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## Introducing Conditional Immediate Indefeasibility: Section 170(1) of the *Land Titles Act*

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### Legislation commented on:

[Land Titles Act](#), RSA 2000, c L-4, s 170(1), as amended by the [Land Titles Amendment Act, 2008](#), SA 2008, c 22, s 9.

The amendments to the *Land Titles Act* that were introduced by the *Land Titles Amendment Act, 2008* included one substantive amendment and that was an amendment to section 170, a provision about indefeasibility of title. Little attention has been paid to this amendment; although it is now four years old, the changes it effected, and the amendment's potential consequences for real estate practice, appear to have been overlooked. On its face, the substantive amendment says that the registered title of a bona fide purchaser or mortgagee is only indefeasible if that party used all reasonable efforts to confirm that the person from whom they took their interest was not an identity thief. It appears to implement a theory of conditional immediate indefeasibility, which would be a significant change to basic principles of our Torrens-style land titles system — if it is effective. However, because the 2008 amending statute changed section 170 in isolation and left intact all of the other provisions in the *Land Titles Act* that confer immediate indefeasibility on purchasers and mortgagees, it is not clear that the amendment will do what it purports to do.

This lengthy comment proceeds as follows. First I set out section 170 and its 2008 amendment and discuss what that rather obscure provision means in the context of other *Land Titles Act* provisions dealing with indefeasibility and the concept of indefeasibility itself. Next I provide a summary of the theories of immediate and deferred indefeasibility and the practical differences made on the implementation of each theory. Then I discuss indefeasibility in Alberta prior to the 2008 amendment and which theory is likely implemented here. I then turn to the reasons behind the amendment to section 170 — the mischief it apparently aimed at — so far as these can be discerned from the public record. This is followed by a look at the changes to indefeasibility of title that the 2008 amendment may have made, using three simple hypotheticals. Next I discuss my doubts about whether the amendment to section 170 is likely to be effective in making those changes to indefeasibility and the reasons for my doubts. I then look at current conveyancing practices relevant to the new requirement in section 170 and the changes to real estate practice that the 2008 amendment might require. I conclude with some brief remarks on the folly of tinkering with one of three fundamental principles underlying a complex land titling system and thereby introducing unpredictability into an area of law generally accepted as requiring certainty.

## A. Section 170 in Context

Section 170 is in the part of the *Land Titles Act* that deals with “Assurance Fees,” i.e., compensation for losses caused by errors by the Registrar and for the deprivation of an interest in land. Assurance fees are charged to fund an Assurance Fund, a user-pay fund set up by section 164 of the *Land Titles Act* and section 1 of the *Tariff of Fees Regulation*, Alta Reg 120/2000.

Section 170 had been virtually unchanged for more than one hundred years: see section 106 of the *Land Titles Act*, SA 1906, c 24. Then, in 2008, section 170 became subsection 170(1) and the legislature added a requirement that purchasers and mortgagees make “all reasonable efforts to confirm that the transferor or mortgagor is the registered owner of the land” if they wanted the protection otherwise offered by the section. Section 170(1), with the 2008 addition underlined, now reads as follows.

### *Protection of bona fide purchasers and mortgagees*

170(1) Nothing in this Act is to be so interpreted as to leave subject to action for recovery of damages, or to action of ejectment, or to deprivation of land in respect of which the purchaser or mortgagee is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act on the plea that the purchaser’s transferor or the mortgagee’s mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription as mentioned in section 183(1)(e), if the purchaser or mortgagee has made all reasonable efforts to confirm that the transferor or mortgagor is the registered owner of the land.

Section 170 is only one of several *Land Titles Act* provisions dealing with indefeasibility, the hallmark of a Torrens system of land registration. In a Torrens land registration system, the state establishes a register of titles to land and guarantees that the person named in that register as the owner of a parcel of land has an indefeasible title, subject only to the mortgages and other encumbrances registered against that title and to a limited number of enumerated statutory exceptions. In the famous Privy Council decision in *Frazer v Walker*, [1967] 1 AC 569 (PC) at 580-81, indefeasibility is described as “...a convenient description of the immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.” An indefeasible title or registered interest in land is one that cannot be defeated, voided, annulled, set aside or forfeited.

Three principles underlie a Torrens system and combine to create indefeasibility:

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 [aka assurance] principle' under which the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. (Marcia Neave, “Indefeasibility of Title in the Canadian Context” (1976) 26 *University of Toronto Law Journal* 173 at 174)

Sections 60, 62 and 183 of the *Land Titles Act* are the most important indefeasibility provisions. Section 60 provides that the owner of land shall hold it free and clear of all encumbrances or interests that are not endorsed on the title (i.e., the mirror principle), but recognizes three exceptions: fraud in which the owner has participated or colluded, exceptions implied by section 61, and a claim under a prior certificate of title. Section 62 is the state's guarantee of title, providing that every certificate of title granted under the Act "is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate..." Section 62 also recognizes exceptions: fraud in which the owner has participated or colluded, prior certificate of title, the exceptions listed in section 61, and misdescription. Section 183(1) is the most important section for our purposes. It first sets out a rule, namely, that "[n]o action of ejectment or other action for the recovery of any land for which a certificate of title has been granted lies or shall be sustained against the owner." It then lists a number of exceptions, situations in which actions for ejectment and other actions for the recovery of land do lie against the owner. That list includes the usual exceptions for fraud, prior certificate of title, section 61 exceptions, and misdescription. Section 183(2) confirms this rule-plus-exceptions structure and the indefeasibility of an owner's title by providing: "In any case, other than one mentioned in subsection (1), the production of the certificate of title or a certified copy of it is an absolute bar and estoppel to any such action against the person named in the certificate of title as owner or lessee of the land described in it."

Section 170(1) must be read in the context of these other indefeasibility provisions. It begins with "Nothing in this Act is to be so interpreted...", so it is put forward as an aid to the interpretation of other provisions in the Act. The Act is not to be interpreted in such a way "... as to leave subject to action for recovery of damages, or to action of ejectment, or to deprivation of land in respect of which the purchaser or mortgagee is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act..." This part of the provision describes an immunity, to put it in Hohfeldian terms. If a person is a bona fide purchaser or mortgagee for value of an interest in land for which they are registered as owner, then they have an immunity, i.e., their entitlements cannot be changed by others: "An immunity is one's freedom from the legal power or "control" of another..." (Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 27 *Yale Law Journal* 28). In the case of section 170(1), a purchaser or mortgagee's property rights and other entitlements cannot be affected or destroyed by others once the purchaser's title is registered or the mortgagee's interest is registered on title. If a person does not have an immunity, then they have its opposite, a liability, and others can change the purchaser's or mortgagee's property rights. Section 170(1) continues on to provide that this immunity that purchasers and mortgagees enjoy is good against "the plea that the purchaser's transferor or the mortgagee's mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error..." So purchasers and mortgagees enjoy immunity from claims that they acquired their property rights from fraudsters. This recognition of an immunity is followed by one exception — "except in the case of misdescription as mentioned in section 183(1)(e)" — which need not concern us. Then it is followed by the 2008 amendment, which is a condition precedent, making the immunity only available "if the purchaser or mortgagee has made all reasonable efforts to confirm that the transferor or mortgagor is the registered owner of the land." But remember section 170(1) begins with "Nothing in this Act is to be so interpreted..." So it is other provisions in the Act that are not to be interpreted so as to make purchasers and mortgagees liable to claims that they received their title through fraud or error if the condition precedent of "reasonable efforts" is fulfilled.

To summarize, section 170(1) seemingly purports to state that, if the condition precedent of “reasonable efforts” is fulfilled, purchasers and mortgagee can enjoy the immunity granted by other *Land Titles Act* provisions, such as section 183(2), so that their registered title or interest in land is indefeasible even if they acquired that title or interest from a fraudster or in error.

## **B. Immediate or Deferred Indefeasibility**

A key question that arises under a Torrens land title system is: when does a title that is otherwise impeachable become indefeasible? In other words, at what point does the state guarantee of an indefeasible title or registered interest in land that is the hallmark of a Torrens system attach and a liability becomes an immunity?

Indefeasibility is either immediate or deferred. A title is immediately indefeasible if a bona fide purchaser for value buys property from a fraudster and yet obtains a good title upon registration. Under the deferred indefeasibility approach, a title to property is impeachable until that title is registered in the name of a bona fide purchaser for value who takes from the bona fide purchaser for value who dealt with the fraudster, i.e., there must be an intermediate innocent party.

The differences between the common law position and the contrasting theories of immediate indefeasibility and deferred indefeasibility under land titles legislation are well summarized in *Lawrence v Maple Trust Company*, 2007 ONCA 74 at paras 14 - 23.

- At common law, under the *nemo dat quod non habet* rule (literally "no one gives what he doesn't have"), only the true owner of land can grant an interest in, or charge on, the land and that all transactions arising from fraud are void. A person cannot pass better title than he or she had. A title to an interest in land that was obtained through fraud could therefore never form the root of a good and valid claim to the land. The common law protects original owners.
- Under the immediate indefeasibility theory, a land titles system creates a system of title by registration that is designed to protect innocent parties such as purchasers and lenders who rely on the land titles register. Once a void instrument is registered, its defects are cured and it is effective to give good title even if acquired by fraud. As a result, the interest of a party acting in good faith without notice of the fraud is immediately indefeasible on its registration if it takes from the person that the register showed to be the registered owner, even if that person committed fraud.
- Under the deferred indefeasibility theory, there are three classes of parties: the original owner; the intermediate owner, who is the person who dealt with the fraudster; and, the deferred owner, a party acting in good faith without notice of the fraud who takes from the intermediate owner. Only a deferred owner defeats the original owner's title. The registration of a void instrument does not cure its defects, and so registration does not give good title. Loss falls on the intermediate owner – the taker from the fraudster – because the intermediate owner had an opportunity to investigate the transaction and avoid the fraud, whereas the deferred owner did not.

I argue that Alberta's *Land Titles Act* provided for immediate indefeasibility, at least prior to 2008, and that the amendments to section 170 appear to change that to a conditional immediate indefeasibility theory.

### C. Indefeasibility in Alberta Pre-2008

Which of these three theories applies depends on whether there is land titles legislation in force in the province to oust the common law position and, if so, exactly what the statute says. It is difficult to look to other jurisdictions for answers unless the legislation in another jurisdiction is almost identical to that in Alberta. So, for example, the Ontario Court of Appeal decided in *Lawrence v Maple Trust Company* that Ontario is a deferred indefeasibility province, but that tells us nothing about the position in Alberta. In *Lawrence v Maple Trust Company*, the resolution of the issue depended on the effect to be given to section 155 of the *Land Titles Act*, RSO 1990, c L.5, which basically retained the common law *nemo dat* principle as the default position by stating that “[s]ubject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.” Alberta’s legislation has nothing similar to Ontario’s section 155.

The Saskatchewan case of *Registrar of Regina Land Registration Dist. v Hermanson et al.*, [1987] 1 WWR 439 (Sask CA), on the other hand, is relevant to Alberta. Saskatchewan’s legislation at the time *Hermanson* was decided was virtually identical to that of Alberta, in part because both inherited the same land titles legislation when they became provinces in 1905. *Hermanson* recognized that legislation made indefeasibility of title a fundamental principle of the Torrens system of land registration. Chief Justice Bayda followed the Privy Council decision from New Zealand in *Frazer v Walker*, [1967] 1 AC 569 (PC) to conclude that “‘it is in fact the registration and not its antecedents which vests and divests title’ and that the statute conferred immediate indefeasibility on a bona fide purchaser for value.”

Although the issue has not been specifically addressed in Alberta, following *Hermanson* the consensus has been that Alberta was most probably an immediate indefeasibility jurisdiction. Indeed, the 2008 amendment to section 170 of the *Land Titles Act* seems to accept immediate indefeasibility as the rule in Alberta. It says that a person can obtain a title or a mortgage through fraud (i.e., from a fraudster) and still have an indefeasible title.

### D. Why Amend Section 170 of the *Land Titles Act*?

The 2008 amendment to section 170 is a response to mortgage fraud. The Government of Alberta established the Advisory Committee on Mortgage Fraud in the spring of 2005 to review a report of the Minister of Government Services’ Expert Panel and formulate recommendations to address the then growing incidence of mortgage fraud in Alberta. Among the nine strategies identified by the Expert Panel to combat mortgage fraud was: “Amend the Land Titles Act and associated Regulations, and standardize the practices and policies of the Land Titles Office.” In the meantime, between the report of the Expert Panel and the establishment of the Advisory Committee, a Mortgage Fraud Prevention Task Group had been formed by the real estate industry to develop education and training programs and best practices for industry members.

The Advisory Committee’s Final Report of November 14, 2005 is available from the Legislative Assembly Library [here](#). That Report noted (at 19) that the Land Titles Office is affected primarily by fraud-for-profit activities, at least two of which involved mortgage fraud:

- the fraudulent transfer of title that is then mortgaged, frequently involving impersonation and identity theft; and

- the use of “straw buyers” - phony loan applicants who use their good credit to obtain a mortgage, then transfer title and have the new non-qualifying loan applicant assume the mortgage. Frequently, the persons assuming the mortgage are unaware that the mortgage value has been inflated in the process.

The Advisory Committee discussed six suggestions to address the role of Land Titles in the mortgage fraud process. Only one of those was close to the amendment actually made to section 170, and that was the suggestion (at 20):

That the Land Titles Act be amended to provide that the Assurance Fund protects only those lenders dealing with the true owner. This would require purchasers to ensure that they are dealing with the person named on the certificate of title. This “deferred indefeasibility” system is in place in British Columbia and Ontario.

However, there was no consensus and the Advisory Committee believed that more consultation was required to address this and other potential amendments to the *Land Titles Act*.

I do not know what happened after that Report, whether there was more consultation, or why section 170 was singled out to bear the burden of protecting “only those lenders dealing with the true owner.” In particular I do not know why all of the concern about mortgage fraud and the practice of lenders led to an amendment that affects purchasers as well as lenders.

Alberta was not, of course, the only jurisdiction whose Torrens land titles system was affected by mortgage fraud. Most recently, the New Zealand Law Commission released its [Report on the Review of the Land Transfer Act 1952](#) (July 2012). It recommended new legislation that retains the essentials of a Torrens system of land registration but introduces some changes to deal with mortgage fraud and other matters. The draft New Zealand [Land Transfer Bill](#) includes, in the proposed Clause 11, a duty for lenders to take reasonable steps to check the identity of would-be borrowers, and a power for a court, in cases of clear injustice, to order correction of the register where a registered owner has lost their home through fraud. The Law Commission acknowledges these are “significant” policy changes. Clause 11 is considerably more comprehensive than the amendment to section 170 of the Alberta statute. It sets standards for what amounts to reasonable steps to verify the identity of a mortgagor; makes it a quasi-criminal offence for a mortgagee to fail to advise the Registrar of the steps taken to verify identity and to produce the material relied on when asked to do so by the Registrar; compels lenders to keep their records for 10 years; and explicitly states that failing to take reasonable steps creates an exception to indefeasibility. There are also appropriate cross-references with other clauses in the proposed bill.

### **E. Indefeasibility in Alberta Post-2008: Three Hypotheticals**

As already mentioned, I think the 2008 amendment to section 170 creates conditional immediate indefeasibility. This becomes clearest if we consider a few hypotheticals.

#### *Scenario 1: The fraudulent “purchaser”/mortgagor*

Suppose that O owns her home free and clear of all encumbrances. Suppose that a fraudster, F, forged O’s signature on a transfer of land, registered that transfer, used that new title to obtain a mortgage from a financial institution, B Co., which did not participate in the fraud, and then F absconded with the money. Let us assume that B Co., though acting bona fide (i.e., with good faith, with honesty), did not make “all reasonable efforts” to confirm that its mortgagor, F, was

the registered owner of the land. If they had, they would have found out that F was indeed the registered owner of the land — the registered owner through fraud, but the registered owner nonetheless.

What can O, the defrauded person, the original owner, do?

Before the amendment to section 170, the original owner, O, would have been able to have their title restored, but it would have been encumbered by the new B Co. mortgage. The title in the name of the fraudster, F, is defeasible under sections 60, 62 and 183(1)(d) of the *Land Titles Act* because those sections state that fraud in which the owner participated or colluded is an exception to indefeasibility. But under the immediate indefeasibility theory, B Co.'s mortgage becomes indefeasible on registration against title. B Co. took from the person that the Land Titles Office register showed to be the registered owner and their mortgage cannot be impeached. But O should be able to sue the Registrar for the money from the Assurance Fund necessary to pay out that mortgage under section 168(b), which provides:

168. Any person . . . (b) who is deprived of any land or encumbrance or of an estate or interest in any land or encumbrance . . . (ii) by the registration of another person as owner of the land or encumbrance . . . and who by this Act is barred from bringing an action for the recovery of the land or encumbrance or interest in the land or encumbrance, may bring an action against the Registrar for the recovery of damages.

Because of section 170 and the other indefeasibility provisions, O could not have sued B Co. for money or an unencumbered title. The fact that the B Co. acquired its title from a fraudster did not expose B Co. to a lawsuit by the original owner, O.

Does anything change in this scenario because of the 2008 amendment to section 170? The answer appears to be yes, if section 170 is effective. The original owner, O, can still defeat the title of the fraudster, F, and get title to her home back in her name. But can she recover the money to pay off the B Co. mortgage from the Registrar and the Assurance Fund? The 2008 amendment to section 170 appears to leave B Co. liable to an action for the “deprivation of land,” i.e., to the loss of their mortgage, because it is only protected if it made all reasonable efforts to confirm that F was the registered owner of the land, and they did not do so. If B Co. is liable because they failed to fulfill the condition precedent to immunity, then perhaps O cannot recover the money to pay out B Co.'s mortgage by suing the Registrar under section 168 because she is no longer “barred from bringing an action for the recovery of the land.” But what action could O bring against B Co, with whom she has no privity? What is the nature of her cause of action? It is one thing to say that the *Land Titles Act* does not bar O from bringing an action to recover her land from B Co., but can O sue B Co. to recover the interest in land that B Co. was given by F? None of the typical “real” actions to recover possession, such as an action for ejectment, seem to be apropos. Could a declaratory action to quiet title be brought? Assuming that O could bring an action to clear B Co.'s mortgage off her title, the financial loss for F's fraud would have been shifted from the Assurance Fund to a financial institution which acted bona fide. In such a case, B Co. probably could not recover from the Assurance Fund, even though section 168 was not amended when section 170 was, because it is at least arguable they were deprived of their mortgage by F's fraud and their own negligence, and not by any of the events listed in section 168 as triggering the right to bring an action against the Registrar.

### *Scenario 2: The fraudulent mortgagor*

In this scenario, let us assume once again, for simplicity's sake, that O owns her home free and clear of all encumbrances. This time suppose that the fraudster, F, pretends to be O, and walks into a financial institution, B Co., with false identification documents in order to take out a mortgage on the property. Once that mortgage is registered and the money paid to our identify thief, F, vanishes. Months later, after several mortgage payments are missed, B Co. forecloses and the fraud is discovered. Once again, let us assume that B Co., though acting bona fide, did not make "all reasonable efforts" to confirm that the person they were taking the mortgage from was the registered owner of the land. In this scenario, had B Co. made "all reasonable efforts," perhaps it would have discovered the identity theft.

What can O, the original owner, do? She has not lost title to her home in this scenario, but she does have a mortgage registered against her title and the mortgagee, B Co., is foreclosing.

As was the case in the first scenario, before the amendment to section 170, under the immediate indefeasibility theory, B Co.'s mortgage would be immediately indefeasible on registration. Its mortgage could not be impeached. But O should be able to sue the Registrar for the money necessary to pay out that mortgage under section 168(b) because she cannot sue B Co. to get rid of that mortgage because of sections 183 and 170.

Does anything change in this second scenario because of the 2008 amendment to section 170? Once again the answer appears to be yes, if section 170 is effective. The 2008 amendment to section 170 appears to leave B Co. liable to an action for the "deprivation of land", i.e., to the loss of their mortgage, because B Co. is only protected if it made all reasonable efforts to confirm that F was the registered owner of the land, and they did not do so. If B Co. is liable because they failed to fulfill the condition precedent to immunity, then perhaps O cannot recover the money to pay out B Co.'s mortgage by suing the Registrar under section 168 because she is no longer "barred from bringing an action for the recovery of the land." The question then becomes: can O sue B Co.? And, if not, can she bring herself within section 168?

### *Scenario 3: The fraudulent "owner"*

In this scenario, let us assume that the fraudster, F, pretends to be O, the person who owns their home free and clear of all encumbrances, but not for the purpose of obtaining the proceeds of a mortgage. Let us assume F pretends to be the owner in order to sell the property to a wealthy and unsuspecting purchaser, P, in order to abscond with the purchase price. F would forge O's signature on a transfer of land to the unsuspecting P and, once the transfer was registered, F would take the money and run. Again, let us assume that P, though acting bona fide, did not make "all reasonable efforts" to confirm that F was the registered owner of the land.

Can O, the original owner, get her home back?

Before the amendment to section 170, O would not have succeeded in getting title to her home back into her name and she would have had to move out — that is exactly what a Torrens system does. The bona fide purchaser for value, P, would have acquired an indefeasible title under sections 60, 62 and 183(1)(d) of the *Land Titles Act* and the theory of immediate indefeasibility. All O could have done was sue the absconding F and, in his stead, the Registrar under section 168(b) for the value of her home. A cannot sue P.



Does anything change in this scenario because of the 2008 amendment to section 170? Once again, I think it does, if section 170 is effective. If we assume that P did not make “all reasonable efforts to confirm that the transferor . . . is the registered owner of the land” that the amendment requires, then P is “subject to action of ejectment, or to deprivation of the land.” O can defeat P’s title and get title to her home back in her name. Can the hapless P recover his purchase money from the Assurance Fund under section 168? He probably could not, even though section 168 was not amended when section 170 was, because it is at least arguable he was deprived of his title by F’s fraud and his failure to fulfill the condition precedent to immunity, and not by any of the events listed in section 168.

#### 4) Summary

Looking at how the amendment to section 170 might work in practice makes clear why I have characterized the amendment as making indefeasibility conditional, i.e., contingent on the purchaser or mortgagee fulfilling the condition precedent to immunity, i.e., making all reasonable efforts to confirm that the transferor or mortgagor is the registered owner of the land. And I think the hypotheticals also suggest that the amendments are a way to shift the losses caused by fraud from the Assurance Fund to bona fide purchasers and mortgagees for value. Perhaps that is a laudable goal, but is the cost of changing the behaviour of purchasers and mortgagees an unacceptably high cost to a Torrens system? And is the 2008 amendment the right way to try to effect a policy change to indefeasibility?

#### F. Is Section 170 Effective?

If section 170 purports to make indefeasibility contingent, can it be effective without amendments to sections 60, 62 and 183 — the fundamental indefeasibility and its exceptions provisions? What is the effect of amending section 170, an interpretive provision, in isolation?

In the hypothetical fraudulent purchaser scenario, I stated that the 2008 amendment to section 170 *appears* to leave the financial institution open to an action for the “deprivation of land,” i.e., to the loss of their mortgage, because they are only protected if they made all reasonable efforts to confirm that the mortgagor was the registered owner of the land, and they did not do so. xx But section 183(1) of the *Land Titles Act*, which is in the Remedial Proceedings part of the Act, very clearly sets out only four exceptions to an owner’s indefeasible title — and a mortgagee is an owner of a mortgage and thus an “owner” under sections 1(p) and (r) — and lack of “all reasonable efforts” is not one of those exceptions. Fraud is, but our financial institution acted bona fides, i.e., without fraud. And section 183(2) is clear that unless you can bring yourself within one of the exceptions in section 183(1), “the production of the certificate of title or a certified copy of it is an absolute bar and estoppel to any [action of ejectment or other action for the recovery of any land] against the person named in the certificate of title as owner or lessee of the land described in it.” Section 62 is to the same effect.

What effect can be given to section 170(1) when it appears to be contradicted by sections 183 and 62? Sections 183 and 62 very clearly provide immunity unless one of the exceptions to indefeasibility they list applies. Can they really be interpreted to — following section 170’s “Nothing in this Act is to be so interpreted ...” wording — to withhold that immunity if section 170(1)’s condition precedent is not fulfilled?

The assurance principle is one of the three foundational principles of a Torrens land titles system. Changing one of the fundamental principles underlying a Torrens system is not that simple; they

are not embodied in just one section. The reforms recommended by the New Zealand Law Commission and described earlier illustrate this complexity.

I should probably note that the alternative to characterizing the amendment to section 170 as creating conditional immediate indefeasibility is to characterize it as adding another exception to indefeasibility. If this is how the amendment is interpreted, it seems to me that it has almost no chance of being effective. The exceptions are clearly listed in sections 60, 62 and 183 (and the fraud exception is also in section 203). I do not see how it can plausibly be argued that those exceptions can be added to by tacking on a “by the way” clause to the end of a section in the part of the Act dealing with the Assurance Fund.

## **G. Implications for Real Estate Practice**

Many purchaser and mortgagees will act through lawyers. It is those lawyers who have to make “all reasonable efforts” to confirm that the transferor or mortgagor is the registered owner of the land so their client can have the protection of section 170. And it is to those lawyers that purchasers and financial institutions will look for compensation if they are deprived of their interest in land without recourse to the Assurance Fund because all reasonable efforts were not made.

Consider again the three hypotheticals set out above, focusing on the role of the lawyer for the mortgagee or purchaser:

### *Scenario 1: The fraudulent “purchaser”/mortgagor*

In this hypothetical, the fraudster, F, forged the signature of the owner, O, on a transfer, registered the transfer and then got a mortgage as the registered owner. It is the financial institution, B Co., which will lose its mortgage if it did not make all reasonable efforts to confirm that F was the registered owner of the land (and if the 2008 amendments are effective). Here, if B Co. or its lawyer does make such efforts, they will confirm that F was the registered owner of the land. The amendment would therefore fail to achieve its purpose of preventing mortgage fraud.

### *Scenario 2: The fraudulent mortgagor*

In this hypothetical, the fraudster, F, merely pretended to be the registered owner, O, using false identification. The financial institution, B Co., will lose its mortgage if it did not make all reasonable efforts to confirm that the mortgagor, F, was the registered owner of the land (and if the 2008 amendment is effective). And in this instance — unlike scenario 1 — F is not the registered owner, but instead an identity thief. As I understand it, the amendment to section 170 was enacted to change the behaviour of financial institutions in exactly this type of case, forcing them to adopt better practices when they initially agree to make the loan. And the amendment should have achieved this behaviour change. Can the mortgagee pass along their obligations to outside counsel? And what would constitute “all reasonable efforts” by a lawyer to verify that the non-client was the mortgagor?

### *Scenario 3: The fraudulent “owner”*

In this hypothetical, the fraudster, F, pretended to be the owner, O, for the purposes of selling the house to P. It is P who will lose his new home and his purchase money if he did not make all reasonable efforts to confirm that F was the registered owner of the land (and if the 2008 amendments are effective). And it is P’s lawyer who will have to make the reasonable efforts required of section 170 in order to protect P, their client. Assuming F is self-represented, how does P’s lawyer meet the section 170 condition precedent?

#### *1) “All reasonable efforts”*

The first question is: what are “all reasonable efforts by the purchaser or mortgagee to confirm that the transferor or mortgagor is the registered owner of the land?” I am not aware of any cases considering section 170 since the 2008 amendments came into effect. Neither am I aware of any changes in conveyancing practices as a result of those amendments. Changes have occurred as result of the work of the industry and government mortgage fraud committees, discussed above, but not because of the 2008 amendment per se.

Nonetheless, there are new, uniform and national “best practices” for combatting money laundering, terrorist financing, and mortgage fraud that probably provide the standard for “all reasonable efforts” for lawyers. [Rules 118.1 to 118.10](#) of the Rules of the Law Society of Alberta, on “[Client Identification and Verification](#),” were approved by the Benchers in April 2008, and came into effect at the end of that year. They were based on the “[Model Rule on Client Identification and Verification](#)” developed by the Federation of Law Societies of Canada in 2008 as part of a national initiative to fight fraud.

Basically, those rules require a lawyer retained by a client to obtain and record basic contact information for that client: full name, residential and/or business address and telephone number, occupation or type of business. When the legal services that a lawyer is retained to provide include receiving, paying or transferring money, then a lawyer must verify their client’s identify using reliable, independent source documents, data or information. There are many details, including examples of acceptable documentation.

Even though these are national, law society approved standards, and they likely amount to “all reasonable efforts,” more could be done. Certainly lawyers’ insurers want more done to prevent fraud. For example, the Lawyers' Professional Indemnity Company (LAWPRO), the Law Society of Upper Canada’s provider of professional liability insurance and title insurance, suggests lawyers should be “[Digging Deeper](#)” to take steps to cross-check and verify information provided by the client, steps such as cross-checking names, addresses, and phone numbers of the client and other people/entities involved in the matter on Google and other search engines; doing reverse searches on phone numbers; looking up addresses using Street View in Google Maps; calling the entity making the payment or loan and asking if they are aware of the transaction; etc. Are those activities part of “all reasonable efforts”?

#### *(2) All reasonable efforts to verify whose identity?*

The main problem with the Law Society Rules is that they are all about a lawyer identifying and verifying the identity of their *own* client. The 2008 amendment to section 170 of the *Land Titles Act* require clients or their lawyers to verify the identity of the client on the *other side* of the transaction — the other side’s client. A purchaser or mortgagee gets the protection of section 170

“if the purchaser or mortgagee has made all reasonable efforts to confirm that *the transferor or mortgagor* is the registered owner of the land.”

Does the 2001 [Western Law Societies' Conveyancing Protocol \(Alberta\)](#) help? After all, one of the goals of the Protocol is to “preserve the integrity of the Torrens land registration system in western Canada” by “enhanced standards of conveyancing practice.” However, the Protocol, like the new Law Society Rules, has lawyers checking their own client, not the other side’s client.

Under Part D of the Protocol, the seller’s lawyer is required to conduct a title search and to “inquire as to the full legal name ... of each Seller [and] verify that the Seller is named as the registered owner of the land.” There is no relevant undertaking in the Trust Conditions or Sample Letter to Buyer’s Lawyer, and nothing saying the purchaser’s lawyer can rely on the seller’s lawyer to have completed these investigations. There is nothing about making all reasonable efforts in compliance with section 170 — assuming that the purchaser’s lawyer could rely on the seller’s lawyer doing so.

Under Part E of the Protocol, when a purchaser’s lawyer is issuing a Solicitor’s Opinion, the lawyer has to confirm the title information and the full legal name and marital status of each purchaser/mortgagor. There is nothing in Part D or the Solicitor’s Opinion to Mortgagee that would allow a mortgagee to rely on the purchaser’s lawyer complying with section 170 except the general conclusion that “the mortgage can now be funded and the funds disbursed.” Perhaps something like the following qualification should be noted on Solicitor’s Opinion to Mortgagee: “If the Seller’s lawyer made all reasonable efforts to confirm that the mortgagor is the registered owner of the land and if I am entitled to rely on the seller’s lawyer doing that work.” But what mortgagee would accept such an opinion?

There is an odd disjunction between the requirements of the amended section 170(1) and the Law Society’s Client Identification and Verification Rules and conveyancing practice. The best practices do not appear to satisfy the *Land Titles Act* requirement that all reasonable efforts to confirm that the transferor or mortgagor is the registered owner of the land be made by the purchaser or the mortgagee. Those Rules and practices are directed at the lawyer’s own client, not the party on the other side.

## **H. Conclusion**

Prior to 2008, Alberta had a fairly pure Torrens system. With the amendment of section 170, however, I think it is fair to describe the Alberta *Land Titles Act* in the same unflattering terms as the Ontario Court of Appeal described Ontario’s statute in *Lawrence* (at para 44) as an “unfortunate hotch potch of ill-matching sections.”

Personally, I do not think that the amendment to section 170 can have the effect it was intended to have. I do not think you can tinker with only one section of a large and complex statute and thereby change one of the fundamental principles underlying that type of statute and introduce a new type of indefeasibility. I expect that someday in the not too distant future we will see a case or two that demonstrates the difficulties of introducing conditional immediate indefeasibility into the Alberta *Land Titles Act*. It would probably be better to refer the matter to the Alberta Law Reform Institute for their considered opinion and recommendations before that happens.

At the very least the 2008 amendment to section 170 of the *Land Titles Act* has introduced unpredictability into an area of law usually seen as requiring certainty. The whole point of a Torrens system of land titling is reliability, simplicity, and speed. A Torrens system achieves these goals, in great part, by diminishing an owner's security of title. By attempting to increase the owner's security of title through the 2008 amendment to section 170, the Alberta legislature has called into question the Torrens system itself.

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