



THE

# LAW SOCIETY OF HONG KONG

香港律師會

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3/F WING ON HOUSE · 71 DES VOEUX ROAD  
CENTRAL · HONG KONG DX-009100 Central 1  
香港中環德輔道中71號  
永安集團大廈3字樓

TELEPHONE (電話) : (852) 2846 0500  
FACSIMILE (傳真) : (852) 2845 0387  
E-MAIL (電子郵件) : sg@hklawsoc.org.hk  
WEBSITE (網頁) : www.hklawsoc.org.hk

Our Ref :  
Your Ref :  
Direct Line :

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BY FAX (21210420) AND BY POST

27 April 2010

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Mr. Simon Cheung,  
Clerk to Joint Subcommittee  
on Amendments to LTO,  
Legislative Council Building,  
8 Jackson Road,  
Central,  
Hong Kong.

Dear Mr. Cheung,

**Panel on Development and Panel on Administration of Justice and Legal Service –  
Joint Subcommittee on Amendments to Land Titles Ordinance (“LTO”) –  
Meeting on 29 April 2010**

We are pleased to attach the Law Society’s submissions on “*Proposed Amendments to LTO - the Rectification and Indemnity Provisions*” for discussion at the above LegCo’s Joint Subcommittee meeting.

Yours sincerely,

Christine W. S. Chu  
Assistant Director of Practitioners Affairs

Encls.

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## THE LAW SOCIETY'S SUBMISSIONS ON PROPOSED AMENDMENTS TO LAND TITLES ORDINANCE - THE RECTIFICATION AND INDEMNITY PROVISIONS

The Development Bureau issued a Consultation Paper in December 2008 to consult the views of stakeholders including The Law Society on its proposed amendments to the Land Titles Ordinance (*"the LTO"*) to subject the so-called *"Mandatory Rectification"* rule (*"MR rule"*) provided in S. 82(3) of the LTO to, inter alia, the following exception:

*"where the current registered owner who is in possession of the property is not the first person to have been registered as owner since the fraud. He is a bona fide purchaser for value or a person deriving title from such bona fide purchaser"*

The Law Society noted that in response to the Government consultation, the majority of stakeholders have submitted in favour of retaining the MR rule in the LTO.

We are mindful of the Development Bureau's observations in paragraph 16 of its April 2010 paper to the LegCo's Joint Subcommittee on Amendments to the LTO (*"Joint Subcommittee"*) that:

- (a) the MR rule represents the consensus reached after extensive deliberations amongst all parties and that one should not underestimate the difficulties for a new consensus to be reached if the issue is to be re-opened; and
- (b) review of this fundamental issue will be time-consuming and significantly delay implementation of the legislation.

We would like to stress at the outset that The Law Society has strong objection to the MR rule. For reasons explained below, we do not think a title registration system with the MR rule would work at all nor do we think this is a *"title registration system"* that we can support. Rather, we believe that a decision on this very important issue which is so

**fundamental to our new system should warrant a closer and more careful scrutiny by all concerned.**

That the MR rule merits serious re-consideration is not lost to the Administration. In fact, despite the Development Bureau's misgivings about the Law Society raising this issue at this stage, it is to be noted that the Bureau has issued a consultation paper 4 years after the LTO was enacted to canvass views on the possibility of abolishing MR rule and replacing it with deferred indefeasibility.

The LTO was enacted in 2004 under a very tight schedule. The Bills Committee was convened in March 2003 and completed its deliberations on the Bill in 39 meetings over a period of 15 months. The Law Society was given the understanding by the Administration then that if the 2002 Land Titles Bill did not get enacted within the 2003-4 LegCo term, it would be very unlikely that the title registration legislation would be re-introduced to LegCo given there were other legislative priorities. At the request of the Administration, weekly meetings were held between representatives of the Administration and members of our Working Party in the period between 15 April and June 2004 to try to resolve issues of concern within that LegCo term.

When The Law Society was asked to endorse the bill, the then Secretary General of The Law Society wrote to the then Land Registrar on 18 June 2004 to give its support of the Bill, but expressing also its two concerns i.e. one, on the drafting of the Bill and two, given the large number of amendments to the Bill, the Law Society felt that a reasonable breathing space was needed to fully absorb the revised bill. The Administration assured The Law Society that it would continue to work with The Law Society *"to address any subsisting points of concern and any issues that emerge on further consideration of the drafting of the LTO before its implementation"*. It was based, inter alia, on such undertaking by the Administration to the Law Society that LegCo has passed the 2002 Bill into law on 7 July 2004.

The MR rule was introduced at a very late stage in 2004. This was done against a background of a rushed through deliberation process, as a political expediency and as a recognition of the fact that due to the effect of the cap on indemnity and the Court being given a wide discretion to rectify, unless rectification was made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system (cf. for example, the Bar's submission dated 2<sup>nd</sup> March 2004). The Law Society understands fully the predicament the Administration was in when it introduced the MR rule.

In the end, the LTO as enacted, was a product of compromise. The Chairperson of the Bills Committee of the LegCo during the 2000-2004 session, the Hon. Margaret Ng, who is also now the Chairman of the LegCo's Subcommittee, when speaking on the passage of LTO, lamented that the MR rule in the LTO rendered the new system more of a "half-way house". Dissatisfaction with this product of political compromise is, therefore, not confined to the Law Society. Given the breathing space that was allowed to reflect on this compromise, the Law Society is firmly of the view that the MR rule renders unworthy the LTO to any claim of a title registration.

As the Administration has rightly pointed out in paragraph 8(b) of its Consultation Paper, the MR rule would have the unintended effect of "*reducing confidence in the title register*" and "*reducing the effectiveness of the new scheme in improving the efficiency with which conveyancing can be conducted*". The Law Society agrees with the Administration in paragraph 8(b) of the Consultation Paper that the "*opportunity should... be taken to reconsider whether the rule should be retained before the LTO is brought into operation*".

### **Why the MR rule is a problem?**

#### Aims of Title Registration

Let us go back in time and ask ourselves the basic question: why do we want a title registration system for Hong Kong? What are the advantages of this new system as compared to our existing deeds registration system?

The answer is simple and clear. The main impetus for Hong Kong to introduce a title registration system is the desire to "*simplify*" the existing cumbersome conveyancing process. Our existing deeds registration system is just a record of transactions affecting the land, not a register of title so much so that title has to be investigated privately by the parties' solicitors perusing bundles of title documents going back to a certain period of time upon every purchase or mortgage of the land.

*The object of title registration is to bring certainty to title and make it unnecessary for purchasers to go behind the register to investigate the chain of title.* And how can this be achieved? This is, to a large extent, achieved by the concept of "*indefeasibility of title*".

#### Importance of the "Indefeasibility of Title" Concept

The *raison d'être* of a title registration system is that the title register is the "conclusive" evidence of title so that a purchaser relying on the register will acquire a title that is warranted by the legislation to be good as against the

whole world, subject to only very limited exceptions. The title registration system speaks of the title being “*indefeasible*”.

Conveyancing process can be simplified under the concept of “*title indefeasibility*”, as a person dealing with the registered owner can safely rely on the register and can be saved from the trouble and expense of going behind the Register in order to investigate the history of the vendor’s title and to satisfy of its validity.

#### Rectification as an Exception to “Title Indefeasibility”

However, title registration systems around the world do provide a procedure called “*rectification*”, as an exception to the concept of “*indefeasibility of title*”. This is in recognition of the fact that the “*indefeasibility of title*” concept could work harshly against innocent registered owner; for an innocent registered owner could find his title displaced as a result of fraud or a void or voidable instrument and his title lost in favour of a newly registered owner under the title indefeasibility concept.

Rectification will allow the register to be corrected in favour of the original displaced owner in appropriate circumstances. Where it is not possible to prevent or recompense for the loss occasioned by the title registration system or a reliance on the register by rectifying the register, financial compensation called indemnity may be paid.

The extent that rectification should be allowed in the case of fraud or forged document to revert the registered title to the original displaced owner vis-à-vis the current registered owner, and the kind of indefeasibility of title system to be adopted have been widely debated subjects in many jurisdictions. It is at the end of the day a balancing exercise between certainty of a transaction and justice in individual cases.

*However, what is clear is that to ensure there will be certainty of title, the scope of rectification should be as limited as possible for the wider the scope of rectification allowed, the less certain the title register will be and the further the inroads into the indefeasibility of title concept thus undermining the basic advantages of title registration system.*

#### The MR Rule

S. 82(3) is the “*MR*” provision in the LTO. It “mandates” the Court to make an order of rectification in favour of “*a former displaced registered owner*” (if innocent) if he lost his title by or as a result of fraud, *irrespective of whoever the current registered owner is*.

The problem with the MR rule is that under such rule, any purchaser of registered property will be subject to the risk of a rectification order being made against him as a result of any fraud involved in any transaction prior to the one in which he is involved. This would work to greatly undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve. *A purchaser may want to go behind the title register to investigate previous transactions in order to obtain greater assurance that he will not be at risk. This would amount to a reversion to the old system of investigation of title as under the current deeds registration system; totally defeats the very purpose of title registration; and renders unworthy the LTO to any claim of a title registration system.*

As mentioned before, the MR rule was introduced in the 2004 legislation as a political expediency in recognition of the fact that due to the effect of the cap on indemnity and the court being given a wide discretion to rectify, unless rectification is made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system.

We believe that stakeholders are also in favour of retaining the MR rule, in part due to the thinking that the MR rule ensures “ownership protection”. However, in terms of “ownership protection”, the MR rule cuts both ways. It will always work to displace the ownership of the innocent current registered owner.

On the issue of doing justice between an innocent original displaced owner who is defrauded and an innocent current registered owner, MR is clearly not the best solution on every occasion. On the contrary, what is clear is that unless one should adopt a change of mindset and move away from the nemo dat principle, the new title registration system would not work.

### **What systems should HK adopt?**

Legal systems around the world adopt either of 2 major principles of indefeasibility:

- (a) *immediate indefeasibility* - under which a bona fide purchaser who relies on the register in dealing with the registered owner and registers a transfer, obtain a clear and valid title, even though the transfer instrument he relies on is void for fraud or forged, except in the case of fraud by the purchaser himself;
- (b) *deferred indefeasibility* - where a purchaser becomes (innocently) the “registered owner” of land, relying on a document that is void for fraud or forged, such a registration can be defeated by the previous

registered owner, but only until such time as the land is on-sold to a bona fide purchaser for value.

#### Our Preferred Option 1 – Section 82(1) & (2) of the LTO

For Hong Kong, we believe that for the sake of certainty of title and ease of conveyancing transactions, the “*immediate indefeasibility*” principle should be followed as far as possible with only very limited discretion given to the court to rectify the register against the current registered owner in circumstances where he is at fault.

Under the LTO as enacted in 2004, the rectification provisions are contained in Sections 81 to 83.

- (a) Section 82 provides for rectification of title by the court;
- (b) Section 82(1) gives a general discretion to the Court to order rectification in, inter alia, cases of fraud, void or voidable instruments. Such discretion is, however, subject to the provisions in subsections (2) and (3);
- (c) Subsection (2) specifies that no rectification order should be made under subsection (1) so as to affect the title of the owner of registered land who is in possession of the land and has acquired it for valuable consideration, unless he himself was a party to the fraud, caused a mistake or omission, or caused the instrument to be void or voidable; had knowledge of the fraud, mistake or omission or that the instrument was void or voidable; or had, by his act or lack of proper care, caused or substantially contributed to that fraud, mistake or omission or to making the instrument void or voidable.
- (d) Subsection (3) contains the mandatory rectification provisions.

A copy of Section 82 is attached at Annex A.

The Law Society proposed to remove the MR provision in S. 82(3). Our proposal to remove S. 82(3) does not necessarily mean that the original displaced registered owner could not recover the property; for the court will have the discretion under S. 82(1) and (2) to rectify the land register and apply the nemo dat rule in the “*unless*” situations mentioned in Section 82(2).

#### Option 2 – UK 2002 position

If, however, S. 82(1) and (2) of the LTO are not considered good enough to do justice to the original displaced registered owner, we would alternatively suggest adopting the UK 2002 position. In this regard, Schedule 4 of the Land Registration Act 2002 is attached at Annex B for consideration. The relevant part of Schedule 4 of the Land Registration Act 2002 reads as follows:

## *“Schedule 4 – Alteration of the Register*

### *Introductory*

1. *In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which-*
  - (a) *involves the correction of a mistake, and*
  - (b) *prejudicially affects the title of a registered proprietor.*

### *Alteration pursuant to a court order*

2. (1) *The court may make an order for alteration of the register for the purpose of –*
  - (a) *correcting a mistake,*
  - (b) *bringing the register up to date, or*
  - (c) *giving effect to any estate, right or interest excepted from the effect of registration.*
- (2) *....*
3. (1) *This paragraph applies to the power under paragraph 2, so far as relating to rectification.*
- (2) *If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor’s consent in relation to land in his possession unless-*
  - (a) *he has by fraud or lack of proper care caused or substantially contributed to the mistake; or*
  - (b) *it would for any other reason be unjust for the alteration not to be made.*
- (3) *If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so....”*

Compared to S. 82 of the LTO in HK where the court has the “*discretion*” to order rectification in the “*unless*” situation mentioned in S. 82(2), the UK 2002 legislation slanted more towards mandatory rectification in so far as the immediate parties to the fraudulent transactions are concerned. Paragraph 3(3) of Schedule 4 “*mandates*” the court to make a rectification order in favour of the original displaced owner in the “*unless*” situations mentioned in paragraph 3(2) “*unless there are exceptional circumstances which justify its not doing so*”.

### Options 1 & 2 vs. the MR rule

As opposed to the MR rule, under either Options 1 or 2 above, any new purchaser would only have to make sure that he has not by fraud or by his act or lack of proper care caused or substantially contributed to the mistake on the



register when he purchased the property. He would only be at risk of a rectification order being made against him where there has been some fault on his part in the “*immediate transaction*” to which he is a party but not when there was fraud in a previous transaction to which he is not an immediate party or as a result of lack of care on the previous owners. As such, in either of these options, the purchaser is made responsible for his own fraud and lack of care. There will be no need for any purchaser to go behind the register and investigate the whole chain of title. The spirit of title registration and thus the benefit of simplicity of conveyancing process can be attained.

### **Further Protections to the Displaced Registered Owners**

To enhance the position of the original displaced registered owner, we have the following suggestions:

(1) Cap on Indemnity

We noted that the need for the MR rule stemmed from the cap on indemnity and have made submissions that the cap should be uplifted.

The Government indicated its concern on unlimited exposure to claims if the cap was removed and cited the problem of scams in other jurisdictions where fraudsters posed as victims in order to claim Government indemnity. In this regard, we believe the Administration should justify the need to retain the cap on indemnity by disclosing information and statistics from the Hong Kong and overseas jurisdictions on the incidences of fraud claims on the indemnity fund under these title registration systems and/or fraud cases in property transactions generally but the Administration’s reply is still awaited.

If, however, the final decision is to maintain the cap on indemnity, we believe there should be a mechanism in the legislation to ensure that the cap would be reviewed upwards from time to time to ensure it will cover the majority (say, not less than 99%) of HK properties.

Likewise, the limitations on indemnity for the pre-conversion defrauded owner under Section. 84(4)(c) of the LTO should be removed

(2) Measures to Minimize Fraud

We believe retaining the MR rule in fear of fraud is putting the horse before the cart. Efforts should better be spent on minimizing fraud. In this regard, we would like to refer to British Columbia experience in which, inter alia, the following safeguards are provided in the system to combat ID theft:

- (a) rules requiring estate agents, solicitors and financial institutions to verify clients' identities following specific guidelines and to keep clients' information record for every purchase or sale of real estate; and
- (b) procedure whereby applications could be made for email notifications to be sent to the registered owner, his agent and lawyer whenever there is an application for registration which would affect the title; and
- (c) procedure for registered owner to apply for a duplicate certificate of title which must be presented before there can registration for change of ownership and making the duplicate certificate very difficult to be forged and replaced.

An article entitled "Title Securing in British Columbia" at Annex C is attached for consideration.

### **Lands held by Indigenous Villagers**

We appreciate the Heung Yee Kuk ("HYK")'s wish to retain the MR rule, in view that many indigenous villager owners "*resided overseas and it is important that they can get back the land in case of fraud*".

We believe that this concern of HYK can be addressed by the Government conducting worldwide public education on the change of law. But in order for the title registration legislation to move forward, if HYK is not comfortable with our above proposals, we recommend giving an option to HYK to consider whether to have all those NT lands held by indigenous villagers remain out of the title registration system at the initial stage and for a mechanism to be put in place whereby the owners of these lands could opt into the new system at a later stage upon title being proved to the Land Registry at their own expense. One benefit of this option is that as these lands will continually be governed by the Land Registration Ordinance, the HYK and the indigenous villager owners could have some leading time to observe the experiences of the operation of the new system upon other lands before deciding whether to opt into the new system. In this regard, we propose the relevant NT lands be identified by reference to Section 4 of the Government Rent (Assessment and Collection) Ordinance.

### **The Law Society's Positions**

To recap, the Law Society's positions are:

- (1) the aim of title registration legislation being to bring certainty to title and "*simplify*" conveyancing process, a title registration system with the MR rule defeats the very purpose for which a title registration system seeks to achieve and as such S. 82(3) has to be deleted from

the LTO;

- (2) to uphold certainty of title as far as possible, the HK system should go for immediate indefeasibility with discretion being given to the court to rectify the register in favour of an innocent displaced owner in very limited circumstances. We recommend the court's discretion in S. 82(1) & (2) be retained;
- (3) alternatively, if our preferred option in (2) is not considered sufficient, we suggest the UK 2002 legislation (i.e. Schedule 4 of the UK Land Registration Act 2002) be adopted;
- (4) to safeguard the position of innocent displaced owners, we propose:
  - (a) the cap on indemnity be uplifted or as a minimum, a mechanism should be in place to enable periodic review of the cap to ensure it will cover the majority (99%) of properties in HK;
  - (b) the exclusion of indemnity for pre-conversion fraud to the innocent former owner under S. 84(4)(c) should be removed;
  - (c) adequate safeguards be introduced into the system to minimize the instances of fraud; and
- (5) an option be given to HYK to consider whether lands held by indigenous villagers should remain out of the title registration system on daylight conversion and for such lands to opt into the system at a later stage.

**The Law Society of Hong Kong  
27 April 2010**

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### Contents of Section

Chapter: 585 **Part B** Title: LAND TITLES ORDINANCE Gazette Number:  
 Section: 82 Heading: Rectification by Court Version Date:

Remarks:

not yet in operation

(1) Subject to subsections (2) and (3) and section 83, the Court may, on application by any person, order the rectification of the Title Register by directing that an entry therein relating to registered land or a registered long term lease be removed or altered, or that an entry relating to registered land or a registered long term lease which has been omitted from the Title Register be entered therein, if the Court is satisfied that the entry was obtained, made or omitted, as the case may be, by or as a result of—

- (a) the fraud, mistake or omission of any person; or
- (b) a void or voidable instrument.

(2) No order may be made under subsection (1) so as to affect the title of a person who is the registered owner of registered land or the registered lessee of a registered long term lease, and who is in possession of the land and has acquired the land or lease for valuable consideration, unless the Court is satisfied—

- (a) that the name of such person was entered in the Title Register as the owner or lessee, as the case may be, by or directly as a result of the fraud, mistake or omission in question or the void or voidable instrument in question, as the case may be; and
- (b) that—

- (i) in the case of fraud, the person—
  - (A) was a party to the fraud;
  - (B) had knowledge of the fraud at the time his name was so entered in the Title Register; or
  - (C) had, by his act or by lack of proper care, substantially contributed to the fraud;
- (ii) in the case of a mistake or omission, the person—
  - (A) caused the mistake or omission;
  - (B) had knowledge of the mistake or omission at the time his name was so entered in the Title Register; or
  - (C) had, by his act or by lack of proper care, substantially contributed to the mistake or omission; or
- (iii) in the case of a void or voidable instrument, the person—
  - (A) caused the instrument to be void or voidable, as the case may be;
  - (B) had knowledge that the instrument was void or voidable, as the case may be, at the time his name was so entered in the Title Register; or
  - (C) had, by his act or by lack of proper care, substantially contributed to making the instrument void or voidable, as the case may be.

(3) Subject to section 83, on an application made under subsection (1) by a former registered owner of registered land or a former registered lessee of a registered long term lease to restore his title to the land or lease on the ground that he lost his title by or as a result of fraud, the Court shall order the rectification of the Title Register to so restore the title of the applicant (and irrespective of whoever is currently the registered owner or registered lessee of the land or lease concerned), if the Court is satisfied that—

(a) the entry in the Title Register by or as result of which the applicant lost his title was procured, whether in whole or in part, by or as a result of—

(i) a void instrument; or

(ii) a false entry in the Title Register;

(b) the applicant was not a party to the fraud; and

(c) the applicant did not, by his act or by lack of proper care, substantially contribute to the fraud.

(4) An order may be made under subsection (1) or (3) whether or not the entry in the Title Register in question was obtained, made or omitted, as the case may be, before, on or after the date of first registration of the registered land or registered long term lease concerned.

(5) The Registrar shall give effect to an order made under subsection (1) or (3) in accordance with the provisions of the order.

(6) This section is without prejudice to the operation of section 3(4)(c).

(7) The Court may make such order as to the costs of proceedings under this section as to the Court appears just.

(8) Any costs of proceedings awarded against the Registrar in any proceedings under this section shall be paid out of the Land Titles Indemnity Fund.

(9) For the purpose of subsection (2), a person who is in receipt of rents or profits, or who has the right to receive rents or profits, in respect of the registered land or registered long term lease concerned shall be treated as being in possession of the land.

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## LAND REGISTRATION ACT 2002

*Mines and minerals*

- 7 An interest in any coal or coal mine, the rights attached to any such interest and the rights of any person under section 38, 49 or 51 of the Coal Industry Act 1994 (c. 21). **A1.159**
- 8 In the case of land to which title was registered before 1898, rights to mines and minerals (and incidental rights) created before 1898.
- 9 In the case of land to which title was registered between 1898 and 1925 inclusive, rights to mines and minerals (and incidental rights) created before the date of registration of the title.

*Miscellaneous*

- 10 A franchise. **A1.160**
- 11 A manorial right.
- 12 A right to rent which was reserved to the Crown on the granting of any freehold estate (whether or not the right is still vested in the Crown).
- 13 A non-statutory right in respect of an embankment or sea or river wall.
- 14 A right to payment in lieu of title.

## Section 65

## SCHEDULE 4

ALTERATION OF THE REGISTER **A1.161***Introductory*

- 1 In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
- involves the correction of a mistake, and
  - prejudicially affects the title of a registered proprietor.

*Alteration pursuant to a court order*

- 2—(1) The court may make an order for alteration of the register for the purpose of— **A1.162**
- correcting a mistake,
  - bringing the register up to date, or
  - giving effect to any estate, right or interest excepted from the effect of registration.
- (2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.
- 3—(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
- (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
- he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
  - it would for any other reason be unjust for the alteration not to be made.
- (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.
- (4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.
- 4 Rules may—
- make provision about the circumstances in which there is a duty to exercise the power under paragraph 2, so far as not relating to rectification;
  - make provision about the form of an order under paragraph 2;
  - make provision about service of such an order.

*Alteration otherwise than pursuant to a court order*

- A1.163** 5 The registrar may alter the register for the purpose of—
- (a) correcting a mistake,
  - (b) bringing the register up to date,
  - (c) giving effect to any estate, right or interest excepted from the effect of registration, or
  - (d) removing a superfluous entry.
- A1.164** 6—(1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.
- (2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless—
- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
  - (b) it would for any other reason be unjust for the alteration not to be made.
- (3) If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.
- (4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.
- A1.165** 7 Rules may—
- (a) make provision about the circumstances in which there is a duty to exercise the power under paragraph 5, so far as not relating to rectification;
  - (b) make provision about how the register is to be altered in exercise of that power;
  - (c) make provision about applications for alteration under that paragraph, including provision requiring the making of such applications;
  - (d) make provision about procedure in relation to the exercise of that power, whether on application or otherwise.

*Rectification and derivative interests*

- A1.166** 8 The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned.

*Costs in non-rectification cases*

- A1.167** 9—(1) If the register is altered under this Schedule in a case not involving rectification, the registrar may pay such amount as he thinks fit in respect of any costs or expenses reasonably incurred by a person in connection with the alteration which have been incurred with the consent of the registrar.
- (2) The registrar may make a payment under sub-paragraph (1) notwithstanding the absence of consent if—
- (a) it appears to him—
    - (i) that the costs or expenses had to be incurred urgently, and
    - (ii) that it was not reasonably practicable to apply for his consent, or
  - (b) he has subsequently approved the incurring of the costs or expenses.

## Section 92

## SCHEDULE 5

**A1.168**

## LAND REGISTRY NETWORK

*Access to network*

- 1—(1) A person who is not a member of the land registry may only have access to a land registry network under authority conferred by means of an agreement with the registrar.
- (2) An agreement for the purposes of sub-paragraph (1) ("network access agreement") may authorise access for—
- (a) the communication, posting or retrieval of information,

Annex C

## Title Security in British Columbia

### Title Security in British Columbia

BC's land titles are secure:

- Our land title system is regarded as among the very best in the world. Land purchasers, sellers and owners can rest assured that their rights and interests are protected, and that there is no pattern of increased title fraud.
- Registered title offers assured ownership and allows for simple, quick and inexpensive land transfers.
- We have an Assurance Fund available to compensate property owners in the very unlikely case that they are financially affected by a title registration error or become the innocent victim of title fraud.
- At the end of 2008, there were approximately 1.9 million active titles in BC. In the past 19 years, the land title system processed nearly 15 million transactions - yet only three claims related to land ownership fraud and only 14 fraud claims related to lesser interests in land such as discharges of mortgage were paid from the Assurance Fund.

### Torrens Principles

Land title in BC operates under a system which is based on the principles of the 'Torrens' registry system. Sir Robert Torrens was an Australian politician and civil servant who in the 1850s was unhappy with the current land conveyancing system. Based on his experience in registering the ownership of ocean vessels, he devised a method of making land registration conclusive. The Colony of Vancouver Island adopted a Torrens system of land title registration in 1861, the second jurisdiction in the world to do so. The Torrens system is now used by countries around the world.

Only a person registered as owner has the right to transfer or otherwise deal with their land title. Registered title also allows for simple, quick and inexpensive land transfers.

### Assured Title

Under the Torrens system, legal ownership of land can only be changed by the act of registration on a public register, and the issuance of a 'Certificate of Indefeasible Title'. A title that is indefeasible cannot be defeated, revoked or made void. The person who has a title has a right, good against the world, to the land. Evidence of the right to land is constituted by an indefeasible title which includes the name of the owner and a listing of any mortgages, agreements for sale, leases, easements, covenants, rights-of-way or other registered charges which may pertain to the title. There are a limited number of exceptions to the principle of indefeasibility which are set out in the *Land Title Act*, the statute which governs BC's land title system.

The strength of the BC system is that it eliminates the need for exhaustive and expensive searches back through the historical chain of ownership to prove that a title is valid and unencumbered. A prospective purchaser need only examine the current title to obtain a full list and description of all interests that affect the title.



## Assurance

Registered titles are 'assured'. This protection is offered by the *Land Title Act* which provides that, should an individual suffer a loss of their title as a result of administrative error or fraud, compensation will be paid. A special Assurance Fund is maintained for this purpose, even though it is very seldom drawn upon. In the past 19 years in BC, there have been nearly 15 million land title transactions with 75 claims paid from the land title Assurance Fund, and only three related to title fraud.

The public is able to rely confidently upon the records of the Land Title Office. Once a title is registered, it cannot be overturned so long as the owner acquired his or her interest in good faith and for valuable consideration.

## Identity Theft

As with any area of commerce, there may be people who want to misrepresent ownership of an item, such as land. Identity theft is a concern these days and people should always ask for identification when dealing with any individual with regard to land title to ensure that they are dealing with the true owner of the land. Lawyers and notaries check their clients' identities before submitting documents to the LTSA. FINTRAC rules require real estate brokers and agents to verify their clients' identities following specific guidelines, and to keep a client information record for every purchase or sale of real estate. If some parties in a real estate transaction are not represented by a real estate broker, the broker/agent will need to verify those parties' identities. Financial institutions are also required to verify their clients' identities for certain transactions following specific FINTRAC guidelines.

## Mortgage Fraud

In April 2009, the BC Court of Appeal held that unless a mortgage is granted by the true owner of a property, the mortgage is invalid and the owner's title will be returned to its original state. The decision provided clarity about a registered owner's security of title to land.

## Steps an Owner Can Take for Additional Peace of Mind

If you still feel that your title is at risk, there are a number of steps you can take.

- Through your lawyer or notary or independent land title registry agent, you can use the LTSA's (or the *Land Title Act's*) Activity Advisory Service accessed through BC OnLine. This service will provide an e-mail notice to the lawyer, notary or registry agent when an application is made that may affect your title.
- Registry agents can conduct title searches for homeowners wishing to check the status of their titles.
- Alternatively, if your title to your land does not have a mortgage or agreement for sale registered against it, for a fee you can apply for a Duplicate Certificate of Title through your lawyer or notary, or at a Land Title Office. No sale, transfer, mortgage or agreement for sale can be registered while the owner holds that duplicate certificate. If you do obtain your Duplicate Certificate of Title, caution should be used to ensure it is kept safely. A lost or destroyed duplicate title is expensive and time-consuming to replace, and without it you cannot sell your property, make

an agreement for sale, or arrange a mortgage. More detailed information on obtaining a Duplicate Certificate can be found [here](#).

- If you only want to have a copy of your title for your personal records, for a fee your lawyer, notary, or registry agent can apply for a State of Title Certificate, which is a certified true copy of your title. More detailed information on obtaining a State of Title Certificate can be found [here](#).
- For a less formal printout of your title, you may obtain a computer-generated 'title search print' from the Land Title Office for a nominal fee.

### Continuous Improvement

The LTSA is responsible for managing the land title system in a manner that protects and maintains the security of land ownership records and documents. BC's land title system includes numerous checks and balances to identify and prevent fraud. We constantly monitor the land title system to make sure it meets current needs. We work closely with the Law Society of British Columbia, Society of Notaries Public of British Columbia, the Association of British Columbia Land Surveyors, lenders, and real estate professionals to ensure that the system remains secure, fair and cost-effective for users.

**For more information on title security and the specific steps that property owners can take to protect themselves against identity theft and title fraud, please read:**

- [Frequently Asked Questions About Title Security in BC](#)
- [British Columbia's Land Title and Survey System or Why BC Property Owners Sleep Soundly at Night](#) by Jeff Beddoes, LTSA Deputy Surveyor General, from Winter 2008 Scrivener magazine