

## The Basics of Alberta’s Torrens Title System: Three Cases

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**Cases commented on:** *St Pierre v Schenk*, [2020 ABCA 382 \(CanLII\)](#); *Calgary (City) v Teulon*, [2021 ABQB 388 \(CanLII\)](#); *St Pierre v North Alberta Land Registry District (Registrar)*, [2023 ABCA 153 \(CanLII\)](#)

These three decisions about the basic elements of Alberta’s Torrens title system cover a wide range of issues. The two Alberta Court of Appeal decisions – one a reserved judgment – arise from the same set of facts, which feature a case of forgery. The first decision looks at whether the registration of a caveat will cure the caveator’s defective title, and the second discusses the Registrar’s liability for the caveator’s loss of an interest in land. The Court of King’s Bench decision stems from facts that are less straight-forward. It considers three statutory exceptions to the principle of indefeasibility that underlies Alberta’s Torrens title system: prior certificate of title, misdescription, and one of the listed exceptions in section 61 of the *Land Titles Act*, [RSA 2000, c L-4 \(LTA\)](#) (an alleged public highway).

### Indefeasibility Background

Indefeasibility is the hallmark of a Torrens system of land registration (named after Robert Torrens, who pioneered the system in South Australia in 1858 in order to get rid of the time-consuming complexity and expense of English conveyancing law). 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 “... immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys.”

Three principles underlie a Torrens system and combine to create indefeasibility. All three are relevant in one or more of the cases we consider:

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 UTLJ 173 at 174)

Land titles legislation is in force in Alberta to displace elements of the common law rules on title and to establish a Torrens system for lands that are brought within the system. Some lands, including unpatented Crown lands and Crown mineral lands, fall outside the Torrens system as recently reaffirmed in *Prairiesky Royalty Ltd v Yangarra Resources Ltd*, [2023 ABKB 11 \(CanLII\)](#) (for the ABlawg comment on that case see [here](#)). At common law, under the *nemo dat quod non habet* rule (literally “no one may give what they don’t have”), only the true owner of land can grant an interest in, or charge on, the land and all transactions arising from forgery are void. The common law protects original owners, but a Torrens land title system protects *bona fide* purchasers and mortgagees for value when they transact on the faith of the register, once those transactions are registered in registrable form.

The word “indefeasibility” does not appear in the *LTA*. Instead, the mirror, curtain, and assurance principles are enacted by a combination of sections. As the Court of Appeal notes in the 2023 *St Pierre* decision, the *LTA* has “a structure of provisions” that require that its words be read “in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature” (at para 6). Sections 60, 62, 168, 170(1), and 183 of the *LTA* are the most important indefeasibility provisions.

The three principles, and the statutory provisions implementing them, impliedly prescribe the analytical approach to be taken in any Torrens title case – an approach not taken by the appellants in any of the three cases but implemented by the Court of Appeal and Court of King’s Bench. The first question is: Who is named as the owner of the relevant interest in land in the current (or top) certificate of title (the mirror principle implemented in sections 62 and 183(2) of the *LTA*). That person has indefeasible title unless an exception to indefeasibility applies. The second question is: Do any of the four possible exceptions to indefeasibility apply (the curtain principle and its exceptions implemented in sections 60, 170, and 183(1) of the *LTA*). Once the first two questions have been answered and a winner and loser determined, the third question is: Will the state compensate the loser for the loss of an interest in land (the assurance principle implemented in section 168 of the *LTA*).

With this background in mind, we now turn to a discussion of the three decisions.

### ***St Pierre v Schenk* (2020 ABCA)**

The appellant, Michel St Pierre, represented himself before the Court of Appeal. He lent \$150,000 to his friend, Christopher Black, in 2014. As security for the loan, Black gave St Pierre a promissory note and a security agreement in the names of Black and Lori Schenk, his adult interdependent partner, as well as their company, Advanced Porcelain Design Inc. Black signed the documents for himself, forged Schenk’s signature on the promissory note and security agreement, and misappropriated the money.

Black and Schenk were the owners, as joint tenants, of an acreage near Ardrossan, Alberta. The security agreement specifically encumbered that land. St Pierre filed a caveat against the title to

the acreage to protect his interest. He could not register a mortgage since his equitable charge was not in registrable form.

Black died and Schenk became the sole owner of the land by right of survivorship. The loan went into arrears, and St Pierre sued the couple's company, Schenk, and Black's estate, seeking foreclosure on or title to the acreage. Neither St Pierre nor Schenk were aware of Black's forgery until after Black's death.

Master Scott Schlosser, in a very short judgment, held that the security agreement was obtained by Black's fraud and was therefore a nullity and not enforceable (*St Pierre v Schenk*, [2019 ABQB 738 \(CanLII\)](#) at para 5). Mr. St Pierre appealed the decision of Master Schlosser to the Court of Queen's Bench. The parties agreed (at para 14) to have the appeal dismissed, however, so that the matter could be heard by the Court of Appeal along with another forgery case involving a registered mortgage and issues of deferred and immediate indefeasibility: *Inland Financial Inc v Guapo*, [2019 ABQB 15 \(CanLII\)](#). As a result, we do not have a reasoned judgment from the Court of Queen's/King's Bench in this first phase of the *St Pierre* matter. It is also unfortunately the case that when the Court of Appeal decided *Guapo* it did so entirely on the basis of dower rights, and found it unnecessary to address the land titles issues (including whether immediate or deferred indefeasibility prevails in Alberta, an issue we will expand on below) that had engaged the lower courts in *Guapo* (see *Inland Financial Inc v Guapo*, [2020 ABCA 381 \(CanLII\)](#) and Nigel Bankes, "[Forgery, Fraud and the Dower Act](#)" (November 19, 2020)).

The unanimous judgment of Justices Peter Costigan, Sheila Greckol, and Kevin Feehan dismissed the appeal in *St Pierre* and upheld the Master's decision (at paras 6, 14). Essentially the Court of Appeal held that because there is no provision in the *LTA* that expressly provides for indefeasibility on the filing of a caveat, the common law prevails, and the fraudulent promissory note and security agreement were therefore void and the debt unenforceable against the land (at paras 4-5).

Schenk was registered as the owner of the acreage on the current certificate of title. She therefore had an indefeasible title to the acreage unless one of the exceptions to the curtain principle applied. The only possibly relevant exception was the fraud by Black. St Pierre's claim did appear on Schenk's certificate of title, but by way of a caveat and not by way of a registered mortgage. A mortgage in registrable form would have given its mortgagee, St Pierre, an indefeasible encumbrance that would be good against Schenk assuming that immediate indefeasibility prevails in Alberta. But what about a caveat?

The Court of Appeal focused on the difference between the filing of a caveat and the registration of a mortgage under the *LTA*. It noted that, while the *LTA* uses both "registration" and "filing" when referring to a "caveat" and a "mortgage," the Act distinguishes between a mortgage that complies with the *LTA*'s registration requirements for mortgages and other encumbrances and is actually registered (sections 102-104, 112-114 of the *LTA*), and a caveat that is filed to give notice of and protect the priority of unregistered instruments (sections 130-135 of the *LTA*) (at para 18).

The Court of Appeal delved into the meaning of "filing", "registration", "instrument", and "caveat" in the *LTA*, noting that a caveat is neither an "instrument" nor an "encumbrance" but a mortgage is both (at paras 18-23). Section 53 states that no "instrument" makes "land liable as security for the payment of money, *unless the instrument is executed in accordance with this Act*

*and is registered under this Act, but on the registration of any such instrument in the manner hereinbefore prescribed [...] the land becomes liable as security”* (at para 24, emphasis added). The formalities for creating a registrable mortgage are different from the formalities that allow a caveat to be accepted for filing at the land titles office (at para 26).

As the Court of Appeal emphasized, it is the “registration of an ‘instrument’ that creates the interest in land” (at para 25). This is set out in section 54 of the *LTA*, which states that as “*soon as registered every instrument becomes operative according to its tenor and intent, and on registration creates, transfers, surrenders, charges or discharges... the land or the estate or interest in the land or estate mentioned in the instrument”* (emphasis added). The Court of Appeal therefore found that the *LTA* makes a clear distinction between filing a caveat claiming an interest under an unregistered mortgage or encumbrance, and registering a mortgage (at para 27).

St Pierre did not register a mortgage that met the *LTA*’s requirements for mortgages, but instead filed a caveat to notify everyone that he claimed an interest in land based on the promissory note and unregistered security agreement. A caveat alerts the public to the fact that St Pierre alleged that he had a valid claim (at para 32). But as has been pointed out in many cases, “[a] caveat does not itself *create* an interest in land; it simply provides notice of a *claim* to such an interest” (at para 30, emphasis in original). Because the documents underlying the caveat – the promissory note and the security agreement – were forgeries, and forgeries are nullities at common law, the caveat only gave notice of a void claim (at para 31; and see paras 12-13, citing Master Robertson’s analysis of the effects of fraud on registrable interests in land in *Bentley v Hooton*, [2019 ABQB 109 \(CanLII\)](#), affirmed [2019 ABQB 231 \(CanLII\)](#)).

Would it have made a difference if St Pierre had a registered mortgage? The answer to that question depends upon whether Alberta is an immediate or a deferred indefeasibility jurisdiction – either generally or specifically with respect to mortgages. In an immediate indefeasibility jurisdiction, registration of a transfer or mortgage cures the underlying invalidity created by the forgery (see *Frazer v Walker*, above). In a deferred indefeasibility jurisdiction, registration of a void transfer or mortgage does not cure the underlying invalidity for the transferee or mortgagee, but it does provide a secure root of title for anybody dealing on the faith of the register with the registered transferee or mortgagee. It is not entirely clear what the position is in Alberta. While we think that the better position, based on statutory interpretation, is that of immediate indefeasibility (largely for the reasons given by the Saskatchewan Court of Appeal in *Hermanson v Schmidt Estate et al*, [1986 CanLII 3241 \(SK CA\)](#); [33 DLR \(4<sup>th</sup>\)12](#), interpreting similar provisions in that province’s land titles legislation), there are certainly decisions in Alberta that prefer the deferred defeasibility approach, especially in the context of mortgages. A case in point is *Guapo*, where both lower courts ruled that a forged mortgage was not cured by actual registration (see Bankes, “Forgery, Fraud and the *Dower Act*” above, for more on immediate and deferred indefeasibility). *Bentley v Hooton* is to the same effect. And as we noted above, the Court of Appeal in both *Guapo* and *Schenk* found it unnecessary to deal with the point.

### ***St Pierre v North Alberta Land Registry District (Registrar) (2023 ABCA)***

In this follow-up case, St Pierre sought compensation from the Registrar’s assurance fund for the loss that he suffered as a result of Black’s forgery. Court of Appeal Justices Jack Watson, Bruce McDonald, and Jo’Anne Streckaf heard this appeal from an unreported judgment of Justice Cheryl

Arcand-Kootenay of the Court of King's Bench, which upheld the unreported decision of an Application Judge to strike out St Pierre's claim for damages against the Registrar of Land Titles. The appeal was dismissed on the basis that St Pierre's arguments were a collateral attack on the earlier decision the Court of the Appeal in *St Pierre v Schenk* (at para 4).

In order for the Registrar to be liable in damages to St Pierre, there had to be a basis for that liability in the provisions of the *LTA* (at para 5). Section 168(1) sets out who may sue the Registrar:

168(1) Any person

(a) who sustains loss or damage *through an omission, mistake or misfeasance of the Registrar* or an official in the Registrar's office in the execution of the Registrar's or official's duties, or

(b) who is deprived of any land or encumbrance or of an estate or interest in any land or encumbrance

(i) through the bringing of it under this Act,

(ii) by the registration of another person as owner of the land or encumbrance, or

(iii) by an error, omission or misdescription in a certificate of title,

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.

Someone who wants to sue the Registrar must meet all of the requirements of the statutory cause of action in section 168. The judgement in *St Pierre v Schenk* made it clear that St Pierre sustained loss and was deprived of his charge against the land in the security agreement because Schenk's signature on the agreement was forged. He did not sustain loss or damage through the Registrar's omission, mistake, or misfeasance (see section 168(1)(a)); there was no evidence that the Registrar's office caused or contributed to the loss (at para 18). Nor was St Pierre deprived of an interest in land or encumbrance by any of the three events listed in section 168(b) (at para 10). He could not be deprived of an interest in land or an encumbrance because he had no interest in land or encumbrance; the forged documents were void at common law (at para 15).

The Court of Appeal went further. They rejected St Pierre's contention that, by filing his caveat, which was ineffective to create the rights he claimed, and by paying a fee to file that caveat, the Registrar was liable to cover his loss at the hands of the forger (at para 18). It was not an argument based on the text of the *LTA*. It was an argument that misperceived the assurance principle in sections 168 to 172 of the *LTA* (at para 18). While we think that it may be better to characterize the case as interpreting and applying the logical consequences of the Court's earlier decision rather than an impermissible collateral attack, we certainly agree that St Pierre's

application was doomed to failure insofar as his loss was caused by the forgery and not by operation of the Register.

### ***Calgary (City) v Teulon (2021 ABQB)***

The City of Calgary claimed that it owned the northern 5.182 meters (the “Disputed Portion”) of a parcel of land in Bowness (the “Parcel”) by virtue of a plan of survey registered in 1988 (the “Road Plan”). Ashton Teulon, a *bona fide* purchaser for value, became the registered owner of the Parcel in 2020, and her certificate of title made no mention of the Road Plan. As such, and based on the mirror principle, Teulon claimed an indefeasible title to the entire Parcel.

Due to an oversight in the Land Titles Office, the registered Road Plan was not noted as an exception on the certificate of title to the Parcel in 1988 or in any subsequent year. The City of Calgary relied on several exceptions to the curtain principle to argue that it was the owner of the Disputed Portion and was entitled to have its Road Plan shown as an exception on Teulon’s certificate of title.

The City had argued that the question was whether it had an interest in the Disputed Portion because it registered the Road Plan and, if it did, whether that interest was defeated by a provision in the *LTA* (at para 23). Justice Jane Sidnell disagreed with the City’s approach. Because Teulon’s certificate of title did not note the Road Plan as an exception to her ownership of the entire parcel, the question had to be whether Teulon’s title could be defeated by the City’s claim based on its Road Plan (at para 24). In other words, the City had to bring itself within one of the exceptions to indefeasibility of title in order to create a transfer of the Disputed Portion to the City that could be enforced against a *bona fide* purchaser for value such as Teulon (at paras 28, 35).

The City argued that Teulon’s title was subject to their Road Plan because of the prior certificate of title exception in section 60 of the *LTA*; or because the Road Plan was a “public highway” under section 61(1)(c) of the *LTA*; or because there was a wrong description of the boundaries of the Parcel under section 62 of the *LTA* (at para 37).

#### ***Prior Certificate of Title***

Section 60 of the *LTA* describes the prior certificate of title exception to indefeasibility in the following terms: “except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.” Justice Sidnell quickly dismissed arguments based on this exception by noting that no certificate of title was ever granted to the City for the Disputed Portion and therefore this exception did not apply (at para 39).

#### ***Statutory Implied Exception: Public Highway***

Section 61(1) lists a number of interests that parcels of land in certificates of title are subject to, by implication and without any mention in the certificate of title. One of those, in section 61(1)(c), is “any public highway... howsoever created on, over or in respect of the land.”

One issue was whether the term “public highway” should be interpreted to include the Road Plan, particularly as there was no definition of “public highway” in the *LTA* (at para 41). However, the Disputed Portion was not being used as any type of public highway at the relevant time; it was a front yard. In addition, the City had made it clear that it had no intention of using the Disputed Portion for any type of public highway (at para 43).

*Nelson v 1153696 Alberta Ltd*, [2009 ABQB 732 \(CanLII\)](#) described when potential purchasers should be alert to the implied public highway exception to indefeasibility in section 60(1)(c), stating that “a person purchasing land with an obvious roadway across the land, could ... anticipate that [such] publicly travelled road is a public highway which, though not shown on the certificate of title, would nevertheless be public land (at para 30).” Justice Sidnell agreed that the reference to “public highway” in section 61(1)(c) was a reference to something physical because the provision required that it be created “on, over or in respect of the land” (at para 46). In this case, there was no physical public highway of any kind on the Disputed Parcel and so the Road Plan was not an implied exception to indefeasibility, no matter how broadly or narrowly “public highway” was interpreted.

### ***Misdescription***

Section 62 of the *LTA* provides an exception to the mirror principle “so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title.” The City argued that Teulon’s certificate of title contained a wrong description of boundaries or parcels because of the Land Titles Office’s failure to register the Road Plan against the certificate of title to the Parcel in 1988 (at paras 49-50). The City argued that since the Land Title Office did not follow the process for dealing with plans of survey when the Road Plan was registered, the Parcel contained a wrong description of boundaries or parcels (at para 52).

Teulon relied upon the discussion of the exception of misdescription in *CPR v Turta*, [1954 CanLII 58 \(SCC\)](#), [1954] SCR 427. In that case, the Land Titles Office made an error when it mistakenly registered CPR’s reservation of coal and petroleum on the certificate of title as a reservation of only coal. The CPR’s transferee subsequently sold the land to a *bona fide* purchaser for value on the faith of the register as it stood at the time, and title was issued with only a reservation of coal. The majority found that the *bona fide* purchaser for value obtained the petroleum rights by virtue of registration on the faith of the register. In a passage quoted by Justice Sidnell (at para 60), Justice Willard Estey explained (at 447-48) that the *LTA* does not say that a Registrar’s mistake makes a certificate of title a nullity. Instead, the *LTA* has provisions that allow the Registrar to correct errors if the certificate of title still belonged to the first person who purchased from CPR, as that person relied upon the transfer from CPR as well as the register. However, once a certificate of title was issued to purchasers from that first purchaser, the title derived its validity from the provisions of the statute and not from the transfer from the CPR to the first purchaser.

However, the opinion that Teulon relied upon was that of Justice John Robert Cartwright, writing in dissent in *Turta*. Quoting from *Hamilton v Iredale*, (1903) 3 (SR) NSW 535, Justice Cartwright approved of the following explanation of misdescription (*Turta* at 440): “Misdescription is where, intending to describe A, I described B, or so describe A as to make it

include B; but it is no misdescription if I described correctly the land I am applying for, though the land is not mine.”

Justice Sidnell relied upon Justice Estey’s statement that exceptions to indefeasibility “should receive a limited or restricted construction” (at paras 58 and 72, quoting *Turta* at 447). She found that the facts of the case before her were not analogous to the hypothetical facts relied upon by Justice Cartwright (at para 62). This was not a case of a person seeking a certificate of title and misdescribing the lands; it was a case of the Land Titles Office making an error and failing to include an exception from the legal description in the certificate of title. Justice Sidnell also relied upon the judgement of Justice Roy Kellock in *Turta*, concurring with the majority, who stated that in his view the misdescription that arose from an error on the part of the Registrar was not the type of wrong description specified as an exception to indefeasibility in what is now section 183(1)(e) of the *LTA*. Additionally, the Parcel had passed through the hands of at least two intervening owners between the one who dealt with the City in 1988 and Teulon (at para 67). Justice Sidnell also noted that the *LTA* contains no definition of “boundary” or “parcel” but the terms are used to connote perimeters, borders, or the limits of a parcel, offering several examples from the *LTA* (at paras 68-72). In light of all of those reasons, she concluded that the misdescription exception did not apply to the case before her (at para 72).

As a result, none of the exceptions to indefeasibility that the City of Calgary relied upon applied in this case. Teulon’s title was therefore indefeasible and not subject to the Road Plan (at para 73).

## Conclusion

The results in these three cases are not surprising, and they confirm some basic principles of land titles law in Alberta. The first *St Pierre* case confirms the distinction between a caveat and actual registration and confirms that a caveat can never cure an invalidity in an underlying document. The second *St Pierre* case confirms that a person can only access the assurance fund to recover for a loss if it is the operation of the Act or an action of the registrar that has caused that loss. Hence a registered owner who is deprived of title by the curative effect of registration of a forged document in favour of a third party may have a claim against the assurance fund, but a person whose loss is *caused* by the forgery rather than by an act of registration will not. And the *Teulon* decision confirms the long-standing judicial practice going back to the Supreme Court of Canada’s decision in *Turta* that courts should take a narrow approach to the statutory exceptions to the principle of indefeasibility.

All three decisions therefore help us understand the contours of the principle of indefeasibility. Unfortunately, however, they do not help us with one outstanding question of land titles law in Alberta, namely whether we are a deferred or an immediate indefeasibility jurisdiction – both generally and specifically with respect to registered mortgages.



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