

# Law Society of Saskatchewan

## Continuing Professional Development Branch

Interests in Land – Statutory and Equitable Considerations Webinar

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ANDREA V. ARGUE

RANDALL M. SANDBECK, Q.C.

ERIC F. W. JOHNSON



Kanuka Thuringer LLP  
BARRISTERS & SOLICITORS

OLIVE WALLER ZINKHAN & WALLER LLP  
BARRISTERS & SOLICITORS



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# A. STATUTORY PROVISIONS

*The Land Titles Act, 2000, SS 2000 C L-5.1 (the “LTA”)*

Definition of “interest” (s. 2(1)(s)):

means any right, interest or estate, whether legal or equitable, in over or under land that is recognized at law that is less than title.

## PART III - Fundamental Principles - DIVISION 1 - Title

This part contains Fundamental Principles summarized by Georgina Jackson in *Land Titles in Saskatchewan*, Vol. 1 (Regina, Saskatchewan Justice, 1988), quoted with approval by Ball J. in *Farm Credit Canada v Gherasim*, 2016 SKQB 182 at para 14:

First, a certificate of title is, subject to certain specified exceptions, conclusive of evidence of ownership, so that it can be relied upon in all transactions concerning that land. This principle is often called the principle of indefeasibility. Second, the scheme of the Act promotes facility of transfer. Relying on the principle of indefeasibility, prospective purchasers can freely deal with anyone purporting to be the registered owner of land. Third, registration of documents is compulsory which means that in order to take priority or have any effect over persons who are not parties to the transactions, the transaction or notice of the transaction must be registered or filed in the appropriate land titles office. Fourth, an assurance fund is created to compensate any person who suffers loss or damage through an error in the operation of the Land Titles System or through deprivation in circumstances where the principle of indefeasibility overrides previous common law rights of ownership.

## Indefeasibility of Title

Section 13 of the *LTA* - Registered owner holds title free from all interests, exceptions and reservations (subject to s.14).

## Section 14 of the *LTA* - Exceptions to Clear Title

- Any interest registered under this Act or any other Act or law.
- Exceptions, reservations and interests implied pursuant to Sections 18-20, whether or not they are registered or mentioned on title.

# Section 18 of the *LTA* - Implied Interests

- Reservations from Crown Grant.
- Legislation providing for:
  - access, including easement or right of way
  - recover taxes by proceedings
  - expropriate
  - restrict use
  - control, regulate or restrict subdivision.
- Public highway, right of way or easements.
- Subsisting lease less than three years with occupation
- Subsisting residential tenancy
- Consent right of way or easement for natural or manufactured gas pipeline outside of municipality (town or city).

## Section 23 of the *LTA* - Reliability of Title

- Taking title or dealing with title, person not bound to inquire into consideration or application of purchase money.
- Person is not affected by any member of notice of any trust, unregistered interest or unregistered transfer and knowledge of existence is not found.

## Section 24 of the *LTA* - Reliability of Interest

- Taking interest in title or interest, person not bound to inquire and not affected by any trust or other unregistered interest.
- Knowledge of trust or other unregistered interest is not imputed as fraud.

## (iii) PART VIII – **Interests** - DIVISION 1 - Registration of Interests

### Section 49 of the *LTA* - Interest Registers for Each Interest

### Section 50 of the *LTA* - Registrable Interests

- Recognized at law.
- Registrable pursuant to legislation.
- Designated as registrable in regulations.
- Interest in an interest to be registered as against interest, but can be registered on title if supporting interest not registered.



## Section 53 of the *LTA* - Interest Registration

- Allows auto attach of judgment in priority to interest where exact name match

## Section 54 of the *LTA* - Effect of Interest Registration

- Notice to parties and priority (s. 27).
- Effective according to terms and not valid through registration.
- No registration effective if no compliance with s. 50, and not valid if not executed before registration (unlike Personal Property Registry).
- Legislated interest is not effective unless form in legislation is provided as attachment.

## (iv) PART V – **Interests** - DIVISION 1 - Registration of Interests

*The Land Titles Regulations, 2001*, RSS 2001 C L-5.1 (the “*Regulations*”)

### s. 36 of the *Regulations* - Registrable Interests

- The public list, registrable pursuant to s. 50(1)(a) of the *LTA*.
- Designated registrable interests includes
  - assignment of rents
  - mortgage of a lease
  - assignment of lease as security

# B. SPECIFIC INTERESTS

## (i) Easements

- What is an easement? May be positive or negative.
- Statutory easement vs. common law easement.
- How are easements created?

Easement references in the LTA

### **PART XVII - Statements of Law – Division 3 - Easements**

- Section 147 - Owner can grant easement or restrictive covenant against own land – removes a common law requirement.
- Section 150 – No doctrine of prescription.

## Common Law Easement Features

- Must have both dominant and servient tenement.
- Must benefit dominant tenement.
- Must be capable of being granted in that the easement must not be an effective transfer, or a right that is ill-defined or not recognized at law.
- Distinct from license. License is not an interest in land.
- Registration and Discharge procedures are established in the *Regulations* – consent of subsequent interest holders required for discharge (s. 148)
- *MC3 Resources Inc. v Hogan*, 2014 SKQB 109. Terms of the grant must be reviewed to determine if effective and subsisting.
- Benefit/burden of covenants in an easement – what runs with the land?
- Drafting tip: positive covenants in a grant will not run with the land.

(ii) Brief review of the enforceability of covenants generally

- Covenants vs. conditions
- Privity of contract
- Privity of estate
- Covenants where no privity of contract or estate

(iii) Restrictive Covenants

- contractual in nature.
- Current law – negative covenant capable of running with the land s. 147.
- Requires dominant and servient tenement.
- Di Casti's six-point test (see *Canada Safeway Ltd. V. Thompson (City)* (1996), 5 R.P.R. (3d) 1 (Man Q.B.), affirmed (1997), 11 R.P.R. (3d) 65 (Man. C.A.); however see s. 147 of the Land Titles Act re: the sixth point.

***Sheppard v Hummel, 2016 SKCA 26***

- Attempt to register a restrictive covenant as a miscellaneous interest.
- Not valid restrictive covenant as no dominant tenement.
- No ongoing contractual relationships and thus not subject to reservations and exceptions appearing on title.

**SEE** Perell, Paul M., Covenants as Contracts and as Interests in Land, 29 *Advocates Quarterly* 476 (2005)

**SEE Generally** OBA Continuing Legal Education, Covenants Concerning the Use of Land, Tuesday, December 8, 2009

### (iii) Right of First Refusal

- Contractual right not currently recognized as interest in land.
- *Stephens v Gulf Oil Canada Ltd.*, 1975 CanLII 711 (ONCA), 65 DLR (3D) 193
- Once offer is made and right of first refusal is exercised, can subsequently create an interest in land.

### (iv) Option to Purchase

- Option to purchase and right of repurchase create equitable interests in land

See P.M. Perell, “Options, rights of repurchase and rights of first refusal as contracts and as interests in land” (1991) 70:1 Canadian Bar Review.

## (iv) Beneficial Interests

- s. 25(1) "Except as against the person making it, an instrument purporting to transfer, assign, charge, deal with or affect any title, interest, or land for which title has issued, does not operate to create or convey any title or interest until an application for registration of a transfer of title or an application for registration of an interest based on that instrument is registered in accordance with this Act."
- ss. 35(1) and (2) "(1) No person may be registered on title as a trustee. (2) The Registrar shall treat any application to register a transfer to or an interest held in the name of a person in his or her capacity as trustee as if there were no trust, and the trustee named in that application is deemed to be the absolute and beneficial owner of the title or holder of the interest for the purposes of this Act."

*Thorsteinson v Olson*, 2014 SKQB 237

“The application of the doctrine of resulting trust to real property in Saskatchewan must, however, be considered in light of the principles of conclusiveness of title established by the Torrens system and in particular *The Land Titles Act*, 2000, SS 2000, C L-5.1 (the “Act”).”

*Commentary:*

“*Olson* joins a line of cases that appear to have been unaware of the important *dictum* in *Frazer v. Walker*. That *dictum* provides that some *in personam* claims remain tenable against a registered owner, even when the principle of immediate indefeasibility governs. Such claims fit in the space between a valid acquisition made in reliance on the top title, and a certified title that is defeasible because the transferee is guilty of Torrens fraud. Canadian courts should debate for themselves how and when the *in personam* qualification should apply, as has occurred in other Torrens jurisdictions. “ (footnotes omitted)

- Ziff, B., “Resulting Trusts and Torrens Title” 50 R.P.R. (5th) 27B

*Thorsteinson v Olson*, 2016 SKCA 134

“Because I find the trial judge did not err in concluding the presumption of resulting trust was rebutted in the circumstances of this case, it is unnecessary to deal with the issue of whether such trusts are incompatible with the Torrens system of land registration in this province.”



(v) Assignment of Rents

- An assignment of rents is not registrable at common law.
- An assignment of rents is a registrable interest as designated under the *Regulations* s.36(2)(h), thus is a registrable interest under s. 50(1)(c) of the *LTA*.

*Swenson v Swenson*, 2006 SKQB 438

(vi) Mortgage Amendments

- Registration of an interest includes registration of an amendment (s.24).
- Attachment by amendment (as in any attachment) displaces description of interest as notice to third parties from date of registration.
- Amendments to interests with prescribed form and authorization are effective from date of registration (ss 58 and 59).

## C. Removing Interests

Interests may be discharged in several ways, depending on the circumstances:

- (i) Application to Lapse;
- (ii) Application for Interest Discharge;
- (iii) Application to Registrar;
- (iv) Application to Court;
- (v) Exhaustion; or
- (vi) Voluntary Discharge.

### (i) Application to Lapse

- Only certain interests are lapsable, including builders' liens, CNV caveats, condominium lien for arrears, leases (both leases of 10 years or more, and those under 10 years), CNV mechanics liens and miscellaneous interests.
- An application may be made to lapse a registered interest pursuant to s. 46 of the *LTR*.
- The application must be made by an approved person, which includes:
  - the registered owner of the affected land (*Regulations*, s. 46(1)(a)) ;
  - the holder of an interest against which the interest sought to be lapsed is registered (*Regulations*, s. 46(1)(b));
  - any person with a registered interest (under s.50 of the *LTA*) in the land (*Regulations*, s. 46(1)(c)); or
  - a member of the Law Society of Saskatchewan acting on behalf of a person outlined above (*Regulations* s. 46(1)(d)).

- the lapse registers as a sub-interest on the interests for which lapse is sought;
- the Registrar then provides a notice to lapse to the interest holder to which the lapse has attached;
- after 30 days have passed from the registration of the lapse sub-interest, an Application for Interest Discharge may be made; and
- to prevent a lapse of interest, a Certificate of Action or a Court Order may be filed with the Land Registry.

(ii) Application for Interest Discharge

- Where a judgment (including a writ or a maintenance enforcement order) is registered against property of the wrong person (i.e. where your client has the same name as a judgment debtor) an Application for Interest Discharge may be made to the Registrar along with an Affidavit of Identity for Summary Discharge.

(iii) Application to Registrar

- ss. 68(1)(a) and 101 of the *LTA*

(iv) Application to Court

- ss 68(1)(b) and 107 of the *LTA*

## (iv) Application to Court

- An application may be made to the court under sections 68(1)(b) and 107 of the *LTA* to discharge an improperly registered or invalid interest

*Nicholson v Trozzo*, 2014 SKQB 182, 448 Sask R 296

- Application may also be made pursuant to specific legislation

- Examples: *The Builders' Lien Act*, s.60

*The Queen's Bench Act*, 1998, s.47

- *Houk v Daniels Investments Saskatoon Ltd.*, 2016 SKCA 147

- s. 109 of the *LTA* gives the courts general jurisdiction to grant a remedy, make a court order, or give directions to the Registrar to discharge a registered interest

### (v) Exhaustion

- an interest may inherently have a limited life and expire after a certain time elapses
- s.55 of the *LTA*
  - as specified by registrant
  - as specified by legislation pursuant to which interest is registered

Examples of the latter: writs of execution, which may expire after 10 years, or builder's liens which may expire if the action where the lien may be realized is not set down for trial within 2 years of the day on which the action commenced.

### (vi) Voluntary Discharge

# D. Improper/Invalid Registration

- s.68(2) of the *LTA* provides that an applicant who submitted registration is liable for losses sustained to any person as a result of the improper registration of an interest
- s.68(3) of the *LTA* provides that an interest holder is liable for losses sustained to any person as a result of the improper registration of an interest if, pursuant to ss. 101 or 107, Registrar or court finds the registration was not discharged after written demand for discharge was made by a person adversely affected by the registration and the interest registered was not valid or its continuance was not justified
- s. 68(4) of the *LTA* exception to the above is if the initial registration was reasonably justified in circumstances
- Improper or invalid registration may give rise to a claim for damages
- See *D.M. Bryan Farms Ltd. v Kemp* (1985), 42 Sask. R. 191 (speaks to s. 150 of The Land Titles Act, R.S.S. 1978 - note re: exemplary damages as well if improper motive)



Thank You.

ANDREA V. ARGUE  
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