

**THE EMPEROR'S NEW CLOTHES:
THE MYTH OF INDEFEASIBILITY OF TITLE IN SASKATCHEWAN**

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By

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Abstract

This thesis explores whether the doctrine of indefeasibility of title and its three associated principles – the mirror principle, the curtain principle, and the insurance principle – are mythical constructs, and not legal facts as they are portrayed in the dominant legal discourse and in traditional legal research sources. It is commonly understood that indefeasibility of title is the hallmark of land titles systems of registration, especially those based on the Torrens model, and Saskatchewan is a jurisdiction which operates such a system. When one examines the genesis of land titles systems and indefeasibility of title, Saskatchewan's land titles statutes and recent court decisions, one discovers that there is a dichotomy between indefeasibility of title in practice and how it is portrayed in theory. Given that land titles systems of registration are statutory creations, it is more appropriate to utilize the language in the legislation and therefore to avoid reliance upon these constructs.

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Dedication

To my children, Nathan and Lucy.

To my partner, Geoffrey.

And to my parents, Ross and Helen.

Without your love, support, and understanding,
this work would not have been possible.
Thank you so much for helping my dream become a reality.

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**THE EMPEROR’S NEW CLOTHES:
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- AN INTRODUCTION**

It might be appropriate to begin this thesis with the iconic phrase, “once upon a time.” Reminiscent of the Andersen fairy tale “The Emperor’s New Clothes,”¹ the thesis exposes that the doctrine of “indefeasibility of title” is little more than a myth in Saskatchewan. Nonetheless, the doctrine and its three associated principles: the mirror, curtain and insurance principle, are supported as legal fact in dominant legal discourse, including judgments of the court:

...the torrens system of land registration encompasses the indefeasibility of title and that the certificate of title is intended to be a complete and accurate reflection of the result of all preceding transactions affecting the land. The plaintiff submits that a person searching a certificate of title is entitled to rely upon such search without looking elsewhere.²

Contrary to this assertion, they have never existed as such.

Such an argument may be considered blasphemous, because “indefeasibility” has grown to be “the received and almost universally accepted manner of describing a ‘title’ under the religion [of the Torrens System].”³ This is not surprising because this growth occurred during a time when provincial and territorial government officials acknowledged that Canadian land titles statutes were:

opaque, and sometimes downright misleading. They ... [had] to be tortured by courts into new forms to meet current conditions. They ... [hid] the light of title registration under bushels of substantive law and administrative detail. They require[d] rationalization and modernization in the light of nearly a century and a half of experience of title registration.⁴

In the 1990s the government of Saskatchewan addressed these concerns,⁵ and in 2000 significantly revamped the land titles system and its legislation,⁶ making it clearer and better

¹ Hans Christian Andersen, “The Emperor’s New Clothes” in Maria Tatar (ed), *The Annotated Hans Christian Andersen*, (New York: WW Norton & Company, Inc, 2008) at 3.

² *GW Harris Drywall Ltd v Saskatchewan (Regina Land Registration District)* (1982), Sask R 149; [1982] SJ no 10 (SKQB) at para 15.

³ Thomas W Mapp, *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System* (Edmonton: The University of Alberta Printing Department, The University of Alberta, 1978) at para 4.23.

⁴ 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) at 4-5.

⁵ Chapter 3 below at 87-92.

organized. As a result, it is now easier to see the problems and limitations inherent in the claim that indefeasibility of title is centrally important to the system's operation. This explains why Saskatchewan is an appropriate focus of analysis.

If one remains taken aback by the hypothesis, it is important to realize that the reliance upon these terms grew during the pre-computer and internet era, at a time when legal research sources were all paper-based. Researching and accessing journal articles and case reporters from other jurisdictions was not always possible, because it depended upon the collection in the research library. Also, one had to examine a series of paper volumes to ascertain interconnections between statutory provisions, and to determine whether any had been amended. There was no other way to research statutes. Accessing more than 100-year-old newspaper articles and almost 200-year-old and out-of-print books was not possible. In this environment, questioning the efficacy of "indefeasibility of title" would be a major research project involving travel to three continents and years of study. There is no evidence that any researcher ever secured funding for such a project.

Fortunately, online research databases now make such research possible. Among other things, in the twenty-first century one can find sources which used to be difficult to access, including: a more than 180 year old treatise containing a draft "Code" (statute) now out of print;⁷ an article on real property reform written by Jeremy Bentham;⁸ excerpts from speeches of Robert Torrens;⁹ more than fifty-year-old foreign journal articles which debate the central features of

⁶ *The Land Titles Act, 2000*, SS 2000, c L-5.1, as discussed in Chapter 3 below beginning at 92.

⁷ James Humphreys, *Observations on the Actual State of the English Laws of Real Property; with The Outlines of a Code* (London, John Murray, 1826) as digitalized by Google Books and found online at http://books.google.ca/books?id=C5kDAAAQAAJ&printsec=frontcover&dq=%22Observations+on+the+Actual+State+of+the+English+Laws+of+Real+Property%22&source=bl&ots+Go_jaklbcG&sig=efh3r9UXOFNBkqshXNTz9J3-4U&hl=en&ei=jELPTJ-eMsKonAfj55jpDw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false > discussed in Chapter 1 below at 6-9.

⁸ Jeremy Bentham, *On Mr. Humphreys' Observations on the English Law of Real Property: with the Outline of a Code, &c.* London, 1827 [Bentham 1827] reprinted in *The Making of the Modern World*. Gale 2009. Gale, Cengage Learning. University of Saskatchewan Library. 13 November 2009 online: <http://galenet.galegroup.com.cyber.usask.ca/serviet/MOME?af=RN&ae=U104702744&srchtp=a&ste=14> > discussed in Chapter 1 below at 6-9.

⁹ Rosalind F Croucher, "Inspired Law Reform or Quick Fix? Or, 'Well, Mr Torrens, what do you reckon now?' A Reflection on Voluntary Transactions and Forgeries in the Torrens System" (2009) 30 *Adel L Rev* 291 at 304 (HeinOnline).

land titles systems;¹⁰ the ten current Canadian land titles statutes¹¹ (none of which have adopted “indefeasibility of title”¹² and only one of which refers to an “indefeasible title”¹³); the Canadian journal articles which have employed the term “indefeasibility of title” or “indefeasible;”¹⁴ and a correlated list of the number of times courts in each province have used the terms “indefeasibility of title,” “mirror principle,” “curtain principle,” and “insurance principle.”¹⁵

Accessing such research sources, in addition to consulting more traditional research sources ranging from Blackstone to Greg Taylor’s new book, *The Law of the Land*,¹⁶ facilitates a more critical analysis of indefeasibility of title and a greater understanding of the context in which it developed than was possible before using the internet and online legal research databases became customary. This explains why such an argument as the one made in this thesis may seem novel.

When one juxtaposes the information contained in the historical and modern sources, and further when one compares the contents of repealed and current land titles legislation in Saskatchewan, one begins to question if indefeasibility truly is a hallmark of land titles systems of registration, or if it ever has been. From the synthesis created out of these research results,

¹⁰ See eg: WN Harrison, “Indefeasibility of Torrens Title” (1954) 2 U Queensland LJ 206 (HeinOnline) discussed in Chapter 3 below at 68; RG Patton, “The Torrens System of Land Title Registration” (1935) 19 Minn L Rev 519 (HeinOnline) referred to in Chapter 4 below; Charles E. Stevenson, “Brevia Addenda: Influence of Bentham and Humphreys on the New York Property Legislation of 1828” (1957) 1 Am J Legal Hist 155 (HeinOnline) referred to in Chapter 1 below.

¹¹ *Land Titles Act*, RSA 2000, c L-4 (Alberta, available on CanLII); *The Land Titles Act, 2000*, *supra* note 6 (Saskatchewan, available on CanLII); *Land Titles Act*, RSO 1990, c L.5 (Ontario, available on CanLII); *Land Titles Act*, RSY 2002, c 130 (Yukon, available on CanLII); *Land Title Act*, RSNWT 1988, c 8 (Supp) (North West Territories, available on CanLII); *Land Titles Act*, RSNWT (Nu) 1988, c 8 (Supp) (Nunavut, available on CanLII); *Land Titles Act*, SNB 1981, c L-1.1 (New Brunswick, available on CanLII); *Land Titles Act*, RSBC 1996, c 250 (British Columbia, available on CanLII); *The Real Property Act*, CCSM c R30 (Manitoba, available on CanLII); and *Land Registration Act*, SNS 2001, c 6 (Nova Scotia, available on CanLII).

¹² Although their statutes do not contain “indefeasibility of title,” Alberta, Saskatchewan, the Yukon, the North-West Territories, and Nunavut do employ the expression “absolute and indefeasible estate of inheritance in fee simple of and in the lands” in the short form mortgage covenant which is found in a schedule or appendix attached to its statute, or contained in a regulation. See: *The Land Titles Act*, RSA 2000, c L-4 at Schedule 2, Column 2; *The Land Titles Regulations, 2001*, SR 2001, c L-5.1, Reg 1, Appendix 2, Column 2; *The Land Titles Act*, RSY 2002, c 130, Schedule 2, Column 2; *The Land Titles Act*, RSNWT 1988, c 8 (Supp), Schedule B, Column 2; NSNWT-NU 1988, c 8 (Supp), Schedule B, Column 2.

¹³ The expression “indefeasible title” is contained in the *Land Titles Act*, RSBC, *supra* note 11 at ss 23, 25, 29, 33, 34 and 37.

¹⁴ See Chapter 2 below at 55-60.

¹⁵ See Chapter 2 below at 62-67.

¹⁶ Greg Taylor, *The Law of the Land The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008).

Chapter 1 provides the context in which land titles systems developed, and of its most important features. “Indefeasibility of title” was not of central importance in more than the first one-hundred years in which common law jurisdictions operated land titles systems of registration, even those based on the Torrens model.¹⁷ The terms “mirror principle,” “curtain principle,” and “insurance principle” were not created until the early 1950s.¹⁸ From this it can be concluded that the genesis of the doctrine of indefeasibility of title in Saskatchewan is very different from how it is usually portrayed.

From this a need was identified to survey traditional research sources regarding indefeasibility of title, to determine if they provide any indication that there is more to indefeasibility of title than how it is commonly portrayed. Chapter 2 serves this function, and outlines the common understanding of indefeasibility of title, and the mirror, curtain, and insurance principles.

The next two chapters refute the common understanding, particularly as it appears in Saskatchewan. The land titles system of registration is based upon a statute, and judicial interpretation has only been necessary when legislative provisions are ambiguous, or when the issue involves a matter which the legislation has failed to address. Chapter 3 examines the contents of Saskatchewan’s land titles legislation of 1906,¹⁹ 1978²⁰ and 2001²¹ and determines that indefeasibility of title and the three principles have never been central tenets of the province’s land titles system. Chapter 4 examines four relatively recent cases where indefeasibility of title has been, or should have been, considered. Contrary to the dominant assertion, three of these cases illustrate that courts do not always treat indefeasibility of title as a legal fact, thereby supporting the argument that it is more myth than reality.

Taken together, these four chapters support the hypothesis that indefeasibility of title has never existed in Saskatchewan. One might think that this is a theoretical issue of limited importance. However, the lack of understanding of this subject potentially can affect many people who live in the ten Canadian jurisdictions which operate land titles systems of

¹⁷ Chapter 1 below.

¹⁸ Theodore BF Ruoff, *An Englishman Looks at the Torrens System* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957).

¹⁹ *The Land Titles Act*, SS 1906, c 24.

²⁰ *The Land Titles Act*, RSS 1978, c L-5 (repealed by SS 2000, c L-5.1).

²¹ *The Land Titles Act, 2000*, *supra* note 6.

registration.²² Consider that in 2006 in Regina, Saskatchewan, two-thirds of all dwellings were single-detached homes,²³ and sixty-eight percent of all dwellings were owner-occupied.²⁴ Home owners are the people who potentially will be adversely affected if lawyers do not understand the nuances inherent in land titles legislation and conveyancing practices. The issue of the myth of indefeasibility is not just theoretical; it possesses practical consequences. It is important that its limitations be exposed, and the public be protected from the misunderstanding which may result from our collective reliance on these terms.

²² These are the Yukon, British Columbia, Alberta, the North West Territories, Saskatchewan, Manitoba, Nunavut, Ontario, New Brunswick and Nova Scotia.

²³ Sask Trends Monitor, *Focusing on People ... a social and demographic profile of the Regina community 2008 Edition* June 2009 at section 5.1, located online at <[http://www.regina.ca/residents/residents-regina-facts/information-facts/Focusing_on_People_2008final\[1\].pdf](http://www.regina.ca/residents/residents-regina-facts/information-facts/Focusing_on_People_2008final[1].pdf)>.

²⁴ *Ibid* at Table 5.1.

CHAPTER 1
PINNACLE OR POSTSCRIPT:
THE GENESIS OF INDEFEASIBILITY OF TITLE

By the early nineteenth century English real property law, especially conveyancing, was like a pot of water which had been heated to a temperature just below boiling. Discussions of revolution or reform were commonplace, and noted utilitarian theorist Jeremy Bentham even participated in the debate.¹ Consequently it is not surprising that in the mid 1820s – more than forty years before a patent was granted to the inventors of the typewriter² - established English lawyer and “conveyancer,”³ James Humphreys, authored a book on this subject.

He called it *Observations on the Actual State of the English Laws of Real Property; with The Outlines of a Code*, and it was in excess of 350 pages.⁴ It included an explanation of the changes he identified as necessary to overhaul this area of law, and a model Code. It was a remarkable feat; Humphreys had to handwrite this treatise before it could be reproduced with typographical plates on a printing press. He was a solicitor, and this task reduced the amount of time available for him to focus on billable work. Because of this, Bentham noted that Humphreys had made “a sacrifice of pecuniary interest on the altar of public good.”⁵

As demonstrated through this project, Humphreys was dedicated to improving the state of conveyancing and the English law of real property, and he thought a Code would function as the pinnacle in possible improvements. Through this treatise, Humphreys sought to expose the

¹ Jeremy Bentham, *On Mr. Humphreys' Observations on the English Law of Real Property: with the Outline of a Code*, &c. London, 1827 [Bentham 1827] reprinted in *The Making of the Modern World*. Gale 2009. Gale, Cengage Learning. University of Saskatchewan Library. 13 November 2009 online:
<<http://galenet.galegroup.com.cyber.usask.ca/servlet/MOME?af=RN&ae=U104702744&srchtp=a&ste=14>> .

² In 1867, US citizen Christopher Latham Sholes invented the typewriter. In 1868, the US government granted a patent for his invention to him, Carolos Glidden and Samuel Soule. See online:
<<http://www.ideafinder.com/history/inventions/typewriter.htm>>.

³ Bentham 1827, *supra* note 1 at 3.

⁴ James Humphreys, *Observations on the Actual State of the English Laws of Real Property; with The Outlines of a Code* (London, John Murray, 1826) as digitized by Google Books and found online at
<http://books.google.ca/books?id=C5kDAAAQAAJ&printsec=frontcover&dq=%22Observations+on+the+Actual+State+of+the+English+Laws+of+Real+Property%22&source=bl&ots+Go_jaklbcG&sig=efh3r9UXOFNBkqshXNTz9J3-4U&hl=en&ei=jELPTJ-eMsKonAfj55jpDw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false>.

⁵ Bentham 1827, *supra* note 1 at 3.

defects in real property law,⁶ to demonstrate emphatically that these laws were “utterly incapable of correction.”⁷ He also wanted to prove that a code in this area was possible, that all elements of the problem could be addressed through legislation, with “practicable” results.⁸ The common law had failed, and he advocated that legislation must replace it.

This was revolutionary. When Humphreys was writing, legislative codes were not popular with the English who associated “code” with the French Civil Code, bringing to mind the relatively recent issues with France and Napoleon.⁹ In such an environment many legal scholars were not receptive to legislative reforms,¹⁰ preferring to rely upon judicial interpretation. Yet Humphreys still chose to draft a code to transform real property law.

His book “was acclaimed as a masterpiece”¹¹ and, given the importance attached to this issue, generated a great deal of debate. At the time there were conflicting opinions regarding reforms to real property law and conveyancing. Some commentators agreed with Humphreys and believed that the entire system needed to be changed. For example, Bentham wrote that “*this* mass of abuse could not be cleared away by any other hand than that of parliament.”¹² Another person wrote under a pseudonym and adopted a more moderate position than had Bentham. However, he still evidenced support for Humphreys’ concepts.¹³

Jonathan Henry Christie exemplified a more traditional and conservative reaction to Humphreys’ work.¹⁴ He wrote that a code would not work because the drafters could not

⁶ Humphreys, *supra* note 3 at 3.

⁷ *Ibid* at 179.

⁸ *Ibid* at 179; Charles E. Stevenson, “Brevia Addenda: Influence of Bentham and Humphreys on the New York Property Legislation of 1828” (1957) 1 *Am J Legal Hist* 155 at 161 [Charles Stevenson] (HeinOnline).

⁹ Humphreys, *supra* note 3 at 2.

¹⁰ JH Baker, *An Introduction to English Legal History* (2nd ed) (London: Butterworths, 1979) at 189. The utilitarian legal scholars Jeremy Bentham and James Austin are two exceptions. See: Jeremy Bentham, *The theory of legislation*, edited and with an introduction by C.K. Ogden (London: Kegan Paul, Trench, Trubner, 1931) and John Austin, *The Province of Jurisprudence Determined* (London: Murray, 1832).

¹¹ Charles Stevenson, *supra* note 8 at 161.

¹² Bentham 1827, *supra* note 1 at 6.

¹³ A Correspondent, “Examination of the Code of Laws of Real Property, proposed by Mr. Humphreys” (1827) 5 *Prop Law* 325 (HeinOnline).

¹⁴ Jonathan Henry Christie, *Letter to the Right Hon. Robert Peel, One of His Majesty’s Principal Secretaries of State, on the Proposed Changes in The Laws of Real Property, and on Modern Conveyancing* (London: John Murray, 1827), as digitized by Google Books and found online at http://books.google.ca/books?id=UYG_PH2j7XoC&pg=PA478&lpg=PA478&dq=%22Code+of+Laws+of+Real+Property%22&source=bl&ots=PKArRubCwJ&sig=-tOgS1rhVqSxG-YGIYORwOOU3nc&hl=en&ei=1-

possibly foresee all issues. Therefore more reliance would have to be placed on litigation if a code was adopted.¹⁵ He also asserted that only incremental changes would work, especially since lawyers exhibited a tendency to revert to the legal systems and practices which they knew and used.¹⁶ To him, the complete transformation of the system of real property law, through the adoption of a code, was unlikely to be effective.

But Humphreys and Bentham believed otherwise. Their commitment to revolution through the pinnacle of legislation was shared later by Robert Richard Torrens of South Australia. In Australia that belief resulted in the development of a land titles system of registration which was adopted in many other jurisdictions including Saskatchewan. More than one hundred and fifty years after the first land titles system was adopted, these statutes are no longer treated as the “pinnacles” of the evolutionary process of conveyancing practices. Instead, the principle or doctrine of indefeasibility of title is.

Contrary to popular belief, “indefeasibility of title” was only a postscript in real property law and conveyancing practices until approximately sixty years ago. This is evidenced through examination of conveyancing practices documented by Blackstone in the late eighteenth century, the reform movement which resulted in the adoption of a deed registry system, and in the development of the first land titles system of registration in South Australia. The term also is noticeably absent from the debate in Canada which resulted in the adoption of land titles systems of registration in Ontario, Manitoba, and the in the North-West Territories.¹⁷

If South Australia legislation is not the genesis of this term, what is? In the late 1950s noted British land titles expert Theodore Ruoff credits Canada and the decision of *Turta v Canadian Pacific Railway*¹⁸ with the creation and popularization of this expression.¹⁹ A closer

[TOTJm0EoGlnQf6 7ET&sa=X&oi=book_result&ct=result&resnum=28&ved=0CBkQ6AEwAQ#v=onepage&q=%22Code%20of%20Real%20Property%22&f=false>](#).

¹⁵ *Ibid* at 6-8.

¹⁶ *Ibid* at 8-9.

¹⁷ Greg Taylor, *The Law of the Land: The Advent of the Torrens system in Canada* (Toronto: University of Toronto Press, 2008).

¹⁸ *Canadian Pacific Railway Company v Turta* (1954), SCR 427; [1954] 3 DLR 1; [1954] SCJ no 31 (SCC) (available on CanLII) [*Turta* SCC citing to QL].

¹⁹ Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) at 8 and 9 n 14.

examination of the trial and appeal judgments²⁰ leads to an inference that Ruoff overstates the importance which the Supreme Court attached to the term. The trial court in *Turta* actually advocates that ownership disputes should be resolved on the basis of the wording contained in the legislation, and not on phrases which are not codified in the statute.²¹ Such an approach, notes the Court, leads to confusion. Neither the Court of Appeal nor the Supreme Court of Canada contradicted this position. Consequently, it was not the Canadian courts but Ruoff – the man who also coined the expressions mirror principle, curtain principle, and insurance principle²² – who promulgated a term which began as a postscript to the real property and conveyancing reform movement, and which is now treated as if it is the pinnacle of land titles systems of registration.²³

1. CONVEYANCING DURING BLACKSTONE’S ERA

Since the Conquest in 1066, the English law has recognized that all land is owned by the Crown, with individuals merely being granted an estate or interest therein. In such a system the original Crown grant is viewed as the foundation of all titles.²⁴ By the nineteenth century, the root of land ownership was causing difficulties in conveyancing, because land was beginning to be valued as a commodity possessing economic value.²⁵ However, conveyancing was a complicated matter, in part because there remained sixteen different types of deeds to effect a transfer of an estate or an interest, none of which were reduced to standardized forms.²⁶

In Blackstone’s *Commentaries*²⁷ the chapter, “Of Alienation by Deed,” illustrates how complexity in the system of deeds adversely impacted conveyancing practices.²⁸ This chapter begins with a recitation of the requirements of a deed which is “a solemn form of contract that is

²⁰ *Turta v Canadian Pacific Railway Company* (1952), 5 WWR (NS) 529; [1952] AJ no 21 (QL) (Alta SCTD) [*Turta Trial* citing to QL].

²¹ *Ibid* at para 147.

²² Ruoff, *supra* note 19.

²³ Chapter 2 below.

²⁴ R Stein, “The ‘Principles, Aims and Hopes’ of Title by Registration” (1983-1985) 9 *Adel L Rev* 267 at 267 (HeinOnline).

²⁵ Austin, *supra* note 10.

²⁶ William Blackstone, *Commentaries on the Laws of England*, vol 2, (Philadelphia: Robert Bell, 1771 [-1772. New York: Oceana Publications, 1967]), Chapter 20.

²⁷ *Ibid*.

²⁸ *Ibid*.

entered into between the seller and the buyer.”²⁹ According to Blackstone, the law requires that eight conditions must be met before a deed is valid. First, the deed must comply with the *Statute of Frauds* and be in writing.³⁰ Second, it “must be founded upon good and sufficient consideration”³¹ or it is invalid. Third, a degree of formality is required in the written form; specifically the deed must be written upon paper or parchment, and not on any other surface such as a stone or a tree bark.³² Fourth, the names of the parties, premises, the nature of the estate or interest being alienated, any reservations annexed to the grant, any conditions, any warranties such as a warranty of the estate being granted, covenants, and conclusion must be sufficient and specific so as to bind the parties to the transaction.³³ Fifth, each of the parties must actually read the deed, or if a party cannot read, it must be read to him.³⁴ Sixth, it must be signed and sealed by each party, to verify that each understands its contents and intends to be bound by them.³⁵ Seventh, a deed must be “*delivered* by the party himself or his certain attorney”.³⁶ This helps to prevent fraud, as it precludes another individual from preparing and bringing forward a fraudulent document at a later time. Finally, for a deed to be valid, it must be attested, or signed by each party in the presence of a witness.³⁷ Blackstone states, if any of these conditions are not met, the deed is invalid, and, as a result, no interest or estate in the land would be transferred.

Next Blackstone reviewed how deeds were used in the different types of transactions in which an interest or estate in land was alienated in England. He noted there were six different types of “original conveyances:” feoffment or livery of seisin; gift; grant; lease; exchange; and partition. He also listed five types of derivative conveyances: release; confirmation; surrender; assignment; and defeasance which includes mortgages.³⁸ Each of these was defined and briefly described in the chapter. After these conveyances, Blackstone turned to alienation by equitable

²⁹ Taylor, *supra* note 17 at 5-6.

³⁰ Blackstone, *supra* note 26 at 295.

³¹ *Ibid* at 296-297.

³² *Ibid* at 297.

³³ *Ibid* at 297-304.

³⁴ *Ibid* at 304.

³⁵ *Ibid* at 305-306.

³⁶ *Ibid* at 306-307.

³⁷ *Ibid* at 307-308.

³⁸ *Ibid* at 310-327.

means and discussed the use and the trust, and identified five types of conveyances that developed in consequence of the *Statute of Uses*.³⁹ These included the covenant to stand seised to uses; the bargain and sale of lands; the lease and release; deeds to declare the uses of other conveyances; and deeds of revocation of uses.⁴⁰ Acquiring an estate in land was far from straightforward during this era.

When land was the subject of a conveyance, the landholder and the person interested in acquiring an estate or interest in land would each hire their own lawyers to review the owner's chain of title – all such deeds – dating back to the original Crown grant.⁴¹ These lawyers would review all such deeds and other instruments in the landholder's possession pertaining to the land's alienation over the centuries. The instruments and deeds were voluminous.⁴² Land descriptions in these documents were lengthy, with more words devoted to the types of interests held in the land which generate revenue than to the actual size or boundaries of the parcel. For example in one deed of lease dating from the eighteenth century, the land was described as:

the capital messuage, called Dale Hall in the parish of Dale in the said country of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before-mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances ...⁴³

³⁹ *Ibid* at 327-337.

⁴⁰ *Ibid* at 338-339.

⁴¹ Stein, *supra* note 24 at 268.

⁴² Stein, *supra* note 24 at 273.

⁴³ Blackstone, *supra* note 26 at Appendix II, ii-iii.

As well, deeds usually were written in one paragraph, without subparagraphs or other breaks, so there were no headings to guide the reader. Sentences could run on for fifty lines.⁴⁴ The lawyer also had to check for defects in the document, “such as invalid attestations, inoperative documents executed by corporate officers where the document is *ultra vires* the powers of the company or without the scope of authority of the officer”⁴⁵ and to determine if the conveyancing instrument contravened any statute.⁴⁶ In short, reviewing such documents was a very difficult and cumbersome task for the lawyer, and an expensive one for the client.

Unfortunately the lawyers’ review of the chain of title did not end with the documents. These lawyers also had to try to ascertain if anyone had an interest in the land which was not documented in writing, such as a claim based on equity. Other times people had good claims, but they were statute barred.⁴⁷ As well, the landholder may have misplaced a deed.⁴⁸ The lawyers for the parties had to carefully check all such matters, because the chain of title was only as good as its weakest link.⁴⁹ As most chains had a weak link, titles were very uncertain.

It took months to search the chain of title and even after the transaction was completed, a stranger could come forward and claim to have a better title to the parcel than the person who had just purchased the property. When this happened, the buyer lost the land and could not recover the money he had paid to the seller.⁵⁰ Sometimes the estate or interest was valid; at other times it was fraudulent. Unfortunately, the system was not designed to allow a person to assess the truth and validity of the competing claims. Given this lacuna, the common law conveyancing system facilitated fraud and forgery.⁵¹

⁴⁴ See draft Marriage Settlement Deed in Bentham, 1827, *supra* note 1 at 28-30.

⁴⁵ Stein, *supra* note 24 at 273.

⁴⁶ Marcia Neave, “Indefeasibility of Title in the Canadian Context” (1976) 26 U Toronto LJ 173 at 173 (HeinOnline).

⁴⁷ Stein, *supra* note 24 at 268.

⁴⁸ *Ibid* at 273.

⁴⁹ Neave, *supra* note 46 at 173.

⁵⁰ This happened to a friend of Robert Torrens, and it is this event that motivated him to develop a system of land titles registration. See: Rosalind F Croucher, “Inspired Law Reform or Quick Fix? Or, ‘Well, Mr Torrens, what do you reckon now?’ A Reflection on Voluntary Transactions and Forgeries in the Torrens system” (2009) 30 Adel L Rev 291 at 304 (HeinOnline).

⁵¹ Neave, *supra* note 46 at 173.

Similarly the storage of the documents offered ample opportunity for fraud, as they were retained in the private possession of the seller. It was relatively easy for a landholder to change a few details on a lengthy and difficult-to-read deed that remained in his possession; no one else could say the deed never contained that term, because no one else had the opportunity to view it. From the reign of Henry VIII there had been a public registry for enrolling sale deeds at one of the Courts of Westminster, but landholders avoided using it. Instead of using deeds of sale, they used a combination of a lease and release.⁵² These types of deeds were not caught by the enrollment rule and thereby the details of what were *de facto* sale transactions of real property remained private and were not subject to public scrutiny. Acquiring land – and being certain you were obtaining and keeping what you believed was the subject of the agreement – was subject to risk.

This lessened the attractiveness of acquiring land, and also made lenders reluctant to use land as collateral when loaning funds to landholders. This was problematic during the industrial revolution, when acquiring private property was viewed by many people, including leading utilitarian legal scholars such as Jeremy Bentham⁵³ and John Austin,⁵⁴ as an important means of increasing the level of public good in society and maximizing the potential of wealth. Changes to real property law needed to be made to facilitate these goals.

2. NINETEENTH CENTURY REFORMS

As noted in the introduction, by the early nineteenth century some lawyers such as James Humphreys began to address real property law and conveyancing practices that were impeding economic progress, and suggesting reforms. Government took notice. In February 1828 Lord Brougham delivered a six-hour speech to Parliament on the need for legal reforms, including laws pertaining to real property. His speech was followed in the subsequent decades by several commissions,⁵⁵ and starting in the 1840s the government made minor changes to conveyancing practices to modernize the law in this area.

⁵² Douglas J Thom, *The Canadian Torrens system with Special Reference to the Statutes of Manitoba, Saskatchewan and Alberta and of the Dominion of Canada* (Calgary: Burroughs and Company, 1912) at 6.

⁵³ Bentham, *supra* note 10 at 112, 118-119, and 194-196.

⁵⁴ Austin, *supra* note 10 at 75 and 100-101.

⁵⁵ Charles Stevenson, *supra* note 8 at 161 and 161 n 20.

2.1 The Deed Registry System

After October 1, 1845, a conveyance of a freehold estate could be effected by a grant without any accompanying ceremony of livery of seisin.⁵⁶ In 1862, England formally adopted a deed registry system.⁵⁷ As part of this development, the law was amended to limit chain-of-title searches to sixty years.⁵⁸ Sale deeds were “simplified”⁵⁹ and deeds were entered on a register according to the name of the party then owning the land or holding the interest.⁶⁰ However, its usage was not compulsory until 1897.⁶¹

Deed registry systems continue to operate today, in jurisdictions such as Ontario and Prince Edward Island.⁶² They incorporate real property law as it developed over centuries, and the chain of title remains very important because the title is only as good as its weakest link.⁶³ To this end, the registry operates like a notice board which conveys priority if the document is properly prepared and executed. Whenever a legal interest in land is alienated, the details of the transaction (but not the description of the parcel of land⁶⁴) are “enrolled” or recorded on the registry. Because one must know the names of the parties to transactions before one can search

⁵⁶ Thom, *supra* note 54 at 5.

⁵⁷ John L McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age* (1992) 18 Wm Mitchell L Rev 61 at 71 (HeinOnline). McCormack also notes at 72 that in 1925 England adopted a system of land titles registration for use in England and Wales.

⁵⁸ Thom, *supra* note 54 at 6; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th ed) (Oxford: University Press, 2008) at paras 8.3.25-8.3.28. These developments are interesting but are beyond the scope of this paper.

⁵⁹ “Simplified” does not mean they were as clearly drafted as the transfers and transfer authorizations utilized within Torrens systems. They remained quite lengthy, as the “fees of solicitors and conveyancing counsel were based on the number of folios in the instrument.” Thom, *ibid* at 6.

⁶⁰ ES Collins, *Land Titles in Saskatchewan – a guide to registrars and their staffs* (Regina: Land Titles, 1966) at 6.

⁶¹ Land Registry, “A Short History of Land Registration in England and Wales” at 10, online at <<http://www1.landregistry.gov.uk/upload/documents/bhist-lr.pdf>>.

⁶² Taylor *supra* note 17 at 99; Marjorie Lynne Benson, Marie-Ann Bowden and Dwight Newman, *Understanding Property: A Guide to Canada’s Property Law* (2nd ed) (Toronto: Thomson-Carswell, 2008) at 153 [Benson].

⁶³ Neave, *supra* note 46 at 173.

⁶⁴ In late 1883 – more than three years before a land titles system was adopted for the North-west Territories – the deed registry office in Moose Jaw began making entries in a registry book. Each entry noted the date when the transaction was entered, the date the transaction was effective, the type of transaction (mortgage, patent, etc.), the names of the parties, and sometimes the name of the municipality was listed. Noticeably absent was any legal description of the land. Source: Day-Book 1 filed with the Moose Jaw Land Titles Office daybooks preserved at Information Services Corporation, 1301 1st Avenue, Regina, Saskatchewan.

the chain of title, it “works best in a jurisdiction with infrequent land transfers and where title searches are uncomplicated and short.”⁶⁵

In the deed registry system, the government operates the system and also stores the deeds which have been enrolled.⁶⁶ No one at the registry office formally reviews the deeds for accuracy so the deeds as entered may contain inaccurate information which serves to invalidate the entire instrument.⁶⁷ For example, if land is not correctly described on a mortgage, no charge will attach to the land. The deed also is invalidated if the attestation clause is not completed correctly. A deed may be forged, or its contents may be the subject of fraud and altered so that it no longer reflects the actual details pertaining to the ownership of the land. If a person fails to register an interest, it will be ineffective against third parties. The onus is on the potential purchaser to search for deeds and to review them for accuracy. Provided the deed is valid, priority is obtained through the timing of registration.⁶⁸ If the deed is not valid, the proprietorship of the land will be compromised.

For these reasons, deed registry systems are unable to provide any warranty regarding land ownership. Such systems:

can be physically cumbersome and time-consuming because a great number of index books may have to be consulted and reconsulted. In addition, where a past transfer of title does not appear in the grantee index, the title searcher may have to guess how ownership may have passed to an owner in order to reach further back in time where additional transactions may be recorded. If a particular transaction does not appear in the grantee index, the searcher is limited to the process of trial and error and may or may not be able to discover how ownership passed to a particular owner.⁶⁹

A nineteenth century commentator expressed the issues inherent in a deed registry system more bluntly:

Under our present method of registration of deeds, any piece of conveyancing no matter how absurd or ridiculous it may be, can be registered, and it may remain on the register for years before its absurdity and utter failure to carry out the intention of the parties is discovered. No doubt the person who concocted the

⁶⁵ Bruce Stevenson, “United States Land Registration and Canada’s Torrens system: A Comparison” 2 Can-Am LJ 123 at 124 (HeinOnline).

⁶⁶ Benson, *supra* note 62 at 153.

⁶⁷ *Ibid* at 155.

⁶⁸ Gray, *supra* note 58 at paras 8.3.25-8.3.28; Bruce Stevenson, *supra* note 65 at 125.

⁶⁹ McCormack, *supra* note 57 at 68 n 22.

“conveyance” ... was fully persuaded that it was all right and in proper legal form, and those who employed him were equally confident that their wishes had been carried out. Notwithstanding all its defects, the deed could be registered, and the title might pass through the hands of several equally accomplished conveyancers, before the defect might be exposed, and in the meantime, the possibility of remedying the defect be increased a hundred fold.⁷⁰

Even so, the deed registry system is an improvement over the common law because there was a central office where a conveyancer could go and, by identifying the parties, learn about transactions which focused on the specific parcel of land. This reduced the potential for missing transactions. Title searches were shortened too; a potential purchaser no longer has to search the chain of title back to the original Crown grant.

Yet the reforms provided in this system could not address its greatest deficiency. Because the root of the title is predicated upon the efficacy of previous deeds and instruments back to a legislated date, problems are “grandfathered in” for the current owner. The nature of the system facilitates uncertainty in land ownership. Given this inherent uncertainty, in the nineteenth century some people continued to lobby for more revolutionary changes to conveyancing.

2.2 Land Titles Systems: an Overview

2.2.1 South Australia

One place where the debate regarding land systems continued was South Australia. It was not a penal colony, but “had been developed on the principle of land purchase, and buying and selling land was its *raison d’être*.”⁷¹ Many of its settlers (including, perhaps, Torrens’ father who was “a well-known political economist and one of the ... [Colony’s] founding fathers”⁷²) were British citizens “dissatisfied with the English religious establishment and, more broadly, with inherited irrationalities and solutions dictated from above.”⁷³ Yet even in the early years of South Australia:

[I]and speculation was rife; and land titles were in *serious* disarray. [Professor Douglas] Pike estimated that it was probable that the documents for three-quarters of the titles had been lost. There had been a number of fires in public offices; land

⁷⁰ Geo S Holmsted, “To the Editor of the Canadian Law Times” (1884) 4 *Can L Times* 20 at 22 (HeinOnline) [Holmsted 1884].

⁷¹ Croucher, *supra* note 50 at 303.

⁷² *Ibid* at 302.

⁷³ Taylor, *supra* note 17 at 20.

sales raced ahead of surveying, and many titles were in the hands of people who were not resident in South Australia.⁷⁴

In such an environment, “dissent and suggestions for reform had a ready hearing.”⁷⁵ Real property reform was of major importance to the colonists, and its first bill for a land titles system was drafted in 1836.⁷⁶ It failed to be accepted, but the issue did not resolve itself.

Robert Richard Torrens, a customs officer at the Port of Adelaide and then the Registrar of Deeds,⁷⁷ was the person who, without any “legal training whatsoever”⁷⁸ was able to move the debate forward and achieve legislative results in the 1850s and in the 1860s.⁷⁹ He became interested in the issue after a friend had purchased land in the colony of India. His friend:

was an officer in the Indian army, who had built a mansion and plantations, and who, after a flaw was discovered in the title, lost not only the land but ‘upwards of 20 000 pounds expended on it in buildings and improvements and was entirely beggared by law expenses.’⁸⁰

Torrens found this situation untenable, and once opined that “the existing law of real property ... [is] ‘complex and cumbrous in its nature, ruinously expensive in its working, uncertain and perplexing in its issues, and specially unsuited to the requirements of this community.’”⁸¹ He was determined to reform the laws of real property in his jurisdiction,⁸² to prevent any of South Australian’s citizens from being harmed as had his friend in India.

As Torrens was not trained in law or a practicing lawyer, real property rules and conveyancing procedures were not axiomatic to him. Additionally, he did not care for lawyers.⁸³

⁷⁴ Croucher, *supra* note 50 at 303-304, footnotes omitted.

⁷⁵ Taylor, *supra* note 17 at 20.

⁷⁶ *Ibid* at 19.

⁷⁷ Croucher, *supra* note 50 at 304.

⁷⁸ Taylor, *supra* note 17 at 19.

⁷⁹ *Ibid* at 18-26.

⁸⁰ Robert Torrens, *Speeches of Robert R Torrens, Esq explanatory of his measure for Reform of the Law of Real Property: to which is appended copy of the bill passed by the House of Assembly of South Australia* (1857) 14, quoted in Croucher, *supra* note 50 at 304.

⁸¹ South Australia, *Parliamentary Debates*, House of Assembly, 1857-58, [202], 4 June 1857 (Robert Torrens), quoted in Croucher, *ibid* at 301.

⁸² Taylor, *supra* note 17 at 19.

⁸³ Croucher, *supra* note 50 at 301.

With the involvement of Dr. Ulrich Hubbe,⁸⁴ an individual familiar with the system of land title by registration operating in Germany and Austria since the thirteenth century,⁸⁵ Torrens developed a system that applied the principles attached to ships' ownership pursuant to the Shipping Acts⁸⁶ and their corresponding titles, to land.

With ships, a certificate was issued to record ownership of the title or the shares held by different persons. For example, if a ship was owned by three different individuals, a separate title was issued for each one. When the owner sold his interest in a ship, the old title was cancelled and a new one evidencing the new owner was created in its place. This new title was the root and there was no need to review the documents on which it is based. Each owner was provided with a duplicate, as proof of ownership. There was no "chain of title" to search, and the title was the only evidence of ownership.⁸⁷ The titles were contained in a register book which is administered privately, not by the government. Such a system facilitated certainty of ownership and therefore commercial transactions.

Torrens believed that land should be treated like ships and that titles should be issued with respect of land. Each new title would be treated as the root, negating reliance upon the efficacy of the chain of title searches necessary in common law and deed registry systems. His approach would also minimize lawyers' roles in conveyancing. Torrens was a member of South Australia's first Parliament "after it became self-governing"⁸⁸ and he used his position to continue advocating these reforms.⁸⁹ When he presented a draft Real Property Bill to Parliament on 4 June 1857, Torrens told the members of the legislature that its objective was:

'to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant.'⁹⁰

⁸⁴ Greg Taylor, *Ulrich Hubbe's Doctoral Thesis – A Note on the Major Work of an Unusual Figure in Australian Legal History* (2009) 13 Legal Hist 121 at 121-122 (HeinOnline).

⁸⁵ Stein, *supra* note 24 at 267.

⁸⁶ Thom, *supra* note 52 at 9; Taylor *ibid* at 22.

⁸⁷ Taylor, *ibid* at 22.

⁸⁸ Croucher, *supra* note 50 at 305.

⁸⁹ Taylor, *supra* note 17 at 20-24.

⁹⁰ South Australia, *Parliamentary Debates*, House of Assembly, 1857-58, [204], 4 June 1857 (Robert Torrens), quoted in Croucher, *supra* note 50 at 302.

The Real Property Act came into force in 1858.⁹¹ It provided that each time the ownership of land changed, the parties would submit the documents to a government-run titles registry. Government would cancel the existing title, and issue a new one. Every time an interest in land was created, those documents should also be submitted to the government-run registry, which would note the essential provisions of the interest on the owner's title. Except in the cases of fraud and error, the Certificate of Title was to be conclusive.⁹²

This scheme was well suited to a colony that had only been settled for a short time⁹³ but where land speculation was rampant.⁹⁴ The chains of title were relatively short and the introduction of a rational system simplified the process of conversion to a land titles system where certainty of title was to be guaranteed by government.

“Indefeasibility of title” was not part of the scheme which the legislature adopted. The legislation did not contain the expressions “indefeasibility of title” or “indefeasible title.” Nor did it mention a state warranty of title. Instead, the legislature employed the following language:

‘33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.’⁹⁵

This is the closest the legislation ever came to enacting true indefeasibility; in it, the only exceptions occurred in cases of fraud or error. Even then, a dichotomy existed between the concept of “indefeasibility of title” as it has come to be known,⁹⁶ and the contents of the legislation.

More exceptions were introduced within six months of the Act becoming law. In December 1858 the South Australian government assented to the *Real Property Law Amendment Act*.⁹⁷ Seventy sections of the original Act were repealed, including section 33.⁹⁸ It was replaced by section 20, which stated:

⁹¹ WN Harrison, “The Transformation of the Torrens’s System into the Torrens system” (1961-1964) 4 U Queensland LJ 125 at 126 (HeinOnline).

⁹² Croucher, *supra* note 50 at 294.

⁹³ Bruce Stevenson, *supra* note 65 at 124.

⁹⁴ Croucher, *supra* note 50 at 303.

⁹⁵ Harrison, *supra* note 91 at 126; Croucher, *supra* note 50 at 294.

⁹⁶ Chapter 2 below.

⁹⁷ 22 Vict No 16, as cited in Harrison, *supra* note 91 at 126-127.

'20. Notwithstanding any error or omission in the observance of any formality herein prescribed to be observed in bringing land under the operation of this Act, and excepting in the case of frauds, and so far as regards any wrong description of any land, or of its boundaries, or the omission or misdescription of any right-of-way or other easement, created in, or existing upon, any land under the operation of this Act, every certificate of title or entry in the register-book, signed by the Registrar-General, shall absolutely vest the estate or interest in the land therein mentioned, in the manner and to the effect expressed in such certificate of title or entry, and the registered proprietor of such estate or interest in the said land, shall be secure from eviction or disturbance or adverse claim, in respect of any estate, right, or interest in the said land, which is not declared in such certificate of title, or entry on the register-book, or in the instrument referred to in such entry.'⁹⁹

Within six months of becoming law, the warranty of title provided in the original Torrens legislation had been reduced. In addition to fraud and error, there was no longer a warranty that the title would be correct vis-à-vis the land's boundaries, a wrong description of the land, or the omission or misdescription of any easement or right of way. With such exceptions, title always remains defeasible in the Torrens system.¹⁰⁰

When compared to the common law and to the deed registry systems, the Torrens system was still remarkable in the degree of certainty of ownership which it facilitated. Because of the increased certainty of title and the increased simplicity in conveyancing practices, the system spread to the other Australian states and New Zealand.¹⁰¹ When the "Torrens" bill was introduced to the New Zealand Parliament in 1870, a member commented that one of the leading principles of the legislation:

'is, that it establishes a public record of all transactions affecting registered land ... so that everyone dealing with the land may know exactly what he is dealing with; and not only that, but by which the rights of incumbrancers, and other persons holding derivative interests in land – trustees, mortgagees, and others – may have a guarantee for the security of their incumbrances.'¹⁰²

⁹⁸ *Ibid* at 127.

⁹⁹ *Ibid* at 127.

¹⁰⁰ Thomas W Mapp, *Torrens Elusive Title* (Edmonton: The University of Alberta Printing Department, The University of Alberta, 1978) at para 4.23 writes, "It is essential that we recognize that because of the possibility of error, potential defeasibility follows inevitably from the Torrens system strategy of legal ownership conferred by state decree."

¹⁰¹ Taylor, *supra* note 17 at 3.

¹⁰² Speech of Hon Henry Sewell, MP (27 July 1870) 8 NZPS 93, as quoted in Janet November and Julia Rendell, "The "Mirror Principle and the Position of Unregistered Interests in the Torrens system" (2010) *New Zealand Law Rev* 151 at 152.

By the time New Zealand and the other Australian states adopted land titles systems of registration, section 20 was already in force. This meant they relied upon the amendments to the original legislation, and title was never completely “indefeasible” in any of them either.

Even so, after the complexity and resulting lack of certainty of ownership inherent in the common law and deed registry systems, the South Australia model appeared to be a panacea capable of providing universal protection to all land owners and interest holders. In such an environment persons elected to government in these colonies could see the benefits of such a system while debating its adoption. This type of debate also occurred in Canada.

2.2.2 Canada

Land titles legislation was passed first in the Colonies of Vancouver Island in 1861 and British Columbia in 1870,¹⁰³ but it is debatable whether they used South Australia as a model.¹⁰⁴ Additionally real property reform was raised as an issue in Upper Canada as early as the mid 1860s. An early reformer, Oliver Mowat, was a lawyer who served as Upper Canada’s Chancellor between 1864 and 1872, and then served as its Premier until 1896.¹⁰⁵ In 1865 he wrote an open letter to then Attorney-General of Upper Canada, John A. Macdonald, regarding the *Quieting Titles Bill* which was being considered by the legislature.¹⁰⁶ Mowat commented on

¹⁰³ Jeremy Finn, “Australasian Law and Canadian Statutes in the Nineteenth Century: a Study of the Movement of Colonial Legislation Between Jurisdictions” (2002) 25 Dalhousie LJ 169 at 196-197 (HeinOnline).

¹⁰⁴ In Taylor *supra* note 17 at 3, the author alleges that the Torrens system spread to the Colonies of Vancouver Island and British Columbia before it spread to the other Australian jurisdictions. In contrast, Hogg does not group British Columbia’s land titles system within the Torrens model. Instead he writes that “British Columbia has a system peculiar to itself, one feature of which is that deed and title registration are combined. Under a different nomenclature the system contains the English feature of “possessory” title, thus resembling Ontario and Nova Scotia, and differing from the Australasian group, which in some other respects it closely resembles.” James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Toronto: Carswell, 1920) at 14, reprinted by Cornell University Libraries, 2007 as part of the Nabu Public Domain Reprints.

Jeremy Finn researched archival materials and could find no material to substantiate claims that Vancouver Island’s land titles system was based on the South Australian model, and he also observes the connection between the South Australian legislation and British Columbia’s *Land Registry Ordinance* 1870 were “refuted, from relatively early days.” Finn *ibid*.

¹⁰⁵ <<http://www.thecanadianencyclopedia.com>>, searching “mowat AND Ontario”.

¹⁰⁶ William Howard Hunter, *Torrens Title Cases: being a Collection of Important Cases Decided by the Courts of England, Australasia and Canada Upon Statutes Relating to the Transfer of Land by Registration of Title, with a full Digest of the Cases*, vol 1 (Toronto: Carswell, 1895) at xlii.

issues arising from the descent of land in a registry system,¹⁰⁷ but also made more general statements regarding issues with a deed registry system and the need for reform, stating:

“Our Registry law has, beyond all controversy, been of immense advantage to the country; and yet in regard to any of the questions I have spoken of, it cannot be said to afford any protection whatever; we need something to supplement its provisions before our titles can have the reliability which it is very desirable they should possess. The Registry law in fact provides for but one source of danger to a purchaser, namely, unknown conveyances affecting the property. It affords little or no aid in ascertaining the validity of conveyances, the proper construction of deeds and will, or any events affecting title, otherwise than by written instruments; or in supplying the future proof of such events. These things may be of greater moment to an intending purchaser than the possibility of there being some deeds affecting the property of which, but for the registry law, he would not have known.

It is a further serious inconvenience, connected with our existing system, that if a purchase is effected, or a loan granted after an investigation which satisfies the solicitor employed that the title is good, the whole investigation has to be gone over again before every fresh transaction in reference to the property; and a title that was satisfactory to one lawyer may not be satisfactory to another; ... the ablest and most cautious lawyers may occasionally make a slip or overlook a defect ... Sometimes, therefore, one solicitor finds it his duty to reject a title which another solicitor has examined and passed; and this is the case not only in Canada but in England also, where conveyancing is a distinct branch of professional practice, and has received a degree of careful attention which it is not possible or general practitioners in Canada to give to it.”¹⁰⁸

It is not apparent if Mowat was cognizant of the Torrens system or was referring to it *per se*, but clearly he believed Upper Canada, soon to be the province of Ontario, should adopt a different type of system. Others had a similar idea.

In 1883 some Toronto residents formed the Canadian Land Law Amendment Association (the “Association”) with a purpose of lobbying for the adoption of a Torrens-type system of land titles registration for Ontario, the North-West Territories and Manitoba.¹⁰⁹ At the time, all of these jurisdictions were subject to English common law rules and implemented deed registry systems based on English legislation.¹¹⁰ Many of the Association’s members were bankers, and

¹⁰⁷ Oliver Mowat, quoted in Hunter, *ibid* at xlii-xliii.

¹⁰⁸ *Ibid* at xliii-xliv.

¹⁰⁹ Taylor, *supra* note 17 at 69-70.

¹¹⁰ As noted by Peter S Stewart, *Manual of Law and Procedures – Saskatchewan Land Titles Offices* (Regina: Lawrence Amon, Printer to her Majesty the Queen, 1962) at 13-14, “[b]y ‘An Act further to Amend the Law respecting the North-West Territories’ 49 Vict. Ch. 25, s. 3, it was provided that ‘the laws of England relating to civil

they favoured the Torrens system's goals of promoting certainty of ownership (which in turn facilitated the use of land as collateral for loans) and of simplifying conveyancing practices.¹¹¹

The Association's members compared the deed registry system which was operating in Ontario with the land titles systems operating in Australia and British Columbia. One of its members, J Herbert Mason, once wrote:

“It will be a grave mistake, if not a lasting disgrace, if, now that an unquestionably better method is known, an antiquated and condemned system, with all its uncertainties, and cumbrous and costly machinery, be inflicted upon the virgin soil of the hope of our Dominion, the Great Northwest. Whoever shall emancipate land from this relic of feudalism; give legislative effect to the Torrens system of transfer by registration; simplify and make uniformly operative the law of descent; abolish general liens and all charges created by operation of law, without registration; and make land as safely and easily dealt with as registered stock or bonds, - will not only be entitled to the thanks of the present generation of his countrymen, but merit the gratitude of millions yet unborn-.”¹¹²

With statements such as this, the Association's members generated a great deal of debate.¹¹³

Much of the debate involved George Holmested, a lawyer and court official involved in the Association.¹¹⁴ He wrote letters to the editor of the *Canadian Law Times*, who then penned rebuttals.¹¹⁵ In one such letter, Holmested compared the Torrens system of land titles to shares and bonds. The editor questioned if such a system could really work and Holmested responded affirmatively and passionately.¹¹⁶ He was committed. He and the Association's other members continued with their efforts and ultimately the Association was successful; in 1886 the Canadian

and criminal matters as the same existed on the fifteenth day of July in the year of our Lord One Thousand Eight Hundred and Seventy shall be in force in the Territories insofar as the same are applicable to the Territories and insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any act of Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada or by any ordinance of the Lieutenant Governor in Council.”

¹¹¹ Taylor, *supra* note 17 at 68-70.

¹¹² AR Thompson, “The Course in Land Titles at the University of Alberta” (1964) 3 *Alta L Rev* 117 at 119 (HeinOnline).

¹¹³ Taylor, *supra* note 17 at 68-94.

¹¹⁴ *Ibid* at 71.

¹¹⁵ Geo S Holmested, Letter to the Editor entitled “Torrens system of Land Transfer” (1883) 3 *Can L Times* 536 [Holmested 1883-1]; Geo S Holmested, Letter to the Editor entitled “Torrens system of Land Transfer” (1883) 3 *Can L Times* 581 [Holmested 1883-2]; Holmested 1884-1, *supra* note 70.

¹¹⁶ Holmested 1883-2 *ibid*.

government adopted the Torrens system for use in the North West Territories, Manitoba, and part of Ontario.¹¹⁷

Although the Torrens system was adopted in these jurisdictions, and a land titles system was operating in British Columbia, there were differences between them. For example, originally Manitoba only operated one Land Titles Office for the entire province, while the concurrently operating deed registry system had several offices throughout the province.¹¹⁸ This meant few people were prepared to use the Torrens system. British Columbia had a unique approach to bringing land within the ambit of the legislative scheme. It included elements of deed registry systems and instituted a system of “possessory title” which was open to challenge.¹¹⁹ The system adopted in the North-West Territories was the closest to the scheme operating in South Australia and New Zealand.¹²⁰ Like the scheme on which it was based, *The Territories Real Property Act*¹²¹ failed to include the expression “indefeasibility of title.”

Within Canada the system in Ontario was the most different from the South Australian model.¹²² Ontario’s approach was based upon the English model, with the Ontario Act incorporating many of the provisions contained in the *Land Transfer Act*:¹²³

[The English Act] was adapted to the country where titles to land were growths of centuries and where custom and precedent exercised an extremely powerful, if not entirely dominating, influence. It is naturally to be expected that in such a case the framers of such an Act would not attempt to deal with land titles in the bold and thoroughgoing fashion adopted in the new colony of Australia, where a large part of the land had not passed from the Crown at all and where none of the titles had any history behind them compared to what is to be found in the case of any piece of land in England. The circumstances of the Province of Manitoba and of the Northwest [*sic*] Territories in 1885, and of the new provinces in 1906, corresponded much more closely with the state of affairs in Australia than with that of England and indeed in Ontario, and it is not surprising therefore to find a difference between the Acts in the prairie provinces and that of Ontario corresponding to that which is found between the Australian Acts and the English

¹¹⁷ Hogg, *supra* note 104 at 14; *The Territories Real Property Act*, SC 1886, c 26.

¹¹⁸ Taylor, *supra* note 17 at 143, 152.

¹¹⁹ Hogg, *supra* note 104 at 67 and 82.

¹²⁰ Neave, *supra* note 46.

¹²¹ *The Territories Real Property Act*, *supra* note 117.

¹²² See eg: Hogg, *supra* note 104 at 4, 63, 64-65, 68, 70, 72, 82, 333, 351-352.

¹²³ *Land Transfer Act*, 1875, 39 & 40 Vict. Cc 17, 30. Taylor, *supra* note 17 at 95-97 notes the connection between the English and Ontario statutes.

Acts of 1875 and 1897. The Ontario Act provides for three varieties of title, possessory, qualified and absolute. The absolute title corresponds to the title certified to under the ordinary certificate of title of land in fee simple under the Torrens systems in Australia and the prairie provinces of Canada.¹²⁴

The Ontario government did interact with the Canadian Land Law Mortgage Amendment Association, and it considered the Torrens system prior to its adoption of land titles registration legislation. For example, when the Ontario government adopted the original legislation, it included an assurance fund which was not part of the English legislation.¹²⁵ Yet the consensus remained that it was based on the English system,¹²⁶ which varies from the Torrens system of land titles registration,

in one fundamental way, which is that the Register may be rectified more readily ... [as it] does not carry with it a definitive indefeasibility once registration is secured without fraud. If under general law rules it is wrong to accept the statement of interests recorded on the Register, it may be rectified to reflect the true legal title, leaving the deprived proprietor to the remedies provided by the assurance fund.¹²⁷

From this, it can be seen that in Ontario, the notion of “indefeasibility of title” was not even treated as a postscript in its original system.

2.3 The Pinnacle of the Reform Movements

By the early twentieth century the Torrens model proved to be the most popular in the British colonies.¹²⁸ The choice was attributable to the model’s twin goals of fostering increased certainty of title, and simplifying and reducing the costs and time associated with conveyancing in common law jurisdictions,¹²⁹ which in turn facilitated settlement. These goals were accomplished through the creation of a register for many – but not all – interests in land.

¹²⁴ Thom, *supra* note 52 at 26-27.

¹²⁵ Taylor, *supra* note 17 at 95.

¹²⁶ Hogg, *supra* note 104 at 14; Thom, *supra* note 52 at 26-27.

¹²⁷ Stein, *supra* note 24 at 267.

¹²⁸ When Hogg lists and briefly describes the twenty-eight jurisdictions in the British Empire which operate land titles systems of registration, he concluded that thirteen of them – located in Australasia, Fiji and Western Canada, were predicated upon the Torrens model. Only England, Ireland, Ontario, and Nova Scotia were considered to reflect the English model. See: Hogg, *supra* note 104 at 5-14.

¹²⁹ *The Territories Real Property Act*, *supra* note 117. The relevant portion of the Preamble reads: “Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate proof thereof, and also to render dealings with land more simple and less expensive: Therefore Her Majesty ... declares and enacts as follows ...”

In keeping with its goals, land titles registration systems always reflected four characteristics:

1. The land is initially placed on the register as a unit of property.
2. Transactions are registered with reference to the land itself, and merely as instruments executed by the owner.
3. Registration of transactions is essential to their validity.
4. Registration, initial or subsequent transactions, acts in some degree as a warranty of title in the person registered as owner, and as a bar to adverse claims.¹³⁰

It is these characteristics, especially when contrasted with historical common law conveyancing practices and rules, which cause individuals to view land titles systems of registration as the pinnacle of real property law and conveyancing. These characteristics – not indefeasibility of title – traditionally were considered the culmination of the real property law and conveyancing reform movement in the nineteenth century.

3. THE GENESIS OF INDEFEASIBILITY OF TITLE

In advocating for a land titles system, Torrens hoped that all interests could be entered on the registry for each piece of land to which they applied,¹³¹ making each title indefeasible. In spite of his aspirations, the first time “indefeasibility of title” was used to describe the impact of land titles registration on conveyancing practices and substantive real property law appears to have been in 1859, after South Australia’s legislation had been adopted. Then Torrens used the term in a pamphlet when describing the *Real Property Act*. He wrote:

‘as a first principle, the South Australian Real Property Act creates ‘independent titles;’ retrospective investigation is cut off; each proprietor of the fee holds direct from the Crown subject to such mortgages, charges, leasehold or other lesser estates as may exist or be created affecting the land.

For secondary confirmation, see: Ruoff, *supra* note 19 at 28; Roger Carter, “Some Reflections on *The Land Titles Act of Saskatchewan*” (1965) 30 Sask B Rev 315 at 315 (HeinOnline); Neave, *supra* note 46 at 173; Stein, *supra* note 24 at 269; Bruce H Ziff, “A Matter of Overriding Interest: Unregistered Easements Under Alberta’s Land Titles System” (1991) 29 Alta L Rev 718 at 718 (HeinOnline); Les A McCrimmon, “Protection of Equitable Interests Under the Torrens system: Polishing the Mirror of Title” (1994) 20 Monash U L Rev 300 at 300 (HeinOnline); Mary-Anne Hughson, Marcia Neave & Pamela O’Connor, “Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders” (1997) 21 Melb U L Rev 460 at 461 (HeinOnline).

¹³⁰ Hogg, *supra* note 104 at 2.

¹³¹ Croucher, *supra* note 50 at 303.

Indefeasibility of title.

Indefeasibility of title created by registration follows of necessity as a corollary to the principle of ‘independent title,’ and out of this again arises the necessity of providing a fund from which rightful heirs and others may be compensated for the value of land which they are debarred from reclaiming against persons who have acquired title by registration as purchasers, mortgagees, or otherwise through the operation of the law.’¹³²

Shortly after, the word “indefeasible” was used in one early Australian statute,¹³³ and the English first included it in *The Land Registration Act* of 1862.¹³⁴ However, it was never widely adopted. By the early 1950s, still only one Australian statute had incorporated the word “indefeasible.”¹³⁵ “Indefeasibility of title” is never mentioned in any of the others. Similarly, indefeasibility’s three associated principles – the mirror, curtain and insurance principles – do not appear to have been codified in any early Australian or English statutes.¹³⁶ From this, it can be inferred that the drafters of the early and subsequent legislation never intended that the concept of “indefeasibility of title” and its three principles would come to dominant legal discourse or be treated as the apex of land titles systems.

Yet they have. If they were not codified in the legislation, where did these terms originate? As evidenced from Torrens’ 1859 quote and the fact that it was not codified in the legislation, the term “indefeasibility of title” has always existed on the fringes of legal discourse. “Indefeasibility of title” did not begin to gain popularity in traditional legal research sources¹³⁷ until an Englishman who was later to be named Chief Registrar of its land titles system, Theodore BF Ruoff, used the expression. He claimed this term originated in Canada with the

¹³² Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* 9 (1859), as quoted in Mapp, *supra* note 100 at para 4.23.

¹³³ Ruoff, *supra* note 19 at 17 and at 17 n 9.

¹³⁴ *The Land Registration Act, 25 & 26 Vict c 53*, also known as “Lord Westbury’s Act”, referred to in John Baalman, *The Torrens system in New South Wales* (Sydney: The Law Book Co of Australasia Pty Ltd, 1951) at 132-133.

¹³⁵ Ruoff, *supra* note 19 at 17.

¹³⁶ None of the tables of contents and/or indexes contained in the old texts and manuals refer to a “mirror principle”, “curtain principle”, or “insurance principle” in any Australian states, Canadian provinces, or in England. See: Thom, *supra* note 52; Hogg, *supra* note 104; Baalman, *supra* note 134; Stewart, *supra* note 110; Mapp, *supra* note 100; and Georgina R Jackson, *Manual of Law and Procedures, Saskatchewan Land Titles Offices* (Regina: Saskatchewan Justice, 1988).

¹³⁷ Chapter 2 below.

Supreme Court's decision in *Canadian Pacific Railway v Turta*.¹³⁸ However, when his treatment of this term is juxtaposed with the language and analysis employed in the trial and appeal courts in *Turta*, it is apparent that Ruoff deserves the credit. He coined the expressions mirror principle, curtain principle and insurance principle, as well as the popularization of "indefeasibility of title."

3.1 The Englishman and His Role in the Genesis of Indefeasibility of Title

Theodore Burton Fox Ruoff began working in London's Land Registry Office in the 1930s and for many years thought the English land titles registry system was the only one operating in the Commonwealth. In the late 1940s when he held the position of Assistant Registrar, Ruoff became interested in the Torrens system. He was amazed to discover that a different system had been developed in South Australia and that it predated England's.¹³⁹ Ruoff was intrigued. Given his interest, he applied for and became the recipient of a travel fellowship in 1951. He used these funds to travel to South Australia, to enable him to learn and write about this different system.¹⁴⁰ Based on the research he undertook on this trip, he authored several articles and then went on to co-author several real property texts, became the Chief Land Registrar of England and Wales,¹⁴¹ and was awarded the title "Companion of the British Empire" ("CBE").¹⁴²

Ruoff was greatly impressed with what he learned about the Torrens system¹⁴³ and, as has been observed in one paper, he wrote with "brevity and deceptive simplicity"¹⁴⁴ and possessed "an easy facility for explanation and description."¹⁴⁵ He was like a newly converted zealot coming out from the wilderness – wanting to proselytize everyone he met, to make them

¹³⁸ *Turta SCC*, *supra* note 18; Ruoff, *supra* note 19 at 17 n 9.

¹³⁹ Ruoff, *ibid* at 1-2.

¹⁴⁰ *Ibid*.

¹⁴¹ Gray, *supra* note 58 at para 2.2.18.

¹⁴² MM Park and IP Williamson, "An Englishman looks at the Torrens system – another look 50 years on" at 2-3, 17 November 2008, found during a google search of "Theodore B. F. Ruoff", online at <[http://www.csdila.unimelb.edu.au/publications/journals/Englishman_looks_at_Torrens_System_\(Aust%20Law%20Journal%2002\).pdf](http://www.csdila.unimelb.edu.au/publications/journals/Englishman_looks_at_Torrens_System_(Aust%20Law%20Journal%2002).pdf)>.

¹⁴³ Ruoff, *supra* note 19 at 27. He was impressed, but he remained convinced that the English system was superior. See, e.g.: Ruoff, *vide* at 35, 36, 58, 59-65 inclusive, 71-75 inclusive.

¹⁴⁴ Park and Williamson, *supra* note 142 at 3.

¹⁴⁵ *Ibid* at 3.

as excited about the Torrens system as he was. Like any new convert, he only understood the big picture. He had not yet grasped some of the more subtle nuances and contradictions inherent in Torrens' scheme. Yet his easy facility with language made the Torrens system appear to be a panacea in the wilderness of real property law.

As early as 1952 he published articles in Australia and New Zealand about the Torrens system.¹⁴⁶ In some of his early papers, he used the phrases "mirror principle", "curtain principle", and "insurance principle"¹⁴⁷ and now he is credited with authorship of them.¹⁴⁸ He also used the phrases "indefeasible title" and "indefeasibility of title" when describing his interpretation of the Torrens system's¹⁴⁹ central features.

He did not restrict his research and writing to issues pertaining solely to the southern hemisphere. In 1955 he submitted a paper entitled "Systems of Land Tenure and Transfer in the Commonwealth and Empire – their Advantages and Disadvantages" to the first Commonwealth and Empire Law Conference.¹⁵⁰ In his paper, Ruoff briefly mentioned "indefeasibility" and credited this expression to Canada.¹⁵¹ When doing so he remarked,

[i]n many jurisdictions they use the word 'indefeasibility' when describing the conclusive state of a title, meaning thereby that the estate of the registered proprietor is paramount and prevails against all comers.¹⁵²

Ruoff seems to have caught someone's attention, because within two years of this Conference he was asked to prepare a book of essays to commemorate the 100th anniversary of the first adoption of the Torrens system. He accepted. In this book, Ruoff began by re-printing the portions of his earlier essay from the Conference.¹⁵³ Then he re-printed his essays which

¹⁴⁶ Ruoff, *supra* note 19 at "Acknowledgement".

¹⁴⁷ *Ibid* at 8.

¹⁴⁸ Neave, *supra* note 46 at 174 n 6; Gray, *supra* note 58 at para 2.2.18; Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Thomson Reuters Canada, 2010) at 473 n 79. Neave's article is discussed more fully in Chapter 2 below at 55-56.

¹⁴⁹ Although there are differences between most, if not all, Torrens systems, Ruoff wrote as if there was one universal system. Ruoff, *supra* note 19.

¹⁵⁰ *Ibid* at 5.

¹⁵¹ *Ibid* at 9 n 14.

¹⁵² *Ibid* at 8.

¹⁵³ *Ibid* at 5-15.

focused on the mirror principle,¹⁵⁴ the curtain principle,¹⁵⁵ the insurance principle,¹⁵⁶ and land titles practices in New Zealand.¹⁵⁷ He inserted some new chapters too. He commented on inadequacies in the Torrens system vis-à-vis the modern era,¹⁵⁸ and its associated method of surveying and describing land.¹⁵⁹ He devoted lengthy chapters to *Canadian Pacific Railway Co Ltd and Imperial Oil Limited v Turta*¹⁶⁰ and to claims against the English insurance fund.¹⁶¹

It took 103 pages to cover all of these topics. Compared to Hogg's treatise which is 399 pages,¹⁶² Ruoff's book is very short. However, Ruoff, with his ability to write simply and clearly, came to be viewed as the expert on the Torrens system, and his book changed the way certainty of ownership within the Torrens system was described. Most instrumental to this was his creation of the expressions mirror principle, curtain principle, and insurance principle.

Ruoff spent most of his book elaborating on the three principles and on problems within the Torrens system. In reality, he hardly mentioned "indefeasibility of title:" using the phrase only three times¹⁶³ and failing to provide any lengthy explanation of it. However, he interwove the phrase "indefeasible title,"¹⁶⁴ and the words "indefeasible"¹⁶⁵ and "indefeasibility"¹⁶⁶ frequently when writing about the three pillars.

The mirror and the curtain are visual references which nearly everyone in the common law can relate to. Each of us looks in a mirror, and each of us has window coverings in our homes. These items are part of our daily existence. When they are used as analogies for the complicated substantive provisions contained in land titles legislation, they possess great power.

¹⁵⁴ *Ibid* at 16-24.

¹⁵⁵ *Ibid* at 25-31.

¹⁵⁶ *Ibid* at 32-40.

¹⁵⁷ *Ibid* at 41-49.

¹⁵⁸ *Ibid* at 59-65.

¹⁵⁹ *Ibid* at 55-58.

¹⁶⁰ *Ibid* at 66-82.

¹⁶¹ *Ibid* at 83-103.

¹⁶² Hogg, *supra* note 104.

¹⁶³ Ruoff, *supra* note 19 at 18, 24, and 51.

¹⁶⁴ *Ibid* at 22.

¹⁶⁵ See eg, Ruoff, *ibid* at 17, 32.

¹⁶⁶ See eg, Ruoff *ibid* at 9, 17, 18, 19, 21, 44, 47, 56, 57, and 80.

Given that two of these two pillars create such sharp visual images, and that the third one is readily grasped because most of us are familiar with insurance, people have remembered and adopted “indefeasibility of title.” This is seen through a brief review of each principle.

3.1.1 The Mirror Principle

In the introductory chapter, Ruoff describes this principle as “the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man’s title.”¹⁶⁷ He reiterates this characterization in the chapter which focuses on the mirror principle; then Ruoff begins by identifying that “the register book reflects all facts material to an owner’s title to land.”¹⁶⁸ Later in this chapter he qualifies this oversimplification by admitting that that “although the register is deemed to be both correct and complete in fact it is never perfect in either respect.”¹⁶⁹ Yet a few pages later, and still in the same chapter, once again Ruoff asserts that “the register is not only paramount but also a mirror of all material information about an owner’s estate.”¹⁷⁰ The intent of this message is that the title is a mirror, and that one can rely on it completely.

This is misleading, because only enumerated legal interests can be registered against a title. Statutory exceptions are not registered on titles.¹⁷¹ Additionally, equitable interests cannot be registered¹⁷² except through the notice provided with a caveat.¹⁷³ However, registering a caveat to notify the world of an equitable interest in the land is not mandatory. This means that a title may never accurately reflect its true and complete state.

3.1.2 The Curtain Principle

Ruoff also postulates that one of the central pillars of the Torrens system is “the curtain principle.”¹⁷⁴ He asserts that the curtain principle most effectively ensures “simplicity in the

¹⁶⁷ *Ibid* at 8.

¹⁶⁸ Ruoff, *supra* note 19 at 16.

¹⁶⁹ *Ibid* at 17.

¹⁷⁰ *Ibid* at 20.

¹⁷¹ Chapter 3 below at 81.

¹⁷² Chapter 3 below at 80.

¹⁷³ Hogg, *supra* note 104 at 180, 289.

¹⁷⁴ Ruoff, *supra* note 19 at 28.

general operation of the Torrens system.”¹⁷⁵ To make this point, he overstates the judicial conclusions drawn in two cases,¹⁷⁶ writing:

‘[t]he register was not to present a picture of legal ownership trammled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account.’ Furthermore, [according to Lord Watson in *Gibbs v Messer*,] ‘the main object of the Act is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity.’ Here the curtain principle simplifies the duties of a disponee or his legal adviser by shutting out forbidden things from his view.¹⁷⁷

Lord Watson’s passage is taken out of context because, immediately following the passage Ruoff quotes, Lord Watson qualifies this remark:

That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.¹⁷⁸

Lord Watson never intended the indefeasible right – or the curtain principle – to apply to everyone. Only a *bona fide* purchaser for value was to be entitled to such protection. Yet Ruoff asserts that indefeasibility applies to all types of “disponee[s]”. By associating a “curtain principle” with this, Ruoff creates a false sense of the protection provided in the legislation.

Later in his book, Ruoff appears to acknowledge his failure to qualify his earlier use of Lord Watson’s statement. When he does so, he restricts the application of the curtain principle to purchasers, claiming:

[t]he curtain principle is one which provides that the register is the sole source of information for proposing purchasers, who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain.”¹⁷⁹

The curtain is not a complete barrier to potential purchasers either; sometimes one needs to look at the documents behind a title, such as the survey plan, to determine if the information on the

¹⁷⁵ *Ibid.*

¹⁷⁶ *Wolfson v RG of New South Wales* (1934) 51 CLR 300 at 308, quoted in Ruoff, *ibid* at 28 n 9; *Gibbs v Messer* (1891), AC 248 at 254 (PC), quoted in Ruoff, *ibid* at 28 n 10.

¹⁷⁷ *Ibid* at 28.

¹⁷⁸ *Gibbs v Messer*, *supra* note 176.

¹⁷⁹ Ruoff, *supra* note 19 at 11.

title is accurate. This qualification tends to be forgotten, and the use of the curtain as first described by Ruoff contributes to an indiscriminate use of the phrase “indefeasibility of title.”¹⁸⁰

3.1.3 The Insurance Principle

Unlike the Torrens system, England and Ireland had always employed the term “insurance fund” in their land registry statutes¹⁸¹ and their systems operated like insurance businesses.¹⁸² This was the term and the scheme with which Ruoff was most familiar; by the time he visited Australia, he had been working in London’s Land Registry Office for approximately fifteen years. As a result, he chose to label the “insurance principle”¹⁸³ as a central feature of the Torrens system, even though many of the Torrens systems employed the phrase “assurance fund” in their statutes. Ruoff justified substituting insurance for assurance, as follows:

Although all the Australian Torrens Acts refer to ‘assurance’, the term ‘insurance’ is a happier one because it refers to a possible, rather than to a certain risk, and I believe that many of the dangers that are commonly contemplated exist only in timid minds.¹⁸⁴

But these two words are not synonyms. “Assurance” means “a positive declaration that a thing is true [, and as] ... a solemn promise or guarantee.”¹⁸⁵ The *Canadian Oxford Dictionary* does provide that “assurance” may be used interchangeably with “insurance”, but notes that this occurs especially in Britain, and most often in the context of life insurance.¹⁸⁶ In Canada, “insurance” means something else. It is:

the act or an instance of insuring property, life, etc.[;] ... a sum paid for this; a premium.[;] ... a sum paid out as compensation for theft, damage, loss, etc.[;] [and] a measure taken to provide for a possible contingency.”¹⁸⁷

¹⁸⁰ See eg, Park and Williamson, *supra* note 142 at 5 where the authors note that “the new English *Land Registration Act 2002* prohibits public access to the information (other than the current title information) contained in the register unless authorised by the registrar.”

¹⁸¹ Hogg, *supra* note 104 at 385.

¹⁸² Ruoff, *supra* note 19 at 35.

¹⁸³ *Ibid* at 32.

¹⁸⁴ *Ibid* at 32 n 1.

¹⁸⁵ *Canadian Oxford Dictionary*, 2^d ed, *sub verbo* “assurance”.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*, *sub verbo* “insurance”.

With this substitution, Ruoff appears to fail to grasp the distinction between this “principle” and the purpose of the assurance fund codified in many early Torrens statutes, and how it was implemented in the land titles regimes.¹⁸⁸

The dictionary definition of “assurance” most closely reflects Torrens’ intent in introducing such a fund in land titles conveyancing. The Torrens system was established as a counterpoint to the system of real property conveyancing which relied upon convoluted and lengthy deeds,¹⁸⁹ with the corresponding need to search the chain of title every time a parcel of land was transferred.¹⁹⁰ It was not universally accepted or adopted. Rather, some landholders were concerned that the land titles registration system would deprive them of the proprietary interests and estates in land. As a result:

The Torrens system was introduced against a background of narrow professional hostility. Its author faced charges that the System would lend itself to manipulation by unscrupulous persons; that innocent owners could be deprived of their rights by land being brought under the Act surreptitiously. Torrens sought to counter his critics with provisions for intense advertising [when land was brought under the Act].¹⁹¹

As an additional assurance to such critics, Torrens adopted an “assurance fund” which was to be financed from fees payable every time land was brought within the Act, and each time thereafter when the title to it was transferred.¹⁹² Torrens wanted to reassure his critics so that they would be encouraged to use the land titles system. His “administrative philosophy”¹⁹³ was based on “the principle that the Assurance Fund had been created for the specific purpose of facilitating the free flow of conversions to the new form of title.”¹⁹⁴ The purpose of the

¹⁸⁸ The legislation governed land titles registration in Australia, New Zealand, and the Canadian prairies all established an “assurance fund.” See: Hogg, *supra* note 104 at 385-388.

¹⁸⁹ Bentham 1827, *supra* note 1.

¹⁹⁰ Stein, *supra* note 24 at 267-268.

¹⁹¹ Baalman, *supra* note 134 at 58.

¹⁹² Saskatchewan’s scheme was similar. Whenever land was first patented or whenever it was subsequently transferred, the Registrar would collect a sum calculated in accordance with a formula contained in the Act. These funds were held in trust by the Provincial Treasurer, and when the assurance fund exceeded \$75,000, “any sum in excess of ... [that] amount may be direction of the Lieutenant Governor in Council from time to time be transferred to and form part of the consolidated revenue fund of the province.” *The Land Titles Act, 1906*, SS 1906, c 24, ss 163, 166(1), and 166(3).

¹⁹³ Baalman, *supra* note 134 at 55.

¹⁹⁴ *Ibid.*

assurance fund truly was to assure land owners and interest holders that they would not suffer losses because of the new system, not to insure real property in conveyancing transactions.

Ruoff ignores this fact when he discusses this principle. Instead he states that the insurance principle was established to compensate persons who had suffered a loss, as:

it warrants that if the mirror of title gives a specious or an incomplete reflection by reason of which someone incurs a loss that cannot otherwise be made good, the State will recompense him. When this happens there is a conversion of a legal right into cash, for the person deprived is to be put in the same situation, so far as money can do it, as if the wrongful act complained of had not been done.¹⁹⁵

A few pages later, Ruoff describes the “insurance principle” even more broadly, implying that it could be accessed in all circumstances:

[T]he insurance principle, properly understood and fully carried out, involves far more than an owner’s title, that is known to be reasonably sound, is guaranteed by the State. In the widest sense it means not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar ..., on bringing land under the Act, to cure the title of known defects so far as he possibly can. It implies that the whole business of registration ought to be conducted with such an economy of public manpower, public time and public money that the saving which is achieved far outweighs any payment of compensation for errors or omissions which may become necessary from time to time. I should like to write the last sentence in the boldest lettering known to the printer.¹⁹⁶

Contrary to his assertions, in the Torrens system registration was never “carried on literally as an insurance undertaking.” In most Torrens jurisdictions, the party which benefitted from the other’s loss was expected to provide the indemnity. Hogg notes that in nineteen out of twenty-two commonwealth jurisdictions operating land titles registration systems:

provision is made by the statutes for the payment of indemnity by the State in certain cases of owners being deprived of property through the statutory warranty of title operating in favour of others. In many of the statutes these enactments are grouped with enactments relating to the raising and keeping of an indemnity fund, and to the conclusiveness of the register, whilst in some cases the same enactment relates both to State indemnity and indemnity from private individuals.¹⁹⁷

¹⁹⁵ Ruoff, *supra* note 19 at 32.

¹⁹⁶ *Ibid* at 33-34.

¹⁹⁷ Hogg, *supra* note 104 at 384.

Saskatchewan was part of the majority. In the case of fraud, a claimant could only recover from the assurance fund if the “real” defendant was impecunious or had absconded from the province.¹⁹⁸ Additionally, Saskatchewan’s assurance fund was not available to a land owner if the land owner breached any trust,¹⁹⁹ if the same land was included in two or more Crown grants,²⁰⁰ or:

[i]n any case in which loss, damage or deprivation has been occasioned by any land being included in the same certificate of title with other land through misdescription of the boundaries or parcels of any land; unless it is proved that the person liable for compensation and damages is dead or has absconded from the province or has been adjudged insolvent or the sheriff has certified that he is not able to realize the full amount and costs awarded in any action for such compensation.²⁰¹

Because of provisions such as these, not everyone suffering a loss in every circumstance could assert a claim against the fund. Given that Torrens legislation obligates government to compensate persons suffering loss in specific, if limited, circumstances, one would expect that a government would do so, and that it would indemnify the aggrieved party. This would occur if an “insurance principle” was a central tenet of these schemes. As an insurer, government would take all necessary action to ensure the claim was legitimate and fell within the statute’s parameters before paying the aggrieved party. If it was an insurance fund, government would then pay the party who had suffered the loss. Statistical evidence from various Torrens jurisdictions suggests otherwise.

When New South Wales stopped collecting money for its Assurance Fund in 1941, more than 750,000 pounds “had been paid into the Fund, while payments out had not exceeded ... 21,000 [pounds].”²⁰² Only one claim was for more than 10,000 pounds. In approximately eighty-five years, less than three percent of the funds collected were paid to claimants. The balance was transferred to the government’s general revenues. Government continued to

¹⁹⁸ *The Land Titles Act, 1906*, *supra* note 192 s 168.

¹⁹⁹ *Ibid* s 167(a).

²⁰⁰ *Ibid* s 167(b).

²⁰¹ *Ibid* s 167(c).

²⁰² Baalman, *supra* note 134 at 56.

promise it would fund claims from its general revenues,²⁰³ but, given these statistics, the likelihood of it doing so in any substantial amount was very small.

Western Canada provides other examples. In the almost twenty years in which the Dominion Government operated the land titles system in the North-West Territories, only one claim was ever paid out from the assurance fund. It amounted to \$259.60 plus costs.²⁰⁴ Yet more than \$200,000 was levied and collected in that period. Consequently, when Saskatchewan and Alberta became provinces and the assurance fund was shared proportionately between them, they each received \$125,621.12 and \$85,350.70²⁰⁵ respectively. By 1956, in Alberta the “sum of \$3,815,645.75 ... [had] been paid in and only \$72,280.33 ... [had] been paid out.”²⁰⁶ Whenever the amount of the fund exceeded a specified amount, the excess was transferred to government’s general revenues. These are just some of the examples of government’s tight-fistedness regarding the assurance fund.²⁰⁷

One reason these funds remained “indecently solvent”²⁰⁸ related to the review of instruments undertaken in land titles offices. Land Titles staff examined every instrument submitted for registration and if the instrument was not substantially correct in form and in substance, the Registrar rejected it.²⁰⁹ As well, at least one Torrens system had a written policy that staff should act to avoid errors and claims being made against the assurance fund.²¹⁰ For all of these reasons, very few substantive registration errors ever occurred.

²⁰³ *Ibid.*

²⁰⁴ Taylor, *supra* note 17 at 129.

²⁰⁵ *Ibid* at 130.

²⁰⁶ Ruoff, *supra* note 19 at 76.

²⁰⁷ This situation has not been altered by the growing prevalence of mortgage fraud in Canada. See Law Reform Commission of Saskatchewan, *Final Report on Private Title Insurance*, April 2007, at 15-16.

²⁰⁸ Baalman, *supra* note 134 at 56. Ruoff quotes Baalman as using the expression “‘indecent solvency’” when Baalman wrote “indecently solvent”. Ruoff, *supra* note 19 at 33.

²⁰⁹ *The Land Titles Act, 1906 supra* note 192 s 78.

²¹⁰Collins, *supra* note 60 at 23 writes: “The Land Titles Act provides for an Assurance Fund out of which is paid damages which the Government have to pay to people who have suffered loss as a result of errors in the land titles office. Although this fund has been set up to meet this kind of situation, efforts must still be made to avoid error, partly because it is important the Assurance Fund be not used up, but also because errors not only cause loss but undermine public confidence in the land titles system. In the ultimate result, it is this question of public confidence which makes it so important that the land titles system can be relied upon. This public confidence depends upon the pride which the staff of the land titles office take in their work, and the care which they exercise to ensure that the utmost reliance can always be placed on the certificates and other documents issued by the land titles office.”

When the Torrens assurance fund is treated as insurance, it seems to be accepted that mistakes will occur, and that such mistakes will be compensated by government each time such a loss occurs. Ruoff's early description of the "insurance principle" promulgates such an interpretation. He knew differently,²¹¹ but he never corrected this impression.

He had an opportunity to do so at the 1955 Conference. Instead, Ruoff reiterated that "if, through human frailty, a flaw appears [on the title], anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the [mirror's] reflection were a true one."²¹² In most of this text – even following his admission that a claim could be difficult or impossible because of legislative changes²¹³ – he consistently maintained that the "insurance principle" was one of the main features of a Torrens system. He confirmed:

[t]he existence of a fund is, of course, an essential and characteristic feature of the Torrens system. Under that system the register is like a mirror which reflects fully, accurately and authoritatively all facts material to the owner's title. If through human frailty, whether it be the mistake of a Registrar, on the one hand, or the fraud of a criminal on the other, there is a flaw in the mirror, in consequence of which an innocent person who has relied upon the reflection being a true one suffers loss, *he must be put into the same position, so far as money can do it, as if the reflection were indeed true.* Thus the Torrens system is nothing more nor less than a system of insurance of title to land by the government – the term 'insurance' is a happier one than 'assurance' because it refers to a possible risk rather than a certain one. Unfortunately, however, the business of registration is seldom conducted as a true insurance business.²¹⁴

With such convincing and easily understandable language, Ruoff transformed "indefeasibility of title" from a postscript in legal discourse, to the focal point of land titles systems of registration. It also helped that he modestly credited the acceptance of this expression to Canada and the decision of *Turta v Canadian Pacific Railway*.

3.2 Canada's Role in the Genesis of Indefeasibility of Title

In 1952 – the same year as Ruoff first published articles pertaining to the three principles – Justice Egbert of the Supreme Court of Alberta wrote a lengthy judgment regarding competing ownership claims to petroleum in a quarter-section of farm land located near Leduc, the location

²¹¹ Ruoff, *supra* note 19 at 66-82.

²¹² *Ibid* at 13.

²¹³ *Ibid* at 13, 34-45.

²¹⁴ *Ibid* at 74.

where an oil well was first drilled in Canada.²¹⁵ Justice Egbert did employ the expression “indefeasibility of title” in his judgment, but he concluded that the matter should be determined upon the wording contained in the legislation, commenting as follows:

Keeping in mind the purpose and intent of the Act . . . , I fail to see how it is possible for a court to import into these protective clauses words which are not there, and to attach to them another condition or exception which the legislature did not see fit to mention.²¹⁶

This approach, and not indefeasibility of title as Ruoff claimed, was the basis upon which the court reached its decision. The facts help to explain this.

In 1903 the Crown had granted a large tract of land including mines and minerals to the Canadian Pacific Railway (“CPR”), and had instructed the Land Titles Office to issue a Certificate of Title. When CPR sold one quarter-section included in this Certificate of Title to an individual in 1908, the transfer specified that CPR had reserved the coal and petroleum. However, when Land Titles registered this transfer, it omitted the petroleum reservation from the purchaser’s new title.

Land Titles discovered the error in 1943. Without notifying CPR or the current land owner,²¹⁷ Mr Turta, Land Titles staff amended the chain of cancelled titles and Turta’s title to reflect CPR as the owner of petroleum. After these “corrections” were completed, Land Titles staff did not inform any of the interested parties regarding what they had done to the title.²¹⁸

After discovering what had occurred,²¹⁹ Turta commenced an action for a declaration that he was “entitled to be registered as owner of all the petroleum in, upon and under the quarter section, and that the substitutions and alterations made to various documents to show the contrary were wrongful.”²²⁰ Turta relied upon the wording of the statute, ie, that registration was everything, and that if a legal interest was not endorsed on the title, it was to be treated as if it did not exist. As the title had registered in his name without showing that petroleum was reserved to CPR, he and his successors held all rights to the petroleum. He also argued that the registrar of

²¹⁵ *Turta Trial*, *supra* note 20 at para 27.

²¹⁶ *Turta Trial*, *ibid* at para 147.

²¹⁷ *Ibid* at para 6.

²¹⁸ *Ibid*.

²¹⁹ The court concluded that Turta learned of this in late March, 1950. *Ibid* at para 25.

²²⁰ *Turta SCC*, *supra* note 18 at 432.

land titles could not “amend” the titles, as their actions prejudiced his rights which he had obtained for value.

Given that Turta had purchased the land from a subsequent owner, and because title had been registered in his name, one would expect a Court to determine that Turta owned the petroleum. He was an innocent purchaser for value. As a corollary, one would expect CPR to make a claim against the assurance fund, on the basis that Land Titles staff had erred when they failed to mark the reservation of petroleum on the 1908 title. Unfortunately for CPR, in 1949 and 1950 the Alberta government had amended its legislation so that: (1) an aggrieved party had six years from the date the error was made to commence such a claim; and (2) restricted the maximum claim to \$5,000.²²¹ Given that the error was made in 1903, CPR was statute-barred from commencing an action against the assurance fund.²²² Also, it did not make commercial sense to institute a claim for \$5,000 when the loss suffered was 1,000 times more than the statutory limit: by the mid 1950s the petroleum in the quarter section had been valued at approximately \$5,000,000.²²³ At trial, all that was known was that Turta’s land was “almost surrounded by producing wells.”²²⁴

For the Alberta government, these amendments were logical from a policy perspective. Since its inception, approximately \$3,800,000 had been collected on behalf of the assurance fund.²²⁵ If CPR had been allowed to assert a claim and succeeded, the Alberta government would have had to take more than \$1,200,000 from general revenues. Additionally, CPR was not the only party which suffered a loss because of errors regarding minerals.²²⁶ Amending the legislation resulted in the government remaining solvent, but it caused problems for CPR.

Faced with this reality, CPR had to try to assert that it owned the petroleum. One of the defences it raised to Turta’s claim was that Turta had not acted “‘upon the faith of the register’” vis-à-vis the petroleum. Succinctly, he was illiterate, he purchased the land for farming, and he

²²¹ “Titles to Minerals in Alberta: The Report of the Benchers’ Special Committee, 1956” (1956) 1 Alta L Rev 185 at 189 (HeinOnline) [Titles to Minerals in Alberta].

²²² *Ibid* at 190.

²²³ *Ibid* at 189.

²²⁴ *Turta Trial*, *supra* note 20 at para 38.

²²⁵ Titles to Minerals in Alberta, *supra* note 221 at 189.

²²⁶ *Ibid*.

had no knowledge of or interest in the petroleum.²²⁷ Therefore in CPR's view, he had not transacted on the faith of the register and was not entitled to retain ownership of the petroleum.

Until then, judicial analysis focused on the reliance placed on the register by a *bona fide* purchaser for value.²²⁸ CPR relied on this approach, but it was patently unfair to someone who was illiterate. The court needed to find a means to "level the playing field" between persons such as Turta and those who could read, write, and comprehend English. This was accomplished by focusing on the statute. In the course of analyzing statutory provisions, Justice Egbert demonstrated a preference for the adjective "indefeasible." It seems to have encapsulated, for him, the essence of the cardinal features of the land titles system, and was a word which could succinctly describe the state of Turta's title.

Among other cases, Justice Egbert analyzed decisions from the four appellate courts in Australia, New Zealand, England and Canada that had originally employed the word "indefeasible." He also identified three such courts which had penned "indefeasibility of title" in their judgments.²²⁹ Of the four which referred to "indefeasible title," one originated in British Columbia, and was quoting the terminology codified in its statute.²³⁰ One of the other cases mentioned both "indefeasibility of title" and "indefeasible title."²³¹ This means there were only five appellate cases in roughly 100 years which employed indefeasible or indefeasibility that Justice Egbert identified as apposite to the issue before him.²³² Each deserves brief mention.

As identified by Justice Egbert, the first prominent use of the adjective "indefeasible" occurred in *Gibbs v Messer*.²³³ It involved a case of identify theft and ultimately the House of Lords determined that Mrs Messer, the original owner who had lost her property through forgery, was entitled to have the title to her land free and clear of the McIntyres' mortgage which the

²²⁷ *Turta Trial*, *supra* note 20 at para 15.

²²⁸ For more discussion regarding this "reliance on the register test" and the problems inherent in it, see: Carter, *supra* note 129.

²²⁹ *Turta Trial*, *supra* note 20.

²³⁰ *Hudson's Bay Insurance Company v Creelman* (1919), 3 WWR 9 at 10 (PC).

²³¹ *Reeves v Kenschur* (1909), 10 WLR 680, 2 Sask LR 125 (SKCA).

²³² These expressions may have been used many more times in trial decisions, but such research is beyond the scope of this paper, and the abilities of the researcher. Although I tried, it was not possible for me to locate the trial decisions of any of these cases, or even the decisions of the New Zealand Court of Appeal. The College of Law, University of Saskatchewan does not carry their Law Reporters, and the decisions are too old to have been digitized at the New Zealand Court of Appeal's website, or at that country's equivalent of CanLII.

²³³ *Gibbs v Messer*, *supra* note 176. A brief description of this case is provided in Chapter 4 below at 111.

fraudster had registered against the title.²³⁴ In this judgment, Lord Watson uses the phrase “indefeasible right”²³⁵ when describing Mrs Messer’s interest in the title to land. Her right could not be challenged, but someone else could potentially replace her as the owner on the title. This means that, as the former registered land owner, Mrs Messer’s right was not automatically enforceable. Only a *bona fide* purchaser for value receives a conclusive title once her ownership is entered on the register, ie, once a new Certificate of Title is issued in the owner’s name. As the former registered owner, Mrs Messer had to bring a court action to recover her land. Ultimately she was successful and recovered her land free of the McIntyres’ mortgage. This right was not automatic; instead, she had to take steps and incur the resulting expenses to recover her property. Contrary to how it often is portrayed today,²³⁶ “indefeasible” did not apply equally to all parties who owned, or held an interest in, the land.

*Mere Roihi v Assets Co*²³⁷ is the next appellate court identified by Justice Egbert which employed this term. At page 725 of its judgment, the New Zealand Court wrote:

’It is the indefeasibility of title of a purchaser for value from the registered proprietor, which indefeasibility exists in the interests of the purchaser and not of the vendor, which is the essential element in the Act.’²³⁸

This decision was reversed upon appeal.²³⁹

Justice Egbert identifies that the New South Wales Court of Appeal used the term too, in *Hamilton v Iredale*.²⁴⁰ The transfer which had been submitted and registered described the wrong parcel of land.²⁴¹ One of the judges,

Walker, J. gave a lengthy illustration of the difference between a case of "misdescription" and "no title" which has been quoted many times and which I do not intend to repeat here. He then goes on to say, referring to the case of "no title" as opposed to "misdescription."

²³⁴ *Gibbs v Messer, ibid.*

²³⁵ *Ibid* at 254.

²³⁶ Chapter 2 below.

²³⁷ *Mere Roihi v Assets Co.* (1902), 21 NZLR 691, as referred to in *Turta Trial, supra* note 20 at para 134.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Hamilton v Iredale* (1903) 3 SRNSW 535, as referred to in *Turta Trial, ibid* at para 179-181.

²⁴¹ *Ibid* at para 179.

‘If, however, I acted bona fide [the situation of the plaintiff here] believing, however mistakenly, that I had a title to the land applied for, then the case does not fall under any of the exceptions to the efficacy of the certificate, and ss. 40 and 42 give one an absolute title, which no Court can take away or review. ... having regard to the obvious policy and intention of the Act, I think the object of the Court should be to support and strengthen, not weaken, the indefeasibility of certificates of title.’²⁴²

In 1906 “indefeasible” was once again employed by the New Zealand Court of Appeal, in *Fez v Knowles*.²⁴³ The passage containing this adjective was quoted often in Canada.²⁴⁴

‘The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in law. * * * The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.’²⁴⁵

Although in this instance the New Zealand Court of Appeal states that the “register is everything” and refers to an “indefeasible title”, it also mentions a restriction on the application of this principle. Instead of making a general pronouncement, it limits the principle to interests which can be registered. If an interest is not capable of sustaining registration, it is not capable of supporting an indefeasible title. According to this explanation of the phrase “indefeasible title”, it is not absolute or all-encompassing.

²⁴² *Ibid* at para 181.

²⁴³ *Fels v Knowles* (1907), 26 NZLR 604 at 620 (NZCA) (“*Fels*”) “cited approvingly in *Boulter Waugh ...*”: *Manor Investments Ltd v Ross*, [2000] AJ no 248 (ABQB) at para 9. *Union Bank of Canada v Phillips and Boulter Waugh Limited* (1919), 68 SCR 385 (SCC) [*Boulter Waugh*].

²⁴⁴ *Boulter Waugh*, *ibid* at 387-388; *Turta SCC*, *supra* note 18 at 443 (Estey J) and 464 (Locke J, dissenting judgment). As identified by Egbert J in the trial decision, *supra* note 20 at paras 138, 113, and 111 respectively, in addition to the significant cases which have been quoted by senior appellate courts which are discussed in the body of this paper, the phrase “indefeasible title” from *Fels v Knowles*, *ibid*, was quoted in: *Ott v Lethbridge Brewing and Malting Co.* (1910), 3 Alta LR 210 (ABSC); *Waimiha Sawmilling Co. v Waione Tbr Co.* [1925], 3 WWR 95, [1926] AC 101; and *Essery v Essery*, [1947] 2 WWR 1044 (ABCA).

²⁴⁵ *Boulter Waugh*, *ibid*.

The final appellate court decision considered by Justice Egbert was *Reeves v Konschur*,²⁴⁶ a 1909 decision of the Saskatchewan's Court of Appeal. The Court wrote:

'Indefeasibility of title, however, is secured by the Act, only to those who obtain title *relying upon the register*''²⁴⁷ and as ''therefore ... *The Land Titles Act* is only intended to confer indefeasible title on those who deal with the registered owner, and deal with him *on the faith of his registered title*.'''²⁴⁸

Once again, the expressions are used in the context of someone dealing with the owner, while the Court's focus remains on the registered title.

Justice Egbert used these cases and the term "indefeasibility of title" to centre his analysis on the legislative provisions contained in the Act. In the judgment, he used the adjective "indefeasible" and the expression "indefeasibility of title" thirty times. Of these, only sixteen were quotations from earlier judgments;²⁴⁹ he penned the rest. By doing so, the Court found the rationale to grant Turta the relief requested in the face of competing authority.

Again, Justice Egbert appeared troubled by the distinction which had arisen between the test which had developed regarding reliance on the register, and the protections afforded in the statute. In keeping with this, he observed:

the whole situation should be reviewed by a court of appellate jurisdiction, and a definitive, authoritative finding made on the specific point as to whether the protective sections of the Act are available only to a purchaser or mortgagee who has acted *bona fide*, has given valuable consideration and has, in addition, acted 'in reliance upon' or 'on the faith of' the register. I would point out that there is not within the four corners of The Land Titles Act a single word as to 'reliance upon the register' or 'acting upon the faith of the register' – the protection is afforded to 'any purchaser or mortgagee, *bona fide* and for valuable consideration', subject only to the specific exceptions set forth in the Act and to nothing else.²⁵⁰

The Court also opined:

Keeping in mind the purpose and intent of the Act ..., I fail to see how it is possible for a court to import into these protective clauses words which are not there, and to attach to them another condition or exception which the legislature did not see fit to mention. If these words are to be read into these sections, it

²⁴⁶ *Reeves v Konschur*, *supra* note 231, cited in *Turta Trial*, *supra* note 20 at para 130.

²⁴⁷ *Turta Trial*, *ibid*.

²⁴⁸ *Ibid*.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* at para 146.

means that protection is afforded to the intelligent and educated purchaser who has some comprehension of the meaning of his vendor's title, but it is denied to the ignorant and illiterate who have no such comprehension and who cannot, therefore, be said to have dealt 'on the faith of the register', and I cannot believe that any such result was intended by the legislature.²⁵¹

Following this case, the use of "indefeasibility of title" became more popular in Canada. Yet this new reliance was not found in the appellant judgments in *Turta*.

The majority of the Alberta Court of Appeal affirmed the trial judgment.²⁵² "Indefeasible" and "indefeasibility of title" were written thirteen times in the appeal court's judgments: eight were contained in quotations and five were found in passages of the judgments.²⁵³ None of them are apposite.

In a fifty-page, six-to-three decision, the Supreme Court of Canada upheld the decision of the majority of the Appeal Court and made a declaration that *Turta* owned the petroleum. In its judgments, the Court used the word "indefeasible" only nine times.²⁵⁴ Interestingly, the dissenting judgments employed "indefeasible" more often than did the majority.

When writing his dissent, Justice Locke quoted from *Gibbs v Messer*, and referred to an "indefeasible right."²⁵⁵ Justice Locke also relied upon the *Fels v Knowles* quotation which employs "indefeasible title" twice. He actually penned "indefeasible nature of the title" once in the text of his judgment. When describing the state of a title in a Torrens jurisdiction, Chief Justice Rinfret used "indefeasible" twice – both contained in a quote – in his dissenting judgment.²⁵⁶ To summarize, the dissenting judgments employed "indefeasible" six times.

Writing for the majority, Justice Estey used "indefeasible" three times. First he quoted a portion of the passage from *Fels v Knowles*, and the passage from *Gibbs v Messer*. Then Justice Estey relied upon the New Zealand quotation as the basis for the following statement:

The foregoing preamble and quotations, as well as others to similar effect, emphasize that the Torrens system is intended 'to give certainty to the title' as it appears in the land titles office. That one who is named as owner in an

²⁵¹ *Ibid* at para 147.

²⁵² *Turta v Canadian Pacific Railway Company*, [1953] 4 DLR 87; 8 WWR (NS) 609; [1953] AJ no 47 (AB CA); Chief Justice Ford dissenting [*Turta Appeal* citing to QL].

²⁵³ *Ibid*.

²⁵⁴ *Turta SCC*, *supra* note 18.

²⁵⁵ *Ibid* at 462.

²⁵⁶ *Ibid* at 433 and 436.

uncancelled certificate of title possesses [to quote the New Zealand Court of Appeal] an ‘indefeasible title against all the world’, subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office ...²⁵⁷

This is hardly a conclusive endorsement of indefeasibility of title as it is commonly employed in the dominant legal discourse today.

Justice Rand wrote a concurring judgment. Like the trial judge, he focused analysis on the legislation, and not on any tests which were not codified in the statute. He described the essence of the registration system as the effect of registration, observing:

The mechanics of registration can be shortly stated. When a transfer is presented at the registry office it is immediately stamped and an entry made in a daybook of the day, hour and minute of its receipt, thereafter taken to be the time of registration. A memorandum is then endorsed on the certificate describing the interest conveyed by the transfer and to that extent cancelling the certificate. By that entry the transmission of title is effected. At the same time a like memorandum, under the seal and signature of the registrar, is made on the duplicate which is held by the owner and which must be presented to the registrar before a transfer can be registered. The new certificate and duplicate are then prepared and signed by the registrar, the former constituting a folio in the register and the latter being delivered to the transferee or new owner.²⁵⁸

Justice Rand chose not to employ “indefeasible” or “indefeasibility of title” in this statement, or in a subsequent remark:

The general and primary conception underlying the statute, as it is of all legislation establishing what is known as the Torrens system of land titles, is that the existing certificate, bearing the name of a real person, is conclusive evidence of his title in favour of any person dealing with him in good faith and for valuable consideration.²⁵⁹

The majority of the Supreme Court of Canada were cognizant that the contents of the legislation such as the phrase “conclusive evidence”²⁶⁰ were determinative and only used “indefeasibility of title” as an interpretation tool to describe the statutory regime. This is the approach they

²⁵⁷ *Ibid* at 443-444.

²⁵⁸ *Ibid* at 451-452.

²⁵⁹ *Ibid* at 452.

²⁶⁰ Chapter 3 below.

advocated. Yet a term popularized by an Englishman has become dominant in describing the central tenets of the Torrens system, with little or any reference to statutory provisions.²⁶¹

CONCLUSION

Throughout the reforms which lead to the development of land titles systems in South Australia and England, “indefeasibility of title” was not the focal point in the legal discourse. Torrens liked the expression, but it was not adopted in South Australia’s legislation which, even from the outset, included restrictions and limitations on the protections afforded to a registered owner. In certain instances, title has always been defeasible.

Instead of being an integral part of the Torrens system from the beginning, the expression did not begin to become popular until approximately one hundred years after the system began in 1858. Theodore Ruoff – a man familiar with the English land titles system – is the person who promulgated the expression and who developed the expressions mirror principle, curtain principle and insurance principle. He credits Canada and *Turta* with the genesis and popularization of “indefeasibility of title” but the judgments show little evidence of this connection.

There are similar issues with the principles, or pillars, as Ruoff describes them. Yet Ruoff’s imagery was, and still is, compelling. He wrote clearly, and his analogies were easy to understand. He made a difficult and complex area of law appear straightforward. As a result, “indefeasibility of title” – which began as a postscript – is now treated as the apex of land titles systems of registration. With this rise, and to our detriment, we appear to have forgotten the following:

the steps necessary to secure such benefits must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way the statute provides.

It cannot be made available in any other way.²⁶²

Had we continued to follow this approach, indefeasibility of title would have remained a postscript, and a myth would not have attained the status of legal fact in dominant legal discourse.

²⁶¹ Chapter 2 below.

²⁶² *Boulter Waugh*, *supra* note 243 at 392-393 (Idington J).

CHAPTER 2

EXPLORATION OF A MYTH: INDEFEASIBILITY IN CANADIAN LITERATURE TODAY

The principle of indefeasibility provides that when title to land is transferred, the new owner takes that title free and clear of all encumbrances except those registered against the title at the time of transfer. Registration is everything. It is conclusive proof of ownership and it is conclusive proof of any interests, exceptions and/or reservations that may affect ownership.¹

This quote encapsulates the dominant understanding of indefeasibility of title in Saskatchewan today: legally trained individuals tend to believe that “indefeasibility of title” is a legal fact, one which is the central feature of the province’s land titles systems of registration.² In reality, the doctrine of “indefeasibility of title” and the associated mirror, curtain, and insurance principles³ are recent constructs,⁴ and research indicates that these expressions have only come to dominate real property law discourse in approximately the past thirty years. Yet most lawyers and judges treat these terms as if they have always been synonymous with our land titles system. Many traditional legal research sources buttress this belief, causing these terms to be treated as all encompassing legal facts.

However, other evidence supports a conclusion that these expressions are not central features of the land titles system but are instead no more than a myth.⁵ Because lawyers rely

¹ Ryan-Froslic J in *Jen-Sim Cattle Co Ltd v Agricultural Credit Corporation of Saskatchewan*, 2006 SKQB 173 (available on CanLII) at para 18 [*Jen-Sim Cattle*].

² To test this assertion, I spoke to three Regina, Saskatchewan lawyers who practice residential real estate about indefeasibility of title, what it means to them, and whether it exists. The least experienced lawyer said that he learned in Property Law that the term means that the title as issued correctly represents the state of the title, and you do not have to look behind it to verify its contents. Lawyer 1, telephone conversation (15 December 2011).

The second one believes it exists, and defines it through comparison to the conveyancing system in the United States, and clarifies the difference by referring to the need for title insurance there. Lawyer 2, telephone conversation (21 December 2011).

The most experienced lawyer who self-identifies as “a bit of a property nerd” believes it is a central feature of the land titles system but refutes the all encompassing definition. He acknowledges that not all lawyers, and especially younger ones, do not appreciate all the nuances associated with this term. He said he has only become aware of them because he has practiced long enough to encounter many land titles issues, “things that make ... [him] shake his head.” Lawyer 3, telephone conversation (5 January 2012).

³ Theodore BF Ruoff, *An Englishman Looks at the Torrens System*, (Sydney: The Law Book Co of Australasia Pty Ltd, 1957), as discussed in Chapter 1 above at 28-38.

⁴ The development of the use of these terms is discussed in Chapter 1 above, *ibid*.

⁵ Chapter 1 above, Chapter 3 below and Chapter 4 below.

upon “indefeasibility of title” to frame land ownership disputes, there exists a less than adequate understanding of the true parameters of land titles law in this province.

To make the argument and in order to comprehend the myth of indefeasibility of title in Saskatchewan, it is helpful to gain a sense of lawyers’ collective understanding of this concept and Ruoff’s three pillars,⁶ or principles, as they are employed currently in Canadian common law jurisdictions. Lawyers often approach an unfamiliar legal area by consulting secondary sources, and then moving to case law and statutes. First a lawyer learns about the general meaning of a legal expression, and then examines how the expression is used in statutory provisions and court judgments. This way, the lawyer has the necessary context in which to apply the law as expressed in the dominant legal lexicon to the facts.

This chapter is organized from this perspective: the discussion proceeds as if an inexperienced lawyer is trying to formulate an opinion regarding a dispute over the ownership of land, one in which involves consideration of the term “indefeasibility of title” as it is used at common law.⁷ As such, the discussion begins with a brief presentation of how “indefeasibility of title” is defined on the internet and in two dictionaries. Then “indefeasibility of title” and the mirror, curtain and insurance principles are considered from the perspective of two recently published introductory property law textbooks and one casebook. Then journal articles are considered as a final general source of legal information.

From this, the analysis turns to an overview of case law and more practice-orientated sources often used by practicing lawyers when considering legal issues and preparing arguments for court. There is a brief review of how recent Canadian courts have interpreted the terms “indefeasibility of title”, “mirror principle,” “curtain principle” and “insurance principle.” After this the discussion shifts to the treatment of these terms in Saskatchewan’s most recently published land titles manual of procedure and in *Torrens’ Elusive Title*,⁸ the seminal text on land titles systems such as the one operating in Saskatchewan. From these sources, the meaning of “indefeasibility of title” within Canada’s dominant legal lexicon as understood by most lawyers and applied by the courts in Saskatchewan becomes clear.

⁶ Chapter 1 above at 28-38.

⁷ The treatment of this term in Saskatchewan land titles statutes is beyond the scope of this chapter, and forms the subject of Chapter 3 below.

⁸ Thomas W Mapp, *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System*, (Edmonton: The University of Alberta Printing Department, The University of Alberta: 1978).

1. INDEFEASIBILITY: THE INTERNET AND DICTIONARIES

Given the prominence attached to “indefeasibility of title” in most land titles registration jurisdictions, a lawyer might expect to find this term defined on the internet or in a dictionary. Yet the results from an internet search of “indefeasibility of title” on www.google.ca do not identify any credible sources on the first page of results,⁹ illustrating the paucity of a decent online definition of this term. For example, the first result refers to the definition found in Wikipedia, which reads, “Torrens title is a system of land title where a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register ...”¹⁰ This definition is more tautological than helpful. The next result identifies an entry in the Free Legal Dictionary which only provides a definition of “indefeasible” as an adjective which means something that “cannot be altered or voided, usually in reference to an interest in real property.”¹¹ “Indefeasibility of title” is not defined.

Similarly the *Canadian Oxford Dictionary* only defines “indefeasible” as an adjective meaning “of a claim, rights, etc. ... that cannot be lost.”¹² “Indefeasibility” simply refers to the noun associated with this entry.¹³

More surprising given its legal focus and the fact that some American jurisdictions operate land titles systems of registration based on the Torrens System,¹⁴ *Black’s Legal Dictionary* only defines “indefeasible.” Reading *Black’s*, the fictitious lawyer learns that “indefeasible” is an adjective affecting a “claim or right”, one meaning “not vulnerable to being defeated, revoked, or lost.”¹⁵ From these sources, our lawyer learns that “indefeasibility” is a noun formed from the adjective “indefeasible.” As a noun predicated upon this adjective, “indefeasibility” must mean something such as a right or claim – or in this case, a title to land – that in itself is “not vulnerable to being defeated, revoked, or lost.”¹⁶ Given *Black’s* failure to

⁹ www.google.ca 22/09/2011, *sub verbo* “indefeasibility of title definition.”

¹⁰ <en.wikipedia.org/wiki/Indefeasibility_of_title>.

¹¹ <<http://legal-dictionary.thefreedictionary.com/indefeasible>>.

¹² *Canadian Oxford Dictionary*, 2nd ed, *sub verbo* “indefeasible.”

¹³ *Ibid.*

¹⁴ RG Patton, “The Torrens System of Land Title Registration” (1935) 19 Minn L Rev 519 (HeinOnline).

¹⁵ *Black’s Law Dictionary*, 9th ed *sub verbo* “indefeasible.”

¹⁶ *Ibid.*

define the term “indefeasibility of title,” it is not surprising that it does not define mirror principle, curtain principle and the insurance principle either.

From this the fictitious lawyer will have to infer a definition of the noun “indefeasibility of title” by adapting the definition of the adjective “indefeasible.” Because the definition of “indefeasible” is stated so emphatically, a lawyer gains the impression that “indefeasibility of title” must be absolute and unchallengeable.¹⁷ Although this impression is not absolute,¹⁸ it has certainly become dominant. In these circumstances it would be unrealistic to expect this lawyer would reach a different conclusion, especially considering the contents of introductory property law textbooks and casebooks.

2. INDEFEASIBILITY: INTRODUCTORY TEXTBOOKS AND CASEBOOKS

Compared to internet sources and dictionaries, the fictitious lawyer should expect to find greater clarity in an introductory legal textbook or a casebook. Three such recently published Canadian books refer to “indefeasibility of title” and the associated mirror principle, curtain principle and insurance principle. Each provides a much better definition than that provided in the dictionaries, but each one also supports the notion of the myth over the actual statutory provisions in effect in Saskatchewan.

For example, the second edition of *A Property Law Reader: Cases, Questions, and Commentary*¹⁹ labels “three central features of title systems”²⁰ as follows:

¹⁷ This approach has been adopted by many persons involved in real estate conveyancing, such as Vancouver real estate agent, Luigi Frascati. At <<http://ezinearticles.com/?Title=Indefeasibility&id=1711688&wparam=1316716888>> Frascati describes “indefeasibility of title as follows: “Indefeasibility, therefore, is a legal principle providing that the Register of Titles is conclusive evidence that the person named on title as holding the interest in the land is, in fact, rightfully entitled to that interest and, furthermore, that his holding is not subject to any condition or encumbrances other than those shown on the title Register. It follows, therefore, that a purchaser can rely completely on what is shown in the Register of titles, since ‘what you see is what you get’. This means, moreover, that a Purchaser’s title can be valid even if there are defects in the Seller’s registered deed.”

¹⁸ Since the term “indefeasibility of title” and the three pillars were first coined in the 1950s (see Chapter 1 above starting at 28), there have been academics and land titles officials in each generation who have identified that the scope of protection according to a landowner in a land titles registration jurisdiction is more limited than what is suggested by the notion of “indefeasibility of title.” Some of these include Canadians Roger Carter and Thomas W Mapp, and Australians John Baalman, WN Harrison, and Robert Stein. See: Roger Carter, “Some Reflections on *The Land Titles Act* of Saskatchewan” (1965), 30 Sask B Rev 315 at 315 (HeinOnline); Mapp, *supra* note 8; John Baalman, *The Torrens System in New South Wales* (Sydney: The Law Book Co of Australasia Pty Ltd, 1951); WN Harrison, “Indefeasibility of Torrens Title” (1954) 2 U Queensland LJ 206 (HeinOnline); R Stein, “The ‘Principles, Aims and Hopes’ of Title by Registration” (1983-1985) 9 Adel L Rev 267 (HeinOnline).

¹⁹ Bruce H Ziff, Jeremy de Beer et al, *A Property Law Reader: Cases, Questions, and Commentary* (2nd ed) (Toronto: Thomson Canada, 2008) [Ziff and deBeer].

- 1) the principle of indefeasibility. Once in place, purchasers need not conduct an historic search of title; they can rely on the ‘top title.’ So it is said that a *curtain* is drawn on past dealings.
- 2) the register is supposed to serve as a *mirror* (or a *photograph*) of all interests relating to a given plot of land.
- 3) insurance (or net) principle ... [is] the third pillar of land titles registration.²¹

This paragraph relies on the construct of indefeasibility and the three principles. They are portrayed as legal facts and acceptance of the myth begins.

In the fifth edition of *Principles of Property Law*,²² the author begins by quoting from the Manitoba Court of Appeal that “[i]ndefeasibility is the heart of a Torrens system.”²³ Almost immediately thereafter, the author acknowledges:

the concept is qualified in major ways. A title is indefeasible when it cannot be vitiated by some antecedent act that might undermine the validity of current rights. In theory, therefore, state registration provides a safe harbour from any defects in title for the party declared by the register to be the owner of Blackacre. The idea of indefeasibility involves the lowering of a curtain on past transactions.²⁴

This author acknowledges that “indefeasibility of title” exists in theory, but this important qualification is overshadowed by his reference to the curtain. Once the curtain has been lowered, there is no requirement to examine “past transactions.” The curtain is a visual reference and as such is the most accessible portion of this quotation. Thus, one remembers it more easily than the acknowledgement that indefeasibility is a theoretical construct.

Another introductory property law textbook, *Understanding Property: A Guide to Canada’s Property Law*,²⁵ takes a different approach. Its authors begin by noting that “[l]and titles registration is not a complete code in that it does not affect interparty dealings relating to unpatented land, nor does it affect unregistered interests in registered lands.”²⁶ This text does not

²⁰ *Ibid* at 980.

²¹ *Ibid* at 980.

²² Bruce Ziff, *Principles of Property Law* (5th ed) (Toronto: Thomson Reuters Canada Limited, 2010) [Ziff].

²³ *Re Cartlidge and Granville Savings and Mortgage Corporation* (1987) 34 DLR (4th) 161 (MBCA) at 172 (per Philip JA) quoted in Ziff *ibid* at 474.

²⁴ *Ibid* at 474.

²⁵ Marjorie Lynne Benson, Marie-Ann Bowden and Dwight Newman, *Understanding Property: A Guide to Canada’s Property Law* (2nd ed) (Toronto: Thomson Canada Limited, 2008) [Benson].

²⁶ *Ibid* at 156.

discuss the mirror principle, curtain principle and insurance principle until it first highlights the fact that the system does not apply to all transactions and to all parcels of land. This means it is a much more accurate portrayal of a land titles system of registration.

However, the authors do employ the terms indefeasibility of title, mirror principle, curtain principle and insurance principle. They begin with the “mirror principle,” describing it as:

Torrens system statutes provide that only those interests endorsed on the certificate of title, or otherwise specifically provided for in legislation, bind subsequent interest holders. Moreover, until it is registered, any transaction relating to the real property [*sic*] does not create an interest in the land enforceable against a third party transferee, whether or not he is aware of the unregistered interest. It is unnecessary to look beyond the information presented on a certificate of title to learn the property description and holder with certainty. As to interests that might burden that title, it is necessary to look at the statutes, as well as the details of the interests on the back of the certificate of title.²⁷

The authors next turn to the “curtain principle,” writing:

With the issuance of a certificate of title comes a state guarantee that the holder of that title is the holder of the estate named in the certificate, and that those investigating title need look no further than interests registered thereon or those implied by statute. A metaphoric curtain or wall shields subsequent interest holders from interests that may have existed prior to the date of issuance of the certificate of title.²⁸

They are even more succinct when discussing the “insurance principle,” using only one sentence to describe it as “[s]hould a mistake occur in the certificate of title, the state provides compensation from a fund known as the assurance fund.”²⁹ Contrary to this assertion, compensation has only ever been paid in very limited circumstances.³⁰

After this, the authors summarize the key features of land titles systems of registration:

When taken together, the mirror principle, the curtain principle, and the insurance principle constitute the underlying doctrine of indefeasibility of title. An indefeasible title holder will retain the land and the party whose interest was defeated will only receive damages.³¹

²⁷ *Ibid.*

²⁸ *Ibid* at 156-157.

²⁹ *Ibid* at 157.

³⁰ See Chapter 1 above at 35-38.

³¹ Benson, *supra* note 25 at 157.

In so doing, they fail to consider the actual provisions in the statute which suggest a more limited degree of protection. Like the other recent textbook and casebook, this textbook unknowingly perpetuates a concept which has a very limited, if any, statutory basis.

After reading these recently published introductory property text and casebooks, it is reasonable to believe that indefeasibility of title and the three principles are the central features of land titles systems of registration. However the knowledge base is still incomplete. For example, the second text describes a number of exceptions to indefeasibility, but does not mention equitable interests or reservations in the original Crown grant,³² neither of which need to be noted on a title in a land titles system of registration as owners are expected to understand the legal exceptions codified in the legislation.³³ These textbooks and the casebook may be misleading as none clearly indicate that the land titles system of registration always is based on a statute:³⁴ no specific statutory provisions are included when the terms are described.

In general, very little attention is given to the “statutory exceptions” mentioned by Professors Benson and Bowden, or to how the concept of indefeasibility is “qualified,” as noted by Professor Ziff. These are introductory texts, written to introduce legal concepts and rules in property law. A more nuanced discussion of issues such as, for example, the debate on immediate or deferred indefeasibility of title,³⁵ the status of mineral titles within Canadian land titles jurisdictions,³⁶ or fraud in the context of land titles,³⁷ is beyond their scope. There are many exceptions to indefeasibility, and they often contradict the “hallmarks” of land titles systems.³⁸

³² *Ibid* at 156-161.

³³ *Ball v Gutschenritter* [1925], 1 DLR 901, SCR 68 (Duff J), as quoted in *Prudential Trust Co Ltd v The Registrar, Land Titles Office, Humboldt Land Registration District* (1956), 2 DLR (2d) 29; [1956] SJ no 40 (QL) (SK CA) at para 112 (citing to QL).

³⁴ The historical development of Saskatchewan’s land titles system of registration, including an examination of the debate surrounding the development of a code for conveyancing in real property law, are discussed further in the Introduction above at 3 n 11; Chapter 1 above at 6-28; and Chapter 3 below.

³⁵ The issue of immediate or deferred indefeasibility is the subject of many common law journal articles, such as: Pamela O’Connor, “Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems” (2009) 13 *Edinburgh L Rev* 194 [hereafter referred to as “O’Connor 2009”] (HeinOnline).

³⁶ See eg: *Olney v Great-West Life Assurance Company*, 2011 SKQB 186 (available on CanLII).

³⁷ See eg: *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, 2005 SKQB 470 (available on CanLII) which is discussed more fully in Chapter 4 below at 106-118.

³⁸ This assertion is developed in greater detail in Chapter 3 below.

Before the magnitude of the exceptions can be comprehended, the central concepts need to be understood. The textbooks and casebook perform this introductory function. If other sources analyzed the exceptions and qualifications, a balanced view of indefeasibility of title and the three pillars would be facilitated. Unfortunately, other sources take a similar approach, only devoting brief mention to the exceptions and thereby creating a misunderstanding of this concept.

3. INDEFEASIBILITY: JOURNAL ARTICLES

The term “indefeasibility of title” has been employed in Canadian journal articles. It was first discussed in Marcia Neave’s “Indefeasibility of Title in the Canadian Context,”³⁹ a 1976 article which has been cited in numerous Canadian journal articles and in court decisions.⁴⁰ Professor Marcia Neave, then a senior lecturer in law at the University of Melbourne,⁴¹ visited Canada in 1976 and published her article in the University of Toronto Law Journal. In this article Professor Neave discusses the “doctrine” and its three pillars as they had been used in her country since the 1950s.⁴² Given that Canadians outside of Alberta⁴³ rarely used these expressions before this article was published, Professor Neave can be credited with importing them into the Canadian legal lexicon.

In her article Professor Neave describes systems of title registration as:

The state establishes title by setting up a register and guaranteeing that a person named as the proprietor in the register has a perfect title subject only to registered encumbrances and to enumerated statutory exceptions. The philosophy of a system of title registration is often described as depending on three principles. The first is the ‘mirror principle’ under which the register is a perfect mirror of the state of title. The second is the ‘curtain principle’ under which the purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register. The third is the ‘insurance principle’ under which the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. Together these concepts

³⁹ Marcia Neave, “Indefeasibility of Title in the Canadian Context” (1976) 26 U Toronto LJ 173 (HeinOnline).

⁴⁰ See eg: *Durrani v Augier*, 2000 CanLII 22410 (ON SC) at para 42.

⁴¹ Neave, *supra* note 39 at n *.

⁴² See Chapter 1 above at 28-38.

⁴³ See Chapter 1 above starting at 38 for an explanation as to how “indefeasibility of title” came to be used more frequently in Alberta.

form ‘the principle of indefeasibility’ frequently referred to by commentators, though the phrase is not used in the legislation itself.⁴⁴

In her experience, the “principle of indefeasibility” and the mirror, curtain and insurance principles were the central features of systems of land titles registration. The first two “principles” create easily remembered visual images for the reader. The associated concepts can be readily grasped from Neave’s careful descriptions. Consequently, these terms are useful tools for summarizing the fundamental principles in a somewhat complex and contradictory land titles registration system.

The term “indefeasibility of title” next appeared in a journal article in 1985. In that year, Roger Carter, a law professor at the University of Saskatchewan, used this expression in the title of a case comment.⁴⁵ He focuses on whether the principle of indefeasibility of title applied to a volunteer or whether the principle was restricted to a situation involving a *bona fide* purchaser for value. Professor Carter refers to the relevant statutory provisions and case law without including any separate definition of the term in his title. As well, he never mentions the mirror principle, curtain principle or insurance principle.⁴⁶

“Indefeasibility of title” was next employed in a case comment⁴⁷ regarding *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)*.⁴⁸ In the case the court considered the competing claims of an innocent joint owner of a home whose signature was forged on a transfer, and those of the good faith purchaser for value.⁴⁹ In the case comment the author introduces the concept of indefeasibility of title as follows:

One of the cardinal principles of the Torrens system is that of indefeasibility of title. Simply stated, it means that the person named as owner on a certificate of title to land has good title to that land against all the world, subject to competing claims or encumbrances endorsed on that certificate, and subject to a limited number of statutory exceptions.⁵⁰

⁴⁴ Neave, *supra* note 39 at 174.

⁴⁵ Roger Carter, “Case Comments: Does Indefeasibility Protect the Title of a Volunteer? A Comment on *Matkowski v. Matkowski Estate AND Matkowski and Sim v. Sim*” (1985) 49 Sask L Rev 329 (HeinOnline).

⁴⁶ *Ibid.*

⁴⁷ Jeff Lee, “Case Comment” Registrar of Regina Land Registration District v. Hermanson et al.” (1988) 52 Sask L Rev 303 (HeinOnline).

⁴⁸ *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)* (1986), 33 DLR (4th) 12; 52 Sask R 164; [1986] SJ no 728 (SK CA) [*Hermanson Appeal* citing to QL].

⁴⁹ This case is discussed in more detail in Chapter 4 below at 99-106.

⁵⁰ Lee, *supra* note 47 at 304.

The author does not mention the three pillars, but his short description of “indefeasibility of title” promulgates the mythical conception of the term.

In 1991, Professor Bruce Ziff from the University of Alberta discusses this term in a case comment involving the status accorded to private easements as overriding interests in Alberta.⁵¹

In the first paragraph, Professor Ziff describes the “driving mission” of the Torrens System:

....there should be no invisible clouds on title. In theory, a purchaser of land should be confident that the title issued by the Registrar of the Land Titles office is indefeasible, at least to the extent that it cannot be undermined by the later discovery of some hidden and prior unregistered interest.⁵²

Once again, the three pillars or principles are not mentioned.

A 1992 article about indefeasibility of title and adverse possession in Alberta⁵³ provides a rather simplistic conception of the basic components of a land titles system of registration. As seen from the following quote, this student believes that all interests are registered against a Certificate of Title, and, except for claims based on adverse possession which is recognized in Alberta’s statute, that no further analysis is required:

adverse possession is contrary to several basic components of a Torrens system. Adverse possession weakens the basic declaration of indefeasibility set out in section 64 of ... [Alberta’s] *Land Titles Act*. By allowing adverse possession, the owner no longer holds land absolutely free from encumbrances, liens, estates and interests not endorsed on the certificate of title. Not only can the adverse possessor encumber the owner’s title but he can make it defeasible as well. Similarly, a Torrens system envisages all interests in land clearly shown on the certificate of title. Further, adverse possession works around the evidentiary effect of a certificate of title. Section 66 [of the Alberta statute] states that a certificate of title is conclusive proof in all courts that the person indicated on the certificate is entitled to the land. This is clearly not the case where the owner’s title has been extinguished but the adverse possessor has not as yet had the certificate of title changed. Another basic Torrens principle ... is that the owner is not subject to ejectment. What is the effect of adverse possession, if not ejectment? Adverse possession therefore strikes at the root of the Torrens system.⁵⁴

⁵¹ Bruce H Ziff, “A Matter of Overriding Interest: Unregistered Easements Under Alberta’s Land Titles System” (1991) 29 Alta L Rev 718 (HeinOnline).

⁵² *Ibid* at 718.

⁵³ Sandra Petersson, “Something for Nothing: The Law of Adverse Possession in Alberta” (1992) 30 Alta L Rev 1291 (HeinOnline).

⁵⁴ *Ibid* at 1316.

As these articles indicate, by the early 1990s the use of “indefeasibility of title” to describe the central feature of land titles systems of registration was commonly accepted. The Australian expressions had become part of Canada’s dominant legal lexicon.

The issues associated with “indefeasibility of title” now seem to be out of vogue with academics. In the past ten years, only one article dealing with systems of title registration has been published in an English Canadian peer-reviewed journal.⁵⁵ This article is written by Brian Bucknall, a lawyer in Ontario: a jurisdiction which operates both a title registration system and a deed registration system. Bucknall “confines his practice to expert advice on real estate transactions and confines his clientele to lawyers and law firms”⁵⁶ and as a result may be considered an expert in this area. When describing land titles systems of registration, he briefly mentions what is meant by “indefeasibility of title,” stating:

The basic principle of Torrens registration and Land Titles registration is that the legal event associated with a change in title to real estate takes place on the public register, not in the course of dealings between the parties. Neither ‘grant’ nor ‘livery’ are of any assistance – documents indicating a change in title must appear on the public register. As with the Registry Act, no unregistered instrument can, other than within certain statutory exceptions, have any relevance to title.

The register of title maintained under the Land Titles Act is intended to be, in a phrase used repeatedly in texts and judgments, a ‘mirror’ and a ‘curtain.’ The register mirrors all current interests in title (all non-current interests being struck out) and draws a curtain across the title history prior to the current registered interests.⁵⁷

Bucknall recognizes that there are statutory exceptions to “indefeasibility” but then asserts that the mirror and the curtain are central features of land titles systems. Stating that “the register mirrors all current interests in title” creates an inference that no other interests are possible, or

⁵⁵ Brian Bucknall, “Real Estate Fraud and Systems of Title Registration: the Paradox of Certainty” (2009) 47 Can Bus LJ 1. *Gill v Bucholtz* 2009 BCCA 137 at paras 1 and 17 (available on CanLII), discloses that Professor Douglas Harris wrote a short piece on amendments to BC’s land titles legislation which was published in a BCLS publication in 2006. However, a search of HeinOnline did not reveal any further Canadian English journal articles which present land titles issues. There is also one French journal article which uses the word “indefeasibility” in the article. See: Francois Brochu, *Le système Torrens et la publicité foncière québécoise* (2002) 47 McGill Law Journal 625 (HeinOnline).

⁵⁶ Bucknall, *ibid* at 1 n *.

⁵⁷ *Ibid* at 10.

exist. No other analysis of these expressions is provided. Consequently it appears as if “indefeasibility of title” operates in most situations.

International research indicates that there is a great deal of reinforcement for the very encompassing view of “indefeasibility of title.” As evidenced by the number of journal articles from Australia,⁵⁸ the notion of “indefeasibility of title” continues to be debated and analyzed in the country where Commonwealth land titles systems originated.⁵⁹ There “indefeasibility of title” is treated as a legal fact. However the same level of debate does not occur in Canada, and so Canadians’ understanding of the concept is not very well developed, and the nuances inherent in land titles systems are not presented in detail. This means the myth can continue to be promulgated through the simplicity and visual imagery inherent in the definition of “indefeasibility” and the mirror and curtain.

4. INDEFEASIBILITY: PRACTICE MANUALS AND SEMINAL TEXTS

Lawyers also read practical sources such as practice manuals and recent seminal texts when learning a new substantive area of law and formulating legal opinions. As a result such sources need to be considered in this discussion of indefeasibility of title.

In the past sixty years three Saskatchewan land titles manuals have been published, all authored by a “Master of Titles,” the statutory official charged with overseeing the operation of the land titles system of registration under *The Land Titles Act*. The first manual dates from

⁵⁸ Australian journals continue to publish articles regarding indefeasibility of title, and the history of the Torrens system. For example, in 2009, the following articles were published: Rosalind F Croucher, “Inspired Law Reform or Quick Fix? Or, ‘Well Mr Torrens, What Do You Reckon Now?’ A Reflection on Voluntary Transactions and Forgeries in the Torrens System” (2009) 30 *Adel L Rev* 291 (HeinOnline); Kelvin F K Low, “The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities” (2009) 33 *Melb U L Rev* 205 (HeinOnline); O’Connor 2009 *supra* note 35; Pamela O’Connor, Sharon Christensen, Bill Duncan, “Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions Affecting Private Land” (2009) 35 *Monash L Rev* 233 (HeinOnline); Horst K Lucke, “Ulrich Hubbe and the Torrens System: Hubbe’s German background, his life in Australia and his contribution to the creation of the Torrens system” (2009) 30 *Adel L Rev* 213 (HeinOnline); Greg Taylor, “The Torrens System – Definitely Not German” (2009) 30 *Adel L Rev* 195 (HeinOnline); Greg Taylor, “Ulrich Hubbe’s Doctoral Thesis – A Note on the Major Work of an Unusual Figure in Australian Legal History” (2009) 13 *Legal Hist* 121 (HeinOnline). From this one may infer that research regarding land titles systems and indefeasibility of title is only “dead” in Canada.

⁵⁹ As noted by R Stein, “The ‘Principles, Aims and Hopes’ of Title by Registration” (1983-1985) 9 *Adel L Rev* 267 at 267 (HeinOnline), land titles systems of registration operate in non-commonwealth countries such as Germany, the Netherlands, and Israel. Greg Taylor, in *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 27 acknowledges that there was a Hamburg system of land titles.

1962 and does not refer to “indefeasibility of title” or any of the three principles.⁶⁰ The next published in 1966 does not mention these terms either.⁶¹ The final manual, published in 1988, does. Under the heading “Indefeasibility,” the author states that the “salient characteristic of a Land Titles System is that the certificate of title is conclusive evidence of ownership.”⁶² The author goes on to indicate that “conclusive evidence of ownership” is affected through section 213 of *The Land Titles Act*.⁶³

Only then does the author use the noun “indefeasibility.” She writes:

The essence of the principle of indefeasibility is that a person is entitled to rely on whatever the certificate of title says. Its accuracy must, therefore, be beyond question both as to what is on the face of the certificate and as to memoranda on the back. It is important also that it be not only accurate but free from ambiguity.⁶⁴

She also uses the term “exceptions to indefeasibility” when describing the limitations to conclusiveness of ownership in a Torrens-based system of land titles registration.⁶⁵ However, like the dictionaries, the author of this manual does not refer to the mirror principle, curtain principle, or insurance principle in the section titled “Indefeasibility.” A discerning reader may wonder about the absence of these expressions while finding support for the notion that “indefeasibility of title” is a principle of law.

To double-check the findings, a seminal text may also be consulted. In 1978, Professor Thomas W Mapp of the University of Alberta authored *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System* for the Alberta Institute for Law Research and Reform.⁶⁶ This text on a Torrens land titles system is applicable to Saskatchewan, since the

⁶⁰ Peter S Stewart, *Manual of Law and Procedures – Saskatchewan Land Titles Offices* (Regina, Lawrence Amon, Printer to her Majesty the Queen, 1962).

⁶¹ ES Collins, *Land Titles in Saskatchewan – a guide or registrars and their staffs* (Regina: Land Titles, 1966). At page 7, Collins does write about two principles, noting that a “certificate of title is, subject to certain specified exceptions, conclusive evidence of ownership, so that it can be relied upon in all business transactions concerning that land.” Collins’ second principle is a restatement of the section which indicates the assurance fund’s purpose.

⁶² Georgina R Jackson, *Manual of Law and Procedures, Saskatchewan Land Titles Offices* (Regina: Saskatchewan Justice, 1988) at 13.

⁶³ *Ibid.* Section 213(1) is reproduced in Chapter 3 below at 84-85.

⁶⁴ Jackson, *ibid* at 13.

⁶⁵ *Ibid* at 13-14.

⁶⁶ Mapp, *supra* note 8.

statutory schemes in both provinces share the same genesis, *The Territories Real Property Act*,⁶⁷ and remained largely the same for many years.

Professor Mapp's text examines the basic legal principles of Torrens' based systems of land titles in much greater detail than any of the other sources. Because of this, he notes some of the inherent contradictions in associating "indefeasibility of title" with such systems. He observes, for example:

It is essential that we recognize that because of the possibility of error, potential defeasibility follows inevitably from the Torrens system strategy of legal ownership conferred by state decree. However, characterizing ownership under the system as inherently defeasible is heresy; it is contrary to the received and almost universally accepted manner of describing a 'title' under the religion.⁶⁸

He credits the "historic environment" for the misunderstanding regarding the supposed centrality of indefeasibility of title to such systems. The Torrens land titles system was developed to address problems that existed with common law conveyancing and the deed registry system which existed in South Australia. Given that South Australia was not a penal colony,⁶⁹ there were many land transactions as land speculators bought land and then sold it to settlers. Each time, the "chain of titles" had to be searched and even then, there was no guarantee that a purchaser was obtaining all the property rights in that parcel of land.⁷⁰ Torrens sought to address the inherent uncertainty in this search of title documents (which could be forged)⁷¹ in a society which recognized adverse possession⁷² and as a corollary, verbal claims to proprietary interests in land. In such an environment, it is doubtful that Torrens was concerned with absolute indefeasibility for each seller and purchaser in every transaction. Such a result was not possible.

Professor Mapp recognizes the inherent contradiction associated with the concept of indefeasibility, writing:

the primary objective of the Torrens system was to eliminate the necessity of verifying the seller's derived ownership. Assume that A was the best owner of Blackacre at common law, that B was subsequently registered as the owner

⁶⁷ *The Territories Real Property Act*, SC 1886 c 26.

⁶⁸ Mapp, *supra* note 8 at para 4.23.

⁶⁹ Croucher, *supra* note 55 at 303.

⁷⁰ Mapp, *supra* note 8 at paras 1.2-1.6.

⁷¹ Stein, *supra* note 59 at 268. For more discussion on this point, see also Chapter 1 above at 16-20.

⁷² James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Toronto: Carswell, 1920) at 4, reprinted by Cornell University Libraries, 2007 as part of the Nabu Public Domain Reprints.

through error, and that C (... Robert Torrens) purchased from B without fraud and became the registered owner. Robert Torrens and others of his generation, based on experience, were haunted by the danger of a prior superior owners [*sic*], and they wanted the state to give them protection from this risk originating in the past. Assuming an adequate compensation system, the question posed by this example is, who gets the mud and who gets the money?⁷³

Professor Mapp is cognizant that only one of these persons can “get the mud” while the other will have to be compensated with money. Only one of their titles can be indefeasible. This is the only recent source which a practicing lawyer might consult which provides such a frank overview of some of the limitations inherent in the doctrine of indefeasibility of title. It is a much more discerning analysis than what is contained in the other sources.

5. INDEFEASIBILITY OF TITLE – A SURVEY OF COURT JUDGMENTS

When studying “indefeasibility of title,” the fictitious lawyer will search court decisions. Such a person will discover that the term has been used regularly in Alberta courts since the early 1950s,⁷⁴ following the trial judge in *Turta v Canadian Pacific Railway* significant use of the expression.⁷⁵ That case was appealed to the Supreme Court of Canada and Justice Estey’s judgment⁷⁶ is the seminal Canadian decision on indefeasibility of title. When discussing relevant cases, Justice Estey quotes judgments from New Zealand and Australia which previously had been quoted in Alberta and Saskatchewan judgments,⁷⁷ thereby legitimizing the use of this term in Canadian jurisprudence. Even so, he does not refer to any of the three pillars or principles.

Much has changed since then. Now the terms introduced by Marcia Neave to Canada are used commonly in provincial judgments and part of the dominant legal lexicon. In British

⁷³ Mapp, *supra* note 8 at para 4.24.

⁷⁴ *Turta v Canadian Pacific Railway Company* (1952), 5 WWR (NS) 529; [1952] AJ no 21 (QL) (Alta SCTD) [*Turta Trial* citing to QL]. This case is discussed in greater detail in Chapter 1 above at 38-46.

Additionally, seventy-nine Alberta decisions reported on CanLII on or before November 19, 2011 contain the word “indefeasibility.” See: <www.canlii.org>, Alberta judgments, *sub verbo* “indefeasibility.”

⁷⁵ *Turta Trial*, *ibid*.

⁷⁶ *Canadian Pacific Railway Company v Turta* (1954) SCR 427; [1954] 3 DLR 1; [1954] SCJ no 31 (SCC) [*Turta SCC* citing to QL].

⁷⁷ *Ibid* at 443.

Columbia,⁷⁸ Alberta⁷⁹ and Ontario⁸⁰ the term “indefeasibility of title” has been used in at least fifty judgments in each jurisdiction. In Ontario and New Brunswick, Neave is cited as the authority for these expressions.⁸¹

Saskatchewan is a little different from these jurisdictions. Unlike Alberta, “indefeasibility of title” only started to be used regularly in the last thirty years, and has only become dominant in approximately the past ten years. It has been mentioned in twenty-seven Saskatchewan judgments, twenty-five of which focus on land,⁸² and nine of which have been issued since 2000.⁸³

In this province the expression “indefeasibility of title” gained popularity after the trial decision of *Hermanson v Martin*⁸⁴ and its subsequent appeal.⁸⁵ This was the first time that Saskatchewan courts addressed the issue of fraud in the land titles system. The expressions

⁷⁸ Introduction above at 3 n 12. As of November 19, 2011, 290 British Columbia decisions reported on CanLII contain the word “indefeasibility.” See: <www.canlii.org>, British Columbia judgments, *sub verbo* “indefeasibility.”

⁷⁹ CanLII Alberta judgments, *supra* note 74.

⁸⁰ As of November 19, 2011, fifty Ontario decisions reported on CanLII contain the word “indefeasibility.” See: <www.canlii.org>, Ontario judgments, *sub verbo* “indefeasibility.”

⁸¹ In Ontario, see eg: *Lawrence v Maple Trust Company*, 2007 ONCA 74 (available on CanLII) at para 44; *Household Realty Corporation Ltd v Liu*, 2005 CanLII 43402 (ONCA) at para 37; *Home Trust Company v Zivic*, 2006 CanLII 38359 (ONSC) at para 3. In New Brunswick, see for example: *CitiFinancial re Morrow Bankruptcy*, 2006 NBQB 132 (available on CanLII) at para 36; and *McKinney v Tobias*, (2006) NBQB 290 (available on CanLII) at para 44.

⁸² A January 20, 2012 search on QuickLaw of Saskatchewan judgments identifies the following number of cases which used the expression “indefeasibility of title”:

judgments issued after 2000	9
judgments issued between 1991 and 2000	3
judgments issued between 1981 and 1990	7
judgments issued between 1971 and 1980	3
judgments issued between 1961 and 1970	2
judgments issued between 1951 and 1960	1
judgments issued before 1951	0

⁸³ *Arndt v First Galesburg National Bank and Trust Co*, 2001 SKQB 234 (available on CanLII); *Winisky v Krivuzoff*, 2003 SKQB 345 (available on CanLII); *Kerr v PanCanadian Petroleum Ltd*, 2004 SKQB 404 (available on CanLII); *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, *supra* note 37; *Neis’ Beach Ltd v Anderson*, 2006 SKQB 5 (available on CanLII); *Jen-Sim Cattle*, *supra* note 1; *Swenson v Swenson*, 2006 SKQB 438 (available on CanLII); *Brick v Modus Resources Ltd*, 2007 SKQB 111 (available on CanLII); *Knogler v Henderson*, 2010 SKCA 119 (available on CanLII).

⁸⁴ *Hermanson v Martin* (1982), 18 Sask R 430; 140 DLR (3d) 512; [1982] SJ no 740 (SK QB) [*Hermanson Trial* citing to QL].

⁸⁵ *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)*, *supra* note 48, discussed in Chapter 4 below at 99-106.

“mirror principle,” “curtain principle” and “insurance principle” were not mentioned in the judgments but “indefeasibility of title” was. Once the term was used in this case, it began to be used more regularly.

In the past five to six years, those few judgments focusing on indefeasibility have made more general and definitive statements about this term. For example, in *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*,⁸⁶ Justice Laing provides a very concise description of this term. He writes:

Under the Torrens’ system, indefeasibility of title is made an incident of registration. Once registered, an instrument is no longer the source of title of the transferee but is replaced by the certificate of title, which subject to the exceptions contained in any particular land titles statute, becomes conclusive.⁸⁷

Technically his analysis is correct because he recognizes that statutory exceptions to “indefeasibility of title” exist. However, this recognition is very brief and is not accompanied by any examples. Because it is a brief general statement, it is easy for an inexperienced lawyer reading it to overlook the number and type of exceptions that are inherent in the land titles system of registration.

In *Jen-Sim Cattle Co Ltd v Agricultural Credit Corporation of Saskatchewan*,⁸⁸ Justice Ryan-Froslic begins the judgment by writing, “Indefeasibility of title has always been the hallmark of the Torrens system of land holding.”⁸⁹ Later, she devotes one paragraph to explaining this concept. Doing so, she writes:

The principle of indefeasibility provides that when title to land is transferred, the new owner takes that title free and clear of all encumbrances except those registered against the title at the time of transfer. Registration is everything. It is conclusive proof of ownership and it is conclusive proof of any interests, exceptions and/or reservations that may affect ownership.⁹⁰

This paragraph is more problematic than the definition of “indefeasibility of title” provided in *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*. In *Jen-Sim* the court uses the phrase “conclusive proof of ownership” which is codified in section 13(1)

⁸⁶ *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, *supra* note 37.

⁸⁷ *Ibid* at para 28.

⁸⁸ *Jen-Sim Cattle*, *supra* note 1.

⁸⁹ *Ibid* at para 1.

⁹⁰ *Ibid* at para 18.

of *The Land Titles Act, 2000*,⁹¹ but does not mention the existence of any statutory exceptions or limitations to an owner's conclusive title. Rather, and more in keeping with the mythical construct, the judge states that "registration is everything" and that registration "is conclusive proof of any interests, exceptions and/or reservations that may affect ownership." Thus, the judgment presents indefeasibility as an absolute and all-encompassing principle, one in keeping with the myth.

Another example of a technically correct yet simplistic description of "indefeasibility of title" is found in *Brick v Modus Resources Ltd.*,⁹² a case decided in 2007. In it Justice Popescul writes:

The integrity of the land titles system in Saskatchewan has long depended on the fundamental principle of indefeasibility of title. A party intending to obtain an interest in land in Saskatchewan is entitled to rely on the certificate of title being correct and conclusively representing all interests in the land without having to look behind the title to determine if there are any unregistered interests. . . . This principle is absolute and is subject only to statutory exceptions or the effects of fraudulent activities.⁹³

Once again, only a brief mention is made of the statutory exceptions. The exceptions are nuanced and complex, and more than a half-sentence general statement is required for readers to comprehend their complexities. Without such elaboration, such general statements, especially when made by members of the judiciary, serve to perpetuate the myth.

None of these cases discuss in detail the statutory provisions which impact the principle of indefeasibility or provide any statutory foundation for the usage of this term. The nuances of real property law in the context of a land titles jurisdiction remain unexplored, just as they do in the introductory textbooks and journal articles. Instead of the detailed level of analysis one would expect in what in reality is a very complicated area of law, the term "indefeasibility of title," without much explanation, is becoming more widely used. With this, the myth of indefeasibility, as it is thought to exist in the dominant legal lexicon, is perpetuated.

Given their widespread use, the fictitious lawyer likely will research cases which have employed the expressions "mirror principle," "curtain principle" and "insurance principle" to try

⁹¹ *The Land Titles Act, 2000*, SS 2000, c L-5.1, s 13(1). The wording of section 13(1) and some of the statutory exceptions to an owner's conclusive title are provided in Chapter 3 below at 92-94.

⁹² *Brick v Modus Resources Ltd*, *supra* note 83.

⁹³ *Ibid* at para 19.

to learn about indefeasibility of title. Searches of these expressions on an online legal database result in a number of “hits” across Canadian provinces which operate land titles systems of registration. For example, the “curtain principle” has been referred to in judgments from New Brunswick,⁹⁴ Ontario,⁹⁵ Alberta⁹⁶ and British Columbia.⁹⁷ The Supreme Court of Canada also has used the terms “mirror principle” and “insurance principle” in a judgment.⁹⁸ Saskatchewan courts have never referred to the mirror principle, but two cases do reference the “curtain principle.”⁹⁹ From this, the lawyer should conclude that little reliance should be placed on these expressions in Saskatchewan.

CONCLUSION

This chapter has attempted to survey how “indefeasibility of title” and the three pillars or principles are used in traditional legal sources such as introductory textbooks, casebooks, journal articles, practice manuals, seminal texts and cases. From this, it becomes apparent that there is a dichotomy between the dictionary definitions of indefeasible and how this word and its associated noun – indefeasibility – are used in the context of land titles systems of registration. Although these expressions are not defined in dictionaries, they have come to be treated as integral features of land titles systems of registration.

Very few of the sources which have been surveyed examine these constructs in the context of legislation, and thereby fail to portray the nuances and complexity inherent in land titles systems of registration such as the one operating in Saskatchewan. Only alluding to statutory exceptions is insufficient to create awareness of the inherent limitations contained in land titles systems. Without any specific references to the actual statutory exceptions or analysis

⁹⁴ See eg: *CitiFinancial re Morrow Bankruptcy*, *supra* note 81 at para 33, 34 and 35; *McKinney v Tobias*, *supra* note 77 at paras 41 and 42; *Stolt Sea Farm and Corey Feed Mills v Silver Harvest*, 2006 NBQB 132 (available on CanLII).

⁹⁵ See eg: *Lawrence v Maple Trust Company*, *supra* note 77 at para 30 and 41; *Rabi v Rosu*, 2006 CanLII 36623 (ONSC) at para 37; *Household Realty Corporation Ltd v Liu*, *supra* note 81; *Citizens Bank of Canada v Pastore*, 2005 CanLII 63799 (ONSC).

⁹⁶ See eg: *Wharton v Smerychynski*, 2000 ABQB 217 (available on CanLII) at paras 4, 66 and 73; *Drebert v Coats*, 2008 ABQB 684 (available on CanLII) at para 26.

⁹⁷ See eg: *Goodrich v British Columbia (Registrar of Land Titles)*, 2004 BCCA 100 (available on CanLII).

⁹⁸ Dissenting judgment of Laskin, CJC in *United Trust v Dominion Stores*, [1977] 2 SCR 915 (available on CanLII) at 924.

⁹⁹ *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, *supra* note 37 at para 33; *Brick v Modus Resources Ltd*, *supra* note 83 at para 19.

of how these exceptions adversely impact certainty of ownership, readers accept the visual images of the mirror and the curtain. This obfuscates the principles actually espoused in legislation and facilitates the growth and acceptance of the mythical construct, one akin to the Emperor's new clothes. As a result, lawyers may fail to understand or apply the substantive elements which are codified in this legislative scheme.

CHAPTER 3

FACT: INDEFEASIBILITY OF TITLE IN SASKATCHEWAN'S LEGISLATION

In construing a Torrens [land titles] Act it is wise to avoid approaching it with a preconception of its general effect, e.g. that the Act confers an indefeasible title, or a “parliamentary title”, or a title distinct from that derived under the general principles of common law. Read subject to a preconception the protecting provisions are likely to be construed too broadly and the exceptions to them too narrowly. The better plan is to take the Act section by section (not forgetting of course that it must be read as a whole) and to see how far each section, examined without preconceptions, but in the light of other sections, alters the general law. In this way the scheme and general purpose of the Act will be built up from the actual provisions of the Act. Too often, it is suggested, interpretation begins with a preconceived scheme into which particular provisions are fitted, whereas the scheme should take its shape from the provisions.¹

Professor WN Harrison

Instead of approaching the progression of Saskatchewan's land titles statutes with an assumption that each one contains provisions which correspond to “indefeasibility of title,” in this chapter the analysis follows the structure advocated by Professor Harrison in his seminal paper “Indefeasibility of Torrens Title.” The two sequential statutory regimes – the first one which was based on the Torrens model and which existed from the time Saskatchewan became a province until approximately ten years ago,² and the latest one which focuses on a computer-based land titles registry – are examined. This analysis establishes that the “doctrine” of indefeasibility of title with its mirror, curtain, and insurance principles have never been codified in the statutory provisions, and that a direct correlation between these concepts and the statutory provisions may not exist.

In section one of this chapter, the first statutory regime is examined. This includes consideration of how Saskatchewan's land titles system altered the general law of real property and conveyancing, and begins with scrutinizing the goals espoused in the original Act, *The*

¹ WN Harrison, “Indefeasibility of Torrens Title” (1954) 2 U Queensland LJ 206 at 206 (HeinOnline).

² The new regime was implemented in stages. Portions of *The Land Titles Act, 2000* SS 2000, c L-5.1 came into effect on June 25, 2001 when the new regime first became operational in the first land titles office. *The Land Titles Act, RSS 1978 c L-5* [*The Land Titles Act, 1978*] was repealed on August 24, 2002 when the last land titles office was converted to the new regime.

Territories Real Property Act.³ Then the discussion focuses on *The Land Titles Act, 1906*.⁴ It begins broadly by examining how this Act's procedural and administrative provisions – which remained largely unchanged until this period ended in 2002⁵ – worked synergistically to alter previous practices and laws and to achieve the statute's goals.

Next the discussion turns to the substantive provisions which may be used to support the preconception of indefeasibility of title and the three principles. Because we know the broader context of this legislative scheme, we are better able to ascertain if the preconception is appropriate. The substantive provisions in *The Land Titles Act, 1906* are considered for consistency: it is logical to examine statutory provisions from the same statute which has been analyzed already. This way, an inference can be made regarding the existence of indefeasibility of title, free from the widely-held assumption.

The same inference can be made from *The Land Titles Act*⁶ codified in the 1978 Revised Statutes. As very little changed since the 1906 Act was proclaimed, the 1978 provisions are only referred to when they depart significantly from the earlier statute. The analysis of these provisions illustrates that “indefeasibility of title” was not central to the Act's functions and goals during the later years of the first regime either.

The final section of the chapter examines “indefeasibility of title” and the three principles in the context of *The Land Titles Act, 2000*.⁷ This statute is treated as a separate regime because it significantly changed the operation of and some of the substantive provisions of the legislation which it repealed. Here the statutory scheme is briefly described in order to identify the regime's goals. Then the specific provisions which support or detract from the alleged link to “indefeasibility of title” and the three principles are analyzed. When these provisions are not viewed through the lens of the preconception, it is difficult to comprehend how “indefeasibility of title” has come to be treated as central⁸ to this land titles regime.

³ *The Territories Real Property Act*, SC 1886 c 26.

⁴ *The Land Titles Act*, SS 1906, c 24 [*The Land Titles Act, 1906*].

⁵ *The Land Titles Act, 1978*, *supra* note 2.

⁶ *Ibid.*

⁷ *The Land Titles Act, 2000*, *supra* note 2.

⁸ Chapters 1 and 2 above, and Chapter 4 below.

1. INDEFEASIBILITY OF TITLE - THE FIRST LAND TITLES REGIME

Contrary to how it has been portrayed in traditional legal research sources,⁹ the land titles system was never designed to be a panacea. Rather it represents an attempt to rationally and systematically address specific deficiencies inherent in common law conveyancing and substantive real property laws,¹⁰ namely the lack of certainty of ownership, and the length of time and amount of work required to give effect to a conveyance. These deficiencies in conveyancing practices and laws shaped the development of the regime, not any overriding objective to develop a perfect and infallible system.

1.1 The Goals of Saskatchewan's Land Titles System

From this perspective, it is easy to understand the system's explicit goals. When the federal government enacted the Torrens System legislation in the North-West Territories,¹¹ its twofold intention was explicit in the Act's preamble: to create certainty in the ownership of land titles, and to simplify conveyancing practices:

“Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate proof thereof, and also to render dealings with land more simple and less expensive: Therefore Her Majesty ... declares and enacts as follows”¹²

Even though the preamble was removed when the 1886 consolidated statutes were published in 1887,¹³ these goals remained¹⁴ and, until recently, continued to guide analysis of land titles issues.¹⁵

⁹ Chapter 2 above.

¹⁰ Chapter 1 above at 6-28.

¹¹ In 1905, part of the lands which comprised the North-West Territories became the provinces of Saskatchewan and Alberta. These provinces then enacted land titles legislation which was based on the federal statute. See: Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 129.

¹² *The Territories Real Property Act*, *supra* note 3 at the Preamble, as reproduced in Roger Carter, “Some Reflections on *The Land Titles Act* of Saskatchewan” (1965) 30 Sask B Rev 315 at 315, and as reproduced in *Canadian Pacific Railway Company v Turta* (1954) SCR 427; [1954] 3 DLR 1; [1954] SCJ no 31 (SCC) [*Turta* SCC citing to SCR] at 452.

¹³ *The Territories Real Property Act*, RSC 1886, c 51.

¹⁴ These goals can be ascertained in some of the recent cases discussed in Chapter 4 below.

¹⁵ These goals also were supported by the operation of the cadastral survey system adopted in the *Dominion Lands Act*, SC 1872 c 23, s 3-15. With these sections, land was described by referring to its location within a quarter-section, a section, a township, a range, and a meridian which had been determined through measuring or surveying the land. Instead of descriptions based on political or geographical features as seen from the example provided in Chapter 1 above at 11, land was described on a title as, for example, the north-east quarter of section three, township

The provisions codified in *The Land Titles Act*¹⁶ adopted by Saskatchewan in 1906 when the province was carved from the North-West Territories continued to support the two objectives. Essentially this statute was a transcription of the federal legislation¹⁷ and therefore it contained a number of provisions designed to simplify land conveyancing and real property law. Some of these provisions were substantive, but others were procedural or administrative. All were important to meeting the statute's twin goals.

1.2 The Goals in Action: a statutory perspective

Our tendency today is to interpret substantive provisions in an effort to establish that indefeasibility of title is intrinsic to the legislation and the land titles system.¹⁸ However, the phrase “indefeasibility of title” had not been developed in 1906;¹⁹ nor had the phrases “mirror principle”, “curtain principle”, and “insurance principle” been added to the legal lexicon.²⁰ Initially analysis focused on attaching meaning to the statutory provisions through examination of specific provisions, and then considering how they interacted together. It was a holistic approach, one which required understanding of how the system functioned as compared to the one which it replaced, as well as knowledge of the most important substantive provisions. Such an approach lends itself to a broad understanding of the system and its goals.

The importance of achieving understanding of the system and its goals through this approach can be emphasized through the use of analogy, one which employs the imagery of baking a cake. The goals of certainty of ownership and simplicity of procedures are the finished cake, the substantive provisions are the ingredients such as flour, eggs, oil, sugar, baking soda and cocoa, and the administrative and procedural sections describe the methods necessary to turn the raw and distinct substantive provisions into the finished product. If the baker mixes the

twelve, range four, west of the prime meridian, comprised of one-hundred sixty acres more or less. Such a description conveyed much more practical information than the type of descriptions used in England, and thereby facilitated certainty in the ownership of land titles.

¹⁶ *The Land Titles Act, 1906*, *supra* note 4.

¹⁷ *The Territories Real Property Act* of 1886 was replaced by *The Land Titles Act, 1894*, SC 1894, c 28. It was used as the basis for the statutes enacted by the governments in Saskatchewan and Alberta in 1906, shortly after they became provinces. Taylor, *supra* note 11 at 129.

¹⁸ See eg: *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, 2005 SKQB 470 (available on CanLII) which is discussed more fully in Chapter 4 below at 106-118.

¹⁹ Chapter 1 above.

²⁰ Marcia Neave, “Indefeasibility of Title in the Canadian Context” (1976) 26 U Toronto LJ 173 at 173-174, and 174 n 6 (HeinOnline), indicates the phrase “indefeasibility of title” was not coined until 1957, when Theodore BF Ruoff, an Englishman, was examining the Torrens System in Australia.

ingredients without regard to the procedural directions, the final product will not resemble a cake. When this happens important ingredients may be forgotten, and the cake may not resemble the product the baker was expecting to produce.

It is the same with the Torrens System of land titles; a practitioner who ignores the procedural and administrative provisions imperils the legislation's goals. In so doing, the framework within which the substantive provisions need to be interpreted becomes lost. It was only by operating together that the two types of provisions revolutionized substantive real property law and conveyancing practices and created certainty of ownership.

Understandably, the administrative provisions in the Act worked to fulfill its goals. No government agency was created explicitly, but the Act stated that the land registration districts were to operate under the direction of the Attorney-General.²¹ Given Saskatchewan's size, the province was divided into different land registration districts,²² and each district contained a "Land Titles Office"²³ maintained at "the public expense"²⁴ by the office of the Attorney-General.²⁵ The person in charge of the entire system was called an "inspector of land titles offices."²⁶ He answered directly to the Attorney-General and was empowered "to inspect the books and records of the several land titles offices" and such other prescribed duties.²⁷

The person responsible for the business conducted in each Land Titles Office was called a "registrar of titles"²⁸ or a "registrar,"²⁹ and, like the inspector,³⁰ had to be a practicing lawyer with at least three years experience in any Canadian jurisdiction.³¹ They were expected to understand the law in this area, and to be able to administer the new system, thereby ensuring consistency which could make ownership more certain.

²¹ *The Land Titles Act, 1906*, *supra* note 4 s 23.

²² *Ibid* ss 18-19.

²³ *Ibid* s 20.

²⁴ *Ibid* s 21.

²⁵ *Ibid* s 28.

²⁶ *Ibid* s 23. This title was changed to "Master of Titles" in 1909. See *An Act to Amend the Land Titles Act*, SS 1909 c 20 s 1.

²⁷ *The Land Titles Act, 1906*, *ibid* s 23.

²⁸ *Ibid* s 2.17.

²⁹ *Ibid* s 25.

³⁰ *Ibid* s 24.

³¹ *Ibid* s 25(2).

Each registrar was given a seal to use on certificates of title³² to prevent forgery. With the seal, anyone looking at a title could ascertain if it was valid. This aligned with the goal of certainty.

All of the land titles officials – the inspector, registrar, deputy registers, and assistant deputy registers³³ - were required to “furnish to His majesty security in a penal sum of not less than one thousand dollars for the true and faithful performance of ... [this person’s statutory] duty”³⁴ which could be “either a joint or several bond”³⁵ at the Attorney-General’s discretion. If they failed to act in accordance with their statutory mandate, potentially they would suffer fiscal consequences. Thus, the bond acted to ensure that they acted within the ambit of the legislation, thereby avoiding the incidences of fraud which had plagued conveyancing in common law.

In keeping with this safeguard enacted to foster certainty of ownership, any person employed at a land titles office could not earn income from a business in conflict with land titles.³⁶ This included acting as an agent for “any person investing money and taking securities on land,”³⁷ accepting money for giving advice regarding the operation of the land titles system,³⁸ acting as a conveyancer,³⁹ or carrying on any other business while working at the land titles office.⁴⁰ As a corollary, land titles staff were protected from unhappy clients because staff were not liable for “any act *bona fide* done or omitted to be done in the exercise or supposed exercise of the powers”⁴¹ given pursuant to the legislation.

Other administrative provisions supported the registration process. Registration was the procedural hallmark of the system because an estate or interest in land would not be effective against third parties until the registrar entered it on the register.⁴² The Act contained forms for

³² *Ibid* s 35.

³³ *Ibid* s 26.

³⁴ *Ibid* s 30.

³⁵ *Ibid* s 30(2).

³⁶ *Ibid* s 33.

³⁷ *Ibid* s 33(a).

³⁸ *Ibid* s 33(b).

³⁹ *Ibid* s 33(c).

⁴⁰ *Ibid* s 33(d).

⁴¹ *Ibid* s 34.

⁴² *Ibid* s 45.

the most commonly used instruments such as certificates of title, transfers and mortgages.⁴³ To ensure accuracy and validity (two factors which contribute to the goal of certainty of ownership), the registrar at each Land Titles Office was responsible to review each submitted instrument before entering it on the proper title. When one was submitted, it was to be stamped with the “date, hour and minute”⁴⁴ it was received, as a means of determining priorities between competing instruments.⁴⁵ Details regarding each instrument also had to be entered in a daybook⁴⁶ and in the register.⁴⁷ If an instrument was not “complete and in proper form or appear[ed] to be unfit for registration,”⁴⁸ the registrar was expected to reject it and return it to the submitting party.⁴⁹

If the instrument was in the correct format, properly attested to in accordance with the Act’s contents,⁵⁰ and all the information contained in the instrument appeared correct on its face, the registrar entered the transaction in the daybook⁵¹ and the register.⁵² If the instrument was a transfer, then the registrar would cancel the existing Certificate of Title⁵³ and issue a new one for the same parcel of land,⁵⁴ entering the information in a folio maintained by the office.⁵⁵

If the instrument was not a transfer, the registrar would enter information about the submitted interest on the folio and the Certificate of Title retained at the government office.⁵⁶ To ensure accuracy and to be able to double-check entries, the registrar also retained the original instruments which had been submitted.⁵⁷

⁴³ *Ibid* s 2.25; s 194.

⁴⁴ *Ibid* s 36.

⁴⁵ *Ibid* s 40(2).

⁴⁶ *Ibid* s 40.

⁴⁷ *Ibid* s 43.

⁴⁸ *Ibid* s 36(2).

⁴⁹ *Ibid* s 36(2) and s 78.

⁵⁰ *Ibid* ss 145-146.

⁵¹ *Ibid* s. 36(2) and s 78.

⁵² *Ibid* s 43.

⁵³ *Ibid* s 44 and s 169.

⁵⁴ *Ibid* s 44 and s 86.

⁵⁵ *Ibid* s 44.

⁵⁶ *Ibid* ss 45 and 47.

⁵⁷ *Ibid* s 46.

Almost all interests pertaining to the land were found on the Certificate of Title, as instruments did not become operative until they were registered.⁵⁸ There was no need to review the transfer on which the title was based.⁵⁹ With the exception of leases with terms of less than three years,⁶⁰ statutory interests⁶¹ and trusts,⁶² the instrument could only affect the rights of a third party after it was registered.⁶³

The process of registration was key, but it was also necessary to understand some of the substantive changes to real property law. Without this, it would be nearly impossible to understand the nuances inherent in Saskatchewan's land titles system.

This is demonstrated early in the statute, in the definitions which may correlate to the concept of indefeasibility. In *The Land Titles Act, 1906*, the use and placement of generic definitions served a procedural and substantive role which worked to fulfill the system's twin goals (not indefeasibility). At the time lawyers were accustomed to having to review judicial authority to attach meaning to the words and phrases in deeds and other conveyancing documents. Because this legislation commenced with a section of definitions, anyone reading it would be exposed immediately to a number of generic terms which replaced the substantive and technical common law definitions.

The section was not organized alphabetically; instead it commenced with the most important concept – land. The Act defined land to include all the broad technical legal interests in real property such as “messuages, tenements, and hereditaments, corporeal and incorporeal of every nature and description and every estate or interest therein and whether such estate or interest is legal or equitable”⁶⁴ – all terms which historically had been mentioned in or omitted from deeds. Likewise, the definition included the elements of land that generate forms of economic value independent from the title to the land *per se*, such as “easements, mines,

⁵⁸ *Ibid* s 80. See also *Alexander v Gesman* (1911), 4 SLR 116 (en banc), where Newlands J. wrote, “Under The Land Titles Act as no instrument takes effect until registered the only way to get in the legal title to land is to obtain a certificate of title.” as quoted in Peter S Stewart, *Manual and Procedures – Saskatchewan Land Titles Offices* (Regina: Lawrence Amon, Printer for her Majesty the Queen, 1962) at 65.

⁵⁹ *Turta SCC*, *supra* note 12 at 453 (Rand J).

⁶⁰ *The Land Titles Act, 1906*, *supra* note 4 s 73.

⁶¹ *Ibid* s 76.

⁶² *Ibid* s 72.

⁶³ *Ibid* s 75; Stewart, *supra* note 58 at 15.

⁶⁴ *The Land Titles Act, 1906*, *ibid* s 2.1.

minerals and quarries unless such items were “specifically excepted.”⁶⁵ Watercourses were included too.

Because of this definition, lawyers no longer had to examine the lengthy legal description of land in a deed to determine what types of interests were included or what type of estates were being created. One word – land – was sufficient, thus making the estate or interest more certain, simplifying conveyancing procedures and minimizing the associated costs.

Other definitions in this section also support the statute’s goals and potentially, indefeasibility of title. For example, “instrument” was broadly defined to include all documents evidencing dealings with land, including:

[a]ny grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification thereof, letters of administration or an exemplification thereof, mortgage or incumbrance or any other document in writing relating to or affecting the transfer of or other dealing with land or evidencing title thereto.⁶⁶

As a result, the statutory definitions replaced the convoluted common law definitions in Saskatchewan; different documents such as grants, certificates of title, transfers, and mortgages were defined together and treated the same. This meant the scope of real property law was simplified and clarified. Instead of needing to understand how the law applied to distinct types of documents or deeds,⁶⁷ one only needed to understand one concept, the “instrument.”

The drafters also used generic definitions to clarify information regarding who had an interest in land, and what type of interest each person held. Instead of using technical differences to ascribe different types of proprietary interests to different persons, “owner” was defined as meaning “any person or body corporate entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy.”⁶⁸ This greatly simplified the law.

The generic “transfer” also fostered simplicity. Instead of sixteen different types of deeds transferring various interests in land,⁶⁹ and other means through which title to land passed

⁶⁵ *Ibid.*

⁶⁶ *Ibid* s 2.11.

⁶⁷ William Blackstone, *Commentaries on the Laws of England*, vol 2, (Philadelphia: Robert Bell, 1771 [-1772. New York: Oceana Publications, 1967]), Chapters 20 and 21, summarized in Chapter 1, above at 9-11.

⁶⁸ *The Land Titles Act, 1906*, *supra* note 4 s 2.2.

⁶⁹ Blackstone, *supra* note 67.

between individuals,⁷⁰ “transfer” referred to “the passing of any estate or interest in land under the Act, whether for valuable consideration or not.”⁷¹ As a result, a conveyance could not be overturned because of technical arguments arising from the definitions attached to different types of deeds.

Additionally, the statute defined “incumbrance”⁷² to refer to charges on land including “mortgage[s], mechanics’ liens and executions against land.”⁷³ Once again, one word was used to encapsulate a number of formerly disparate interests, thereby simplifying conveyancing practices and reducing associated costs. Anyone reading the Act chronologically was exposed to these concepts, aiding understanding of the new concepts and procedures within the remainder of the statute. All of these substantive changes made conveyancing simpler, and also made it appear straightforward.

The Act also contemplated administrative errors made by land titles staff.⁷⁴ This ensured there was a summary procedure in place before any person suffered loss or damage requiring compensation from the government office. To respond to any such administrative errors the Act included an “assurance fund;” the registrar was obliged to collect a sum based on the value of land or transaction before completing the tasks of registration.⁷⁵ If any person suffered loss or damage through “any omission, mistake or misfeasance”⁷⁶ of the inspector, registrar, or any other person employed at a Land Titles Office and if this person could not eject the person in possession or receive compensation from the person at fault, a claim could be made against the assurance fund.⁷⁷ In these circumstances, government would compensate the aggrieved person who then would not be left without any recourse. It made the system more attractive, and differed from the common law. As such, it was an administrative feature possessing substantive elements, ones which acted to fulfill the Act’s goals.

⁷⁰ *Ibid* at chapter 21.

⁷¹ *The Land Titles Act, 1906, supra* note 4 s 2.3.

⁷² *Ibid* s 2.7.

⁷³ *Ibid* s 2.7.

⁷⁴ See eg: *Turta SCC, supra* note 12, discussed in Chapter 1 above at 38-46.

⁷⁵ *The Land Titles Act, 1906, supra* note 4 s 161, and discussion in Chapter 1 above at 33-38.

⁷⁶ *The Land Titles Act, 1906, ibid* s 151.

⁷⁷ *Ibid* s 151.

From these examples, the importance of the procedural and administrative characteristics espoused in the legislation becomes clearer than occurs when the discussion focuses on indefeasibility of title. All of these elements were necessary to achieve the system's goals, and only considering some of them reduces the conceptualization of the scheme's scope and ambit. To return to the cake analogy, both the ingredients and the procedures listed in the recipe need to be followed for the baker to achieve the goal of producing a cake. Reducing the discussion to "indefeasibility of title" is akin to using a cake mix or to failing to include a key ingredient: the result just is not the same as when the baker goes to the trouble of understanding and following the complete recipe, and achieves the anticipated result.

1.3 Indefeasibility of Title in Saskatchewan's first Land Titles Statute

As has been alluded to, when considering *The Land Titles Act, 1906* from the preconception of indefeasibility of title, the level of analysis is more ritualistic: only the most apposite substantive provisions are treated as important. One considers sections that verify and buttress the notion of indefeasibility and its principles, while the rest largely are treated as extraneous.

This can be seen with the insurance principle⁷⁸ which may be inferred from the number of sections in the 1906 Act, all of which refer to the assurance fund.⁷⁹ From a substantive perspective, the most important of these is section 151. According to it, if any person suffered loss or damage through "any omission, mistake or misfeasance"⁸⁰ of the inspector, registrar, or any other person employed at a Land Titles Office:

in the execution of their respective duties under the provisions of this Act and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any certificate of title or in any memorandum [*sic*] upon the same ... and who by the provisions [*sic*] of this Act is barred from bringing an action of ejectment or other action for the recovery of the land may in any case in which remedy by action for recovery of damages hereinbefore provided is barred bring an action against the registrar as nominal defendant for the recovery of damages.

2. If the plaintiff recovers final judgement [*sic*] against ... [the registrar of land titles] the judge before whom such action is tried shall certify to the act of such judgment and the amount of the damages and costs recovered and the provincial treasurer shall pay the amount thereof out of the assurance fund aforesaid to the

⁷⁸ For more discussion on the insurance principle, see Chapter 1 above at 33-34.

⁷⁹ *The Land Titles Act, 1906 supra* note 4 ss 148-157 inclusive and 163-167 inclusive.

⁸⁰ *Ibid* s 151.

person entitled on production of an exemplification or certified copy of the judgment rendered.⁸¹

If a person suffered financial loss because of an error made by land titles staff and if the defendant was impecunious or had absconded from the province or could not be found,⁸² and if no action for ejectment was possible, the person harmed could bring an action against the registrar of land titles and collect damages from the provincial government. With this, government was creating certainty of ownership and fostering public confidence in the system.

From section 151 it is apparent that the assurance fund was never intended to be treated as insurance.⁸³ An insurance company pays the policy holder for losses suffered which are payable under the terms of the insurance contract, and then attempts to recover the amount it paid to the policy holder from the individual who caused the loss, usually by means of a subrogated claim. In the first land titles regime, the person who suffered a loss and who could not bring an action for ejectment had to attempt to recover damages from the person who caused the loss before seeking compensation from land titles.

Furthermore, not everyone could bring such a claim against the land titles system: only persons who suffered losses because of “errors, mistakes or misfeasance” by the land titles office. In all other instances, compensation could not be claimed from the government. Referring to the assurance fund codified in the first statutory regime in Saskatchewan as the “insurance fund” does not reflect the contents of the legislation. These provisions served a different purpose, in keeping with Torrens’ belief that “the Assurance Fund had been created for the specific purpose of facilitating the free flow of conversions to the new form of title.”⁸⁴ Having an assurance fund which fostered the conversion of land to the land titles system of registration did not reflect “indefeasibility of title:” it achieved the goals of simplifying conveyancing practices and creating certainty of ownership.

It is similar with the “mirror principle.” The “principle” is closest to section 75(1), which read:

⁸¹ *Ibid* s 151.

⁸² *Ibid* s 156.

⁸³ Chapter 1 above at 34-38.

⁸⁴ John Baalman *The Torrens System in New South Wales Being a Commentary on the Real Property Act, 1900, As Amended and As Affected by Various Other Statutes* (Sydney: The Law Book Co of Australasia Pty Ltd, 1951) at 55 and Chapter 1 above at 34 and 36.

The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title, absolutely free from all other incumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title.⁸⁵

Reading this section, it appears as if the phrase “absolutely free from all other incumbrances” may be sufficiently broad to encompass the analogy of a mirror. One looks at the title and it reflects all interests that affect the land except for statutory exceptions,⁸⁶ or cases in which the owner has participated in fraud, or when there is a prior Certificate of Title.⁸⁷ The wording in this provision is almost identical to the portrayal of indefeasibility of title in traditional legal research sources,⁸⁸ so it seems as if it supports the mirror principle.

Considering the numerous “incidents implied by virtue of” the Act, or statutory exceptions, this correlation is problematic. For example, trusts could not be mentioned on a Certificate of Title, and trustees named in instruments were “deemed to be the absolute and beneficial owners of the land for the purposes of this Act.”⁸⁹ Because of this prohibition, a beneficiary of a trust needed to use the device of the caveat⁹⁰ if this person wanted to notify third parties of the trust and of the beneficial interest in the land. If a beneficiary failed to do so, the Certificate of Title would remain silent and third parties would not have notice of the beneficiary’s equitable interest in the land.

⁸⁵ *The Land Titles Act, 1906*, *supra* note 4 s 75(1).

⁸⁶ Chapter 1 above at 29-30.

⁸⁷ Janet November and Julia Rendell, “The “Mirror Principle and the Position of Unregistered Interests in the Torrens System” (2010) *New Zealand Law Rev* 151 at 160.

⁸⁸ Chapter 2 above.

⁸⁹ *The Land Titles Act, 1906*, *ibid* s 79(2).

⁹⁰ The “caveat” was a device created for land titles systems of registration which could be used when an interest or estate in land could not be registered against the title *per se*, as occurs with equitable interests and estates such as those arising through the operation of a trust. Therefore the caveat was a means whereby such interest holders could advise third parties of the encumbrance. The main section was 136, which read: “Any person claiming to be interested in any land under any will, settlement or trust deed or under any unregistered instrument or under an execution where the debtor is interested beneficially but the title to which is registered [*sic*] in the name of some other person or otherwise may lodge a caveat with the registrar to the effect that registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.” *The Land Titles Act 1906*, *ibid* s 136.

Among other things, each Certificate of Title was subject to the following types of interests and estates which did not need to be registered on the title to be effective:

- (a) any subsisting reservations or exceptions contained in the original grant of the land from the crown;
- (b) all unpaid taxes;
- (c) any public highway or right of way or other public easement howsoever created upon, over or in respect of the land;
- (d) any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual ... [occupation] of the land under the same;
- (e) any decrees, orders or executions against or affecting the interest of the owner in the land which have been registered and maintained in force against the owner;
- (f) any right of expropriation which may by statute or ordinance be vested in any person, body corporate or His Majesty;
- (g) any right of way or other easement granted or acquired under the provisions of *The North-West Irrigation Act*.⁹¹

Because of these, it would have been prudent for a potential purchaser to review the original Grant on file at the land titles office to see if there were any exceptions to the estate granted to the owner (such as mines and minerals), to contact the local municipality to determine if any property taxes were owing, to conduct a search of the vendor at the local courthouse to discover if any judgments or writs of execution encumbered the vendor's property, to review the legislation giving government or its agencies the power to expropriate land, and to attend at the property to determine if a tenant was using it, if there was a trail or railway running across it, or if any water bodies were located on it. Only then would a purchaser comprehend the true extent of the property being acquired.

These statutory exceptions illustrate that some interests have never needed to be registered on a title to adversely affect the owner's estate. Because of them, the mirror is not the most accurate analogy. Instead of producing indefeasibility of title, this section acts to fulfill the goals of certainty and facility of transfer. A potential purchaser knew where to look to discover any unregistered interests. This was much more efficient than the common law. It is this context, not the preconception of indefeasibility with its mirror principle, which is necessary to understanding its importance.

⁹¹ *Ibid* s 76.

There may be a better correlation with the curtain principle, as sections 73, 74, 77, 80 and 81 support its existence. They read:

73. After a certificate of title has been granted for any land no instrument until registered under this Act shall be effectual to pass any estate or interest in any land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money.⁹²

74. Upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified therein shall pass or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.⁹³

77. After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein or to render the land liable as security for the payment of money as against any *bona fide* transferee of the land under this Act unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder.⁹⁴

80. Every instrument shall become operative according to the tenor and intent thereof so soon as registered and shall thereupon create, transfer, surrender, charge or discharge as the case may be the land or estate or interest therein mentioned in such instrument.⁹⁵

81. Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution.⁹⁶

These provisions confirm that instruments only becomes operative once they are registered at the land titles office and if they are “executed within the provisions of this Act.”⁹⁷ It does not matter when they are signed; the date of registration is key. This is confirmed in section 73 which states that except for a lease with a term of three years or less, no instrument is “effectual to pass any estate or interest in any land” or capable of “render[ing] such land liable as security for the payment of money” until the instrument is registered in accordance with the provisions contained in the Act.⁹⁸

⁹² *Ibid* s 73.

⁹³ *Ibid* s 74.

⁹⁴ *Ibid*, s 77.

⁹⁵ *Ibid*, s 80.

⁹⁶ *Ibid* s 81.

⁹⁷ *Ibid* s 77.

⁹⁸ *Ibid* s 73.

Section 81 also reflects the notion that underlies the curtain principle, because it clarifies the issue of competing interests: whichever one was registered first was entitled to priority over all subsequently registered interests, regardless of when each was executed.⁹⁹ One does not look at the instruments on which the estate or interest is based. It is as if a curtain has fallen behind the title; registration is required to ascertain validity and to determine competing priorities.

Even if the curtain works as an analogy, it fails to buttress “indefeasibility of title.” Rather, it is a device which promotes certainty of ownership and simplifies the process of conveyancing. *The Land Titles Act, 1906* was not a panacea focused on indefeasibility of title, it was focused on improving and rationalizing the common law.

1.4 Indefeasibility of Title in *The Land Titles Act, 1978*

Between 1906 and 2001, the land titles regime and statute changed very little, and *The Land Titles Act, 1978*¹⁰⁰ continued to be a mixture of administrative, procedural and substantive provisions which served to fulfill its twin goals. The early definitions which simplified real property law remained substantially unchanged. For examples, mines and minerals and watercourses remained in the definition of “land.”¹⁰¹ A “Registrar of Titles” continued to manage each land titles office,¹⁰² and the legislation specified the minimum qualifications required to hold this position.¹⁰³

Most importantly, the process of registration remained central in the attainment of certainty of ownership and facility of conveyancing. This was codified in section 67(2) which provided that

[e]very instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.¹⁰⁴

Unfortunately the legislation did not always make this readily apparent.

One factor which contributed to this confusion was the location of related provisions: not all of them were grouped together within the statute. As an example, the provisions considered

⁹⁹ *Ibid* s 81.

¹⁰⁰ *The Land Titles Act, 1978, supra* note 2.

¹⁰¹ *Ibid* s 2(1)(k).

¹⁰² *Ibid* s 14.

¹⁰³ *Ibid* s 11.

¹⁰⁴ *Ibid* s 67.

relevant to “indefeasibility of title” were scattered through-out the Act. Most often sections 68, 213 and 237 were considered to be the substantive provisions supporting “indefeasibility of title,”¹⁰⁵ and they serve to illustrate this point.

Section 68 provided:

The owner of land for which a certificate of the title has been granted shall hold the same subject, in addition to the incidents implied by virtue of this Act, to such encumbrances, liens, estates or interests as are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title, as mentioned in section 213.¹⁰⁶

Section 213(1) read:

Every certificate of title and duplicate certificate of title granted under this Act shall, except:

- (a) in case of fraud wherein the owner has participated or colluded; and
- (b) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and
- (c) so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title;

be conclusive evidence, so long as the same remains in force and uncanceled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.¹⁰⁷

The relevant portion of section 237 is subsection (2). It stated:

A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person:

- (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or is not caveated, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the purchase money; or

¹⁰⁵ See eg: *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)* (1986), 33 DLR (4th) 12; 52 Sask R 164; [1986] SJ no 728 (SK CA) [*Hermanson Appeal* citing to QL]; on appeal from *Hermanson v Martin* (1982) 18 Sask R 430; 140 DLR (3d) 512; [1982] SJ no 740 (SK QB) [*Hermanson Trial* citing to QL], discussed in Chapter 4 below at 99-106.

¹⁰⁶ *The Land Titles Act, 1978*, *supra* note 2 s 68.

¹⁰⁷ *Ibid* s 213(1).

(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered or caveated, any rule of law or equity to the contrary notwithstanding.¹⁰⁸

These sections demonstrate that they were not determinative; one also had to consider other related sections, such as those specifying the “exceptions and reservations implied under this Act.”¹⁰⁹

In addition to the statutory exceptions contained in the 1906 Act, these included:

- (a) “the rights of Her Majesty under *The Mineral Taxation Act, 1983*,”¹¹⁰
- (b) “the rights of municipalities under *The Tax Enforcement Act*,”¹¹¹
- (c) “any subsisting tenancy agreement within the meaning of *The Residential Tenancies Act*,”¹¹²
- (d) “any right of way or other easement granted or acquired under the *Irrigation Act* (Canada), or *The Water Corporation Act*,”¹¹³
- (e) any right acquired by adverse possession prior to the land being granted or the first title being issued;¹¹⁴
- (f) “liens in favour of Her Majesty for advances of seed grain, fodder or other goods by way of relief,”¹¹⁵
- (g) “the reservation of any minerals that become vested in Her Majesty pursuant to any *Mineral Taxation Act*, and the rights of Her Majesty with respect to such minerals,”¹¹⁶
- (h) “any zoning regulation made pursuant to the *Aeronautics Act* (Canada) ... on the deposit of the regulation with a plan and description of the lands affected by the regulation as required by that Act,”¹¹⁷ and

¹⁰⁸ *Ibid* s 237(2).

¹⁰⁹ *Ibid* s 213(1).

¹¹⁰ *Ibid* s 69(b)(i).

¹¹¹ *Ibid* s 69(b)(ii).

¹¹² *Ibid* s 69(e).

¹¹³ *Ibid* s 69(h).

¹¹⁴ *Ibid* s 71.

¹¹⁵ *Ibid* s 69(j).

¹¹⁶ *Ibid* s 69(k).

- (i) public utility easements “situated outside the corporate limits of an urban municipality within the meaning of *The Urban Municipality Act, 1984*, to construct and maintain a pipe line on or under that land pursuant to a program established for the purpose of supplying natural or manufactured gas to one or more persons.”¹¹⁸

From this list it can be inferred that the protection afforded by the Certificate of Title had shrunk because the number of exceptions had increased. This does not support indefeasibility, but instead demonstrates confusion regarding the scope of the legislation.

These statutory exceptions also exhibit the type of complexity which had become inherent in the land titles legislation: in order to comprehend the scope and nature of these exceptions, in many cases different statutes needed to be consulted. This removes the title from the preconception of “indefeasibility” and from the notion that the title functions as does a mirror.

In further support of this observation that the level of protection had decreased, some of the protections contained in *The Land Titles Act, 1906* had disappeared from the 1978 legislation. As an example, by 1978 a title was no longer conclusive evidence “so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title.”¹¹⁹ Likewise, claims based on adverse possession¹²⁰ or prescription¹²¹ were not recognized unless the proprietary right existed before the land was granted.¹²² Also, a title was not treated as determinative of mineral ownership unless the chain of title had been reviewed and a mineral certificate had been issued.¹²³ Until this occurs compensation is not available if the “owner” suffers a loss, making minerals distinct from the surface of the land.

From these changes, it becomes even more apparent that “indefeasibility of title” was not axiomatic to the legislation in the first land titles regime in Saskatchewan. The expressions “indefeasibility of title,” mirror, curtain, and insurance principle never appear. The main

¹¹⁷ *Ibid* s 69(l).

¹¹⁸ *Ibid* s 69(m).

¹¹⁹ *Ibid* s 213(1)(c).

¹²⁰ *Ibid* s 71.

¹²¹ *Ibid* s 72.

¹²² *Belanger v Canadian Pacific Ltd* (1978), 93 DLR (3d) 734; [1978] SJ no 529 (SK CA) (citing to QL).

¹²³ *The Land Titles Act, 1978*, *supra* note 2 s 208. The predecessor of this provision became effective June 1, 1951 pursuant to *An Act to Amend The Land Titles Act*, SS 1951, c 34 s 6.

substantive provisions suggest adherence to the two goals espoused in the 1886 legislation, not to “indefeasibility of title.” The administrative and procedural provisions, as well as the generic definitions which facilitated a shift in practice to the land titles system, support the same assertion. From considering this regime from the perspective of the statute instead of the preconception, it can be inferred that indefeasibility of title was not of central importance: it is more likely that it is a myth.

2. INDEFEASIBILITY OF TITLE IN THE SECOND STATUTORY REGIME

2.1 The Goals in Action

During the period in which the land titles system remained largely unaltered, Canadian society changed a great deal. This resulted in a dichotomy between land titles systems of registration, and the societies which they served. All the provincial and territorial governments except Quebec recognized this issue, and in the late 1980s they struck a joint committee to examine issues in Canadian land registries and to suggest solutions. In so doing, the Joint Committee summarized the issue facing them as follows:

The existing title registration statutes are based on 19th century Australian or English statutes. Some of their central concepts have served us well. However, they leave problems unsolved. They are opaque, and sometimes downright misleading. They have had to be tortured by courts into new forms to meet current conditions. They hide the light of title registration under bushels of substantive law and administrative detail. They require rationalization and modernization in the light of nearly a century and a half of experience of title registration.¹²⁴

As part of this report, the Joint Committee drafted a model statute which included registration of titles to provide conclusive evidence that the person named was the owner. The report recommended that interests be treated differently, that they should merely be recorded on the title, without any obligation to verify that each was valid and enforceable.¹²⁵ This way, the land titles systems operating in the Canadian common law jurisdictions could be made more rational, and transactions could be processed more efficiently.

¹²⁴ 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) at 4-5.

¹²⁵ *Ibid* at 5-6.

Modernization was required in Saskatchewan. For one thing, because the Act had always obligated the government to retain the original instruments which had been submitted as part of conveyancing transactions, and the cancelled Certificates of Title,¹²⁶ the land titles offices were facing a storage issue. When the government began considering modernizing the system, “over four miles of shelving”¹²⁷ was necessary to store all of the historic instruments. Many of the older documents were deteriorating,¹²⁸ and “loss of paper records was becoming a problem.”¹²⁹ These practical issues needed to be addressed because if the system remained the same, logistical problems would grow with time, as more instruments were processed and then retained.

As well, Certificates of Title were organized and filed according to the legal description of the land; if one did not know the land’s legal description, there was no way to search the title. If a creditor wanted to learn if a debtor owned land but did not know the legal description, the creditor would either have to contact the local municipality or conduct an examination of discovery of the debtor. Neither was very efficient. Because of this filing system, a secondary issue existed too: there was a risk that if a title was accidentally filed in the wrong folder, there was no way to find it except to search all other title folders. This was inefficient, and reduced certainty of ownership.

Encumbrances against individuals, such as Writs of Execution and Powers of Attorney which had been registered at a land titles office, were another issue which caused the Saskatchewan government to modernize the land titles system.¹³⁰ Instead of being endorsed on Certificates of Title, these were recorded in the “General Record.”¹³¹ This separate registration book – organized by the person’s name and not by the land’s legal description – needed to be searched for the owner’s name each time an individual was planning to acquire an interest or estate in the land. If a potential purchaser failed to do so, the title acquired would be subject to

¹²⁶ *The Land Titles Act, 1978 supra* note 2 s 29(2).

¹²⁷ Fraser Nicholson, “Canada’s State-of-the-Art Title Technology” March/April 2002 *Title News* at 1, a publication of Information Services Corporation, located online from a search conducted April 2, 2009. See: <<http://www.isc.ca/default.aspx?DN=491,442,14,1,Documents>>.

¹²⁸ Information Services Corporation, “Basic Information about the LAND Project” (Paper delivered at the “Ready, Set, Go – The New Land Registration System” offered by the Saskatchewan Legal Education Society Inc., in May 2001), (SKLESI: Saskatoon, 2001) at 3 [Basic Information about the LAND Project].

¹²⁹ *Ibid.*

¹³⁰ Nicholson, *supra* note 127 at 1.

¹³¹ *The Land Titles Act 1978, supra* note 2 s 31.

such interests. In contrast to the system's goals, the "General Record" complicated matters and had the potential to reduce certainty.

Moreover, each land transaction could only be submitted, reviewed, and processed in its geographically assigned regional office. Work could not be redistributed between the ten different offices, as "[e]ach office maintained discrete records and customers were required to identify and contact the correct office in order to view records for a particular office."¹³² The process was inefficient.

In smaller centres, a transaction could be completed within a few days of submission. However, in busy offices such as Regina and Saskatoon, especially during the summer when many people were buying and selling homes, it could take weeks to process and register a transfer and mortgage.¹³³ Purchasers were paying interest on late closing: not because their paperwork had not been completed in a timely fashion, but because of procedural bottlenecks in the land titles system. This problem acted to thwart the system's original goals.

Given the plethora of issues involved in continuing to operate such a system, in 1995 the provincial government decided to re-engineer the entire land titles system in Saskatchewan. In keeping with its new goals, this project's initial objectives were:

- To review the operations, legislative base, processes and service of Land Titles and plan processing;
- To develop plans for the future introduction of automated services;
- To develop an automated system for Land Titles;
- To convert the existing information in Land Titles into an electronic database;
- To create the ability to display parcels of land graphically; and
- To link title information to the provincial SaskGIS Cadastral (Saskatchewan Geographic Information System) Database.¹³⁴

Interestingly, certainty of title and indefeasibility of title were not listed in the project's initial goals.

This changed when the Saskatchewan Cabinet approved a number of general principles for the LAND ("Land Titles Automated Network Development")¹³⁵ Project. The Cabinet approved document included an implicit commitment to certainty of title; the principles were:

¹³² Nicholson, *supra* note 127 at 1.

¹³³ *Ibid.*

¹³⁴ Basic Information about the LAND Project, *supra* note 128 at 2.

¹³⁵ *Ibid* at 2.

- To recognize that the existing Torrens system is the appropriate system of land registration for Saskatchewan;
- To provide quality products and services, in a timely manner, and for good value for money;
- To accommodate maximization of integration and co-ordination of related land information services;
- To utilize the latest, most cost-effective technology at minimum cost;
- To continue Land Titles as a public program, to meet the need for continuity, quality, consistency and neutrality, as well as to achieve other public policy goals, such as debt collection and maintenance enforcement; and
- To maximize employment security for existing staff.¹³⁶

Although certainty of title can be implied, it appears as if government was more concerned with improving the facility of conveyancing. These principles and the issues facing the land titles system identified by government representatives, provide some assistance in assessing what a common law province such as Saskatchewan valued in the system. No longer certainty of title and facility of transfer: these had been replaced with rationality and modernity.

The LAND project continued, and decisions were made which reflected the changed policy objectives. These included drafting new legislation and developing a computer system for the automation of land processes, one in which all land information in the province could be accessed by, among other things, either the legal description of the land or the owner's name. By 2001, it was concluded that the LAND System was ready to become operational. On June 25, 2001 *The Land Titles Act, 2000* was proclaimed in force, and the new system began to be implemented. By the fall of 2002¹³⁷ the new regime, with its increased focus on facility of conveyancing, had completely replaced the former system.

In keeping with the general principles approved by Cabinet in 1996, the new statute has attempted to address the issues associated with the former legislative scheme while maintaining the application of indefeasibility of title.¹³⁸ In the process, some of the definitions and key features which may imply indefeasibility changed. Instead of codifying common law concepts of different interests and estates in land in one word, now “‘land’ means ... the surface; ... mines and minerals; and ... unless the context requires otherwise, the condominium units and common

¹³⁶ *Ibid* at 3.

¹³⁷ *Ibid* at 6.

¹³⁸ Nicholson, *supra* note 127 at 1.

property included in a condominium plan.”¹³⁹ The legislation reads much easier, but it contains less substantive information.

Another significant change involves the Certificate of Title, which used to be considered the old system’s “centerpiece.”¹⁴⁰ Its status as such supported the preconception of indefeasibility. The new Act clarifies that this is no longer accurate, as the Certificate of Title has been replaced with the “title” which includes “a surface title, a mineral title or a condominium title, but does not include an uncertified mineral title.”¹⁴¹ Nothing in the definition indicates that all particular information about the title is found on the title, as occurred in the former Act.¹⁴² This reinforces that the title is less important than was the Certificate of Title in the former regime.

Further support for this assertion is found in Part III of *The Land Titles Act, 2000*. It is entitled “Fundamental Principles” and includes all of the legislation’s main tenets, beginning with the newly created “ownership register.”¹⁴³ According to section 11(1):

Subject to subsection (3), the Registrar shall establish and maintain an ownership register for:

- (a) each surface parcel that has been the subject of a Crown grant submitted to the land titles registry;
- (b) each mineral commodity that has been the subject of a Crown grant submitted to the land titles registry; and
- (c) each condominium unit that is the subject of an application for issuance of title pursuant to *The Condominium Property Act, 1993*.¹⁴⁴

This ownership register for all patented land in Saskatchewan – not a Certificate of Title pertaining to an individual piece of land – is now the central feature of the land titles system. The reduced status attached to the titles for specific pieces of land alludes to the change in focus: certainty of ownership may not be as important as it once was.

¹³⁹ *The Land Titles Act, 2000*, *supra* note 2 s 2(1)(u).

¹⁴⁰ Georgina R Jackson, *Manual of Law and Procedures, Saskatchewan Land Titles Offices* (Regina: Saskatchewan Justice, 1988) at 13.

¹⁴¹ *The Land Titles Act, 2000*, *supra* note 2 s 2(1)(rr).

¹⁴² Section 29(1) of *The Land Titles Act, 1978*, *supra* note 2 provided that the Registrar “shall keep each certificate of title and shall record thereon the particulars of all instruments, dealings and other matters by this Act required to be registered or entered on the certificate of title and affecting the land including therein.”

¹⁴³ *The Land Titles Act, 2000*, *supra* note 2 s 11(1).

¹⁴⁴ *Ibid* s 11(1).

This seems to be reinforced in the treatment of interests. Now interests are not referred to in Part III, which only refers to registered owners. Interests appear later, in Part VIII, and section 54(3) states that registration does not validate an interest which is void.¹⁴⁵ For example, if a mortgage is improperly executed or if the land is not properly described on the document, registration no longer cures the defect. This is a change from *The Land Titles Act, 1978* which, in accordance with the goal of certainty, provided that interests were treated as valid once registered. All of this supports the notion that facility of transfer is now the system's most important goal, and that the Act was changed substantively to reflect this new reality.

2.2 Indefeasibility of Title in *The Land Titles Act, 2000*

If indefeasibility of title is a hallmark of the land titles system, it is reasonable to expect that it would be codified in the legislation, especially since the statute was enacted after use of these terms became popular.¹⁴⁶ This does not occur: none of these terms are mentioned. The statute comes closest to doing so in two places, both located in Part III – Fundamental Principles. Section 13(1) entitled “Effect of title” reads:

Where the Registrar issues a title pursuant to this Act:

- (a) subject to section 14, the registered owner holds the title free from all interests, exceptions and reservations; and
- (b) subject to section 15:
 - (i) the title is conclusive proof that the registered owner is entitled to the ownership share in the surface parcel, mineral commodity or condominium unit for which the title has issued;
 - (ii) the title may not be altered or revoked or removed from the registered owner; and
 - (iii) no action of ejectment from land or other action to recover or obtain land lies or shall be instituted against the registered owner.¹⁴⁷

The second place is the heading to section 23 which reads “Reliability of title.” However, this section does not imply indefeasibility of title in the sense in which it is used in the dominant legal lexicon. Instead it reads:

- (1) A person taking or proposing to take from a registered owner a transfer or an interest in land or dealing with a title:
 - (a) is not bound:

¹⁴⁵ Section 54(3) is reproduced in Chapter 4 below at 109.

¹⁴⁶ Chapter 2 above.

¹⁴⁷ *The Land Titles Act, 2000*, *supra* note 2 s 13(1).

- (i) to inquire into or ascertain the circumstances in or the consideration for which the registered owner or any previous registered owner acquired title; or
 - (ii) to see to the application of the purchase money or any part of the purchase money; and
- (b) notwithstanding any law to the contrary but subject to sections 18 and 35, is not affected by any direct, implied or constructive notice of:
- (i) any trust;
 - (ii) any other unregistered interest; or
 - (iii) any unregistered transfer.
- (2) Knowledge on the part of the person that any trust or other unregistered interest or any unregistered transfer is in existence must not of itself be imputed as fraud.¹⁴⁸

At first glance it appears as if these statements endorse the concept of indefeasibility of title. According to section 13(1), subject to some statutory provisions, an interest, exception or reservation must be registered on the title for it to encumber the owner's estate in the land. Exceptions exist. Titles continue to be subject to, among other things, reservations and exceptions contained in the original Crown grant,¹⁴⁹ statutory easements,¹⁵⁰ municipal tax arrears¹⁵¹ residential tenancies,¹⁵² prior titles,¹⁵³ and roadway plans.¹⁵⁴ None of these need to be registered on the face of a title.

As well, subsection 14(a) states that “[e]very title is subject to any interest that is registered against the title pursuant to this Act or any other Act or law.”¹⁵⁵ This includes the beds and shores of water bodies located within the parcel of land.¹⁵⁶ A title for minerals is not even

¹⁴⁸ *Ibid* s 23.

¹⁴⁹ *Ibid* s 18(1)(a).

¹⁵⁰ *Ibid* s 18(1)(b)(i).

¹⁵¹ *Ibid* s 18(1)(b)(ii).

¹⁵² *Ibid* s 18(1)(e).

¹⁵³ *Ibid* s 16(2).

¹⁵⁴ *Ibid* s 18(1)(c).

¹⁵⁵ *Ibid* s 14(a).

¹⁵⁶ See: *The Saskatchewan Watershed Authority Act, 2005*, SS 2005 c S-35.03, s 39. Subsection (1) provides in part that “The Crown shall not make any grant of lands or of any estate in lands in terms that vest in the grantee: (a) any exclusive or other property or interest in, or any exclusive right or privilege with respect to: (i) any river, stream, watercourse, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh or other water body.”

conclusive proof of ownership until it is certified.¹⁵⁷ Consequently, a person may think he owns the small lake on the title, or minerals, when someone else does. This means the old problem has not been fixed, and indefeasibility of title continues to be elusive in the new legislation.

Further support is found in the fact that “legal description” is not even defined in *The Land Titles Act, 2000*. This phrase is defined in *The Land Surveys Act, 2000*.¹⁵⁸ Consequently a title does not define and cannot be used as:

proof of ... the boundaries of a parcel; ... the extent or area determined by the boundaries of a parcel; ... the boundaries of a condominium unit or the common property included in a condominium plan; or ... the extent or area determined by the boundaries of a condominium unit or the common property included in a condominium plan.”¹⁵⁹

A person is the owner of a title, but the existence of the title does not guarantee that the boundaries or size of the parcel outlined in that title are accurate. In keeping with this limitation, a landowner who suffers loss because the boundaries of a parcel are incorrect or because a water body decreases the size of the parcel is not entitled to claim or to be paid compensation for the loss. A title is only conclusive proof of ownership of a parcel of land which may or may be described accurately. Because of this limitation, how can one say the title is indefeasible?

Likewise, the expressions “mirror principle,” “curtain principle” and “insurance principle” are not codified in *The Land Titles Act, 2000*. The nearest reference is found in Part XII which is titled “Assurance and Compensation,” and a close examination of this Part also demonstrates that indefeasibility of title is not central to this new regime. The primary section in Part XII is 84, and, if one only reads subsection 84(2), it appears as if it is very comprehensive, almost akin to an insurance scheme:

84(2) Subject to the exclusions mentioned in sections 85 and 86, any person who sustains loss, damage or deprivation in any of the following circumstances is entitled to make a claim for compensation pursuant to this Part:

- (a) where a registration made by the Registrar was not authorized by this Act;
- (b) where the Registrar has omitted to make a registration as required by this Act;

¹⁵⁷ *The Land Titles Act, 2000*, *supra* note 2 s 13(2). As indicated in note 122 *supra*, this approach was first adopted in 1951. The only real difference is that the distinction is easier to understand in the 2000 Act than it was in the earlier statutes.

¹⁵⁸ *The Land Surveys Act, 2000*, SS 2000, c L-4.1, s 2(q.1).

¹⁵⁹ *The Land Titles Act, 2000*, *supra* note 2 s 13(4).

- (c) where the Registrar has made an error or omission in the performance of a duty or function pursuant to this Act that is not mentioned in clause (a) or (b);
- (d) where a former registered owner has been deprived of title through the registration of an invalid transfer and that former registered owner is prohibited by section 15 from bringing an action of ejectment or other action to obtain or recover land;
 - (d.1) where:
 - (i) the circumstances mentioned in clause 15(1)(b.1) exist; and
 - (ii) title has been restored to the former registered owner pursuant to section 101.1 or 107;
 - (d.2) where:
 - (i) the circumstances mentioned in clause 15(1)(b.1) exist; and
 - (ii) title has not been restored to the former registered owner;
- (e) where a registered owner has been divested of title by the operation of clause 15(1)(c) and section 16;
- (f) where a former registered owner recovers land in an action brought pursuant to subsection 15(3) and the title recovered includes an interest that was not registered against the prior title of that former registered owner;
- (g) where:
 - (i) a mortgage obtained on the basis of a fraudulent instrument has been registered;
 - (ii) the Registrar pursuant to section 101.1 or the court pursuant to section 107 has directed that the registration of the mortgage mentioned in subclause (i) be discharged against title;
 - (iii) the mortgagee has demonstrated the prescribed due diligence; and
 - (iv) the mortgagee satisfies the Registrar that the mortgagee has no right:
 - (A) to claim title insurance as defined in *The Saskatchewan Insurance Act*; or
 - (B) to otherwise recover the mortgagee's loss.¹⁶⁰

In all of these circumstances, a person can claim compensation from Information Services Corporation.

However, there are even more exceptions than there are enumerated grounds for claiming compensation. In section 85 there are eighteen exceptions listed pertaining mainly to surface, condominium, certified minerals, and interests.¹⁶¹ One of these pertains to claims for compensation “related to a boundary problem or an allegation that title is for a parcel or condominium unit with boundaries or an extent or area other than what was assumed or

¹⁶⁰ *The Land Titles Act, 2000*, *supra* note 2 s 84(2).

¹⁶¹ *Ibid* s 85.

understood by the registered owner.”¹⁶² This clarifies that a registered owner cannot claim compensation from the Registrar if there is an issue with the boundaries of the parcel of land which the owner thought she owned. This exception is a significant departure from the notion of indefeasibility, and from the idea that the Act contains an insurance principle.

Some other subsections contained in section 85 which restrict claims for compensation include situations when the “loss, damage or deprivation”¹⁶³ is:

- (a) suffered by a person who knowingly participates or colludes in a fraud;
- (b) occasioned by a registered owner’s breach of any trust whether express, implied or constructive;
- (c) by reason of the improper use of the seal of a body corporate;
- (d) by reason of the lack of capacity or lack of authority in a body corporate to deal with the title or interest involved or to execute or take the benefit of the registration;
- (e) by reason of a registration authorized on behalf of a body corporate by a person who lacks capacity to apply for registration on behalf of the body corporate;
- (f) occasioned by the failure of the Registrar to register an interest based on a writ or a maintenance order against a title of any registered owner or against an interest of any interest holder under a name that is different in any way from the name by which he or she is described in the writ or maintenance order;
- (g) occasioned by the registration by the Registrar of an interest based on a writ or a maintenance order against a title owned or interest held by a person who is not the person named in the writ or maintenance order;
- (h) occasioned by the failure of the Registrar to ensure compliance with any requirement set out in Part XVII or in any other Act or law with respect to the registration of an interest;
- (i) occasioned by the failure of the Registrar to ensure compliance with any requirement set out in any other Act with respect to a transfer or the discharge, amendment, assignment or postponement of an interest;
- (j) occasioned by the registration of a transfer or the registration of an interest by a person who has not been properly appointed by a power of attorney or who does not have authority under a power of attorney;
- (k) occasioned by a correction or registration by the Registrar in accordance with sections 97, 99 and 101.¹⁶⁴

¹⁶² *Ibid* s 85(1).

¹⁶³ *Ibid* s 85.

¹⁶⁴ *Ibid* s 85.

From this list, it becomes obvious that compensation is only available in very limited circumstances, and usually is not available when the Registrar makes an error. It also clarifies that Information Services Corporation does not review corporate documents and powers of attorney to the degree necessary to verify that they have been properly executed. All of this is very different from the notion of “indefeasibility of title” and the insurance principle. Instead it seems as if compensation is only accessible in very limited circumstances when a loss is suffered in the context of a surface, certified mineral, or condominium title.

The Act also enumerates six additional exceptions to compensation specifically related to uncertified mineral titles.¹⁶⁵ In effect, until a mineral title is certified, it is not conclusive evidence that the person named as owner actually has the best title to the minerals.

When the statutory provisions are considered by themselves, without any preconception of what one will discover, the insurance principle and indefeasibility of title are more fiction than fact.

CONCLUSION

Within Saskatchewan, Professor Harrison appears to be correct. If one analyzes the statute, the preconceived notion of indefeasibility of title is not supported by its most important statutory provisions. In this regard, it is the same now as it was in the past. The Saskatchewan legislation has never mentioned indefeasibility of title or the three principles. When one closely examines the provisions in the context of the system’s goals, the provisions have never suggested the presence of them either. “Conclusiveness of ownership” offers very limited protection, but, because it is codified in the legislation, it should be respected.

Imposing an overly broad conception of “indefeasibility of title” on a legislative scheme such as this simply increases confusion, and leads to a misunderstanding of how the Act is to be interpreted. It would be much more beneficial to follow Professor Harrison’s advice, and look to the limits of the statutory provisions every time one needs to examine a land titles issue. Indefeasibility of title is not supported directly by the statutory provisions: treating it as if the statute does so is akin to clothing oneself in the Emperor’s new jacket. The user believes he is dressed, but others may not be able to distinguish what is being worn.

¹⁶⁵ *Ibid* s 86.

CHAPTER 4
A CAUTIONARY TALE:
INDEFEASIBILITY OF TITLE IN RECENT CASES

Keeping in mind the purpose and intent of the [Land Titles] Act ... I fail to see how it is possible for a court to import into these protective clauses words which are not there, and to attach to them another condition or exception which the legislature did not see fit to mention.¹

- Justice Egbert of the Alberta Supreme Court Trial Division in Turta v Canadian Pacific Railway Company

This chapter serves the same function of many fairy tales:² it provides a cautionary tale of the pitfalls and perils which may occur when one strays from accepted mores of behaviour, or, in this case, analysis. In 1952 Justice Egbert warned lawyers of the potential perils which could arise if lawyers strayed from the contents of land titles legislation, and instead imported other words and phrases into the analysis. Yet, as evidenced by the reliance on “indefeasibility of title” in traditional research sources,³ and as illustrated by four Saskatchewan cases, this is exactly what has been happening.

Saskatchewan lawyers, and consequently its courts, do not always analyze the applicable legislative provisions. Based on the arguments presented by lawyers, courts rarely devote a great deal of analysis to the statutory provisions and to the operations of the land titles scheme. Instead, lawyers. As a result, the courts demonstrate a preference for common law principles.

Sometimes the lawyers and courts followed the concept of “indefeasibility of title” as it is used in dominant legal discourse. Other times they have sidestepped its application, using the doctrine of abandonment and contract law principles to avoid the rigidity associated with the complex statutorily-based land titles scheme. Thus, often the myth of indefeasibility and other common law principles have been the rationale for decisions as opposed to the statute and the legislative scheme.

¹ *Turta v Canadian Pacific Railway Company* (1952), 5 WWR (NS) 529; [1952] AJ no 21 (QL) at para 147 (AB SCTD) [*Turta Trial* citing to QL].

² See eg: Hans Christian Andersen, “The Emperor’s New Clothes” in Maria Tatar (ed), *The Annotated Hans Christian Andersen*, (New York: WW Norton & Company, Inc, 2008) at 3; and “Rumpelstilskin” in Vivian French, *The Kingfisher Mini Treasury of Fairy Tales* (Boston: Kingfisher, 2000) at 70.

³ Chapter 2 above.

This preference, and its affect on land titles discourse, will be illustrated through analysis of four fairly recent Saskatchewan cases: the chapter begins by examining two cases in which the courts explored the issue of fraud in ownership disputes over land because this issue is apposite to the notion of indefeasibility of title. The first case, *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)*, was decided respectively by the Court of Queens Bench in 1982⁴ and the Court of Appeal in 1986,⁵ at a time when “indefeasibility of title” was just gaining a certain cachet in Saskatchewan. The second, *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*,⁶ was decided by the Court of Queen’s Bench in 2005.

The discussion then turns to two cases where the analysis is more troubling. Instead of applying principles codified in land titles statutes or even relying upon “indefeasibility of title”, *Arndt v First Galesburg National Bank and Trust Co*⁷ and *Henderson v Knogler*⁸ provide evidence that some courts have base decisions on legal principles which usually are treated as anathema in real property disputes, or after a transfer of title to real property has been registered. One discovers that, contrary to the almost blind reliance on “indefeasibility of title” espoused in traditional legal research sources; it is not always treated as a legal fact or universally applied in land titles disputes.

1. HERMANSON V SASKATCHEWAN (REGINA REGISTRAR OF TITLES)

Hermanson v Saskatchewan (Regina Registrar of Titles) is the first case before the Saskatchewan courts to determine competing ownership claims in the context of fraud and identity theft. The statement of claim was issued in 1978 but a decision of the Court of Queen’s Bench was not issued until September 9, 1982.⁹ The Registrar of the Regina Land Registration District consequently filed a Notice of Appeal on October 26, 1982. Valerie Hermanson, the

⁴ *Hermanson v Martin* (1982), 18 Sask R 430; (1982), 140 DLR (3d) 512, [1982] SJ no 740 at paras 2-3 (SK QB) [*Hermanson Trial* citing to QL].

⁵ *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)* (1986), 33 DLR (4th) 12; [1986] SJ no 728 (SK CA) [*Hermanson Appeal* citing to QL].

⁶ *CIBC Mortgages Inc v Saskatchewan (Registrar of Titles)*, 2005 SKQB 470 (available on CanLII) [*CIBC Mortgages Inc*].

⁷ *Arndt v First Galesburg National Bank and Trust Co*, 2001 SKQB 234 (available on CanLII) [*Arndt v First Galesburg*].

⁸ *Henderson v Knogler*, 2010 SKCA 119 (available on CanLII) [*Henderson Appeal*]; 2009 SKQB 96 (available on CanLII) [*Henderson Trial*]; 2011 SKQB 399 (available on CanLII) [*Henderson Chambers*].

⁹ *Hermanson Trial*, *supra* note 4.

plaintiff in the court action, filed a Notice of Intention to Vary on October 26, 1982. The appeals were heard on August 23, 1983, but Chief Justice Bayda and Justice Brownridge, the two panel members who remained seised with the case,¹⁰ took more than three years to issue two concurring judgments. These delays and the concurring judgments by the Court of Appeal justices indicate that both levels of court analyzed the issues carefully and were cognizant of the important policy elements accompanying the issues of identity theft and fraud.

The case arose following difficulties in a marriage. Valerie and Edward Schmidt were married in 1962 and had two children. In 1971 they purchased a house in Regina, held title to it as joint tenants, and lived there as a family. In the spring of 1972 a petition for divorce was issued and a divorce decree absolute was granted that fall, without the family property issues being determined. The parties continued to hold title to the former family home as joint tenants, while Valerie and the two children moved to Calgary.¹¹ In the meantime, she remarried and changed her last name to Hermanson.

Edward Schmidt continued to live in the family home until late May, 1975, when he sold it to Ralph Martin. There is some suggestion that it was a private sale because the judgment states that in April they reached an agreement whereby Martin would pay \$13,500.00¹² for the property. In exchange for the registration of a first charge against the title, Co-operative Trust Company of Canada agreed to loan Martin \$12,271.00. Schmidt agreed to loan him the amount required to cover the balance of the purchase price and, given that the total of the two loans exceeded the purchase price, presumably the amount necessary to cover legal and registration costs, with the second mortgage being registered in the amount of \$2,200.00.¹³ From this it appears as if Martin did not need to use any of his own funds to complete the transaction. Schmidt's lawyer prepared the mortgages and registered them and the transfer for Martin,¹⁴ and

¹⁰ The records at the Court of Appeal for Saskatchewan, disclose that the appeal was heard by a three justice panel – Chief Justice Bayda, Justice Wood and Justice Brownridge – on August 23, 1983 and the Court reserved its decision until November 13, 1986. According to information recorded at the website for the Saskatchewan Courts, <http://www.sasklawcourts.ca/default.asp?pg=ca_justices_27>, Justice Wood retired in 1984 when he turned 75 years of age, meaning he was unavailable to participate in the judgment of this case.

¹¹ *Hermanson Trial*, *supra* note 4 at paras 2-3.

¹² *Ibid* at para 41.

¹³ *Ibid* at para 4.

¹⁴ *Hermanson Appeal*, *supra* note 5 at para 12.

title to the property was registered in his name on May 29, 1975. On the same date the two mortgages were also registered.¹⁵

When Schmidt attended at the lawyer's office to execute the transfer and related documents, he was informed that his wife needed to sign the documents too. Schmidt left the office and within thirty minutes returned with a woman he introduced as Valerie. They executed the documents in front of the lawyer and then she left.¹⁶

Valerie Hermanson was unaware the house had been sold or that two mortgages had registered against its title for more than two years.¹⁷ From this one can infer that she never informed the land titles office of her address in Calgary. Her ex-husband never told her what he had done.

Martin moved onto the property, and made the payments on the Co-operative Trust mortgage. However, he never made any payments to Edward Schmidt on the second mortgage¹⁸ before Schmidt died in March 1977. At his death Schmidt's only significant asset was the mortgage registered against the former family home.¹⁹

Hermanson learned of her former husband's death in October, 1977. She believed she was the surviving joint tenant of the Regina home and hired a Regina lawyer to assist her with its transmission. In January 1978, when she learned the title to the property had been transferred,²⁰ Hermanson commenced a court action to have the land transferred into her name, free and clear of the mortgages. In the alternative, she made a claim against the Registrar of Titles of the Regina Land Registration District for the value of the land²¹ to be paid from the assurance fund. She also filed a complaint regarding the forgery with the Royal Canadian Mounted Police Fraud Squad, but they were unable to locate the woman who had impersonated her.²²

In the trial judgment, the Court examined the interplay between three statutory provisions and the treatment of similar provisions by the courts in other jurisdictions. Justice McIntyre

¹⁵ *Hermanson Trial*, *supra* note 4 at para 6.

¹⁶ *Ibid* at para 5.

¹⁷ *Ibid* at para 6.

¹⁸ *Ibid* at para 6.

¹⁹ *Ibid* at para 7.

²⁰ *Ibid* at para 7.

²¹ *Ibid* at para 9.

²² *Ibid* at para 8.

began the analysis with section 68 of *The Land Titles Act*²³ which “enshrine[s] indefeasibility of title as a fundamental principle of the Torrens System of Land Registration.”²⁴ It read:

The owner of land for which a certificate of the title has been granted shall hold the same subject, in addition to the incidents implied by virtue of this Act, to such encumbrances, liens, estates or interests as are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title, as mentioned in section 213.²⁵

Quoting this section, the Court acknowledged the importance of registration in land titles schemes.

The Court also referred to the other key statutory provisions, namely sections 196²⁶ and 213(1).²⁷ Section 213(1) specified when a title was conclusive proof of ownership against persons not named as owner on the Certificate of Title.²⁸ Section 196(1) enumerated those situations whereby an owner could recover the land. It read:

No action of ejectment or other action for the recovery of land for which a certificate of title has been granted shall lie against the owner under this Act, except in the case of:

- (a) a mortgagee, as against a mortgagor in default;
- (b) a lessor, as against a lessee in default;
- (c) a person deprived of land by fraud, as against the person who through the fraud has been registered as owner, or as against a person deriving title otherwise than as a transferee *bona fide* for value from or through such owner through fraud;
- (d) a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such land;
- (e) an owner claiming under a prior instrument of title, where two or more grants are registered, or two or more certificates of title issued, in respect of the same land;

²³ *The Land Titles Act*, RSS 1978, c L-5, s 68(1) [*The Land Titles Act*, 1978].

²⁴ *Hermanson Trial*, *supra* note 4 at para 17.

²⁵ *The Land Titles Act*, 1978, *supra* note 23 s 68.

²⁶ *Hermanson Trial*, *supra* note 4 at para 18.

²⁷ *Ibid* at para 19.

²⁸ Chapter 3 above at 85-86.

(f) rights arising under any of the clauses of section 69.²⁹

In quoting these sections, the Court recognized the fundamental principles underlying the statutory scheme.

The Court then considered the Privy Council decisions which had examined fraud and identify theft in land titles disputes from Australia and New Zealand. It considered *Gibbs v Messer*³⁰ and the more recent decision of *Frazer v Walker*.³¹ The Court used the wording employed by the Privy Council in *Frazer* to conclude that “it is in fact the registration and not its antecedents which vests and divests title”³² and that the statute conferred immediate indefeasibility on a *bona fide* purchaser for value.³³

Justice McIntyre then applied the statutory provisions and the quote from *Frazer* to the facts before him. Although *indicia* was present which could be considered to be characteristic of real estate fraud including the fact that Martin: never used any of his money as a down-payment, financed the purchase price and legal expenses, never made a payment on the mortgage owing to Schmidt, and used the same lawyer as Schmidt³⁴ – the Court concluded that Martin was a *bona fide* purchaser for value. Because he had not participated in the fraud perpetrated on Hermanson, he held the title to the property free of all unregistered interests with the exception of those mentioned in section 68. Thus Martin was unburdened by Hermanson’s former jointly held estate, and the title became indefeasible the moment it was registered in Martin’s name. It was conclusive proof against all claimants, including Hermanson.

Although Hermanson was not entitled to eject Martin from the property, the Court concluded that, given that she had held title to the property jointly with her ex-husband, she was entitled to half the value of the property at the date of the sale, with interest thereon. If Schmidt’s estate could not satisfy the debt, it was to be paid from the assurance fund.

The Registrar of the Regina Land Registration District was dissatisfied with the result and appealed. Valerie Hermanson filed a Notice to Vary. Both parties asserted that Hermanson

²⁹ *The Land Titles Act, 1978, supra* note 23, s 196(1).

³⁰ *Gibbs v Messer*, [1891] AC 248 (PC).

³¹ *Frazer v Walker*, [1967] All ER 649 (PC).

³² *Frazer v Walker, ibid* at 651, cited in *Hermanson Trial, supra* note 9 at para 32.

³³ *Frazer v Walker, ibid* at 654, cited in *Hermanson Trial ibid* at para 33.

³⁴ Pursuant to the decision of *The Law Society of Upper Canada v Cunningham* 2010 ONLSHP 0097 (available on CanLII) at para 43, all of these factors are *indicia* of mortgage fraud.

should recover her property, and made alternative secondary and conflicting arguments. Both appeals were dismissed, but the concurring judgments illustrate the different approaches which courts may employ when considering a land titles issue: Justice Brownridge relied primarily on the common law, while Chief Justice Bayda took an approach more aligned with Justice Egbert's admonition. Each deserves mention.

Justice Brownridge reproduced sections 68, 196 and 213 after the recitation of facts at the start of his judgment,³⁵ but devoted most of the analysis to common law authorities such as *Gibbs v Messer*³⁶ and the supporting Saskatchewan and Alberta cases which had been considered by the trial judge.³⁷ In his judgment, the statutory provisions were interwoven with the trial judge's analysis of the cases from other jurisdictions, in particular *Assets Company, Limited v Mere Roihi*,³⁸ and *Frazer v Walker*.³⁹ As seen from his following statement, traditional sources of law – case authorities and equity – were at the forefront:

Finally, there are no doubt cases where the registered owner, having been deprived of his title by forgery or fraud, should have his title restored. But this is not such a case. The issue in this case is about indefeasibility of title and the present registered owner has been the registered owner since May 29, 1975. It is neither just nor equitable that he should now be deprived of his title because of the fraud of others if that can be avoided. As Lord Wilberforce pointed out in *Frazer v Walker*, there is nothing to prevent the court from granting equitable relief as the circumstances require even if it cannot or feels it ought not to take away the title of the present registered owner and restore it to a former owner.⁴⁰

Although he concurred with the judgment authored by Justice Brownridge, Chief Justice Bayda placed much greater emphasis on the statutory provisions, an approach better suited to a statutory regime such as the land titles system of registration. Bayda CJS started the analysis by examining the relevant statutory provisions, without any examination of case authorities from other jurisdictions. From the statutory analysis he concluded:

the term fraud as used in s. 196 must be limited to the new owner's fraud, that is, to fraud in which he participated or colluded As noted, to define 'fraud' in s.

³⁵ *Hermanson Appeal*, *supra* note 5 at 7-8.

³⁶ *Gibbs v Messer*, *supra* note 30, referred to *Hermanson Appeal*, *ibid* at 8-9.

³⁷ *Hermanson Appeal*, *ibid* at 9-10.

³⁸ *Assets Company, Limited v Mere Roihi* (1905), AC 176 (PC).

³⁹ *Frazer v Walker*, *supra* note 31.

⁴⁰ *Ibid* at 12.

196 to coincide with ‘fraud’ in ss. 68 and 213 automatically results in the application of ‘immediate indefeasibility’ theory.”⁴¹

Chief Justice Bayda then addressed the interpretation of “fraud.” Because this term is not defined in *The Land Titles Act*, he turned to the common law, specifically to jurisdictions possessing similar land titles statutes to Saskatchewan. Whenever he examined the interpretation of fraud in such cases, the judgment referred to the statutory provisions that had been applied, and compared them to Saskatchewan’s. Like the Court below, he primarily referenced cases from Australia and New Zealand, as those jurisdictions’ statutory provisions were almost identical to those in Saskatchewan.

From this, Bayda CJS held that section 196(c) had to be restricted to situations in which the new owner had actually participated in the fraud, and, contrary to the common law, that equitable fraud or constructive knowledge of the fraud was not sufficient to overturn ownership of the title.⁴² He therefore concluded that Martin had not participated in fraud as it is described in land titles statutes. This judgment was rooted in the statute; one assumes Justice Egbert would have been pleased.

In *Hermanson*, both levels of court demonstrated a commitment to the principles underlying Saskatchewan’s land titles system, namely, that registration confers ownership rights which can only be defeated in limited and enumerated circumstances. From beginning with the statute, and then using it as the context for analyzing case law from jurisdictions possessing similar legislative provisions, both levels of court demonstrated a degree of comprehension and acceptance of the land titles statute and regime that often is missing from more recent judgments. All the judges concluded that registration was the scheme’s most important feature, and that a new owner must participate in the fraud for his title to be set aside. Indefeasibility of title was only mentioned as a corollary to the statutory provisions.

Both appeal judgments utilized Torrens System terminology instead of phrases developed in the common law. Chief Justice Bayda began his judgment by quoting Justice Brownridge’s statement that Martin was an “owner of land for which a certificate of title ... [had] been granted.”⁴³ A “Certificate of Title” is a creation of the Torrens System. Neither refers to deeds;

⁴¹ *Hermanson Appeal*, *supra* note 5 at para 5.

⁴² *Ibid* at para 5.

⁴³ *Ibid* at para 2.

instead Justice Brownridge wrote about the fraudulent execution of a *transfer*,⁴⁴ which is another Torrens System creation.⁴⁵ The “instrument numbers” given to the mortgages by land titles staff were also mentioned.⁴⁶ From their choice of language, it can be inferred that the judges possessed significant knowledge and understanding of the land titles scheme, with its inherent notion of conclusiveness of ownership. These examples illustrate knowledge of the principles and operation of a Torrens System of land registration and decisions based on the contents of the legislation, which should be the standard of analysis in any land titles case.

2. ***CIBC MORTGAGES INC. V SASKATCHEWAN (REGISTRAR OF TITLES)***

In 2005 the Saskatchewan Court of Queen’s Bench once again examined the issue of fraud arising from identity theft in the context of real property ownership. By this time employing the expressions “immediate indefeasibility” and “deferred indefeasibility” to describe the effect of the protections afforded in land titles legislation had become firmly entrenched as dogma in legal discourse. However, two different streams of analysis were possible: one based on this immediate / deferred indefeasibility debate in the common law to distinguish the authority of *Hermanson*; or one which relied upon the new legislation and statutory interpretation principles to do so.

As noted by Elmer A Driedger in the preface to his seminal text, *The Composition of Legislation*,

Statutes are laws. They are supposed to settle the rights and liabilities of the people, and they are enforced by the courts. They must be, so far as we can make them, precise. They are serious documents. They are not, like the morning newspaper, to be read today and forgotten tomorrow. Like all other serious works of literature, they must be read and studied with care and concentration. Every word in a statute is intended to have a definite purpose and no unnecessary words are intentionally used. All the provisions in it are intended to constitute a unified whole. It represents many long hours of hard work. Only fifteen minutes may be required to read the words in it, but that is not enough. Anyone who wishes to understand a statute must be willing to spend a little time with it, reading it through, slowly and carefully, from beginning to end, and then re-reading it several times.⁴⁷

⁴⁴ *Ibid* at para 5.

⁴⁵ This can be contrasted to the headnote, which uses the word “deed” instead of transfer. *Ibid* at para 1.

⁴⁶ *Ibid* at paras 5-6.

⁴⁷ Elmer A Driedger, *The Composition of Legislation*, 2nd ed, (Ottawa: The Department of Justice, 1976) at xxiii.

In 2001 Saskatchewan repealed *The Land Titles Act* and replaced it with *The Land Titles Act, 2000*, a new statutory regime in which the goal of facility of transfer is preferred to the goal of certainty of title.⁴⁸ As the new statute also possesses a different focus than its predecessor and a different type of organization, arguments could have been developed that *Hermanson* did not apply in the context of the new statute.⁴⁹

Unfortunately it appears as if the lawyers arguing the case failed to make the statutory interpretation argument. Instead, they relied upon “indefeasibility of title” and were therefore compelled to make the common law central to the discussion, instead of statutory analysis which would have enabled the Court to author a more coherent judgment based on the legislation instead of a common law “principle.” Thus, the Court employed a circuitous analysis – including a cursory review of leading cases, articles, and the term “indefeasibility of title” as it has developed in British Columbia and Ontario in the context of fraud and mortgages – without any in depth comparison of these sources with the provisions contained in *The Land Titles Act, 2000*.⁵⁰

In *CIBC Mortgages Inc. v Saskatchewan (Registrar of Titles)*,⁵¹ a fraudster had caused the title to 611 Leslie Avenue, Saskatoon to be registered in the name of Trent Doerksen, a real individual who lived in Prince Albert.⁵² For a number of years an elderly couple owned and lived in that house. After the husband died, his widow transferred title to their two children, one

⁴⁸ Chapter 3 above at 68 n 2.

⁴⁹ Although this argument is beyond the scope of this thesis, a few comments based upon Driedger, *supra* note 48 need to be made to support this assertion. If one contrasts the style of organization between the statutes, one sees that *The Land Titles Act* was organized in such a manner as to emphasize registration, including bringing land into the ambit of the legislative scheme, with no distinction between transfers and interests. In *The Land Titles Act, 2000*, the statute is organized to emphasize the importance of ownership, with owners being accorded much more attention than land. Interests have been separated from the statutory protections provided to owners of parcels of land. Instead of being based on the value of the interest, now a flat-fee is charged when an interest is registered. This is because interests are no longer reviewed prior to registration. These are significant changes, and could have been used to assert that decisions made in the context of the former legislative regime were no longer applicable, and could be distinguished.

⁵⁰ *The Land Titles Act, 2000*, SS 2000, c L-5.1.

⁵¹ *CIBC Mortgages Inc*, *supra* note 6.

⁵² *Ibid* at para 4.

of whom lived in Edmonton and one of whom lived in Calgary.⁵³ In less than a year, the widow also died,⁵⁴ and the house remained vacant for a period of months.⁵⁵

At some point the fraudster obtained a Saskatchewan Health Card and a birth certificate in Trent Doerksen's name.⁵⁶ The fraudster then applied for and obtained mortgage approval in Calgary,⁵⁷ ensuring there was very little possibility that the mortgage broker would learn of the intended fraud. Mortgage instructions were sent to a Saskatoon lawyer and when the fraudster met with him, he produced Doerksen's birth certificate and health card.⁵⁸ The lawyer undertook and completed the work, and the fraudster instructed him to forward "the net mortgage in the amount of \$149,287.26 ... by a law firm trust cheque made out to Trent Doerksen to a branch of the Royal Bank of Canada in Saskatoon."⁵⁹ Once the fraudster had the mortgage proceeds, he disappeared.

Less than one month later, one of the property's real owners learned of the fraudulent transfer and mortgage when an insurance policy that listed Trent Doerksen as the home owner was mailed to the Leslie Avenue house and subsequently forwarded to him.⁶⁰ At the time the real owners were negotiating the sale of the property so it was imperative that they be able to finalize the transaction. Within two months of learning of the fraud, CIBC Mortgages Inc and the Registrar of Titles executed a consent order which transferred the title to the land back to the original owners and discharged the mortgage, enabling the real owners to convey clear title to the purchaser.⁶¹

However, the parties could not resolve all the issues. The borrower had absconded with the mortgage proceeds and the lender received no payments. CIBC Mortgages Inc⁶² believed it

⁵³ *Ibid* at para 2.

⁵⁴ *Ibid* at para 2.

⁵⁵ *Ibid* at para 3.

⁵⁶ *Ibid* at para 6.

⁵⁷ *Ibid* at para 5.

⁵⁸ *Ibid* at paras 6-8.

⁵⁹ *Ibid* at para 8.

⁶⁰ *Ibid* at para 9.

⁶¹ *Ibid* at para 1.

⁶² According to Dale Beck, Counsel for Saskatchewan in this case, this was actually a subrogated claim brought by the title insurance provider, and CIBC Mortgages Inc was only the nominal plaintiff. Dale Beck, Address to the Canadian Bar Association Real Property and Trusts Section Meeting, Regina, Saskatchewan (16 January 2012).

was entitled to receive compensation for its loss from the Registrar of Titles. The Registrar would not agree so the matter proceeded to court.

The parties were able to agree to the wording of the issue, and it was reproduced in the consent order which enabled the property to be transferred into the names of the real owners. The issue in the consent order does not mention “indefeasibility of title;” rather, it refers to the statute, asking the Court to answer:

‘Is CIBC Mortgages Inc. entitled to be compensated by Information Services Corporation of Saskatchewan pursuant to part XII of *The Land Titles Act, 2000*, in relation to the mortgage registered as Interest Register #109531773, Interest #127294094 against Title #128591332 whether as a result of the discharge of the mortgage pursuant to this order or otherwise?’⁶³

Part XII of the Act focuses on compensation: when it is available and the processes necessary to claim it. From the wording of the issue it can be inferred that the parties expected the Court to focus the analysis on the legislative provisions.

The substantive provision at the focus of the dispute was subsection 54(3). It prescribes the relationship between the registration and validity of interests, and states:

Any interest registered ... is only effective according to the terms of the instrument or law on which the interest is based and is not deemed to be valid through registration.⁶⁴

As seen from subsection 54(3), a registered interest only has priority against subsequent interests if the instrument on which it is based is valid. This is contrary to the interpretation attached to the provisions in the former land titles statute,⁶⁵ whereby registration cured and validated a void instrument. Subsection 54(3) leaves void but registered interests vulnerable to challenge from subsequent registered interest holders or other parties with interests or estates in the same parcel of land. Given how the parties framed the issue as one based on statute, one would have expected CIBC Mortgages Inc’s claim to fail, without any analysis of “indefeasibility of title.”

However, instead of analyzing the issue identified by the parties in the consent order, the Court held that its task was to determine:

⁶³ *CIBC Mortgages Inc*, *supra* note 6 at para 1.

⁶⁴ *The Land Titles Act, 2000*, *supra* note 50, s 54(3).

⁶⁵ Peter S Stewart, *Manual of Law and Procedures, Saskatchewan Land Titles Offices* (Regina: Lawrence Amon, Printer to her Majesty the Queen, 1962) at 13. This change to the statutory regime is discussed more fully in Chapter 3 above, and the text accompanying notes 73-77 above.

whether a person who takes a mortgage interest in land, not from the registered owner, but from someone who forges the registered owner's name, is entitled to remain on title after the forgery is discovered.⁶⁶

With this reframing, the emphasis on Part XII of the Act and subsection 54(3) was diminished. This enabled the Court to consider other sources, leaving the judgment circuitous and the analysis less helpful than it might otherwise have been.

To establish this point, the judgment's organization deserves examination. Judicial decisions usually follow a similar format. The facts are presented first and then the issue is described. If the issue involves consideration of some statutory provisions, usually they are presented next. Sometimes this involves explanation of the principles of statutory interpretation. After this, the court presents cases which have considered the statutory provisions. Most often, only the most significant cases are presented, including those significant cases which can be distinguished. Then the facts are analyzed in the context of the legal authorities. Once this is completed, the Court states its conclusion. This is the approach which the judgment of Chief Justice Bayda demonstrated in *Hermanson v Saskatchewan*.

This format was not followed exactly in *CIBC Mortgages Inc*, and because of this, the judgment appears confusing and is difficult to follow. The Court began as expected, with a recitation of the facts. This was followed by the parties' framing of the issue and a broad summary by the Court of the position of each of the parties. The Court then reframed the issue so it did not refer to the statute. After this, the judgment became more confusing, perhaps because the Court followed the arguments made by counsel who failed to highlight the nuances and complexities which arise when "indefeasibility of title" – as this term is presented in the dominant legal lexicon – becomes the focus of analysis instead of the applicable statutory provisions. This failure to grasp the nuances inherent in such analysis is illustrated by presenting and examining the Court's analysis as it progresses.

After reframing the issue, the Court commences with a brief description of some cases which it describes as the leading authorities. One would expect the discussion to begin with *Gibbs v Messer*,⁶⁷ *Frazer v Walker*,⁶⁸ and *Hermanson v Saskatchewan*⁶⁹ as they all arose in land

⁶⁶ *CIBC Mortgages Inc*, *supra* note 6 at para 11.

⁶⁷ *Gibbs v Messer*, *supra* note 30.

⁶⁸ *Frazer v Walker*, *supra* note 31.

titles jurisdictions based on the original Australian model. The first two are the leading international land titles cases in which fraud and competing ownership claims were considered, and were decided respectively by the House of Lords and the Privy Council. Given their importance, a brief review of each is required.

In *Gibbs v Messer*,⁷⁰ the House of Lords concluded, and thereby overruled the decisions of the trial and appeal courts, that a mortgagee who had loaned money to a fraudster posing as a landowner was not entitled to compensation from the land titles office. As well, the House of Lords ordered that the mortgagee's interest was to be discharged from the real landowner's title.⁷¹ Consequently, registration did not protect the subsequently registered mortgagee who was left without any satisfactory remedy.

In *Frazer v Walker*,⁷² a land owner had lost his property to foreclosure because his spouse forged his name to a mortgage, and then failed to make payments. The landowner sought to have the title vested in his name, and the mortgage discharged from the title on the basis that he, as one of the owners, had not executed it. The Privy Council concluded he was not entitled to compensation from the land titles office. It also found that the forged mortgage was valid because it was registered on the title.⁷³ This is the decision on which the Court of Appeal in *Hermanson v Saskatchewan*⁷⁴ relied.

Instead of leading with these cases, the Court commences its presentation of legal principles and rules with a quotation contained in a British Columbia trial judgment, *Vancouver City Savings Credit Union v. Hu*.⁷⁵ The Court does not describe the fact situation facing the British Columbia Supreme Court; this decision is simply used as the vehicle from which to reproduce Lord Watson's famous statement in *Gibbs v Messer*.⁷⁶

⁶⁹ *Hermanson Appeal*, *supra* note 5.

⁷⁰ *Gibbs v Messer*, *supra* note 30.

⁷¹ *Ibid.*

⁷² *Frazer v Walker*, *supra* note 31.

⁷³ *Ibid.*

⁷⁴ *Hermanson Appeal*, *supra* note 5.

⁷⁵ *Vancouver City Savings Credit Union v. Hu* (2005), 31 RPR (4th) 309 at para 32 (BCSC), as cited in *CIBC Mortgages Inc.*, *supra* note 6 at para 14.

⁷⁶ *Gibbs v Messer*, *supra* note 30 at 254, quoted in *CIBC Mortgages Inc.*, *ibid* at para 14.

The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed or transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.⁷⁷

Nor does the Court provide any information regarding the statutory provisions in issue in *Gibbs v Messer* or for that matter, in *Vancouver City Savings Credit Union v Hu*. After Lord Watson's quote, the Court highlights the fact that the quote refers to "persons dealing with the registered proprietors,"⁷⁸ and then moves on. Noticeably the Court fails to refer to *Frazer v Walker*,⁷⁹ the decision that changed the law from that expressed by Lord Watson.

Instead of presenting these authorities, the Court devotes one sentence to the English authority of *Cooper v Vesey*,⁸⁰ writing: "*Gibbs v. Messer, supra*, also affirmed what was stated in *Cooper v. Vesey, supra*, that a forged mortgage is a nullity."⁸¹ This is equally troubling for a number of reasons.

First, the conclusion expressed in *Cooper v Vesey* contradicts the approach taken in Saskatchewan since the early 1920s. In the second paragraph of the 1962 *Manual of Law and Procedures, Saskatchewan Land Titles Offices*, Peter S Stewart, QC, then Master of Titles, writes:

Under the Torrens system, registration goes further and it is registration which gives operation to instruments. Section 66, sub-section ... (2) of the Saskatchewan Land Titles Act, 1960, reads as follows: 'every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.' In *Elford v. Elford* (1921) 1 W.W.R. 341 Mr. Justice Taylor said at page 346 that certain transfers were never validly executed and should never have been accepted by the Registrar of Land Titles, but that as the Registrar accepted the documents and registered them they

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Frazer v Walker, supra* note 31. Although the Court does not mention *Frazer v Walker* when it refers to *Gibbs v Messer*, the Court does discuss it later in conjunction with its analysis of *Hermanson v Saskatchewan*. See: *CIBC Mortgages Inc, supra* note 6 at para 20.

⁸⁰ *Cooper v Vesey*, [1882] 20 Ch D 611 (CA), cited in *CIBC Mortgages Inc, ibid* at paras 12, 15.

⁸¹ *CIBC Mortgages Inc, ibid* at para 15.

became operative according to the tenor and intent thereof when registered and thereupon transferred the lands therein mentioned not by virtue of the instrument but as directed by the statute.⁸²

This quote indicates the dominant practice in Saskatchewan before *The Land Titles Act, 2000* was proclaimed in force: that is, registration validated void instruments, regardless of whether they pertained to transfers or interests that encumbered titles.

For example, in *Elford v Elford*⁸³ a grantee of a power of attorney transferred titles to himself from his estranged spouse, even though the Power of Attorney did not expressly empower him to do so. This was fraud. However, the land titles office accidentally registered the transfers and the court concluded that, because the transfers had been registered, even though he had no authority to execute the documents in favour of himself, titles were to remain in the fraudster's name.⁸⁴ The provisions in the land titles legislation regarding registration were followed, not the common law principles regarding fraud.⁸⁵ This decision was reversed by the Supreme Court of Canada when it applied common law provisions instead of the statute,⁸⁶ but, as seen from Stewart's quote, land titles staff in Saskatchewan continued to apply the position taken by the trial judge. This position is contrary to the conclusion reached in *Cooper v Vesey*.⁸⁷

Cooper v Vesey is a decision of the English Court of Appeal. At the time, the Australian based land titles systems were much more rigid regarding the legal impact of registration than were the land titles systems derived from the English model. In such jurisdictions, registration was not as definitive. In the Australian model, the state essentially provided a "statutory warranty of title"⁸⁸ once it issued a Certificate of Title. This meant that a person's ownership of the title to a parcel of land could only be challenged in certain prescribed circumstances such as error by land titles staff, or fraud. With the English model, it was possible for a person not named as owner on a title to assert ownership of a parcel of land by means of quieting of titles

⁸² Stewart, *supra* note 65 at 13.

⁸³ *Elford v Elford*, [1922] 64 SCR 125 [*Elford SCC*].

⁸⁴ *Elford v Elford* (1921), 1 WWR 341 (SK KB).

⁸⁵ *Elford SCC*, *supra* note 74.

⁸⁶ *Ibid.*

⁸⁷ *Cooper v Vesey*, *supra* note 80.

⁸⁸ James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Toronto: Carswell, 1920) at 4 and 384, reprinted by Cornell University Libraries, 2007 as part of the Nabu Public Domain Reprints.

legislation and a resulting judicial decree of ownership.⁸⁹ This meant the title issued by the state could be overruled if someone else could prove he had a better ownership claim than the person listed on the title.

Another significant difference involved the relationship between registration and interests. In the Australian model, an interest gained priority over other interests once it was registered in the land titles system. In the English model, interests were registered, but their status and priorities between competing interests were governed by the contents of the instruments.⁹⁰ Perhaps these distinctions explain why the Saskatchewan Court of Appeal in *Hermanson*⁹¹ did not refer to *Cooper v Vesey*.

In spite of these distinctions in the effect attached to registration in the two types of land titles systems, in *CIBC Mortgages Inc* the Saskatchewan Court followed the authority based upon the English model. No explanation was provided regarding the different models, and why *Cooper v Vesey* applied in Saskatchewan. Referring to it was unnecessary and confusing for anyone who has read *Gibbs v Messer*, *Frazer v Walker*, and *Hermanson*.

The Court's analysis in *CIBC Mortgages Inc* then shifts from court decisions to an article produced for the Law Society of Upper Canada regarding the distinctions between immediate and deferred indefeasibility of title.⁹² Once again, there is very little explanation as to how it applies in Saskatchewan.

Then the Court attempts to ground the immediate versus deferred indefeasibility of title debate in statutory provisions. In so doing, the Court quotes provisions contained in Ontario's and British Columbia's legislation which support the theory of deferred indefeasibility of title.⁹³

⁸⁹ *Ibid* at 4.

⁹⁰ *Ibid* at 64-65.

⁹¹ *Hermanson Appeal*, *supra* note 5.

⁹² Sidney H Troister, "Fraud in Real Estate Transactions: The Effects and Remedies" *The Law Society of Upper Canada Special Lectures 2002, Real Property Law: Conquering the Complexities* (Toronto: The Law Society of Upper Canada, 2003) 529 at 537, cited in *CIBC Mortgages Inc*, *supra* note 6 at para 16. The debate regarding the superiority and application of immediate indefeasibility and deferred indefeasibility has been discussed widely in legal literature and therefore requires no significant analysis in this thesis. Briefly put, in immediate indefeasibility jurisdictions, a *bona fide* purchaser for value retains title to the land, while the deposed former owner is only entitled to monetary compensation. *Hermanson v Saskatchewan* is an example of case which utilized the immediate indefeasibility approach, based on the wording in the legislation. In deferred indefeasibility jurisdictions, a title based on fraud is not indefeasible while it is held in the name of the person who first benefits from the fraud, i.e., a good title cannot be based on a void instrument. The title only becomes indefeasible when it passes to the next purchaser.

⁹³ *CIBC Mortgages Inc*, *supra* note 6 at paras 17-18.

in these jurisdictions, registration does not act to cure registration of an instrument which is founded upon a void instrument. The Court also acknowledges that “[t]here is no similar provision in the Saskatchewan Act.”⁹⁴

Only then does the Court consider the theory of immediate indefeasibility adopted in *Hermanson*⁹⁵ and *Frazer v Walker*.⁹⁶ It does not repeat any statutory provisions considered in these judgments. It does not compare *Frazer v Walker* to *Gibbs v Messer*. The Court distinguishes *Hermanson*, writing that the “rectification powers of the registrar contained in the Act which were not applicable in this case.”⁹⁷ In two paragraphs the court summarizes these cases and then moves on to consider *In the Matter of Lorrie Risman*, an Ontario decision issued by Nancy Sills, the Deputy Director of Title for that province.⁹⁸

The Court seems persuaded by the Deputy Director’s observation that in Canada, “the only case to apply the doctrine of immediate indefeasibility was *Hermanson*.”⁹⁹ Ms Sills then qualifies her comment by admitting that “[d]ue to the difference in statutory provisions, it is not appropriate to apply *Frazer v Walker* or *Hermanson* in Ontario.”¹⁰⁰ However, a reader is left with the impression that deferred indefeasibility is a superior approach to adopt in such a dispute.

This implication is supported by the next paragraph wherein the Court observes:

A cursory review of the case law in the other western Canadian provinces does not disclose one case where a forged transfer or interest, forged meaning it did not emanate from the person who was the registered owner on title, upheld the forged interest.¹⁰¹

Only then does the Court examine provisions in *The Land Titles Act, 2000*.¹⁰² Among others, it reproduces sections 13(1), 23, 50, 54 and 84. It determines that “indefeasibility of title” is an incident of sections 13(1) and 23 without providing any significant support for this

⁹⁴ *Ibid* at para 18.

⁹⁵ *Hermanson Appeal*, *supra* note 5.

⁹⁶ *CIBC Mortgages Inc*, *supra* note 6 at paras 19-20.

⁹⁷ *Ibid* at para 19.

⁹⁸ *Ibid* at para 21, no citation provided in the judgment.

⁹⁹ *Ibid* at para 21.

¹⁰⁰ *Ibid* at para 21.

¹⁰¹ *Ibid* at para 22.

¹⁰² *The Land Titles Act, 2000*, *supra* note 50.

assertion.¹⁰³ It then analyzes the facts in the context of the legal rules it has presented, focusing its discussion on indefeasibility of title. In so doing, the Court never addresses the fact that section 54(3) which specifically pertains to interests may impliedly except the general statement made in section 23 regarding the scope of protection afforded in the legislation.¹⁰⁴

Through its failure to consider some of the nuances inherent in the statutory provisions, the Court's analysis is incomplete and provides fodder for Justice Egbert's admonition; in 2005 the Court overlooks some of the problems associated with treating the myth of indefeasibility of title as fact. There is very little comparison of the cases with the facts or with the previous or current statutory provisions. For example, the Court does not highlight the fact that the conclusiveness of an owner's title outlined in section 13 does not apply to interests¹⁰⁵ such as the mortgage in question.

Instead the Court writes that indefeasibility of title is "made an incident of registration"¹⁰⁶ in a Torrens System. "Incident" is defined as: "an event or occurrence ..., [as] a minor or detached event attracting general attention or noteworthy in some way ..., [and in law, as] a privilege, burden, etc., attaching to an obligation or right."¹⁰⁷ The Court's use of the word "incident" minimizes the importance attached to registration in Torrens' legislative schemes such as the one operating in Saskatchewan. Rather than a "detached event," the statute provides that it is registration that makes a person's title conclusive against all other individuals except those possessing: interests which are the subject of statutory exceptions; equitable interests; and registered interests recognized as capable of supporting registration within the legislative scheme.

Registration is the central feature of the legislation. Until an instrument such as a transfer is registered, the purchaser has no legal basis for claiming an interest in the land against third parties. The relationship is defined by contract prior to the registration of the instrument. However, once the transfer is registered, it is the title which governs and binds individuals.

¹⁰³ Sections 13(1) and 23 are reproduced in Chapter 3 above at 94 and 95 respectively.

¹⁰⁴ Driedger, *supra* note 47 at 106-107.

¹⁰⁵ *The Land Titles Act, 2000*, *supra* note 50 ss 13 and 54(3).

¹⁰⁶ *CIBC Mortgages Inc*, *supra* note 6 at para 28.

¹⁰⁷ *The Canadian Oxford Paperback Dictionary* (Don Mills Oxford University Press 2000) *sub verbo* "incident."

The Court does not seem to possess a nuanced understanding of this legal fact. This is demonstrated when it notes that “[o]nce registered, an instrument is no longer the source of title of the transferee but is replaced by the Certificate of Title, which subject to the exceptions contained in any particular land titles statute, becomes conclusive.”¹⁰⁸ In a Torrens System, the instrument is never conclusive proof of ownership or the source of an individual’s title: registration is.¹⁰⁹ If land is patented, legal ownership is not recognized until a title is issued by the land titles office. A title is only prepared following registration of a transfer or grant of letters patent. This is more than an “incident” of registration.

The Court relies upon sources from Ontario and British Columbia. From this, one infers that the statutory provisions are similar and that land titles systems are homogeneous, when they are not. James Edward Hogg determined that the English and Australian-based systems are very different, and that British Columbia is unique. Hogg found that out of the thirty-one jurisdictions operating land titles systems before 1920, essentially there were twenty-two different types of systems.¹¹⁰ Different jurisdictions have adopted very distinct statutory provisions, and care must be taken to compare the statutes when applying cases from different jurisdictions.¹¹¹ When a Court fails to do so, the reader is left with a misconception regarding the law, one which embraces the myth of indefeasibility of title. The distinctiveness of each jurisdiction’s statutory provisions may be lost in the adoption of precedents from a land titles system developed in a different jurisdiction.

Because it is not completely cognizant of these subtleties inherent in the concept of indefeasibility, the Court demonstrates a preference for the myth. It concludes that section 54(3) limits the concept of indefeasibility of title inferred from the legislative provisions, and holds that the statutory provision is not appropriate as a basis for determining the legal issue before it. It does not offer an explanation as to why indefeasibility of title trumps the express provision –

¹⁰⁸ *CIBC Mortgages Inc*, *supra* note 6 at para 28.

¹⁰⁹ *Stewart*, *supra* note 65 at 13.

¹¹⁰ *Hogg*, *supra* note 88 at 1-5.

¹¹¹ To consider some of the differences in the different land titles jurisdictions, especially differences between Saskatchewan, British Columbia and Ontario, see *Hogg*, *ibid* at 1-5, 11, 14, 63-65, 67-72, 82, 327-329, 333, 351-352.

particularly when the legislature chose not to codify the term in the legislation.¹¹² In a very complex area of law masquerading as a rational system, one myth has replaced another.¹¹³

In the end, the Court rightly dismisses CIBC Mortgages Inc's application to receive compensation from the Registrar of Titles.¹¹⁴ Unfortunately, the decision is not based upon section 54(3), but upon the common law:

On the facts in this matter, Trent Doerksen was the registered owner on title. CIBC took a mortgage interest, not from Trent Doerksen, the registered owner, but from a fraudster who impersonated Trent Doerksen. It did not take its interest from the registered owner, and therefore does not gain the benefit of the 'curtain' principle of the Torrens' system articulated in s. 23 of the Act. The result is the forged mortgage which it received from the fraudster is a nullity at common law and is unenforceable against the title. It is properly removable from title pursuant to s. 68 of the Act.¹¹⁵

This is the essence of subsection 54(3), yet the Court decided not to apply it. The instrument – the mortgage – was void because it was not executed by the real Trent Doerksen. Pursuant to the statute, registration did not validate it.

The Court's conclusion is correct, but its reasoning is not. Section 54(3) addressed the issue before the Court. Instead of applying it, the Court based its conclusion on the underlying preconception of indefeasibility of title with its associated mirror, curtain and insurance principles, as they have been applied in jurisdictions which have always followed the deferred indefeasibility model. This makes the judgment disjointed and unnecessarily complex. It also demonstrates what can happen when a lawyers and a Court accept a myth as fact, and begin analysis from a preconception that it exists, instead of the applicable statutory provisions.

¹¹² This is reminiscent of the past, when courts relied upon the notion of "transacting on the faith of the register" to resolve ownership disputes in land titles jurisdictions. In *Turta v Canadian Pacific Railway*, *supra* note 1, Justice Egbert deplores the tendency to rely on the expression "transacting on the faith of the register" when this concept is not embodied in the legislation.

¹¹³ Before "indefeasibility of title" became popular, lawyers and courts focused analysis on "transacting on the faith of the register." Roger Carter cautioned against this approach which also was not based on wording in a statute, writing: "If this writer's experience in the practice of law means anything, then it is probably true to say that – when it comes to problems of conveyancing, and advising clients, with respect to matters falling under Torrens System legislation – the average practitioner, as the years go on, tends to rely more and more blindly on the strength of the 'register'." See: Roger Carter, "Some Reflections on *The Land Titles Act* of Saskatchewan" (1965) 30 Sask B Rev 315 at 315 (HeinOnline), and the discussion regarding *Canadian Pacific Railway Company v Turta* (1954) SCR 427; [1954] 3 DLR 1; [1954] SCJ no 31 (SCC) in Chapter 1 above at 38-46.

¹¹⁴ *CIBC Mortgages Inc*, *supra* note 6 at para 34.

¹¹⁵ *Ibid* at para 33.

3. **ARNDT V FIRST GALESBURG NATIONAL BANK AND TRUST COMPANY**

*Arndt v First Galesburg National Bank and Trust Company*¹¹⁶ is the latest Saskatchewan case which interpreted provisions from *The Land Titles Act, 1978*.¹¹⁷ The Court of Queen’s Bench had to determine who had the better ownership claim when the registered owner had been dead for more than sixty years. The facts brought the case squarely within the ambit of “indefeasibility of title” and the relevant statutory provisions. In these circumstances one would expect that the registered owner, and persons claiming through him such as the defendants, would succeed in such an ownership claim. Yet in this case the court held otherwise and made a declaratory order that the Arndts held title to the land on the basis of abandonment.

The facts help to explain this unexpected result. On December 15, 1925, Arthur D Stearns of Galesburg, Illinois was registered as the owner of a half-section of uncultivated land located in south-eastern Saskatchewan.¹¹⁸ During his lifetime Stearns leased the land to Adolph Arndt, a local farmer.¹¹⁹ In 1930 Stearns and Arndt reached an agreement regarding the sale and purchase of the half section.¹²⁰ They agreed that Arndt would pay \$1,600 for the half section, paying for the land over time and executed an agreement for sale. In conjunction with doing so, Arndt paid \$50 towards the purchase price.¹²¹

In 1931, Stearns assigned Arndt’s payments to First Galesburg National Bank and Trust Company (“First Galesburg”).¹²² First Galesburg then sent a letter to Arndt informing him of the assignment,¹²³ and registered a caveat against the title to the land to protect its interest.¹²⁴ However, First Galesburg did not submit a copy of the agreement of sale or the assignment with its caveat, and, as noted by the trial judge, “No agreement for sale has been found nor produced.”¹²⁵ It was also noted that “[t]here are no bank records of any transaction and no

¹¹⁶ *Arndt v First Galesburg*, *supra* note 7.

¹¹⁷ *The Land Titles Act, 1978*, *supra* note 23.

¹¹⁸ *Arndt*, *supra* note 7 at para 4.

¹¹⁹ *Ibid* at para 7.

¹²⁰ *Ibid* at para 5.

¹²¹ *Ibid* at para 6.

¹²² *Ibid* at para 5.

¹²³ *Ibid* at para 6.

¹²⁴ *Ibid* at para 4.

¹²⁵ *Ibid* at para 6.

records with respect to whether any moneys were owed or ever paid under the agreement for sale. All bank records have been destroyed.”¹²⁶ This meant that there was “no evidence that any payment was ever made to the Stearns or to First Galesburg pursuant to the alleged agreement for sale.”¹²⁷

Arndt and his heirs used Stearns’ land from 1930 to 1998.¹²⁸ Starting in 1930 the Arndts began paying property taxes levied against the land by the rural municipality. They did not always do so promptly, but eventually taxes always were paid.¹²⁹ Until 1999 the rural municipality listed a member of the Arndt family as the land’s assessed owner.¹³⁰ Yet at all times, Arthur D Stearns was listed as the registered owner on the Certificate of Title granted by Land Titles.

Stearns died in 1935.¹³¹ He left all his property to his widow¹³² but he did not mention the Saskatchewan land in his will.¹³³ Mrs Stearns died intestate in 1938 and all her assets were transferred to their four surviving children.¹³⁴ Like her husband, her estate documents failed to mention the Saskatchewan land.¹³⁵

The “purchaser,” Arndt, died in 1939 and “letters of administration with respect to his estate were not applied for until 1952.”¹³⁶ In his Schedule of Assets filed with the Court, his widow only referred to land to which her deceased husband was the registered owner and failed to indicate that Arndt had any ownership interest in Stearns’ land.¹³⁷ Neither the Stearns nor the Arndts made any claim to the land in their respective estate documents.

At trial in 2001 the Court noted that Arndt’s beneficiaries:

¹²⁶ *Ibid* at para 24.

¹²⁷ *Ibid* at para 27.

¹²⁸ *Ibid* at para 9.

¹²⁹ Between 1942 and 1978, the rural municipality registered three separate tax liens against the title to Stearns’ land. Each one was later withdrawn upon payment of the tax arrears. *Ibid* at para 4.

¹³⁰ *Ibid* at para 8.

¹³¹ *Ibid* at para 12.

¹³² *Ibid* at para 13.

¹³³ *Ibid* at para 29.

¹³⁴ *Ibid* at para 17.

¹³⁵ *Ibid* at para 29.

¹³⁶ *Ibid* at para 25.

¹³⁷ *Ibid* at para 25.

contacted solicitors with respect to having a transfer of [Arndt's] lands registered in the name of ... [his widow]. There is no evidence that any steps were taken at that time to complete the matter nor was there any caveat filed against the title even though the Arndts allegedly had been in possession and farming the land since at least 1930.¹³⁸

From this it could be argued that when they sought letters of administration in 1952, the Arndts knew they did not own the land which they had been using for more than twenty years, and did not believe that Stearns had abandoned it.

Arndt's widow died in 1982. Once again, the Stearns land was not referred to in the list of assets filed with the court.¹³⁹ In fact, the Arndts took no action to assert that they owned Stearns' land until after another family – the Hockleys – stepped forward and located heirs with whom in 1998 they negotiated and executed a lease and a right of first refusal.¹⁴⁰

Once this happened, the Arndts sought a vesting order pursuant to section 87 of *The Land Titles Act*. Section 87 read:

A judge of the Court of Queen's Bench may, upon such notice as he deems fit or, where in his opinion the circumstances warrant, without notice:

- (a) make a vesting order and may direct the registrar to cancel the certificate of title to the lands affected and to issue a new certificate of title in the name of the person in whom by the order the lands are vested.¹⁴¹

The couple who had gone to the trouble and expense of locating Stearns' heirs – the Hockleys – defended on the basis of indefeasibility of title, and on the lack of documentary evidence of any agreement for sale or any payment.¹⁴²

Most likely the lawyers expected that the Hockleys would be successful in this action. First, abandonment is rarely used in conjunction with real property, and only then in conjunction with claims to incorporeal hereditaments.¹⁴³ Second, a Certificate of Title was granted to Arthur D Stearns in 1925. Arndt never registered his alleged interest against the title to the property.

¹³⁸ *Ibid* at para 25.

¹³⁹ *Ibid* at para 26.

¹⁴⁰ *Ibid* at para 26.

¹⁴¹ *The Land Titles Act, 1978, supra* note 23, s 87(a).

¹⁴² *Arndt v First Galesburg, supra* note 7 at para 29.

¹⁴³ A detailed discussion of abandonment is beyond the scope of this thesis. If a reader wants to learn more about the application of this doctrine at common law and in Saskatchewan, see: *Turner v Waterman* (1965), 54 DLR (2d) 737; (1965), 53 WWR 595 (SK QB) (available in CanLII), and the articles referred to at n 155 *infra*.

There was corollary evidence of the existence of an agreement for sale executed by Stearns and Arndt, but the agreement itself and evidence of any payments were not produced as evidence. In accordance with section 67, as against third parties such as the Hockleys the agreement was unenforceable.

The Arndts' legal arguments contradict the supremacy accorded to the dominant understanding of "indefeasibility of title" that the Certificate of Title is conclusive evidence of the information contained therein, subject to specific exceptions enumerated in statute. Statutory provisions support this: specifically, sections 67, 68, 71 and 213 support the Hockleys' position. If a Certificate of Title really is indefeasible, then one would have expected the defendants to be successful.

This is also supported by the fact that Saskatchewan does not recognize ownership claims based on adverse possession. Ever since 1913,¹⁴⁴ the statute has precluded a "squatter" from claiming to own land for which a title has already issued and which the "squatter" has possessed for a number of years. Section 71(2) of the former Act read:

After land has been brought under this Act no right, title or interest adverse to or in derogation of the title or of the right to possession of the registered owner shall be acquired, or be held to have been acquired since the nineteenth day of December, 1913, by the possession of another, and the right of the registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been impaired or affected by any such possession since the said date.¹⁴⁵

When someone else is in adverse possession of another's land, the rightful owner can bring an action to recover the land, because the rightful owner is the person named on the Certificate of Title. This person has a better claim to the real property than does any squatter. One would have expected the Court in *Arndt* to apply this section, and to refuse to grant the vesting order requested by the Arndts.

Nonetheless, the Court found that Mr Stearns had abandoned the land.

The Court began its analysis by considering *Turner v Waterman*,¹⁴⁶ an earlier Saskatchewan case which considered the same issue, and then rejected the abandonment

¹⁴⁴ *An Act to amend The Land Titles Act*, SS 1913, c 30 s 6.

¹⁴⁵ *The Land Titles Act, 1978*, *supra* note 23, s 71(2).

¹⁴⁶ *Turner v Waterman*, *supra* note 143, referred to in *Arndt v First Galesburg*, *supra* note 7 at para 32.

argument.¹⁴⁷ The Court quoted the paragraphs from *Turner* where it was determined that adverse possession and prescription are “inconsistent with indefeasibility of title.”¹⁴⁸ In *Arndt*, the Court also included a quotation from *Turner* which reads:

‘In *Hackworth v Baker*, [1936] 1 WWR 321 (Sask.), Turgeon, J.A. (as he then was) interpreted the effect of the various sections [regarding the effect of registration of title] . . . , at p. 332:

“Some of the cardinal principles of the Torrens registration system are embodied in these sections, and in one respect or another they are designed to do away with some of the rules of the old law of real property, and consequently with some of the difficulties and controversies to which the old rules gave rise. These sections establish: (1) That estates and interests pass upon the registration and not upon the execution of the instrument; exception being made only in the case of certain leasehold interests; (2) That priority dates from the time of registration and not from the time of execution; (3) That the registered owner, except in the case of his own fraud, holds his land free from all estates or interests not noted on the registrar, saving certain leasehold interests already mentioned, and subject to the reservations and incidents provided by the statute; (4) That possession by another shall not derogate from the registered owner’s right; (5) That a person taking a transfer from the registered owner shall not, except in the case of his own fraud, be affected by any notice given him of another’s equity or unregistered interest in the land; that further on this point, knowledge of such equity or unregistered interest shall not be considered a fraud; and it is expressly set out that this protection is to be given to the purchaser ‘any rule of law or equity to the contrary notwithstanding.’”¹⁴⁹

This quote sets out the cardinal features of the land titles system in Saskatchewan, most notably the importance attached to registration. The land titles systems developed to promote certainty of ownership.¹⁵⁰ This could only be achieved by reducing the importance attached to deeds executed by the parties to transactions and which remained in the possession of the landowner, making them easily susceptible to forgery and fraud.¹⁵¹ Once the land titles system

¹⁴⁷ *Ibid.*

¹⁴⁸ *Turner v Waterman*, *supra* note 143 at 602, quoted in *Arndt v First Galesburg*, *supra* note 7 at para 32.

¹⁴⁹ *Ibid* at 602-604, quoted in *Arndt v First Galesburg*, *supra* note 7 at para 32.

¹⁵⁰ Greg Taylor, *The Law of the Land: the Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 10.

¹⁵¹ Chapter 1 above at 9-13.

was better established and recognized, there was no longer a need to recognize adverse possession.¹⁵² Instead, registration was the most important feature of the legislative scheme.

However, the Court does not elaborate on these cardinal features. Instead, it again quotes from *Turner v Waterman*:

‘No student of our land titles system would seriously contend, I think, that a trespasser could not gain any title, possessory or legal, by effluxion of time as against the registered owner of the land ...’¹⁵³

....

‘However, in the event that evidence is available from which the court might reasonably infer that the land had, in fact, been paid for, or abandoned, I am prepared to consider the application ... as one for a vesting order under ... *The Land Titles Act, 1960*.’¹⁵⁴

Applying the doctrine of abandonment in a land titles jurisdiction ignores the importance attached to registration. At common law, abandonment is usually only available in disputes involving personal property or incorporeal hereditaments in real property such as easements or licences.¹⁵⁵ Even then, abandonment will only be established if two preconditions are present: the owner must give up possession and must demonstrate the intention that the owner no longer wants to retain or recover the property in question. Abandonment is not akin to a gift in that the owner does not choose who will receive and take control of the property; instead, the owner abandons control and has no intention to exclude others from it, thereby leaving it to be claimed by the first person who discovers it and takes it into his or her own possession.

¹⁵² Presumably Saskatchewan initially recognized adverse possession because land was granted to individuals and claimed by some settlers before the land titles system was adopted. These persons needed the opportunity to bring their land into the ambit of the legislation because it would have been prejudicial to do otherwise. By recognizing adverse possession, all persons who had acquired estates in land prior to the adoption of the land titles system in Saskatchewan in 1886 had an opportunity to obtain Certificates of Title.

¹⁵³ *Turner v Waterman*, *supra* note 143 at 602-604, quoted in *Arndt v First Galesburg*, *supra* note 7 at para 32.

¹⁵⁴ *Turner v Waterman*, *ibid* at 604, as quoted in *Arndt v First Galesburg*, *ibid* at para 33.

¹⁵⁵ There are no recent Canadian articles which consider abandonment claims in the context of interests in real property. However, the issue has been considered in the United States. See eg: James C Roberton, “Abandonment of Mineral Rights” (1969) 21 *Stan L Rev* 1227 at 1227-1228 (HeinOnline); Lior Jacob Strahilevitz, “The Right to Abandon” (2010) 158 *U Pa L Rev* 355 (HeinOnline); and Eduardo M Penalver, “The Illusory Right to Abandon” (2010) 109 *Mich L Rev* 191 (HeinOnline).

That said, there exists “a firmly established common law rule [that] provides that a corporeal interest in land cannot be abandoned.”¹⁵⁶ It is a rule predicated upon “the seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land.”¹⁵⁷

In *Arndt*, the Court neglected to consider that perhaps abandonment was not available, and even if it was, the facts do not support the requirements in the legal test. Specifically, there is no evidence that Stearns intended to leave the land for the first finder to claim possession. Had Stearns done so, he would have walked away from it without entering any contractual relationship. He would not have known who occupied it. Instead he left it in the possession of someone who was to make installment payments. Stearns even assigned these payments to a financial institution. Drawing an inference of abandonment enabled the Court to recognize the Arndts’ adverse possession of the land, thereby avoiding the statutory prohibition codified in section 71.

This judgment indicates that the Court was cognizant of the authorities which did not support the Arndts’ claims. For example, the Court quoted section 71 and commented on the prohibition against adverse possession.¹⁵⁸ As well, the Court referred to *Jones v McLean*,¹⁵⁹ a decision of the Manitoba Court of Appeal which provides that abandonment does not apply to land in a land titles jurisdiction. In it the Court wrote at page 252:

’I know of no principle of English law under which real estate can pass from one to another by “abandonment”. One man cannot abandon his property to another. The term is to [*sic*] [not] applicable to the transfer of property. A man may sell or give away his property to another but he clearly cannot “abandon” it to another.’¹⁶⁰

The Court in *Arndt* even acknowledged that “[t]he concept of abandonment has been discussed in different contexts but rarely in the context of real property.”¹⁶¹ The authorities did not support this approach.

¹⁵⁶ Robertson *ibid* at 1228.

¹⁵⁷ *Ibid* at 1228.

¹⁵⁸ *Arndt v First Galesburg*, *supra* note 7 at paras 38 and 44.

¹⁵⁹ *Jones v McLean*, [1931] 2 DLR 244, referred to in *Arndt v First Galesburg*, *supra* note 7 at para 43.

¹⁶⁰ *Ibid* at para 43.

¹⁶¹ *Arndt v First Galesburg*, *supra* note 7 at para 41.

To distinguish these authorities, the Court placed great weight on a justification suggested but not adopted in *Turner v Waterman*:¹⁶²

[t]he title to land should not be left in a state of limbo if it can be avoided. If abandonment is established then the purchaser would not be holding the land adverse to or in derogation of the registered owner, nor would the question of indefeasibility of title arise.” If the land had been partially paid for but abandoned it could be said that those interested had accepted what had been paid in full satisfaction, and hence the terms of the Agreement for Sale had been met. If, on the other hand, nothing can be proven to have been paid on the Agreement for Sale and there has been abandonment, this, I think, could well be construed as a grant of the legal title to the purchaser. These observations should not be taken as attempting to establish any fixed rule; each case must depend on its particular circumstances.

Although abandonment, sufficient to bring into play the Limitations Acts, did not at common law carry with it the right to legal title, I am of the opinion that in the event of abandonment being proven to the satisfaction of the Court, Section 86 is wide enough to empower the Court to make a vesting order [as to the proper owner of the land].¹⁶³

These comments can be contrasted with the more reasoned approach taken in 1966 by the Saskatchewan Court of Appeal in *Montreal Trust Company v Murphy*.¹⁶⁴ This case involved determination of ownership interests in land arising out of an agreement of sale of land entered into in 1918, where the purchaser made the initial payment and remained in possession until his death. Thereafter the defendant, his executrix, assumed management of the land.¹⁶⁵

The Court of Appeal began its analysis by quoting the statutory provision against ownership claims based on adverse possession,¹⁶⁶ and section 213 which provided that, except in certain enumerated situations such as fraud or error, a:

“certificate of title ... granted under this Act shall be conclusive evidence, so long as the same remains in force and uncanceled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.”¹⁶⁷

¹⁶² *Turner v Waterman*, *supra* note 143.

¹⁶³ *Ibid* at 606, quoted in *Arndt*, *supra* note 7 at para 34.

¹⁶⁴ *Montreal Trust Co v Murphy* (1966), 59 DLR (2d) 634; [1966] SJ no 225 (SK CA) (citing to QL).

¹⁶⁵ *Ibid* at para 2.

¹⁶⁶ *Ibid* at paras 9-10.

¹⁶⁷ *Ibid* at para 11.

It went on to apply *Smith v National Trust Co*, a decision in which the Supreme Court of Canada had interpreted a statutory prohibition against adverse possession in Manitoba's legislation to determine whether a person can acquire "a title by possession."¹⁶⁸ For Justice Duff, given the statutory prohibition, such an argument was "'untenable."¹⁶⁹

This argument also proved to be untenable to the Court of Appeal in *Murphy*. Writing for the Court, Justice Hall concluded:

A purchaser can only obtain title through the terms of his agreement for sale. This he cannot do if he himself is in default, unless performance by him has been waived by the vendor. This was, I think, the position quite properly taken by Davis, J., in *Turner v. Waterman*. His reference there to abandonment of the land by the vendors necessarily includes waiver of performance under the agreement for sale.

The title of the registered owner must under our *Land Titles Act* remain intact and indefeasible. It, therefore, cannot be extinguished by effluxion of time.¹⁷⁰

In so doing, Justice Hall qualified the position articulated in *Turner v Waterman*. Yet in *Arndt*, the Court ignored this qualification and the definitive statements made by appellate courts on this issue.

Instead of applying these authorities and the legislative provision which states that once issued a title is conclusive proof of ownership except in certain prescribed situations, the Court treated section 87 as definitive:

the principles of the Torrens System confirm the significance of the principle of "indefeasibility of title". As a general rule, possession by the Arndts for a period of 70 years or more does not impair the registered owner's claim to the land. The exception is s. 87 of *The Land Titles Act*.¹⁷¹

This approach allowed the Court to ignore the prohibition against adverse possession, and to apply abandonment to a dispute centering on the ownership of land.

Also troubling is the fact that the Court does not seem to accept that its power to make a declaratory order should be constrained by the Act's substantive provisions, or even by the

¹⁶⁸ *Ibid* at paras 12-13.

¹⁶⁹ *Smith v National Trust Co* (1912), 1 DLR 698; 45 SCR 618, 1 WWR 1122 at 710 (Duff J), quoted in *Montreal Trust Co v Murphy*, *ibid*.

¹⁷⁰ *Ibid* at paras 15-16.

¹⁷¹ *Arndt*, *supra* note 7 at para 39.

“principle” of indefeasibility of title. To apply such common law principles contradicts the underlying importance attached to registration in the statute, and indefeasibility of title. Given its dominance in legal discourse, one would expect the Court to apply “indefeasibility of title” to the facts, if it fails to base its decision upon the applicable statutory provisions. In *Arndt*, neither approach is adopted. This development is further evidence that “indefeasibility of title” is not as universally accepted or understood as it is portrayed in traditional legal research sources.

4. **HENDERSON V KNOGLER**

The recent case of *Henderson v Knogler*¹⁷² went to trial,¹⁷³ and then to appeal,¹⁷⁴ finally returning to the trial judge¹⁷⁵ to determine a procedural matter arising in the context of *The Planning and Development Act, 2007*.¹⁷⁶ The issue fell within the ambit of *The Land Titles Act, 2000*¹⁷⁷ and indefeasibility of title. However, the Courts virtually ignored the principles of real property law and relied upon contract law principles instead.

Ardel Henderson and his wife intended to subdivide and sell a portion of the lakefront lot they owned at Candle Lake, Saskatchewan. Their lot was abutted on the north by another titled lot, and the lands to the south were designated as a provincial forest and were vested in Her Majesty the Queen in right of the province. The Crown’s land had never been patented and as a result, title had never been raised. This meant there were a number of procedural steps that had to be accomplished before the Hendersons could proceed.

The Hendersons started the necessary process in the late 1990s, and the copy of the survey plan (Figure A)¹⁷⁸ illustrates the boundaries of their lot. It included all of Parcel C, and well as all the land located between the dashed line and the lake front located in Parcel K. The

¹⁷² *Henderson Appeal*, *supra* note 8.

¹⁷³ *Henderson Trial*, *supra* note 8.

¹⁷⁴ *Henderson Appeal*, *supra* note 8.

¹⁷⁵ *Henderson Chambers*, *supra* note 8.

¹⁷⁶ *The Planning and Development Act, 2007*, SS 2007, c P-13.2.

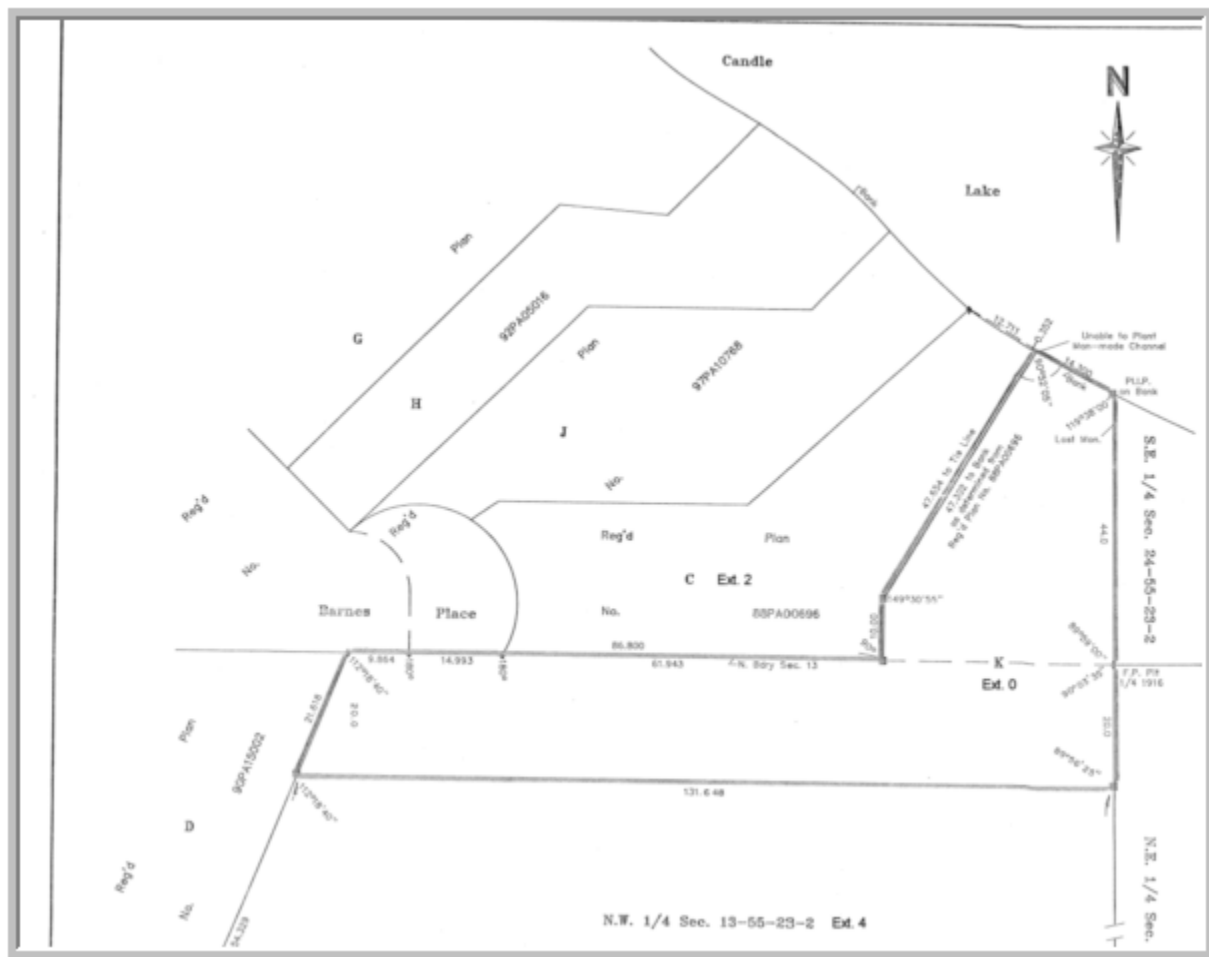
¹⁷⁷ *The Land Titles Act, 2000*, *supra* note 50.

¹⁷⁸ OC 115/2003, (2003) Sask Gaz II, 99 identifies the land as “All that portion of the North West Quarter Section 13, Township 55, Range 23, West of the 2nd Meridian, in the Resort Village of Candle Lake, Saskatchewan, as Shown on Plan 100259052.” All plans are searchable in the online database maintained by Information Services Corporation. Figure A is the portion of Plan 100259052 which indicates the land in dispute, and the dimensions of both lots.

submitted survey plan was approved by Order in Council,¹⁷⁹ but the subdivision had not been finalized and a new title had not been created for the portion of land the couple wished to retain, before Henderson advertised it for sale.

When they learned the lakefront property was for sale, the Knoglers arranged with Henderson to meet with him at the lot. Henderson showed them the survey pins indicating the portion of the lot that was not for sale. After an offer and counteroffer, ultimately they reached an agreement for the purchase and sale of the lot. This occurred before the subdivision had been completed, so these documents referenced Parcel C, the entire lot owned by Henderson.

Figure A
Survey Plan of the Hendersons' Subdivision



¹⁷⁹ *Ibid.*

However, one of the conditions involved the creation of an easement regarding the use of the marina located on the property which Henderson was selling; he and his wife needed to retain access to it. A copy of the survey plan was attached as a schedule to this easement which was executed by the parties. Thus, there was evidence that the parties intended that the Hendersons would retain the portion identified as Lot K on the survey plan. In spite of this, title to Henderson's entire lot registered in the names of the Knoglers.

When Henderson's lawyer learned of the error, he wrote to the Knoglers' lawyer asking if they would consent to signing all documentation necessary to correct the problem. The Knoglers refused. They took the position that they obtained title to the land identified in the purchase documents and in the transfer authorization, and that Henderson would have to assume responsibility for his error.

Arguably, the Knoglers' position was based on the traditional understanding of the doctrine of indefeasibility of title.¹⁸⁰ Henderson had signed the transfer authorization even though it did not refer to the correct parcel. Title to the entire property had registered in the Knoglers' names. Once this title was issued, a curtain dropped behind it, making all other instruments superfluous. The new title was a mirror of their proprietary interest, and could not be challenged by the disgruntled former owner. Constructive notice is not recognized in land titles statutes.¹⁸¹ Given that Henderson had not registered a miscellaneous interest against the title to the property regarding the proposed subdivision before the transaction was concluded, notice had not been provided in accordance with the statute or judicial authority.¹⁸²

Because of this, Henderson could not allege that the Knoglers had committed fraud in taking title to the entire parcel. The Knoglers were *bona fide* purchasers for value who did not have recognizable legal notice of Henderson's interest, because the statutory provisions regarding notice in the land titles legislation override the common law principle of constructive notice.¹⁸³ Had Henderson wanted to retain an interest in the property, he should have

¹⁸⁰ See Chapter 2 above.

¹⁸¹ Constructive notice is not recognized in land titles systems; one only has notice of an interest which has been registered. See: *Union Bank of Canada v Phillips and Boulter Waugh Limited* (1919), 68 SCR 385 (SCC) [*Boulter Waugh*].

¹⁸² *Ibid.*

¹⁸³ *Boulter Waugh, ibid.*

encumbered the title with a miscellaneous interest before he sold it. He failed to do so and as a result the property belonged to the Knoglers.

This defense was not considered because Henderson did not commence an action against the Knoglers pursuant to *The Land Titles Act, 2000*. Even though title had already registered in the Knoglers' names, the action was based upon a claim of mutual mistake. Both the vendor and the purchaser knew that the legal description contained in the contract documents and the transfer authorization did not match the parcel of land which was the subject matter of the contract.

Before this case, Saskatchewan Courts had not applied the contractual doctrine of "mutual mistake" in disputes of this nature. It is questionable whether it is appropriate to apply mutual mistake to the terms of a contract after title has been issued in the names of the purchaser. One of the cardinal features of a land titles system is that the registered title, and not the deed or instrument on which it is based, is the foundation of the person's ownership. There was no error *per se* on the title. Henderson executed the transfer authorization for Parcel C, and the Knoglers registered it. Title issued in their names, and the documents on which it was based were no longer determinative between the parties. As to ownership, the contents of the title governed.

In a regime such as Saskatchewan's, mutual mistake coupled with rectification only is appropriate before title has registered.¹⁸⁴ For example, such a claim may be made in conjunction with the remedy of specific performance.¹⁸⁵ Thus, if Henderson had realized the mistake before title had registered in the Knoglers' names, and the Knoglers refused to return the transfer authorization, assertions of mutual mistake and rectification, coupled with the remedy of specific performance, would have been effective. As well, such an approach would have avoided conflict with the substantive provisions in *The Land Titles Act, 2000* and with the principle of indefeasibility of title.

¹⁸⁴ *In re Land Titles Act; In re Pogue and Lane* (1951), 3 WWR (NS) 97 (AB KB). However, in British Columbia, with its unique approach to considering both the title and the deed on which it is based, its Supreme Court in *Peters v British Columbia (Registrar of Titles)*, [1999] BCJ no 3118 (QL) has concluded that "this court may, upon being satisfied that the parties were in complete agreement as to the terms of their agreement, that they had a common intention as to the manner in which title should be taken, and that the deed did not properly record their intention due to a common or mutual mistake, rectify the record." Examining the differences between British Columbia's and Saskatchewan's land titles regimes are beyond the scope of this thesis, but the distinction needs to be mentioned to ensure readers understand that careful consideration needs to accompany any decision to use such an approach in Saskatchewan.

¹⁸⁵ *Conkin and Conkin v Konschuh and Konschuh* (1984), 54 AR 326; [1984] AJ no 901 (AB QB).

Instead of considering the applicability of *The Land Titles Act, 2000*, the trial judge never referred to “indefeasibility of title” or any statutory provisions.¹⁸⁶ The Court of Appeal mentioned sections 13(1) and 23(1), referring to them as “the principles of indefeasibility,”¹⁸⁷ but concluded that “those provisions do not apply to the circumstances of this case.”¹⁸⁸ I respectfully disagree because this dispute focuses on the ownership of a parcel of land. Title had issued, and therefore the legislation should have been determinative.

The parties and the Court could have applied mutual mistake and upheld the statutory provisions expressing the fundamental principles of the land titles system of registration. Two reasons support this position. First, the first portion of subsection 13(4) provides:

No title defines or is proof of:

(a) the boundaries of a parcel; [or]

(b) the extent or area determined by the boundaries of a parcel.¹⁸⁹

With the provision, the Court was not bound to conclude that the Knoglers’ title was conclusive proof that they held title to all of Parcel C. The parties’ mutual mistake demonstrated otherwise. The Court could have acknowledged the fundamental principles of the statutory scheme and the “principle” of indefeasibility of title, and then used subsection 13(4) as a statutory exception to that scheme. This approach would have enabled the Court to avoid applying the principles codified in section 13(1) of *The Land Titles Act, 2000*.

In addition, it was open to the Court to apply equity to the facts because equitable estates and interests cannot be registered in the land titles scheme except by means of the notice provided by causing a caveat or miscellaneous interest to be endorsed on a title.¹⁹⁰ Given that the parties never intended the Knoglers to take title to all of Parcel C, Henderson may have argued that the Knoglers were holding the portion of Parcel C identified as Parcel K on the Survey Plan, as trustees. *The Land Titles Act, 2000* precludes any one from being registered “on title as trustee”¹⁹¹ but equitable estates are recognized in the land titles system.¹⁹² They just

¹⁸⁶ *Henderson Trial*, *supra* note 8.

¹⁸⁷ *Henderson Appeal*, *supra* note 8 at para 10.

¹⁸⁸ *Ibid.*

¹⁸⁹ *The Land Titles Act, 2000*, *supra* note 50 s 13(4).

¹⁹⁰ Carter, *supra* note 113.

¹⁹¹ *Ibid.*, s 35(1).

¹⁹² Carter, *supra* note 113.

cannot be registered in the same manner available for legal interests. Making a declaration that the Knoglers held title to a portion of Parcel C as trustees for Henderson would have allowed the courts to uphold the fundamental principles of the legislation and the “principle” of indefeasibility of title. This approach also would prevent the Knoglers from benefitting from the mutual mistake. Instead of this, the analysis regarding the land titles provisions and the principle of indefeasibility of title is missing.

CONCLUSION

These cases illustrate that indefeasibility of title, as it is used in the dominant legal lexicon, is not always followed or universally understood. Nor is Justice Egbert’s cautionary admonition from the trial judgment in *Turta v Canadian Pacific Railway*. In *Hermanson v Saskatchewan*,¹⁹³ Chief Justice Bayda adopted a very traditional approach favoured by Justice Egbert, one which focused on the statutory provisions and only considered cases from jurisdictions possessing similar statutory regimes when he needed to interpret a word (fraud) which was not defined in the legislation. This is the approach which one expects if “indefeasibility of title” exists, and if lawyers are cognizant of the fact that land titles systems are based upon a statute, and not simply upon the common law.

The final three cases are examples which demonstrate that indefeasibility of title is not always applied consistently; rather, it deserves to be treated as a myth, and not as a legal fact. In *CIBC Mortgages Inc.*,¹⁹⁴ the Court could have based its decision on section 54(3) of *The Land Titles Act, 2000*¹⁹⁵ but it appears as if this argument was not made. Consequently the Court employs the notion of “indefeasibility of title” as it has developed in Ontario and British Columbia. Since the statutes in these two jurisdictions have always provided that an interest’s priority against third parties is based on the instrument, in contrast to Saskatchewan’s former legislation which bases priority upon registration, the reliance on these authorities is troubling.

In *Arndt*,¹⁹⁶ the Court adopts the doctrine of abandonment which normally does not apply to ownership interests in land, in preference to the statutory provisions and “indefeasibility of title.” In so doing, the Court bases its decision on an assertion that the statute empowers it to

¹⁹³ *Hermanson Appeal*, *supra* note 5.

¹⁹⁴ *CIBC Mortgages Inc.*, *supra* note 6.

¹⁹⁵ *The Land Titles Act, 2000*, *supra* note 50.

¹⁹⁶ *Arndt v First Galesburg*, *supra* note 7.

vest ownership in a claimant, without any requirement to comply with the statute's substantive provisions. The Court ignores the fact that all land, once patented, is subject to the provisions contained in the land titles legislation. In this instance, a common law doctrine is preferred to the statutory regime.

In *Henderson v Knogler*,¹⁹⁷ the Court of Appeal concludes that indefeasibility of title does not apply to the dispute. Surprising, it could still rely on *The Land Titles Act, 2000* to make a vesting order regarding the ownership of the portion of the parcel which was not contemplated by either party in the sale. The Court does so upon the basis of the contract doctrine of mutual mistake, without considering the effect registration has upon a title. Given that land titles systems are statutory regimes designed to replace the complexity associated with common law conveyancing laws and practices,¹⁹⁸ a reader would expect the Court to apply and analyze the relevant statutory provisions. This does not happen, illustrating that “indefeasibility of title” is not universally applied or understood.

Is there an inverse relationship between our general acceptance of this principle and the degree of analysis present in court judgments? Arguably, the more we rely upon “indefeasibility of title” as an operating principle in real estate transactions, the less understanding of land titles systems and fundamental principles is demonstrated in litigation. From these recent cases, it can be concluded that indefeasibility of title is a myth, and therefore, in any dispute focusing on land ownership in Saskatchewan, caution is necessary.

¹⁹⁷ *Henderson Appeal*, *supra* note 8.

¹⁹⁸ Chapter 1 above.

**THE EMPEROR'S NEW CLOTHES:
THE MYTH OF INDEFEASIBILITY OF TITLE IN SASKATCHEWAN**

- CONCLUSION

When one thinks of fairy tales, often there is an expectation that the protagonist will face a number of trials but will ultimately triumph, with the last phrase in the story being “and they lived happily ever after.” If this thesis was such, then one might perceive the author as the wicked witch, and would expect that ultimately the reliance upon the doctrine of indefeasibility of title and its three principles would continue in the dominant legal lexicon, and that all would be well for the members of the public who own homes in this land titles jurisdiction. After all, the doctrine of “indefeasibility of title” is like a suit of clothes that protects them.

Alternatively, one might equate “living happily ever after” with turning away from using these terms, and relying upon the contents of *The Land Titles Act, 2000*,¹ instead. In this thesis it has been established that often the essence of the land titles system of registration is reduced to the notion of “indefeasibility of title,” even though this expression fails to encapsulate the complexities and contradictions contained within the framework legislation in Saskatchewan.² In order to assess the best outcome, it must be remembered that the theoretical legislative framework began with practical policy objectives which continue to shape the land titles system. Government has always had explicit reasons for enacting this structure. These policy reasons should shape the discourse regarding land titles systems and practices, and not simply reflect an expression promulgated by someone with only a theoretical knowledge of the Torrens System.³

The land titles system operating in Saskatchewan is modeled on the Torrens System which was adopted in South Australia.⁴ It is known that Torrens sought to protect purchasers and mortgagees in almost all instances and used the expression “indefeasibility of title.”⁵ It is also known that the assurance fund was adopted to encourage landowners to cease use of the deed registry system and to cause their lands to be enrolled in the land titles system.⁶ Torrens

¹ SS 2000, c L-5.1.

² For evidence of this see Chapters 2 and 3 above.

³ Chapter 1 above.

⁴ Chapter 1 above.

⁵ Chapter 1 above.

⁶ Chapter 1 above.

knew the system needed a “carrot” to encourage people familiar with another system to convert to his system of land titles. He had very ambitious policy goals which the legislature soon realized were not very practical:

Torrens’s main aim was to make the purchase of an interest in land simple, safer, and cheaper, by barring retrospective investigation of title; and for this purpose it would have been sufficient to make the register conclusive in favour of the bona fide applicant who first brought land under the Act and the bona fide purchaser who subsequently dealt on the faith of the register. However, in his original Act, Torrens went further and laid down a broader principle of indefeasibility. Since “dependent titles” were the source of evil, he not unnaturally adopted “independent titles” as the remedy; and, as he said, “indefeasibility of title created by registration follows of necessity as a corollary to the principle of independent title.” But this would give protection in some cases where it was not necessary for his purpose, or might even cause injustice. This is recognised in the original exceptions of fraud and error; and the additions to these exceptions made by later Acts indicate a view that there were other cases where the certificate should not prevail. It was not necessary to make the protection of a registered proprietor so absolute that a neighbour should be deprived of an easement merely because it had been omitted from the certificate; and, more important, it was not necessary that a proprietor should in all cases be entitled to take advantage of an error as to parcels at the expense of the true owner of land wrongly included in a certificate. A long list of exceptions made somewhat unreal the declaration that registration vested a new title in the person registered. More particularly, the recognition of the exception of wrong description meant that there was no guarantee of parcels, and made it difficult to treat the certificate as a new grant of the land described in it. Of course, it might still have been maintained that the certificate operated as a grant, but as a grant which in the specially excepted cases would be wholly or partially invalid. But this would have been an artificial conception, and it must have seemed better to abandon the original principle, and instead to treat the certificate of title as being what its very name imported, rather than as a grant or source of title. The certificate could then be made conclusive in cases where this was necessary to achieve the purpose of the legislation, and open to challenge and correction in other cases where it was not necessary to protect the registered proprietor at the expense of others with a better claim. The one case where absolute protection was necessary was the case of the bona fide purchaser for value dealing on the faith of the register, and accordingly the changes which further qualified the general principle of indefeasibility were accompanied by an elaboration of the provisions that made the certificate conclusive in favour of the bona fide purchaser for value.⁷

⁷ WN Harrison, “The Transformation of Torrens’s System into the Torrens System (1961-1964) 4 U Queensland LJ 125 at 129-130 (HeinOnline).

Consequently, it is apparent that South Australia's original land titles system was designed to protect purchasers and by implication, the mortgagees who used the land as collateral in exchange for loans, from the endemic weaknesses in the common law and in deed registry systems.⁸ This protection involved substantive changes to the law – certainty of ownership through a title as opposed to from the deeds which preceded the transfer in ownership – and practical and administrative matters. The process was designed to improve transfers, making them more efficient, ie, to simplify the transfer process and to thereby reduce the associated costs. This way, the underlying objective of protecting the purchaser and the mortgagee could be achieved.

Canada had similar policy objectives which shaped the land titles system in the North-West Territories. With the adoption of *The Dominion Lands Act*⁹ in 1872, Canada evidenced a commitment to having settlers on agricultural lands located within this region and Manitoba.¹⁰ For this to occur, a type of state machinery which could efficiently process the grants of land was needed. The Torrens System of land titles registration served this function.

With this goal in mind, the *Territories Real Property Act*¹¹ was assented to on June 2, 1886, and the new scheme was proclaimed in force effective January 1, 1887.¹² Its preamble explicitly stated the government's objectives in adopting this legislation, reading,

Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate proof thereof, and also to render dealings with land more simple and less expensive: Therefore Her Majesty ... declares and enacts as follows¹³

The government wanted to achieve two goals. First, it wanted “to give certainty to the title to estates in land,” meaning it wanted persons to be assured that the person named on the title in most instances was its owner. In keeping with this goal, registration accompanied by the issuance of a Certificate of Title was fundamentally important. This level of certainty would

⁸ Chapter 1 above.

⁹ *The Dominion Lands Act*, SC 1872 c 23.

¹⁰ Kirk N Lambrecht, *The Administration of Dominion Lands, 1870-1930* (Regina: Canadian Plains Research Center 1991) at 3-4.

¹¹ *The Territories Real Property Act*, SC 1886, c 26.

¹² Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) AT 115-116.

¹³ *The Territories Real Property Act*, *supra* note 11 at the Preamble.

encourage individuals to purchase land, and would cause lenders to be more likely to use land as collateral in exchange for making loans to settlers.

The government also wanted to simplify conveyancing practices and thereby make the transaction of acquiring and divesting oneself of real property more affordable. If practices were simplified so that a chain of lengthy and convoluted documents would no longer need to be reviewed in great detail, the transactions could be concluded in less time and at less cost. Whereas conveyancing in the common law was based on the “deed,” with its lack of standardized language,¹⁴ the Torrens System promulgated the use of forms in conveyancing transactions, for everything from a Certificate of Title to a transfer and a mortgage.¹⁵ Such standardized and concise forms were easy to understand, and this reduced conveyancing costs and the time required to complete the transaction.

These were the government’s initial policy goals. The preamble was dropped when the statutes were consolidated in 1887,¹⁶ but, even after Saskatchewan and Alberta became provinces and enacted their own land titles legislation based on the federal statute,¹⁷ these goals continued to be recognized. Even in the 1960s, at least one scholar continued to use the wording from the preamble.¹⁸ In the late 1970s another described the goals differently, in terms of their effect:

There are two deliberate fundamental elements in a Torrens system; one is administrative, and the other is legal. They are intimately related and together they constitute the strategy of the system. The administrative element is a comprehensive set of records maintained by the state disclosing all possible interests in any lands covered by the system. The legal element is the limitation of legal interests to those conferred by the state.¹⁹

The administrative mechanism of registration by the state produces a legal result – certainty of title ownership – while simplifying administrative processes, thereby reducing expenses and increasing the speed in which conveyancing transactions can be processed. One goal is administrative, and one is substantive.

¹⁴ Chapter 1 above.

¹⁵ Chapter 3 above.

¹⁶ *The Territories Real Property Act*, RSC 1886, c 51.

¹⁷ Taylor, *supra* note 12 at 129.

¹⁸ Even in 1965, these two goals were the focus of a journal article. See: Roger Carter, “Some Reflections on *The Land Titles Act of Saskatchewan*” (1965) 30 Sask B Rev 315.

¹⁹ Thomas W Mapp, *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System*, (Edmonton: The University of Alberta, 1978) at para 4.5.

In determining how to characterize the fundamental features of Saskatchewan's land titles system and whether indefeasibility of title is one such feature, it must be recognized that there always has existed a potential for tension between these two goals. If certainty of ownership of title – the substantive legal result – is the paramount objective, transactions may not be able to be processed quickly or cost effectively. For example, if the system's goal is to effect certainty of ownership of title in all instances, land titles staff must peruse every instrument in great detail prior to registration. Then government will be assured that the important details in the instrument – including the names of the parties and the legal description of the land – are identified correctly, and that the document has been properly executed. Doing so takes time.²⁰

If the paramount goal is simplifying conveyancing processes and reducing associated costs, certainty of ownership cannot be so absolute.²¹ Transactions can be processed very quickly, or ownership of title can be very certain; both goals cannot be achieved in equal measure. This inherent tension has been described by government personnel as follows:

A land titles conveyancing system should have two purposes. One is to provide security of ownership, that is, it should protect an owner against being deprived of ownership except by his or her own act or by the specific operation of a legal process such as expropriation or debt collection. The other purpose is to provide facility of transfer, that is, it should enable anyone, particularly a purchaser, to acquire ownership easily, quickly, cheaply and safely. Unfortunately, a measure designed to achieve one of these purposes is likely to militate against achieving the other.²²

In the former statutory regime,²³ certainty of title was preferred. Land titles staff took as much time as necessary to review instruments prior to registration, as their mandate was to reject instruments which were invalid.²⁴ For example, if land titles staff discovered that a mortgage

²⁰ Anecdotally, I started practicing real estate in 2000 and remember how long it took to complete transactions when *The Land Titles Act*, R.S.S. 1978 c L-5 was in effect. During the summer of 2001 it would take up to six weeks for the Regina Land Titles office to process residential real estate transactions. This was very frustrating for clients who were purchasing homes and paying late interest on closing because of a bottleneck in the system.

²¹ Before Saskatchewan adopted *The Land Titles Act, 2000*, *supra* note 1, interests were accorded the same status as transfers: once an interest was registered, it was enforceable against third parties, even if the instrument on which it was based was void *ab initio*. This is no longer the case, pursuant to section 54(3). For more discussion of this change, see Chapter 4 above at 111-124.

²² 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) at 6.

²³ Chapter 3 above at 70-88.

²⁴ *The Land Titles Act, 1978*, *supra* note 20 s 26(2).

failed to describe the land properly, it would not be registered. Depending on the cover letter, land titles staff would either reject the faulty instrument or, if the lawyer had asked to be contacted prior to rejection, the lawyer would be given the opportunity to correct the instrument to make it capable of sustaining registration.²⁵ This process ensured that certainty of ownership could be attained in a matter of weeks, which was a great improvement over the common law.

In the most recent Saskatchewan legislation, facility of transfer is now the chosen goal.²⁶ The instruments upon which interests are based are no longer reviewed when they are submitted for registration. If the instrument is invalid, registration does not cure the defect.²⁷ This is one reason why transactions usually are processed in less than three days.²⁸ It is important to acknowledge the primary policy goal, because it is this which shapes the form, content and interpretation of the legislation, and which acts as the benchmark to measure the appropriateness of “indefeasibility of title.”

There is another inherent tension in the policy goals of the land titles system. The system was adopted to protect settlers – persons acquiring land – and lenders who wanted to certainty of ownership before they would use land as collateral. The system was not designed to protect everyone equally. For example, a dispute always involves at least two parties with competing interests. In land disputes, there is one piece of land in issue and usually it cannot be divided equitably between the parties. Only one party can succeed in a claim of ownership of the title. With land, there is little room for compromise or divided success. This creates tension and nuance.

This underlying focus on the purchaser and by implication, the lender, is often hidden in the current discourse surrounding “indefeasibility of title.” Often it is treated as if it applies equally to vendors and purchasers. Mrs Hermanson discovered the problems with this type of reasoning. She was the legal owner who had been defrauded of her property. However, a *bona fide* purchaser for value was held to have the better ownership claim.²⁹ Similarly, the Hockleys

²⁵ Anecdotally, in 2001 I once submitted a mortgage that failed to describe the land properly. Given the contents of my cover letter, land titles staff contacted me and I went to the land titles office and hand wrote the missing information on the mortgage. Then it was processed and registered.

²⁶ Joint Land Titles Committee, *supra* note 22, as discussed in Chapter 3 above at 89.

²⁷ *The Land Titles Act, 2000 supra* note 1, Part XII, with special reference to s 54.

²⁸ <<http://www.isc.ca>>.

²⁹ *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)* (1986), 33 DLR (4th) 12; [1986] SJ No 728 (SK CA) [*Hermanson Appeal* citing to QL] discussed at Chapter 4 above at 103-110.

entered into a written lease containing a right of first refusal with one of the descendants of the owner named on the Certificate of Title. Their claim was defeated by the family who had maintained possession of the land for more than sixty years, initially through an agreement with the owner.³⁰ Both cases illustrate how a purchaser is favoured over a vendor or previous owner in this legislation.

However, this policy is not universally understood or applied; reliance on “indefeasibility of title” can adversely impact the public. Consider the Knoglers, the couple who purchased a lakefront lot at Candle Lake, Saskatchewan from Mr Henderson.³¹ Both the vendor and the purchasers knew that only a portion of the lot was to be sold, but the transfer for the entire parcel registered in the Knoglers’ names. Instead of recognizing that an issued title is not conclusive proof of the boundaries of the parcel,³² the Knoglers continue to act as if indefeasibility of title is all encompassing.³³

They incurred expenses: (a) for an application to lapse a miscellaneous interest which Mr Henderson caused to be registered against the title to the land;³⁴ for trial;³⁵ for an appeal;³⁶ and for a return to the trial judge because they were refusing to complete a procedural step required to effect the Court of Appeal’s judgment.³⁷ Had the Knoglers possessed a more nuanced understanding of “indefeasibility of title” shortly after they purchased the land from Mr Henderson, they may not have acted as if “technically the land”³⁸ was theirs, and adopted a less costly and time-consuming course of action. As it is, they illustrate how purchasers can incur expenses from relying upon “indefeasibility of title” as expressed in the dominant legal lexicon and as buttressed through reliance on land titles forms, with the accompanying failure to completely encapsulate the nuances inherent in the land titles scheme.

³⁰ *Arndt v First Galesburg National Bank and Trust Co*, 2001 SKQB 234 (available on CanLII) [*Arndt v First Galesburg*] discussed at Chapter 4 at 124-134.

³¹ *Henderson v Knogler*, 2010 SKCA 119 (available on CanLII) [*Henderson Appeal*], discussed more fully in Chapter 4 above at 134-139.

³² *The Land Titles Act, 2000*, *supra* note 1 s 13(4), quoted in Chapter 3 above at 96.

³³ *Henderson v Knogler*, 2011 SKQB 399 (available on CanLII) [*Henderson Chambers*].

³⁴ *Henderson v Knogler*, 2009 SKQB 96 at para 40 (available on CanLII) [*Henderson Trial*].

³⁵ *Ibid.*

³⁶ *Henderson Appeal*, *supra* note 31.

³⁷ *Henderson Chambers*, *supra* note 33.

³⁸ *Henderson Trial*, *supra* note 34 at para 40.

Indefeasibility of title is a myth masquerading as a legal fact, one which can harm the unwary. Twenty-five percent of all claims made against lawyers arise in real estate.³⁹ It is unclear if any can be attributed to lawyers' failure to understand the nuances of indefeasibility of title,⁴⁰ but when one considers the degree of complexity in this area, and how it increases through a less-than complete understanding of the realities of indefeasibility of title, this interpretation may be a factor in the proliferation of claims.⁴¹ Lawyers and judges do not always possess a nuanced understanding of this term,⁴² and reliance upon the three principles serves to obfuscate the legislation's substantive provisions and its goals.

Take the mirror principle. Lawyers are taught that in a land titles system predicated upon the Torrens model, the title is like a mirror which reflects all pertinent information.⁴³ Yet this image does not really capture the essence of the title. Some Canadian scholars critique this image on the basis that a mirror produces a reverse image of the object. They reject its use, and instead advocate that a photograph is more applicable.⁴⁴ While correct vis-à-vis the image created by this analogy, they neglect the fact that a title is not conclusive proof of items such as the boundaries of the parcel of land, or of the ownership of the beds of water bodies located within the parcel. Because of such deficiencies in information, one should not say that the title is like an ordinary mirror or photograph which reflects all of its essential elements. It does not.

The owner and the land are described on the title, but the image is hazy and may be distorted. If one wants an accurate or certain image, one cannot rely on what one sees but must ask questions. For example, in the former regime it would have been prudent to review the plan referred to in the legal description if one was purchasing land with a metes and bounds description. More generically, each title contains a statement to the effect that the estate is subject to statutory exceptions, which serves as a clue that one cannot rely solely on the

³⁹ Tom Schonhoffer, QC, CEO of The Saskatchewan Law Society, lecture to law students in Real Estate Transactions course at the University of Saskatchewan, College of Law, 19 January 2011.

⁴⁰ This is another issue which deserves greater examination but which is beyond the scope of this thesis.

⁴¹ No research currently exists to support this assertion. However, this assertion could serve as a hypothesis for an interdisciplinary study between a lawyer and a sociologist, which is beyond the scope of the research for this thesis.

⁴² Contrast the positions taken by Lawyer 1 and Lawyer 2 with Lawyer 3 as presented in Chapter 2 at 48 n 2.

⁴³ Chapter 2 above.

⁴⁴ Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 472-473; Bruce H Ziff, Jeremy deBeer, Douglas C Harris and Margaret McCallum, *A Property Law Reader: Cases, Questions, and Commentary* 2nd ed (Toronto: Thomson Canada, 2008) at 980.

information in the document. On a title, there is some basic information from which to draw inferences, and which can guide a careful viewer who seeks to determine if more information is required to obtain a clear and certain image.

Referring to the curtain principle may also confuse: it is portrayed as if it is drawn, but in Saskatchewan, the curtain remains half-open. A title is conclusive proof of ownership of a surface parcel; in this circumstance the curtain is drawn. Yet until a mineral title is certified, the window of ownership remains wide open, and all instruments back to the grant must be reviewed to reach a conclusion as to who has the best ownership claim. The documents behind the title – or curtain – are vitally important. This means the ownership information on such a title is uncertain.

It is similar if a water body is contained within the boundaries of a parcel of land. Because water bodies are vested in the Crown without any obligation for them to be titled, they remain statutory exceptions to ownership. *The Provincial Lands Act*⁴⁵ and *The Saskatchewan Watershed Authority Act, 2005*⁴⁶ and the grant need to be consulted before one can make a conclusive determination as to the ownership of the beds and shores.⁴⁷ When such a water-body is present, even if the title indicates that the parcel contains 160 acres, the owner cannot rely on the curtain to claim the water-body is included. Once again, the curtain remains open. This is the effect of the statutory exceptions.

In Chapters 1 and 3, it has been established that the “insurance principle” does not capture the intent of the compensation provisions in the legislation.⁴⁸ Because compensation from the Registrar of Titles is only available in limited circumstances,⁴⁹ referring to this as a

⁴⁵ *The Provincial Lands Act*, RSS 1978 c P-31 ss 10 and 12. Section 12 begins by stating that “Where provincial lands bordering on a lake, river, stream or other body of water are disposed of by the Crown, then, in the absence of an express provision in the disposition to the contrary, the bed of such lake, river, stream or body of water shall not pass to the person otherwise acquiring the lands, and the disposition shall be construed accordingly and not in accordance with the rules of the common law.”

⁴⁶ *The Saskatchewan Watershed Authority Act, 2005* SS 2005 c S-35.03 s 39(1)(a)(i) prohibits the Crown from granting “any lands or . . . any estate in lands in terms that vest in the grantee any exclusive or other property or interest in, or any exclusive right or privilege with respect to any river, stream, watercourse, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh or other water body.”

⁴⁷ Chapter 3 above.

⁴⁸ Chapter 2 above and chapter 3 above.

⁴⁹ Chapter 3 above.

principle is misleading. One Australian commentator succinctly summarized the problems inherent in referring to this as a principle:

It is said that the assurance fund warrants or guarantees the title against losses which may flow from the operation of the system of title by registration. In such cases we have a paradox: the principle of “indefeasibility” is replaced by that of “guarantee” – the one gives security against deprivation, while the other assumes the possibility of such deprivation and grants financial assistance if it occurs. The existence of this principle is a further limitation upon the case advanced for the claim of “indefeasibility”. In addition, difficulty of access to the assurance fund in most jurisdictions belies the claim that it is a “principle” of title by registration that loss should be met from such a fund. Large accumulations of moneys in the many funds (in Australia, England and Wales, for example) support this contention. Many titles have been held to be bad upon the basis of the indefeasibility of someone else’s title, but few claims have ever succeeded against the assurance fund to make good the losses. Then, there are jurisdictions where no fund exists, yet there is registration of title: Germany, Austria and Israel. This supposed “principle” is exploded.⁵⁰

Given that these constructs have come to dominate the legal discourse regarding land titles issues, it is not surprising to find statements such as this in court decisions:

The integrity of the land titles system in Saskatchewan has long depended on the fundamental principle of indefeasibility of title. A party intending to obtain an interest in land in Saskatchewan is entitled to rely on the certificate of title being correct and conclusively representing all interests in the land without having to look behind the title to determine if there are any unregistered interests. This principle has often been referred to as the ‘curtain’ principle of the Torrens system. This principle is absolute and is subject only to statutory exceptions or the effects fraudulent activities.⁵¹

With this type of approach, very little attention is given to the statutory exceptions or to the contents of the legislation. Land titles systems are treated as homogenous, when in reality the systems are distinct.⁵² “Indefeasibility of title” makes real property law seem settled and simplistic, which may help to explain why land titles issues have so infrequently been the subject of journal articles in recent years.⁵³ The misunderstanding which results may further exacerbate the collective reliance upon these terms. A way

⁵⁰ R Stein, “The Principles, Aims and Hopes” of Title by Registration (1985) 9 Adel L Rev 267 at 274.

⁵¹ *Brick v Modus Resources Ltd*, 2007 SKQB 111 (available on CanLII) at para 19, quoted in Chapter 2 above at 65.

⁵² Chapter 1 above at 23-25 and Chapter 4 above at 111-124.

⁵³ Chapter 2 above at 55-60.

needs to be found to change this situation and to create more awareness of the complexities inherent in Saskatchewan's land titles system.

The land titles scheme is predicated upon a statute and the intentions of the legislature, not common law and the interpretation of judges. In this milieu, the language contained in the statute should be preferred over a legal construct. "Indefeasibility of title" and the three principles contradict the explicit policy goals espoused in the legislation and therefore should not be used as the basis for interpreting the substantive statutory provisions. This term was not included in South Australia's first land titles statute.⁵⁴ Closer to home, Saskatchewan has been much the same: in the succession of statutes in Saskatchewan's first land titles regime, and in Saskatchewan's new Act which was adopted in 2001, "indefeasibility of title" and the three principles have never been explicitly mentioned.⁵⁵

Even when the province adopted new legislation to support a modern, computer-based land titles system in which purchasers continue to benefit from the statutory protections, Saskatchewan chose not to include these terms which dominant real property law discourse.⁵⁶ "Indefeasibility of title" and the three principles do not favour purchasers or mortgagees; without a nuanced understanding of the actual scheme, it appears as if existing land owners receive the same benefits as to purchasers. The statutory scheme suggests otherwise. By excluding these terms, it may be concluded that government implicitly acknowledged that these descriptions are not accurate reflections of its policy agenda.

If lawyers use the language of the statute instead of reducing debate to discussions of indefeasibility, the limitations and nuances inherent in the system become more apparent. "Indefeasibility of title" and the three principles make it seem as if the land titles legislation provides broader protection than is available. If lawyers cease relying upon these expressions and instead use the language of the statute, they will possess better comprehension of the ambit of the legislation and the protections it provides to their clients in specific and enumerated circumstances.

Examples have been provided as to the results which occur when the terms are preferred to the contents of the legislation. This fact is illustrated in the discussions regarding *Arndt v*

⁵⁴ Chapter 1 above.

⁵⁵ Chapter 3 above.

⁵⁶ Chapter 2 above.

First Galesburg National Bank and Trust Co, CIBC Mortgages Inc v Saskatchewan (Registrar of Titles), and *Knogler v Henderson*.⁵⁷ In each of these cases, the conclusion reached by the Court was either not supported by the contents of *The Land Titles Act*, or the court focused on the common law conception of “indefeasibility of title” as espoused in the dominant legal lexicon and largely ignored the applicable statutory provision which addressed the issue before it.

It seems as if there has always been tension between the use of aids and legal principles which are not codified in the legislation, and the contents of land titles legislation. Certainly the courts appear to have grappled with this issue. Thus, in *Fels v Knowles*⁵⁸ the New Zealand Court of Appeal was compelled to write,

The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law.⁵⁹

This same tension is evident when the Supreme Court of Canada in *Union Bank of Canada v Phillips*⁶⁰ debated the concept of notice and whether the Saskatchewan land titles provision or the common law interpretation should apply. Chief Justice Davies quoted the applicable provision and then concluded that the statutory provision should be preferred to an equitable principle, writing that:

the object and purpose of this section ... was to lay down a different rule which should govern in cases coming within its ambit, and unless we are prepared to ignore the section altogether or fritter away its language and meaning, we must hold that ... these equitable rules established by the authorities, however just and equitable they may seem to be under ordinary circumstances, are not applicable to cases coming within [the applicable] section ... of “The Land Titles Act.”⁶¹

This statement was not an aberration, as in the same case Justice Idington reached the same conclusion that the wording of the statutory provision must be applied. Only he expressed it in stronger words:

I cannot, however, see how such [equitable] doctrines can be maintained in such cases as in view of the express language of the legislature ...

⁵⁷ Chapter 4 above.

⁵⁸ *Fels v Knowles* (1896), 26 NZ Rep 604 at 620, quoted with approval by Chief Justice Davies in *Union Bank of Canada v Phillips and Boulter Waugh Limited* (1919) 58 SCR 385 (*Boulter Waugh* citing to QL).

⁵⁹ *Fels v Knowles*, *ibid*.

⁶⁰ *Boulter Waugh*, *supra* note 58.

⁶¹ *Ibid* at 387.

It seems impossible that the proper effect can be given to that section unless we try to appreciate what the legislature was about.

Clearly it was not satisfied with the results of the law as settled by judicial expressions and decisions, and had determined upon the adoption of a system of registration as a basis of ownership of land a means of settling the order of priority of claims into or out of any such ownership when once registered under the Act in question.

In doing so it cast upon those acquiring any such ownership or claim to any interest therein burdens, perhaps previously unknown, in the way of diligence in order to protect the rights so acquired by observing the provisions of the Act in that regard under penalty of losing ownership or priority of claim save in the case of fraud on the part of those obtaining the priority, which the Act seems clearly to contemplate as possible even with notice or knowledge unless springing from that conveyed by means of registration of a caveat....

But the steps necessary to secure such benefits must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way that statute provides.

It cannot be made available in any other way.⁶²

The Supreme Court recognized that the statutory regime was preeminent, and that it must be followed even contrary to long-established equitable principles.

It is ironic that in the case credited with the popularization of “indefeasibility of title,” *Canadian Pacific Railway v Turta*,⁶³ the judge who used this expression the most⁶⁴ simply tried to use it as an adjunct to assist in his task of statutory interpretation. Justice Egbert did not start from the preconception⁶⁵ that the statute contained the principle of indefeasibility of title, or that its provisions needed to be interpreted in accordance with this concept.⁶⁶ Instead he asserted:

Keeping in mind the purpose and intent of the Act ..., I fail to see how it is possible for a court to import into these protective clauses words which are not there, and to attach to them another condition or exception which the legislature did not see fit to mention.⁶⁷

⁶² *Ibid* at 392-393.

⁶³ *Canadian Pacific Railway Company v Turta* (1954) SCR 427; [1954] 3 DLR 1; [1954] SCJ no 31 at 9 n 14 (SCC) [*Turta* SCC citing to QL].

⁶⁴ Chapter 1 above at 38-46.

⁶⁵ Harrison, *supra* note 7 at 125-126.

⁶⁶ Chapter 1 above at 38-46.

⁶⁷ *Turta v Canadian Pacific Railway Company* (1952), 5 WWR (NS) 529; [1952] AJ no 21 (QL) (Alta QB) at para 147 [*Turta Trial* citing to QL].

Such an approach would better serve the public, because lawyers would be forced to read the statute instead of relying upon “principles” and forms, and would thereby gain greater comprehension of what actually is a very complex system. “Indefeasibility of title” and the three principles are not adequate for describing it, and should therefore be used sparingly, if at all.

“Indefeasibility of title” as it has come to be understood in the dominant legal discourse is a myth which obfuscates the Saskatchewan government’s policy objectives for operating a land titles system. As evidenced by the survey of cases in Chapter 2 and the more in-depth analysis of a few recent cases in Chapter 4, these concepts are misunderstood by many lawyers and by the public, and this has the potential to inflict harm on homeowners. The Legislature has chosen not to adopt “indefeasibility of title” in the statutory provisions, and used the expression “conclusive proof of ownership” instead. This policy decision should be respected. Doing so would result in greater clarity and would promote understanding of the nuances inherent in Saskatchewan’s land titles scheme. The time has come for the emperor to take off his new suit and start wearing his old clothes. They may be frayed, but at least they are visible to all. If this occurs, this “story” may deserve the classic, fairy tale, ending.