Report on

Land Title Conveyance Practices and Fraud

Submitted to

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1. Executive Summary

The purpose of this study is to produce, for the province of Quebec and the Common Law provinces and territories which are using, or in the process of converting to, a land title registry system (rather than the older deeds registry system still in use in Nova Scotia, Prince Edward Island and Newfoundland and Labrador), a detailed description of title conveyance and mortgage registration, funding, and discharge practices. It also covers the related legislative and regulatory framework, and insurance, recourse and/or compensation schemes related to fraud in title conveyance or mortgage registration, funding or discharge, available to lenders, other parties involved in providing these services and/or to the public. More specifically, this Report deals with two distinct types of fraud. The first type, "fraud on the registry" occurs when documents which are forged or otherwise invalid are registered in the land registry. The second type, "fraud by breach of undertaking," occurs when the lawyer or notary acting for the vendor in a transaction misappropriates the purchase money and fails to apply it to pay off an existing mortgage granted by the vendor.

2. Methodology

The study is based on

- a comprehensive review of relevant legislation, regulations and lawyer's rules of professional conduct
- a comprehensive review of relevant case-law, including formal decisions regarding compensation by the land titles office in Ontario
- a review of relevant literature
- interviews with provincial officials responsible for the administration of the land conveyancing systems
- interviews with representatives of the title insurance industry
- interviews with representative legal practitioners

Legislation and related rules and regulations were reviewed to determine the formal law governing the specified types of fraud. Case-law was reviewed to determine the way in which courts had interpreted the relevant law, and also as a source of evidence of the impact of fraud on victims. Interviews with provincial officials (in the case of fraud by forgery, primarily) and legal practitioners (in the case of fraud by breach of undertaking, primarily) and title insurance representatives were conducted to determine practice in cases which were settled rather than litigated, and to provide information regarding overall incidence and consequences of fraud.

3. Findings

3.1 Introduction

The harm caused by fraud can be reduced by preventing the fraud or by insuring the loss caused by those frauds which are not prevented. Both prevention and insurance of fraud increase the cost of land transactions. Since the mortgage lending business and the legal practice of land conveyancing are very cost competitive, the costs of preventing or reducing fraud are ultimately borne by people who buy, sell and mortgage their land. This means that the goal is not complete prevention or insurance, but a cost-effective combination of prevention and insurance. This is just as with any other type of property. Fraud in land conveyancing is really a specialized form of theft–theft of land rather than theft of personal/moveable property. While break-and-enter theft can be reduced, by locks and sturdy doors, it cannot be eliminated entirely at reasonable cost, and insurance is a necessary complement to prevention.

While some steps may be taken to reduce fraud in land conveyancing, complete prevention of fraud would clearly not be cost-effective. The reduction in harm would not justify the increased costs, which would be borne in every transaction, not just those involving fraud. Thus insurance against the fraud which remains is crucial to protect victims against loss.

The provincial systems governing land transactions have a role to play in this respect. These systems can be divided into two basic categories: land titles systems, which guarantee the validity of title as shown by the registry; and document registration systems, which publicize the relevant documents, but do not make any guarantee as to their validity. This distinction is very important to fraud on the registry, as the compensation provided by land titles systems to those who rely on the registry to their detriment is an important form of insurance against fraud which is not available in jurisdictions with document registration systems. Land titles systems are in place or in the course of implementation in all jurisdictions except Quebec, Prince Edward Island and Newfoundland and Labrador, which operate document registration systems. This Report does not make any assessment of the desirability of moving from a document registration system to a land titles system as this transition is a major law reform project which is primarily driven by issues other than fraud prevention.

Even within the land titles systems, the degree of protection against fraud in land conveyancing varies very significantly. Older land titles systems, such as that in Ontario, provide protection which is less than optimal from the perspective of the homeowner or lender in several important respects.

Private title insurance gives protection against fraud which is generally broader than that provided by the land titles system. The relative advantage varies significantly depending on the jurisdiction. The advantages of title insurance are greatest in jurisdictions with older land titles systems, and in Quebec, with its document registration system. One significant problem with title insurance as a solution to the fraud problem is its relatively low-market penetration. While title insurance is available across the country, market penetration is quite limited except in urban Ontario, and even there it is not universally purchased. Further, title insurance can only be purchased at the time of acquisition of an interest in land, so it is not available to homeowners who did not obtain title insurance initially but who might now wish to purchase protection against fraud for their current home. In principle a form of post-purchase fraud protection insurance could be offered, but further study would be required to determine whether it could be sold and administered at a marketable price.

3.2 Fraud on the Registry

3.2.1 Introduction

Fraud on the registry can be subdivided into two categories; fraud by forgery and fraud by impersonation. In fraud by forgery the wrongdoer will typically register forged documents transferring the property into his name, then register a forged discharge of any existing mortgage, and finally obtain a new mortgage against the property and abscond with the money without making any payments. Fraud by impersonation most typically occurs in the context of a marital breakup where the spouse with possession of the marital home will have an accomplice impersonate the other spouse in order to sell or mortgage the property without sharing the proceeds with the other spouse. More technically, fraud by forgery occurs when the fraudster registers a transfer of title into his own name, so that anyone dealing with the fraudster is nonetheless dealing with the registered owner, notwithstanding that the registration was obtained by fraud. Fraud by impersonation occurs whenever the purported interest originates with someone other than the registered owner of the property.

3.2.2 Prevention

The most obvious way of preventing fraud on the registry is by verifying the identity of the grantor (vendor/mortgagor) in a land transaction. Requiring the lawyer or notary handling the transaction to require reasonable documentary identification is a simple and inexpensive method of verifying identity which is effective against some types of fraud by impersonation, in particular opportunistic fraud practiced by unsophisticated parties. Verifying identity in this manner is now a professional responsibility of any lawyer or notary involved in a real estate transaction. In any case where fraud by impersonation occurred because of the lawyer or notary's failure to meet this obligation, the victim of the fraud will be entitled to compensation from the lawyer or notary's professional liability insurance. However, this will not prevent all fraud. Sophisticated wrongdoers may obtain forged identification or they may simply bypass the lawyer or notary and present forged documents, including those attesting to their identity, at the registry office. More stringent steps to verify the identity of the parties, for example by examination of signatures, is almost certainly not cost-effective given the current state of identification technology, whether at the registry office itself or by the lawyer or notary concerned.

Restricting access to the registry office to lawyers and notaries might prevent a fraudster from directly depositing forged documents. However, even though it is wise to engage a lawyer or notary in any land transaction, prohibiting private citizens from registering documents

themselves would be very politically sensitive. Further, it would not prevent fraud by impersonation involving forged identity documents, nor would it prevent fraud in which a lawyer or notary colluded, as in the Wirick affair. It therefore appears that there is at present no cost-effective method of completely preventing the registration of forged documents.

When initial registration of forged documents cannot be prevented, completion of the fraud may be prevented by early detection. In particular, under the Saskatchewan land titles system a notification statement is sent to the registered owner whenever a transfer or mortgage is registered. A complementary provision allows the Director to freeze the register to prevent fraud. Thus when the fraudster registers a forged transfer, the true owner will be notified and may be able to have the register frozen before the wrongdoer is able to mortgage the fraudulently obtained property. This feature is unique in land registration systems in Canada, but it is derived from the personal property security systems, where it is well established. The feature requires an automated system in order to be implemented, which is probably why it is only present in Saskatchewan's recently enacted Land Titles Act. Other jurisdictions are now sufficiently automated that this system could in principle be implemented. This feature probably cannot be implemented in a document registration system, such as that in Quebec, which does not provide an unambiguous statement of current ownership. *Experience to date in Saskatchewan is limited, but the notification and freeze system appears sound in principle and could provide a significant means of preventing fraud.*

The ultimate means of preventing fraud is deterrence through criminal penalties. Criminal sanctions do provide some deterrence at present, but it is difficult to say whether these penalties should be increased, given competing demands on the criminal justice system.

3.3 Compensation in Land Titles Systems

In jurisdictions with a land titles system, the land titles assurance fund is an important source of compensation for those harmed by fraud on the registry. There is very significant jurisdictional variation in the land titles compensation systems.

The most complete information on claims against the land titles fund is available from Alberta. The annual average claims paid over the past thirteen years is approximately $31,000. The pattern is that in about half the years there are no claims at all, but every year or two substantial claims are paid. Approximately 400,000 transfers or mortgages are registered annually in Alberta. This means that the average cost of fraud payouts per transaction is roughly 10¢. This is roughly comparable with the experience in British Columbia, not taking into account the recent Wirick affair.

3.3.1 Substantive Rules

Fraud on the registry involves a contest between two innocent parties: the original owner of the property, and the innocent party who purchased or lent money in reasonable reliance on the register which showed the fraudster as the owner. Most land titles systems provide that in such a contest, the third party who relied on the register–most often a bank or other institutional lender–is entitled to the property itself, while the original owner is entitled only to compensation. This means that in a land titles system (unlike a document registration system) it is possible for a homeowner to discover one day that she is no longer the legal owner of the house she lives in, even though she was not negligent or careless in any way. The owner will be entitled to compensation from the land titles assurance fund, and institutional lenders to date have generally been willing to forbear on foreclosing on the mortgage until the owner has

received compensation which may be applied to discharge the mortgage. However, delays in receiving compensation are significant in some jurisdictions and the institutional lender will be entitled to foreclose before compensation can be obtained. Further, the compensation from the assurance fund will not normally be perfect, as it does not cover the full legal costs of obtaining compensation, nor does it compensate for mental distress or loss of use of the property as collateral, nor for any sentimental attachment to the property in case the owner is forced to move out.

In New Brunswick, in contrast, it is not possible for a homeowner to have her house sold out from under her, as the land titles system provides that the owner in possession is entitled to the property, while the party relying on the registry is entitled only to compensation. This recognizes that monetary compensation is not usually adequate compensation for loss of a home, while compensation is normally entirely adequate for the third party. In particular, in the most common situation in which the other victim is a bank which lent money on the strength of the register, compensation is probably even better than an entitlement to the property itself, as it will usually be quicker and less expensive for the bank to recover its money by claiming from the land titles assurance fund than by foreclosing on the property. *A land titles system which prefers the owner in possession therefore appears to have substantial advantages and no disadvantages as compared with the standard land titles system.*

Fraud by impersonation occurs most commonly in the context of an acrimonious marriage breakup. The party remaining in possession of the house may seek to sell or mortgage the property without the consent of the spouse by having his or her current partner impersonate the spouse. There is significant variation between land titles system in the treatment of the purchaser in the case of fraud by impersonation. Lenders and purchasers are probably also treated differently even in a single jurisdiction.

Consider first the position of a innocent purchaser who is the victim of such a fraud. In systems with “deferred indefeasibility”, in particular Ontario and British Columbia, the land titles system does not provide any protection to the immediate purchaser who buys from the fraudster, even though the purchaser registers their interest. The immediate purchaser will have no defence against the other spouse’s claim on the house, and will not be entitled to compensation from the land titles assurance fund. In contrast, systems with “immediate indefeasibility” protect the immediate purchaser. Either system will protect a subsequent purchaser who purchases from the immediate purchaser who dealt with the fraudster.

The argument against “immediately indefeasibility” is twofold. First, the victim was not defrauded because of reliance on the titles registry, which was correct in every respect, but rather because she failed to detect the impersonation. Because there was nothing wrong with the land titles system, it should not be liable for the loss. This argument is not persuasive, since the question is not whether the land titles office was at fault, but rather whether the victim should be insured, regardless of the fault of the land titles office. The second argument is that denying compensation to the immediate victim will reduce the incidence of fraud by giving the victim an incentive to take more care. However, it is really the lawyer or notary for the victim who will take measures to detect the impersonation, not the victim herself. The lawyer who fails to take reasonable steps to verify the identity of the vendor will be liable for professional negligence. In cases where a lawyer was negligent, the land titles office which compensates a victim will have a subrogated right to sue the lawyer for the loss caused by their negligence. Thus even the system of immediate indefeasibility does provide incentives for the lawyer to verify the identity of the vendor. Further, the system of deferred indefeasibility denies compensation in all cases, not just those where there were reasonable steps which could have been taken to prevent the fraud. The

system of deferred indefeasibility may provide some incentive for a purchaser or lender to use a lawyer who will take even more care than is mandated by professional standards. This may have some merit as applied to institutional lenders, but this is probably not a reasonable burden to impose on individual purchasers. *On the whole, the system of immediate indefeasibility appears to provide better protection at little additional cost as compared with deferred indefeasibility.*

There is some uncertainty with respect to the position of the lender in most jurisdictions. It appears to be generally believed that the position of the lender is the same as that of the purchaser; that is, in the system of deferred indefeasibility, the immediate lender to the fraudster would not be protected, but an assignee would be protected, and in a system of immediate indefeasibility, even an immediate lender to the fraudster would be protected. In B.C., in contrast, it is clear that a lender is completely unprotected if the mortgage did not originate with the registered owner of the property. The Court of Appeal decision which established this point is often thought to be relevant only to B.C. because of the unique statutory provisions of the *B.C. Act*. However, one aspect of the decision may apply more widely. The Court noted that even though a valid mortgage may be created by the fraud, there is no debt owing by the owner, so the owner is entitled to a discharge of the mortgage. The situation is as if the bank entered into and registered a valid mortgage with the true owner, and then inadvertently advanced the funds to a complete stranger. Though this argument has not been addressed in a reported decision in any other jurisdictions, it does appear to be generally applicable. *In conclusion, there is some uncertainty, but it appears that a lender will not receive any protection from the land titles system in a case of fraud by impersonation.*

3.3.2 Amount of Compensation

The different land titles systems are uniform in the amount of compensation paid. A victim of fraud who is entitled to compensation will be compensated for the value of the interest in land which has been lost as a result of the fraud, plus the reasonable expenses of bringing the claim. The "reasonable expenses" will not normally cover all of the claimant's actual costs. Additional recovery from the assurance fund of the following amounts, though not currently allowed in any jurisdiction, is sometimes proposed: the entire legal costs of bringing the claim; punitive damages which may have been awarded against the wrongdoer; mental suffering caused by the fraud; and "consequential loss" related to the loss of use of equity in the property, for example business losses resulting from the loss of the opportunity to use the house as collateral for a secured line of credit.

There is no sound argument for allowing the victim to recover punitive damages from the land titles system. Punitive damages, as the name suggests, are intended to punish the fraudster for intentional wrongdoing, not to compensate the victim. The victim has no persuasive entitlement to punitive damages since they do not represent a loss suffered, and since the land titles system has not done anything intentionally blameworthy there is no justification for imposing punitive damages on it.

The principle that a successful party is entitled only to reasonable costs and not to his full actual costs is a general principle of Canadian law. This is unfortunate from the perspective of the innocent party, but the rule is needed to provide an incentive to moderate legal fees. This rationale is persuasive, and in any event there is no persuasive argument to suggest that the land titles system should be an exception from the general rule.

Mental distress represents a true harm suffered by the defendant, but there are nonetheless sound reasons for not permitting recovery of such damages from the assurance fund. First, such damages

are very difficult to quantify and there is a consequent risk of inflated claims. Secondly, the assurance fund operates to cure the harm done by putting the victim in the position they would have been in had the harm not occurred. This can be done with purely financial loss, where money is a good substitute for property, but compensation for mental distress will not prevent or cure the distress itself. For this reason it is not sound policy to insure against mental distress through the assurance fund, notwithstanding that such damages may be legitimately claimed from the wrongdoer.

The strongest case in favour of compensation relates to consequential loss, which is a true harm suffered by the defendant which can be remedied by monetary compensation. The strongest argument against compensation for such harm is that it is very difficult to quantify. Was the loss suffered because of loss of the line of credit, or because of entirely unrelated reasons such as poor management or a general business downturn? There is a risk of inflated claims as well as increased legal costs in establishing the claims. For these reasons the law generally has traditionally refused to recognize such claims. However, there has recently been a move towards a more liberal attitude in the law generally, and compensation for such claims from the assurance fund might be considered.

Even when fraud occurs, legal costs, mental distress and consequential loss can be reduced or eliminated by ensuring that the procedure for compensation for the lost interest itself is speedy and efficient. *Given the strong arguments against compensation for all of these types of loss, improved compensation claims procedure is a better approach to these types of harm than is increased compensation.*

3.3.3 Procedure

Land titles systems can be divided into two categories procedurally. In older systems, such as that in Ontario, the land titles assurance fund is a fund of last resort. This means that the victim of the fraud must first pursue the wrongdoer directly, and it is only once the victim has obtained a judgment against the wrongdoer and has unsuccessfully attempted to collect from the wrongdoer that the victim can turn to the land titles assurance fund. In newer systems, such as those in Saskatchewan and New Brunswick, the land titles system operates as a fund of first resort. A victim of fraud is entitled to claim directly from the land titles assurance fund without first pursuing the wrongdoer. Once payment is made, the Director of land titles is subrogated to the rights of the victim and can themselves pursue the wrongdoer.

The arguments in favour of a fund of last resort is that by requiring a judgment against the wrongdoer it ensures that a loss has indeed been suffered. It also minimizes the cost to the land titles assurance fund by ensuring that any available amounts are recovered from the wrongdoer. And by placing hurdles in the way of recovery from the fund, it provides an additional incentive for potential victims to take care not to be defrauded in their land transaction. The obvious disadvantage of a fund of last resort is that it imposes much greater costs on the victim of fraud.

The arguments in favour of a fund of last resort are not persuasive. In a fund of first resort the Director of land titles can require evidence to her satisfaction that a loss has indeed occurred, and in many cases of fraud, as in the case of forged documents, the fraud is relatively easy to establish. A fund of last resort minimizes the costs to the land titles assurance fund, but it increases the cost of the land titles system as a whole because the consequent delay in compensating the victim results in mental distress and consequential loss which are reduced or eliminated with a fund of first resort. The argument that the fund of last resort increases incentives to take care is also weak. In the first place, the victim is required to pursue the wrongdoer even in cases where there was absolutely nothing the victim could have done to prevent the fraud. And when something could have been done to prevent the fraud, for example where the fraud was made possible by the negligence of the lawyer for the victim, the Director of land titles will be entitled to pursue a subrogated action against the lawyer.

In summary, a fund of first resort appears to be clearly superior to a fund of last resort.

3.3.4 Summary of Land Titles Systems

Fraud by forgery occurs when the fraudster registers a transfer of title into his own name, so that anyone dealing with the fraudster is nonetheless dealing with the registered owner, notwithstanding that the registration was obtained by fraud. Fraud by impersonation occurs whenever the purported interest originates with someone other than the registered owner of the property.

In fraud by forgery, the true owner can have the register rectified to remove the fraudster from title and restore title to the true owner, so long as the fraudster has not dealt with the land. If the fraudster has sold or mortgaged the land while registered as owner, the purchaser or mortgagee will have a valid interest and the owner will not be entitled to an interest in the land itself. The owner will only be entitled to compensation from the assurance fund. One exception is found in New Brunswick, where the owner in possession will be entitled to the land and the innocent purchaser or mortgagee will be entitled to compensation.

Summary of Land Titles Systems				
Jurisdiction	**Fraud by Forgery**	**Fraud by Impersonation**		**Fund is First or Last Resort**
	Owner in possession keeps property?	Purchaser's indefeasibility is	Lender is	
N.B.	Yes	immediate	probably unprotected	First
Ont.	No	deferred	probably unprotected	Last
Man.	No	unclear	probably unprotected	Last
Sask.	No	immediate	probably unprotected	First
Alta.	No	unclear	probably unprotected	Last
B.C.	No	deferred	unprotected	First (in practice)

In fraud by impersonation, immediate indefeasibility means that the party dealing directly with the fraudster will be protected by the land titles system. Deferred indefeasibility means that a purchaser dealing directly with the fraudster will *not* be protected by the land titles system, but someone who subsequently takes an interest from that immediate purchaser will be protected. As noted, a lender is probably unprotected in all cases; the lender would not be entitled to enforce the mortgage against the land nor would the lender be entitled to claim from the assurance fund.

3.4 Fraud by Breach of Undertaking

Fraud by breach of undertaking does not rely on aspects of provincial land registration systems. Rather, it exploits features of the procedure by which land is most commonly transferred. Usually, a vendor has a mortgage on the property which she requires the proceeds of sale to discharge, while at the same time the purchaser must finance the purchase by taking out a mortgage on the property. Despite there often being insufficient equity in the property to secure both mortgages, the purchaser's bank advances funds to finance the purchase, and the vendor's lawyer undertakes to use the purchase funds to discharge the mortgage. Fraud by breach of undertaking occurs when the vendor's lawyer breaches this undertaking.

Compensation available to parties affected by fraud by breach of undertaking is generally uniform across the provinces. Neither land titles systems nor document registration systems provide any compensation for fraud by breach of undertaking. Each provincial and territorial law society operates a fund with the purpose of compensating those victimized by member lawyers' acts of misappropriation and theft. These funds are of limited efficacy, however, because all are discretionary and many operate as funds of last resort. The discretionary nature of the funds means that potential claimants cannot count on compensation from them. While the funds do

generally compensate all eligible claimants as a matter of course, this uncertainty of compensation undermines the effectiveness of the funds as compensatory vehicles. Further, where a fund operates as one of last resort, victims of defalcation must exhaust all possible alternative avenues of compensation before applying to the fund for compensation. This requirement entails that documenting a claim is somewhat onerous and compensation tends not to be timely.

Provincial law societies also have the power to impose special levies on members for the purpose of compensating victims of member lawyers' dishonesty. Compensation through such a levy tends to suffer from the same problems as compensation through defalcation funds, namely delay and uncertainty. Operating compensation funds as funds of last resort is not justifiable as a means of providing potential claimants incentive to act carefully to prevent fraud, as there is little a client can reasonably do to prevent his lawyer from absconding with trust funds. In this respect, lenders are somewhat better situated than clients; nevertheless, they are able to act mainly to detect fraud early rather than to prevent it entirely.

Some victims of fraud by breach of undertaking can obtain compensation through lawyers' professional liability insurance as a first resort. For eligible claimants, recovery through professional liability insurers is as of right rather than discretionary. This sort of first resort, non-discretionary compensation is more timely and more certain than the discretionary, last resort compensation generally offered by law societies. However, not all victims will be eligible to claim compensation from professional liability insurers. Except in Ontario, victims of defalcation by sole practitioners will not be eligible, as sole practitioners cannot obtain insurance against their own fraudulent acts. Even in Ontario, where this sort of coverage is available to sole practitioners, it is optional for them.

One means of broadening compensation to those affected by fraud by breach of undertaking is to levy a fee on real estate transactions. Such a per-transaction fee can then be used, as is the case in Ontario, to purchase additional insurance. This strategy has the advantage of offering first resort coverage to a larger class of parties than is currently available through professional liability insurance.

The most obvious means of preventing fraud by breach of undertaking would be to implement a practice of cheque splitting. Rather than issuing one cheque in trust from which a vendor's lawyer undertakes to make appropriate payments, the purchaser issues a separate cheque to each party holding an encumbrance on the property. The vendor's lawyer thus has little or no opportunity to deal dishonestly with the funds. While a few procedural details would have to be settled in order to implement a practice of cheque splitting, preventing fraud by breach of undertaking through such a practice would seem to be justified as relatively simple, inexpensive, and effective. *Lawyers in a number of Canadian jurisdictions routinely use split cheques to transfer property and find the practice convenient and efficient.*

3.5 Title Insurance

Title insurance is a form of private insurance which protects against many types of loss consequent on a purchase of land, including many types of fraud. Title insurance must be purchased at the time of the purchase of the land or the interest therein. There is no legal or practical requirement that title insurance be purchased; it is truly optional for either a lender or a home purchaser. Title insurance is available throughout the country, including Quebec, but market penetration is reasonably high only in urban Ontario. After-purchase fraud insurance might in principle be offered as a limited form of title insurance directed against fraud in

particular, but more study would be required to determine whether it would be cost-effective to do so.

Title insurance provides very good substantive protection against the types of fraud discussed in this Report. Any of the victims of fraud on the registry, whether homeowner or mortgage lender, would have a valid claim under their policy if they had purchased title insurance. In particular, title insurance does provide protection to the immediate victims of fraud by impersonation; that is, it provides “immediate” rather than “deferred” protection. Title insurance also provides protection to an insured purchaser or lender who finds their interest subject to the vendor’s prior mortgage in the case of fraud by breach of undertaking. However, it does not provide protection to an insured vendor of the property, whose lawyer breached their undertaking to use the purchase money to pay off the vendor’s mortgage, as that breach of undertaking does not directly affect the vendor’s title.

Title insurance only covers the value of the lost interest in the property. It does not cover punitive damages against the wrongdoer, or claims for mental distress or consequential loss. In this respect the compensation is the same as that provided by a land titles system.

Title insurance is also advantageous procedurally. The insured victim has a claim directly against the insurer, without any need to pursue the wrongdoer. In other words, it is a “fund of first resort.” Equally important, a claim invokes the insurer’s “duty to defend” so *all* of the victim’s legal costs are covered. The insurer has a subrogated claim against the wrongdoer, which it may or may not choose to pursue, but in any event, the victim is not responsible for legal costs.

On the whole, the protection provided by title insurance is clearly superior to that provided in older land titles systems with deferred indefeasibility and a fund of last resort, such as that in Ontario. The protection against fraud on the registry is comparable to that provided by the more modern land titles systems, such as those in Saskatchewan and New Brunswick, except that title insurance is broader in also protecting some parties against fraud by breach of undertaking.

A title insurer may dispute coverage, in cases for example where the insurer believes that the victim colluded in the fraud. In that case a claimant may have to sue the insurer to obtain compensation. The same is also true in a land titles system, even one of first resort, as the Director may deny claims she believes are unfounded, in which case the claimant will have to appeal that decision to a court in order to obtain compensation. There is no reason to believe that a title insurer will generally be more or less likely to admit claims that the Director in a land titles system of first resort, though there may be differences depending on individual companies and Directors.

Apart from the lack of universality, the only possible disadvantage of title insurance is the cost. Title insurance costs approximately $250 to insure both the owner and lender in a single transaction and $200 if only one party chooses to buy insurance. It is essential to recognize that title insurance provides coverage against many problems other than fraud, and indeed fraud claims are a relatively small proportion of all claims. Thus these amounts cannot be considered to be the cost of protection against fraud alone. It has not been possible to disaggregate this number to provide an estimate of the cost of protection against fraud alone.

In document registration systems, such as Quebec, or in land titles systems with less complete coverage, such as Ontario, title insurance is an attractive option for homeowners and lenders as a means of protection against fraud.

3.6 Conclusions

Despite recent high profile instances, fraud in land conveyancing does not appear to have reached crisis proportions in Canada. The general historical pattern of title fraud is that there are generally few cases, but those cases which do occur cause considerable loss. It is not possible to say whether the recent high profile cases are simply an exaggerated instance of this historical trend, or whether they represent the beginning of a new trend towards more title fraud. This incidence of fraud might increase, if for example, organized crime were to systematically target land registration systems for fraudulent schemes in a way which was not done historically.

With present identification technology it would not be cost-effective at present to prevent such fraud entirely. One promising means of preventing fraud involving registration of forged documents, which is not yet widely adopted, is the “notice of registration” system used in Saskatchewan. Cheque splitting, which is not yet universally practiced, appears to be a quite effective means of preventing fraud by breach of undertaking.

When fraud is not prevented, compensation for victims is desirable. The document registration systems used in Quebec do not provide such compensation. The land titles systems adopted in most other Canadian jurisdictions do provide compensation to many victims of fraud on the registry, but there are significant differences in the adequacy of the compensation. Older systems, such as that in Ontario, protect a more limited range of victims and impose significant procedural hurdles. Newer systems, such as those in Saskatchewan and New Brunswick, provide more complete protection with a more streamlined process. In addition, the legal rule, unique to New Brunswick, which ensures that an homeowner cannot be dispossessed of her home, should be considered for wider adoption. In document registration systems, such as Quebec, or in land titles systems with less complete coverage, such as Ontario, title insurance is an attractive option.

4. Introduction

This Report deals with fraud which occurs in the process of sale and mortgage of land in the land titles system, which is in place or in the course of implementation in all the Common Law provinces except Prince Edward Island and Newfoundland and Labrador,[1] and in the Quebec system of land conveyancing. The Report does not deal with all types of fraud which may be involved in a land transactions, such as those in which the value of the property is inflated, or where the purchaser intends to use the property for criminal purposes. The focus is on fraud in the process of sale.

More specifically, we are concerned with two main kinds of fraud. The first type is when forged documents are registered in the registry. Typically the wrongdoer will register forged documents transferring the property into his name, then register a forged discharge of any existing mortgage, and then obtain a new mortgage against the property and abscond with the money without making any payments. This type of fraud is exemplified by the Tesoro affair which occurred in Ontario.

The second type of fraud depends on the details of the way in which property is transferred. In a typical real estate sale, the vendor has a mortgage and needs the purchase money to pay it off. The purchaser, on the other hand, needs to take out a mortgage on the property in order to raise the money to buy it. The problem is that one property can't fully secure both mortgages at the same time. The usual solution is that the purchaser's bank[2] advances the money to the lawyer for the vendor even though the vendor's bank still has a mortgage, and the lawyer for the vendor "undertakes," or promises, to use the money to discharge the vendor's mortgage. Usually this practice works well, but in rare cases the vendor's lawyer breaks his promise and absconds with the money. Sometimes this is done in collusion with vendor. We will refer to this second type of fraud as "fraud by breach of undertaking." It does not involve any forged documents and does not depend on the registry.[3] This type of fraud is exemplified by the Wirick affair which occurred in British Columbia.[4]

The purpose of this Report is to describe and discuss proposals which seek to reduce the harm caused by fraud. This can be done in two ways: by preventing fraud, or by insuring it. We should expect that a combination of fraud prevention and insurance will provide the best protection. It may be possible in principle to prevent fraud entirely, perhaps by taking elaborate measures to verify the identity of any person dealing with land. But any steps that would completely prevent fraud would be very expensive, and the cost will be paid in every transaction, even those which are

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[1]The relevant Acts are: British Columbia, *The Land Title Act* R.S.B.C. 1996, c. 250; Alberta, *The Land Titles Act* R.S.A. 2000, c. L-4; Saskatchewan, *The Land Titles Act*, 2000 S.S. 2000, c. L-5.1; Manitoba, *The Real Property Act* C.C.S.M. c. R30; Ontario, R.S.O. 1990 c. L.5; New Brunswick, R.S.N.B. 1973 c. L-1.1. All references to Land Titles Acts in the body of this Report refer to these *Acts* as listed here. Nova Scotia has only recently begun implementation of a land titles system under the *Land Registration Act* S.N.S. c.6 2001. Because of the very limited experience under the Nova Scotia system, the provisions of its *Act* are not considered in detail in this Report.

[2]There are a number of different types of lending institutions which might be involved in financing a house purchase. For convenience we use "bank" to refer to all of these institutional lenders.

[3]The authoritative record of title set up in every land titles system is usually known as the "register" (e.g. New Brunswick, Ontario, B.C., Manitoba) but it is also sometimes known as the "registry" (e.g. Saskatchewan). The difference in terminology is not significant, and for convenience we will use the term, "registry" throughout this Report.

[4]This does not correspond exactly to the Wirick affair, as Wirick, the lawyer concerned, colluded with the vendor in most if not all instances of the fraud, and Wirick did also apparently register some forged documents.

entirely legitimate. It may be less expensive to take precautions that are somewhat less effective and so will not prevent fraud entirely, and insure against the few cases of fraud which result. Insurance reduces the harm caused by fraud by compensating the victim. A system of complete compensation would be just as good as preventing fraud entirely, from the perspective of the victim, since the victim will be insured for all of their losses. But as with perfect prevention, perfect insurance may also be very expensive. A perfect system would have to compensate not just for the money stolen by the wrongdoer, but also for the inconvenience of making a claim, the stress of discovering that a fraud has been perpetrated, any losses that might have resulted from the reduced availability of credit while the claim is being resolved, and so on.

Preventing harm and insuring against it are not completely separate endeavors. There are connections between the two. For example, it is important to recognize that efficient and speedy compensation can actually prevent some of the harm. If it takes three years to resolve a claim, then the harm from mental distress and lost credit might be very large, while if it takes three weeks to resolve the claim the stress and inconvenience will be much less. We should also recognize that there may be a trade-off between insuring against fraud and preventing it. A party to a transaction may be in a position to take steps to prevent fraud, for example by verifying the identity of the vendor. If that party is fully insured against any loss, they may be less careful in protecting themselves, since they will insured in the event of loss. The more perfect the insurance –if it pays out immediately for all losses–the less incentive there is for a party to prevent the fraud in the first place.

In other words, the harm caused by fraud may be prevented or reduced, but doing so is costly. Ultimately that cost is borne by people who buy, sell and mortgage their land, through fees paid on registration or to a private title insurance company. Both the mortgage lending business and the legal practice of real estate conveyancing are very cost competitive. Increased costs from measures to prevent fraud will largely be passed on to the home purchaser, as will savings from more efficient practices. This means that there is a great deal of convergence in the interest of the various parties–except, of course, the wrongdoer.

In particular, it is wrong to say that homeowners want a system that provides the greatest possible compensation to the victim of fraud. It is true that a homeowner who has actually been the victim of fraud wants the most complete possible compensation; but homeowners as a group want the cost of buying and mortgaging homes to be as a low as possible. There will inevitably be a trade-off between these different goals held by homeowners as a group. For this reason we should expect that the best practical system will be to prevent as much fraud as is possible at a reasonable cost, and to provide insurance for as much of the rest as is possible at reasonable cost. So, we want to identify the most effective and efficient fraud prevention methods, the most effective and efficient insurance methods, and the best combination of the two.

Fraud on the registry and fraud by breach of undertaking are very different in practice and in the ways in which they should be addressed. One of the most important differences is that the land titles system provides compensation to many of the victims of fraud on the registry, but it does not provide any protection to any of the victims of a breach of undertaking by the vendor's lawyer. For this reason this Report will deal with the two in turn, in separate parts. Part 5 deals with fraud on the registry, focusing on the operation of the land titles system, and Part 6 deals with fraud by breach of undertaking. Part 7 deals with title insurance as a solution to some of these problems.

5. Fraud on the Registry

5.1 Introduction: Types of Fraud on the Registry

Fraud on the registry can usefully be divided into two types. The first type is what we will refer to as "fraud by forgery." In a typical case of this type the fraud is perpetrated by a rogue who is not known to the true owners of the property. The fraudster selects the victim at random, or because some chance connection has provided the information which he needs. The fraudster forges all the necessary documents needed to give himself[5] clear title, including the transfer document which purports to represent a sale from the true owners to the fraudster, along with all necessary supporting documentation, such as a forged affidavit of execution, purporting to be from a lawyer who has sworn that the vendor appeared before her and signed the transfer. The rogue then registers these documents himself by simply walking in to the relevant registry office. Because the cost of verifying signatures would be prohibitive, the office staff do not check the signatures, but simply verify that the documents are formally correct. If they are, the parcel is transferred into the name of the fraudster, so that the registry shows the fraudster as the new owner of the property. This all happens while the true owner is still living in the home. The wrongdoer usually then mortgages the property to a third party, normally a bank or other lending institution. If the property is vacant the fraudster will sometimes gain access to the house to allow the lender to conduct an appraisal.[6] Far more commonly the wrongdoer will seek a low-ratio mortgage so that a "drive-by" appraisal will be sufficient to satisfy the lender that the property has sufficient value.[7] More occasionally he will sell the property to an unsuspecting purchaser. It is much more common for the wrongdoer to mortgage the property because very few purchasers are willing to purchase a house without having entered it, while many banks will lend on the basis of a "drive-by" appraisal if the loan amount is a relatively small proportion of the value of the property. In either case the wrongdoer will then abscond with the mortgage money. This type of fraud is exemplified by the Tesoro affair which occurred in Ontario in which Emanuele Tesoro perpetrated this type of fraud in respect of five different Toronto properties. For convenience we will refer to this as "fraud on the registry" since it involves the registration of documents which are forged or otherwise void.

In the second kind of fraud, fraud by an imposter, the wrongdoer poses as the owner. The party taking an interest in the property, that is, the bank or a would-be purchaser, believes that they are dealing with the person who is shown by the register to be the owner, but in fact they are dealing with someone else. The wrongdoer is often known to the victim. For example, in the leading recent Canadian case out of Saskatchewan, the property in question belonged jointly to a married couple Valerie Joan Schmidt and Edward Roy Schmidt.[8] The couple were divorced, but the property remained in both their names. Edward Schmidt arranged to sell the property to a Mr.

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[5]This report uses gender specific pronouns such as "him" to refer to the wrongdoer because it appears from the cases and incidents reported in the news that the wrongdoer is almost invariably male.

[6]If the property is vacant and on the market the fraudster may collude with or pose as a real estate agent to gain access to the lock box.

[7]If the lender suggests a full appraisal the fraudster will have a plausible story as to why he would prefer not to have the appraiser enter the property. He may say, for example, that the property is rented and he does not want the tenant disturbed.

[8]Registrar, Regina Land Registration District v. Hermanson, (1986) 33 D.L.R. (4th) 12. (Mrs. Schmidt had remarried and taken the name Hermanson by the time the case was brought.)

Ralph Martin. In order to avoid sharing the proceeds with his former wife, he brought in a woman who posed as his former wife and signed the transfer in her name. A sale rather than a mortgage is relatively common in these spousal cases as the spouse who is perpetrating the fraud may be living in the property.

In other cases, the imposter may be a professional con artist who is entirely unknown to the victims.[9] By investigating public records or other means, the fraudster may select a property which is currently unmortgaged (that is, the current owners have paid off any mortgage and own the property outright). The fraudster will then obtain a mortgage by impersonating the owner, often with the aid of forged identification. Legally both of these types of fraud are the same, since both result from impersonation of the true owner.

Thus fraud can occur in a wide range of contexts, from those where the wrongdoer is entirely unknown to the victim, to cases where the victim and wrongdoer know each other intimately. But from a legal perspective the point is not that the wrongdoer typically knows the victim in imposter fraud, but not in fraud by forgery, since these are only typical examples. The key difference is that in the case of fraud by forgery the person, the bank or innocent purchaser is dealing with is actually the person who is shown by the registry as the owner, even though that registration was obtained fraudulently; while in the case of imposter fraud, the bank (or purchaser) is dealing with someone other than the person who is shown on the registry as the owner. The importance of this distinction is described in detail in Section 5.5.

In both fraud by forgery and fraud by impersonation, the title registry is changed in a way which adversely affects the original owner of the property, without the consent or knowledge of the original owner of the property. So, one court case begins its description of the facts as follows:

In June of 1995, the plaintiffs (the "Durranis") went out to purchase a lawnmower. In the course of a routine credit check they were shocked to learn about a sizeable judgment that had been registered against title to their home known municipally as 1 Gilroy Drive, in Scarborough, Ontario, registered under the *Land Titles Act*, R.S.O. 1990, c. L.5 (the "Act"). This was the beginning of what can only be described as a nightmare for the Durranis. They went on to learn that as a result of a fraud perpetrated upon them by someone who they had never met, their home had been sold out from under them in a series of transactions that included a mortgage being placed on the property in favour of the Royal Bank of Canada (the "Bank").[10]

What is the result in this kind of case? Does the Bank have a valid mortgage? Must the Durranis pay it off? Are they entitled to compensation? If the Bank's mortgage is not valid, is it entitled to compensation? In short, who gets the money and who gets the mud? These questions are at the heart of both prevention and compensation of fraud under the land titles system.

To answer these questions we need to understand the legal systems which govern ownership of land. All legal systems in Canada governing the ownership of land rely on registration of ownership related documents in a land registration office. However, there is a great deal of variation in the effect of registration. There are two main types: title guarantee systems; and document registration systems. In a title guarantee system registration of a title transfer

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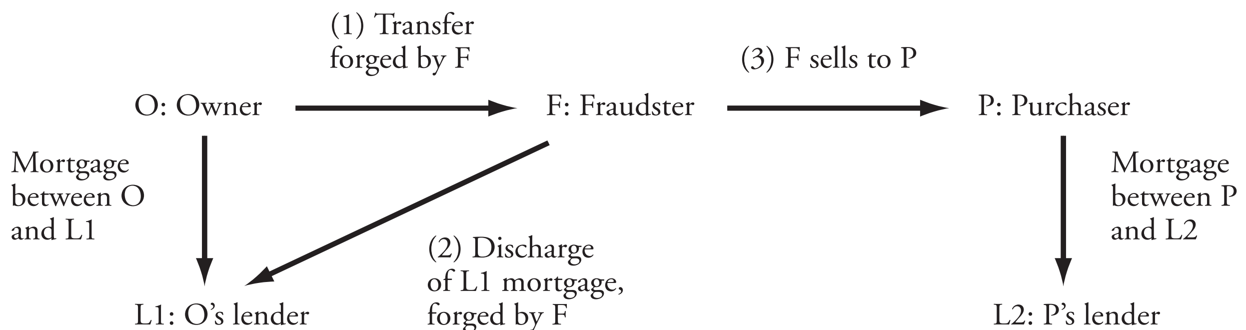
[9]See for example the Alberta case of Beneficial Realty Ltd. v. Bae (1996) 182 A.R. 356. The homeowners knew nothing of the fraud until receiving a foreclosure notice from the lender–which they simply ignored. Since they had never had any dealings with the lender, they assumed the notice was simply a mistake.

[10] Durrani v. Augier (2000) 50 O.R.(3d) 353, 000 (S.C.J.)

document in the legally established land registration office results in a guarantee of title. This means that any person dealing can rely on the ownership shown in the land registration office and if any loss results from that reliance, the victim is entitled to compensation. In particular, if a forged document is registered, persons dealing with the land can rely on the ownership shown by that forged document. Though there is a great deal of important jurisdictional variation in the details, this type of "land titles" system is in place or in the course of implementation in all jurisdictions in Canada except Quebec, Prince Edward Island and Newfoundland and Labrador. In a document registration system, in contrast, registration of a document does not guarantee its validity. A forged document has no more effect if it is registered than if it is unregistered; that is, it has no effect at all in either case. The only effect of registration is that if there is a competition between a registered document, which is otherwise valid, and an unregistered document, which is otherwise valid, the registered document wins. The goal of a document registration system is to ensure that all documents relating to ownership of land are publically available for inspection. It is up to persons dealing with the land to inspect the documents and decide for themselves whether the documents are valid and effective. Again, though there are jurisdictional variations in the details, this same form of document registration system was originally in place in all Canadian jurisdictions from Ontario eastwards. Ontario, New Brunswick and Nova Scotia are in the course of converting to land titles systems. Quebec, P.E.I. and Newfoundland and Labrador operate document registration systems and currently have no plans to convert to a land titles system.

Fraud by Forgery (1)



The property is owned by O, who has an outstanding mortgage to their lender, L1.
Step 1: The fraudster, F, forges a transfer from the owner, O, to himself.
Step 2: F forges a discharge of L1's mortgage and registers it.
Result after Step2: F is shown on the land titles register as the owner of the property with clear title.
Step 3: F sells the property to an unsuspecting purchaser, P.
The fraud is now complete and F absconds with the money.
If P did not purchase with cash, P will have financed the purchase with a loan on the property, from L2. This is not necessary to the fraud.

Consider the different consequences of these systems in the cases of fraud. Suppose O owns property. F, a fraudster, forges a transfer from O to F. F registers the forged document, so that it now appears that F owns the property. F then sells the property to P, and executes a deed from F to P, which P registers. P honestly believes that F owns the property. (Exactly the same analysis

would apply if F had mortgaged the property to a lender, L, rather than selling it to P. L and P would be in the same position.)

As we have noted, under a document registration system, as in Quebec, registration of a transfer or mortgage in the registry office does not give any validity to the document. If the document is forged it is ineffective whether or not it is registered. The basic principle is summed up in the saying "you can't give what you don't have"–in law Latin "*nemo dat quod non habet.*" Any forged document, such as the purported transfer from O to F, is void and ineffective. Since F doesn't have any interest in the property, he has nothing to give to P. So, even though P honestly believed that F owned the property, and paid F in full for it, F had nothing to give and P gets nothing for his money. O remains the owner of the property, so long as O can prove that the deed was a forgery. P can sue F, but that is not likely to be of much comfort, as the wrongdoer is usually judgment proof (that is, does not have enough money to satisfy a claim against him).

P may have a claim against her lawyer if the lawyer was somehow negligent. In particular, in the case of fraud by impersonation, if P purchased directly from F, believing him to be O, the true owner, and if P's lawyer was negligent in failing to adequately verify "O's" identity, P would have a claim against her lawyer for the amount of her loss.[11] But this is not always a solution to P's problem, since P can be the victim of fraud without any negligence on the part of her lawyer. In the case of fraud by forgery, there is normally no way to tell from the paper trail alone, which is all that the lawyer can reasonably examine, that the deed from O to F was a forgery. And even in the case of fraud by impersonation the lawyer may not be negligent, if, for example, the fraudster had apparently satisfactory identification which was itself forged.[12] Alternatively, if the forgery happens earlier in the "chain of title" there would be no way to discover the fraud by requiring identification from the vendor.

Thus, in a document registration system, in many cases the victim of the fraud will have no recourse at all from the land registration system. The ownership remains with the true owner, who therefore suffers no loss. The purchaser gets no interest at all in the property, and his money is lost, in whole or in part, to the fraudster. The victim of the fraud in such circumstances may have protection from outside the land registration system, if she had chosen to buy title insurance.[13]

To summarize, in Quebec, P.E.I. and Newfoundland and Labrador , the victim of fraud by impersonation may sometimes have recourse against her lawyer for negligence (as discussed in Part 5.5), but apart from this the victim will be without protection unless she had bought title insurance for her property (discussed in Part 6).

5.2 Fraud by Forgery

The operation of a title guarantee or "land titles" system is quite different. The basic principle is that a good faith purchaser should be able to rely on the register. Under the document registration system it is the chain of deeds themselves which establish ownership, and each document in the chain must be valid. In the land titles system it is the land titles registry which

[11]This is discussed in more detail in Part 5.5.

[12]Similarly, cases have occurred where the fraudster was related to the true owner and had the same or a very similar name.

[13]This is discussed in more detail in Part 6.

establishes ownership. In other words, the owner of a parcel of land is whoever the registry says is the owner.[14] This is known as "indefeasibility of title." The deeds are just evidence which the Registrar of Land Titles,[15] a public official, relies upon in changing the registry. This principle is not absolute, so a forger cannot himself get good title by registering a forged document. So, a *Land Titles Act* generally says that the registered owner holds the title free from all interests, "except where the registered owner has acquired the title by participating or colluding in fraud." In our example, if F registers a forged deed under the land titles system and the register is changed to show F as the owner, O remains the true owner since F acquired the title by participating in the fraud. If the fraud is caught in time, the register will be corrected or "rectified" to strike out F's name and show O as the owner. This is the same as under the document registration system.

But the situation is very different when F sells to P and P's title is registered. Since, in our example, P honestly believes that F is the true owner, and P paid full value for the property, under the land titles system P is now the true owner, because P is shown as such in the register, and P did not participate or collude in any fraud. There is nothing P could have done to protect herself, so the principle that an innocent party is entitled to rely on the register means that her interests are valid. (Not all land titles systems operate in exactly the same way–see the discussion of the New Brunswick system below in Part 5.6–but this is the most common approach, which illustrates the principle.)

So, comparing the results, under the document registration system O gets the land, while under the basic land titles system P gets the land.[16] But there is another difference between the registry system and the land titles system, namely the availability of compensation to a victim of fraud. In order to allow people to rely on the registry, people who suffer a loss because of the operation of the land titles system are entitled to recover compensation from the land titles system. In our example, P would get the land–and, in principle, would be entitled to require O to move out–but O would be compensated for the loss of his property. Compare this with the registry system, where O keeps his land, but P, who is just as innocent as O, gets nothing at all.

Fraud by Forgery(1) – Property has been sold by F	
Party	**Result**
Original Owner (O)	O no longer owns the property. P can insist that O move out. O still owes the mortgage debt to L1. O is entitled to compensation from the land titles assurance fund, in the amount of the value of the property.

[14]So, for example, the *Saskatchewan Land Titles Act* s. 13(1)(a) provides that "Where the Registrar issues a title . . .the registered owner holds the title free from all interests" except registered interests and those shown on the registry , exceptions and reservations; and except where the registered owner has acquired the title by participating or colluding in fraud.

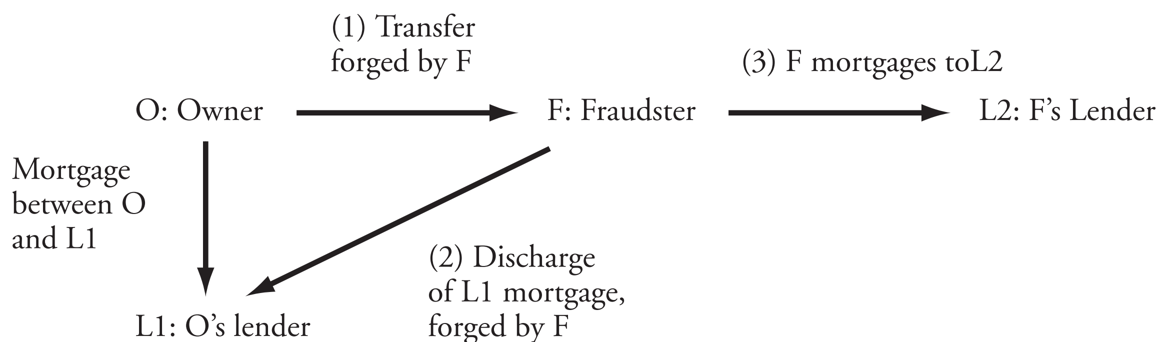
[15]In some jurisdictions the title is "Director of Land Titles." For convenience in this Report we will use the term "Registrar" exclusively.

[16]There are some exceptions to this general statement: see the discussion of the New Brunswick rule in Part 5.6 below.

Original Owner's Bank (L1)	L1 no longer has a valid mortgage on the property. L1 is still owed the mortgage money by O, but if O has no substantial assets besides the property, L1 may not be able to recover this money.
Purchaser (P)	P owns the property. P does not owe anything to O. P's lender, L2 (if there is one) has a valid mortgage on the property which secures a loan to P. P is fully protected.
Lender to Purchaser from Fraudster (L2)	L2 has a valid mortgage on the property. L2 is fully protected.

To complete the picture, keep in mind that any mortgage has two parts: it is a loan by the lender to the borrower, with a promise to repay; plus a claim on the property, so that if the loan is not repaid, the lender is entitled to sell the house and use the proceeds to repay the loan. The debt is independent from the claim on the house. If the borrower fails to repay the loan, the lender has the choice of either suing the borrower to recover the debt, or selling the property and applying the proceeds to the debt. If the sale price of the property is not enough to fully pay off the debt, the lender is entitled to sue the borrower for the difference (the "deficiency"). This means that even though O no longer owns the property, and O's lender, L1, no longer has a valid mortgage against the property, O is still obliged to repay off her debt to L1. The fraud does not discharge O's debt to L1, it merely changes it from a "secured" debt (which means that L1 can sell the property itself to pay the debt), to an "unsecured" debt. But there are processes to allow L1 to recover an unsecured debt, and these ultimately involve selling any other assets which O might have if O does not pay her debt to L1. This means O must rely on compensation from the land titles assurance fund to pay off her debt to her lender, L1.

Fraud by Forgery (2)



While this example illustrates the operation of the land titles system, it is not a common scenario in practice. Instead of selling the house to an innocent purchaser, P, the fraudster will almost always mortgage the house to a lender directly. This is because a purchaser will rarely buy a house without stepping inside, but it is not uncommon for a lender to take a mortgage on the basis of a "drive-by" appraisal if the loan amount is a relatively small proportion of the property value. This is illustrated in Figure "Fraud by Forgery (2)" and summarized in the Table below.

As a matter of law, this is very similar to the scenario in which the fraudster sells the property to an innocent purchaser. The lender is entitled to rely on the register, which shows F as the owner of the property, clear of any other mortgage. The lender verifies that F is in fact the person who is shown by the register to be the owner, which he is. The lender then advances the money and registers its interest in good faith. As a matter of legal principle, L2 is in exactly the same position as P was in. The register will be corrected or "rectified" against F to show O as the owner, since a fraudster cannot himself gain a valid interest by forgery. But since L2 dealt with the person shown on the register to be the owner, L2 has a valid interest in the property, in this case a mortgage. L2 has lent money to F, but F has disappeared or has squandered or transferred the funds out of the country, so L2 can't recover from F. O never borrowed any money from L2, so O doesn't owe a debt to L2. However, L2 has a valid mortgage on O's home.

Fraud by Forgery (2) – Property has been mortgaged by F	
Party	**Result**
Original Owner (O)	O owns the property. O still owes the mortgage debt to L1. L2 has a valid mortgage on the property for the money lent to F. L2 can foreclose and sell the property, forcing O to move out, unless P can insist that O move out unless O pays off F's mortgage. O is entitled to compensation from the land titles assurance fund, in the amount required to pay off the mortgage to L2.
Original Owner's Bank (L1)	L1 has a valid mortgage on the property, but it is second in priority to L2's mortgage, rather than being first in priority. If the value of the property is less than the total value of the two mortgages, the value of L1's mortgage is impaired. L1 is entitled to recover the mortgage money from O, apart from the mortgage on the property, but if O has few assets apart from the property, L1 may find it difficult to recover.
Lender to Fraudster (L2)	L2 has a valid mortgage on the property which secures a loan to F. L2 can sell O's property to satisfy the loan to F.

The effect is that if O does not pay off the debt which F owes to L2, L2 can sell O's home to pay the debt. Further, while O's mortgage to its own lender, L1, has been fraudulently discharged, the mortgage is still valid. The registration can be restored, although it will be second in priority to L2's mortgage, rather than being first in priority; and O still owes the mortgage debt to L1. If O does not pay off L2, L2 will sell O's house and O will still owe his debt to L1.[17] O is of course entitled to compensation from the assurance fund, just as in the previous example. This means that in principle O can recover from the assurance fund and use the money to pay off L2, so that everyone is back in his original position, just as in the previous example.

5.3 Procedure for Compensation

5.3.1 Introduction

The aim of the land titles system is to simplify selling and mortgaging property by making the registry the authoritative source of title information. In the document registration system every document in the "chain of title" must be examined every time a property is sold or mortgaged. In contrast, in the land titles system, the purchaser or bank only needs to check the registered ownership. There are no further documents to verify to establish ownership. The result is that in the vast majority of cases the land titles system operates to reduce the cost of selling and mortgaging your home. But, as we have seen, it also means that under a land titles system it is possible for a homeowner to wake up one morning and discover that she no longer owns the house she lives in. At first glance this is a radical result, and the trade-off hardly seems worth it: save a few dollars on selling your house on the one hand, only to risk losing it entirely on the other. This is why the insurance principle is so important to the operation of the land titles system. The promise of the land titles system is that if your house is sold out from under you, in circumstances where you cannot get it back, you will be compensated for the loss.[18]

If compensation is speedy, then much less harm is done. In a case where the fraudster transferred title into their name and mortgaged the house, even after the title is rectified to return title to the true owner, the bank will have a valid mortgage, and will be entitled to foreclose[19] if the mortgage is not paid. But the bank does not want to foreclose; what it really wants is the money. If compensation to the homeowner is quick, the bank will be willing to wait to be paid out of the proceeds of the assurance fund payment to the owner, rather than foreclosing. Indeed, so far banks have shown a remarkable willingness to refrain from foreclosing and wait for the owner to make a claim against the assurance fund, even when this process is very lengthy. But even if the

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[17]Strictly, since O is still the owner, and L1 has a mortgage agreement with O, L1 can re-register its mortgage, but it will second in priority to L2. That is, L2 will have a first claim against the house, but L1 is entitled to any money which is left over.

[19] Traditionally compensation was paid out of a special land titles "assurance fund" which was funded out of a contribution of some portion of the registration fees. Today, depending on the jurisdiction, the assurance fund is completely backed by the provincial consolidated fund, and in some cases there is no assurance fund at all and compensation is paid out of the consolidated fund directly or out of the revenues of the Crown corporation responsible for administering the *Land Titles Act*. Funding is discussed in more detail in Part 5.8.1. For convenience we may speak of compensation "out of the assurance fund" to refer to compensation under a Land Titles Act, but it should be understood that in jurisdictions which do not have a separate fund, this just means compensation according to the rules of the land titles system.

[19]The term "foreclosure" has two related meanings. In the broad sense it means any type of procedure for enforcing a mortgage in which the original owner loses title to the property to the benefit of the mortgage lender. In the strict legal sense "foreclosure" refers to a particular type of procedure for enforcing a mortgage. The lender will more commonly enforce its mortgage by exercising its power of sale, which is technically a different remedy from foreclosure. Indeed, in a number of jurisdictions "foreclosure" in the technical sense is not available at all. In this report "foreclosure" is always used with the first, broader meaning.

bank chooses not to foreclose, it is entitled to do so once the usual redemption period has passed.[20] A system which allows delay and relies on the bank's forbearance adds to the stress on the homeowner. And further, even if the bank does not foreclose, the mortgage, though fraudulently obtained, remains on the title until the lender is paid off. Until that happens the homeowner cannot sell his house, for example if he takes a new job in a different city. Nor can the homeowner refinance his mortgage, or use the home equity for a line of credit. Even if he is not evicted, the homeowner's ability to deal with his property is crippled under the claim against the assurance fund is settled. Thus speedy compensation is extremely important to the victim of the fraud.

5.3.2 Assurance Fund of Last Resort or First Resort?

In all land titles jurisdictions the first step for a victim of fraud is to attempt to recover the land itself. In some circumstances, depending on the jurisdiction and the nature of the fraud, the original owner of the land may be entitled to have the register "rectified" to show her as owner with a clear interest.[21] A victim who is entitled to recover her land and have the title rectified to show her as the true owner must take that course; she is not entitled to claim compensation from the fund instead. This requirement does not generally pose a problem, as the true owner usually wants the property back in any event, and imposing this requirement avoids difficulties which might otherwise be associated with valuing the land.

If the victim cannot reclaim the land, she is generally entitled to make a claim against the land titles assurance fund. However, making this claim is not always straightforward.

Some jurisdictions operate on the principle that the assurance fund is a fund of last resort. Even though the victim cannot recover the land, she must exhaust all other avenues before applying to the fund for compensation. In particular, the victim must attempt to recover the money from the wrongdoer before turning to the fund.

In Alberta a victim of fraud must bring an action against the wrongdoer and the Registrar as a nominal defendant[22] and the victim is not entitled to recover from the assurance fund unless and until the court certifies that the money cannot be recovered from the wrongdoer.[23] The Ontario system is similar in that the fund is a fund of last resort, but the details are different. A person wrongfully deprived of land must first claim against the wrongdoer,[24] but the Registrar need not

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[20] See for example, Toronto-Dominion Bank v. Jiang, (2003) 63 O.R. (3d) 764 (Ont. S.C.J.) for a recent example in which the court held that the bank was entitled to sell the property which was in the possession of the original owner in order to pay off a mortgage which had been taken out by a forger. Note that in New Brunswick, if the owner is living in the house, the bank will not be entitled to foreclose, but will only be entitled to compensation from the assurance fund: see Part 5.6.

[21] See the discussion of deferred indefeasibility, below Part 5.5, and the discussion of the New Brunswick system in Part 5.6, for example of when recovery of the property is possible.

[22] Section 172 of the *Alberta Act* provides that the fund will not compensate the victim until a judge "has made an order declaring that the judgment is not and cannot presently be satisfied in whole or in part out of the goods or land of the [wrongdoer]." The *Manitoba Act* s.181(1)-(2) is similar to the *Alberta Act* in this respect and would probably apply in the same manner, but because of the lack of claims against the fund, this is not certain.

[23] The *Manitoba Act* is similar to the *Saskatchewan Act*. Section 191 of the *Manitoba Act* allows discretionary payment of a claim against the registrar without an action being brought "where it appears that a district registrar is liable, or may be liable, for loss or damage to a person under this *Act*, and that the claim therefore is a fair and reasonable one," but this is understood to apply to cases where the registrar has made a mistake, and not to cases of fraud (interview with Rick Wilson, Manitoba Registrar-General of Land Titles).

[24] S.57(1)

be joined as a party to the initial action against the wrongdoer. If the victim cannot recover from the wrongdoer, she may apply to the Director of Titles for compensation from the fund.[25] Evidence that the judgment cannot be satisfied is required, though a formal judicial declaration to that effect is not.[26]

The procedure is very different in Saskatchewan and New Brunswick, which, perhaps not coincidentally, have the most recent *Land Titles Acts.*[27] In those jurisdictions the assurance fund operates as a fund of first resort. A victim who has been deprived of his title by registration of an invalid title and who is not entitled to recover his land, is entitled to claim against the fund directly.[28] The Registrar has the power to make a determination as to whether the claimant is in fact entitled to compensation.[29] If the Registrar determines that the claim is deserving, the Registrar can award the claimant indemnification for his loss, plus reasonable expenses of bringing the claim.[30] If this is done, the Registrar is then subrogated to any rights that the claimant may have against any wrongdoer.[31] This means that the Registrar obtains any right to compensation against the fraudster that the victim would have had, and the Registrar can pursue the wrongdoer to recover the amount which was paid out as indemnification.

On its face the system in British Columbia appears to operate as a fund of last resort, but in practice it is essentially a fund of first resort. The main provisions in the *Act* under the heading "Remedies of person deprived of land" set out a system very similar to that of Alberta and Manitoba; the victim must proceed first against the wrongdoer,[32] and only if the wrongdoer is dead or absconded or if a court certifies that the judgment is unrecoverable, can the victim apply to the fund.[33] However, a separate section of the *Act* permits the Registrar, in case involving less than $5,000, or the Attorney General in other cases, to pay a claim from the assurance fund without any court intervention and without the need for the victim to bring an action against the wrongdoer.[34] This provision is regularly invoked to allow compensation to an innocent victim

[25]S.57(4)

[26]See e.g. *In the Matter of the Application of Nimita Raina et al* decision of the Deputy Director of Titles, 22 February 2002. The Rainas were one of the homeowners defrauded by Tesoro.

[27]Saskatchewan has of course long had a land titles system, but its *Act* was entirely overhauled in 2000.

[28]Sask s. 84(2), 89; NB S. 73(1); 74(1)

[29]Sask s. 89(2)(a); NB s. 74(1)

[30]Sask s.90; NB s.74(1)

[31]Sask s. 94; NB s. 75-76. Alternatively, in Saskatchewan a claimant may, if she wishes, pursue the wrongdoer directly, in which case she must give notice to the Registrar if she wants to keep open the possibility of applying for compensation at a later date: ss. 95, 96. In New Brunswick there is nothing specific in the *Act* in this regard, but a claimant may presumably pursue the wrongdoer directly under the general law of fraud, though it is not clear whether the Registrar must be notified if a claim is to be brought subsequently against the fund. A claimant might want to do this because some forms of damages are available against a wrongdoer which cannot be recovered as indemnification from the fund. In particular, the victim might be awarded punitive damages against the wrongdoer. However, since the wrongdoer has usually fled or is judgment-proof, this is not a significant practical point.

[32]S. 296(2)

[33]S. 296(4),(5)

[34]S. 305 "Payment from assurance fund without action"

directly from the fund without requiring the victim to bring a court action against the wrongdoer.[35] Thus in effect British Columbia operates as a fund of first resort.

There is, however, a potentially significant difference between the New Brunswick and Saskatchewan approaches and that in British Columbia. In any of these jurisdictions the Registrar (or the Attorney General in B.C.) may deny a claim–obviously, the fund cannot simply pay out to anyone who makes a claim, or the system would be flooded with false claims. There will inevitably be some close calls, and in exercising her discretion to pay a claim the Registrar will be torn between a desire, on the one hand, to pay out valid claims with minimal inconvenience to the victim, and, on the other hand, a desire to protect the fund against false claims. Thus, even in jurisdictions in which the Registrar is empowered to pay out claims without a judicial order, the attitude of the Registrar towards such claims can significantly affect the speed and ease of recovery of even legitimate claimants. This is very much as is the case with insurance companies generally, including private insurers, some of which are significantly more willing than others to pay out claims.

The difference between the N.B. and Saskatchewan systems and that in B.C. arises in cases where the Registrar believes the claim is not valid and refuses to pay. In the first two jurisdictions, the claimant can appeal the Registrar's decision directly to a court.[36] Even at this stage the claimant does not need to pursue the wrongdoer. In those jurisdictions the victim is *entitled* to compensation from the fund if she has been deprived of land, regardless of whether she has pursued the wrongdoer, and this entitlement is enforceable by an appeal of the Registrar's decision. This is important because the if the claimant is successful in applying to the court for an award of compensation out of the fund, she will be assured of getting paid immediately, while a judgment against a wrongdoer may require efforts at enforcement before against claimant can claim against the fund. In contrast, in B.C. the victim is only *entitled* to compensation after pursuing the wrongdoer and satisfying the various statutory requirements. Payment without a court action is at the discretion of the Attorney General or Registrar, as the case may be, and there is no appeal if the claim is denied. The victim's recourse would be to use the more onerous procedure in which the wrongdoer is sued with the Registrar joined as a nominal party in order to obtain an order for payment from the fund.

This distinction is likely to be of little practical significance if the Registrar is generally willing to pay out valid claims on reasonable evidence. But the more direct route of appeal against a Registrar's decision is a difference in principle between a true fund of first resort and a hybrid fund of first resort. This difference could be significant in practice depending on the Registrar's attitude towards paying claims, and the practice might even vary if the existing Registrar retires or is otherwise replaced.[37]

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[35]Interview with Ken Jacques, Director of Land Titles, Province of British Columbia

[36]Sask s. 91; NB s. 74(2). In New Brunswick the claimant may apply to a court for indemnification out of the fund even if she has not applied to the Registrar first, while in Saskatchewan the claimant must apply to the Registrar first and can only turn to the court if she is denied compensation or is dissatisfied with the compensation which the Registrar proposes to award.

[37]Note that other jurisdictions, in particular Alberta and Manitoba, have similar provisions allowing discretionary payments, but in those jurisdictions it is understood that the discretion will only be exercised in the case of an error by the Registrar. This observation is not intended as a criticism of the Registrar's exercise of their discretion, and this view is clearly supported by the legislation, which very clearly provides that in the case of fraud the fund is a fund of last resort. However, this variation in the exercise of discretion does show the uncertainty associated with relying on a discretionary provision to provide compensation.

To summarize, even though there is the potential for the Registrar to deny a claim, in Saskatchewan, New Brunswick and British Columbia (in practice) the assurance fund is a fund of *first resort* as compared to Ontario, Manitoba, Alberta, where it is a fund of *last resort.*

In all systems, in those cases in which the fund compensates the victim, the Registrar is subrogated against the wrongdoer, which is to say that the Registrar, having paid out to the victim, is entitled to attempt to recover that amount from the wrongdoer.[38] Of course, in those systems where the victim cannot recover against the fund unless he has exhausted his remedies against the wrongdoer, it is unlikely that the Registrar will have any more success in recovering against the wrongdoer.

What are the advantages and disadvantages of these two approaches?

Putting the burden on the victim to pursue the wrongdoer has considerable justification in cases of fraud by imposter, where the victim actually dealt with the wrongdoer. In subsequent sections we will see that some systems, namely systems of "deferred indefeasibility without compensation", actually deny recovery entirely in such cases, in order to provide an incentive for the lawyer acting for a bank or purchaser to take due care in ascertaining the identity of the person they are dealing with. Alberta and Manitoba take a middle ground in a sense, in that the system is one of immediate indefeasibility, but the fund is one of last resort, so that the person who dealt directly with an imposter will be compensated, but the burden is placed on that person to pursue the wrongdoer before turning to the fund. This is a compromise which gives an incentive to take care, without denying compensation entirely.

A similar argument can apply in some cases of rogue fraud. Even though in those cases the bank is dealing with the person shown as owner on the register, so it is not possible to discover the fraud simply by asking for identification, in many cases it may be possible to discover the fraud by other means. In particular, in true rogue frauds it is not uncommon that the original owner is still living in the house and a thorough appraisal which includes inspecting the interior of the home, would normally discover the fraud, since the rogue will not even have a key. The fraudster avoids this problem by applying for a mortgage which is only a small percentage of the value of the house (recall that any existing mortgage has been fraudulently discharged), so that a drive-by appraisal is sufficient to establish that there is enough value in the property.[39] A more thorough appraisal would normally reveal the fraud. It is not possible to deny compensation entirely in such a case, where the registry does show the wrongdoer as owner, as this would defeat the entire land titles system. However, putting the burden on the bank to pursue the wrongdoer before claiming against the assurance fund does provide some incentive to take steps to ensure the legitimacy of the registered owner by off-the-record inquiries, namely a more thorough appraisal. The other side of this argument is that this additional burden, which is only realized in the very small number of cases where fraud has occurred, may not have any real impact on whether a bank undertakes a more thorough appraisal. And even if it does, it is not clear that the benefit of detecting fraud is worth the cost of more thorough appraisals, since the cost of the more thorough appraisal would be borne in every case, not just those in which fraud is involved.

However, these are not strong arguments in favour of operating a fund of last-resort, as they both rely on the notion that the victim could have done something to protect themselves. While this is

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[38]Alta s.173

[39]This was Tesoro's technique.

sometimes true, often it is not. Even where a homeowner's house has been sold out from under him by a forger, where there is absolutely nothing the victim could have done to prevent the fraud, a system of last resort requires the victim to pursue the wrongdoer before approaching the assurance fund. In other words, the victim, not the assurance fund, bears the primary responsibility, even though it is the nature of the land titles systems, and not any fault of the owner, which gave rise to the fraud. The promise of the land titles system was that the combination of an authoritative registry plus the assurance fund would simplify and reduce the cost of transactions without reducing security of ownership. In cases where an entirely innocent homeowner is compelled to pursue a wrongdoer to judgment before claiming against the fund, the promise of security of ownership is significantly impaired.

The justification for operating a fund of last-resort system is not entirely clear. One argument is that it will reduce the burden on the assurance fund by ensuring that all other potential avenues of recovery are pursued. This is a weak argument. In fact, the effect may actually be to increase the burden on the fund. This is because when the victim is unable to recover from the wrongdoer and brings a claim against the fund of last resort, the victim is entitled to recover all reasonable costs associated with the action, including the costs of pursuing the wrongdoer. When the fund is a fund of first resort, the Registrar who pays out is subrogated against the wrongdoer, so that any available assets of the wrongdoer are available to set off the compensation payable by the fund, just as under the fund of last resort system. But if the Registrar is of the view that any judgment against the wrongdoer would likely be unrecoverable, the expense of actually proceeding with the action can be avoided entirely, whereas in the fund of last resort this fruitless expense may be incurred simply in order to establish an entitlement to claim against the fund. Further, the Registrar, with all the resources of the land titles system behind him, is clearly in a better position to pursue a fraudster than is the victim, particularly when the fraud was enabled by the nature of the land titles system and the victim was innocent and could have done nothing to prevent the fraud. In other words, in either system any money which can be obtained from the fraudster will be as follows: though in one system it will be the victim who pursues the fraudster and in the other it will be the Registrar. But the fund of last resort probably increases the legal costs of pursuing the fraudster and it certainly places the burden of doing so on the victim, who is much less able to bear that burden.

Further, it is important to remember that we are concerned with minimizing the overall costs of the system to everyone involved. Relieving the burden on the assurance fund at the while put the same or even greater expense on innocent victims of fraud, who are much less able to bear that burden, is no saving at all from the overall social perspective.

Another argument for a fund of last resort is that requiring the victim to obtain a judgment against the fraudster proves that there was in fact a fraud, and so prevents claims against the assurance fund which are themselves fraudulent. Note that this argument is evidently not the main justification for a system of last resort, since both Alberta and Ontario require not just a judgment, but also evidence that the judgment cannot be satisfied. This second requirement does nothing to help establish the fraud itself. In any event, this argument is not particularly persuasive. In the first place, a system of first resort also has safeguards against fraudulent claims. If the Registrar feels the claim is not valid, she can refuse to pay it, in which case the claimant can appeal that decision to the courts. And even if the Registrar requires equally stringent proof of the fraud, an application to the Registrar could be much speedier than a court action. At the very least the delay required to show that the judgment is unenforceable would be eliminated. Nor is necessary for the Registrar to require the same level of proof as would be required by a court, as a court action is a finding against the wrongdoer, and fairness to the defendant is important, whereas a decision to pay to a claimant does not involve any enforceable finding of guilt against

the third party who might be responsible. That is left to be determined if the Registrar decides to pursue her subrogated rights. And finally, the Registrar's exercise of her discretion is not unfettered. It is circumscribed by the need for approval from a superior authority, namely the responsible Crown Corporation or the Minister responsible for that Crown Corporation in New Brunswick and Saskatchewan respectively. Protection of the public fund is thus provided through governmental oversight rather than through the court process.

5.3.3 Summary

To summarize, a fund of last resort is designed to reduce the burden on the land titles assurance fund by assuring that all other avenues are pursued before the fund is approached. But it probably increases costs to the land titles system as a whole. Any money which could have been obtained from the fraudster by the victim could equally well be obtained from the fraudster by the Registrar pursuing the victim's claim in their stead. And requiring the victim rather than the Registrar to pursue the fraudster probably increases the associated legal costs. Certainly the fund of last resort places a heavy burden on the party least able to bear it, namely the innocent victim, rather than placing it on the Registrar, where a claim against the fraudster can be pursued by professionals whose home is not at stake.

5.4 How much compensation?

5.4.1 Introduction

When a victim is not entitled to recover the land or clear a mortgage from his title, how much compensation should a victim of fraud be entitled to? A successful claimant is entitled to compensation for the value of the interest lost (that is, the value of the property if it has been transferred to a new owner as a result of the fraud, or the amount of money required to pay off any mortgage which may have been registered through fraud) plus interest. The claimant is also entitled to reasonable expenses of bringing the claim against the fund, though this will not normally cover all of the claimant's actual costs.[40]

The principle that the victim should be compensated for the full actual value of the interest in the land which was lost is not controversial. The fact that the entire amounts of the victims legal costs are not recoverable is more controversial. And it is sometimes suggested that additional categories of loss should be claimable. In particular, three types of additional amounts should be considered. First, punitive damages may be available against the wrongdoer, but generally cannot be claimed against the fund. Also, the victims may have suffered mental anguish as a result of losing their house and the need to go through a sometimes lengthy claims process. And thirdly, the victim may have suffered what is known as "consequential loss." For example, if a mortgage is registered through fraud but is nonetheless valid, the owner can make a claim against the fund for an amount sufficient to discharge the mortgage, but until the claim process is completed and the amount paid out, the home equity is not available for other purposes. So, if a small business owner relies on a line of credit secured by his home in order to finance cash flow in his business,

[40]Sask ss. 87, 90; NB s. 77; BC s. 304 The *Ontario Act* is obscure on this point (see s. 57), but it has been interpreted in a similar manner: see *Kerr v. Ontario (Land Titles Assurance Fund)* [1999] O.J. No. 4647 (Sup. Ct.) and *In the Matter of Nimita Raina et al. supra* see p.113. The *Manitoba Act* is unclear (see s. 87) and there is no case-law directly on point, but it is similar to the Ontario Act and would likely be interpreted in the same manner. In jurisdictions in which the fund is one of last resort, costs of the original action against the wrongdoer are recoverable in addition to costs of making the claim against the fund: in Ontario see *Kerr v. Ontario (Land Titles Assurance Fund)* and see p. 113 and in B.C. see *Crédit Foncier Franco-canadien v. Bennett et al.* (1962) 34 D.L.R. (2d) 342 (B.C.S.C.).

this line of credit may not be available and the business could suffer as a result.[41] The losses to the business attributable to the loss of credit during the claim period is one form of consequential loss. In particular, since the loss is financial, not physical, it is known as "consequential economic loss."

The argument against allowing the recovery of punitive damages from the assurance fund is compelling, for reasons which are discussed below. The second and third types of claim, mental distress and consequential loss, raise more difficult problems. In contrast to the claim for punitive damages, both of these types of claim do represent claims for harm actually suffered by the victim. However, allowing these types of claims against the fund would raise significant problems which have been the subject of much debate in other areas of law.

5.4.2 Costs

Successful claimants are generally entitled to at least a portion of the costs of bringing the proceedings. In a system of first resort, where a claim may be brought directly against the Registrar for payment out of the assurance fund, the claimant is generally entitled to "reasonable expenses" of bringing the claim.[42] In a system of last resort, where the claimant will incur costs in pursuing the fraudster before a claim is brought for compensation from the fund, some part of the legal costs incurred in pursuing the claim may also be claimed from the fund. In B.C. and Alberta, the legal costs awarded against the fraudster will ultimately be recoverable from the assurance fund.[43] In Ontario, the award of costs from the assurance fund is in the discretion of the Director of Titles.[44]

Despite this liability on the part of the assurance fund for costs against the wrongdoer and "reasonable" costs of bringing the claim, the claimant's full costs will not normally be recovered. This mirrors the general rule in the Canadian legal system more broadly; the winning party is awarded costs, but not the full costs of the action. The normal award of costs is on what was traditionally known as "party and party" basis (now known in Ontario as "partial indemnity costs"). This kind of award is not the true costs incurred by the successful party, but rather an estimate of the reasonable costs of bringing the action. The proportion of the full costs varies according to the type of action and how much the lawyer in question actually charged, but party and party costs are generally somewhere in ballpark of 50 per cent of true costs (though this can vary substantially with the nature of the case, the costs scale in the jurisdiction and the amount actually charged by the lawyer in question). An award known as "solicitor and client costs" (or "substantial indemnity costs" in Ontario) is a closer approximation to true costs. Solicitor and client costs are rarely awarded. Usually the award is made because of some kind of unreasonable conduct on the part of the solicitor for the losing party that unnecessarily increased the costs of the action, or sometimes because of the egregious nature of the defendant's behaviour. Thus

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[41] See the claims made in *ibid.*

[42] Sask s. 90(1)(b), 92(1)(b)(ii); N.B. s. 74(1). Note that the *N.B. Act* expressly provides that the Registrar may choose to award costs even to an unsuccessful claimant.

[43] B.C. s. 296(5)(c). In Alberta, the Registrar must be joined as a co-defendant along with the fraudster, and the judgment will be entered against the registrar if it is unrecoverable from the fraudster. Thus the Registrar will be liable for whatever costs are granted to the claimant in the normal course.

[44] Ont. S. 57(8). However, it remains unclear whether this is an unfettered discretion or whether some proportion of the costs against the fraudster may be encompassed in "damages": see Youssef v. Ontario (Ministry of Consumer and Commercial Relations)[2003] O.J. No. 622 para. 15.

solicitor and client costs may be awarded against the fraudster, but there are often other parties to the action, such as a bank which has a valid mortgage on the victim's property, and solicitor and client costs will almost never be awarded against such other parties.

The bottom line is that the costs paid to the successful claimant out of the assurance fund will almost never compensate the claimant for his full actual costs. While this is hard on the innocent victim, there is a compelling reason for this policy. If full actual costs were awarded from the assurance fund, then the lawyer for the claimant would have a strong incentive to inflate his costs, for example by charging an exorbitant hourly rate. These spiraling legal costs would then be borne by the land titles office and would lead to higher registration fees. Limiting recovery of costs is essential to keeping legal costs under control. It may be said that the costs recovery should be more generous, but this is a matter for general law reform. There is nothing unique to the land titles system which would justify a different costs scale than that which is generally used.

This conclusion emphasizes the need to make the procedure for compensating the victim as simple and speedy as possible, in order to minimize the costs which the innocent victim will have to bear.

5.4.3 Punitive Damages

Punitive damages are damages which are greater than the loss actually sustained by the victim. Punitive damages may be awarded against a fraudster as punishment for his behaviour. The question is whether these damages awarded against a fraudster should be claimable against the fund if they are unrecoverable from the fraudster.

It is not entirely clear as a matter of existing law whether punitive damages awarded against the fraudster can be claimed from the assurance fund,[45] but the argument *against* allowing such claims is very strong. Punitive damages, are, as the name suggests, intended to punish the wrongdoer in order to deter future wrongdoing. The land titles Registrar has done nothing wrong, so there is no point to levying punitive damages against the fund. It is true that the punitive damages awarded against a wrongdoer would have ended up in the hands of the claimant, but this is more or less a happenstance. The money has to end up somewhere, and in a traditional civil law action, there are only two parties, the victim and the wrongdoer, so if the wrongdoer is made to pay the victim must be the recipient. But punitive damages do not represent any loss which the victim has suffered, so the victim has no particular moral claim to that money. Note that the fraudster may also be criminally prosecuted and may be fined as part of the sentence. The fine serves exactly the same purpose as punitive damages, namely to deter future wrongdoing, but the money goes to the state rather than to the victim. Note also that the victim is not prevented from seeking punitive damages *from the wrongdoer*; the rule is simply that if the victim cannot actually recover those damages from the wrongdoer he is not entitled to claim them from the fund. We would not say that the Registrar should serve jail time if the fraudster cannot be found; nor would we say that the Registrar should pay a criminal fine which might be levied against the fraudster. For exactly the same reasons the assurance fund should not be liable for punitive damages.

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[45] See *Durrani supra* see p. 112, in which punitive damages in the amount of $25,000 ordered against the wrongdoer: "I award punitive damages in favour of the Durranis against Mr. Augier in the amount of $25,000. I make no comment about whether this amount is one that can properly be claimed from the Fund."

5.4.4 Mental Distress

The issue of claims for mental distress is more difficult. It is true that mental distress is a real harm suffered by the victim, and from that view should be compensated. But compensating this type of claim raises very serious problems which have long been recognized in other areas of law. One problem is that a claim for mental distress is very difficult to quantify. How much is mental anguish worth? Allowing claims for mental distress runs the risk of inflated claims. There is a second argument against allowing claims for mental distress, which is more subtle but ultimately more compelling. Remember that the assurance fund is a form of insurance. Everyone who buys or mortgages a house pays a small fee towards the assurance fund in order to pay for compensation in case something goes wrong. This is worthwhile because the compensation actually reduces the harm which would otherwise have occurred. When fraud does occur, instead of having to pay off a new mortgage out of your own funds, you are compensated so that you are no worse off financially than if the fraud had not occurred. Mental distress is different because the harm is suffered even if you are financially compensated. That is, compensation for purely financial loss actually prevents the harm, while compensation for mental distress does not prevent the harm. Since insurance does not reduce the suffering, it does not make sense to insure against it. In other areas of law claims for mental distress are now recognized, despite the possibility of inflated claims, but this is because of the need to deter wrongdoing. As we have already seen, it does not make sense to charge the assurance fund with deterrence penalties.

The best response to the problem of mental distress is not to compensate the victim, but to prevent the harm in the first place by ensuring that when a fraud is committed the victim is quickly compensated. If compensation is speedy enough, the mental distress will be minimal, and the issue of compensation will be irrelevant.

5.4.5 Consequential Economic Loss

The last category, consequential economic loss, is the most difficult. This type of loss may occur, for example, if a small business owner relies on a line of credit secured by their home in order to finance cash flow in their business. If the title to the house is fraudulently encumbered, this line of credit may not be available and the business could suffer as a result. Consequential economic loss is not at present recoverable under any existing land titles system. However, the argument in favour of allowing recovery is much stronger than in the two cases discussed above, since it is a true financial loss suffered by the victim. Very similar issues have been extensively discussed in other areas of law, in particular in the law of negligence. For a long time consequential economic loss was generally not recoverable, just as it is not at present recoverable in land titles systems. But more recently there has been a clear trend driven by a number of decisions from the Supreme Court of Canada, towards allowing recovery in a broader range of these types of cases.[46] There is an argument to be made that this trend in the law of negligence should be reflected in the law of the land titles system.

To begin with, we must recognize that there are sound reasons for refusing these types of claims. As has long been recognized in the general law of negligence, claims for consequential economic loss raise particular problems of "remoteness" which suggest a need to limit recovery. The classic example is a case in which a ship hits a bridge and businesses cut off from the mainland suffer in

[46]See in particular Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2 Canadian National Railway Co. v. Norsk Pacific Steamship Co, [1992] 1 S.C.R. 1021; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85 Hercules Managements Ltd. v. Ernst & Young [1997] 2 S.C.R. 165;

consequence.[47] Can those businesses sue the shipowner for the loss of business? The problem is very similar in principle to whether the victim of fraud can recover for the loss of business consequent on his reduced working capital. The problem with economic loss in particular is that, unlike the case of physical loss, there is no natural stopping point in the economic consequences which arguably flow from the initial harm. In a famous phrase, the problem is "the possibility that the defendant might be exposed to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'."[48]

A similar concern with the limits of liability is undoubtedly what underlies the refusal of land titles assurance funds to compensate this kind of loss. Suppose, as in our example, the victim's business has suffered because she could not use a line of credit secured by her home for business purposes. Even if we accept that there has been some loss, it may be very difficult to determine how much harm has been done by the loss of that line of credit as opposed to general business conditions. Perhaps the victim's business would have declined anyway, at least to some extent, just because of the business cycle, or because her products were out of fashion or because a new competitor had started up. It can be very difficult to distinguish the loss caused by these factors as opposed to the loss caused by the lack of a line of credit. The problem then is that the victim might be overcompensated and so benefit unfairly at the expense of the contributors to the fund. Further, the cost of assessing the claim may increase dramatically as experts must be brought in to testify as to the extent of the loss.

Thus we have seen that similar concerns underpin the traditional refusal of the courts to award damages for consequential economic loss in negligence law and the refusal of the *Land Titles Acts* to provide compensation for the same types of loss. But the state of negligence law generally is changing. Though the law in Canada on this point remains somewhat uncertain, we can say that recovery of this kind of loss is allowed where fears about indeterminate liability are sufficiently allayed. In particular, where the reliance by the claimant was reasonable and reasonably foreseeable, and where the person against whom the claim was made knew the identify of the class of potential claimants and the nature of the losses which might be claimed, recovery of consequential economic loss will be entertained.[49]

Arguably, just as negligence law generally is changing, consideration should be given to compensating similar types of losses out of the assurance fund when these concerns can be addressed. Admittedly this "test" for allowing compensation in negligence is vague, and it is not clear how it would apply to the circumstances of a claim of the kind made against the fund. But we can say that despite legitimate policy concerns about indeterminacy in claims for consequential economic loss, the type of consequential loss suffered by the victim of fraud would at least be on the borderline of the kind of claims which would be recognized in modern law in other contexts.

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[47]This was essentially the issue addressed, somewhat inconclusively, by the Supreme Court of Canada in Canadian National Railway Co. v. Norsk Pacific Steamship Co, [1992] 1 S.C.R. 1021.

[48] Per Cardozo C.J., , 174 N.E. 441, 444 (N.Y.C.A. 1931), quoted with approval by La Forest J. for the Supreme Court of Canada in Hercules Managements Ltd. v. Ernst & Young [1997] 2 S.C.R. 165, 192.

[49] More particularly, a *prima facie* duty of care is raised where "(a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable" and but this duty can be limited to cases involving "'knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant' and 'use of the statements at issue for the precise purpose or transaction for which they were prepared.'" See ibid at 188, 197.

It is important to note that consequential loss is likely to be much greater if the victim's compensation is delayed. Thus in a system where the assurance fund is a fund of first resort, so that an innocent victim can get speedy compensation from the fund directly rather than engage in a lengthy pursuit of the wrongdoer, consequential losses should be minimal. For this reason, and in view of the difficulty of quantifying claims for consequential economic loss, it may be entirely reasonable to exclude claims consequential economic loss from the compensation from the fund. However, in systems where the fund is a fund of last resort, the innocent victim who could do nothing to prevent the fraud may suffer significant consequential loss through no fault of their own. Under such systems the argument in favour of allowing claims against the fund for consequential economic loss is much stronger.

Further, consequential economic loss is much more likely to be suffered by a homeowner, since the primary cause of this type of loss is a shortage of funds and this will not be a problem for a bank. Thus consequential loss should also be less of a problem in a system, such as that in New Brunswick, which give preference to the owner in possession and leave the lender to seek compensation from the wrongdoer or the fund.

5.5 Fraud by Impersonation

5.5.1 The Position of the Purchaser: Deferred and Immediate Indefeasibility

Now consider the case of fraud by impersonation. There is considerable variation in the way that different land titles systems treat this case. In either system, when a property is fraudulently sold or mortgaged, the original home owner who had his land sold or mortgaged out from under him is entitled to protection. The difference comes in the treatment of the purchaser who was caught up in the fraudulent scheme. The two main approaches are known by the rather technical names of "immediate indefeasibility" and "deferred indefeasibility" depending on how the innocent purchaser is treated. At the same time, lenders may also be treated differently from purchasers in any given system.

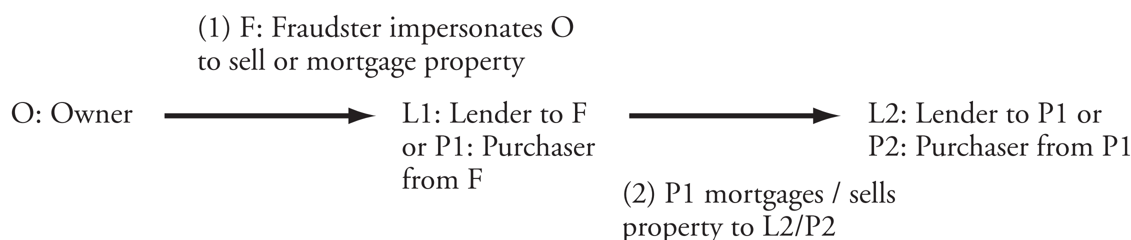
First consider the position of a purchaser. In the system of immediate indefeasibility, any purchaser who is the victim of a fraud in which invalid documents are registered in the land titles system is protected, so long as he did not actually participate in the fraud.[50] In the system of deferred indefeasibility some purchasers are *not* protected, even though they did not participate in the fraud. Whether a purchaser is protected depends on the exact manner in which he was defrauded. In particular, any purchaser who dealt with the person actually shown on the register to be the owner is protected, even if the "owner" was a fraudster who obtained the registration by forgery. This is the same as the system of immediate indefeasibility. But the two systems operate differently in the case of fraud by impersonation, where a purchaser deals with an imposter in the belief that he is the owner shown on the registry. In the system of deferred indefeasibility, the immediate purchaser from the imposter is not protected. Notwithstanding that he did not collude in the fraud, he is not entitled to keep the land or to any compensation. This is in contrast to a system of immediate indefeasibility where that purchaser would be protected so long as he honestly believed that the imposter was the true owner. The systems differ only in their treatment of the immediate purchaser who dealt with the fraudster. In either system, if that first

[50]Either by compensation or by the right to retain the interest in the land.

purchaser, who is then registered as owner, sells the property to a subsequent purchaser, the subsequent purchaser *is* protected, even though the original innocent purchaser was not. In other words, the indefeasibility is "deferred" to the second innocent purchaser.

Similar principles apply in any case where the party who is defrauded was not dealing with the person shown by the register to be the owner, for example if a complete stranger impersonates the owner and obtains a mortgage by using forged identification to establish his identity. The bank's mortgage will be invalid and the register will be rectified to remove it, and the bank will not be entitled to compensation for its loss.

Fraud by Impersonation



The property is owned by O, with clear title (no mortgage) or substantial equity.
Step 1: The fraudster, F, impersonates the owner, O, and sells or mortgages the property to L1/P1.
The fraud is now complete and F absconds with the money.
P1 may then sell the property to P2, or mortgage the property to L2.
In a system of immediate indefeasibility, only O, P1, P2 and L2 are all protected.
In a system of deferred indefeasibility, only O, P2 and L2 are protected. P1 is not protected
at all, and is not entitled either to keep the land or to compensation from the assurance fund.
P1's only remedy is to sue the fraudster.

Probably the most common case of this type happens when an estranged couple owes property jointly and the husband sells the property by having another woman impersonate his wife. In that case, one of the people sitting in the office when the document is signed is an imposter. Even though the purchaser is not colluding in the fraud and may honestly believe that the imposter is in fact the wife, the purchaser is not in fact dealing with the person shown on the register as being the owner. If the true wife discovers the fraud at this point, in a deferred indefeasibility system, the register will be rectified in her favour to show her as the owner and the purchaser will not be entitled to compensation from the assurance fund for the loss of that interest, even if he did not know of the fraud.

The purchaser will be entitled to sue the husband, but this may or may not offer any real relief. If the purchaser borrowed money from a bank to finance the purchaser, he will still owe that money to the bank.[51] The purchaser may or may not be able to sue her lawyer for her loss. The lawyer's

[51] The classic case is [1891] A.C. 248 (P.C.), a case out of the Australian state of Victoria in which the lawyer for the original owner, a Mrs. Messer, forged a transfer into the name of a fictitious person and then, posing as that fictitious person, took a private mortgage from a couple named McIntyre. As usual, the rogue took the money and fled, leaving Mrs. Messer and the McIntyres to bear the burden of his fraud. This is an unusual type of fraud, since the fraudster forged a transfer, not into his own name, but into the name of a fictitious person. Though this may appear on the surface to be a case of fraud by forgery, the position of the lender or purchaser who deals with the fraudster in this case is the same as in the case of fraud by impersonation. This is because the purchaser in this case is not dealing with the person shown by the registry to be the owner. In that particualr case the Privy Council held that the mortgages were invalid and Mrs. Messer was entitled to have them cleared from her title. The

liability is based only on negligence, so the purchaser will be entitled to compensation from her lawyer only if the lawyer was negligent in verifying the identity of the other party. It is now generally considered professional negligence for a purchaser's lawyer not to ask for identification from the vendor. If the lawyer did not ask for identification, the purchaser will be entitled to sue her lawyer for negligence, and compensation will ultimately be available from the lawyer's professional indemnity insurance. However, if the fraudster presented forged identification which appears to be adequate, then the lawyer will have fulfilled her professional responsibility, and the purchaser will not have a claim against the lawyer.

Canadian land titles provinces are split on the issue of deferred versus immediate indefeasibility. Saskatchewan and New Brunswick have immediate indefeasibility.[52] Thus even the person dealing directly with the forger is protected, though this protection is by means of compensation, rather than by an entitlement to the land. Ontario[53] and British Columbia[54] have implemented deferred indefeasibility. The situation is unclear in Alberta and Manitoba, since the Acts are not clear, particularly given the controversy surrounding the issue, and there appears to be no authoritative decision directly on point in either jurisdiction

Fraud by Impersonation		
Party	**Immediate Indefeasibility**	**Deferred Indefeasibility**
Owner	O loses his title, in the same manner as fraud by forgery, but is entitled to compensation from the assurance fund.	O owns clear title and is unaffected by the fraud, if the property is in the hands of the first purchaser, but loses title if the property is sold to a second purchaser.
Initial Purchaser or Lender	P1 or L1 has a valid interest.	P1 or L1 has no interest and is not entitled to compensation.
Second Purchaser or Lender	P2 or L2 has a valid interest.	P2 or L2 has a valid interest.

McIntyres were left with nothing, and they apparently could not recover from the assurance fund. *Frazier v Walker* [1967] 1 AC 569 (P.C.) was a classic spousal fraud case in which the wife forged the name of her husband on a mortgage. The Privy Council held that the particular *New Zealand Act* in question provided for immediate indefeasibility, so that the bank was entitled to a valid mortgage. But the Privy Council did remark that they were "prepared to assume. . . that according as either failed in these proceedings, the former owner . . .would, and the purported mortgagees . . .would not, be enabled to claim compensation [from the assurance fund]."

[52] In Saskatchewan see *Hermanson supra* see p.113; in N. B. LTA s. 73(2). The New Brunswick approach described above, whereby the person in possession is preferred, also applies in cases of fraud by impersonation, so that a person dealing directly with a forger is liable to having his interest removed from the title, but if that is done, he is entitled to compensation. Thus the system is one of immediate indefeasibility in that the immediate purchaser is protected, though this may be with money instead of with the property.

[53] See *In the Matter of an Application by Lorrie Risman*, decision of the Deputy Director of Titles, February 1,1998, available on file with the author or from the Ontario Director of Titles.

[54] B.C. s. 297(3) "A person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument."

The debate as to whether a particular system is one of immediate or deferred indefeasibility turns on the particular wording of the legislation. It is not productive to follow the details of the judicial interpretation of the various *Acts*, which were often obscurely drafted on this point. The main general arguments are more instructive.

First, the primary "technical" argument is that a person defrauded by an imposter is not entitled to compensation from the assurance fund because his loss is not a result of reliance on the register. Recall, in these cases there is normally absolutely nothing wrong with the register. The person shown on the register as the owner is in fact the owner. The real cause of the loss is not reliance on the register–on the contrary, the register was entirely accurate and could not have been improved or corrected in any way. Rather, the victims were defrauded because they were careless enough to rely on the word of an imposter, rather than asking for identification. As the Privy Council explained in the leading case over 100 years ago, *Gibbs v Messer*:

The [innocent purchasers] cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty.[55]

The more fundamental policy argument underlying this somewhat technical point is that denying compensation to someone who deals with an imposter will serve to prevent fraud in the first place by encouraging persons dealing with land to check the identity of those whom they deal with. Put another way, though the lender may have honestly believed that the imposter was the true owner, this belief was negligent, or at least careless, and to reward this carelessness with compensation would only encourage others to be careless as well, thus burdening the assurance fund – and thereby landowners generally – with the costs of that carelessness.[56] Again, as the Privy Council said in *Gibbs v Messer*:

In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.[57]

In other words, the debate between deferred and immediate indefeasibility is not simply about insurance principles. Rather, it is directly concerned with fraud prevention. As we have seen, when deferred indefeasibility would apply to return the land to the original owner, the bank or purchaser was dealing with an imposter. For this reason it might have been possible to prevent the fraud simply by asking the "owner" for identification or using other means to make sure that the person purporting to mortgage the land was actually the person shown by the register to be the owner.

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[55][1891] AC 248

[56]In *Frazier v Walker* [1967] 1 AC 569, [1967] 1 All ER 649 though the Privy Council did not decide the issue, it remarked that if the mortgagees were not entitled to recover, "it might still have been the intention of the legislature, that they should bear their own loss, which has not arisen from any fault of the registry, or even from any reliance by them on the registry, rather than that it should fall on taxpayers in New Zealand." Note that the second purchaser who takes from first purchaser and thus receives the benefit of the deferred indefeasibility, is in fact dealing with the person shown by the register to be the owner, and there is nothing that the second purchaser could do to protect himself from the consequences of the prior fraud. This is why a system of deferred indefeasibility distinguishes between the person taking on the basis of a document which is itself void, and a subsequent purchaser.

[57] *Gibbs v Messer* [1891] AC 248

While the land titles staff as practical matter cannot verify the identity of the parties themselves, documentation is required in which a witness affirms that the parties are who they say they are. In Saskatchewan for example, where the *Hermanson* case took place, there is a requirement that an application for the registration of a mortgage or transfer be accompanied by an affidavit of execution in which one of a specified list of people, normally the lawyer involved in the transaction, swears that he witnessed the signature of the transfer and that the witness was satisfied that the persons signing were in fact who they purported to be.[58] Since the person purporting to be Valerie Joan Schmidt was not in fact who she claimed, the lawyer who executed the affidavit of execution stating that she was, should not have stated that she was without having verified this fact properly. In the Prairie provinces the registrars report that since the *Hermanson* case, law society standards have made it clear that lawyers must ask for adequate identification, and these standards are apparently generally adhered to. The Registrars credit this practice with extremely low incidence of imposter fraud which has been seen since then. In cases where the purchaser's lawyer fails to ask for identification and fraud by impersonation is perpetrated as a result, the purchaser will have a claim against their lawyer for professional negligence. This is true even in a system of deferred indefeasibility, since the claim against the lawyer depends on the professional standards, and not on the land titles system, and the claim is ultimately backed by the lawyer's professional liability insurance.

On the other hand, there are a number of arguments in favour of the system of immediate indefeasibility. The most obvious is that it is harsh to deny compensation entirely to a person, who, though they might have prevented the fraud had they taken more care, did not actually participate or collude in the fraud.[59] This is particularly compelling when we recognize that it will not always be a bank or other sophisticated party who will bear the burden of the loss. For example, in the leading modern Canadian decision, that of the Saskatchewan Court of Appeal in *Hermanson*,[60] the person dealing with the forger was not a bank, but an individual purchaser, a Mr. Martin, who, it appears, was buying the property as a home for himself. The home belonged jointly to a husband and wife who had divorced three years before the sale. The wife had moved out of the city after the divorce and no longer occupied the house, though title remained in her name jointly with her former husband. Thus there was no way that the purchaser could have protected himself by inspecting the house. The Court of Appeal held that the Saskatchewan *Land Titles Act* implemented a system of immediate indefeasibility, which meant that the purchaser retained title to the house which he intended to occupy, and the wife who had been defrauded was entitled to compensation. To have held that the Saskatchewan system was one of deferred indefeasibility would have meant that Mr. Martin would have lost his home, and would have had no recourse against the fund. In holding in favour of immediate indefeasibility the Court of Appeal expressly remarked on the purchaser's lack of expertise:

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[58] See Sask. , L-5.1 Reg.1, s.24. The *Hermanson* case took place under the prior *Act*, but this requirement was substantially the same.

[59] While it is not always easy to say whether a lender colluded in the fraud, the cases make it clear that a lender or purchaser who did not actually commit the fraud but who had a good reason for suspecting that the person they were dealing with was acting fraudulently but who chose to turn a blind eye in order to get a deal that was too good to be true, will be considered to have colluded in the fraud: see *Durrani v. Augier* [2000] 50 O.R.(3d) 353. The point is that typically the purchasers or lenders who would lose out in a system of deferred indefeasibility are acting innocently and in good faith.

[60](1986) 33 D.L.R. (4th) 12 (C.A.)

> Mr. Martin had no lawyer acting for him. All the documents, including the mortgages, were drawn by the law office representing Mr. Schmidt. In these circumstances, I find it difficult to accept the view adopted in *Gibbs v. Messer* and subsequent cases that it was Martin's responsibility to assure himself that the transfer to him was genuine and not a forgery.[61]

Further, it is not always possible to verify the identity of the vendor at a reasonable cost. The most straightforward way to verify the identity of the vendor is simply to ask for identification. It is certainly reasonable to require this simply step, and doing so is now clearly the professional responsibility of the lawyer acting for the purchaser (if the purchaser is independently represented). But in some cases the fraudster will have satisfactory identification. Fraud by impersonation may be divided into two broad categories: opportunistic fraud, perpetrated by someone who knows the victim, most typically an estranged husband whose girlfriend impersonates his wife; and professional fraud, perpetrated by con artists who are not known to the victim. The practical difference between the two is that it is generally easier to prevent opportunistic fraud. In contrast, the professional fraudster will typically have forged identification which appears satisfactory, so that the simple step of asking for identification will not prevent the fraud. In the case of opportunistic fraud, the wrongdoers are often unsophisticated, and asking for identification will often be sufficient to prevent the fraud. However, even in cases of opportunistic fraud the imposter may sometimes have adequate identification. This was the case in two recent instances of imposter fraud appear in Alberta.[62] In one case a son impersonated his father. Since they both had the same name, checking identification did not detect the fraud. In another case the property owner was impersonated by a relative whose middle name was the same as the property owner's first name. The imposter explained to the lawyer involved that he usually went by his middle name, and so again checking identification failed to detect the impersonation. In these cases, where the lawyer took reasonable steps to verify the identity of the parties, the purchaser will not have a claim against the lawyer for negligence. In a system of deferred indefeasibility, the purchaser would therefore be without recourse, except for the claim against the fraudster, which is often worthless.

Thus requiring the lawyer for the purchaser to ask for identification is certainly useful in preventing imposter fraud, but this simple step alone cannot prevent all such fraud. While it might be possible for the purchaser or his lawyer to take additional steps to verify the identity of the vendor, this is probably not a reasonable requirement. Asking for and recording identification is a fairly simple and inexpensive procedure. Further verification of identification, such as personally visiting the owner, would needlessly add significant expense to the vast majority of legitimate transactions. In some cases there may be warning signs, such as nervousness of the vendor, or unusual haste, which might serve to alert the lawyer that the transaction is suspicious and that further steps should be taken to verify the identity, but responding to these kinds of "soft" signals is too nebulous a mandate as a professional requirement. After all, many legitimate vendors are nervous or in a hurry.

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[61] (1986) 33 D.L.R. (4th) 12 at 26. Nor should it be thought that it is completely unusual that the victim would be an individual rather than a bank: this was the case in where the victims, who were ultimately denied compensation as the Privy Council held in favour of deferred compensation, were individuals who were investing in a mortgage against the property in question; and in similarly Risman decision, supra n.52.

[62] Kelly Hillier, Director of Land Titles North – Province of Alberta

Further, the argument that a system of deferred indefeasibility provides stronger incentives for the purchaser to verify the identity of the vendor is weakened by the fact that in a system of immediate indefeasibility the Registrar of land titles can bring a subrogated action against a lawyer whose negligence caused the loss. That is, in a system of immediate indefeasibility, the land titles fund will pay out to the defrauded purchaser, but the Registrar will then make a claim against the lawyer, in the same way that the purchaser would have claimed against the lawyer in a system of immediate indefeasibility.[63] Such an action was in fact initiated in the Hermanson case, though it appears that the action was ultimately abandoned.[64] This implies that the Registrar would be able to recover any amount paid out from the fund by way of an action against the lawyer involved. It should be emphasized that this ability to claim over against the lawyer who negligently swore a false affidavit of execution land titles is not merely a way of transferring the loss from the assurance fund to the lawyers professional liability insurance fund. Much more importantly, it is a means of ensuring that the lawyers involved in a transaction have the incentive to properly verify the identity of the parties to the transaction. The real difference then, is that in a system of deferred indefeasibility the purchaser has an incentive to go to a lawyer who is even more careful than professional standards require, and who may be able to prevent the fraud by responding to "soft" signals. But placing this kind of burden on a typical home purchaser is probably unreasonable.

What about the argument that the land titles system did not cause the loss in any way, so why should it be responsible? After all, there was nothing wrong with the registry itself. This is a good point, but it is not conclusive. The land title system itself must remain liable for failures of the system, including registering a forger as the owner, in order to provide incentives for the land titles system to take care to prevent errors. But in the case of fraud by an imposter, imposing liability on the land titles system does not provide any incentives for the land titles office to take care, as there is nothing that the land titles office could have done to prevent the fraud. This argument is sound so far as it goes, but it is premised on the notion that the land titles system should be liable only if it was at fault. The alternate view is that insurance against this kind of fraud is needed, and the land titles system is in a position to provide it, regardless of fault. Put another way, if everyone carried title insurance, then there would be no need for immediate indefeasibility.[65]

To summarize, the argument in favour of deferred indefeasibility is that it provides a strong incentive for the parties to prevent the fraud in the first place. The argument in favour of immediate indefeasibility is that unsophisticated parties are better protected, and fraud is adequately deterred by the Registrar's recourse against the lawyer who failed to check identification.

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[63]It would be possible for a *Land Titles Act* to provide specifically that a party entitled to execute an affidavit of execution or similar document will be liable to the victim or the Registrar if the Registrar has paid compensation to the victim in the event that the affidavit is sworn falsely as a result of negligence. In that case the liability of the lawyer involved would be clear from the *Act* alone. However, this is not usually done. More usual is a provision such as that of the *Saskatchewan Act* which provides that the Registrar is subrogated to the rights of the victim and can recover compensation paid from "the person responsible for the loss." On this wording alone it is not clear whether the lawyer would be liable for carelessly swearing a false affidavit of execution. But if the law society standards stipulate that the lawyer must require identification and she fails to do so before executing the affidavit, then that will clearly constitute negligence. The bottom line is liability of the lawyer in such a case could in principle be established by the *Land Titles Act* alone, but it is more usual that it would be established by a combination of the *Act* and law society practice standards.

[64]The motion to add the lawyer involved as a defendant is reported in *Hermanson v. Martin* 128 D.L.R. (3d) 354 (Sask. C.A.).

[65]See the discussion of title insurance below in Part 6.

5.5.2 The Position of the Lender

Outside of British Columbia it seems to be generally thought that the position of the lender follows the position of the purchaser. That is, in a system of immediate indefeasibility, a bank taking a mortgage from an imposter would be protected so long as it did not collude in the fraud, and in a system of deferred indefeasibility a bank taking an assignment of a mortgage would be protected, again, so long as it did not participate in or know of the fraud. Though this appears to be the generally accepted view, it must be doubted in view of the 1963 decision of the B.C. Court of Appeal in *Crédit Foncier Franco-Can. v. Bennett*.[66]

The *Bennett* decision held that in the case of fraud by impersonation a lender receives no protection at all from the land titles system.[67] In other words, so far as fraud by impersonation is concerned, a lender is in exactly the same position that he would be in at Common Law; if the mortgage was not actually granted by the registered owner of the property, the lender has no recourse against the property and has no right to compensation from the land titles assurance fund. This is true whether the bank dealt directly with the imposter or took an assignment from a lender who dealt with the imposter.[68] This decision has subsequently been legislative affirmed by an amendment to the *Act*.[69]

It seems to be generally thought that the *Bennett* decision is only an interpretation of the particular provisions of the *B.C. Act*, and so is not applicable in other jurisdictions which all have quite different wording. It is true that a major part of the Court of Appeal's reasoning turned on the particular provisions of the *B.C. Act*. However, the Court of Appeal had a second entirely separate rationale which is more widely applicable.

The basic argument is that a mortgage has two parts: a debt, and an interest in land which is security for that debt. Even though a particular *Land Titles Act* may provide that the lender's interest in the land is valid, despite having been taken through an imposter, there is no debt owing by the owner as the lender never actually advanced funds to the registered owner. If there is no debt owing, the mortgage may be valid as an interest in land, but the owner has a right to a discharge of that mortgage without making any payments. As the Court said in *Bennett*:

> [T]he mortgage, if it were a valid instrument in the hands of the registered assignee, would secure nothing, as the mortgagors had received nothing thereunder and, hence, would owe nothing to the mortgagee or a registered assignee.[70]

The notion that the debt and the interest in land are distinct is a familiar one which often arises in the context of an assignment of a mortgage. If an originating bank lends money to a property owner with a mortgage as security, it is uncontroversial that if the mortgage is assigned to a

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[66](1963) 43 W.W.R. 545 (B.C.C.A.)

[67]*Bennett* was decided on s. 41 of the older Land Registry Act, RSBC 1960, c. 208, since repealed, which is nonetheless substantially identical to the wording of s. 26 of the current *Act*.

[68]The specific facts in *Bennett* concerned an assignment of a mortgage.

[69]B.C. s. 26(2): "(2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable."

[70]*Supra* n.67 at 551.

second bank the owner is entitled to credit for any amounts paid to the originating bank before the owner receives notice of the assignment. To take this point a step further, if the originating bank agreed to lend $100,000 to a property owner and entered into a mortgage agreement to that effect and then assigned the mortgage to a second bank before any funds were actually advanced, it is quite clear that the second lender would have no claim against the property or its owner. The owner is perfectly entitled to say, "Yes, that is a valid mortgage agreement which I signed, but there is no money owing under it." This is most obviously true with respect to a collateral–mortgage, but it applies to any type of mortgage. The principle remains valid even if the mortgage is registered, since the challenge is to the debt, not to the validity of the interest. Indeed, a mortgage will normally be registered before the funds are actually advanced, and the lender clearly cannot refuse to advance the funds and then demand repayment on the grounds that the mortgage was registered, notwithstanding that the mortgage amount was specified.

In the case of fraud by impersonation, the situation in effect is as if the bank and the true owner of the property entered into a mortgage and registered it, and then the bank inadvertently advanced the funds to a complete stranger. Having registered the mortgage, the bank is entitled to an interest in the land as security for the debt advanced to or authorized *by the owner of the land*; the bank is not entitled to enforce its interest in respect of any amount is might have loaned to anyone. The owner in such a case is entitled to defend a foreclosure action with the plea that she should be entitled to a discharge as there was no money owing under the mortgage. Put another way, registration guarantees the interest, but it does not guarantee the debt. This principle is generally accepted, even in the land titles context, and there is no reason to make an exception in the case of fraud by impersonation.

This is different from the case of fraud by forgery, where the wrongdoer has transferred title into his own name. In that case the lender is dealing with the registered owner, notwithstanding that the owner/wrongdoer is liable to have the title rectified against him. Until the title is rectified, the wrongdoer is the owner, so far as any third party is concerned. When the true owner has the title rectified, she will be in a position of a purchaser who has taken title subject to a valid prior mortgage; she will not be personally liable for the debt, but the lender is entitled to enforce the mortgage against the property to recover the amount owing.

This implies that a lender and purchaser may be treated differently, by the same land titles system. There is no inconsistency in so doing. In the case of a purchaser all that is at issue is the interest in land itself, while in the case of a mortgage there is both an interest in land and a separate debt. The interest in land is treated the same way whether a purchaser or lender is involved; the difference arises because of the treatment of the *debt*, which is irrelevant when ownership is concerned. So, technically, the lender's interest in the land would be valid under a system of immediate indefeasibility even if the lender dealt immediately with the purchaser; and a bank taking an assignment of a mortgage granted by an imposter would have a valid interest in land in a system of deferred indefeasibility. This is technically different from the Common Law, where the interest in land itself would be invalid. But in either case, even though the interest in land would be valid, there would be no debt owing by the registered owner to the bank. Because there is no debt, the owner is entitled to a discharge, and the net effect would be exactly the same as if the mortgage itself were invalid. The bank will not be entitled to enforce the mortgage against the registered owner to recover the money it had advanced.

While this argument may seem somewhat technical, it closely tracks the underlying policy argument. The policy rationale behind this conclusion is that a register only indicates interest in land; the register is not a register of debts. The legislature might have created a register of debt, by providing that any repayment has to be registered in order to be effective against third parties

(e.g. an assignee of the mortgage), but no legislature has ever done so. As a consequence, the lender can never rely on register to indicate the state of the debt. It is always possible that the debt is less than the documentary evidence indicates that it should be, and the only way an assignee can be sure of this is to inquire of the registered owner. Given that this inquiry is required generally, there is no reason not to require it to protect against fraud by impersonation.

This provides a good reason for distinguishing between an assignee of a mortgage and a subsequent purchaser in cases where the original mortgage/sale was made by an imposter. But what about the original lender who dealt with the imposter? The original lender seems to be in very much the same position as the purchaser who “buys” from an imposter. In a system of immediate indefeasibility this immediate purchaser is protected, so why shouldn’t the immediate lender be protected as well? And indeed it should be recognized that this argument respecting the lender’s position is a variant of the same argument that has led to the “deferred indefeasibility” approach to the purchaser’s interest. The fact that a debt is involved rather than only an interest in land creates a distinction between the situation of a purchaser and the situation of a lender, but in the end the argument is that there was nothing wrong with the register, and the lender should have protected himself by directly enquiring of the owner as to the status of the debt. As we have seen, not all courts have accepted this argument with respect to the purchaser’s position, and it is not clear whether all courts would accept the argument with respect to the lender, notwithstanding the distinction based on the fact that the amount of the debt as well as the validity of the interest is in question. For this reason, it is not possible to say conclusively what the position of the lender is in jurisdictions outside of British Columbia and the point does not appear to have been directly argued elsewhere. But even in the case of a purchaser we have seen that the arguments for and against immediate indefeasibility are closely balanced, with different jurisdictions going in different directions. In the case of a lender, the true owner can raise arguments against the debt, not just the interest in land, and these are based on well established principles. This is likely to tip the balance against the lender even in jurisdiction which accept immediate indefeasibility in the case of a purchaser. Thus the argument that the lender is not protected in the case of fraud by impersonation has considerable merit and must be considered to be a likely outcome if the point were litigated.

Finally, we should return to the facts in *Bennett* itself and the situation in B.C. In *Bennett* the originating lender did not deal with an imposter, as is more typically the case in fraud by impersonation. Rather, an officer of the originating lender forged the mortgage and registered it, before assigning it to a second party (for value) who then assigned it on to the plaintiff Crédit Foncier Franco-Canadien. While this case involved forgery rather than impersonation, it is considered here under the discussion of fraud by impersonation. The key difference between the two types of fraud is that in fraud by forgery, as we have defined it above, the registered owner is a party to the mortgage, notwithstanding that he was registered as owner by forgery, whereas in fraud by impersonation the registered owner is not a party to the mortgage. The fact that in *Bennett* it was an officer of the lender who forged the owner’s name to the mortgage rather than some third party imposter, is of no consequence.

To summarize, in British Columbia it is clear that a lender has no protection at all in a case of fraud by impersonation. This is probably also true in other jurisdictions, but there are no cases directly on point and in consequence the law is not entirely clear.

5.6 Reducing the Harm

5.6.1 Favoring the Person in Possession

It is important to recognize that the land titles system is not itself the cause of fraud. Fraud by registration of forged documents was always possible under the traditional registry system, since there was no examination of the validity of the documents. The registry was simply a repository of documents. The lawyer for a purchaser could examine the documents in the registry, but it is usually no easier for the lawyer for the purchaser to tell from the face of the document whether it is forged than it is for the Registrar under the land titles system. The difference between the systems is that under the traditional registry system it is the innocent purchaser who loses the land, while under the basic land titles system it is the current owner who loses the land. And the land titles system has the advantage, in principle, that the current owner of the property will get compensated for the land out of the land titles assurance fund, while under the traditional system the innocent purchaser may not have any source of compensation at all.

With that said, the rule that the innocent homeowner may lose her land as a result of forgery can operate harshly. It is possible to go away on vacation and come back to discover that the bank is about to foreclose[71] and sell your house. As we have just seen, the general rule under the land titles system is that the bank is indeed entitled to sell your home to pay off the mortgage which an unknown rogue took out on your property. The harshness of the rule is reduced in practice because a bank who has given a mortgage on the property would much rather have the loan paid off than go to the expense of foreclosing on the property. The owner is entitled to recover the amount paid from the assurance fund, and this will normally be sufficient to pay off the fraudulent, but valid, mortgage. The bank will often be willing to allow time for O to take these steps, as the bank would rather have the money than foreclose, so this result is not a complete disaster for O.[72] But O is still in the very stressful situation of being required to make a claim against the assurance fund in order to pay off a mortgage or risk being ejected from her own house. The notion that the bank probably won't foreclose immediately may be small comfort. And the bank is entitled to foreclose without waiting for the true owners to complete her claim, and it is only by the good grace of the lending institutions that this does not appear to have actually happened so far.

Even if the bank does not choose to foreclose immediately, this does not solve all of the owner's problems. It may take some time to resolve the matter–years in some cases–during which time refinancing the mortgage or selling the house will be impossible. And the owner may face significant legal fees in order to make her claim for compensation. These fees may be reimbursed as part of the compensation package, but the financial hardship and risk is increased in the

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[71]Note that "foreclosure" is a technical term for a particular type of process for a lender with a valid mortgage to realize his rights under a mortgage in default. Foreclosure is not always used, and indeed it no longer even exists in some jurisdictions. Nonetheless, the term is often used popularly to mean any process by which the lender sells the mortgaged property to pay off the debt in question, and the term will be used in that sense in this report, since nothing turns on the particular types of procedure which the lender uses to realize on his mortgage.

[72] So, in (2000) 50 O.R.(3d) 353 the Court remarked that "I do not have to deal with what enforcement rights the Bank may have under the mortgage as the Bank, to its credit, has given its counsel instructions not to enforce its rights against the Durranis until matters have been resolved with the Fund. Based on this undertaking, any enforcement proceedings under the mortgage are stayed pending the resolution of matters by the Director of Titles or further order of this court." Similarly, in the fraud that gave rise to the decision in Toronto-Dominion Bank v. Jiang, (2003) 63 O.R. (3d) 764 (Ont. S.C.J.), it is reported that the TD Bank has agreed to wait until the true owners have had a chance to pursue their application for compensation from the assurance fund: see Bob Aaron, "Mortgage fraud victims can also lose homes" Toronto Star, August 2, 2003.

meantime, particularly since the legal fees will usually only be paid in part by the assurance fund. These problems are especially severe in jurisdictions which operate as a fund of last resort (see Part 5.3.2), in which the innocent victim is required to attempt to recover her losses from the fraudster before she is entitled to recover anything from the fund. This might take several years and cost thousands of dollars. (This uses fraud by forgery as an example, but the same concerns arise in fraud by impersonation whenever there is a contest between two innocent parties each of whom is entitled either to compensation or to the land. Recall that as we have seen, in the case of fraud by impersonation, in some jurisdictions a party who dealt directly with the imposter will not be entitled to compensation, even though he did not actually participate in the fraud: see above Part 5.5.)

So, even though there are factors that lessen the blow, the bottom line is that under the traditional land titles system, a completely innocent homeowner may lose ownership of his home while living in it, and this can cause severe hardship, despite the availability of compensation.

One response to this problem is found in a unique provision of the New Brunswick land titles system. The *New Brunswick Act* has a provision which says, in effect, that the person who is in possession of the land is entitled to keep the land. An innocent party who relied on the register, for example a bank, will get compensation instead.

Compare the results under the various systems in the most typical case where the wrongdoer mortgages the property to the bank without ever taking possession. Under the traditional registry system the original owner gets the land and the bank gets nothing. Under most land titles *Acts*, the bank gets the land and the original owner gets compensation. In New Brunswick, the original owner gets the land and the bank gets compensated. It is true that in New Brunswick the original owner still has to make a request to the registrar to correct the register, but the owner does not actually have to recover the money from the assurance fund in order to pay off the bank's mortgage. Instead it is the bank which has to seek to recover the money.

The New Brunswick system is attractive in that it protects the interest of the original owner in possession. It recognizes that the person in possession of the land is most likely to have some emotional attachment to the land. It is particularly compelling in the most common case where the competition is between the true owner and a bank which has given a mortgage to the wrongdoer. Rather than having the owner's land tied up and unavailable for use while the registrar decides whether compensation is due, potentially causing severe hardship to the individual, it is the bank which can seek compensation from the land titles fund on a business basis. While this imposes an additional burden on the bank, the bank is better able to bear the burden, as the bank can seek compensation from the fund on a business basis without suffering disruption in its overall operations, while the relative burden on an individual of seeking compensation is much greater.

In the less usual case, where the land it passed on from the rogue to a good faith purchaser who actually moves in, the New Brunswick system favors the new purchaser. The owner will only get compensation. But the new purchaser can only move in in a case where the true owner was not actually in possession, so it is reasonable to provide the true owner with compensation rather than requiring the good faith buyer who actually took possession to move out again.

Though the New Brunswick system differs from the standard land titles system, its operation is entirely consistent with the basic underlying principles of land titles systems. The real purpose of the indefeasibility of the registry is to allow persons to deal on the faith of the registry without having to go behind it to examine the previous transactions. The standard theory of land titles

systems is that in order to ensure that a person can rely on the land titles registry, it is necessary that anyone who deals with the property in reliance on the registry will get the interest that they

thought they were getting. The theory of the New Brunswick system is that all that is really necessary is that anyone who relies on the registry will get *either* the land or compensation. Recall that under the traditional registry system A would get the land and B would get nothing. Under the standard land titles system B would get the land and A will get compensation. Under the New Brunswick system both A and B would get either the land or compensation. The premise is that assurance of compensation if you do not get the land is sufficient to allow reliance on the land titles registry. So, in particular, where B is a bank, B does not want the land at all; what the bank really wants is the money. From the bank's point of view an assurance that it will get enough money to satisfy the mortgage is as good, or better, than an assurance that it will get the land itself.

In British Columbia a similar policy has been suggested as a possible change to the existing *Act*. The proposal differs from the New Brunswick approach in that in a competition between two innocent parties, rather than preferring the party in possession, as in New Brunswick, preference would be given to the party with a "substantial connection" to the property.[73] The two policies are similar, since the party in possession clearly has a significant connection to the property, but the "substantial connection" approach would allow consideration of other factors. For example, if the property were inherited and had been the family for a long period, this might establish a substantial connection which would allow preference to be given to the original owner, even if the property were unimproved or unoccupied. Both approaches are aimed at the same goal, which is minimize the harm by ensuring that the property itself goes to the party who places the highest non-monetary value on it. The New Brunswick rule is arguably simpler and clearer, while the British Columbia proposal allows consideration of a broader range of relevant factors.

[73]Interview with Ken Jacques. The possibility of a change of this kind was made in an recent internal report which has not (as yet) been released. As the internal report has not been released, it is not possible to say whether that report endorses the proposed change, and nothing in this report should be construed as reflecting the views expressed in the internal report as to the merits of the proposal.

Consider the details of the New Brunswick approach. As in all land titles systems, the register in New Brunswick is an authoritative statement of ownership. And as in other land titles systems, the register may be corrected or "rectified" in certain situations.

The difference is that in most jurisdictions the register may not be corrected, even in the case of fraud, if the correction would detrimentally affect "rights conferred for value" (see e.g Man s. 23(1)(c)). So, in our example, because the bank gave value for its mortgage interest, which is to say it actually advanced funds to the wrongdoer, the register cannot be rectified to remove the mortgage from the title. This situation in different in New Brunswick, where the relevant section provides that the registrar may rectify the register "where an estate or interest, charge or encumbrance has been registered in the name of a person who, if the land had not been registered under this Act, would not have been owner of the estate or interest, charge or encumbrance" (s. 68(c)). We have seen that under the traditional system, no one, including a lender, can take a valid interest from someone holding on the basis of a forged title. So, under the New Brunswick the title can be corrected to remove the bank's mortgage in a case where the bank dealt with a wrongdoer who had fraudulently transferred title into their name. But though the bank is not entitled to foreclose on the property once the register is corrected, the bank would be entitled to compensation from the assurance fund. (See s. 73(1), the general indemnification section, which provides that "Any person who suffers damage by reason of the rectification of the title register" except in specific circumstances which do not apply to the bank in our example.)

But the *New Brunswick Act* does not just say that any interest that would have been invalid at Common Law is invalid. Rather, it provides that the register cannot be rectified "so as to affect detrimentally the title of the registered owner who is in possession" (with some exceptions which are not relevant here). So, if a new owner has purchased the property and moved in, the register will not be rectified against him, even if he would not have been the owner under the traditional system. In other words, the *New Brunswick Land Titles Act* gives preference to the innocent party who is in possession.

5.6.2 Summary: Person in Possession v Basic System

To summarize, the New Brunswick system, which favours the person in possession, the result of the fraud by forgery where the property is mortgaged is (2) is as follows.

Fraud by Forgery(2) in New Brunswick–Property has been mortgaged by F	
Party	**Result**
Original Owner (O)	O owns the property. O still owes the mortgage debt to L1.
Original Owner's Bank (L1)	L1 has a valid first mortgage on the property.
Lender to Fraudster (L2)	L2's mortgage is not valid, but L2 is entitled to compensation from the assurance fund for the amount of the mortgage.

The "person in possession" rule is advantageous in that it minimizes the harm by giving ownership of the property to the person who values it the most. This reduces much of the consequential loss, such as emotional distress and loss of flexibility in the use of the house which arises under the basic land titles system. This rule normally puts the burden on the purchaser or lender instead. In the most common case, when the fraudster has mortgaged the property to the bank, it is not clear that the person-in-possession rule is any worse for the bank than the traditional rule. In the first place, the stress on the bank is much less, as the burden is carried by professionals whose job it is to deal with such matters; no one's personal home is on the line. Secondly, even if the bank is entitled to the property, as in the basic system, it must incur costs in the foreclose action which is needed to actually realize on this security. It is not clear that the cost of making a claim against the assurance fund, particularly in a jurisdiction where the fund is one of first resort, would be any greater than the cost of the foreclosure action. In that case the owner-in-possession rule favours the owner without any offsetting disadvantage to the bank. This is a win-win situation. When the fraudster sold the property rather than mortgaging it, it is true that the burden will fall on the individual purchaser instead of the original owner. But the purchaser's loss will be less than that of the owner in possession, as he will not normally have an emotional attachment to the property.

In summary, there is a strong argument that the "person in possession" rule is better than the traditional rule in essentially all circumstances.

5.7 Prevention of Fraud

5.7.1 Introduction

The discussion to this point has focused initially on compensation for loss, though we have seen that compensation and prevention are related in the context of the discussion of deferred indefeasibility. We have also seen that procedures for requiring identification from parties to a transaction will prevent some, though not all, fraud by imposters. This section discusses other types of measures which might be taken to prevent fraud. Note that except where specifically

noted, these measures are generally applicable in document registration jurisdictions as well as in land titles jurisdictions.

5.7.2 Criminal Prosecution

At present the main way in which fraud by forgery is prevented is by the threat of punishment on being caught. The prospect of civil liability, which should deprive the wrongdoers of their ill-gotten gains and perhaps also add punitive damages in addition, reduces the incentive to commit a fraud. However, the effect of this deterrence is reduced since the wrongdoer will not be significantly worse off if he is caught than if he did not commit the fraud in the first place, and it will often be difficult to actually recover any of the fraudulently obtained money. The threat of criminal punishment for fraud if probably the more significant deterrence. Criminal punishment might be imposed either for fraud under the Criminal Code[74] or for offences which are provided for under most *Land Titles Acts.*[75] The offences established under the *Land Titles Acts* are more specific than those under the Criminal Code, and the sentences are also different, but the scope of coverage is roughly the same as applied to the types of fraud we have noted, so that there is no basic difference in principle between the Criminal Code provisions and the offences under the specific *Acts*.

The efficacy of the threat of criminal prosecution depends on how likely the wrongdoer is to get caught and how severe the punishment is likely to be. The length of the jail sentence should be important in deterring fraud. It may be more important in cases of rogue fraud, since such fraud is more likely to be undertaken by a person with a specific plan to make money by fraud, as opposed to the imposter fraud which appears often to be more opportunistic and in some ways less rationally motivated, particularly when it is a spouse who is being defrauded.[76]

This suggests that fraud by forgery could be reduced by increasing the jail sentences for this type of crime. But this suggestion faces many problems. First, it would require broad reforms, such as sentencing guidelines. Further, the penal system is arguably already over-burdened, and it is not clear that longer incarceration for this type of fraud would be the best use of those resources. Incarceration is expensive to society, and even if it were effective in reducing the incident of fraud longer jail sentences might arguably be even better used in respect of other types of criminals. This is of course not to say that longer jail sentences for fraudster would not be desirable, but there are countervailing considerations which mean that it is unreasonable to rely solely on criminal sanctions to prevent fraud.

5.7.3 Restricting Access to Registration

The most direct response to the problem of forgery is more stringent checks on registration of the documents. Under a system in which documents are accepted in paper format "over the counter",

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[74] E.g. Criminal Code , R.S.C. 1985, c. C-46, s.366

[75] See e.g. B.C. s. 387, 388, 390; Alta s. 212; Ont s.155, 156.

[76] For example, Tesoro, who committed fraud in respect of five Toronto properties, was sentenced to 38 months on each charge, but to be served concurrently: see the news report by Mike Slaughter, "Stolen dreams," Toronto Star, February 9, 2002 Saturday Ontario Edition. The bulk of the more than $1.5 million which was obtained by fraud has apparently not been recovered, as it was transferred out of the country by Tesoro: *ibid.* It may be that this penalty is insufficient to deter a hardened con artist.

which is to say from any person who walks into the land titles office, more stringent checks are almost certainly not feasible. The land titles staff would have to check the signature on the document against a signature of the current owner held on file. This process would be time-consuming and costly in itself. Nor would it be guaranteed to prevent fraud, since it is often difficult to compare signatures authoritatively. If the staff rejected any significant number of documents because the signatures didn't match, this would almost certainly result in many cases in which entirely legitimate transactions were initially rejected, with consequent expense and delay. If the staff were more lax in comparing signatures, then a committed forger could no doubt obtain a sample of the homeowner's signature and forge it well enough to pass muster. Therefore it seems clear that checking paper signatures would be far too costly in terms of delay and expense imposed on the vast majority of transactions which are entirely legitimate.

One way of preventing or at least combating identity theft would be to refuse over-the-counter registrations. In that case, all applications would have to come through a lawyer. The lawyer would determine the identity of the applicant, and the registry office staff would verify that the identity of the lawyer on submission (so that a forger could not pose as a lawyer in order to submit forged documents). This might be effective at reducing fraud by forgery, but it would be a major change in office practice which could introduce significant burdens, both in staff time in verifying the identity of the person submitting the application, and in added cost and inconvenience, particularly in rural areas where lawyers are not always readily available. Similarly, electronic submission of documents verified by some form of secure electronic signature could prevent fraud by making forgery of signatures much more difficult, whether such electronic submissions were made only through lawyers or notaries, as would be the case under current proposals, or even if it were expanded to the general public with access to the necessary technology.

There are two main difficulties with this proposal. First, it is unlikely to prevent fraud by forgery entirely, as the fraudster might pose as the true owner in order to commit the fraud. In other words, rather than preventing fraud, it might simply transform fraud by forgery into fraud by impersonation.

A second difficulty is that to effectively prevent fraud by this method, public access to the registry would have to be seriously curtailed. It is true now that it is unwise to conduct a real estate transaction without the aid of a lawyer, but to formally prohibit non-lawyers, or at the very least those without sophisticated technological skills, from transferring real estate on their own, would be highly politically charged. To restrict access to the registry in this manner in order to prevent fraud would ultimately be a political decision, but to date there appears to be a general perception that the cost is not worth any potential benefit.

5.7.4 Notification Statements and Freezing the Register

Saskatchewan's new *Land Titles Act* has introduced two measures which would help detect fraud quickly and prevent harm once the fraud has occurred. This would indirectly lead to fraud prevention, since the fraudster who has transferred the property into his name will require some time to mortgage it and abscond with the funds. If the fraud is detected before that time, it may be possible to prevent the loss. The more difficult it is to successfully benefit from the fraud, the less likely it is that fraudsters will target the real estate system.

The first measure is that whenever any interest is registered in Saskatchewan, including a mortgage or a transfer, a notification statement is sent to the owner (in the case of a charge) or the previous owner (in the case of a transfer).[77] Thus, if a wrongdoer forges an application for transfer and thereby succeeds in having the title registered in his name, the victim will receive a notification that his property has been sold, thus alerting the victim to the fraudulent transaction. The victim can then take steps to prevent further dealing with the property. While this does not prevent the initial fraudulent transfer, if the victim acts before the forger has succeeded in mortgaging the property or selling it to an innocent third party, any loss can be prevented and the title can be rectified to remove the fraudulent conveyance.

This practice is derived from the existing one under the *Personal Property Security Acts* (PPSA) in which a verification statement will be send to the lender when his security interest is discharged, as a safeguard against unauthorized discharges.[78] Experience to date in Saskatchewan indicates that while the system generally operates well, there are some minor problems. In particular, the notification statements generate a significant number of calls to the land titles information centre as the recipients sometimes do not understand the significance of the statement. In some cases the recipient does not appreciate that the notification does not entitle him to object to, for example, an expropriation. It is anticipated that these problems will be resolved with modifications to the form of the notices and with better public understanding of the system. This is consistent with the experience under the PPSAs where notification statements are routinely issued without difficulty. It should be acknowledged that because the PPSAs apply only to mortgages, the recipients of the notices are usually experienced institutional lenders with a good understanding of the system, so that confusion as to the nature of the notification statement is unlikely.

The implementation of notification statements depends to some extent on a fully automated database, as the administrative burden of sending notices would otherwise be significant. It may be that this is why notification statements of this type have not historically been a part of land titles systems. However, all land titles are now, or soon will be, at a level of automation which would support this functionality.

Notification statements are not feasible in document registration systems, as the ownership information is not maintained in an unambiguous form. In a land titles system there is a readily identifiable owner of each parcel of land, whereas in a document registration system a determination of ownership involves an interpretation and assessment of the registered documents, and this process cannot be automated.

The effectiveness of notification statements in preventing fraud depends on the speed with which they are delivered. In Saskatchewan a party may elect to have notices delivered by e-mail, in which case notification is very speedy. Of course it is not possible to make it mandatory that parties accept e-mail notification, but the efficacy of the notification system in preventing fraud will no doubt increase as e-mail usage continues to spread.

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[77]Sask. L-5.1 Reg 1, Division 3: Verification of Registration

[78]There is some variation in detail. The *New Brunswick Act* exemplifies the practice in the pure form, as the verification statement is mandatory, as it is under the Saskatchewan Land Titles Act: see NB PPSA Reg. 95-57, s.10.

A complementary but distinct provision of the *Saskatchewan Act* allows the Registrar to "freeze" the register.[79] The *Act* gives the Registrar a very broad discretion to prohibit the transfer of any title and prohibit the registration of any interest against the title "where it appears necessary to the Registrar to prevent. . . threatened or apprehended fraud."[80] Thus in any case in which someone received notification that a transfer of his property had been registered even though he had not sold the land himself, the person affected could respond by alerting the Registrar, who could then freeze the title to prevent any further dealings until the legitimacy of the contested transfer was determined. It should be noted that the provision gives the Registrar a very broad discretion, and is not limited to those situations. To date this provision has been used twice, once in the case of a difficult marital dispute where the Registrar felt there was a real possibility of a fraudulent transfer by one spouse, and in another case where an imposter was posing as another person generally, and it was thought that the imposter might try to deal with that person's property. In both these cases the freeze was imposed at the request of at least one of the registered title owners, but again, this is not a requirement of the provision.

Because of the broad discretion granted to the Registrar to freeze a title, there must be some control over the use of this power. In order to provide this control, any person who feels aggrieved when the Registrar freezes a title is entitled to apply to the court for a review of the Registrar's decision.[81]

5.8 Cost of the System

Note that historically compensation in a land titles system was made from a special land titles "assurance fund" set up under the *Act*. Now it is more common for the compensation to come directly out of the general provincial consolidated fund, or for the assurance fund to be fully backed by the consolidated fund. The significance is that in cases where compensation comes only from the fund, compensation might be denied or limited if the fund was drawn down. This is still the case in principle in Alberta, for example, where the fund is capped at $49 million plus whatever net revenues have been generated by the fund since March 31, 1994.

In jurisdictions with more recent *Acts*, namely New Brunswick and Saskatchewan, there is no assurance fund *per se*. For example, in Saskatchewan, the land titles system was recently reorganized to provide for administration of the *Act* by the Information Services Corporation of Saskatchewan. Claims arising from older incidents are paid out of the consolidated fund, while claims arising since the reorganization are paid directly by the Information Services Corporation.[82] Amounts less than $100,000 can be settled by the Registrar, while settlements in excess of this amount require the approval of the responsible Minister.[83] Fees for registration of

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[79]Since a fraudster has no right to register a forged document, the Registrar in any land titles system has the right, either expressly or by implication, to refuse to register forged documents. Thus in other jurisdictions effectively the same result might be achieved if the Registrar were to use this authority to systematically reject registrations relating to a particular parcel. However, doing so without the express authority such as is conferred by the *Saskatchewan Act* would bend the intent of the legislation and it is unlikely that Registrar generally would be willing to take this step without such express legislative authority.

[80]Sask s.99.

[81]Sask s. 107(b).

[82]Sask LTA s. 93(2),(4).

[83]S. 90(3), Land Titles Regulation c. L-5.1 Reg 1, s. 103.

titles and mortgages are paid to ISC and there is no nominal allocation to the assurance fund. New Brunswick operates in a very similar manner.

Provinces with older *Acts* tend to maintain an assurance fund, but this is really a fiction when the fund is fully backed, either in principle or in practice, by the consolidated fund. These provinces also often have a nominal allocation of some portion of fees to the assurance fund. But since extra assurance fund monies go to the consolidated fund, and any shortfall comes out of the consolidated fund, the allocation of fees to support the assurance fund is purely notional, and the fees allocated in that manner do not really reflect the cost of operating the fund.

A better estimate of the cost of fraud is the approximate value of claims relative to the number of transactions. Most Registrars report that fraud claims are a small proportion of all claims against the assurance fund.[84] However, the cost of fraud is not really just the cost of fraud per transaction, because this does not include the overhead of running the insurance system. But since fraud is a relatively small proportion of the overall claims, we can almost treat fraud costs as a purely additional cost.

The best estimate of the annual cost of fraud claims was provided by the Alberta land titles office.[85] A complete review of assurance fund payouts related to fraud since 1989-1990 to 2001-2002 shows that total claims of $402,000 have been paid, for an annual average of approximately $31,000. The pattern is that in about half the years there are no claims at all, but every year or two substantial claims are paid. There are an estimated average of approximately 400,000 transfers[86] or mortgages annually. This means that the average cost of fraud payouts per transaction is approximately 8¢. In other words, of the fees paid in every sale or mortgage, approximately 8¢ goes towards paying fraud claims out of the assurance fund.

Similarly exact numbers are not available for British Columbia. The current Director of Land Titles estimates that claims of all types against the assurance fund are approximately $100,000 and that fraud claims are a relatively small proportion of this total–perhaps as little as 5-10 per cent.[87] Though these are very rough numbers, they are consistent with the Alberta experience. Since approximately 500,000 transfers and mortgages are registered in B.C. annually, this implies that fraud costs per transaction are less than 10¢.

[84]Most claims result from some kind of error in the land titles office. Some of these are current errors, as when a mortgage is discharged from the wrong parcel, but (depending on the jurisdiction) many of the claims stem from the early days of the system when procedures were not as rigorous, where problems are surfacing only now.

[85]By Kelly Hillier, Director of Land Titles North, Province of Alberta

[86]This includes transmissions on death as well as an arm's length sale.

[87]These numbers are approximate estimates based on his own experience, which is relatively limited as he has only held his office for three years.

It is important to recognize that these figures are not directly comparable. The B.C. system does not protect mortgages, and this is no doubt the main reason why it has fewer claims against it than the Alberta system, which does protect mortgages. Note also that claims against the fund are not a full reflection of the costs of fraud. In Alberta, for example, the assurance fund is a fund of last resort, so a greater proportion of the cost of fraud will be borne by the victim than in a jurisdiction with a system of first resort. Further, payouts by the fund do not reflect the full loss to the victim, since, as we have seen, costs are not fully indemnified, nor is consequential loss.

British Columbia – In B.C. recovery of a claim against the land titles office is recovered from the Minister of Finance and Corporate Relations, which is to say, out of the general revenue fund, and is "charged to" the assurance fund.[88] However, the Minister "must pay from the consolidated revenue fund the amount of a claim or judgment in respect of which the assurance fund is liable if there is not at that time a sufficient amount at the credit of the assurance fund."[89] This means that the adequacy of the fund is irrelevant to the claimant's ability to recover. The fund must be maintained at a minimum of $50,000,[90] but even if the fund is somehow drawn below this amount, or if the amount in the fund is otherwise insufficient to satisfy the claim, the claim will be paid nonetheless out of the general revenue fund. This means that so far as a claimant is concerned, the assurance fund is fully backed by the province's general consolidated fund. After a claim is paid it is charged to the fund, but this is purely an internal bookkeeping matter. The assurance fund, notional though it is, is funded by a $5 levy on every registration of a title (i.e. a sale) or mortgage. The total fee for these transactions is $55, of which $5 is allocated to the assurance fund,[91] so that the total levy for a transaction involving a sale and mortgage would be $10. This levy has proven more than adequate to maintain the fund, which was started in 1920 with $50,000.

Alberta – In Alberta the assurance fund is notionally funded by an allocating to the assurance fund 10 per cent of all fees levied on any type of transaction.[92] The exact fee depends on the nature of the transaction, and in the case of a sale or mortgage also depend on the value of the property or mortgage. As an example, the fee for the registration of a sale of $250,000 would be $85 and the fee for the registration of the mortgage would be $65, so that the total amount allocated to the assurance fund would be $15.[93] In fact the fund is not separately held, but all fee monies collected, including those allocated to the assurance fund, are simply paid into the general provincial revenue fund. The assurance fee allocation is nonetheless significant in principle, because the fund is currently capped at $49 million plus the amount of paid-as-assurance fees since 1994, less the sum of payouts from the fund since 1994. In principle if the

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[88] S. 296(5),(7)

[89] S. 306

[90] S. 295(2)

[91] *Ibid* Schedule, Item 1, 2

[92] AR 120/2000 - Land Titles - Tariff of Fees, s.1(2)

[93] *Ibid* s. 3(1), 4(1)

claims paid exceeded the amount notionally contributed to the fund, the fund could eventually be depleted. However, the amount notionally allocated as assurance fees so far exceeds the claims paid that for all practical purposes the fund is not capped. For the same reason, the amount of the fees notionally allocated to the assurance fund is not a realistic assessment of the cost of running the assurance fund protection against fraud. A more realistic assessment of the cost of claims due to fraud is to simply divide the average amount of claims, which is approximately $30,000/year, by the number of registrations, approximately 900,000/year. This gives an average cost of 3¢ per registration to fund the claims due to fraud. Note that although firm figures are not available, it appears that claims due to fraud are a relatively small proportion of all claims. The majority of claims are due to errors of the registry office staff. Some of these errors stem, for example, mineral claims from the early 1900s, where office practices were not entirely rigorous, which are only now coming to light. Other are current errors, as where a builder lien is erroneously discharged from the wrong property.

Manitoba – In Manitoba there is a notional assurance fund, but it is fully backed by the provincial consolidated fund.[94] The fund is maintained at $75,000; if it exceeds this amount, funds may be transferred to the consolidated fund[95] The fund is funded solely by fees paid when property is first brought under the Act, and not by levies on subsequent transfers or mortgages. This has so far proved adequate to fully maintain the fund and satisfy all claims, though once all properties are brought under the Act some alternative means of funding will be presumably be required. There have been no fraud related claims at all in Manitoba for many years (within the knowledge of the current Director).

[94]Man s. 187(1)

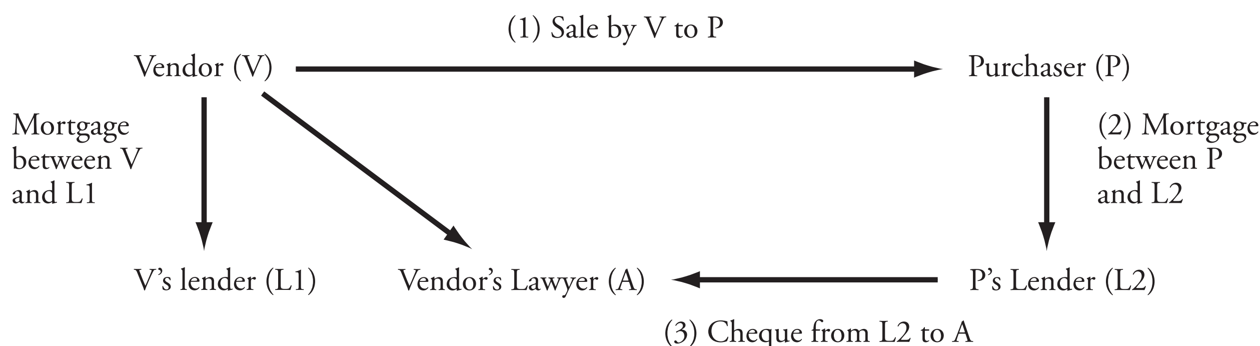
[95]S. 185(1).

6. Fraud by Breach of Undertaking

6.1 The Problem: Exploiting the Procedure for Property Transfer

The second type of fraud, fraud on the lender, or fraud by breach of undertaking, is possible because of particulars of the procedure by which property is transferred. While there are variations in detail (for example, in Quebec real estate transactions are handled by notaries rather than by lawyers), the following general description applies in all Canadian jurisdictions. In the simplest and most usual situation, the vendor has a mortgage on the property and requires the proceeds of the sale to discharge the mortgage. At the same time, the purchaser must finance the purchase by taking out a mortgage on the new property. Often there is insufficient equity in the property to secure both mortgages. So, the purchaser's bank advances funds to finance the purchase, and the vendor's lawyer undertakes to use the purchase money to discharge the vendor's mortgage. Most of the time, this works out as planned for all involved. Very occasionally, the vendor's lawyer fails to discharge the vendor's mortgage and instead absconds with the funds advanced for that purpose by the purchaser's bank.

Fraud by Breach of Undertaking



The absconding lawyer is able to successfully execute this sort of fraud by exploiting features of the procedure for transfer of property, namely the willingness of banks to advance funds in excess of the value of the property in reliance on the lawyer's undertaking. The holders of such subsequent mortgages are not likely to become concerned even when the prior mortgages remain undischarged for some time, as lawyers and banks do not tend to expedite the execution, processing, and registration of mortgage discharges. Months after the absconding lawyer has breached his undertaking to discharge the mortgage, banks holding subsequent interests suppose that all is well and that the processing and registration of the prior mortgage discharge will soon be complete. The lawyer may make payments on the prior mortgages he has undertaken to discharge in order that the holders of those mortgages do not become alert to the irregularity. This is essentially what occurred in the recent Wirick affair in British Columbia in which solicitor Martin Wirick apparently acted in concert with Tarsem Gill to in various suspicious real estate transactions. As described by President Gibbs of the Law Society of British Columbia,

> Instead of paying off the prior encumbrances, as he undertook to do, Mr. Wirick misdirected the down payment and mortgage funds to Mr. Gill or one of his companies.

> Mr. Gill then used some of that money to service mortgage debts that should have been discharged, thereby preventing those mortgages from going into default.
>
> As those prior mortgages had not been paid out, no discharges were forthcoming. But, because the prior mortgages were being serviced, those lenders did not become concerned. Mr. Wirick exploited the lag time for the issuance of discharges (of up to six months, and even longer for some institutions) to create a plausible story as to why he was not supplying the discharges of the prior encumbrances in a timely way.
>
> As a result, Mr. Wirick was able to string things out. Eventually, he came up with discharges either by paying out the prior encumbrance with other misdirected funds, or possibly by forging discharges in some cases.
>
> Mr. Wirick's actions on behalf of his client Gill remained undetected for three years.[96]

Wirick happened to collaborate with Gill. However, the lawyer may act alone and the vendor or purchaser or both may be entirely innocent of wrongdoing and unaware of any impropriety in the transaction.

6.2 The Result: the Positions of the Parties

When a lawyer absconds with funds which he undertook to use to discharge the vendor's mortgage, the involved parties do not receive what they anticipated getting from the transaction.

The vendor still owes the debt to his lender on the first mortgage which was to have been paid out by the purchase money. The fact that the vendor's lawyer has absconded with the proceeds of sale that were to finance the discharge of the mortgage does not affect the mortgage's validity. Notwithstanding the lawyer's fraud, title to the property that secures the mortgage passes as planned from the vendor to the purchaser. The vendor has no claim against the purchaser for the purchase money, because the money was paid by the purchaser to the vendor's agent, the absconding lawyer. If the bank that advanced the vendor funds on the security of the property chooses to pursue the vendor on the debt, and the vendor has adequate assets to satisfy the debt, then it is the vendor alone who is the ultimate victim of the fraud.[97] Fortunately for the vendor, the lender will probably choose to foreclose in order to realize on the security for the debt rather than pursue the vendor.

The bank that advanced funds to the vendor still has a valid mortgage on the property, notwithstanding the fraud, and notwithstanding that title to the property has passed from the vendor to the purchaser. That the property now belongs to the purchaser does not affect the priority of the bank's mortgage or the institution's ability to foreclose in order to realize on the property, which is security for the loan to the vendor. The bank remains in the position of being able to choose between going after the vendor personally for the payment of the debt, or foreclosing on the mortgage. If the property was the vendor's major asset, the vendor may not have sufficient assets to make good on the mortgage debt. Even if the vendor has sufficient assets, it is generally simpler for the lender to realize on the security interest by foreclosure than bring an action against vendor personally in order to recover the debt.

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[96] *United Savings Credit Union v. 631252 B.C. Ltd*. 2002 BCSC 1681. Sigurdson J. quotes President Gibbs of the Law Society of British Columbia.

[97] Of course, this ignores any compensation that may be available to the vendor.

The innocent purchaser finds his title to the property encumbered by the vendor's undischarged mortgage. Recall that the purchaser bought the property with the understanding that the proceeds of the sale transaction would be used to discharge the vendor's existing mortgage. The lawyer's fraud no more invalidates the purchaser's mortgage than it does the vendor's mortgage; both mortgages are valid. Being prior in time, the vendor's mortgage is superior in priority to the purchaser's mortgage. The problem for the purchaser is that the bank holding the vendor's mortgage may foreclose on the property in order to realize on its security interest. Where the bank forecloses, it is the purchaser who is the ultimate victim of the fraud. The property will be sold, and the proceeds put toward the vendor's mortgage debt. Any remaining proceeds would go toward the purchaser's mortgage debt. Having lost most if not all of her equity in the property, the hapless purchaser will nevertheless owe her bank the balance of her mortgage debt.

The bank that advanced funds to the purchaser finds that its security interest does not have the high priority it expected. The bank's expectation was that the vendor's lawyer would make good on his undertaking to discharge the vendor's mortgage. When he does not, the purchaser's lender's mortgage is second in priority to the mortgage held by the vendor's bank, instead of first in priority as the purchaser's bank expected. Such a subsequent mortgage may secure little or no equity in the property; that is, the value of the property will probably not be enough to pay off both mortgages if the property is sold. If the bank holding the prior mortgage forecloses in order to realize on its interest in the property, then the purchaser's bank may end up with nothing. The lender to the purchaser would receive only the proceeds of sale in excess of those required to satisfy the vendor's mortgage. The lender to the purchaser no longer has security for the purchaser's mortgage debt. So, if the purchaser should default, the lender's only option is to bring an action against the purchaser personally to recover the debt. This option is not nearly as satisfactory as foreclosure; if the purchaser has defaulted on the debt, it may be because she has insufficient assets to pay it, in which case the lender might recover little or nothing by bringing an action.

Party	**Result**
Vendor (V)	V no longer owns the property. However, V still owes mortgage debt to L1.
Vendor’s Bank (L1)	L1 still has a valid mortgage on the property which is first in priority. L1 is entitled to recover the mortgage money from V, apart from the mortgage on the property; however, V may not have sufficient assets to pay off the mortgage. L1 is entitled to foreclose on the property in order to satisfy the mortgage to V.
Purchaser (P)	P gets title to the property. P owes a mortgage debt to L2. P’s title to the property remains encumbered by the mortgage (for money lent to V) held by L1. L1 can sell P’s property to satisfy the loan to V. P’s title is also encumbered by the mortgage (for money lent to P to finance the purchase of the property) held by L2.
Purchaser’s Bank (L2)	L2 has a valid mortgage on the property which secures the loan to P (to finance the purchase of the property). However, L2's mortgage is second in priority to the mortgage held by L1. So, if the value of the property is less than the total value of the mortgages held by L1 and L2, the value of L2's mortgage is impaired. If L1 forecloses, L2 will receive only the proceeds of sale over and above that necessary to satisfy V’s debt to L1. L2 is still entitled to recover the mortgage money from P, but P may not have sufficient assets to pay off the mortgage.

6.3 Compensation

What sources of compensation are available when a solicitor breaches his undertaking to discharge a vendor's mortgage? To which parties are they available, and in what circumstances?

6.3.1 Title Insurance

We will see below in Part 6 that if they have purchased title insurance prior to the sale of the property, the purchaser and the lender to the purchaser can recover the losses they incur when the vendor's lawyer breaches an undertaking to discharge the vendor's mortgage. Title insurance guarantees the purchaser's expectation of getting title clear of the vendor's mortgage. Title insurance would not, however, assist the vendor or the vendor's bank, as these parties' losses do not result from defects in title.

6.3.2 Land Titles Assurance Funds

None of the victims of fraud by breach of undertaking can claim compensation from provincial land titles assurance funds. This is because in fraud by breach of undertaking, the victims' losses do not result from reliance on the register or from errors in operation of the registry system.

6.3.3 Law Society Defalcation Funds

Each of the thirteen provincial and territorial law societies has set up a fund to compensate those who suffer monetary loss attributable to members' defalcation. The Federation of Law Societies of Canada has set up a further fund to compensate those who suffer monetary losses attributable to defalcation by lawyers engaged in the interprovincial practice of law; that is, lawyers practicing in provinces other than those in which they maintain membership in the law society.[98] The defalcation funds are generally constituted through annual levies on members for that purpose, and in some provinces, through investment of fund assets. In Nunavut, a portion of the fee non-member lawyers pay to practice in the jurisdiction goes into the fund. Some law societies hedge against catastrophic loss, for example because of a very large defalcation in a particular year, by reinsuring with licenced insurance companies. In principle, money recovered in subrogated claims against wrongdoing members also goes into the fund. Having compensated a victim of a lawyer's defalcation, the fund obtains the victim's right of action against the absconding lawyer. The fund can bring a subrogated action against the lawyer in the victim's name.

In order to claim reimbursement from a defalcation fund of a provincial or territorial law society, one generally applies to a committee constituted for the purpose of adjudicating such claims. The committee will usually require applicants to explain the factual circumstances underlying their claim and to submit supporting documentation. The Nova Scotia Barristers' Society suggests, for example, that applicants submit copies of relevant bills, invoices, cancelled cheques, receipts, correspondence and legal documents.

In order to claim compensation from a law society defalcation fund, one must have suffered monetary loss attributable to a lawyer's misappropriation or conversion (theft) of funds or

[98]Depending on the jurisdiction, this fund may be known as the "Special Compensation Fund," the "Assurance Fund," the "Reimbursement Fund," or the "Indemnity Fund." Despite the variety of names, these funds operate on the same general principles, though with variation in detail, and we will refer to them as "defalcation" funds.

property. The funds must have been entrusted to the lawyer in his professional capacity. So, for example, a person who suffers a loss consequential to engaging in a business enterprise with someone who happens to be a lawyer cannot claim from the fund, even if the lawyer absconds with money entrusted to him. This is because the lawyer in that situation is not acting in his professional capacity; that is, he is not acting as a lawyer, not practicing law. This requirement is not a hurdle in the situation where a lawyer breaches his undertaking to discharge a vendor's mortgage, since in undertaking to discharge the mortgage, the lawyer is always acting in a professional capacity.

In some jurisdictions, claimants must not only have entrusted funds to the absconding lawyer in his professional capacity; they must have done so in the context of a solicitor-client relationship; it is not enough that the lawyer was acting as a lawyer, he must have been acting as the *claimant's* lawyer. In such jurisdictions, therefore, only the *vendor* can claim compensation from the fund when his lawyer breaches an undertaking to discharge the vendor's mortgage. None of the vendor's bank, the purchaser, and the purchaser's bank enjoys a solicitor-client relationship with the absconding lawyer. Nevertheless, these parties often suffer losses when a vendor's lawyer breaches his undertaking to discharge the vendor's mortgage. The restriction of compensation to solicitor-client contexts therefore compromises the fund's usefulness as a compensatory vehicle. It will work well only to compensate some victims of fraud.

In some jurisdictions, the law society defalcation fund operates as a fund of last resort. In order to claim from the fund, a claimant must demonstrate that she pursued all other avenues of compensation before applying to the fund. She must have exhausted all civil and criminal compensation mechanisms, as well as any applicable insurance schemes and compensation funds. Even where the fund does not operate as one of last resort, the committee responsible for adjudicating claims generally takes into account whether the claimant has made every effort to minimize and recover the loss. By operating as funds of last resort, law societies presumably reduce the number of eligible claims, thus limiting demand on the funds. However, requiring that a claimant exhaust all avenues of compensation before turning to the fund is not always efficient. An absconding lawyer will often be judgment-proof. Pursuing all possible alternate avenues for compensation can be expensive, time-consuming, and ultimately fruitless. In Ontario, for example, it is not unusual for claims to take eighteen months to process. One reason for the delay is that it often takes that long for a claimant to pursue to the committee's satisfaction all reasonable avenues of compensation. This delay is less than ideal, as a claimant will generally be in a tenuous financial position during the wait for compensation.

A claimant's "need" or "hardship" is a factor to be taken into account in many provinces. This criterion generally means that the fund will not pay compensation to banks affected by a lawyer's defalcation. Denying compensation to banks might be defended as necessary to give banks incentives to adopt procedures that would prevent fraud by breach of undertaking. Indeed, banks are well situated to adopt such procedures. This is discussed further below. It is not clear, however, that the "need" restriction has any practical effect. Suppose the vendor's bank forecloses in order to realize on its security interest in the property. It is unlikely that there would be sufficient equity in the property to discharge the mortgage held by the lender to the purchaser. Moreover, if the property was the purchaser's major asset, the purchaser may not have the means to pay the mortgage debt even if the lender takes the matter to court. A "need" criterion will mean that the lender to the purchaser cannot recover from the defalcation fund. However, a purchaser unable to make good on his mortgage debt could qualify for compensation from a defalcation fund, despite the "need" criterion. Presumably, the purchaser would put the compensation toward the

mortgage debt. Even where banks are technically barred from recovering, they can benefit from the law society defalcation fund.

Perhaps the most important characteristic of the defalcation fund is that payment of a claim is discretionary.[99] Even if you have been the victim of fraud by your own lawyer, there is never any *right* to payment from the defalcation fund. If the claims adjudication committee turns down your claim, you cannot appeal that decision to a court. So, as noted above, in many jurisdictions banks cannot claim from the fund because there are not needy. But this “needs” criterion can be applied to anyone. The claims adjudication committee decides whether an applicant is needy or not, and there is no appeal from that decision.

This is not to suggest that the claims committee often refuses to compensate a true victim of fraud. It seems that at one time payments were quite strictly limited by the “needs” criterion, so that the defalcation fund was sometimes referred to as a “widows-and-orphans” fund. More recently the trend is toward being more generous in making payment to any individual victim of fraud by a lawyer, as the fund has taken on the role of ensuring the public’s faith in the legal profession. But the discretionary nature of a decision does create uncertainty. Where committees have discretion, claimants cannot be sure that they will receive compensation. In practice, claimants’ expectation of compensation will depend on particular committees’ disposition with respect to the exercise of their discretion.

There is a positive side to the discretionary nature of the payments. It does create the potential for efficiency. To give an example, where a claims committee is convinced that a claimant has made out a good case for compensation, the committee need not insist that she waste resources pursuing all possible alternate avenues. With discretion, the committee can insist that a claimant produce exactly as much evidence as the committee needs to be convinced that the fraud has occurred, and no more. This is an efficiency not enjoyed by the courts, as courts must also consider fairness to both the parties, the lawyer accused of fraud as well as the alleged victim. A grant by a compensation fund does not invoke the same considerations of fairness, as it does not necessarily entail any financial or legal consequences for the member alleged to have acted dishonestly.[100] The member’s guilt or innocence is adjudicated separately from claims against the defalcation fund. However, the streamlined process possible through committees’ exercise of discretion is not widely realized. For example, as noted earlier, some funds do require that claimants pursue every possible avenue of compensation, no matter how unlikely it is that this will be fruitful.

Law society defalcation funds generally compensate only monetary loss; that is, the amount misappropriated or converted. The funds do not generally pay out amounts to compensate other types of damage, such as damages for consequential loss, nor do they pay compensation in respect of expenses or interest. So, in the situation where a lawyer breaches his undertaking to discharge a vendor’s mortgage, the fund may reimburse a claimant in the amount taken. However, if a bank forecloses in order to realize on its security interest, the fund will not compensate the claimant for the loss of the property. The limitation of compensation to monetary loss is particularly

[99]Subject to applicable statutory criteria, the claims adjudication committee has discretion as to whether to compensate the claimant in respect of the loss, and if so, in what amount. Applicable statutory criteria include obvious requirements such as that no party to a fraudulent act can claim compensation from the fund in respect of it, as well as more technical requirements such as time periods within which claimants must apply to the fund if their applications are to be considered. See for example s. 13.03(5) of the Rules of the Law Society of Newfoundland and s. 51(6) of *Ontario’s Law Society Act*.

[100]Many defalcation fund committees will, however, wait for the results of a disciplinary hearing before awarding compensation. This is partly because a claimant must demonstrate the member’s dishonesty in order to recover.

significant where a defalcation fund operates as a fund of last resort. Claimants will normally be undercompensated for their losses because they cannot recover the cost of pursuing alternate avenues of compensation.

Claimants' recovery is also often limited explicitly by caps on recovery. Most of the law societies set an explicit limit on the amount the fund will pay out as compensation in respect of a single claim, or as a consequence of the actions of a particular member. Further limits are established for aggregate claims payable during a policy period. Some of the funds provide further that no claim will be paid out in excess of the amount of money in the fund. In the event that the payable claims in a given year exceed the amount of money in the fund, the funds pay the claims *pro rata* out of amount available in the fund; that is, if there is only enough money in the fund to cover 80% of the dollar value of the claims, each claimant will receive 80 per cent of his claim. Even where eligible to recover, then, claimants will again not be compensated for their full losses.

Because of the various limits on recovery, the law society defalcation funds do not operate to fully compensate those affected by lawyers' fraud by breach of undertaking. Such a system might be justified as preventing that sort of fraud by creating an incentive for people to act carefully to avoid being victimized. If they do not anticipate that they will receive compensation for their losses, people have a greater incentive to act carefully in order to prevent those losses. However, there is little that a vendor can do to prevent his lawyer from absconding with the funds that were to discharge the vendor's mortgage. Lawyers and lending institutions are potentially better situated to implement procedures that would prevent fraud by breach of undertaking. However, a policy of denying compensation to innocent parties in order to provide incentives to lenders seems overly harsh.

British Columbia

The Law Society Special Compensation Fund is a fund of last resort. Historically, the fund would pay out a maximum of $17,500,000 per year. After the Wirrick affair, the law society voted to remove the $17,500,000 cap.

Alberta

The Law Society Assurance Fund will pay out a maximum of $150,000 per claim. It is a fund of last resort. However, need is not a criterion for payment, so banks can claim from the fund.

Saskatchewan

The Law Society Special Fund will pay out a maximum of $250,000 per member. It is a resource fund, not a fund of last resort.

Manitoba

The Law Society Reimbursement Fund is a resource fund, not a fund of last resort. It compensates banks.

Ontario

The Law Society Compensation Fund will pay out a maximum of $100,000 per claim. It is a fund of last resort, and it does not pay out to banks.

Quebec

The Chambres des Notaires Indemnity Fund will pay out a maximum of $100,000 per event and a maximum of $100,000 per notary.

New Brunswick

The Law Society Compensation Fund is a fund of last resort. Need is a criterion, and the fund does not pay out to banks.

Nova Scotia

The Barristers' Society's Reimbursement Fund will pay out a maximum of $300,000 per member. In no year will the fund pay out more than the lesser of half of the fund capital and $750,000. It is a resource fund, not a fund of last resort. It does not normally compensate banks.

Prince Edward Island

The Law Society Reimbursement Fund is a fund of last resort. Need is a criterion for compensation.

Newfoundland and Labrador

The Law Society Compensation Fund will pay out a maximum of $50,000 per claim and $150,000 per member or firm. In no year will the Fund pay out more than 75 per cent of the capital in the Fund at the beginning of the year. The fund is one of last resort. Need or hardship is a relevant criterion, so the fund does not compensate banks.

Yukon

The Law Society Special Fund will award a maximum of $500,000 per claim. It is not a fund of last resort. There has never been a claim against the fund.

Northwest Territories

The Law Society Assurance Fund will not make a single payment in excess of $50,000. It is not a fund of last resort, but need is a criterion. No claims have yet been made against the fund.

Nunavut

The Law Society of Nunavut is in the process of establishing claims criteria for the recently established Law Society Assurance Fund. No claims have yet been made against the fund.

FLSC Fund

Further to the provincial and territorial defalcation funds, the Federation of Law Societies of Canada (FLSC) has established a fund to compensate those who "sustain a financial loss arising from the misappropriation of monies or property by a lawyer while engaged in the inter-provincial practice of law."[101] A lawyer engages in inter-provincial practice when she practices law in a province or territory, the law society of which she is not a member. The fund is constituted

[101]Appendix 6 - Point 3 of Interjurisdictional Protocol
http://www.flsc.ca/en/committees/interjurisprotocol.asp#app6

through contributions of provincial law societies levied on members for that purpose. The amount in the fund is currently $1 million.

The FLSC fund is an "excess" fund. Those eligible for compensation under compulsory professional liability insurance are not eligible for compensation by the fund. All of the provincial law societies have signed a protocol which specifies how claims arising in the context of inter-provincial legal practice are to be resolved. None of the territories have signed the protocol. Essentially, the FLSC fund exists to ensure that claimants are not undercompensated as a result of their claims having arisen in the context of inter-provincial practice. The FLSC fund is available to ensure that claimants are compensated as they would be if their claim had arisen in the context of domestic legal practice in the province in which the claim arose. The fund will not award more than $450,000. However, a claimant whose loss is greater than that can apply to the absconding lawyer's home jurisdiction for further compensation.

6.3.4 Law Society Special Levy

A further means of compensating victims of lawyers' fraud by breach of undertaking would be to implement an emergency levy on members of the relevant jurisdictional law society. This is a retroactive, *ad hoc* levy which is most likely to be implemented to address specific major instances of fraud which overwhelm the resources of the jurisdictional law society's defalcation fund. In other words, an emergency levy is an after-the-fact response to a specific instance of fraud which would exhaust the resources of the defalcation fund, but where the law society feels that it is important the victims be compensated in order to maintain public faith in the profession. An emergency levy was assessed by the Law Society of Alberta about twenty years ago. Subsequent to a $6 million defalcation, each member lawyer was levied $1,600. A special levy has been discussed as a possible solution to the Wirrick affair, as the Law Society of British Columbia Special Fund is not expected to be nearly adequate to compensate those affected.[102] Various jurisdictions' *Law Society Acts* provide for the eventuality that a law society might seek to implement such a levy.[103]

As a means of compensating victims of lawyers' defalcation, an emergency law society levy might be relatively easily administered, flexible, and expedient. However, such a mechanism suffers from many of same deficiencies as the law society special fund. A claimant's prospect of compensation through a special levy is even less certain than her prospect of compensation out of a defalcation fund, as the implementation of a special levy is even more *ad hoc* and discretionary than is the administration of a special fund. Even though payment from the defalcation fund is discretionary, at least we know it exists; but there is no guarantee that an emergency fund will be established in any particular instance. The establishment of an emergency fund may be quite

[102]An early estimate was that the claims would approximate $45 million. The fund assets were roughly $20 million, and the claims predicted to be in excess of $30 million.
http://www.lawsociety.bc.ca/library/bulletin/2002/body_bulletin_02-10-01(PV-Wirick).html

[103]See for example Rule 701(1) of the Rules of the Law Society of Saskatchewan.

contentious within the profession. Some areas of practice, real estate law in particular, are much more likely to give rise to claims, as lawyer's deal with large amounts of clients' money in trust accounts. Lawyer's practicing in low-risk areas of law often resent being levied to pay for claims arising from high-risk types of practice. The solution in Alberta, where all members of the profession were assessed equally, is one possible response, but it is not the only possible approach. For example, the levy could in principle be limited to lawyers practicing in a certain area of law, and the amount of the levy might vary depending on the type of practice. Because the emergency fund is a response to a specific instance, all of these issues will be decided in light of the particular facts.

Law societies are very conscious of the need to preserve the faith of the public in the legal profession, and the very limited historical record, in particular the Alberta example, suggests that ultimately an emergency fund is likely to be set up if needed. However, the *ad hoc* and discretionary nature of an emergency fund means that there will be considerable uncertainty in the payment, which creates stress for any potential claimant. Further, very lengthy delays in payment are almost certain. Since the funds are set up in response to a specific instance of fraud, there will necessarily be a lengthy delay as the need for the fund is assessed, and details, particularly contentious details, such as which members of the profession should be assessed, are settled.

6.3.5 Professional Liability Insurance

In every Canadian jurisdiction, practicing lawyers are required by statute to carry professional liability insurance. Sometimes also termed "errors-and-omissions" insurance, such professional liability insurance covers claims attributable to lawyers' negligence, errors and omissions, in performing or failing to perform professional services.[104] Errors and omissions coverage is broad. It covers "all sums which the insured shall become legally obligated to pay as damages arising out of a claim." Anyone who can obtain a damages award against a lawyer can benefit from that lawyer's professional liability insurance. One need not, therefore, enjoy a solicitor-client relationship with a lawyer to recover from that lawyer's professional liability insurer.[105] All of the likely victims of a lawyer's breach of undertaking, including banks, can recover compensation through the lawyer's professional liability policy. Any or all of the vendor, the vendor's bank, the purchaser, and the lender to the purchaser can recover from the absconding lawyer's insurer, as each of these parties can prevail against the lawyer in a civil cause of action. Provincial and territorial *Insurance Acts* provide that once a claimant has obtained a judgment against an insured, the claimant can seek compensation directly from the insurer. This is a significant advantage for a claimant, because it can be very difficult to recover from an absconding fraudster. An insurer, conversely, is very likely to make good on its obligation to indemnify.

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[104]LawPRO Policy in Ontario covers: http://www.lawpro.ca/insurance/LAWPRO_policy2003.asp
"all sums which the INSURED shall become legally obligated to pay as DAMAGES arising out of a CLAIM, provided the liability of the INSURED is the result of an error, omission or negligent act in the performance of or the failure to perform PROFESSIONAL SERVICES for others."

[105]The policy issued by LawPRO in Ontario provides, for example, that in agreeing to insure a particular lawyer, the insurer agrees "to pay on behalf of the INSURED all sums which the INSURED shall become legally obligated to pay as DAMAGES arising out of a CLAIM, provided the liability of the INSURED is the result of an error, omission or negligent act in the performance of or the failure to perform PROFESSIONAL SERVICES for others."

A claimant need not necessarily pursue a matter to judgment to recover from an insurer in respect of it. Insurers reserve for themselves in their insurance contracts the right to settle matters in respect of which they must indemnify the insured, and they routinely settle claims without insisting on a formal determination of liability and assessment of damages. It is generally less expensive for insurers to settle cases in which they do not expect to prevail than it is for them to litigate the cases. This is good for claimants because it means that they can often recover compensation quickly and inexpensively.

However, errors-and-omissions policies do not normally cover claims arising from insured lawyers' dishonest or fraudulent acts.[106] As a practical matter, however, some victims of fraud can take advantage of lawyers' errors-and-omissions coverage. This is a consequence of partnership law, and particularly of the rule that each partner in a partnership is personally liable for the obligations of the business. In most jurisdictions, errors-and-omissions policies provide indemnity to innocent partners; that is, to partners who did not participate in or know of the fraudulent act in question. So, where the lawyer that absconded with a claimant's money happens to be a member of a partnership, the claimant can recover against the innocent partners of the fraudster. But where the fraudster is a sole practitioner, the victim does not have this option.

Further, some professional liability insurers do insure against an insured lawyer's fraud. The Ontario-based professional liability insurer LawPRO offers Innocent Party coverage.[107] This is very similar to the coverage offered in most jurisdictions against fraud by the insured lawyer's partner, since it does protect the insured lawyer against those types of claims. In addition, the LawPRO coverage also includes fraudulent conduct by the insured herself. Normally, one cannot insure against one's own fraudulent act. The reason is moral hazard; the risk that the insured will deliberately engage in the insured conduct in order to recover from the policy.[108] Where a fraudster has innocent party professional liability insurance coverage, a victim can obtain a judgment against the fraudster, then claim compensation directly from the fraudster's insurer. The moral hazard problem is dealt with because once the insurer has paid a claim, it has a subrogated right to pursue the lawyer who has committed the fraud. In other words, the lawyer's insurer will compensate the victim, but then go after the lawyer. However, the LawPRO coverage is not as a practical matter much better than the innocent partner insurance offered in other jurisdictions. The effect of the coverage is the same when the absconding lawyer is in a partnership. And while Innocent Party coverage is available to sole practitioners (in case they use agents in their practice), it is optional. Perhaps most importantly, this coverage is normally limited to $250,000 per claim *and in the aggregate.* This means that the insurer will not pay out more than $250,000 in respect of a single policy, no matter what the value of the claims that are made. It is possible to purchase more coverage, but this additional coverage is optional. This means that this type of coverage will be of limited assistance to victims of systematic fraud.

Professional liability coverage is not limited to compensation for monetary loss. Indemnification is available in respect of claims for all manner of compensatory damages as well as pre-judgment and post-judgment interest. Professional liability coverage is not available, however, to cover penalties, legal fees, or punitive or aggravated damages.

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[106]For example, LawPRO Policy in Ontario: "This POLICY does not apply:
(a) to any CLAIM in any way relating to or arising out of any dishonest, fraudulent, criminal or malicious act or omission of an INSURED;"

[107]Lawpro 2003 Professional Liability Insurance for Lawyers, Endorsement 5, available at http://www.lawpro.ca/insurance/LAWPRO_policy2003.asp

[108]Fire insurance does not, for example, cover the situation in which you deliberately set fire to your own house.

The amount of money recoverable from professional liability policies is limited. Lawyers must carry a minimum of $1 million per occurrence errors-and-omissions coverage. An occurrence is generally specified to be a single error, omission, or negligent act, or a set of related ones. Additional coverage is available, usually to a total of $5 million per occurrence. A particular claimant can recover no more than the limit on recovery per occurrence. So, a person awarded $10 million in damages by a court in respect of a professional liability claim can recover, at most, the limit of the defendant's professional liability insurance policy. Moreover, the maximum recovery might be even less, depending on how many parties claim injury from the particular occurrence at issue. If a number of parties are determined to be entitled to claim against a particular solicitor in respect of a particular incident, they will split the recoverable insurance money pro rata. That many parties suffer damage attributable to a single or related error, omission, or negligent act does nothing to increase the total amount available to compensate damage from that error. Aggregate liability, that is, liability in respect of any one member in one year, is generally limited to $2 million. This means that the insurer will not pay out more than $2 million in claims against a particular member in one year. This limit on aggregate liability also limits claimants' recovery. If a particular lawyer has been subject to previous professional liability claims, and the insurer has already paid out a number of those claims in a particular year, then a late-coming claimant may not recover at all.

The law societies of Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan, the Northwest Territories, the Yukon, and Nunavut insure through the Canadian Lawyers Insurance Association (CLIA). CLIA was established as a reciprocal insurance exchange. Participating law societies agree on standard limits and policy terms, and CLIA issues a master policy to each, performs a co-ordinating role, and administers claims which exceed law society deductibles. Premiums for mandatory coverage are paid through annual law society levies, and individual members of provincial and territorial law societies pay premiums for voluntary excess coverage. Innocent Party coverage is available in many jurisdictions, but it covers only the innocent partners of a fraudster, not the fraudster himself.

The Law Societies of Upper Canada (Ontario) and Newfoundland and Labrador insure through the Lawyers' Professional Indemnity Company (LawPRO), an insurer licenced to provide professional liability coverage in various Canadian jurisdictions. LawPRO offers Innocent Party insurance coverage. In Ontario, lawyers in partnerships must carry a minimum of $250,000 coverage per claim and in the aggregate. As much as $1 million worth of innocent party coverage is available. It is optional for sole practitioners.

The Law Society of British Columbia insures through the British Columbia Lawyers Insurance Fund. There is no innocent party coverage available here. Policy limits are $1 million per occurrence, and $2 million annual aggregate. Since 2002, the Fund has offered the option Innocent Insured Coverage which is "designed to protect innocent lawyers in firms who may face claims that are otherwise uninsured because of the business interests of another lawyer at the firm." It covers only the innocent partners of a fraudster, not the fraudster himself.

6.3.6 Real Estate Transaction Fee

Ontario imposes a $50 fee on both vendor and purchaser in every real estate transaction, and puts the money toward liability insurance.[109] The Law Society of British Columbia has approved in principle a similar insurance levy of $30 per transaction. The idea is to broaden errors-and-omissions coverage. The Conveyancing Task Force of the Law Society of British Columbia notes that such coverage could replace the Law Society Special Fund. Such a scheme would have advantages over law society levies and defalcation funds as well as over professional liability insurance. Recovery would be as of right rather than discretionary as is the case with law society funds. Parties could count on compensation and would therefore be better compensated in respect of losses due to fraud. Moreover, a broader class of claimant could benefit from such a scheme. Need would not be a factor, so banks could claim. Another attractive feature of such a scheme is that it would be better targeted than defalcation funds and law society general levies. The latter schemes levy all lawyers in the same amount, even though only a small proportion of lawyers engage in and benefit from areas of practice most risky in terms of defalcation. By funding an insurance scheme through a transaction fee on real estate, law societies can impose the risks of real estate practice on those who benefit from it.

6.4 Preventing Fraud

6.4.1 Cheque Splitting: How does it Work?

One possibility for preventing fraud by breach of undertaking is the adoption of a practice of cheque splitting. Instead of issuing one cheque from which the vendor's lawyer undertakes to make appropriate payments, the purchaser issues separate cheques in the names of the parties holding encumbrances on the property. In the simplest case, one cheque is made payable to the vendor's bank, in the amount necessary to discharge the mortgage, and the other for the balance of the purchase price is made payable to the vendor's solicitor in trust. The cheque made payable to the mortgagee could be delivered to the vendor's lawyer or directly to the mortgagee.

The idea of cheque splitting is not new, and it is not unique to Canada. The Judicial Committee of the Privy Council of the United Kingdom had occasion to discuss the merits of solicitors' undertakings and cheque splitting as alternative conveyancing practices in the 1984 case of *Edward Wong v. Johnson Stokes & Master.*[110] In that case, a solicitor acting for a vendor had breached his undertaking to discharge the vendor's mortgage and absconded with funds entrusted to him for that purpose. Conveyancing through such undertakings, as is the case in most Canadian jurisdictions, had long been common practice in Hong Kong. In England, however, the practice had long been a more fraud-proof one that involved cheque splitting. In endorsing the use of split cheques to avoid the risk of fraud by breach of undertaking, as occurred in the case, the Lords commented that "simple precautions such as these would ensure that the purchaser or lender was placed by his solicitor in the favourable position which he ought to occupy when he parts with his money."[111]

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[109] See By-Law 16 of the Law Society Act, R.S.O. 1990, c.L.8

[110] *Edward Wong Finance Co.* Ltd. v. Johnson Stokes & Master, [1984] AC 296 (Privy Council)

[111] *Ibid*

Steps involved in Cheque Splitting as Practiced	
1	Purchaser (P)'s bank advances $ to P's lawyer in trust.
2	Vendor (V)'s lawyer obtains from encumbrance holders statements detailing amounts necessary to discharge encumbrances.
3	P's lawyer makes out cheques to encumbrance holders.
4	P's lawyer delivers cheques to V's lawyer, who undertakes to pay out encumbrances.
	or P's lawyer delivers cheques directly to encumbrance holders (less common).

6.4.2 Objections to cheque splitting

Although a practice of cheque splitting seems a promising way to prevent fraud by breach of undertaking, it is the subject of a number of objections.

One objection is that split cheques would nevertheless be vulnerable to fraudulent endorsement by a party given to such a course of action. A lawyer who would breach an undertaking to discharge a client's mortgage might similarly be inclined to fraudulently endorse the mortgage cheque and abscond with the funds. So, if the cheque payable to the vendor's mortgagee is delivered to the vendor's lawyer, a practice of cheque splitting may do little to prevent fraud. The simple answer to this objection is for the purchaser's lawyer to deliver the cheque directly to the encumbrance holder. The vendor's lawyer would not then have opportunity to divert the funds intended to discharge the vendor's mortgage.

Another objection to a practice of cheque splitting is concerned with privacy. In order to make out cheques to individual encumbrance holders, purchasers' lawyers must know the amounts necessary to discharge the encumbrances. Some apparently view this as private financial information. Even if this privacy concern is compelling, the risk of fraud by breach of undertaking seems more compelling.

Further objections to a practice splitting relate to perceived difficulties of implementation. Critics suggest that mortgage statements would have to be final and accurate so that purchasers and their lawyers can rely on them when issuing cheques. However, a less onerous proposal would be for involved parties to agree on who should be responsible to correct a situation where a mortgage statement turns out not to be accurate. Other critics note that provision would have to be made for the accrual of daily interest. Where interest accrues daily, and a purchaser's lawyer is less than prompt in issuing a cheque to the bank holding the vendor's mortgage, the cheque may not be sufficient to discharge the mortgage. Standard conveyancing contracts would have to be adapted to provide for contingencies such as these, but surely this would not be too onerous a task.

Cheque splitting is already the practice in a number of Canadian jurisdictions. New Brunswick's Standards for the Practice of Real Property Law and the Yukon Guidelines Pertaining to Real Property Transactions require purchasers' lawyers to issue split cheques. Ontario's 1992 Practice Guidelines similarly recommend a practice of cheque splitting. Although not required, cheque splitting is common practice in conveyancing transactions in Prince Edward Island. Cheque splitting seems to work in these jurisdictions; the various objections to the practice have not materialized as significant.

6.4.3 Other Proposals

Various practices have been proposed which would aim not as much to prevent fraud by breach of undertaking, as to detect it quickly in order to minimize consequent losses. It has been suggested that lawyers should adopt a more aggressive timetable according to which to seek evidence of mortgage discharges. It is the long time period during which both the vendor's and the purchaser's mortgages encumber title that permits fraud by breach of undertaking to work. By lessening this time period, fraudulent activity might be detected or deterred. Similarly, the Conveyancing Task Force of the Law Society of British Columbia has proposed that vendors' solicitors should be required to provide purchasers' solicitors with evidence of payment of existing encumbrances on title within 48 hours of mortgage repayment. Such requirements are potentially problematic in that their fulfillment is not necessarily within a lawyer's control; therefore the proposals cannot be backed by sanction. Fulfilling the proposals would require the cooperation of lending institutions. Their acknowledging receipt of payment would be particularly useful. As banks suffer losses from the sort of fraud the proposals aim to detect, one would think that they would be willing to participate in countermeasures. In any case, their participation can be compelled. For example, section 19 of British Columbia's *Cost of Consumer Credit Disclosure Act* imposes an obligation on banks to provide a discharge of mortgage within 30 days of repayment.

7. Title Insurance

Title insurance provides an alternative means of compensation for homeowners and lenders who are harmed by fraud. Title insurance is a form of private insurance which is entirely separate from the land titles system. It is not provided automatically on registration of a property in the land titles system, but must be purchased separately, like any other form of private insurance. Unlike automobile insurance, there is no legal requirement that title insurance be purchased. And unlike general homeowners insurance, which protects against fire and similar losses, the lender will not insist that the homeowner purchase title insurance, as the lender can purchase its own separate insurance. Purchasing title insurance is truly optional for either a lender or a home purchaser. The question discussed in this section is whether purchasing title insurance a is good idea as protection against fraud.

Title insurance originated in the United States against the backdrop of the document registration system which is used in the U.S., as it still is in Quebec, P.E.I. and Newfoundland and Labrador. The problem with the document registration system is that the entire chain of title to each property must be searched every time a property is sold. This is wasteful, since the same documents will be reviewed over and over by different lawyers. In the land titles system this duplication is eliminated by having each document examined only once, by the land titles officials. Since the registry can be relied upon in the land title system, there is no need for subsequent purchasers to examine the same document again. In the U.S. the problem of duplicative searching, which gave rise to land titles system in Canada, was addressed by title insurance instead. A title insurance company would, in effect, duplicate the public registry records in its own "title plant." When a purchaser wants title insurance, the insurer will search the title in their title plant. Since there are typically only a small number of insurers active in any area, it is likely that the same insurer would have examined the same title on a prior transaction. The title insurer could therefore search title only back to the last transaction where it had insured title, thus eliminating duplication.

Title insurance is a relatively recent phenomenon in Canada. Title insurance is available throughout Canada, including Quebec. However, market penetration is relatively high only in urban Ontario, and it is relatively low in the rest of the country. It is particularly noteworthy that market penetration in Quebec is among the lowest in the country, even in urban centres. The document registration system of that province is very similar in principle to the U.S. system where title insurance was developed, and quite different from the land titles systems in place in most of the rest of Canada. In particular, the Quebec system requires the duplicative searching of title which title insurance was originally designed to ameliorate. Of more relevance to the issue of fraud, because it is a document registration system and not a title guarantee system, the Quebec regime offers much less protection against fraud than does the land titles system. For both these reasons one would expect title insurance to be more attractive in Quebec than in jurisdictions with a land titles system. The reasons for the low use of title insurance in Quebec are not entirely clear. It may simply be a consequence of the relatively recent advent of land titles in Canada generally.

Two title insurance companies, First American Title Insurance Company, which operates in Canada under the business name First Canadian Title, and Stewart Title Guaranty Company, dominate the market for title insurance in Canada. Other insurers are active, but the following discussion refers specifically to the coverage offered by these two major insurers.

Title insurance can only be bought by the home owner when the home is purchased, or by a lender when the property is mortgaged. It cannot be purchased subsequently. The policy may be issued either to the lender or the home purchaser, though most typically both the purchaser and the lender in a single transaction will be covered if either party is. This is encouraged by the cost structure. A residential title insurance policy costs about $200 to insure either the purchaser or the lender, and an extra $50 (i.e. a total of $250) to insure both parties.

Title insurance in this traditional sense is much more attractive in a registry system than in a land titles system, where the register can be relied upon to show current ownership, so that duplicative searching is not necessary. But title insurance now has expanded to cover a much broader range of problems associated with the purchase of a house, for example where a building extends partially onto the neighbour's land, or if work was done on the building by the prior owner without a building permit or in violation of the building code, and remedial work is required to bring the work up to standard, or if a zoning by-law is being violated.

Title insurance also covers a number of aspects related to fraud. This report discusses only those aspects of title insurance which are related to fraud. Nothing in this report should be taken to suggest that title insurance is or is not desirable or wise for reasons unrelated to fraud. In other words, even if a home purchaser reading this report comes to the conclusion that title insurance is not needed to protect against fraud in their jurisdiction, title insurance may nonetheless be desirable because of the other types of protection which it offers.

Title insurance is very effective at protecting the victims of fraud. Title insurance does not change who is entitled to the land. This is determined by the principles of the land titles system. However, title insurance may offer compensation to a person who is not entitled to compensation under the land titles system; it may also offer an alternative source of compensation to a person who is entitled to compensation under the land title system.

Recall that in the usual case of fraud by forgery the true owner of the property will find that the property has been mortgaged out from under him. If the owner had title insurance, the policy would cover the amount required to pay off this mortgage and restore clear title to the owner.[112] This would also restore the owner's lender to first priority. If the owner was not insured by the owner's lender (L1) and so the owner's lender would have a second priority mortgage, rather than a first priority mortgage. The lender would be insured against any loss occasioned by this loss of priority.[113] (The exact amount of the loss depends on the remaining equity in the house.) In the case of fraud by forgery where the house has been sold by the fraudster to an innocent purchaser, as noted, title insurance cannot change the fact that purchaser owns the house, as this is governed

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[112]The relevant provisions are: First Canadian Title, Owner's Policy, covered title risk 3(a) "Forgery, fraud, duress, incompetency, incapacity or impersonation" and 3(b) "After the Policy Date, forgery of an instrument by which someone else claims to own an interest in or have a lien on your Title." Stewart Title, Owner's Policy, covered title risk 3 "Forgery, fraud, duress, incompetency, incapacity or impersonation." and 4 "Forgery after the Policy Date of an instrument by which someone else claims to own an interest in or have a lien on your title."

[113]The relevant provisions are: First Canadian, Lender's Policy, insured risk 5 "The invalidity or unenforceability of the Insured Mortgage upon the title" and 20 "Forgery after Date of Policy of any assignment, release, discharge (partial or full), postponement or modification of the Insured Mortgage; or in the event the Insured has acquired the estate or interest in the manner described in Section 2(a) of the Conditions and Stipulations and has not conveyed the title, forgery of any instrument by which another claims the title has been conveyed after Date of Policy"; Stewart Title, Lender's Policy, insured risk, 5 "The invalidity or unenforceability of the Insured Mortgage upon the title" and 22 "Forgery after Date of Policy of any assignment, release, discharge (partial or full), postponement or modification of the Insured Mortgage; or in the event the Insured has acquired the estate or interest in the manner described in Section 2(a) of the Conditions and Stipulations and has not conveyed the title, forgery of any instrument by which another claims the title has been conveyed after Date of Policy."

by the land titles law.[114] However, title insurance would compensate the owner for the full value of the house; and if the owner was still living in the house this might be sufficient to pay off the purchaser and regain title.

Similarly, in a case of fraud by impersonation, where the owner loses her interest, either because she is in a jurisdiction with immediate indefeasibility or because the property has been sold to a second purchaser, she will also be covered in the same way as in the case of fraud by forgery. More importantly, recall that in systems of deferred indefeasibility an initial lender or purchaser who deals with a fraudster will be entirely unprotected: he will have neither an interest in the property nor a right to compensation from the assurance fund. Title insurance would compensate the lender (or purchaser) for his lost interest in that case.[115] This is particularly important because there would be no claim against the assurance fund.

The bottom line is that any victim of fraud on the registry who has title insurance will be covered for his loss, regardless of whether he is are also entitled to claim against the assurance fund.

Title insurance is also helpful in protecting a purchaser or lender to a purchaser in a case of fraud by breach of undertaking. As we have seen, this type of fraud occurs when the property is purchased and the vendor's lawyer breaches his undertaking to discharge the vendor's existing mortgage. The result of a breach of undertaking by the vendor's lawyer is that instead of getting a clear title subject only to his own mortgage, the purchaser gets a the property still subject to the vendor's mortgage. The purchaser's lender, instead of getting a first priority mortgage, gets a second priority mortgage. Since the vendor's mortgage has not been paid off, the vendor's bank still has a valid first mortgage, and the vendor still owes the mortgage debt to his bank. In principle the vendor's bank has the choice between pursuing the vendor personally for the debt or selling the property to satisfy the debt, once it goes into default. If the vendor's bank successfully recovers the debt from the vendor, the mortgage will be discharged and the purchaser will be unaffected. However, it is very unlikely that the vendor's bank will choose to do this, as the vendor's main asset is generally the property, and enforcing a mortgage is easier than enforcing a debt. This means the vendor's bank will usually seek to satisfy the mortgage debt by selling the property, which now belongs to the purchaser. This of course harms both the purchaser and his lender, since the purchaser's property will be sold out from under him, without compensation.

We have seen that in this situation none of the victims will have any claim against the land titles assurance fund. In contrast, title insurance purchased by the purchaser and/or his lender prior to the sale will protect both the purchaser and the purchaser's lender in this situation, as it insures the clear title that they expected to get. So, if the purchaser had title insurance and the vendor's bank sought to foreclose, title insurance would pay off the vendor's mortgage in order to clear the purchaser's title.

However, title insurance does *not* protect the vendor, even if the vendor had purchased title insurance at the time he had originally purchased the property. This is because the breach of the vendor's lawyer's promise to pay off the vendor's mortgage does not directly affect title. It is true that the vendor does not have the money available which he expected to be able to use to pay off his mortgage, but this is just the same as if a burglar had broken into the house and stolen the

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[114]So, recall that in New Brunswick, the purchaser would not own the house.

[115]See the reference to "impersonation" in the owner's policy and "invalidity" in the lender's policy.

same money from a safe. In other words, title insurance is not theft insurance, just because the money which was stolen happened to be earmarked to pay off the mortgage.

As well as providing coverage in a number of situations where the land titles assurance fund does not, title insurance is also advantageous in terms of speed and costs. This is particularly important when the land titles systems is one of last resort. We have seen that speedy compensation is very important to minimizing the harm caused by fraud, both from stress and because of the loss of flexibility in mortgaging or selling the property until the claim is settled. While title insurance only compensates for the value of the land, and not for associated harm such as mental distress or consequential economic loss, those types of harm are minimized because a title insurance policy is insurance of first resort. The insurer will pay out quickly on being satisfied that the fraud has occurred and that the homeowner has in fact suffered a loss. There is no need for the victim to pursue the wrongdoer or even make a claim to the assurance fund.

This leads to another advantage of the title insurance system. We have seen that costs are an important issue, as the victim's full legal costs are not reimbursed in full. This is particularly important when the victim has to pursue the wrongdoer before making a claim against the fund. Not only will a title insurer pay out without requiring the victim to pursue the wrongdoer, the title insurer actually has a duty to defend the insured. This means that the insurer will supply a lawyer, at its expense, to deal with the legal problems raised by the fraud. So, if an owner has their house mortgaged out from under them and receives a foreclosure notice from the bank which lent money to the fraudster, not only will the owner be entitled to be compensated by the title insurer, the title insurer will also supply a lawyer to deal with the bank's claim. In effect, if the owner has title insurance, his costs are entirely covered.

It is also important to recognize that when the title insurer pays a claim, it will be subrogated to the rights of the victim. This means that the title insurer will be able to pursue the fraudster to recover money which was stolen. This is important from a deterrence perspective. The threat of a claim by the title insurer makes fraud more risky for the fraudster even if the victim is insured. Of course, the insurer will only choose to pursue such a claim if there is some prospect of recovering something from the fraudster. But this is desirable, as there is no point in wasting money in trying to get blood from a stone, as may happen in a land titles system of last resort.

In principle the title insurer also has a subrogated claim against the assurance fund in cases where the insured victim would have been able to make a claim against the fund. It does not appear that any title insurer has yet attempted to make such a claim.

With these points in mind, how does title insurance compare to the guarantee offered by the land titles system?

First, as we have seen, land titles systems across the country are quite different and not all land titles systems provide compensation to every innocent party who suffers a loss as a result of fraud. In particular, we have seen that in cases of imposter fraud a land titles system with deferred indefeasibility, such as that in Ontario, does not provide compensation to a lender or purchaser who dealt with an imposter. The lender or purchaser in this situation who has purchased title insurance would be compensated. Similarly, in cases where the vendor's lawyer breaches his undertaking to pay off the vendor's mortgage, title insurance will protect the purchaser and the purchaser's lender, who would have no claim against the assurance fund.

Even in cases where the victim would have a claim against the assurance fund, title insurance offers advantages, particularly when the land titles system is one of last resort. Next consider cases in which title insurance coverage is alternative to the land title guarantee. For example, in most

land titles systems, an owner who occupies a house may have it sold out from under him. In this case the owner is clearly entitled to compensation from the land titles assurance fund. If the owner had purchased title insurance, he would also be entitled to compensation under the title insurance policy. The title insurance policy does not require the owner to claim against the land titles guarantee before making a claim under the policy. This means that the owner has the option of claiming against either her title insurance policy, or against the land titles assurance fund. Note that the amount of the claim is the same in either case, which is to say the value of the property itself. Like the land titles guarantee, title insurance does *not* cover claims such as emotional distress or consequential loss.

In this case it may seem that title insurance is unnecessary, since the owner is already insured by the land titles system, so it is a waste of money to get the same insurance from a private title insurer. This is not necessarily true, however.

In jurisdictions such as Ontario where the land titles assurance fund is a fund of last resort, the homeowner will be required to exhaust all his other options, including claims against the wrongdoer, before a claim may be made against the fund. This can take a very long time and require the homeowner to incur significant legal expense. In contrast, title insurance is a fund of first resort. The insurer will pay out quickly on being satisfied that the fraud has occurred and that the homeowner has in fact suffered a loss. The insurer is then subrogated to the rights of the homeowner, which means that the insurer is entitled to take action against the wrongdoer to recover the money, if it so desires. The insurer may or may not choose to pursue the wrongdoer, depending on whether there seems to be a reasonable chance of recovering some of the money; but this is of no concern to the homeowner, who will be paid no matter what the insurer decides. The insurer may in principle be entitled to pursue this to the point of being compensated from the land titles assurance fund, though this has not yet been attempted. It is true that the title insurer will not pay out automatically on any claim being made, as the insurer must satisfy itself that a real loss has occurred, or the insurance policy would be open to abuse. But this is generally very easy to establish in the case of a either forgery or an imposter, where it is easy to show that the owner who was registered on title never dealt with the purchaser or the bank.

From the perspective of the homeowner, the bottom line is that in a jurisdiction such as Ontario where the land titles assurance fund is a fund of last resort, title insurance may be very valuable. The difference between being able to get immediate compensation and leave the pursuit of the wrongdoer to someone else and having to pursue a wrongdoer through the courts before receiving any compensation is enormous. We should also recognize that even though title insurance does not provide compensation for harm such as mental distress or consequential economic loss, it can prevent such harm by paying out quickly. Most of the mental distress and consequential economic loss in this type of case arises from the delay between discovering the fraud and being compensated. When compensation for the direct monetary loss is immediately forthcoming, the harm from these other types of losses is minimized, even if they are not compensated directly.

In a jurisdiction where the fund is a fund of first resort, the case is less clear. There are two reasons why a homeowner or lender might consider title insurance even in these jurisdictions. First, even when the fund is in principle is a fund of first resort, no insurance payment is ever entirely automatic, simply on payment of a claim. In order to prevent abuse of the insurance system, any insurer must always take steps to assess the validity of the claim. So, an application must be made to the Director of Land Titles, who must assess the merits of the claim before authorizing payment. To some extent, then, the ready availability of compensation, even from a fund of first resort, depends on the willingness of the Director to settle apparently valid claims promptly.

Thus, even when the fund is nominally a fund of first resort, actual availability of compensation may be more or less prompt. Of course, exactly the same is true of private title insurance. In any field of insurance some insurers may pay out more readily than others.

Is there any reason to think that the private title insurer will pay out more readily than a land titles assurance fund which is a fund of first resort? There is some reason to think that private insurers may pay out more readily, namely that the industry is reasonably competitive and a reputation for prompt settlement of claims is a selling point for a particular insurer. In contrast, there is only one land titles assurance fund, so there is no competitive pressure to settle claims quickly. On the other hand, it may be said that private title insurers have an incentive to deny claims in order to maintain profits, and this pressure is absent in the case of the assurance fund. On the whole, it is difficult to say whether there is any reason in principle to think that private title insurance will pay out more quickly.

On the other hand, because payment out of the fund depends on the exercise of judgment by a Director or other responsible officer, some individual officials may be more willing than others to settle a claim. It may be that at a particular time in a particular jurisdiction, the title insurer is more willing to pay out a claim than is the assurance fund, not because of structural institutional reasons, but simply because of the way in which the specific individual with authority views the balance between settling claims promptly and protecting the fund from abuse. Put another way, even though there is little reason to think that the assurance fund will be worse than a private title insurer in settling valid claims promptly, there is no reason to think that the assurance fund will be any better in that regard. There is likely to be variation one way or the other depending on the specifics of how the different insurers are operated. It may be that in some jurisdictions and times, a homeowner may legitimately feel that a title insurer will settle more readily than will the land titles assurance fund.

A particularly strong form of this problem arises in a jurisdiction such as B.C., where, as noted earlier, the assurance fund is formally a fund of last resort, but the practice has been to take advantage of a discretionary power to pay claims to operate as a *de facto* fund of first resort. In contrast, in Alberta, where the *Act* is very similar on its face, the practice is that the discretionary power is only exercised in the case of an error on the part of the land titles office, and not in the case of fraud perpetrated by a third party. Who is to say that the next Director of Land Titles in B.C. will not decide to reverse course and follow the Alberta model, and so turn the fund from a fund of first resort to a fund of last resort. A homeowner might understandably prefer to rely on title assurance rather than on the current practice of the land titles office.

To summarize, the advantages of title insurance are: (1) complete coverage–insurance covers all types of fraud, even those which are not covered by land titles, in particular fraud by impersonation, which is not covered in all land titles jurisdictions, and fraud by breach of undertaking (with respect to the purchaser and their lender); (2) speed of compensation–title insurance is a fund of first resort; (3) legal costs–the insurer has a duty to defend and will bear all the legal costs associated with the fraud.

Thus in jurisdictions with document registration systems, such as Quebec, or in land titles systems with relatively poor protection for the interest holder, such as Ontario, title insurance is an attractive option for the homeowner or lender for protection against fraud. In more modern land titles systems the advantages of title insurance as compared with relying on compensation from the land titles system are reduced, but title insurance is still an option which some consumers might wish to purchase, particularly for its coverage of fraud by breach of undertaking.

The only possible disadvantage of title insurance to the purchaser or lender is the cost. As we have noted, this is approximately $200 for coverage of either a purchaser or a lender, or $250 for both. Recall that title insurance covers many title risks besides fraud, so the value of title insurance cannot be determined solely on the basis of the protection it provides against fraud. Title insurers report that fraud is a relatively small proportion of their total claims. First Canadian in particular reports that frauds and forgeries accounted for approximately 2 per cent of the total number of claims received in 2002 but accounted for almost 14 per cent ofcla ims payments in the same year, including payment of legal costs associated with defending the validity and enforceability of the mortgagewh ere appropriate. Note that fraud claims tend to be much larger in amount than other types of claims, as a large part of the entire value of the property is often at issue. These numbers indicate that the average cost of fraud to the title insurer per transaction is much higher than the average cost of fraud to the land titles office per transaction. The reason for this is not entirely clear. Part of the reason is that the title insurer is a fund of first resort and bears all related legal costs–in other words, claims payments by title insurers are higher because it provides better insurance than a land titles fund of last resort. Another reason may be that essentially all transactions are registered, while it is the more valuable properties, which are more likely to fall victim to fraud, which are more likely to have title insurance.

Finally, one impediment to title insurance as a solution to the fraud problem is that it must be purchased on the purchase of land or an interest therein. This is problematic because with relatively low penetration in much of the country, particularly historically, many homeowners who do not currently have title insurance and who might wish to purchase it purely as a protection against fraud, do not have the opportunity to do so.

The reasons for the limited market penetration are not entirely clear. As noted earlier, title insurance was originally developed in the United States to provide protection against hidden title defects resulting from searches in the inefficient public document registry offices. Title insurance was primarily a complement to, or substitute for, a title search in the public registry. This is why it was available only at the time of purchase of the interest in land. Even though Canadian registry systems were for many years similar in principle to those in the United States, title insurance never took hold here in the same way. This may simply be because the U.S. based title insurer's did not seek to expand in Canada until relatively recently. Title insurance is less necessary under a land titles system as opposed to a document registry system because land titles reduces the cost of duplicative searching which provided the main impetus for title insurance. However, title insurers have expanded the range of protection which is offered beyond pure insurance of title, though most of the protection continues to be focused on the state of the property at the time of purchase, as for example, protection in the event that a previous owner had extended the building in contravention of zoning by-laws or without a building permit. Further, as we have noted, title insurance offers better protection against fraud than does the land titles system, especially when compared with older land titles systems such as that in Ontario. In view of these features of title insurance and because market penetration is substantial in some regions but not in others, it may be that the relatively low market penetration in most of the country is due to lack of awareness.

The potential market gap in respect of those homeowners who did not purchase title insurance at the time of acquisition of their home, but who now want better protection against fraud than that offered by the land titles or document registration system (in Quebec), could potentially be filled by post-purchase fraud protection insurance. Many of the types of risk that a standard title insurance policy protects against, most obviously the risk of a defect in title, can only be effectively insured against at the time of acquisition of the property. However, fraud by forgery can, in

principle, be effectively insured against after the acquisition of the property. The insurer would conduct a point-in-time inquiry to determine the current state of title, and then insure against fraudulent changes to title. This type of post-purchase fraud insurance would necessarily be more limited than standard title insurance, as the insurer could not protect against, for example, breaches of the building code, as it would be impossible to determine whether the defect in question was caused by the insurance applicant or a prior owner. Fraudulent conveyance of a property by a fraudster is really a form of theft of land. It happens that because of the nature of land, theft is accomplished by fraud rather than by physically taking the property in question. And just as personal property insurance is a widely used form of protection against theft, so post-purchase fraud insurance could be used to protect against theft of land.

While it might be preferable to buy the whole package at the time of purchase of the property, some homeowners might still find it worthwhile to purchase fraud protection for their current home. For example, after-purchase forgery protection might be offered as a rider to a standard homeowner's insurance, thus reducing the costs of selling the policy. Overall, post-purchase fraud protection might be attractive to homeowners who do not wish to sell their current house, yet are concerned about being victimized by another Tesoro affair. More study would be required to determine whether such a policy could be sold and administered at a marketable price.

8. Conclusions

Despite recent high profile instances, fraud in land conveyancing does not appear to have reached crisis proportions in Canada. The general historical pattern of title fraud is that there are generally few cases, but those cases which do occur cause considerable loss. It is not possible to say whether the recent high profile cases are simply an exaggerated instance of this historical trend, or whether they represent the beginning of a new trend towards more title fraud. This incidence of fraud might increase, if for example, organized crime were to systematically target land registration systems for fraudulent schemes in a way which was not done historically.

The harm caused by fraud can be reduced by preventing the fraud or by insuring the loss caused by those frauds which are not prevented. Both prevention and insurance of fraud increase the cost of land transactions. Since the mortgage lending business and the legal practice of land conveyancing are very cost competitive, the costs of preventing or reducing fraud are ultimately borne by people who buy, sell and mortgage their land. This means that the goal is not complete prevention or insurance, but a cost-effective combination of prevention and insurance.

Some fraud can be prevented by requiring the lawyer or notary handling the transaction to require reasonable documentary identification from the vendor or mortgagor of property. Requiring such identification is now a professional responsibility of any lawyer or notary involved in a real estate transaction. While this is a worthwhile measure, it can only prevent relatively unsophisticated attempts at fraud by impersonation. More stringent steps to verify the identity of the parties, for example by examination of signatures, is almost certainly not cost-effective given the current state of identification technology, whether at the registry office itself or by the lawyer or notary concerned.

Restricting access to the registry office to lawyers and notaries might prevent a fraudster from directly depositing forged documents, but this would be politically unpalatable and would not eliminate fraud entirely. It therefore appears that there is as present no cost-effective method of completely preventing the registration of forged documents.

When initial registration of forged documents cannot be prevented, completion of the fraud may be prevented by early detection. The Saskatchewan innovation of a providing a notification statement to the registered owner whenever a transfer or mortgage is registered, combined with the ability of the Director of land titles to freeze the register, is a promising means of early detection which could be implemented in automated land titles systems.

The ultimate means of preventing fraud is deterrence through criminal penalties. It is difficult to say whether these penalties should be increased, given competing demands on the criminal justice system.

In jurisdictions with a land titles system, the land titles assurance fund is an important source of compensation for those harmed by fraud on the registry. There is very significant jurisdictional variation in the land titles compensation systems.

Most land titles systems provide that in a contest between the original owner of property and the innocent party who purchased or lent money in reasonable reliance on the register, the third party who relied on the register–most often a bank or other institutional lender–is entitled to the property itself, while the original owner is entitled only to compensation. New Brunswick has a unique rule which protects the ownership of the owner in possession, and provides compensation to the third party who relied on the register. Such a rule, preferring the owner in possession,

appears to have substantial advantages and no disadvantages as compared with the standard land titles system.

Some land titles systems do not provide compensation to the direct victim of fraud by impersonation, while others do. Systems which provide protection to the immediate victim of fraud by impersonation appear to provide better protection at little additional cost.

Land titles systems only provide compensation to a victim of fraud for the value of the interest in land which has been lost, plus "reasonable" legal costs of making a claim. It is sometimes suggested compensation be broadened to provide for full legal costs, as well as claims for mental distress and consequential loss. There are strong arguments against broadening compensation to cover these types of loss. These types of loss are better addressed by improving the compensation claims procedure, as speedy and efficient compensation for the lost interest itself can prevent other types of harm from occurring.

Land titles systems can be divided into two categories procedurally. In older systems, such as that in Ontario, the land titles assurance fund is a fund of last resort. This means that the victim of the fraud must first pursue the wrongdoer directly, and it is only once the victim has obtained a judgment against the wrongdoer and has unsuccessfully attempted to collect from the wrongdoer that the victim can turn to the land titles assurance fund. In newer systems, such as those in Saskatchewan and New Brunswick, the land titles system operates as a fund of first resort. A victim of fraud is entitled to claim directly from the land titles assurance fund without first pursuing the wrongdoer. Land titles systems with a fund of first resort appear to be clearly superior to those with a fund of last resort.

Compensation available to parties affected by fraud by breach of undertaking is generally uniform across the provinces. Compensation may be available from special discretionary funds, or, in some cases, from the lawyer's professional liability insurance. Some form of compensation is generally ultimately available, but there may be significant delay and uncertainty in claiming the compensation. Cheque splitting appears to be a relatively effective means of preventing fraud by breach of undertaking. Lawyers in a number of Canadian jurisdictions routinely use split cheques to transfer property and find the practice convenient and efficient.

Title insurance is a form of private insurance which protects against many types of loss consequent on a purchase of land, including many types of fraud. In document registration systems, such as Quebec, or in land titles systems with relatively poor protection for the interest holder, such as Ontario, title insurance is an attractive option, with cost being the only possible disadvantage. Title insurance must be purchased at the time of purchase of an interest in land. Post-purchase fraud insurance could in principle be offered, but more study would be required to determine whether such a policy could be sold and administered at a marketable price.

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9. Legislation

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Tel: (867) 668-4405

Graham, Jan – Executive Secretary, Law Society of Yukon
Tel: (867) 668-4231

11.13 Nunavut

Denroche, Allan – Private Practitioner
Tel: (867) 920-4151

Kehler, Kate – Executive Director, Law Society of Nunavut
Tel: (867) 979-2330

11.14 Other Legal

Bourque, Diane – Executive Director, Federation of Law Societies of Canada
Tel: (514) 875-6351

Piette, Maurice – Observer for the Chambre des Notaires du Quebec – Co-Chair, Federation of Law Societies of Canada-Canadian Bar Association National Real Estate Project
Tel: (514) 376-3660

Tremblay, Ann – Independent Consultant – Manager, Federation of Law Societies of Canada-Canadian Bar Association National Real Estate Project
Tel: (613) 748-9537

11.15 Title Insurance

Hanesiak, Richard – Director of Residential Underwriting – First Canadian Title (registered business style of First American Title Insurance Company)

Thwaites, Sandra – Vice-President, Canadian Claims – Stewart Title Guaranty Co.

12. Electronic Resources

12.1 Insurers

Canadian Lawyers Insurance Association
http://www.clia.ca/siteE.htm

First Canadian Title
http://www.firstcanadiantitle.com/default.asp

Lawyers' Professional Indemnity Company
http://www.lawpro.ca/Default.asp

Law Society of British Columbia Lawyers Insurance Fund
http://www.lawsociety.bc.ca/services/frame_services_insurance.html

12.2 Canadian Institute of Mortgage Brokers and Lenders

http://www.cimbl.ca/

12.3 Law Societies

Federation of Law Societies of Canada
http://www.flsc.ca/

Canadian Bar Association
http://www.cba.org/

Law Society of Newfoundland
http://www.lawsociety.nf.ca/

Law Society of Prince Edward Island
http://www.lspei.pe.ca/

Nova Scotia Barristers' Society
http://www.nsbs.ns.ca/

Law Society of New Brunswick
http://www.lawsociety-barreau.nb.ca/

Barreau du Quebec
http://www.barreau.qc.ca/

Chambre des notaires du Quebec
http://www.cdnq.org/

Law Society of Upper Canada
http://www.lsuc.on.ca/

Law Society of Manitoba
http://www.lawsociety.mb.ca/

Law Society of Saskatchewan
http://www.lawsociety.sk.ca/

Law Society of Alberta
http://www.lawsocietyalberta.com/

Law Society of British Columbia
http://www.lawsociety.bc.ca/

Law Societies of the Northwest Territories
http://www.lawsociety.nt.ca/

Law Society of Yukon
http://www.lawsocietyyukon.com/

Law Society of Nunavut
http://lawsociety.nu.ca/

12.4 Law Society Reimbursement

Nova Scotia Barristers' Society Reimbursement Fund
http://www.nsbs.ns.ca/reimbursement.html

Law Society of Upper Canada Lawyers Fund for Client Compensation
http://www.lsuc.on.ca/public/compfund_en.jsp

Federation of Law Societies of Canada – Interjurisdictional Protocol
http://www.flsc.ca/en/committees/interjurisprotocol.asp

12.5 National Real Estate Project

http://cba.org/CBA/EPIIgram/Aug2002/

12.6 Western Canada Conveyancing Project

Law Society of Manitoba
http://www.lawsociety.mb.ca/conveyancing_project.htm

Law Society of Saskatchewan
http://www.lawsociety.sk.ca/Torrens/features.htm

Law Society of Alberta
http://www.lawsocietyalberta.com/pubs_policies_reports/westerntorpaper.asp

12.7 Electronic Registration of Land Title Documents

Government of British Columbia - Land Title Branch
http://srmwww.gov.bc.ca/landtitle/electronic_filing.html

Law Society of Upper Canada
http://www.lsuc.on.ca/services/edroverview_en.jsp

13. News Stories

Aaron, Bob, “Mortgage fraud victims can also lose homes,” *Toronto Star*, 2 August 2003, Saturday Ontario Edition.

Aaron, Bob, "Property Title Fraud Strikes a Nerve," *Toronto Star*, 23 February 2002, Saturday Ontario Edition, p. M1.

Aaron, Bob, “Stolen dreams,” *Toronto Star*, 9 February 2002, Saturday Ontario Edition, p. M1.

Christopoulos, George, "Alleged Fraudster Hunted $3.6M Mortgage Scam," *The Toronto Sun*, 7 April 2000, Final Friday Edition, p. 22.

Hudson, Kellie, "Property Scam Nets $3.6 Million," *Toronto Star*, 7 April 2000, Friday Edition.

Slaughter, Mike, "Title fraud costs taxpayers," *Toronto Star*, 9 March 2002 Saturday Ontario Edition, p. M6.

Wilhelmson, Michael, "B.C. lawyers facing surcharge in wake of $18.3 million claims over single lawyer's activities," *The Lawyers Weekly*, 4 October 2002.

Wilhelmson, Michael, "Real estate lawyer's actions cause shock waves at B.C. banks," *The Lawyers Weekly*, 20 September 2002.

14. Annotated Literature Review

Peter A. Alces, Assistant Professor, University of Alabama School of Law. 1985
Luther M. Dorr, Jr., Judicial Clerk, United States Senior District Judge Seybourn Lynne.
"ARTICLE: A Critical Analysis of the New Uniform Fraudulent Transfer Act." ***1985 U. Ill. L. Rev. 527*****, 1985.**

Provides a historical overview of fraud prevention acts, including the *Uniform Fraudulent Conveyance Act* (UFCA). It also compares the UFCA to the *Uniform Fraudulent Transfer Act* (UFTA) and critically evaluates their strengths and weaknesses. A comparison of the strengths and weaknesses of the UFTA to Canada's current conveyancing system may be useful.

John C. Anderson, Judicial Clerk, Illinois Appellate Court.
Michael L. Closen, Professor of Law, The John Marshall Law School.
"Article:D ocument Authentification in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority." ***17 J. Marshall J. Computer & Info.***
L. 833**, 1999.**

This article addresses the use of digital signature technology, and poses the question of whether the traditional notary public should serve as the model for the new position of certification authority. Discusses increased rates of Internet fraud and benefits and limitations of the use of digital signatures as a potential preventative measure.

Dent Bostick, Professor of Law, Vanderbilt University.
"Land Title Registration: An English Solution to an American Problem."
63 Ind. L.J. 55**, 1987.**

Examines real estate title assurance schemes in the United States, which it describes as wasteful and archaic, as well as ineffective. The author contends that certain elements of British title assurance schemes could be adapted to the American situation in order to improve it. This article may be useful first as a resource on deed and title warranties, title insurance, and a historical perspective on British land registration. Second, the suggestions for improvement
to the U.S. system may point to potential areas for improvement in our own title assurance schemes.

Ann M. Burkhart, Associate Professor, University of Minnesota Law School. Restatement of Mortgages Symposium: "Third Party Defenses to Mortgages." ***1998 B.Y.U.L. Rev. 1003*****, 1998.**

Details various fact patterns of mortgage fraud. The author also differentiates the ways in which the Uniform Commercial Code (when the mortgage is considered a negotiable instrument by the courts) will deal with these fraudulent conveyances from the methods of land laws and recording acts. This article describes the current trends in court decisions for specific types of fact pattern in the United States, and outlines the various defenses third parties may have against a mortgage holder's action.

Michael L. Closen, Professor of Law, John Marshall Law School.
"SYMPOSIUM: Issues Affecting Notarial Law and Policy: Article: The Public Official Role of the Notary." ***31 J. Marshall L. Rev. 651*****, Spring, 1998.**

This article examines the range of consequences of the notary being a public officer. It addresses the issues of fiduciary responsibility, personal liability, vicarious liability, and the presumption of validity and its exceptions for notarized documents. The author notes the public service responsibilities of notaries public and explores "…the responsibility of notaries to avoid official misconduct and the attendant role of governmental oversight of this officially commissioned or licensed functionary." This article also discusses international and interstate recognition of notarizations.

Michael L. Closen, Notary Public, State of Illinois. Professor of Law, John Marshall Law School; Adjunct Professor of Law, Loyola University of Chicago.
"ARTICLE:To Swear ... or Not To Swear Document Signers: The Default of Notaries Public And A Proposal To Abolish Oral Notarial Oaths." ***50 Buffalo L. Rev. 613*****, Spring/Summer, 2002.**

A discussion of society's dependence on notarial oaths. Includes a section on the role of notaries protecting against document fraud by impostors.

CIMBL Mortgage Industry Fraud Task Force.
"Canadian Mortgage Industry Fraud White Paper." October 26, 2001.

This paper identifies the various types of mortgage fraud, including the following categories: property, employment, identification, equity and title. It discusses industry fraud loss estimates. It also details recent fraud reduction initiatives, and suggests that originators and insurers work together to reduce fraud on an industry level. It suggests fraud awareness training for industry members, and that the industry should act quickly to reduce the incidence of mortgage fraud in order to protect its reputation.

Conveyancing Practices Task Force, The Law Society of British Columbia.
"Interim Report." August 6, 2002.
http://www.lawsociety.bc.ca/library/report/docs/ConveyancingPracticesTF-interim.pdf

This report identifies a need to change certain conveyancing practices and to "…improve the financial protections that cover real estate transactions." It discusses a specific investigation of a Vancouver solicitor in his real estate practice as a starting point for its investigation. The report identifies current conveyancing practices and some current issues with these practices, and also suggests potential solutions. These solutions include the possibility of a two-cheque system. The report analyses the potential benefits and issues that may arise form implementing such a system. It contains other recommendations for improvements to conveyancing practices as well. The report also describes the B.C. Law Society's Special Compensation Fund, and explains some current issues facing the fund. It suggests some ways in which title insurance and fidelity insurance may be put to use to augment the current system.

**Conveyancing Practices Task Force, The Law Society of British Columbia.
"Second Interim Report." December, 2002
http://www.lawsociety.bc.ca/library/report/docs/ConveyancingPracticesTF-2nd.pdf**

This report begins with further analysis of the recommendations of the Task Force's first Interim Report, based on feedback from the legal profession. This feedback led the Task Force to abandon the two-cheque system as a viable alternative. The Task Force also revisited the alternative of providing unequivocal support for solicitor's undertakings, as discussed in Interim Report 1. The report expresses a concern that abuse of an unmanageable magnitude may arise. The Task Force abandons any idea that fidelity insurance proceeds be used to fund past financial losses. The report goes on to detail potential new practice initiatives, including a "transparency response," a "30-30 rule," and innocent party insurance coverage.

Charles B. DeWitt, III, Assistant Dean for External Relations and as an adjunct professor at the Cecil C. Humphreys School of Law. "Title Insurance: A Primer." ***3 Tenn. J. Prac. & Proc. 15*****, 2000.**

An overview of title insurance, including its history, the need for the industry, typical claims, and some misconceptions associated with the title insurance industry. Also discusses fraud by title insurance agents, which coupled with forgery has recently represented 15-30 per cent of title claims. The forgery specifically mentioned is the scenario of a couple representing that they are husband and wife, but one of the parties is not the spouse of the other. The author also suggests that a title policy can be extremely useful should the examining or closing attorney commit an act of omission or negligence or outright fraud.

**Charles N. Faerber, Vice President of Notary Affairs and Executive Editor of Publications for the NNA.
"SYMPOSIUM: Issues Affecting Notarial Law and Policy: Article: Being There: The Importance of Physical Presence to the Notary."** ***31 J. Marshall L. Rev. 749*****, Spring, 1998.**

This article describes two common ways in which a notary may be deceived by a person known to him or her. Either (a) "[t]he exploiter, well known to the notary, introduces a stranger with little or no identification as a spouse or associate, then pressures the notary to notarize the stranger's signature on a property deed or other valuable paper and to ignore the inadequate documentary identification as a favor…" Or (b) "[t]he exploiter, well known to the notary, presents a property deed or other valuable document bearing the signature of an absent spouse or associate, often also well known to the notary, then pressures the notary to notarize the signature and to ignore the signer's absence as a favor…" The article focuses on the second scenario for a discussion of notarial misconduct, including specific case examples.

Dean Arthur R. Gaudio, Dean and Professor of Law, Western New England College School of Law.
"Symposium:Choosi ng the Digital Future: The Use and Recording of Electronic Real Estate Instruments: Electronic Real Estate Documents: A Model for Action." ***24 W. New Eng. L. Rev. 271*****, 2002.**

Article advocates the establishment of a uniform electronic recording system in the State of Iowa, as well as a Uniform Act on electronic recording for the U.S. The most relevant section for our purposes would be the author's description of what is currently being done in the U.S. to prevent conveyancing fraud within the paper recording system. He briefly mentions the possibility of fraud within the proposed electronic recording system, essentially to suggest that an electronic recording system will prevent most fraud.

Mary-Anne Hughson, Tutor and Research Associate, Faculty of Law, Monash University.
Marcia Neave, Professor of Law, Monash University.
Pamela O'Connor, Lecturer in Law, Monash University.
"Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders." ***21 Melbourne U. L.R. 460*****, December, 1997.**

Article discusses the inherent conflict between the Torrens system of land title registration and the equitable principles applicable to holders of unregistered interests. It differentiates between the common law principle of *nemo dat quod non habet* and the rule of protection of innocent purchasers regardless of whether the transferor has good title, which is typical of title registration systems. The authors discuss possible reform of the caveat provisions, which provide some protection to holders of equitable interests not recordable in the register; adjudication of priority contests between unregistered interests; and *in personam* claims. They suggest ways to incorporate these reforms into a Torrens system.

James Steven Rogers, Associate Professor of Law, Boston College.
"Negotiability as a System of Title Recognition." ***48 Ohio St. L.J. 197*****, 1987.**

This article argues that it is time for negotiable instruments law to change. The most relevant portion of the article contends that Holdsworth's classic third essential characteristic of negotiability, the proposition that a *bona fide* purchaser of a negotiable instrument can acquire good title even from a thief, is currently unnecessary due to equitable principles. The author discusses the typical problems that this rule was designed to counteract, such as the insecurity inherent in a *bona fide* purchaser being subject to a host of unknowable claims. He also maintains that this type of problem has "…long been resolved by general principles of *bona fide* purchase applicable to any form of property, negotiable or not." While a claim in equity may be made against the aforementioned "thief" directly, Mr. Rogers contends that "…[a]s a general principle of equity, any such equitable claims to recover property transferred in a voluntary transaction subject to rescission, or to enforce claims to property that were not in fact properly effectuated, are cut off if the property ends up in the hands of a *bona fide* purchaser."

Dan S. Schechter, Professor of Law, Loyola, Los Angeles.
"ARTICLE: Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Rethinking the Goals of the Recording System and Their Consequences."
***62 S. Cal. L. Rev. 105*, November, 1988.**

This article states that in a case of conflict between a grantee of real property where the transfer is intentionally or accidentally not recorded, and the grantor's creditor who holds a judicial lien on the property, who wins the conflict depends on the facts of the particular case and the jurisdiction. The author addresses the arguments for both outcomes. He suggests that fraud deterrence is a main reason for a recording system, but not the only reason. He addresses the fact that unrecorded transfers are void only as to certain classes of protected parties and are otherwise valid. Therefore, the author argues, in the case of an unprotected party, recording statutes do not "…invalidate the unrecorded interest, even though some fraudulently unrecorded transactions may thereby be insulated from attack." He goes on to discuss the fundamental goals of a recording system, and to suggest that the rationale of cost avoidance "…appears to encompass, unify, and refine both the certainty and fraud deterrence theories…." The article also addresses the costs associated with fraudulently unrecorded transfers.

Sam Stonefield, Professor of Law, Western New England College School of Law.
"Symposium:Choosi ng the Digital Future: The Use and Recording of Electronic Real Estate Instruments Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues and a Recommended Decisional Process." ***24 W. New Eng. L. Rev. 205*, 2002.**

Covers the possibility of fraud associated with the use of electronic real estate documents, but has more to do with electronic signatures, database security, privacy concerns, etc., than with conveyancing fraud.

Peter J. Van Alstyne, founder and President of the Notary Law Institute in Salt Lake City, Utah.
"ARTICLE:The Notary's Duty of Care for Identifying Document Signers." ***32 J. Marshall L. Rev. 1003*, Summer, 1999.**

Discusses the role of the notary in preventing fraud by ascertaining the true identity of document signers both historically and today. Particularly, this article addresses the elements of signature forgery, the ways in which identities are established or fraudulently obtained, and the evidentiary issues associated with the establishment of identity.

Dale A. Whitman, Professor of Law, Brigham Young University.
"SYMPOSIUM:The Robert Kratovil Memorial Seminar in Real Estate Law: Digital Recording of Real Estate Conveyances." ***32 J. Marshall L. Rev. 227*****, Winter, 1999.**

Describes the properties, advantages and disadvantages of Public Key Infrastructure (PKI) as a form of digital signature, including the fact that PKI seems less susceptible to fraud and forgery than ink-on-paper signatures are. The article also addresses the *Uniform Electronic Transactions Act* (UETA), the core concept of which is that "…electronic documents should be recognized and enforced to the same extent as paper documents." This *Act* would cover deeds, mortgages, releases, and other ordinary real estate documents. The statute of frauds would be satisfied by electronic documents (whether printed or not) under the UETA. The author contends that UETA seems much too general to be effective as applied to recording of real estate title documents. He suggests several issues that should be addressed before implementing a digital recording system.

Dale A. Whitman, James E. Campbell Missouri Endowed Professor of Law, University of Missouri-Columbia.
"Symposium:Choosi ng the Digital Future: The Use and Recording of Electronic Real Estate Instruments: Are We There Yet? The Case for a Uniform Electronic Recording Act." ***24 W. New Eng. L. Rev. 245,*** **2002.**

Discusses the Statute of Frauds requirement of a writing for all conveyances of interests in land in most American jurisdictions. Other than this mention, this article does not discuss fraud, but rather the legal intricacies involved in implementing a uniform electronic recording act.