invoke the *Land Title Act* to defeat the prior interest amounted to fraud.[83]

Since these early decisions interpreting the 1978 amendment to the provision abolishing notice, the pendulum has swung between the finding that notice of a prior unregistered interest amounts to fraud,[84] and that notice alone does not.[85] *Woodwest* has become the standard-bearer for the proposition that notice is fraud, *Jager the Cleaner* that notice alone is not fraud. The most recent decisions suggest *Jager the Cleaner* is the stronger authority. In *Szabo v Janeil Enterprises Ltd*, a case involving an attempt to

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81 [1982] 6 WWR 624, 26 RPR 81 (BCSC) [*Woodwest* cited to WWR].

82 *Ibid* at 629.

83 *Ibid* at 636.

84 *Palfenier v Cech*, [1982] BCJ no 1016 (QL), 1982 CarswellBC 2287 (WL Can) (SC) [*Palfenier*]; *Dhaliwal v Jaswal* (1986), 6 BCLR (2d) 189, [1986] BCJ no 757 (QL) (SC) [*Dhaliwal*]; *Anglican Synod of the Diocese of British Columbia v Tapanainen*, [1990] BCJ no 1164 (QL), 1990 CarswellBC 958 (WL Can) (SC); *Pilcher v Shoemaker* (1997), 13 RPR (3d) 42, [1997] BCJ no 2038 (QL) (SC) [*Pilcher*]; *Vancouver City Savings Credit Union v Alda Wholesale Ltd*, 2000 BCSC 411, 31 RPR (3d) 128. See also two decisions that turned on procedural issues but appear to equate notice with fraud: *Konsap v Grattan*, 2003 BCSC 1880, 16 RPR (4th) 238; *Deschamps v Wloka*, 2006 BCSC 261, [2006] BCJ no 332 (QL).

85 *Sibley v British Columbia (Registrar of Land Titles)*, [1981] BCJ no 43 (QL), 1981 CarswellBC 1625 (WL Can) (SC); *Nicholson v Riach* (1997), 34 BCLR (3d) 381, 11 RPR (3d) 69; *Skeetchestn Indian Band v British Columbia (Registrar, Kamloops Land Title District)*, 2000 BCSC 118 at para 39, 30 RPR (3d) 272; *Rogers v Landmark*, 2000 BCSC 320, 35 RPR (3d) 87; *Szabo v Janeil Enterprises Ltd*, 2006 BCSC 502, 42 RPR (4th) 228 [*Szabo*]; *Vancouver City Savings Credit Union v Serving for Success Consulting Ltd*, 2011 BCSC 124, 1 RPR (5th) 280 [*Vancity v Serving for Success*].

confirm a prior unregistered easement of which the holder of the fee simple interest had constructive notice, McKinnon J ruled that "fraud cannot be presumed, but instead must be strictly alleged and strictly proved. Here, there is simply no evidence to warrant the inference that the conduct of the [holders of the registered title] was sufficiently dishonest to deprive them of the protection of s. 29."[86] Similarly, in *Vancity v Serving for Success*, a case where the holder of a registered mortgage sought priority over a prior and unregistered sub sublease, Bracken J acknowledged "divergent lines of authority",[87] but followed *Jager the Cleaner* and *Szabo* in ruling that "the law requires more than simple notice" to find fraud.[88]

Although trending recently towards abandoning the doctrine of notice, the case law is divided over whether notice amounts to fraud. Nonetheless, some additional generalization is still possible. First, following *Hudson's Bay Co*, courts appear more likely to find fraud where there is express or actual rather than constructive notice even though the statutory provision abolishing notice has never distinguished between the different types of notice.[89] Second, the timing of notice is important. If the registered holder of the interest has notice only after it changed its position in reliance on the absence of a prior registered interest, then notice is likely to be irrelevant. As a result, if a purchaser receives notice of a prior unregistered interest after it enters a contract of purchase and sale, but before it registers its interest, then notice will probably not matter; the purchaser will take its interest free of the prior unregistered interest.[90] Again, this differentiation based on the timing of notice does not appear in the statute, which provides that notice of a prior unregistered interest is irrelevant even to a person who is "contracting or dealing with or taking or proposing to take" an interest in

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86 *Szabo*, *supra* note 85 at para 48.

87 *Vancity v Serving for Success*, *supra* note 85 at para 62.

88 *Ibid* at para 88.

89 See e.g. *Toy*, *supra* note 70; *Me-N-Ed's*, *supra* note 70; *Pilcher*, *supra* note 84.

90 See e.g. *Re Pacific*, *supra* note 69; *March*, *supra* note 69. But see *Woodwest*, *supra* note 81 (Court noted inconsistent precedent); *Greveling v Greveling*, [1950] 2 DLR 308, [1950] 1 WWR 574 (BCCA) (different conclusions among the appellate court justices about the timing of notice) [*Greveling*].

land from a registered owner.[91] Finally, courts seem more likely to find that notice of prior unregistered interest amounts to fraud where the prior unregistered interest is the fee simple interest.[92] This tendency towards protecting prior unregistered fee simple interests may reflect the status of the fee simple as the largest interest in land in the common law, but again this status is not recognized in the notice provision, which explicitly encompasses title and lesser interests in land. The limits on the abolition of notice in British Columbia appear in the case law, not in the statute.

## IV. TO ABOLISH OR NOT TO ABOLISH NOTICE

British Columbia's title registration system neither abolishes nor affirms the doctrine of notice. Purchasers of interests in land who register their interests do not know whether or not their interests will be subject to those prior and competing unregistered interests of which they have notice. This longstanding uncertainty about the doctrine of notice in British Columbia is an example of what property scholar Pamela O'Connor labels "bijural ambiguity".[93] In her analysis of title registration systems, "bijural" refers to the coexistence of the statutory rules that create the title registration framework with ordinary or common law and equitable rules that define interests in land; the ambiguity arises where the relative position of these coexisting bodies of rules is unresolved.[94] O'Connor focuses on the uncertainty in some title registration jurisdictions over the choice of immediate or deferred indefeasibility,[95] something that also bedeviled the system in British Columbia until amendments in 2005 to its *Land Title Act*.[96] The ambiguity over the nature of indefeasibility is resolved in British

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91 *Land Title Act*, RSBC 1996, c 250, s 29(1).

92 *Chapman v Edwards, Clark and Benson* (1911), 16 BCR 334, 1 WWR 59 (CA); *Danica*, supra note 70; *Palfenier*, *supra* note 84; *Dhaliwal*, *supra* note 84.

93 Pamela O'Connor, "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems" (2009) 13 Ed Law Rev 194.

94 *Ibid* at 195, 197.

95 *Ibid* at 197.

96 See Douglas C Harris, "Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the *Land Title Act*" (2006) 64:4 Advocate 529.

Columbia, but the question of whether the title registration framework abolishes the equitable doctrine of notice is not.

This ambiguity is a function not only of an unresolved tension between statute and common law but, more fundamentally, of a system caught between competing desires to create certainty for purchasers and security for existing owners. Legal scholars Matthew Harding and Robin Hickey attribute the source of ambiguity to a failure to resolve or make choices between the different values that animate the desires for dynamic or static security.[97] They focus on the values of personal identity, liberty, and utility in relation to Demogue's categories of security. In doing so, they point out that the choice between values, and therefore between static and dynamic security, "must be a political choice."[98]

Most jurisdictions with a title registration system modeled on the South Australian Torrens title have made the political choice in favour of abolishing notice. This is, perhaps, a manifestation of Kevin Gray and Susan Gray's claim that "[i]n the law of property, justice is never quite as important as order", something they attribute to the predilection in the common law to "minimising confusion over property entitlements" with "hard-edged rules" that "promote socially useful commerce and avert costly controversy."[99] The clarity and simplicity, indeed the order, of a rule that makes prior unregistered interests irrelevant to purchasers of interests in land who register their interests is appealing. However, Gray and Gray appear to lament the loss of responsiveness in the hard-edged rules and consequent diminishing of a "much needed 'ethical element'" in land registration systems.[100] Perhaps because of concerns such as this, even those jurisdictions that abolish the equitable doctrine of notice find ways to retain certain elements. In Australia, the holders of registered interests in land who indicate an intention to honour a prior unregistered interest are bound by that statement on the principle that it raises a personal equity or an *in personam* claim against

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97 Matthew Harding & Robin Hickey, "Bijural Ambiguity and Values in Land Registration Systems" in Susan Bright, ed, *Modern Studies in Property Law* (Oxford: Hart Publishing, 2011) vol 6, 285.

98 *Ibid* at 290.

99 Gray & Gray, *supra* note 5 at para 8.2.31 [citation omitted].

100 *Ibid* at para 8.2.32 [citation omitted].

them.[101] In England, those persons with an unregistered interest who are in actual occupation of the land may hold an interest that overrides a subsequent registered disposition.[102]

Given the decades of judicial swinging between retaining and abolishing notice in British Columbia, it appears that either a clear statement from the British Columbia Court of Appeal (BCCA) or legislative intervention is required to resolve the uncertainty.[103] In 2011, the British Columbia Law Institute (BCLI) published its report addressing the confusion over the continuing relevance of notice and recommending statutory amendments that retained the modified version of the doctrine of notice that exists in British Columbia.[104] In doing so, it understood that it continued British Columbia's tradition of blending equitable principles within the title registration system. What the BCLI characterized as the strict Torrens approach, which abolished notice in other western Canadian provinces, New Zealand, and the states in Australia, was

> too great a departure from the place that considerations of fairness and equity have been accorded in the land title system of British Columbia and the practice that surrounds it. In other words, British Columbia's system is seen as a unique blend of equity and Torrens principles that would be overturned if fairness considerations based on facts known to the person claiming the protection of the [*Land Title Act*] were subordinated completely to conclusiveness of the register.[105]

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[101] See Butt, *Land Law*, *supra* note 5 at paras 20.101–03.

[102] See Gray & Gray, *supra* note 5 at paras 8.2.55–62.

[103] The BCCA has touched upon the issue in several cases, but the analysis of whether notice amounted to fraud was peripheral. In *Greveling*, *supra* note 90, the BCCA focused on whether implied or imputed notice amounted to actual notice. More recently, in *Lee v Ling*, 2007 BCCA 603, [2008] 3 WWR 36, the principal issue was whether it had been appropriate to proceed by way of summary trial.

[104] BCLI Report, *supra* note 12. One of the authors of this article, Douglas C Harris, was a member of the BCLI Board of Directors, 2012–14. He was not a member of the board when the BCLI issued this report, and the views expressed in this article are those of the authors, not the BCLI.

[105] *Ibid* at 27.

More than 30 years earlier, lawyer Gerald Ghikas published a review of the case law in British Columbia and came to a similar conclusion.[106] Although retaining elements of the doctrine of notice might "inspire some apoplexy on the part of ardent advocates of the Torrens system," he wrote, "when the consequences of a rigid application of the Torrens System are carefully considered, as they have been by the Courts of this Province, they are found to deviate substantially from the objectives of common morality which have traditionally been embodied in all equitable principles."[107]

Some elements of the BCLI's proposed amendments emulate standard abolition of notice provisions in other jurisdictions. In particular, the BCLI recommended that the Province retain the fraud exception, but that it add a statement that knowledge alone of a prior unregistered interest would not amount to fraud.[108] In effect, the legislation should stipulate that the fraud exception would apply only to common law or actual fraud, not equitable fraud where notice of a prior interest was sufficient to establish fraud. However, this change, by itself, would lead the courts to adopt a strict abolition of notice approach, which the BCLI concluded was undesirable. In its attempt to achieve a middle ground between reaffirming the equitable doctrine of notice and adopting a strict Torrens approach abolishing notice, the BCLI proposed to carve out a particular circumstance in which the equitable understanding of fraud would continue to apply. If a person acquiring an interest in land for value had actual knowledge of a prior unregistered interest before entering a binding contract, then he or she would acquire the interest subject to the prior unregistered interest.[109] Moreover, in order to emphasize that a person acquiring an interest was only affected by a prior unregistered interest where he or she had actual knowledge of that interest, the BCLI also proposed that the amended statute should explicitly abolish constructive notice: the question should be whether the person

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106 Ghikas, *supra* note 65.

107 *Ibid* at 220.

108 BCLI Report, *supra* note 12 at 41–42.

109 *Ibid* at 34–35. If the person were acquiring the interest as a gift, then the BCLI recommended that the person would take the gift subject to the prior unregistered interest if he or she had actual knowledge of the prior interest before registration. See *ibid* at 37–39.

acquiring the interest knew of the prior unregistered interest, not whether they ought to have known.[110]

These recommendations seem to run at cross-purposes. On the one hand, the BCLI proposed that mere knowledge or knowledge alone of a prior unregistered interest should not amount to fraud; on the other, defeating a prior interest of which one has actual knowledge should not be permitted because to do so would be unfair or unconscionable. The first proposed amendment—mere knowledge does not amount to fraud—would do away with equitable fraud; the second—knowledge amounts to fraud—would have the effect of retaining it, albeit only where the purchaser has actual knowledge of a prior unregistered interest before entering a binding contract.

The BCLI's recommended revisions to the abolition of notice scheme run to three pages. In addition to the existing exceptions in section 29 and the provisions outlined above, the revisions include detail about the timing of notice, differential treatment of transfers for value and gifts, a definition of what amounts to actual knowledge, and specific provisions for trusts. The recommendations represent the most comprehensive attempt to provide a statutory explication of the limited circumstances in which the doctrine of notice might still exist in a title registration system. In fact, they appear an effort to codify some of the principles contained in the line of BC cases that would preserve the doctrine of notice: first, that the doctrine of notice is relevant if there is actual knowledge, and second, that notice matters up to the point where a party enters a binding contract to acquire a property interest, but not after. The fact that the recommended statutory revisions run to three pages reveals something of the difficulty in choosing a middle path between abolishing or retaining notice. Most jurisdictions have chosen the simpler path of abolishing notice, or, where choosing a middle path, of articulating a principle and leaving the courts to provide the detail.

A 2010 report from the New Zealand Law Commission (NZLC) on that country's title registration legislation steers closer to the strict abolition of notice approach than the BCLI.[111] The proposed amendment begins

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[110] *Ibid* at 31, 36–37.

[111] NZLC Report, *supra* note 13 at 21.

with an assertion that fraud is to be understood as "forgery or other dishonest conduct", and then that the doctrine of constructive notice does not apply in determining whether conduct is fraudulent.[112] However, where a person acquiring an interest "had actual knowledge of, or was wilfully blind to, the existence of [a prior unregistered] interest", and where that person "intended at the time of registration of the estate or interest that its registration would defeat the unregistered interest", then the person acquiring the interest committed fraud.[113]

The provision has the virtue of brevity, but the reliance on the notion of intent to defeat the prior unregistered interest leaves unresolved the problem that registering an interest and, by doing so, defeating the prior interest is part of the ordinary course of business. Establishing the intent to defeat may be obvious in some circumstances, but in most instances defeating an unregistered interest is the effect of registering an interest, regardless of intent. What is most interesting, however, is that the NZLC is proposing to retain a role, albeit limited, for the doctrine of notice.

A third approach that also attempts to retain some limited role for the doctrine of notice was proposed in 1990 by the Joint Land Titles Committee (JLTC), a body comprising representatives from all the Canadian provinces and territories (except the civil law jurisdiction of Quebec). The JLTC proposed to abolish the doctrine of notice, including constructive notice, but indicated that it should amount to fraud to allow a person acquiring an interest in land to defeat a prior unregistered interest where he or she not only knew of the prior unregistered interest but also that the holder of that interest objected to the transfer and would be prejudiced by it.[114] There should be no duty on the person acquiring an interest in land to investigate whether the holder of the prior unregistered interest in land objected to the transfer or would be prejudiced by it; he or she should be able to assume that the holder of the unregistered interest authorized the transfer. Nova Scotia, in building its title registration system in the early 21st century, adopted this approach.[115]

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[112] *Ibid* at 213.

[113] *Ibid.*

[114] JLTC Proposals, *supra* note 14 at 34–36, 49.

[115] *Land Registration Act*, SNS 2001, c 6, s 4.

Each of these proposals' attempts to establish a continuing role for the doctrine of notice. That role would be limited, but also more extensive than the current law in Australia, which provides for the prior unregistered interest only where the holder of the registered interest indicates an intention to be bound by the prior interest. The JLTC's approach comes closest to the strict Torrens abolition-of-notice approach in that it places the onus on the person choosing not to register an interest to make known his or her opposition to a transfer of title or other interest in land that might prejudice his or her interest. Otherwise, the person acquiring and registering an interest in land can proceed unaffected by the existence of unregistered interests.

However, our intent in this article has not been to advocate for a strict Torrens approach or a continuing role for the doctrine of notice. This article was motivated by the current confusion in British Columbia over the continued existence of the doctrine of notice in its title registration system. That confusion needs to be rectified, but while we recognize the preponderance of opinion in other jurisdictions and among academic commentary in favour of abolishing notice, we are agnostic about whether to adopt a strict Torrens approach or to retain notice and the equitable understanding of fraud. Either is preferable to the present confusion. We see the clarity and the efficiency gains in the former and the fairness considerations that courts have been so reluctant to concede in the latter. The doctrine of notice does create uncertainty, and therefore additional risk, which adds to the costs of transactions, possibly through the greater use of title insurance.[116] A strict Torrens approach would appear to do best what title registration systems were designed to do—simplify and facilitate transfers of interests in land and, in doing so, emphasize dynamic security. If that were the overriding goal, then British Columbia should move to abolish notice. That said, the judicial reluctance to countenance the loss of a property interest because of a failure to register the transferring instrument in circumstances where the person standing to benefit from this result knew of

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[116] Other factors, including the lack of indefeasibility for charges, also appear to be pushing those acquiring property interests towards title insurance in British Columbia. On the status of charges in British Columbia, see Douglas C Harris & Karin Mickelson, "Finding *Nemo Dat* in the *Land Title Act*: A Comment on *Gill v Bucholtz*", Case Comment (2012) 45 UBC L Rev 205.

the prior unregistered interest, may reflect deep-seated notions of fairness and a desire for static security that we are reluctant to abandon. The courts in British Columbia have disagreed for decades about the statutory direction provided in the *Land Title Act*, so it is time, as the BCLI recommends, for legislative intervention. In our view, adopting either approach to the doctrine of notice is preferable to the confusion that presently exists in British Columbia. The choice of rule should be made with a clear understanding of the underlying policy choice between static and dynamic security.