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# Book Review of the Law of the Land: The Advent of the Torrens System in Canada, by Greg Taylor (Toronto: Osgoode Society for Canadian Legal History, 2008)

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# BOOK REVIEWS

*THE LAW OF THE LAND: THE ADVENT OF THE TORRENS SYSTEM IN CANADA*, by Greg Taylor, Toronto: Osgoode Society for Canadian Legal History, 2008, 256 pp.

Systems for recording interests in land are not the subject of much public interest or concern in Canada. Occasionally a sympathetic victim of egregious fraud receives some media attention, but generally the land system operates quietly in the background. This has not always been so, and Greg Taylor's history of Torrens or title registration in Canada reveals a nineteenth century during which the merits and limitations of the common law, deeds registration, and title registration systems were vigorously and publicly debated. Eventually, title registration based on a model first developed in South Australia would prevail in the provinces and territories from British Columbia to Ontario. The civil law jurisdiction of Quebec remains an outlier, and the conversion of the Maritime Provinces to title registration is occurring unevenly, but otherwise Canada, unlike its neighbour to the south which opted for deeds registration systems and title insurance, is a collection of title registration jurisdictions. Taylor's book, one of only a handful of single-authored national legal histories in Canada, reveals how this came to be so.

There are many varieties of title registration, but they share the defining features that Taylor sets out in an introductory chapter. Unlike common law or deeds registration systems where the holder of an interest in land is always subject to the claim of the person wrongfully deprived of that interest, title registration guarantees that the person registered as the holder of title *is* the title holder. To use the common metaphor, title registration draws a curtain between the registry and all prior transactions, making the latter irrelevant to the existing state of title. With few minor exceptions, registration cures any defects in title. As a result, the title registry is not just a repository of property instruments, as in a deeds registration system; it is, to use the other common metaphor, a mirror that reflects the existing state of title. To varying degrees, title registration systems also abolish the common law doctrine of notice; the holder of a registered interest is unaffected by notice of unregistered interests. Some systems include assurance funds to compensate those

who, because of fraud and because an innocent purchaser is now the registered title holder, lose a title that would have been unassailable at common law. The end result is a system that provides purchasers and, by extension, lenders who take property interests as security for a loan, greater confidence in the veracity of the interests they acquire. It is a system designed to simplify and facilitate the transfer of interests in land.

Taylor then turns to South Australia in the late 1850s, wellspring of title registration in the common law world, and to its principle champion, Robert Richard Torrens, for whom the system is named. Torrens was not a lawyer; indeed, Taylor reveals that the agitation to replace the common law deeds-based system was in part a reaction to the widespread perception that lawyers had made the transfer of interests in land unnecessarily complicated, risky, and expensive. Torrens' contribution, suggests Taylor, was that he "converted the vague idea of title by registration into a practical proposition that was a real step forward in the law, made a version of it which appeared to justify the trouble and cost attendant upon its introduction, and persuaded the public of its usefulness."[1] In 1858, South Australia had the first title registration system in the common law world.

Taylor then works through the transposition of title registration to Britain's North American colonies. Although title registration would come to prevail between the Pacific and the Ottawa River, it would do so in an uneven and irregular manner befitting a federal state where jurisdiction over land lay with the provinces. Each province and territory had its own path to and version of title registration and Taylor's principal contribution is to document those paths and their attendant debates.

The Colony of Vancouver Island, established in 1849 as a proprietary colony of the Hudson's Bay Company, became the first jurisdiction in what would become Canada and the second common law jurisdiction anywhere to adopt title registration when it passed the *Land Registry Act* 1860. The route of transmission was not previously clear, but Taylor's archival sleuthing establishes the line from South Australia, through the Colonial Office and the office of the solicitor general for England, to Vancouver Island. The emissary

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[1] Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: Osgoode Society for Canadian Legal History, 2008) at 19.

was George Hunter Cary who, in 1859, was appointed attorney general of the newly formed mainland colony of British Columbia and acting attorney general of the existing colony of Vancouver Island. Although a remote and sparsely populated corner of empire, Taylor argues that Vancouver Island was an important first transpacific foothold for title registration because it revealed the system's relevance beyond Australia.

Nonetheless, there were some important adaptations of the Torrens system in its new locale. Perhaps most significantly, Vancouver Island legislators decided against instituting an expensive Torrens land commission to validate each title on first registration. Instead, the act introduced a two-tier system in which a titleholder acquired "absolute" title on first registration, but could only acquire "absolute and indefeasible" title (the state guarantee of title) five years after first registration.[2] The result was a registry of absolute titles that were not indefeasible (and hence vulnerable to the challenge from those with competing claims) and another registry of titles that were absolute and infeasible. In effect, the Vancouver Island statute privatized the business of establishing valid title on first registration by delaying the moment of indefeasibility to allow the opportunity for challenge. Taylor considers this an appropriate modification for the small, young colony of Vancouver Island without the resources of its South Australian counterpart to fund a commission.

Similarly, Taylor describes the decision not to adopt title registration for the mainland colony of British Columbia as "careful planning for the needs of a demographically different colony."[3] Governor James Douglas determined that such a system would only work if prospective purchasers had ready access to a land registry, something that would require multiple registries for the dispersed settlement on the mainland and an unjustifiable expense. In its early years the mainland colony used a deeds registration system, and it was only after the two colonies united in 1866, and then not until the *Land Registry Ordinance* 1870, on the cusp of the colony's entry into the Canadian confederation, that title registration was extended across British Columbia. Taylor attributes the triumph of title registration in the unified colony, hardly a foregone conclusion when the larger mainland colony joined with

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2 *Ibid.* at 43.

3 *Ibid.* at 59.

its island neighbour, to the "inherent superiority" of title registration, but also to the effective management of the title registration system by its registrar general for Vancouver Island, E.G. Alston.[4]

In fact, in Taylor's account, the appearance and then spread of title registration is largely a function of its "inherent superiority" coupled with effective advocacy and competent administration. The result is a study that focuses on the people and the political debates over title registration but pays little attention to the social or economic forces that created the circumstances in which title registration came to be viewed as desirable. These limitations become particularly apparent in Taylor's analysis of the movement for title registration in Ontario.

Unlike the short history of non-Aboriginal settlement in British Columbia, late-nineteenth century Ontario faced the task of reconciling more than a century of Crown grants and real estate transactions in a single land registry.[5] In 1885, Ontario introduced title registration for the City of Toronto and County of York. The region was small, and registration remained optional even within the confined boundary; an efficient deeds registry system continued to operate and drew those who balked at the registration fees. Two years later Ontario extended title registration to a large tract of its sparsely settled north and west and required the registration of all new land grants in the vast territory. Taylor credits these successes to the work of the Canada Land Law Amendment Association. The association's membership consisted largely of moneylenders and their legal counsel who were, of course, interested in a land system that improved the security of title and facilitated the granting of mortgages to secure loans. Notwithstanding this obvious self-interest, Taylor is at pains to suggest that the members were honourable men, well-respected in the community, and motivated at least as much by a sense of public service as by pecuniary gain. Indeed, Taylor ap-

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4 *Ibid.* at 60.

5 The move to title registration in British Columbia would have been much more involved had the system contemplated Aboriginal interests in land, but it did not, a point that the B.C. Court of Appeal confirmed years later when it ruled that Aboriginal title was a form of title that did not belong in the title registration system, at least not as presently constructed. See *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, 2000 BCCA 525, [2000] 10 W.W.R. 222, 80 B.C.L.R. (3d) 233.

pears indignant about the "obvious cheap shots" in the historical record,[6] which suggested that the avarice of moneylenders motivated their actions; in his view, theirs was a noble cause in the "interest of society as a whole",[7] and Taylor discounts what he labels a "Marxist" analysis that would see some class interest at play.[8]

One need not be a Marxist historian to recognize title registration as part of a long process of decoupling land from established social bonds and of reconstructing it as a commodity like any other. Title registration systems were introduced to facilitate the transfer of interests in land. They were part of a process of simplifying and integrating land more fully in the market economy, of enabling it to circulate more freely, and of situating it as a factor of production within mid-to-late-nineteenth century capitalism. Torrens title provided security for local purchasers, but it also helped to bring the land of Britain's overseas colonies within the ambit of British capital. Title registration came to prevail in Canada not because of its inherent superiority, but rather because of its usefulness in repositioning land within an emerging liberal order.[9] Taylor might have made far more of the larger social and economic context in which the significant changes in the recording of property interests occurred. Instead, he has written what is largely a political history of a legal innovation, leaving the social or economic history for others.

Taylor describes a relatively straightforward route to title registration across the Prairie Provinces. In 1887, again partly as a result of the concerted efforts of the Canada Land Law Amendment Association, the federal government passed the *Territories Real Property Act*, instituting title registration

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6 Taylor, *supra* note 1 at 87.

7 *Ibid.* at 93.

8 *Ibid.* at 86.

9 See Ian McKay, "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History" (2000) 81 Canadian Historical Review 617 at 621, for an argument that nineteenth century Canada should be understood as a "historically specific project of rule" to construct a liberal order. See also Philip Girard, "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920" in John McLaren, A.R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005) 120.

in what would become Saskatchewan, Alberta, and the northern territories. When Saskatchewan and Alberta became provinces in 1905, they immediately passed their own title registration statutes, confirming a system that was already well-established. On the other hand, Taylor recounts the operation of the Torrens system in Manitoba as a cautionary tale about insufficient infrastructure. In 1885, Manitoba introduced a mandatory title registration system, provoking a backlash over registration costs and the inconvenience of a single, central land registry in Winnipeg. Several years later, the legislature voted to make title registration optional, but the government continued to promote the system and, once the concerns about over-centralization were resolved with the opening of additional registries, Manitobans converted quickly to title registration.

The extension of title registration across Ontario would take most of the twentieth century and relatively few title-holders would register their interests until its final two decades. Nonetheless, today the conversion nears completion and Taylor concludes "[t]he conquest of the great province of Ontario by the Torrens system in the late twentieth century is surely its most significant one since its early victories in South Australia and its neighbouring colonies in the late 1850s and early 1860s."[10]

The unfinished business for title registration in Canada remains Quebec and the Maritimes. Taylor notes little appetite for the system in Quebec, either historically or today. He attributes this to the difficulties that several centuries of European settlement would pose to creating a single land registry, to the challenge of adapting Torrens registration to a civil law tradition, and to "a general lack of enthusiasm for legal imperialism from English Canada."[11] One might add that in Quebec, where the nineteenth century settlement frontier was exceedingly limited, the speculative buying and selling of land did not assume the importance that it did in western Canada. A system designed primarily to facilitate the transfer of interests in land, therefore, was not a priority and not worth the expense. Similarly, in the Maritimes an older history of European settlement complicated the conversion to title registration, and imparted less nineteenth century urgency to simplify the process of

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[10] Taylor, *supra* note 1 at 111.

[11] *Ibid.* at 156.

transferring land. Property interests were much more settled than in the Canadian west and, as in Quebec, the costs of converting to title registration outweighed the benefits. Moreover, Taylor notes that the legal profession in the Maritimes, particularly in Nova Scotia, provided concerted opposition to title registration. No doubt this opposition reflected a concern for loss of conveyancing work, but probably also a professional evaluation that settled interests in land were less secure in title registration systems than in the common law system of deeds. A little more than a century later, with the advantages, Taylor suggests, of title registration increasingly apparent in an age of electronic data transmission, Nova Scotia and New Brunswick are proceeding with conversions to title registration.

Beyond the detail of title registration and its implementation across the country, Taylor's study illustrates the capacity of the British Empire in the 19th century to circulate ideas, including legal innovations, among its settler colonies. That a radically new land system installed in one corner of the empire—South Australia—could be adopted within two years in another corner—Vancouver Island—is a function of empire. Some ideas circulated with people, but in many more instances the Colonial Office in London acted as a clearing-house, receiving legislation from one jurisdiction and dispatching it, sometimes with advice on its merits, to others. The techniques of colonial rule and of settlement were based on local knowledge, but also on the experience of empire, and historian John Weaver has described Torrens title as "a favoured instrument of rational colonialism."[12]

On another note, the differential adoption of title registration across Canada is yet another example of Canada's regionalism. That it should appear in land law is hardly surprising given the provinces' jurisdiction over land, but it is a reminder that the idea of Canada as a nation stretching across a continent was very much a work in progress in the nineteenth century. The regionalism is evident is the differential reception and adaptation of title reg-

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12 John Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 243. For a survey of title registration in the British Empire, see James Edward Hogg, *Registration of Title to Land throughout Empire* (Toronto: Carswell, 1920). His earlier work, *The Australian Torrens System* (London: W. Clowes, 1905), has also been widely consulted outside Australia.

istration, but also in the lack of attention to British Columbia within central Canadian debates about title registration, and Manitoba's lack of interest in the Ontario example on its doorstep. British Columbia, as a small colony and then province, was easily dismissed, and Ontario had not the experience with title registration that had accumulated in Australia by the 1880s. Nonetheless, although both Canadian examples were at hand, it was London and the Colonial Office rather than the fellow provinces that continued to draw the attention of Torrens' advocates and of legislators.

In places, Taylor's work assumes a somewhat evangelical quality. He assumes the "inherent superiority" of title registration,[13] and that it is "objectively" better than other land systems.[14] Moreover, there is something triumphalist in his declarations of "[t]he conquest of the great province of Ontario by the Torrens system",[15] or that the arrival of Torrens title in Nova Scotia and New Brunswick adds the "sixth and seventh Canadian province to its worldwide empire."[16] It is clear that the author is as convinced of the merits of Torrens registration as the advocates of whom he writes. Nowhere does he pronounce title registration as superior to deeds registration coupled with title insurance (the U.S. approach), but his tone throughout is that of an admirer of title registration, not a critic.

Finally, Taylor concludes with the intriguing suggestion that the uptake of title registration systems across most of common law Canada, contrasted with the failure of Torrens to colonize the United States, reflects a Canadian "willingness, in dealing with assets of great importance to the public such as land, to carry on aspects of its [Canada's] corporate life through agencies of the state as the representative of the whole community, rather than through private enterprise such as title insurance companies."[17] Perhaps so. It is certainly an enduring Canadian myth that the state has played a more significant and prominent role north of the 49th parallel, assuming responsibility

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13 Taylor, *supra* note 1 at 60.

14 *Ibid*. at 163.

15 *Ibid*. at 111.

16 *Ibid*. at 161.

17 *Ibid*. at 168.

for matters that were left to private industry and enterprise to the south. Or perhaps financial institutions captured Canadian policy makers at an opportune late nineteenth century moment to introduce and solidify title registration, much as title insurers have captured U.S. policy makers in the twentieth century to keep title registration out. In either event, the state guarantee of title in title registration systems across most of Canada operated to facilitate the transfer of interests in land; it was public intervention to smooth the functioning and growth of private markets in land. However, explanations for the differential adoption of title registration in North America must remain speculative pending a comparative study, or at least a fuller use of the existing literature on title registration in the U.S. In the meantime, Taylor has told the story of the reception of title registration in Canada and has made an important and useful contribution to the discipline of legal history which, for the most part, remains as regional as the systems for recording interests in land.

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