



**Manitoba Law  
Reform Commission**

# **INDEFEASIBILITY OF TITLE AND RESULTING AND CONSTRUCTIVE TRUSTS**

**ISSUE PAPER**

**April 2016**



## **Indefeasibility of Title and Resulting and Constructive Trusts**

Issue Paper #3

April 2016

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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## TABLE OF CONTENTS

<b>ACKNOWLEDGMENTS</b> .....	<b>v</b>
<b>CHAPTER 1: INTRODUCTION</b> .....	<b>1</b>
<b>CHAPTER 2: THE TORRENS SYSTEM AND INDEFEASIBILITY OF TITLE</b> .....	<b>4</b>
A. Deeds Registration System vs. the Torrens System .....	4
B. Indefeasibility of Title and Reliance on the Register .....	5
C. Statutory Exceptions to Indefeasibility of Title .....	6
<b>CHAPTER 3: RESULTING AND CONSTRUCTIVE TRUSTS</b> .....	<b>11</b>
A. What is a Trust? .....	11
B. Historical Origins of the Trust .....	11
C. When Will a Court Determine that a Trust Relationship Exists Between Parties?....	12
D. In What Circumstances Are Resulting and Constructive Trust Claims Made? .....	13
E. Resulting Trusts at Common Law.....	13
F. Constructive Trusts at Common Law.....	15
1. The substantive constructive trust and wrongful acts .....	16
2. The remedial constructive trust and unjust enrichment. ....	17
3. The importance of unjust enrichment and remedial constructive trusts in distribution of assets upon relationship breakdown .....	17
4. How does the court determine the validity of a claim for unjust enrichment and when will a constructive trust be found to be the appropriate remedy?.....	22
<b>CHAPTER 4: RECOGNITION OF RESULTING AND CONSTRUCTIVE TRUSTS UNDER <i>THE REAL PROPERTY ACT</i></b> .....	<b>25</b>
<b>CHAPTER FIVE: CASE LAW CONCERNING THE RECOGNITION OF RESULTING AND CONSTRUCTIVE TRUSTS</b> .....	<b>31</b>
A. Manitoba.....	31
1. <i>Fort Garry Care Centre Ltd. v. Hospitality Corporation of Manitoba inc.</i> .....	32
2. <i>Ehrmantraut (Bankrupt) Re ("Ehrmantraut")</i> .....	33
3. <i>Molinski v. Chebib</i> .....	35
4. <i>Hyczkewycz v. Hupe</i> .....	37
B. Alberta .....	39
1. <i>Bezuko v. Supruniak</i> .....	40
2. <i>Drebert v. Coates</i> .....	41
C. British Columbia .....	42
1. <i>Frame v. Rai</i> .....	42
2. <i>Dhaliwal v. Ollek</i> .....	43
D. Saskatchewan .....	44
1. <i>Semchyshen v. Semchyshen</i> .....	44
2. <i>Thorsteinson v. Olson</i> .....	45
<b>CHAPTER SIX: CONCLUSION AND ISSUES TO CONSIDER</b> .....	<b>47</b>
<b>APPENDIX: RELEVANT SECTIONS OF <i>THE REAL PROPERTY ACT</i></b> .....	<b>54</b>

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## CHAPTER 1: INTRODUCTION

This paper examines the law in Manitoba as it relates to the relationship between the principle of indefeasibility of title, codified in section 59(1) *The Real Property Act* (“*Real Property Act*”),<sup>1</sup> and the proprietary interests in land established by resulting and constructive trusts.<sup>2</sup> In other words, the paper explores the issue of whether the fact that someone’s name appears on a certificate of title as an owner of a piece of land constitutes conclusive proof that he or she is entitled to the full value of the land, and may develop, sell or transfer it as he or she sees fit, or alternatively, whether, notwithstanding the fact that his or her name appears on the certificate of title as the owner, the title holder may be found by a court of law to hold the land in trust for another person, and accordingly be liable to provide some or all of the benefits derived from the land to that other person.

The issue of whether there is an implied trust, such as a resulting or constructive trust, between the title holder to a piece of land and someone else is often raised when courts are called on to resolve disputes between family members regarding property ownership. Courts are frequently tasked with resolving such disputes as a result of the breakdown of a marriage or common-law relationship, a disagreement over the allocation of proceeds of an estate of a deceased person, or a falling out between parents and offspring or between siblings, to name but a few examples. When the property at issue is real property (i.e. land) and the title to the land is in the name of one or more family members but not in the name of others, the courts may determine that a resulting or constructive trust relationship exists between the title holder(s) and those whose names do not appear on the title,<sup>3</sup> provided that the necessary criteria for establishing the existence of such trusts have been met.<sup>4</sup>

Resulting and constructive trusts are relationships imposed by the courts on persons who hold title to or own real property. They are used by courts to ensure fair or just outcomes in circumstances where title holders may have acquired title through some type of wrongful act,

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<sup>1</sup> C.C.S.M., c. R30, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/r030e.php>. Section 59(1) of the *Real Property Act* essentially states that the individual whose name appears on the certificate of title to a piece of property registered in the land titles office is the owner of that property, and that he or she is indefeasibly entitled to the land or interest in land specified in the land title certificate. An indefeasible interest in land is one that is impossible to annul, make void or forfeit. Under the Torrens system of land titles registration (explained later in this paper), a person who holds an indefeasible interest in land is theoretically, at least, immune from adverse claims made against the title by someone whose interest in the land has not been registered. The certificate of title, in effect, functions as a guarantee that no interests on the title exist but for those that have been registered on the land, subject to certain, limited exceptions.

<sup>2</sup> In law, a trust is a relationship in which one party (the trustee) holds or owns or controls property for the benefit of another (the beneficiary). Sometimes the obligation to hold property in trust for another is expressly assumed, while at other times, it is implied. In resulting and constructive trust relationships, the existence of the trust relationship is generally implied; courts determine the existence of implied trusts by examining the actions, words and behavior of the alleged trustee and beneficiary in relation to each other and in relation to the property in question in order to determine whether or not the parties intended to establish a resulting or constructive trust, or alternatively, whether the nature of their relationship is such that without the court’s imposition of a trust relationship between the parties, unfairness to one of the parties would result. These concepts will be discussed in further detail later in this paper.

<sup>3</sup> It is important to note that courts can find that a resulting or constructive trust relationship exists between individuals other than family members. However, a breakdown in a relationship between family members is the most common scenario giving rise to a finding by the courts that a resulting or constructive trust relationship exists.

<sup>4</sup> These criteria will be discussed in detail later in this paper.

such as a breach of fiduciary duty or situations where, despite the fact that his or her name does not appear on the certificate of title to a piece of real property, a non-title holder has made substantial contributions to the acquisition, preservation, maintenance or improvement of that property, making it unjust or unfair for the title holder to reap all of the benefits from the land. If the courts determine that a resulting or constructive trust relationship exists, they will rule that the title holder is, in effect, a trustee who holds some or all of the property in trust for a person to whom he or she owes a duty or who made contributions in respect of the land (the beneficiary). Courts often determine the existence of these types of trusts based on the behavior of the parties, since, in most cases, there is nothing written down to establish the existence of a trust relationship between those involved in the dispute. If the courts determine that a resulting or constructive trust relationship exists, the title holder may be required to add the beneficiary's name to the certificate of title to the property, transfer title of the property to the beneficiary or sell the property and divide the proceeds with the beneficiary, to name a few outcomes. If courts are unwilling, or consider themselves unable through the operation of statute or precedent to recognize the existence of these types of trust relationships, the result may be inequitable: the bad behaviour of fiduciaries may be encouraged or those who do not hold title to but have made substantial contributions in relation to real property may be unjustly impoverished or unfairly deprived of property while title holders may be unjustly enriched.

Manitoba courts have generally held that the principle of indefeasibility of title, as expressed in section 59(1) of the *Real Property Act*, prevents them from recognizing the existence of resulting and constructive trusts, even when the criteria necessary for establishing these types of trust relationships under the law have been met. They have relied on a Manitoba Court of Appeal decision, *Fort Garry Care Centre Ltd. v. Hospitality Corporation of Manitoba Inc.* ("*Fort Garry*"),<sup>5</sup> as authority for this principle. However, two more recent decisions of the Manitoba Court of Queen's Bench, *Molinski v. Chebib* ("*Molinski*")<sup>6</sup> and *Hyczkewycz v. Hupe* ("*Hupe*"),<sup>7</sup> have suggested that the *Fort Garry* case, which dealt with the principle of indefeasibility of title in relation to the ability to amend certificates of title to remove rights-of-way, may be distinguishable on its facts and that accordingly, notwithstanding the principle of indefeasibility of title enshrined in section 59(1) of the *Real Property Act*, it is open for Manitoba courts to

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<sup>5</sup> (1997), 123 Man.R. (2d) 241, [1997] M.J. No. 650 (QL) (MBCA), available online at:

<http://www.canlii.org/en/mb/mzca/doc/1997/1997canlii3523/1997canlii3523.html?autocompleteStr=Fort%20Garr&autocompletePos=1>.

<sup>6</sup> 2012 MBQB 123, available online at:

<http://www.canlii.org/en/mb/mqcb/doc/2012/2012mbqb123/2012mbqb123.html?autocompleteStr=molinski&autocompletePos=1>.

<sup>7</sup> 2015 MBQB 34, available online at:

<http://www.canlii.org/en/mb/mqcb/doc/2015/2015mbqb34/2015mbqb34.html?autocompleteStr=Hyczkew&autocompletePos=2>, rev'd 2015 MBQB 134, available online at:

<http://www.canlii.org/en/mb/mqcb/doc/2015/2015mbqb134/2015mbqb134.html?autocompleteStr=Hyczkewycz&autocompletePos=1>, rev'd 2016 MBCA 23, available online at:

<http://www.canlii.org/en/mb/mzca/doc/2016/2016mbca23/2016mbca23.html>. It is important to read the remarks regarding section 59(1) of the *Real Property Act* and its impact on the ability of Manitoba courts to recognize resulting and constructive trusts made by the motion judge in the Court of Queen's Bench in *Hupe*, 2015 MBQB 134, in light of the recent Manitoba Court of Appeal decision in *Hupe*, 2016 MBCA 23. The Court of Appeal affirmed the motion judge's decision to set this matter down for trial, but essentially classified his remarks on the topic of section 59(1) of the *Real Property Act* and resulting and constructive trusts as *obiter dicta* (an expression of opinion from the bench, but not one that establishes precedent or is essential to the decision). The *Hupe* decision will be discussed in further detail later in this Issue Paper.

recognize the existence of resulting and constructive trusts in appropriate circumstances. In both *Molinski* and *Hupe*, the courts referenced decisions of Alberta and British Columbia courts. Courts in these provinces appear to have no difficulty recognizing the existence of resulting and constructive trust relationships, notwithstanding the existence of statutory provisions in both jurisdictions that are similar to section 59(1) of the *Real Property Act*.<sup>8</sup>

In light of the *Fort Garry*, *Molinski* and *Hupe* decisions, as well as a review of case law from Alberta, British Columbia and Saskatchewan,<sup>9</sup> this paper explores the unsettled state of the law in Manitoba regarding section 59(1) of the *Real Property Act*, which guarantees indefeasibility of title, and resulting and constructive trusts. It also examines whether or not statutory amendments to the *Real Property Act* could be enacted to ensure that resulting and constructive trusts may be recognized by Manitoba courts, as well as the difficulties that might be involved in crafting such amendments.

Chapter 2 of this paper explains how the Torrens system of land registration, the system of land registration predominantly used in Manitoba and exclusively used in Alberta, British Columbia and Saskatchewan, is designed to work. It also sets out the current law as it pertains to indefeasibility of title under Manitoba's *Real Property Act*. Chapter 3 explains the law in Canada with regard to resulting and constructive trusts. Chapter 4 examines provisions relating to resulting and constructive trusts found in the *Real Property Act*. Chapter 5 provides an overview of some of the inconsistencies in the court decisions of Manitoba, Alberta, British Columbia and Saskatchewan with respect to indefeasibility of title and the recognition of resulting and constructive trusts. Chapter 6 discusses the likelihood of a judicial resolution to the current uncertainty at law as to whether Manitoba courts may recognize resulting and constructive trusts in light of section 59(1) of the *Real Property Act*. It also explores some of the challenges that may be associated with attempting to craft legislative amendments that would allow for the recognition of resulting and constructive trusts while at the same time ensuring that the purposes of and principles underlying the Torrens system of land registration are preserved.

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<sup>8</sup> It is important to note that by contrast, the courts in Saskatchewan, another jurisdiction with similar indefeasibility of title provisions to those found in Manitoba's *Real Property Act*, have steadfastly held that the provisions respecting indefeasibility of title in *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1 (available online at: <http://www.qp.gov.sk.ca/documents/english/Statutes/Statutes/15-1.pdf>) operate to prevent the recognition of resulting and constructive trusts under the laws of that province.

<sup>9</sup> The case law in these three provinces has been examined because, like Manitoba, all of these provinces use the Torrens system for land title registration, and have indefeasibility of title provisions in their real property statutes that are very similar to section 59(1) of the *Real Property Act*.

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## CHAPTER 2: THE TORRENS SYSTEM AND INDEFEASIBILITY OF TITLE

### A. Deeds Registration System vs. the Torrens System

Most of the common law jurisdictions in Canada use the Torrens system to register ownership of or interests in land, albeit some of the jurisdictions that use it do not do so exclusively (several jurisdictions are still in the process of converting from the deeds registration system to the Torrens system).<sup>10</sup> The majority of Canadian common law jurisdictions have embraced the Torrens system because it provides more certainty to owners regarding the interests in land they actually hold. It also provides more certainty to purchasers as to the interests in land they will be acquiring should they choose to go through with their decisions to buy the real property in question.

Originally, under the English common law, landowners who wished to demonstrate that they owned or held an interest in a piece of land would have to trace their ownership or interest through successive deeds of ownership back to the earliest grant of land by the Crown to the first owner. This was known as establishing chain of title. Because an individual might be required to trace the deeds back through hundreds of years and through numerous changes in ownership over that time, it was a very cumbersome way of proving title to the land. Additionally, a person could never be absolutely sure that he or she had found or traced all the deeds back to the source. One's ownership of the land could always potentially be challenged. This made it very difficult for prospective sellers of land to guarantee exactly what they were selling and for potential purchasers to know what they were buying.

Eventually, many common law jurisdictions in Canada and elsewhere developed a deeds registration system, which allowed landowners to register their title deeds with a registry office. The act of registration gave the registered deed priority over all unregistered interests as well as interests that were registered as a later date; however, the act of registering one's interest in land did not eliminate the possibility of other, unregistered interests cropping up at a later time.

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<sup>10</sup> The only two exceptions are Prince Edward Island and Newfoundland, both of which continue to use the deeds registration system, as opposed to the Torrens system. Nova Scotia and New Brunswick have both systems in place, but are phasing in the Torrens system to replace the deeds registration system. In New Brunswick, this process of converting from a deeds registration system to a Torrens registration system began in 2001 (see the Government of New Brunswick's website at: <http://www.snb.ca/e/4000/4106e.asp>) while in Nova Scotia, it began in 2003 (see the Government of Nova Scotia's website at: <http://www.novascotia.ca/sns/access/land/land-services-information/land-registry.asp>). In Ontario, the old deeds registration system still governs a substantial number of properties in Ontario, particularly in southern Ontario, although conversion from the deeds registration system to the Torrens system is underway. By contrast, properties in northern Ontario are primarily transferred and registered in accordance with the Torrens system. In Manitoba, the Torrens system governs almost all land transfers and registrations in the province, with only some few parcels of land governed by the deeds registration system. In British Columbia, Alberta and Saskatchewan, the Torrens system is the only system in use. The Torrens system is also the only system in use in the Yukon, the Northwest Territories and Nunavut. In Quebec, the rules regarding property ownership, including ownership of real property, are determined by Quebec civil law, and more particularly, the *Civil Code of Quebec*, C.Q.L.R. c. C-1991, available online at: [http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ\\_1991/CCQ1991\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html). Book Four of the *Civil Code of Quebec* provides detailed rules for property acquisition and ownership. Parties who sign contracts or agreements establishing rights with respect land must register their agreements with the Quebec land registration office. This serves to provide public notice to anyone dealing with the land in the future as to the existence of agreements with respect to the land.

Accordingly, the holder of the deed could still never be absolutely sure, even after doing a chain of title search, what other interests in the land might exist, and the purchaser never knew with certainty whether he or she was purchasing the title to the land in its entirety, or whether someone might show up later with an unregistered deed to challenge his or her interest in or ownership of the land.

In the mid 1850s, Robert Torrens of South Australia developed a different type of land registry system, under which a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register. Land ownership is transferred through registration of title instead of using deeds. Under the Torrens system of land registration, the idea is that, subject to a few exceptions (which will be discussed later), the land titles register provides conclusive evidence that the person named in the certificate of title as holding an interest in land is fact entitled to that interest. His or her holding is not subject to any condition or encumbrance other than those shown on the register. The Torrens system has the effect of simplifying land transactions because it means that, at least in theory, unless an interest in land or notice of a claim against the land is included in the registry, it does not, in effect, exist. Owners and purchasers of land can accordingly rely on the registry to determine the type of interest in land someone holds and is capable of passing on, rather than being forced to establish chain of title.

The Torrens system of land registration was first adopted by British Columbia, and, as stated above, is now used in most Canadian common law jurisdictions, including Manitoba. The Torrens system has been in use in Manitoba since 1885, and most of the land in the province is held and registered under that system. The process of registering and transferring ownership and interests in Torrens-held lands is governed by the *Real Property Act*. A small percentage of older properties in Manitoba are still held, registered and transferred in accordance with a deeds registration system established under *The Registry Act* (“*Registry Act*”).<sup>11</sup>

## **B. Indefeasibility of Title and Reliance on the Register**

The fundamental concept underlying the Torrens system, the idea that one can “rely on the register” to determine who owns or has an interest in a piece of real property, is expressed in section 59(1) of the *Real Property Act*. Section 59(1) of that Act states:

59(1) Every certificate of title or registered instrument,<sup>12</sup> as long as it remains in force and is not cancelled or discharged, is conclusive evidence at law and in equity, as against the Crown and all persons, that the owner is indefeasibly entitled to the land or the interest specified in the title or instrument.<sup>13</sup> [footnote added]

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<sup>11</sup> C.C.S.M., c. R50, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/r050e.php>.

<sup>12</sup> An “instrument” is defined in section 1 of the *Real Property Act* as “a certificate of title, title, certificate of search or charge, book, record, plan, or data stored in the electronic information system, relating to a dealing with land, or creating a mortgage, encumbrance, or lien thereon, or evidencing title thereto and includes any duplicate of the instrument.”

<sup>13</sup> A copy of section 59(1) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled “Relevant Sections of *The Real Property Act*.”

In other words, if a person holds a valid certificate of title or has legitimately registered his or her interest in land on the title, then, as a general principle, that title certificate or registered instrument will be honoured. The fact that the person has registered his or her interest is proof positive that he or she holds a particular interest (or potential interest) in a piece of land.<sup>14</sup> The converse is also, at least as a general principle, held to be true: if one's interest in land is not registered, then it will not be honoured or recognized.<sup>15</sup>

### C. Statutory Exceptions to Indefeasibility of Title

Having said this, however, the general rule of indefeasibility of title provided in section 59(1) is subject to certain exceptions. These exceptions are described in succeeding subsections of section 59 of the *Real Property Act*. For example, section 59(1.2) states:

59(1.2) Despite subsection (1), in a proceeding under this Act, a person may show that the owner is not entitled to the land or the interest specified in the title or the registered instrument when the owner of the land or the owner of the registered instrument has participated or colluded in fraud or a wrongful act.<sup>16</sup>

Accordingly, if a person can prove to a court's satisfaction that the title or registered interest holder obtained his or her title or interest in land by fraud or wrongdoing, the court may indeed look behind the register and determine that the title or interest in the land should vest elsewhere, be voided or removed.<sup>17</sup>

Fraud and wrongdoing are perhaps the most obvious or straightforward exceptions to the principle of indefeasibility of title. They are not, however, the only exceptions provided by the *Real Property Act*. Section 59(1.1) of the Act states:

59(1.1) Despite subsection (1), a person may show that a certificate of title is subject to any of the exceptions or reservations mentioned in section 58.<sup>18</sup>

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<sup>14</sup> It is important to note that for the purposes of simplifying the discussion surrounding indefeasibility of title and the description of the registration process, the term "registered interest" is used throughout this Issue Paper to refer to all of the interests or potential interests in land that are filed or recorded against the title in the Land Titles Registry. Technically, not all of these interests are considered to be "registered interests" under the law. Some interests, such as caveats, for example, are only filed or recorded against title. Caveats will be discussed in further detail later in this paper.

<sup>15</sup> The principle of indefeasibility of title or reliance on the registry is similarly expressed in other Canadian jurisdictions that primarily or exclusively use the Torrens registration system. See, for example, sections 60(1) and 62(1) of Alberta's *Land Titles Act*, R.S.A. 2000, c. L-4, available online at: <http://www.qp.alberta.ca/documents/Acts/L04.pdf>; section 23(2) of British Columbia's *Land Title Act*, R.S.B.C. 1996, c. 250, available online at: [http://www.bclaws.ca/Recon/document/ID/freeside/96250\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96250_00); and section 13(1) of Saskatchewan's *Land Titles Act, 2000*, *supra* note 8.

<sup>16</sup> A copy of section 59(1.2) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled "Relevant Sections of *The Real Property Act*."

<sup>17</sup> Other Canadian jurisdictions have similar exceptions to indefeasibility of title for in cases of fraud or wrongdoing enshrined in their legislation. See, for example, sections 60(1) and 62(1) of Alberta's *Land Titles Act*, *supra* note 15; section 23(2)(i) of British Columbia's *Land Title Act*, *supra* note 15; and section 15(1)(a) of Saskatchewan's *Land Titles Act, 2000*, *supra* note 8.

<sup>18</sup> A copy of section 59(1.1) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled "Relevant Sections of *The Real Property Act*."

Section 58 of the *Real Property Act* then goes on to provide a list of exceptions to the principle of indefeasibility of title explicitly recognized by statute. These exceptions are:

- subsisting reservations contained in the original grant of land from the Crown (section 58(1)(a));
- municipal charges, rates and assessments<sup>19</sup> existing at the date the certificate was issued or subsequently imposed on the land (section 58(1)(b));
- rights-of-way or easements, no matter how created (section 58(1)(c));
- any lease or agreement to lease that is less than three years in duration, where the lessee occupies the land (section 58(1)(d));
- drainage levies or builder's liens (section 58(1)(e));
- registered instruments, where the name of the debtor contained in the instrument exactly matches the name of the person who holds the certificate of title to the land (section 58(1)(f));
- any pending litigation order made by a Manitoba court registered against the land since the certificate of title was issued (section 58(1)(g));
- any right of expropriation by statute (section 58(1)(h));
- title to land acquired by adverse possession<sup>20</sup> prior to the land in question being brought under the ambit of the *Real Property Act*, where the person who acquired title through adverse possession under the *Registry Act* continues to occupy the land (section 58(1)(i));
- caveats<sup>21</sup> affecting the land filed since the date that the certificate of title was issued (section 58(1)(j));

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<sup>19</sup> Municipal charges, rates or assessments could include municipal taxes owed on the property, outstanding development charges (fees generally paid by property developers to municipalities in order to offset the costs of infrastructure necessary to serve an expansion, new development, redevelopment or an intensification of use of a given property) or unpaid water bills, to name two examples.

<sup>20</sup> Known more colloquially as "squatter's rights," adverse possession was, at common law, a method of acquiring title to real property despite the fact that the person occupying the land did not own the land. In order to acquire ownership in this fashion, the person in possession had to be in open, notorious and continuous occupation of the land to the exclusion of the owner and the owner must have failed to eject the occupier for a statutorily prescribed period of time. One can no longer acquire title to land under the *Real Property Act* through adverse possession in Manitoba (see section 61(2) of the *Real Property Act*, *supra* note 1).

<sup>21</sup> In its document, *Manitoba Land Titles – Frequently Asked Questions*, available online at: [https://www.tprmb.ca/tpr/land\\_titles/lto\\_offices/docs/lto\\_faq.pdf](https://www.tprmb.ca/tpr/land_titles/lto_offices/docs/lto_faq.pdf), the Land Titles Office of the Property Registry for the Province of Manitoba states that caveats are "notices from parties who are not owners of lands that they are

- development plans and zoning by-laws legally made under the *The Planning Act*,<sup>22</sup> *The Municipal Act*,<sup>23</sup> or any city charter (section 58(1)(k));
- any zoning regulation made under the *Aeronautics Act*<sup>24</sup> which has been filed with the registry (section 58(1)(l)); and
- any limitation, restriction or permit issued under *The Highways Protection Act*<sup>25</sup> (section 58(1)(m)).<sup>26</sup>

A list of similar, but not identical, explicitly recognized statutory exceptions to the general principle of indefeasibility of title may be found in other Canadian jurisdictions that primarily or exclusively use the Torrens land registration system.<sup>27</sup>

It is important to note that some of the documents that may be registered or recorded against title listed in section 58(1) do not constitute evidence of a definite interest in land. Some only advise of potential interests in the land. A good example is a caveat filed against title to a piece of real property pursuant to section 58(1)(j) of the *Real Property Act*. A caveat is a notice from a party who is not the owner of the real property in question that he or she is claiming some right or interest in the land. While a caveat may be filed against title, it is important to note that the caveat itself does not represent an interest in land. Rather, it is the underlying agreement, document or instrument giving rise to the caveat that potentially creates the estate or interest in land. The caveat itself only provides notice of the claim in question. While it true that some agreements or documents giving rise to a caveat are non-contentious,<sup>28</sup> the mere act of filing a caveat, in and of itself, cannot therefore be viewed as creating a definite interest in land. The validity of the claim of the person who filed the caveat may be disputed in court. If the courts agree that the claim is valid, then any person dealing with that land going forward will be subject to the interest claimed in the caveat. Accordingly, caveats, while they may be filed against title, may only serve to provide notice that a possible or potential interest in the land in question exists.

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claiming some right or interest in the lands. Usually this claim results from some agreement entered into between the owner of the lands and the person who filed the caveat.”

<sup>22</sup> C.C.S.M., c. P80, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/p080e.php>.

<sup>23</sup> C.C.S.M., c. M225, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/m225e.php>.

<sup>24</sup> R.S.C. 1985, c. A-2, available online at: <http://laws-lois.justice.gc.ca/eng/acts/A-2/>.

<sup>25</sup> C.C.S.M., c. H50, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/h050e.php>.

<sup>26</sup> A copy of section 58(1) of the *Real Property Act* may be found in an Appendix to this Issue Paper entitled “Relevant Sections of *The Real Property Act*.”

<sup>27</sup> See, for example, section 61(1) of Alberta’s *Land Titles Act*, *supra* note 15; section 23(2) of British Columbia’s *Land Title Act*, *supra* note 15; and sections 14, 15 and 18 to 21 of Saskatchewan’s *Land Titles Act, 2000*, *supra* note 8.

<sup>28</sup> An example would be a caveat respecting a development agreement between a landowner and the City of Winnipeg under *The City of Winnipeg Charter*, S.M. 2002, c. 39, available online at: <https://web2.gov.mb.ca/laws/statutes/municipal/c03902e.php>. Generally, Manitoba land title offices would only accept registration of a development agreement between a municipality and a landowner if the municipality in question has complied with the statutory requirements to enter into a development agreement and sufficient detail regarding the agreement is filed along with the caveat. Accordingly, these types of caveats are generally seen as representing more of a definite interest in land.

What is even more interesting to note about the exceptions to the general principle of indefeasibility of title listed in section 58(1) is that not all of the interests in land which might constitute encumbrances<sup>29</sup> on the title or interests in land held by non-owners of real property need to be registered against the title in order to have legal effect. While some of these interests, such as registered instruments (section 58(1)(f)), pending litigation orders (section 58(1)(g)), caveats (section 58(1)(j)) and zoning regulations made under the *Aeronautics Act* (section 58(1)(l)) expressly require registration or filing against title, others, such as rights-of-way or easements (section 58(1)(c)), leases (section 58(1)(d)), drainage levies and builders liens (section 58(1)(e)), and adverse possession (section 58(1)(i)) do not. This does not mean that some of the latter interest cannot be registered against title. Easements and builders liens, for example, are, in practice, often registered against the title.<sup>30</sup> However, these interests may exist at law, and courts may recognize them in the event of a dispute over real property rights even if they are not registered against the title.<sup>31</sup> The opening words of section 58(1) make this clear. Section 58(1) states:

58(1) The land, mentioned in a certificate of title, shall, by implication and **without special mention in the certificate, unless the contrary be expressly declared**, be deemed to be subject to [the various interests outlined in sections 58(1)(a) to (m)]... [emphasis added]

Thus, while the principle underlying the Torrens system of land registration is that an interest (or potential interest) in land must be registered in order for it to be honoured, in practice, this is not necessarily the case, particularly if one's interest in land falls under one of the explicitly recognized exceptions listed in sections 58(1) of the Act where registration or filing in the Land Title's Office is not explicitly mentioned. This is why, under the *Western Law Societies Conveyancing Protocol (Manitoba)*,<sup>32</sup> Manitoba vendors are generally required as part of a real estate transaction and as a precondition to sale to provide purchasers with a Declaration as to Possession. The Declaration as to Possession is a statutory declaration in which the vendor:

- provides the purchaser with details about who currently owns and occupies the land;

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<sup>29</sup> Section 1 of the *Real Property Act* defines an "encumbrance" as "a charge or lien on land other than a mortgage, and includes an hypothecation of the charge or lien."

<sup>30</sup> In addition, statutory easements, like the ones granted to agencies like Manitoba Hydro, MTS Allstream, or the Crown, for example, must be registered against title in order to have effect. See sections 111 and 111.1 to 111.5 of the *Real Property Act*.

<sup>31</sup> See, for example, the case of *Willman v. Ducks Unlimited (Canada)*, 2004 MBCA 153, available online at: <http://www.canlii.org/en/mb/mzca/doc/2004/2004mbca153/2004mbca153.html?resultIndex=2>. In this case, Ducks Unlimited was attempting to argue that the agreement that it made with the previous owner of the land, which allowed Ducks Unlimited to use the land for a waterfowl project, constituted an easement, which ran with the land, rather than a licence. The Manitoba Court of Appeal came to the conclusion that the agreement was a licence rather than an easement, but acknowledged that if it had been an easement, the agreement could have been recognized as an interest in the land regardless of whether or not it had been registered with the Land Titles Office. See para. 31.

<sup>32</sup> This document is available on the Law Society of Manitoba's website at: [http://www.lawsociety.mb.ca/publications/western-conveyancing-protocol-supporting-documents/Conveyancing\\_Protocol\\_Rev2009.pdf](http://www.lawsociety.mb.ca/publications/western-conveyancing-protocol-supporting-documents/Conveyancing_Protocol_Rev2009.pdf). This protocol "details the minimum responsibilities of Lawyers in the context of a typical residential real estate transaction which involves a new mortgage financing." See page 4 of the *Western Law Societies Conveyancing Protocol (Manitoba)*.

- lists any interests or charges against the land, including mortgages, easements, right-of-way, leases, judgments, encumbrances, municipal or government claims, orders, and so forth; and
- warrants that he or she knows of no other interests against the land but for the ones that he or she has listed.

The statements made by the vendor in the Declaration as to Possession give a potential purchaser another avenue through which to become aware of additional unregistered interests against the land. The Declaration as to Possession can also assist a purchaser in holding a vendor liable, at a later date, for any losses the purchaser has suffered due to one of these unregistered interests in land should it turn out that the vendor knew of the unregistered interest and failed to disclose it.

Neither resulting nor constructive trusts are mentioned in the statutory exceptions to the general principle of indefeasibility of title found in section 58(1) of the *Real Property Act*, or in any of the other subsections of section 58 of that Act, although, as will be explained elsewhere in the paper, it is possible section 59(1.2) of the Act, which provides an exception to the indefeasibility of title principle found at section 59(1) of the Act in the case of a title or interest acquired through fraud or wrongdoing, could function as a statutory exception in the case of substantive constructive trusts.<sup>33</sup>

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<sup>33</sup> The two types of constructive trust – the substantive constructive trust and the remedial constructive trust – along with the tests used by courts to establish their existence will be discussed in detail in Chapter 3 of this paper.

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## CHAPTER 3: RESULTING AND CONSTRUCTIVE TRUSTS

### A. What is a Trust?

In order to understand what resulting and constructive trusts are, it is first necessary to understand what a trust is. According to one widely accepted definition:

A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.<sup>34</sup>

In other words, a trust relationship exists when a person, who holds or has title to certain property, is under an obligation, established by the person's words or actions, or alternatively, imposed by law, to provide the benefits arising out of that property to another person.

### B. Historical Origins of the Trust

The concept of the trust has its roots in the history of the development of the English common law. In the 12<sup>th</sup> and 13<sup>th</sup> century in England, the Court of Kings Bench began to be called upon more and more to resolve disputes between parties. In order to ensure greater consistency in decision making, judges of this court began to rely on earlier court decisions to guide them in making decisions in the cases before them, giving rise to the doctrine of precedent. In addition to relying on precedent, judges of the Court of Kings Bench began to become more and more restrictive regarding the types of claims they were willing to hear. If a claim was novel, or was explained or argued in a new way, judges would reject such claims out of hand, refusing, in many circumstances, to even hear the case. Between the operation of the doctrine of precedent and the refusal to hear new types of claims or arguments, the law became, in the eyes of many, insular, technical, and unjust in its application.

Unable to obtain justice from the Court of Kings Bench, prospective litigants began to petition the King of England to dispense justice notwithstanding the common law, claiming that the common law was too rigid to provide a fair outcome. The King would have these petitions reviewed by his Chancellor, who was usually a clergyman trained in canon law, and who would, after hearing the case, dispense justice based not on the common law, but rather on the basis of what he considered right and fair in the circumstances (equity).<sup>35</sup> Out of this practice, a parallel court system, the Court of Chancery, came into being in England. The Court of Chancery was responsible for developing new legal rights, including the right to redeem land by paying off a mortgage with interest (known as the equity of redemption), as well as the principle of trusts, where a person (trustee) can be found by a court be holding land for the benefit of another (beneficiary), notwithstanding that the other person is not the owner. It also developed new legal

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<sup>34</sup> G.W. Keeton and L.A. Sheridan, *The Law of Trusts*, 12<sup>th</sup> ed. (London: Barry Rose Law Publishers, 1993) at p. 3.

<sup>35</sup> The *Dictionary of Canadian Law* defines "equity" as "1. Fairness. 2. That part of the general law which provides remedies not available at common law." See D. Dukelow and B. Nuse, *Dictionary of Canadian Law*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1995) at p. 399.

remedies. For example, the Court of Chancery was responsible for developing the remedy of restitution (whereby, in the event of a successful claim for breach of contract, for example, a person could be required to return property back to a previous owner in lieu of paying damages to compensate the previous owner for his or her loss), as well as the remedy of injunctive relief.

For hundreds of years, the Court of Kings Bench and the Court of Chancery existed in England side by side. Litigants would decide to commence an action in one court or another, depending on their cause of action and the remedy they were seeking. Eventually, in the early 17<sup>th</sup> century, it was decided by the King that in cases of conflict between the courts, decisions of the Court of Chancery were to prevail. However, decisions from the Court of Chancery entailed their own problems. Some litigants began to complain that because cases in this court were not decided on the basis of precedent, but on the basis of what was “right” in the eyes of the judge, decision-making in the Court of Chancery was too arbitrary and the outcomes were too unpredictable. In the 19<sup>th</sup> century, legislation was enacted in England merging the Court of Kings Bench and the Court of Chancery. The English High Court that was created through this merger was thereafter empowered to enforce both common law and equitable rights and remedies. In other words, they had (and continue to have) both common law and equitable jurisdiction. Furthermore, the doctrine of precedent is used when applying both common law and equitable principles.

As Canada’s laws and court system, at least in the Canadian common law jurisdictions, are largely derived from the British system, Canada’s superior courts also have jurisdiction to dispense justice on the basis of both common law and equity. Both sets of principles continue to exist in Canadian law. Understanding the historical development of the court system and the law in England helps one appreciate why it can seem from time to time that common law and equitable principles are in conflict: they grew out of separate legal traditions.<sup>36</sup>

The above historical overview also serves to highlight the fact that because trusts are a concept in law that arose out of the Court of Chancery, the key principle that courts are concerned with when they are asked to evaluate whether or not a trust relationship exists between two parties in relation to property is what would be fair to the parties involved.

### **C. When Will a Court Determine that a Trust Relationship Exists Between Parties?**

In terms of how a court goes about deciding whether a trust relationship exists, much will depend on whether or not the trust is express or implied. In the case of an express trust, where there is an actual document stating that certain property is subject to a trust, determining that a trust relationship exists between parties in relation to property is relatively straightforward. In other cases, however, the existence of the trust must be inferred from the behavior of the parties in relation to each other but more particularly, in relation to the property in question, as well as from the nature of the relationship between the parties generally. These types of trusts are called implied trusts, and determining whether or not a trust relationship exists in such circumstances may be more challenging. Both resulting and constructive trusts are considered to be implied trusts; however, courts use different rules when called upon to determine whether or not these

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<sup>36</sup> For a more thorough review of the history of the development of the Court of Chancery and of the trust, see *The Law of Trusts*, *supra* note 34 at pp. 21-36.

trusts exist. In the case of a resulting trust, courts focus largely on the behaviour of the parties at the time that the property was acquired or title to the property was transferred, although they do not disregard the subsequent behaviour of the parties in relation to that property. By contrast, with respect to the constructive trusts, the focus is less on the intent of the parties at the time the property was acquired or transferred, and more on the nature of relationship between the parties and what would be fair in terms of property distribution, having regard to how the parties have dealt with each other, and more specifically, how they have dealt with each other in relation to the property, throughout the whole course of their relationship.

#### **D. In What Circumstances Are Resulting and Constructive Trust Claims Made?**

With respect to resulting and constructive trusts more specifically, both create proprietary interests in real and personal property. They are important legal tools in the distribution of assets on breakdown of marital and common-law relationships, but particularly the latter. They also sometimes come into play in resolving disputes between other family members surrounding property ownership in situations where the property is held or registered in the name of one family member only but there is evidence to show that other family members have contributed towards the acquisition or upkeep of the property. Resulting and constructive trust relationships can also be found to exist in situations where a person has provided care, money or support to someone who has died in the expectation of an inheritance, but does not receive an inheritance from the deceased. In addition, these types of trusts may be relevant in cases involving bankruptcy where decisions may be made about a bankrupt's distributable assets, or in cases where a person owed a fiduciary duty or a duty of loyalty towards another in respect of a piece of property and breached that duty.

While a resulting or constructive trust claim may be made in respect of both personal and real property, for the remainder of this paper we will be focusing on these types of trust relationships in the context of disputes over real property, since it is the impact of the indefeasibility of title provision found in section 59(1) of the *Real Property Act* on the ability of Manitoba courts to recognize the existence of resulting and constructive trusts that forms the subject matter of this paper.

#### **E. Resulting Trusts at Common Law**

What is a resulting trust? Accordingly to the Supreme Court of Canada in in *Pecore v. Pecore* (“*Pecore*”):<sup>37</sup>

A resulting trust [is a relationship that] arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the

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<sup>37</sup> 2007 SCC 17, available online at:

<http://www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html?autocompleteStr=pecor&autocompletePos=1>.

trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).<sup>38</sup>

While a court will not always find that a resulting trust exists in the case a gratuitous transfer of land from one party to another (in some circumstances, the court will determine that this transfer constituted a gift), in the event of a dispute over property where there has been a transfer of land from the former title holder to a current title holder without payment of money for the land, courts will often be asked to consider whether or not a resulting trust relationship exists between the transferor and the transferee. Accordingly, one key circumstance which, coupled with evidence of the intent of the parties, often gives rise to a finding of resulting trust is when there has been a gratuitous transfer of land from a former title holder to the current title holder.

A hypothetical fact scenario in which a court might determine this type of resulting trust to exist might be a case where a mother, who originally held title to a piece of land, gratuitously transferred title of the land to her adult son as part of her estate planning, in order to prevent her daughters from sharing in title to the land at the time of her death. No document was signed between the mother and son establishing an express trust, but the mother states that it was always her understanding that she was to have the benefit of the property until she died, at which point it would become her son's. Following the transfer of title to the land to her son, the mother continued to live on the property and to pay all of the bills in relation to the property. Later on, the son, finding himself in serious debt, decides that he wants to sell the land against his mother's wishes. The mother and son find themselves in court, with the son claiming that as the title holder he is free to sell the land if he chooses and to use the proceeds from the sale to pay off his debts, while the mother claims that she is a beneficiary of a resulting trust in the land, and is therefore entitled to have title to the land transferred back to her.

Courts may also find that a resulting trust exists between parties when a person loaned the title holder some or all of the money necessary to purchase the land in question.<sup>39</sup> An example of this type of situation may be when a brother advances money to his sister and her husband to assist them in purchasing an investment property. The sister and her husband's name are on the title, but the brother claims that it was mutually understood between all parties that when the investment property was sold, he would get a share of the proceedings proportionate to his contribution to the purchase price.<sup>40</sup>

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<sup>38</sup> *Ibid.* at para. 20.

<sup>39</sup> See D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada*, 4<sup>th</sup> ed., (Toronto, Carswell, 2012) at p. 401.

<sup>40</sup> While the two illustrative examples provided above involve situations where a resulting trust could be found to exist in favour of someone other than a spouse, it is important to note, that resulting trusts can also be found to exist upon the breakdown of a marriage or common-law relationship. See for example, *Kerr v. Baranow*, 2011 SCC 10 at paras. 12 to 29, where the Supreme Court of Canada concluded that resulting trusts arising from gratuitous transfer of land could be found to exist as between former common-law spouses, but that common intention resulting trusts could not (common intention resulting trust are situations where, despite the fact that the title appears only in one person's name, one former spouse claims that it was "common intention" of both parties that they were to have an equal interest in the land). In the latter situations, as between former common-law spouses, a finding of constructive trust is the more appropriate remedy for restitution. This case is available online at: <http://www.canlii.org/en/ca/scc/doc/2011/2011scc10/2011scc10.html?resultIndex=1>.

In either case, the court's determination regarding whether or not a resulting trust exists will turn on the specific facts of the case, and the intentions of the parties as demonstrated by their behaviour and other evidence, including written evidence, such as contracts or documents. Courts will particularly look to the behaviour of the parties at the time that title was transferred or acquired to see whether or not it provides evidence of intent to establish a resulting trust. A finding that there has been a gratuitous transfer of land or that a party has advanced purchase money to the current title holder, does not, in and of itself, mean that a court will find that a resulting trust relationship exists as between the current title holder and the former title holder. In either circumstance, a finding that these events have occurred merely creates a legal presumption in favour of the existence of a resulting trust. The presumption can be rebutted if the current title holder can show, on a balance of probabilities, that it was the intent of the transferor of title or person who loaned the money to provide a gift to the current title holder.<sup>41</sup> If a resulting trust is found to exist, then the current title holder will be required to transfer title in the land back to the original title holder, or the person who contributed towards the purchase price will be entitled to an interest in the land that is commensurate with his/or her contribution.

## F. Constructive Trusts at Common Law

What is a constructive trust? According Waters, Gillen and Smith in *Waters' Law of Trusts in Canada*:

. . . [A] constructive trust [is a relationship that] comes into existence, **regardless of any party's intent**, when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he owes performance of the obligation.<sup>42</sup> [emphasis added]

The authors then go on to distinguish between resulting and constructive trusts, acknowledging that the distinction may be become blurred at times.<sup>43</sup> They state:

The terms "implied", "resulting" and "constructive" trusts have caused a good deal of confusion in the law of trusts, but if one keeps in mind that there can be only two sources of trust obligation – the intention of a property owner to create a trust, or the imposition by the law of a trust obligation upon persons – then much of the confusion is alleviated. "Implied" is sometimes used to mean implied intention: occasionally, to mean a trust implied or imposed by law. "Resulting" describes what happens to the property subject to a trust; it goes back to the original owner or the person with the best claim to it. A "resulting" trust

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<sup>41</sup> *Waters' Law of Trusts in Canada*, *supra* note 39 at pp. 401 and 405 – 406. It is important to note that a different presumption will apply if there has been a gratuitous transfer of land from a parent to a minor child. In this case, a legal presumption that this transfer of land was intended to be a gift will apply. This is known as the presumption of advancement. As with the presumption that a resulting trust exists in a gratuitous transfer between adults, the presumption of advancement can likewise be rebutted if there is sufficient evidence demonstrating a different intention on the part of the transferor at the time that title was transferred to the current title holder. See *Pecore*, *supra* note 37 at paras. 27 – 41.

<sup>42</sup> See *Waters' Law of Trusts in Canada*, *supra* note 39 at p. 478.

<sup>43</sup> Adding to the confusion surrounding these terms is the fact that often, those who allege that they are the beneficiaries of such trusts will argue both claims in their court proceedings. In other words, they will claim that they are the beneficiaries of a resulting trust, or in the alternative, a constructive trust, or *vice versa*.

sometimes arises from intention, at other times from the imposition of law. A constructive trust is construed or imposed by law; it never means anything else.<sup>44</sup> [footnotes omitted]

The above passages from *Waters' Law of Trust in Canada* appear to indicate that, in the case of resulting trusts as opposed to constructive trusts, courts are more likely to look at the intent of the parties, particularly at the time that the land in question was transferred from the original title holder to the new title holder, with the idea being that, if a resulting trust is found to exist, the original title holder (the transferor) will receive title to the land back.

## 1. The substantive constructive trust and wrongful acts

There are two different types of constructive trust: the substantive constructive trust and the remedial constructive trust. The substantive constructive trust may provide a remedy in situations where the title holder has acquired property through some sort of wrongful act. In many, but not all, cases, there will have been a fiduciary relationship between the title holder and non-title holder, and the title holder will have acquired title to the property through breach of his or her duties of honesty or loyalty to the non-title holder. In such cases, it is not necessary for the non-title holder to demonstrate that the title holder has been unjustly enriched by his or her act or that the non-title holder has been unjustly deprived of property or resources in order to prove the existence of a constructive trust. Proof that title to the property has been acquired through a wrongful act coupled with the existence of a duty owed towards the non-title holder will be sufficient. This is because the constructive trust finding, in such circumstances, is made to further the public policy objective of discouraging the bad behaviour of those who find themselves in fiduciary-like relationships with others.

While there has been much less written by courts in recent years about the substantive constructive trust than the remedial constructive trust, there can be no doubt that both types of constructive trust continue to exist in Canada. The Supreme Court of Canada clarified this in *Soulos v. Korkontzilas* (“*Soulos*”).<sup>45</sup> McLachlin J. (as she then was), writing for the majority of the court in that case, stated:

The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the

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<sup>44</sup> *Waters' Law of Trusts in Canada*, *supra* note 39 at p. 478.

<sup>45</sup> [1997] 2 SCR 217, available online at:  
<http://www.canlii.org/en/ca/scc/doc/1997/1997canlii346/1997canlii346.html>.

property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

[. . .]

I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.<sup>46</sup> [citations omitted]

It is important to note that section 59(1.2) of the *Real Property Act*, which provides an exception to the indefeasibility of title principle found in section 59(1) of the Act in circumstances where the registered title or interest holder in a piece of real property has acquired his or her title or interest through "fraud or a wrongful act," would appear to expressly allow for the recognition of the substantive constructive trust in Manitoba. However, there does not appear to be Manitoba case law directly addressing this point.

## **2. The remedial constructive trust and unjust enrichment**

By contrast, a remedial constructive trust is founded in a claim for unjust enrichment, rather than a claim that the title holder acquired the property through a wrongful act or breach of fiduciary duty. It is accordingly unnecessary for a non-title holder seeking an interest in land through a remedial constructive trust to provide proof that the title holder committed a wrongful act in acquiring the property. As stated by McLachlin J. in *Soulos*, a remedial constructive trust may be found to exist in "situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself."<sup>47</sup>

Unjust enrichment is an equitable principle which holds that no one should be allowed to profit at another's expense without providing compensation for the benefits received. Courts use this doctrine to justify compensating individuals who have provided benefits in the form of money, property, services or other contributions to another, when there is no reason at law for the person in receipt of those benefits to retain them without providing some form of compensation or restitution.

## **3. The importance of unjust enrichment and remedial constructive trusts in distribution of assets upon relationship breakdown**

Claims of unjust enrichment are often (but not exclusively) made in family law proceedings upon relationship breakdown when one party to a marriage or common-law relationship holds sole title to real property that has been used by both parties during the course of their time together. When the time comes to divide the parties' assets, if the courts are satisfied that unjust

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<sup>46</sup> *Ibid.* at paras. 16 – 17.

<sup>47</sup> *Ibid.* at para. 36.

enrichment has occurred or would occur but for court intervention, they will often use the remedial constructive trust as a mechanism to recognize and give legal effect to the contributions both spouses have made towards the real property prior to separating. If there has been a finding that a remedial constructive exists, the non-title holder will be granted an interest in the real property in question.<sup>48</sup>

Unjust enrichment and remedial constructive trust claims are particularly common in circumstances where there has been a breakdown of a common-law relationship, since many Canadian jurisdictions do not apply the same rules for division of property upon the breakdown of a common-law relationship as they do upon the breakdown of a marriage.<sup>49</sup> Until relatively

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<sup>48</sup> See, for example, *Rathwell v. Rathwell*, [1978] 2 SCR 436, available online at:

<http://www.canlii.org/en/ca/scc/doc/1978/1978canlii3/1978canlii3.html?autocompleteStr=Rathwell&autocompletePos=1> and *Pettkus v. Becker*, [1980] 2 SCR 834, available online at:

<http://www.canlii.org/en/ca/scc/doc/1980/1980canlii22/1980canlii22.html?resultIndex=4>.

<sup>49</sup> In *M v. H.*, [1999] 2 SCR 3, available on-line at:

<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii686/1999canlii686.html?resultIndex=1>, the Supreme Court of Canada determined that the definition of spouse contained in Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, as it existed at that time, infringed the right to equality guaranteed by section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*") because it failed to include common-law same sex partnerships. In the wake of this decision, Parliament and the provincial legislatures started amending various statutes to include a definition of "common-law spouse" or "common-law partner" or to change the definition of spouse to include common-law relationships to ensure that their legislation would be *Charter* compliant. It should be noted, however, that despite the fact that these definitions now apply equally to opposite sex and same sex couples, Canadian provincial and territorial laws differ in how they define a common-law relationship. To provide some examples, in British Columbia, section 3(1)(b) of the *Family Law Act*, S.B.C. 2011, c. 25 (available online at: [http://www.bclaws.ca/civix/document/id/complete/statreg/11025\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01)) specifies that a person is a common-law spouse of another person if he or she has lived with that other person in a marriage-like relationship for at least two years, or if he or she has a child with that person. By contrast, Alberta statutes contain no definition of common-law spouse or common-law relationship. Rather, pursuant to section 3(1) of the *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5 (available online at: <http://www.qp.alberta.ca/documents/Acts/A04P5.pdf>), if a person has been living together in a relationship of interdependence with another person for at least three years, has been living together in a relationship of some permanence with another person and has a child with that other person, or has entered into an adult interdependent partner agreement with that other person, then the parties qualify as "adult interdependent partners" under Alberta law, and are entitled to some of the same rights and recognition under the law as common-law spouses are in other Canadian jurisdictions. In Saskatchewan, two statutes enacted in 2001, *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No.1)*, S.S. 2001, c. 50 (available online at <http://www.qp.gov.sk.ca/documents/english/chapters/2001/chap-50.pdf>) and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No.2)*, S.S. 2001, c. 51 (available online at: <http://www.qp.gov.sk.ca/documents/english/chapters/2001/chap-51.pdf>) amended the definition of spouse in numerous Saskatchewan statutes, including *The Family Property Act*, S.S. 1997, c. F.6.3 (available online at: <http://www.qp.gov.sk.ca/documents/english/statutes/statutes/F6-3.PDF>) to include a person that is cohabiting or has cohabited with another person for at least two years. In Manitoba, the definition of "common-law partner" was added to numerous Manitoba statutes by *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, S. M. 2001, c. 37 (available online at: <https://web2.gov.mb.ca/laws/statutes/2001/c03701e.php>) and was subsequently added to Manitoba's family law property regime by *The Common-Law Partners' Property and Related Amendments Act*, S. M. 2002, c. 48 (available online at: <https://web2.gov.mb.ca/laws/statutes/2002/c04802e.php>), which came into force by proclamation on 30 June 2004 (Man. Gaz.: 29 May 2004). Under Manitoba law, pursuant to section 1 of *The Family Maintenance Act*, C.C.S.M. c. F20 (available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/f020e.php>), to qualify as a common-law partner for the purpose of a family maintenance order, such as an order for child or spousal support, one must have lived together with another person in a conjugal relationship for at least three years or for at least one year if one has a child with the other person, or alternatively, one must have, together with the other person, registered the common-law relationship

recently, the family law statutes of all of Canada's provinces and territories specified that the value of all assets accumulated during the period of marriage or in contemplation of the marriage was shareable upon separation or death, subject to some certain standard exceptions, such as gifts or inheritances, for example. However, the same legislative standards did not apply with respect to common-law relationships. With respect to common-law relationships, the presumption at law was that each common-law partner was entitled to the assets that he or she owned. Only if the common-law partners owned property jointly was that property to be presumptively shared equally upon separation. A common-law partner, upon the breakdown of his or her relationship, would accordingly have to rely on an unjust enrichment claim in order to claim an interest in land if title to the land in question was registered solely in the name of his or her partner.<sup>50</sup>

Currently, only five Canadian jurisdictions – British Columbia,<sup>51</sup> Saskatchewan,<sup>52</sup> the Northwest Territories,<sup>53</sup> Nunavut<sup>54</sup> and Manitoba<sup>55</sup> – apply the same division of property principles to

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pursuant to section 13.1 of *The Vital Statistics Act*, C.C.S. M., c. V60 (available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/v060e.php>). However, a different definition of common-law partner exists under Manitoba law for the purposes of division of property upon relationship breakdown. In those circumstances, an individual is only considered a common-law partner of another person if he or she has lived together in a conjugal relationship with that other person for at least three years or has, with that other person, registered the common-law relationship under section 13.1 of the *The Vital Statistics Act* (see section 1(1) of *The Family Property Act*, C.C.S.M. c. F26, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/f025e.php>). The statutes of other Canadian jurisdictions offer just as much variety in terms of what constitutes a common-law relationship under federal, provincial or territorial law (differences with respect to the length of time the parties must have been living together in order for their relationship to qualify as common-law partnership, whether or not the time limit changes if there is a child of the relationship, etc.) as the statutes of the jurisdictions used as examples in this footnote, although, in all jurisdictions, the statutes contain definitions that are broad enough to include both same-sex and opposite-sex common-law relationships.

<sup>50</sup> In most Canadian jurisdictions, this is still the case. In Alberta, for example, the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, available online at: <http://www.qp.alberta.ca/documents/Acts/M08.pdf>, applies only to property division upon the breakdown of a marriage, not upon the breakdown of an adult interdependent partnership, which, as stated in the previous footnote, is how common-law relationships are referred to under Alberta law. The same is true in Ontario. Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, available online at: <https://www.ontario.ca/laws/statute/90f03> specifies that the division of property rules found in that act applies only with respect to married spouses, or spouses whose marriages may be void or are voidable. Examples of other Canadian jurisdictions where the division of property rules in family law statutes only apply in respect of married spouses include: Newfoundland and Labrador (see the *Family Law Act*, R.S.N.L. 1990, c. F-2, available online at: <http://www.assembly.nl.ca/legislation/sr/statutes/f02.htm>); Prince Edward Island (see the *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, available online at: [http://www.gov.pe.ca/law/statutes/pdf/f-02\\_1.pdf](http://www.gov.pe.ca/law/statutes/pdf/f-02_1.pdf)); New Brunswick (see the *Marital Property Act*, S.N.B. 2012, c. 107, available online at: <http://laws.gnb.ca/en/ShowPdf/cs/2012-c.107.pdf>); and the Yukon (see the *Family Property and Support Act*, R. S. Y. 2002, c.83, available online at: [http://www.gov.yk.ca/legislation/acts/faprsu\\_c.pdf](http://www.gov.yk.ca/legislation/acts/faprsu_c.pdf)). Quebec's matrimonial property regime applies only in respect to married spouses and civil union spouses, not to *de facto* common-law couples (see the *Civil Code of Quebec*, C.Q.L.R. c. C-1991, *supra* note 10, articles 401 to 430, as well as the Supreme Court of Canada's decision in *Quebec (Attorney General) v. A*, 2013 SCC 5, available online at: <http://www.canlii.org/en/ca/scc/doc/2013/2013scc5/2013scc5.html?autocompleteStr=2013%20SCC%205&autocompletePos=1>). Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, available online at: <http://nslegislature.ca/legc/statutes/matrimon.htm>, likewise applies only to spouses and not to common-law partners upon relationship breakdown. Having said this, however, in the case of Nova Scotia, if the couple registers their common-law relationship as a domestic partnership under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494 (available online at: <http://nslegislature.ca/legc/statutes/vitalsta.htm>) then, pursuant to section 54(2)(g) of that Act, they have the same rights with respect to property division upon relationship breakdown as they would have if they were married.

<sup>51</sup> See section 3 and sections 81 to 87 of British Columbia's *Family Law Act*, *supra* note 49.

common-law couples as they do to married couples in their respective family property statutes.<sup>56</sup> However, in each of these jurisdictions, the common-law couple in question must meet the definition of common-law spouse or partner under the relevant legislation in order for the division of property rules to apply to them.

With respect to division of property rules in Manitoba, since 30 June 2004, the date that *The Common-Law Partners' Property and Related Amendments Act*<sup>57</sup> came into force, *The Family Property Act* ("Family Property Act")<sup>58</sup> has provided that both spouses and common-law partners are presumptively entitled to an equal division of assets, including real property, upon relationship breakdown. Section 2.1(1) of the *Family Property Act* states:

2.1(1) Except as otherwise provided in this Act, **this Act applies to all common-law partners**, whether they commenced cohabitation before or after the coming into force of this section, and whether cohabitation began within Manitoba or in a jurisdiction outside Manitoba,

(a) if the habitual residence of both common-law partners is in Manitoba;

(b) where each of the common-law partners has a different habitual residence, if the last common habitual residence of the common-law partners was in Manitoba; or

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<sup>52</sup> See the definitions of "spouse" and "family property" found at section 2(1) of Saskatchewan's *Family Property Act*, *supra* note 49, as well as sections 20 to 27 of that Act.

<sup>53</sup> See the definition of "spouse" found at section 1(1) of the Northwest Territories' *Family Law Act*, S.N.W.T. 1997, c. 18 (the definition of "spouse" includes someone who has cohabited with another in a conjugal relationship for at least two years, or who has cohabited with another in a conjugal relationship of some permanence where they have a natural or adoptive child together), as well as sections 33 to 35 and 48 to 50 of that Act. This statute is available online at: <https://www.justice.gov.nt.ca/en/files/legislation/family-law/family-law.a.pdf?t1455130743405>.

<sup>54</sup> See the definition of "spouse" found at section 1(2) of Nunavut's *Family Law Act*, S.N.W.T. (Nu) 1997, c. 18 (the definition of spouse is the same as that found in the Northwest Territories legislation), as well as sections 33 to 35 and 48 to 50 of that Act. This statute is available at: <http://www.gov.nu.ca/sites/default/files/gnjustice2/justicedocuments/Consolidated%20Law/Current/635152793981093750-2013950713-consSNWT1997c18.pdf>.

<sup>55</sup> See the definition of "common-law partner" found at section 1(1) of Manitoba's *Family Property Act*, *supra* note 49, as well as sections 13 to 17 of the Act.

<sup>56</sup> Nova Scotia is another jurisdiction that provides these rights to some common-law relationship, but, as indicated footnote 50, only those who have registered their common-law relationship as a domestic partnership under section 53 of Nova Scotia's *Vital Statistics Act*, *supra* note 50, are given the same rights upon property division as married couples. In Nova Scotia, one cannot acquire these property division rights by virtue of having lived together with another person for a specified period of time or having had a child with that other person. For the purposes of other pieces of legislation in Nova Scotia, one may be considered to be in a common-law relationship if one has lived together with another person in a conjugal relationship for at least two years (see, for example, the definition of "common-law partner" found in section 2(aa) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, available online at: <http://nslegislature.ca/legc/statutes/maintenance%20and%20custody.pdf>). However, one is not considered to be a common-law spouse pursuant to this definition for division of property purposes upon relationship breakdown.

<sup>57</sup> See *supra* note 49. *The Common-Law Partners' Property and Related Amendments Act* significantly amended *The Marital Property Act* and changed that statute's name to *The Family Property Act*. It also amended numerous other Manitoba statutes, such as *The Homesteads Act*, C.C.S.M. c. H80 (available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/h080e.php>); *The Law of Property Act*, C.C.S.M. c. L90 (available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/l090e.php>); and the *Intestate Succession Act*, C.C.S.M. c. I85 (available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/i085e.php>), to name a few examples.

<sup>58</sup> See *supra* note 49.

- (c) where each of the common-law partners has a different habitual residence and the common-law partners have not established a common habitual residence since the commencement of their common-law relationship, if the habitual residence of both at the time that the common-law relationship commenced was in Manitoba. [emphasis added]

Section 3 of that Act further states:

3 Where this Act applies to a spouse or common-law partner under section 2 or 2.1 it also applies to every asset of the spouse or common-law partner except as herein otherwise provided, and where this Act does not apply to a spouse or common-law partner by reason of any provision of section 2 or 2.1 it also does not apply to any asset of the spouse or common-law partner notwithstanding any other provision of the Act.

Sections 2.1(1) and 3 of the *Family Property Act*, when read together, demonstrate that the same rules for division of assets apply with respect to married persons and common-law partners in Manitoba. The definitions of “family asset” and “family home” found at section 1(1) of the Act further reveal, firstly, that real property may constitute a family asset for the purpose of the Act, and secondly, that it is not necessary for spouses or common-law partners to own the property in question jointly for it to be considered a family asset. All that is necessary for an asset to qualify as a “family asset” under section 1(1) of the Act is that the asset in question be “owned by two spouses or common-law partners or either of them and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes. . .” and all that is necessary for a “family home” to qualify as this type of family asset under section 1(1) of the Act is that it be “property in which a spouse or common-law partner has an interest and that is or has been occupied by the spouses or common-law partners as their family residence. . .”

However, in order for this presumptive entitlement to equal division of assets to apply when one’s common-law relationship breaks down, one must first qualify as a common-law partner pursuant to the definition of this term contained in the Act. Section 1(1) of the *Family Property Act* defines a “common-law partner” as:

- a) another person who, with the person, registered a common-law relationship under section 13.1 of *The Vital Statistics Act* or
- (b) subject to subsection 2.1(2), another person who, not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years commencing either before or after the coming into force of this definition.

Accordingly, in Manitoba, before the division of property regime provided by the *Family Law Act* will apply to common-law couples upon the breakdown of their relationships, the parties must have either registered their common-law relationship under the *Vital Statistics Act*,<sup>59</sup> or alternatively, if their relationship has not been registered, must have lived together in conjugal relationship for at least three years. In addition, if the common-law spouses in question separated prior to the coming into force of *The Common-Law Partners’ Property and Related Amendments Act* on 30 June 2004, they will not qualify as common-law partners, even if they

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<sup>59</sup> See *supra* note 49.

were together for more than three years.<sup>60</sup> In any of these three circumstances, common-law spouses who do not hold title to real property would still have to rely on unjust enrichment claims, asking the court to determine that a remedial constructive trust exists in order to obtain an interest in the real property owned by title-holding spouse.

#### **4. How does a court determine the validity of a claim for unjust enrichment and when will a constructive trust be found to be the appropriate remedy?**

As stated previously, if a non-title holder wants to claim an interest in land through the vehicle of a remedial constructive trust, he or she must first demonstrate that unjust enrichment has occurred. The test for unjust enrichment was clearly outlined by the Supreme Court of Canada in *Pettkus v. Becker*.<sup>61</sup> In order to demonstrate unjust enrichment, a plaintiff must show that:

- (1) there has been an enrichment;
- (2) a corresponding deprivation has been suffered by the person who supplied the enrichment; and
- (3) there is an absence of any juristic reason for the enrichment itself.<sup>62</sup>

The Supreme Court of Canada, in the 2011 case of *Kerr v. Baranow*<sup>63</sup> further expounded on each of the three elements of the test for unjust enrichment, providing guidance as to how courts are to determine whether or not each branch of the test has been met:

For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake.

Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched. That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered.

The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case.

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<sup>60</sup> See section 2.1(2) of the *Family Property Act*, *supra* note 49.

<sup>61</sup> *Supra* note 48.

<sup>62</sup> *Ibid.* at 848. Also see *Peter v. Beblow*, [1993] 1 S.C.R 980 at 987, available online at: <http://www.canlii.org/en/ca/scc/doc/1993/1993canlii126/1993canlii126.html?autocompleteStr=peter%20v.%20be&autocompletePos=1>.

<sup>63</sup> *Supra* note 40.

Juristic reasons to deny recovery may be the intention to make a gift (referred to as a “donative intent”), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff’s expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as “the legitimate expectation of the parties, the right of parties to order their affairs by contract.”<sup>64</sup> [citations omitted]

Once unjust enrichment has been established, the court must then determine whether or not a constructive trust remedy would be the most appropriate way to address this unjust enrichment (hence the term “remedial constructive trust”). In the case of division of property upon relationship breakdown between common-law spouses, a court will often find a constructive trust to exist when the title to real property is in the name of only one spouse, but the other spouse has made contributions to the acquisition, preservation, maintenance or improvement of this property. In such circumstances, a share of the property proportionate to the contribution of the non-title holding spouse, or alternatively, to the unjust enrichment of the spouse who holds title, will be subject to a remedial constructive trust in favour of the spouse without title. In other words, the spouse whose name appears on the title is found, by the court, to be holding part of the real property in trust for the spouse whose name does not appear on the title.

Generally speaking, courts will only find that a remedial constructive trust exists between the parties if they determine that a monetary award would be inadequate compensation in the circumstances of the case. McLachlin J. (as she then was), writing for the majority of the Supreme Court of Canada in *Peter v. Beblow*,<sup>65</sup> stated:

[In an action for unjust enrichment] [t]wo remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and . . . title to the house based on a constructive trust.<sup>66</sup>

[...]

... I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.<sup>67</sup>

It is important to note this point. While a claim of unjust enrichment may give rise to a court’s conclusion that a remedial constructive trust exists between the title holder (trustee) and non-title holder (beneficiary), a court will not automatically conclude that a remedial constructive trust exists between parties even when satisfied that the three part test for unjust enrichment has been met. A court may instead conclude that damages would be a more appropriate remedy in the

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<sup>64</sup>*Ibid.* at paras. 38 – 41.

<sup>65</sup>*Supra* note 62.

<sup>66</sup>*Ibid.* at 995.

<sup>67</sup>*Ibid.* at 997.

circumstances, particularly when there is a weak link between the contributions made or services provided by the non-title holder and the property in question.

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## CHAPTER 4: RECOGNITION OF RESULTING AND CONSTRUCTIVE TRUSTS UNDER THE *REAL PROPERTY ACT*

As noted earlier in this paper, resulting and constructive trusts are not listed as express exemptions to the principle of indefeasibility of title under 58(1) of the *Real Property Act*. This is likely because much of the time, a trust relationship, particularly if it is an implied trust, does not exist at law until a court determines it to exist. In the case of resulting and constructive trusts, there is rarely any sort of written agreement between the title holder and the non-title holder establishing the trust relationship, and courts are required to rely on other evidence, such as the relationship between the parties generally and their behavior with respect to the land in question to determine whether or the common law test for establishing a resulting or constructive trust has been met. Given that one of the primary purposes underlying the concept of indefeasibility of title, and indeed, of the whole Torrens land registration system is to create certainty regarding who owns interests in land, it makes sense that one might not wish to recognize a resulting or constructive trust relationship as an interest in land, absent a trust document, unless and until a court declares such a relationship to exist.

Manitoba statute and case law provides that, in circumstances where an alleged beneficiary of a resulting or constructive trust has commenced an action in a Manitoba court, seeking to obtain recognition, at law, that a resulting or constructive trust relationship exists, the alleged beneficiary may register a pending litigation order against the title.<sup>68</sup> Once registered, the pending litigation order provides notice to any potential purchaser that the individual who commenced suit against the title holder may have an interest in the real property in question.<sup>69</sup> Similarly, once the Manitoba Court of Queen's Bench has determined that a resulting or constructive trust relationship exists, and quantifies it, a certificate of judgment may be issued

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<sup>68</sup> See sections 58(1) to 58(6) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/c280e.php>. Also see Rule 42 of the *Court of Queen's Bench Rules*, M.R. 553/88, available online at: <https://web2.gov.mb.ca/laws/rules/qbr1e.php#r42>. These provisions explain how to obtain and file a pending litigation order, as well as how to obtain a discharge of such an order. Section 58(2) of *The Court of Queen's Bench Act* specifies that a pending litigation order, once issued, forms a lien and a charge against the land. For an example of a case where pending litigation order was issued after the commencement of an action claiming the existence of a resulting or constructive trust, please see, *Mellco Developments Ltd. v. Portage La Prairie (City)*, 2002 MBCA 125 at para. 18. This case is available online at: <http://www.canlii.org/en/mb/mbca/doc/2002/2002mbca125/2002mbca125.html?searchUrlHash=AAAAAQAsInBlb mRpbmcbG10aWdhdGlvbGl3AgImNvbnN0cnVjdGl2ZSB0cnVzdCIAAAAAAQ&resultIndex=3>. See, as well, the case of *Spiring v. Spiring*, 2004 MBQB 55 at paras. 76 – 86. This case is available online at: <http://www.canlii.org/en/mb/mbqb/doc/2004/2004mbqb55/2004mbqb55.html?autocompleteStr=Spiring&autocompletePos=3>. It may seem counterintuitive that Manitoba courts have sometimes been willing to issue pending litigation orders in cases involving resulting and constructive trusts when such claims appear destined to fail at trial once a defendant or respondent makes the argument that section 59(1) of the *Real Property Act* prevents courts from recognizing the existence of these types of trust relationships. After all, in order for a plaintiff to obtain a pending litigation order, he or she must demonstrate that he or she has a reasonable claim to an interest in the land. However, as the above cases demonstrate, pending litigation orders have been issued by Manitoba courts in such circumstances.

<sup>69</sup> See sections 58(1)(g) of the *Real Property Act*, *supra* note 1, and section 58(2) of *The Court of Queen's Bench Act*, *ibid*.

and filed against the title, pursuant to section 2 of *The Judgments Act*.<sup>70</sup> At that point, the judgment becomes a lien and charge against the land.<sup>71</sup>

Given that a claimant can initiate a proceeding seeking to have a court recognize his or her resulting or constructive trust claim and subsequently register a pending litigation order against the title, and given that, once a resulting or constructive trust has been recognized and quantified by a court in a judgment, the beneficiary of the trust can file a certificate of judgment as a registered interest against the title, is this not sufficient to protect the interests of resulting or constructive trust holders? Unfortunately, the answer to this question appears to be no (although, as stated previously, it would appear that there is room for a substantive constructive trust to be recognized due to the wrongful acts exception found at section 59(1.2) of the *Real Property Act*). The problem is that since resulting or constructive trusts are not explicitly listed under section 58(1) of the *Real Property Act* as exceptions to the general principle of indefeasibility of title, Manitoba courts have been unwilling to recognize them in their judgments, notwithstanding that the facts of particular cases may support the existence of such trusts. If a judgment does not recognize the resulting or constructive trust, then the interest in land cannot be registered in the form of a certificate of judgment.

With respect to whether or not the resulting or constructive trust can be registered as an interest against title prior to a judgment being issued by a court, if the alleged beneficiary has commenced a lawsuit to have his or her trust recognized, then, pursuant to section 58(1)(g) of the *Real Property Act*, the answer would appear to be yes, as long as the alleged beneficiary is able to obtain a pending litigation order in accordance with section 58(1) of *The Court of Queen's Bench Act* and Rule 42.01 of the *Court of Queen's Bench Rules*.<sup>72</sup> Absent the issuance of a pending litigation order, however, the constructive or resulting trust claim will not generally be recognized. In addition, if the action that forms the basis for the pending litigation order is discontinued, the action has been dismissed or disposed of, or the parties consent to the discharge of the pending litigation order, the registrar of land titles, must, upon application, discharge the pending litigation order and remove the registration of the order from the title.<sup>73</sup>

To complicate matters further, the *Real Property Act* also contains explicit protections for prospective purchasers of land or persons to whom title is transferred in circumstances where no pending litigation order in respect of a trust claim has been filed against the title or no certificate of judgment recognizing and quantifying the trust claim has been registered against the title. Section 80(2) of the *Real Property Act* absolves purchasers or transferees from the need to inquire how current or previous title holders acquired their title or to investigate where the purchase money for the property came from, except in the case of fraud or a wrongful act.

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<sup>70</sup> C.C.S.M. c. J10, available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/j010e.php>. See, as well, section 58(1)(f) of the *Real Property Act*, *supra* note 1. For an example of Manitoba case law that supports this principle, please see *Molinski v. Chebib*, *supra* note 6 at para. 4, where, in a recitation of the facts that had taken place before trial, Schulman J. explains that the applicant's constructive trust claim was recognized and quantified by the court, and filed as a lien charge against the title. This case is available online at: <http://www.canlii.org/en/mb/mbqb/doc/2012/2012mbqb123/2012mbqb123.html?autocompleteStr=molinski&autocompletePos=1>.

<sup>71</sup> *The Judgments Act*, *ibid.*, at section 2.

<sup>72</sup> *Supra* note 68.

<sup>73</sup> See Rule 42.02(2) of the *Court of Queen's Bench Rules*, *supra* note 68.

Section 80(2) also clearly provides that unless a trust or other interest has been registered against title, even if the purchaser or transferee has notice of it, his or her purchase or transfer (in other words, his or her ability to take clear title) will not be affected by this interest. Section 80(2) states:

80(2) A person who contracts for, deals with, takes or proposes to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not — except in the case of fraud or a wrongful act in which that person has participated or colluded —

(a) required for the purpose of obtaining priority over a trust or other interest **that is not registered by an instrument or caveat,**

(i) to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest, or

(ii) to see to the application of the purchase money or any part of the money; and

(b) affected by any **notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by an instrument or caveat,** despite any rule of law or equity to the contrary. [emphasis added]

In addition, section 80(3) of the *Real Property Act* states:

80(3) A person's knowledge that a trust or interest is in existence — although it is not registered by an instrument or a caveat — shall not of itself be imputed as fraud or a wrongful act.

When one reads sections 80(2) and 80(3) of the *Real Property Act* together,<sup>74</sup> it becomes clear that a potential purchaser of land or a person to whom land is transferred, whether for market value or otherwise, has absolutely no obligation to inquire of the vendor as to whether or not he or she is holding some or all of the interest in land in trust for a beneficiary, absent fraud or a wrongful act on the part of the purchaser or transferee. Further, even if the potential purchaser or transferee has knowledge that some type of trust relationship exists between the title holder and a beneficiary, purchasing the land from the title holder or taking title to the land in the face of such knowledge does not, in and of itself, constitute fraud or a wrongful act. In other words, if there is no pending litigation order registered against the title in respect of the trust claim, no express trust document filed as an instrument or caveat against title or no certificate of judgment recognizing the trust claim filed against the title, the purchaser or vendor is entitled to purchase or take title to the land from the title holder as if no such trust relationship existed. The purchaser or transferee will not be required to look behind the register.

One might think that the simple solution to this problem would be to register one's trust interest in the land, even before initiating proceedings and obtaining a certificate of pending litigation. However, this implies that there is something written down (a trust document, for example) to

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<sup>74</sup> Copies of sections 80(1) to 80(3) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled "Relevant Sections of *The Real Property Act*." Section 80(1) contains definitions of terms which are relevant for the purpose of sections 80(2) and 80(3) of the Act.

substantiate the existence of the trust, which is capable of being registered as an instrument. Oftentimes, in resulting and constructive trust situations, no such documentation exists. It is also important to note that section 81(1) of the *Real Property Act* prohibits the district registrar of land titles from “making any entry in the register containing notice of trusts, expressed, implied or constructive,” except in certain, clearly defined circumstances.<sup>75</sup> The district registrar is also empowered, under section 81(2), to refuse to register any instrument where it states that the purchaser or transferee of land holds the land in trust for someone else, although, since the power is discretionary, the implication is that the registrar may also register these types of instruments against the title if he or she chooses. Finally, section 81(3) states that if an instrument discloses the existence of a trust, or a transferee is described as a trustee in an instrument, the district registrar is under no obligation to inquire as to the power of the owner to deal with the land. In fact, the district registrar may deal with the land as if the trust or trustee relationship did not exist, unless a caveat has been registered against the land. Accordingly, just as sections 80(2) and 80(3) of the *Real Property Act* absolve the purchaser or transferee from the need to look behind the register to see if a trust relationship exists, sections 81(1) to 81(3) of the Act<sup>76</sup> also absolve the district registrar from the need to make such inquiries. In the case of a trust relationship, while a formalized trust document may, as stated above, be entered as a registered instrument or caveat on the title pursuant to section 81(2) of the Act, and while the right to register a pending litigation order against the title or a certificate of judgment against the title also remains, unless the trust relationship is one of the clearly defined exceptions outlined in section 81(1), there is no obligation on the part of the registrar to recognize the beneficiary of the trust as a title holder, regardless of whether or not the trust is express, implied, resulting or constructive.<sup>77</sup>

It is also important to note that sections 62(1) and 62(2) of the *Real Property Act* limit the ability of individuals to commence actions against the registered owners of land for recovery of land except in certain limited circumstances. These sections state:

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<sup>75</sup> Some of situations where the district registrar can register notice of trust include, for example, land held by an executor or estate administrator under a will or by a person as a trustee in bankruptcy. See the full listing at section 81(1) of *The Real Property Act*, *supra* note 1. Also see section 49(2) of the *Real Property Act*, which states:

49(2) The district registrar shall not, except in the case of authorized assignments or compositions, extensions, schemes, or arrangements, with creditors under the *Bankruptcy and Insolvency Act* (Canada), in issuing a certificate of title to the assignee, or in entries he makes regarding the transmission, refer to the fact that the new owner is an assignee or trustee, or that he holds the land, mortgage, encumbrance, or lease, for any other than his own absolute use, and for the purpose of a registered dealing therewith he shall be deemed to be the absolute owner thereof.

<sup>76</sup> Copies of sections 81(1) and 81(3) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled “Relevant Sections of *The Real Property Act*.”

<sup>77</sup> Provisions limiting either the duty or ability of purchasers or transferees or registrars to officially take notice of resulting or constructive trusts may also be found in land titles legislation in Alberta, Saskatchewan and British Columbia. See, for example, sections 47 and 203(2) of Alberta’s *Land Titles Act*, *supra* note 15, and sections 23(1)(b)(i) and 35 of Saskatchewan’s *Land Titles Act, 2000*, *supra* note 8. Section 29(2) of British Columbia’s *Land Title Act*, *supra* note 15 limits the recognition of unregistered interests, including resulting and constructive trusts, while sections 294.6(b) and 303(b) limit the ability of litigants to recover compensation from two separate government insurance funds when they have been deprived of land as a result of a breach of trust by the registered owner. Having said this, section 180 of British Columbia’s *Land Title Act* appears to explicitly allow express trusts to be recognized on the land titles register in British Columbia.

62(1) No action of ejectment or other action for the recovery of land under the new system lies or shall be sustained against the registered owner for the estate or interest in respect of which he is so registered, except in the following cases:

- (a) The case of a mortgagee or encumbrancer as against a mortgagor or owner of land subject to an encumbrance in default, and in that case a mortgagee or encumbrancer is entitled to bring action notwithstanding the mortgage or encumbrance is a security only.
- (b) The case of a lessor as against a lessee.
- (c) The case of a person deprived of land by fraud or error as against the person registered as owner through fraud or error, or as against a person deriving his right or title, otherwise than bona fide for value, from or through a person so registered through fraud or error.
- (d) The case of a person deprived of land included in a certificate of title of other land by misdescription of the other land or its boundaries, as against the registered owner of the other land, not being a transferee thereof bona fide for value or deriving from or through such a transferee.
- (e) The case of a registered owner claiming under the certificate of title prior in date of registration, where two or more certificates of title have been issued in respect of the same land.
- (f) For rights arising or partly arising after the date of the certificate of title under which the registered owner claims.
- (g) For rights arising under any of the matters as to which the certificate of title is subject by implication.

62(2) In any other case, the production of the certificate of title shall be held to be an absolute bar and estoppel of such an action against the person named in the certificate as owner of the land therein described.<sup>78</sup>

No explicit mention is made in section 62(1) of the Act of trusts, or resulting or constructive trusts more specifically, as an exception to the general rule limiting the ability of persons to commence an action for recovery of land against the registered owner. It is possible, however, that resulting and constructive trusts would, in many circumstances, fall under the exception outlined in section 62(1)(f). This section allows parties to commence actions against registered owners for recovery of land “for rights arising or partly arising after the date of the certificate of title under which the registered owner claims.”

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<sup>78</sup> Copies of section 62(1) and 62(2) of the *Real Property Act* may also be found in an Appendix to this Issue Paper entitled “Relevant Sections of *The Real Property Act*.”

Having said this, however, in many resulting (as opposed to constructive) trust situations, it is the actual act of gratuitously transferring the land in the first place that is the primary indicator that the trust relationship exists. It is possible that, in such cases, the exception described in section 62(1)(f) would not apply, and any such action for recovery of land would be barred by section 62(2).<sup>79</sup> There does not appear to be available case law on this point.

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<sup>79</sup> For an example of a recent case where section 62 of the *Real Property Act* was used in conjunction with section 59(1) to bar a claim for recovery of land, please see *Director of Criminal Property and Forfeiture v. Lamy*, 2015 MBQB 156, available online at: <http://www.canlii.org/en/mb/mbqb/doc/2015/2015mbqb156/2015mbqb156.html?searchUrlHash=AAAAAAAAAAEAEENDU00gYyBSMzAsIHMgNTkAAAABABMvMjkxNzgtY3VycmVudC0xIzU5AQ&resultIndex=15>. It is important to note that this case did not involve a resulting or constructive trust claim, but an examination for discovery with respect to forfeiture proceedings under the *Criminal Property Forfeiture Act*, C.C.S.M. c. C306. This Act is available online at: <https://web2.gov.mb.ca/laws/statutes/ccsm/c306e.php>.

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## CHAPTER 5: CASE LAW REGARDING THE RECOGNITION OF RESULTING AND CONSTRUCTIVE TRUSTS

As indicated earlier in this paper, Manitoba, Alberta, British Columbia and Saskatchewan all have similar provisions in their land titles legislation guaranteeing indefeasibility of title. Indefeasibility of title underpins the Torrens system of land registration, limiting (in theory, at least) the need for an individual to look behind the register to discover whether there are interests in the land that may exist other than are shown on the registry or those exceptions explicitly created by statute. All four jurisdictions have also enacted similar statutory exceptions to the indefeasibility of title principle in their land titles legislation. None of the statutory exceptions enacted in these four pieces of legislation include resulting or constructive trusts (although, in British Columbia, section 180 of the *Land Title Act*<sup>80</sup> appears to create an explicit statutory exception for express trusts where there is a trust instrument establishing the existence of the trust).<sup>81</sup> In addition, all four jurisdictions have limited the need for purchasers and transferees or land titles registrars to recognize or take notice of resulting or constructive trusts in their respective land titles statutes. Despite these similarities, however, the courts in these jurisdictions have taken very different positions regarding whether or not resulting and constructive trusts can be recognized by the courts in the face of the indefeasibility of title provisions, with Manitoba and Saskatchewan courts holding that such trusts cannot be recognized and Alberta and British Columbia courts holding that they can.

### A. Manitoba

A review of the Manitoba case law shows that once a party to a dispute involving a resulting or constructive trust claim invokes section 59(1) of the *Real Property Act*, Manitoba courts are unwilling to recognize the existence of these types of trust relationships due to a perceived conflict between such recognition and the indefeasibility of title provision found at section 59(1) of the *Real Property Act* (although, as will be discussed thoroughly later in this paper, two more recent Manitoba court judgments seem to argue in favour of such recognition). Most of this unwillingness stems from lower court reliance on *Fort Garry*,<sup>82</sup> a 1997 Manitoba Court of Appeal decision which, oddly enough, did not involve a resulting or constructive trust claim, but instead concerned an application to have registered rights-of-way removed from the titles to adjacent properties. In *Fort Garry*, the court relied on the principle of indefeasibility of title found in section 59(1) of the *Real Property Act*, as well as what was then section 80, but is now section 80(2) of the *Real Property Act*, to refuse to make changes to the certificates of title.

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<sup>80</sup> *Supra* note 15.

<sup>81</sup> Section 25(2)(f)(ii) of British Columbia's *Land Title Act*, *supra* note 15, also appears to allow beneficiaries to commence an action for recovery of land in court against a registered owner in cases where the registered owner is a trustee. However, when one reads this provision in conjunction with section 29(2) and section 180 of this Act, it seems likely that the registered owner would have to be registered as a trustee on the certificate of title pursuant to section 180 of the Act before such an action could be commenced. Section 180 of the Act, in turn, speaks about the registration of trust instruments or wills (see sections 180(4) and section 180(5) of the *Land Title Act*). These provisions, when read together, seem to limit the abilities of beneficiaries to commence such actions for recovery against trustees to situations where there is an express trust in place. There does not appear to be available case law directly addressing the interpretation of section 25(2)(f)(ii) of British Columbia's *Land Title Act*.

<sup>82</sup> *Supra* note 5.

## 1. *Fort Garry Care Centre Ltd. v. Hospitality Corporation of Manitoba inc.*

The parties in this case were the owners of adjacent pieces of real property. They had long ago agreed that they would have rights-of-way over each other's property. These rights-of-way were reflected in the certificates of title. A dispute arose when one of the owners planned an expansion which would result in an almost total encroachment of the other's right-of-way.

One of the owners brought an application to have the rights-of-way excised from both certificates of title pursuant to section 176(1) of the *Real Property Act* (this section empowers the Manitoba Court of Queen's Bench to issue an order to the district registrar to cancel, correct, substitute or issue a certificate of title). The applications judge granted the order, excising the rights-of-way from the certificates of title on the basis that it was the fair and reasonable thing to do in the circumstances.

On appeal, the Court of Appeal found that the applications judge had no authority to change the certificates of title on this basis. It determined that the ability to make changes to certificates of title is circumscribed by several sections of the *Real Property Act*, including section 59(1) and section 80 (now section 80(2)). The court concluded:

In Manitoba, however, the jurisdiction of the court is circumscribed. The [*Real Property Act*] emphasizes the significance of the certificate of title under the Torrens land registration system. Section 59(1) states that, subject to fraud and specific reservations which have no application in the present case, the certificate of title is conclusive evidence at law and in equity that the registered owner is entitled to the land described therein for the estate or interest therein specified.

[...]

The spirit of the legislation in its totality is to discourage a legal attack which would call into question what is shown on the certificate of title, except on the basis of fraud or the rectification of a mistake. ...<sup>83</sup>

Subsequent to the Manitoba Court of Appeal's decision in *Fort Garry*, there arose a number of cases involving resulting or constructive trust claims in which Manitoba Court of Queen's Bench judges concluded that they were unable to recognize the existence of the claims because section 59(1) of the *Real Property Act* operated to preclude such recognition, or alternatively, that the resulting or constructive trust claims had not been made out, but even if they had been, section 59(1) of the *Real Property Act* would have precluded the courts from recognizing them.<sup>84</sup> In either set of circumstances, the courts in question have relied on *Fort Garry* as the case law authority supporting this principle.<sup>85</sup>

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<sup>83</sup> *Ibid.* at paras. 19 and 24.

<sup>84</sup> It is also interesting to note, however, that from time to time, the Manitoba Court of Queen's Bench has recognized the existence of a resulting or constructive trust claim in relation to real property and has granted one party a larger share of the value of the property upon asset distribution or has ordered title to the property transferred back to the original owner. In such cases, however, there is generally no mention of section 59(1) of the *Real Property Act*. See, for example, *Spakowski v. Smith*, [1998] M.J. No. 230 (MBQBFD) (QL) at paras. 28 – 31. Also see *V.E.H. v. R.P.H.*, (2000) 144 Man R (2d) 138 (MBQB) (FD), also indexed as [2000] M.J. No. 108 (MBQB)

## 2. *Ehrmantraut (Bankrupt), Re (“Ehrmantraut”)*<sup>86</sup>

The *Ehrmantraut* case provides an excellent illustration of the reasoning used by the Manitoba courts in circumstances where one of the parties has made a resulting or constructive trust claim and where the court’s attention has been drawn, generally by opposing counsel, to section 59(1) of the *Real Property Act*. It clearly shows that Manitoba courts have struggled with the decision not to recognize resulting or constructing trusts, but have concluded that the statutory indefeasibility of title provision found at section 59(1) of the Act trumps such claims.

*Ehrmantraut* involved a dispute between a father and a son’s trustee in bankruptcy. The son, who was bankrupt, had been listed as a joint tenant on the title to a condominium along with his father. The father led evidence to demonstrate that he and his wife owned the adjacent condominium and had decided that they wanted to purchase the condominium that formed the subject of the dispute; however, they found themselves unable to obtain the requisite financing from the bank to do so on their own. The bank had informed the father that he and his wife would qualify for sufficient financing if their son became the co-purchaser of the condominium unit along with one of them. The son agreed to become the co-purchaser. Subsequently, some years later, the son declared bankruptcy.

When the matter came before the court, the father contended that he and his son had agreed that the son was simply lending his name to the purchase in order to facilitate financing, and that the condominium would belong to the father. The father also led evidence to demonstrate that he advanced all of the money for the down payment and had always paid the mortgage and expenses for the condominium. The father argued that, accordingly, there was a resulting trust relationship between him and his son. He asked that the certificate of title be amended to remove

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(FD) (QL). This case is available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2000/2000canlii21148/2000canlii21148.html?autocompleteStr=Huta&autocompletePos=1>.

<sup>85</sup> See, for example, *G.W.M. v. S.J.M.* 2005 MBQB 202, also indexed as *McBurney v. McBurney* [2005] M.J. No. 326 (Q.B.) (QL) at paras. 20 – 21. This case is available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2005/2005mbqb202/2005mbqb202.html?resultIndex=1>. Also see *H.L.S. v. G.R.S.* 2006 MBQB 48 at paras. 48, 56, 63 and 72. This case is available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2006/2006mbqb48/2006mbqb48.html?resultIndex=1>. In this case, the court concluded, at para. 56, that *Fort Garry* stands for the principle that “s. 59(1) of the *Real Property Act* renders indefeasible any title mentioned therein **in the absence of clear evidence of an agreement between the title holders to the contrary**” [emphasis added]. The wording used in this case would seem to leave the door open for the court to recognize the existence of a resulting or constructive trust if there was sufficient evidence of the parties’ intent to create one (the court concluded that there was insufficient evidence of intent to create a constructive trust in this particular case). In addition, see *Keay v. Keay*, 2007 MBQB 64 at paras. 41 – 46. This case is available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2007/2007mbqb64/2007mbqb64.html?autocompleteStr=2007%20MBQB%2064&autocompletePos=1>.

<sup>86</sup> Also indexed as *Ehrmantraut v. Ehrmantraut (Trustee of)*, 2008 MBQB 4, available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2008/2008mbqb4/2008mbqb4.html?resultIndex=1>, rev’d 2008 MBQB 140, available online at: <http://www.canlii.org/en/mb/mbqb/doc/2008/2008mbqb140/2008mbqb140.html?resultIndex=1>, rev’d 2008 MBCA 127, available online at:

<http://www.canlii.org/en/mb/mbca/doc/2008/2008mbca127/2008mbca127.html?autocompleteStr=2008%20MBCA%20127&autocompletePos=1>.

his son's name as joint tenant. If the court had ordered that the certificate of title be amended in this manner, this would have had the effect of removing the condominium unit from the son's estate in bankruptcy.

At first instance,<sup>87</sup> a Master of the Manitoba Court of Queen's Bench, functioning as a Registrar in Bankruptcy, allowed the father's application. While recognizing that the *Fort Garry* case seemed to stand for the principle that the resulting trust should not be recognized, the Master preferred the decision of the Manitoba Court of Appeal in an older case, *Rogalsky v. Rogalsky Estate* ("*Rogalsky*").<sup>88</sup> In the *Rogalsky* case, notwithstanding the fact that one son was listed as a joint tenant with Mr. Rogalsky in respect of one piece of farm property and the other was listed as a joint tenant with Mr. Rogalsky on a separate piece of farm property, the court recognized that their names had been added to title solely for the purposes of allowing their deceased father to obtain financing, and concluded that the sons accordingly held the land in trust for their father. No mention was made of section 59(1) of the *Real Property Act* in the *Rogalsky* case.

The trustee in bankruptcy appealed the Master's decision to a judge of Manitoba Court of Queen's Bench, who reversed the Master's decision.<sup>89</sup> McKelvey J. stated:

The operation of s. 59 [of the *Real Property Act*] must be evaluated along with the fact that a resulting trust may arise by operation of law. A resulting trust occurs when the legal owner is found to hold the property for the benefit of the donor. This transpires when an individual purchases a property and title is taken in the name of another or jointly with another. This presumption results because equity does not assume a gift when a gratuitous transfer of property has been made. There must be evidence of a contrary intention to rebut such a presumption. It is also the case that resulting trusts need not be in writing, which obviously may result in complications such as arguably exist in this case.

[...]

[...] It is important to note, however, that a trust agreement can still be registered by way of a caveat on the title. This mechanism serves to provide notice as to the existence of a trust to those who view the title.<sup>90</sup>

McKelvey J. noted that the decisions of *Fort Garry* and *Rogalsky* were in opposition to each other, but preferred the decision of the Manitoba Court of Appeal in *Fort Garry*, in part because no analysis had been made in the *Rogalsky* case of the impact that section 59(1) of the *Real Property Act* might have on a resulting trust claim. She stated:

[...] [T] here was no consideration of the operation of s. 59 [of the *Real Property Act*] in the Court's reasons for decision in *Rogalsky*. This is a troubling factor in terms of this analysis. The applicant argued, based upon *Rogalsky*, that s. 59 does not oust the equitable jurisdiction of the Court to recognize a resulting trust. Conversely, the argument has been made by the

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<sup>87</sup> 2008 MBQB 4, *ibid.*

<sup>88</sup> [1986] 4 W.W.R. 336, [1986] M.J. No. 241 (QL).

<sup>89</sup> 2008 MBQB 140, *supra* note 86.

<sup>90</sup> *Ibid.* at paras. 17 and 18.

trustee that the Court failed to recognize the existence or operation of s. 59 in the context of that decision, thereby rendering the findings to be clearly distinguishable.<sup>91</sup>

She also referred to a line of cases in Manitoba, all of which had followed *Fort Garry* and none of which had followed *Rogalsky*. She finally concluded:

I find that the operation of the section [section 59 of the *Real Property Act*] does render infeasible any title in the absence of clear evidence of an agreement between the titleholders to the contrary, fraud or other exceptions as set out in s. 58 of the Act.

There are no cases where a Court has expressly held that a resulting trust can be applied to overcome the infeasibility provision of s. 59 of the Act. Section 59 is clear, and restrictive in its language.

Every certificate of title, ... is conclusive evidence at law and in equity, ... that the person named in the certificate is entitled to the land described therein for the estate or interest therein specified ...

Accordingly, I find that I am bound by the *Fort Garry* case and conclude that s. 59 has operated as conclusive evidence at law and in equity that the applicant and his son held the property as joint tenants.<sup>92</sup>

In the alternative, McKelvey J. found that there was insufficient evidence to support the existence of a resulting trust relationship between the father and the bankrupt son, since only the affidavit evidence of the father was before the court. There was no independent evidence to corroborate the existence of an agreement between the father and the son to the effect that the son was holding part of the title in trust for the father.

The father appealed this decision to the Manitoba Court of Appeal.<sup>93</sup> In a very short decision, the Court of Appeal indicated that it agreed with McKelvey J. that there was insufficient independent evidence of a resulting trust. It also stated:

As we are deciding the appeal on this issue alone, it is not necessary for us to deal with the issue of infeasibility of title under s. 59 of *The Real Property Act*, C.C.S.M., c. R30, a matter best left for another day.<sup>94</sup>

### 3. *Molinski v. Chebib*

Following the *Ehrmantraut* decision, Manitoba judges began to rely on it, as well as *Fort Garry*, as case law authority to support their decisions that section 59(1) of the *Real Property Act* operated to prevent them from recognizing resulting or constructive trust claims.<sup>95</sup>

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<sup>91</sup> *Ibid.* at para. 30.

<sup>92</sup> *Ibid.* at paras. 41 to 43.

<sup>93</sup> 2008 MBCA 127, *supra* note 86

<sup>94</sup> *Ibid.* at para. 4.

<sup>95</sup> See, for example, *Bankruptcy of Sherry Gauthier*, 2012 MBQB 101 (“*Gauthier*”) at para. 20. This case is available online at: <http://www.canlii.org/en/mb/mbqb/doc/2012/2012mbqb101/2012mbqb101.html?resultIndex=1>. In this case, Ms. Gauthier, who was bankrupt, tried to claim that a certain piece of property should not form part of

However, given that the Court of Appeal in *Ehrmantraut* declined to issue a definitive statement regarding section 59(1) of the *Real Property Act* and whether or not it operated to prevent courts from using their equitable jurisdiction to recognize and constructive trusts in appropriate circumstances, two relatively recent cases from the Manitoba Court of Queen's Bench seem to suggest that the conclusion reached by McKelvey J. in *Ehrmantraut* on this point might be open to question.

The first of these is the Manitoba Court of Queen's Bench decision in *Molinski*.<sup>96</sup> *Molinski* concerned the distribution of the proceeds of a house sale, following the dissolution of a marriage. The husband, Mr. Chebib, had purchased a home in 1993. He married his wife, Ms. Molinski, in 1999. Following the marriage, the property in question became the family home, but the title to the house remained in the husband's name. Between 2003 and 2006, Mr. Chebib became entangled in legal and financial difficulties that made it necessary for him to borrow money large sums of money from his parents, which he failed to repay. Consequently, Mr. Chebib's mother obtained a judgment against her son. She registered her judgment against the title to the property in 2006. Meanwhile, Ms. Molinski was pursuing various claims against Mr. Chebib as their marriage was encountering difficulties. In 2007, after Mr. Chebib had transferred the title to the property to his parents, Ms. Molinski obtained a court judgment declaring that she was the beneficiary of constructive trust in the family home, entitling her to a 25 percent interest in the house as of the date of the marriage. The main issues in the case were whether the wife's constructive trust could be recognized in light of section 59(1) of the *Real Property Act* and whether or not the wife's registered judgment against the property should take priority over the mother's judgment (the proceeds from the sale of the house were insufficient to satisfy both judgments).

The lawyer for Mr. Chebib's mother argued, on the basis of section 59(1) and 81(1)<sup>97</sup> of the *Real Property Act* that the declaration of constructive trust should not be recognized and should not be

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her estate in bankruptcy because, although she was listed as a joint tenant in the property along with her mother and brother, she had paid no money for her interest in the property. Title to the property was previously solely in the name of her mother, and accordingly, Ms. Gauthier argued that she was a trustee, with the resulting trust being in favour of her mother. The court decided that the transfer of joint tenancy to Ms. Gauthier and her brother had been a gift from the mother to her children and that no resulting trust had been established on the facts; however, it indicated that *Fort Garry and Ehrmantraut* would have, in any event, operated to prevent the court from recognizing the resulting trust. Also see *McLean v. McLean*, 2012 MBQB 206, available online at:

<http://www.canlii.org/en/mb/mbqb/doc/2012/2012mbqb206/2012mbqb206.html?resultIndex=1>. This case was very different on the facts, since the court was called upon to decide on whether or not one piece of property which formed part of a deceased's estate was subject to a resulting trust in favour of one of her children, or whether that piece of property formed part of the mother's estate and thus, was an asset to be divided among her five children equally. As in the *Gauthier* decision, the court determined that the facts did not support the resulting trust relationship between the mother and child in question. It also noted in passing that counsel for the estate had failed to rely on *Ehrmantraut* to argue that "a certificate of title is conclusive evidence of ownership both at law and in equity and thereby ousts the equitable jurisdiction of the court to recognize a resulting trust." The wording of the judgment seems to suggest, however, that the court may have relied upon the case had it not already concluded that no resulting trust relationship existed between the parties. See para. 46 of *McLean v. McLean*.

<sup>96</sup> *Supra* note 6.

<sup>97</sup> As described earlier in this memorandum, section 81(1) of the *Real Property Act*, *supra* note 1, states that except in certain, specific circumstances, "the district registrar shall not make any entry in the register containing notice of trusts, expressed, implied or constructive."

given priority in registration over the mother's judgment. The court disagreed. Schulman J. first ruled on the subject of retrospectivity, quoting from a Supreme Court of Canada judgment<sup>98</sup> which held that constructive trusts "will be recognized as coming into existence from the time when the unjust enrichment first arose, even though it is judicially declared at a later date."<sup>99</sup> With respect to the court's ability to recognize and give effect to the constructive trust judgment, notwithstanding the principle of indefeasibility of title enshrined in section 59(1) of the *Real Property Act*, Schulman J. stated that, while he recognized that McKelvey J., in the *Ehrmantraut* decision, had held that "a resulting trust cannot overcome the indefeasibility of s. 59, ... [i]n my view, there is no reason to apply s. 59 so as to preclude giving priority to Sandy's [Ms. Molinski's] rights."<sup>100</sup> He cited two Alberta cases, one of which had been appealed to the Supreme Court of Canada, as authority for the principle that indefeasibility of title provisions served to protect *bona fide* purchasers for valuable consideration only.<sup>101</sup> He did not mention the *Fort Garry* decision in his judgment, seeming to imply that, insofar as section 59(1) and resulting or constructive trusts were concerned, there was no definitive answer provided in Manitoba at the appellate level, noting that the Manitoba Court of Appeal in its decision in *Ehrmantraut* had left this matter for another day.

#### 4. *Hyczkewycz v. Hupe*

The *Hupe*<sup>102</sup> case is the most recent Manitoba court decision dealing directly with whether or not a resulting or constructive trust claim can be recognized notwithstanding the principle of indefeasibility of title contained in section 59(1) of the *Real Property Act*. As with *Molinski*, *Hupe* arose out of a dispute over division of assets upon the breakdown of a marriage. However, in *Hupe*, the plaintiff, Ms. Hyczkewycz, was the mother of the wife. The wife had chosen not to defend against her mother's claim, so the defendant was the husband. Ms. Hyczkewycz claimed that she had a beneficial interest in some pieces of property, titles to which were either in the name of her daughter alone or in the names of her daughter and son-in-law as joint tenants. Mr. Hupe, the defendant, had moved for summary judgment to dismiss this action before a Master of the Manitoba Court of Queen's Bench,<sup>103</sup> relying on section 59(1) of the *Real Property Act* as well as on the *Fort Garry* and *Ehrmantraut* decisions as authority for the principle that a resulting trust cannot overcome the indefeasibility provisions found in section 59(1) of the Act. The Master concluded that based on these authorities, he should grant Mr. Hupe's motion for summary judgment to dismiss Ms. Hyczkewycz's action.

Ms. Hyczkewycz's appealed this motion to dismiss to a judge of the Manitoba Court of Queen's Bench.<sup>104</sup> Rempel J. reviewed the case law on resulting and constructive trusts and section 59(1)

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<sup>98</sup> The judgment in question was *Rawluk v. Rawluck*, [1990] 1 S.C.R. 70, available online at: <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii152/1990canlii152.html?resultIndex=3>.

<sup>99</sup> *Molinski v. Chebib*, *supra* note 6 at para. 12, quoting from *Rawluk v. Rawluck*, *ibid.* at p. 91.

<sup>100</sup> *Molinski v. Chebib*, *supra* note 6 at para. 13.

<sup>101</sup> *Ibid.* at para. 13. The two Alberta cases cited were *Bezuko v. Supruniuk*, 2007 ABQB 204, available online at: <http://www.canlii.org/en/ab/abqb/doc/2007/2007abqb204/2007abqb204.html> (discussed in more detail later in this paper) and *Kaup and Kaup v. Imperial Oil Ltd. et al.*, [1962] S.C.R. 170, available online at: <http://www.canlii.org/en/ca/scc/doc/1962/1962canlii49/1962canlii49.html>.

<sup>102</sup> *Supra* note 7.

<sup>103</sup> 2015 MBQB 34, *ibid.*

<sup>104</sup> 2015 MBQB 134, *ibid.*

of the *Real Property Act*, including the cases of *Fort Garry*, *Ehrmantraut*, and *Molinski*. He noted that, as pointed out by Ms. Hyczkewycz's counsel, *Fort Garry* did not deal with resulting trusts, but rather an easement claim, and therefore might be distinguishable on that basis. He also noted that counsel for Ms. Hyczkewycz had submitted that:

the principles cited in that case [the *Fort Garry* case] ... were intended to protect *bona fide* purchasers for value from claims arising in equity but not necessarily persons who acquire title gratuitously, that is to say, without consideration.<sup>105</sup>

Rempel J. then went on to review case law from other jurisdictions, such as Alberta, British Columbia and Saskatchewan, and noted that in Alberta and British Columbia, in particular, courts have held that indefeasibility provisions found in land titles statutes are not an automatic bar to a trust claim, particularly when the person who holds title did not acquire it as a *bona fide* purchaser for value.<sup>106</sup> Following this review, he concluded:

In my view, the Manitoba case law interpreting s. 59 of the Act does not cast in stone a general principle that the Act trumps all equitable claims against those who hold a legal claim to title in Manitoba, but instead creates a statutory presumption as to the indefeasibility of title. Like any presumption in law, it can be rebutted by evidence showing an agreement or intention that something other than an indefeasible title was intended.

It is clear that by virtue of s. 59 of the Act, the law in Manitoba places *bona fide* purchasers for value in a very strong position to defend any effort to rebut the statutory presumption by way of an equitable claim such as a resulting trust. I note that the Manitoba Court of Appeal has recently emphasized the strong position of *bona fide* purchasers for value in its decision in *Kim v Kim*, 2014 MBCA 34 (CanLII), 306 Man.R. (2d) 68.

However, the title created by s. 59 of the Act is not iron clad. Section 59 of the Act creates a title that is indefeasible, subject to certain exceptions, and the courts should not close the door on litigants who have evidence that the party holding title took that title in circumstances giving rise to one of those exceptions. Reading s. 59 of the Act in a way that would make titles acquired without consideration iron clad would be contrary to public policy in my view, as it would preclude the court from addressing a potential injustice.<sup>107</sup>

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<sup>105</sup> *Ibid.* at para. 18.

<sup>106</sup> *Ibid.* at paras. 20 – 27. The cases reviewed by Rempel J. in *Hupe* include *Frame v. Rai*, 2012 BCSC 1876, available online at:

<http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1876/2012bcsc1876.html?autocompleteStr=Frame%20v&autocompletePos=2>; *Dhaliwal v Ollek*, 2010 BCSC 1524, available online at:

<http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1524/2010bcsc1524.html?autocompleteStr=Dhaliwal%20v.%20Oo&autocompletePos=4>, aff'd 2012 BCCA 86, available online at:

<http://www.canlii.org/en/bc/bcca/doc/2012/2012bcc86/2012bcc86.html?autocompleteStr=Dhaliwal%20v%20Oo&a utocompletePos=2>; *Bezuko v. Supruniuk*, *supra* note 101; and

*Schimelfenig v Schimelfenig*, 2014 SKCA 77, available online at:

<http://www.canlii.org/en/sk/skca/doc/2014/2014skca77/2014skca77.html>. Along with *Bezuko v. Supruniuk*, *Frame v. Rai* and *Dhaliwal v. Ollek* will be discussed in further detail later in this paper. As *Schimelfenig v Schimelfenig* does not deal squarely with the indefeasibility of title provisions in Saskatchewan land titles legislation and the relationship of such provisions to resulting and constructive trusts, this case will not be discussed elsewhere in this paper.

<sup>107</sup> 2015 MBQB 134, *supra* note 7 at paras. 28 – 30.

Having said all of the above, however, Rempel J. did not then go on to make a finding in this case that a resulting trust existed and could be recognized by the court notwithstanding section 59(1) of the *Real Property Act*. The subject of this appeal was whether Mr. Hupe's motion for summary judgment should have been granted. Rempel J. concluded that it should not have been, and dismissed the motion.

Mr. Hupe subsequently appealed Rempel J.'s decision to dismiss Mr. Hupe's motion for summary judgment to the Manitoba Court of Appeal. The Manitoba Court of Appeal concurred with the decision of Rempel J., deciding that this matter was not an appropriate one for summary judgment and dismissed the appeal.<sup>108</sup> The Court of Appeal characterised the law with respect to how section 59(1) of the *Real Property Act* should be interpreted when resulting and constructive trust claims have been made as "unsettled" and stated:

We are satisfied that there are triable issues as to the proper interpretation of section 59, given the approaches in other provinces and the case law in Manitoba, and also as to the fact surrounding the alleged resulting trusts.<sup>109</sup>

However, it also concluded that the remarks made by Rempel J. in *Hupe* regarding section 59(1) of the *Real Property Act* and whether or not it should be interpreted as preventing Manitoba courts from recognizing resulting and constructive trusts did not constitute a binding precedent with respect to the law in this area. The court stated:

In reaching our decision, we are neither endorsing nor disagreeing with the interpretation of section 59 given by the motion judge. Whether that section is an absolute bar, a rebuttable presumption or something else is a question we think is best left for the trial judge to decide, with the benefit of a full record.<sup>110</sup>

A full trial on the merits in the *Hupe* case is currently scheduled to take place in 2017.

## B. Alberta

Unlike the situation in Manitoba courts, where there appears to be some uncertainty at law as to whether or not constructive or resulting trusts can be recognized in the face a statutory provisions upholding the indefeasibility of title principle, Alberta courts have been generally much more willing to recognize these type of trust interests, despite the fact that Alberta's indefeasibility of title principle is very similar to Manitoba's. Section 62(1) of Alberta's *Land Titles Act*<sup>111</sup> states:

62(1) Every certificate of title granted under this Act (except in case of fraud in which the owner has participated or colluded), so long as it remains in force and uncanceled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of

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<sup>108</sup> 2016 MBCA 23, *supra* note 7 at para. 3.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* at para. 4.

<sup>111</sup> *Supra* note 15.

boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

Notwithstanding the strength of the indefeasibility of title provision in Alberta *Land Titles Act*, Alberta courts appear to have drawn a distinction between those who are *bona fide* purchasers for valuable consideration who have relied on the register (in other words, third party purchasers who have paid money to purchase the property at its stated value and who rely in good faith on the register to provide them with notice of other interests in the property) and those who are not in that position. The former are entitled to the full protection provided by section 62(1) of Alberta's *Land Titles Act*, while the latter may not be.

### 1. *Bezuko v Supruniuk*

*Bezuko v. Supruniuk*<sup>112</sup> involved the distribution of proceeds from the sale of the marital home following a breakdown of the marriage. The husband, Mr. Bezuko, had owned and lived a house prior to the marriage, which later become the marital home. He had substantial equity in the home at the time of the marriage. However, following the marriage, the wife, Ms. Supruniuk, had paid off the debt associated with the marital home, and became the sole registered owner of the property. The husband claimed a resulting trust in his favour.

Ms. Supruniuk argued that where land is transferred under the Torrens system, the presumption of resulting trust cannot apply because of the concept of indefeasibility of title guaranteed by section 62(1) of the Alberta *Land Titles Act*. She relied on three decisions from Saskatchewan in support of her position.<sup>113</sup>

The Alberta court declined to follow the Saskatchewan decisions on the basis that they were inconsistent with the Supreme Court of Canada's 1962 decision in *Kaup v Imperial Oil*.<sup>114</sup> Ross, J. stated:

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<sup>112</sup> *Bezuko v. Supruniuk*, *supra* note 101.

<sup>113</sup> The cases that Ms. Supruniuk relied upon were *Podboy v. Bale*, 2001 SKQB 28, available online at: <http://www.canlii.org/en/sk/skqb/doc/2001/2001skqb28/2001skqb28.html>; *Lafaver v. Lafaver*, 2003, SKQB 73, available online at: <http://www.canlii.org/en/sk/skqb/doc/2003/2003skqb73/2003skqb73.html>; and *Winisky v. Krivuzoff*, 2003 SKQB 345, available online at:

<http://www.canlii.org/en/sk/skqb/doc/2003/2003skqb345/2003skqb345.html>. See *Bezuko v. Supruniuk*, *supra* note 101 at para. 26.

<sup>114</sup> *Kaup and Kaup v. Imperial Oil Ltd. et al.*, *supra* note 101. This case involved a transfer of land, in which there was a reservation of mines and minerals. However, due to registrar error, the full terms of the reservation did not make its way onto the new certificate of title. The land was subsequently transferred from the new owner to the new owner and her spouse as joint tenants, without payment of consideration. The question was whether or not the new joint tenants were able to rely on the register, or, in other words, whether they had become the owners of most of the mine and mineral interests in the land, because of the principle of indefeasibility of title. Martland J., writing for the court, held, at p. 184 of the judgment, that:

The [Alberta] *Land Titles Act* altered the common law rule that no man can convey a better title than he possesses only to the extent that it established certain special rights for the benefit of the *bona fide* purchaser for value. Accordingly, the registration of a transfer from UK, who had no title to any minerals, to herself and her husband, made without consideration, did not confer any title to mines and minerals in the transferees.

None of the Saskatchewan decisions has been followed in Alberta, and I decline to do so. In my view, the Saskatchewan decisions are inconsistent with the holding in *Kaup v. Imperial Oil Ltd.*, that the indefeasibility provisions of the *Land Titles Act* protect only *bona fide* purchasers for valuable consideration, who have relied on the register. The Alberta Court of Appeal elaborated on this concept in *Re Passburg Petroleums Ltd. and Landstrom Developments Ltd.*, observing that decisions of the Supreme Court of Canada make it “abundantly clear that interest in land under the *Land Titles Act of Alberta* may be created and may exist independent of the register between the ‘immediate parties’ or volunteers claiming through the immediate parties.”<sup>115</sup> [citations omitted]

Ross J. accordingly concluded therefore that there had been a resulting trust created to the benefit of Mr. Bezuko.

## 2. *Drebert v. Coates*<sup>116</sup>

This case was a bit different than the ones discussed previously, as it involved neither a resulting or constructive trust, but an express trust. At issue was whether or not a writ of execution could be registered against title. Ms. Drebert was a mother, who, through operation of a trust document and as part of her estate plan had transferred a joint interest in her property to her son. A judgment was subsequently obtained against the son, and a writ of execution was filed against the title to the property. Following this, the son transferred title to the property back to the mother pursuant to the terms of the trust document, which specified that the mother could direct the son to transfer title to the property back to her at any time. The title was then registered in the name of the mother alone. Once this was done, Ms. Drebert applied to have the writ of execution removed from the title. Ms. Coates, who had obtained judgment against the son, applied to have the title transferred back into the name of the mother and the son, arguing that the terms of the trust document should not be recognized by either the land titles registrar or the courts due to the principle of indefeasibility of title, and the fact that Alberta’s *Land Titles Act* contains provisions limiting the ability of the registrar to take notice of trusts, whether express, implied or constructive.

This case is mostly of value for what it has to say regarding the ability of equitable interests in land to be recognized by Alberta courts, notwithstanding the principle of indefeasibility of title introduced by the Torrens system. The court, in deciding to discharge the writ of execution and recognize the terms of the trust document, cited with approval an excerpt from Di Castri in *Thom’s Canadian Torrens System*.<sup>117</sup> At page 174 of that book, Di Castri stated:

It is perhaps not going too far to say that as the courts construe the Acts at the present time equitable interests in land ancillary to the registered estate may be created as fully as in the past: as regards his records the registrar is broadly speaking absolved from and in fact forbidden to pay any attention to such interests but as between the parties they stand in the

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<sup>115</sup> *Bezuko v. Supruniuk*, *supra* note 101 at para. 30.

<sup>116</sup> 2008 ABQB 684, available online at:

<http://www.canlii.org/en/ab/abqb/doc/2008/2008abqb684/2008abqb684.html?autocompleteStr=Dreber&autocompletePos=1/>

<sup>117</sup> V. Di Castri, *Thom’s Canadian Torrens System* (Calgary: Burroughs and Co., Ltd., 1962).

same position as under the general law, ... our courts administering both law and equity may and generally do recognize these interests when this can be done without doing violence to the principles and purposes of the Acts<sup>118</sup>

### C. British Columbia

As is the case in Alberta, British Columbia courts have also been more willing than Manitoba courts to recognize the existence of resulting and constructive trusts, notwithstanding the fact that it has a similar provision guaranteeing indefeasibility of title in its *Land Title Act*.<sup>119</sup> Section 23(2) of British Columbia's *Land Title Act* states:

23 (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following [interests]: ...<sup>120</sup>

The provision then goes on to provide a list of interest in land, similar to those found at section 58(1) of Manitoba's *Real Property Act*. Resulting and constructive trusts are not listed as interests in the land to which title to the land may be made subject.

#### 1. *Frame v. Rai*

This case<sup>121</sup> involved a dispute between a woman and her sister-in-law over ownership of a house. Title to the house was registered in the names of Ms. Frame (the plaintiff), Ms. Rai (the defendant) and Ms. Rai's late husband as tenants in common. Ms. Frame claimed, however, that notwithstanding the fact that the title indicated that she was only entitled to one-third of an interest in the house, she was actually entitled to a half interest. She had evidence to demonstrate that she had contributed 75% of the down payment at the time of the purchase and alleged that she and her late brother had agreed that they would own the property jointly.

The judge in this case, Jenkins J., summarized the state of law in British Columbia with respect to indefeasibility of title. He stated:

Section 23(2) of the *Land Title Act*, provides for the doctrine of indefeasibility of title which is at the heart of the Torrens system of registration. Under section 23(2), an "indefeasible title is conclusive evidence at law and in equity that the person or persons named in the title are indefeasibly entitled to the estate in fee simple described in the certificate of indefeasible title...". The Torrens system places the burden upon the person challenging the state of title to show that the registered owner holds his or her interest or a portion thereof in trust for another ... There are several exceptions to indefeasibility, none of which are applicable in this case. However, there are equitable principles which can challenge indefeasibility.<sup>122</sup>  
[citations omitted]

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<sup>118</sup> *Drebert v. Coates*, *supra* note 115 at para. 28

<sup>119</sup> *Supra* note 15.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Frame v. Rai*, *supra* note 106.

<sup>122</sup> *Ibid.* at para. 100.

After reviewing an extensive line of British Columbia case law, the judge concluded that the statutory presumption that the person or persons whose name is on the title is indefeasibly entitled to the interest in land shown on the title may be displaced by equitable principles, including the presumption of a resulting trust and the concept of a constructive trust.

In this particular case, the judge determined that a remedial constructive trust existed in favour of Ms. Frame based on the facts of the case. It concluded that Ms. Rai would be unjustly enriched if Ms. Frame's share was limited to the one-third interest in the land shown on the certificate of title. In his view, case law supports "a displacement of the s.23 (2) statutory presumption [of indefeasibility of title] in cases where unjust enrichment would otherwise result."<sup>123</sup>

## **2. *Dhaliwal v. Ollek***

This case<sup>124</sup> involved a dispute over an investment property in Surrey, British Columbia. Title to the property was in the name of the defendants, Mr. and Ms. Olleck. The brother in law of Ms. Olleck, Mr. Dhaliwal, claimed that he had provided at least half of the funds used for the down payment on the property, that he had assisted Mr. and Ms. Olleck in their efforts to obtain financing for the property and that his son was responsible for collecting the money from the individuals who were renting the property (these funds were then used to pay down the mortgage). He further claimed that it was always his understanding, as well as the understanding of the Ollecks, that he would be entitled to a half interest in the property, notwithstanding the fact that his name did not appear on title. The Ollecks relied on section 23(2) of British Columbia's *Land Title Act* and the principle of indefeasibility of title contained within it to argue that they were the sole owners of the property.

The trial judge concluded that a resulting trust had been established in favour of Mr. Dhaliwal. He stated;

I have concluded based on the whole of the evidence, on a balance of probabilities, that Mr. Dhaliwal and Mr. and Mrs. Ollek had a common intention that Mr. Dhaliwal's financial contribution towards the purchase of the Property would be treated as an investment in the Property. Neither side believed or intended that Mr. Dhaliwal's contribution of \$65,000 towards the purchase of the Property was a gift. Neither side believed or intended that Mr. Dhaliwal's contribution was a mere loan. When Mr. Dhaliwal made this contribution, both he and Mr. and Mrs. Ollek intended that Mr. Dhaliwal would have an interest in the Property as a co-investor with the Ollecks. As such, while the presumption of resulting trust has not been rebutted, the statutory presumption found in s. 23 (2) of the *Land Title Act*, as relied upon by the Ollecks, has been displaced.<sup>125</sup>

The British Columbia Court of Appeal upheld the trial judge's findings on appeal.<sup>126</sup>

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<sup>123</sup> *Ibid.* at para. 128.

<sup>124</sup> *Dhaliwal v. Ollek*, *supra* note 106.

<sup>125</sup> 2010 BCSC 154, *ibid.* at para. 189.

<sup>126</sup> 2012 BCCA 86, *supra* note 106.

## D. Saskatchewan

Unlike the courts of Alberta and British Columbia, the courts in Saskatchewan, like those in Manitoba, have been resistant to recognize that resulting or constructive trusts exist in the face of indefeasibility of title provisions. Section 13(1) of Saskatchewan's *Land Titles Act, 2000*<sup>127</sup> states:

- 13(1) Where the Registrar issues a title pursuant to this Act:
- (a) subject to section 14, the registered owner holds the title free from all interests, exceptions and reservations; and
  - (b) subject to section 15:
    - (i) the title is conclusive proof that the registered owner is entitled to the ownership share in the surface parcel, mineral commodity or condominium unit for which the title has issued;
    - (ii) the title may not be altered or revoked or removed from the registered owner; and
    - (iii) no action of ejectment from land or other action to recover or obtain land lies or shall be instituted against the registered owner.

It is important to note that while Saskatchewan's *Land Titles Act, 2000* contains several unusual exceptions to the indefeasibility of title principle contained in section 13(1) of the Act,<sup>128</sup> trusts, whether resulting, constructive or otherwise, are not one of the expressly listed exceptions.

### 1. *Semchyshen v. Semchyshen*<sup>129</sup>

This case involved a dispute between a mother and her son and daughter-in-law over the ownership of the family farm. The father, who was deceased, had transferred title to the farm to his son and daughter-in-law, primarily for income tax purposes. The mother claimed a resulting trust in her favour. With respect to whether or not a resulting trust could exist in the face of the indefeasibility of title provision found at section 13(1) of the *Land Titles Act, 2000*, Gabrielson J. of the Saskatchewan Court of Queen's Bench stated:

In considering whether the transfers gave rise to a resulting trust, the first issue is whether a resulting trust can exist in respect to land in Saskatchewan as Saskatchewan is based upon a Torrens system of land registration. In the cases of *Canada (Attorney General) v. Saskatchewan (Attorney General)*, 1987 CanLII 4989 (SK CA), [1988] 5 W.W.R. 706, [1987] S.J. No. 617 (QL) (Sask. C.A.); *Podboy v. Bale*, 2001 SKQB 28 (CanLII), 201

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<sup>127</sup> *Supra* note 8.

<sup>128</sup> See sections 14, 15, and 18 to 21 of Saskatchewan's *Land Titles Act, 2000*, *supra* note 8.

<sup>129</sup> 203 SKQU 206, available online at:

<http://www.canlii.org/en/sk/skqb/doc/2013/2013skqb206/2013skqb206.html?autocompleteStr=Semchys&autocompletePos=3>.

Sask.R. 306; and *Winisky v. Krivuzoff*, 2003 SKQB 345 (CanLII), 237 Sask.R. 213, the principle of conclusiveness of title under a Torrens system transfer was found to exclude a beneficial interest imposed by operation of law in the circumstances of a gratuitous transfer. Although the specific sections of *The Land Titles Act*, R.S.S. 1978, c. L-5 referred to in those cases have changed, *The Land Titles Act*, 2000, S.S. 2000, c. L-5.1, still recognizes the conclusiveness of title. Section 13 thereof provides as follows:

13(1) Where the Registrar issues a title pursuant to this Act:

(a) subject to section 14, the registered owner holds the title free from all interests, exceptions and reservations; and

(b) subject to section 15:

(i) the title is conclusive proof that the registered owner is entitled to the ownership share in the surface parcel, mineral commodity or condominium unit for which the title has issued;... .

Courts in other Torrens system jurisdictions have questioned the principle of conclusiveness of title as a necessary feature of the Torrens land registry systems. See *Bezuko v. Supruniuk*, 2007 ABQB 204 (CanLII), 80 Alta. L.R. (4th) 94. However, in my opinion, until such time as the Saskatchewan Court of Appeal deals further with this issue, I am bound to apply the law as set out in the *Canada v. Saskatchewan*, *Winisky v. Krivuzoff* and *Podboy v. Bale* cases, *supra*. I therefore find that in the circumstances of this case there can be no resulting trust once the transfer of titles took place and the land was registered in the defendants' name.<sup>130</sup>

Gabrielson J. then went on to find that, in any event, the facts supporting the presumption of a resulting trust had not been made out in this case.

### **A. *Thorsteinson v. Olson***<sup>131</sup>

The matter at issue in this case was a gratuitous transfer of land from a mother to her son. The mother later wished to revoke the transfer, claiming that the son had exerted undue influence on her in obtaining the transfer of land in the first place. In the alternative, she claimed a resulting trust in the land in her favour.

On the issue of the resulting trust, after a lengthy review of case law in Saskatchewan with respect to resulting trusts and whether or not they can be recognized notwithstanding indefeasibility of title provisions in the *Land Titles Act*, 2000, Schwann J. concluded:

Therefore, based on the statutory provisions referred to above and established jurisprudence, it can be stated with confidence that the doctrine of resulting trust is inapplicable where the impugned transfer of land has been registered in Saskatchewan's land titles system. As Marjorie's claim requires this Court to look beyond the certificate of title and give effect to

<sup>130</sup> *Ibid.* at paras. 25 – 26.

<sup>131</sup> 2014 SKQB 237, available online at:

<http://www.canlii.org/en/sk/skqb/doc/2014/2014skqb237/2014skqb237.html?autocompleteStr=Thorsteinson%20v.%20o&autocompletePos=1>.

an equitable doctrine in which she claims to have retained a “beneficial interest” in the land following transfer, it is at clear odds with statute. As aptly put in *Winisky, supra*, this approach “is not only inconsistent with the principle of conclusiveness of title as found in *Podboy* and *Lefaver, supra*, but preserves a principle of equity which no longer serves a useful purpose and is inconsistent with the modern trend to search for true intent” (para. 30).<sup>132</sup>

She then went on to determine that, in the event she was wrong on this point, the facts of the case did not support the existence of a resulting trust, but rather, the land had been gifted by the mother to the son as part of her estate plan.

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<sup>132</sup> *Ibid.* at para. 103.

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## CHAPTER 6: CONCLUSION AND ISSUES TO CONSIDER

As stated at the beginning of this Issue Paper, the Commission's objective in preparing this paper was to explore the issue of whether the fact that someone's name appears on a certificate of title in Manitoba as an owner of a piece of land constitutes conclusive proof that he or she is entitled to the full value of the land, and may develop, sell or transfer it as he or she sees fit, or alternatively, whether, notwithstanding the fact that his or her name appears on the certificate of title, the title holder may be found by a court of law to hold the land in trust for another person, and accordingly be liable to provide some or all of the benefits derived from the land to that other person. In many respects, the matter under discussion in this Issue Paper is one of statutory interpretation: should section 59(1) of the *Real Property Act* be understood to mean that, absent some sort of clear statutory exemption, the registered owner of a piece of real property is indefeasibly entitled to that property and a person holding a registered interest is indefeasibly entitled to that interest, no matter what other interests may exist at law or equity? If one merely examines the plain meaning of the words of section 59(1) of the *Real Property Act*, there is a compelling argument for answering "yes" to this question. After all, the wording of this provision does state:

59(1) Every certificate of title or registered instrument, as long as it remains in force and is not cancelled or discharged, **is conclusive evidence at law and in equity, as against the Crown and all persons**, that the owner is indefeasibly entitled to the land or the interest specified in the title or instrument. [emphasis added]

Such an interpretation would also be consistent with the purpose or intent which underlies the Torrens land titles registration system in all jurisdictions that have adopted it; namely, that owners and holders of interests in land should be able to rely on the register to determine exactly what they own or hold, and purchasers should similarly be able to rely on the register to determine what they are buying and whether or not the land that they are purchasing is subject to pre-existing interests that they might have to honour.

Having said this, however, there is also a strong argument to be made that the protection granted to title or interest holders under the Torrens system has always been limited, allowing for the recognition of unregistered interests in certain circumstances. In particular, one could argue, as courts in Alberta and British Columbia have done, that the indefeasibility of title provisions found in real property statutes of those jurisdictions that use the Torrens land registration system are designed primarily to protect *bona fide* purchasers for value without notice, guaranteeing that these individuals, when purchasing real property, do not have to take unregistered interests in land into account. However, the same iron-clad indefeasibility guarantee may not exist for title holders who have obtained title to real property through other types of arrangements, such as gratuitous transfers, or in situations where another party, such as a spouse, common-law partner or family member has contributed substantially to the acquisition, preservation, maintenance or improvement of the title holder's property. In such cases, the statutory presumption of indefeasibility may be rebuttable.

At present, in Manitoba, it appears to be somewhat unclear as to whether or not the principle of indefeasibility of title found in section 59(1) of the *Real Property Act* operates to prevent Manitoba courts from recognizing the existence of resulting and constructive trusts. A review of the statute and case law in Manitoba, as well as the case law in Alberta, British Columbia and

Saskatchewan with respect to indefeasibility of title and resulting and constructive trusts, reveals the following:

1. In Manitoba, a claimant who believes he or she is the beneficiary of a resulting or constructive trust with respect to a piece of real property may register his or her interest in the land in the following circumstances:
  - (a) after commencing proceedings against the title holder (this would potentially allow the claimant to obtain a pending litigation order which could be registered against title pursuant to section 58(1)(g) of the *Real Property Act*);
  - (b) after obtaining a judgment from a Manitoba court recognizing the existence of the resulting or constructive trust (the judgment could be registered against the title to the property pursuant to section 2 of *The Judgments Act* and section 58(1)(f) of the *Real Property Act*); or
  - (c) if there is an express trust document which could be filed as a caveat against the land (this document could be registered against title pursuant to section 58(1)(j) of the *Real Property Act*). Such a trust document may exist in a resulting trust situation, but will almost never exist in a constructive trust situation, given that constructive trusts are most usually found to exist in cases where common-law or marital relationships have broken down. Generally spouses or common-law partners will not have signed a document to establish a trust relationship between them in relation to real property to which only one of them holds title.
2. Absent the situations described above, neither purchasers of the land nor individuals to whom title is transferred in Manitoba are obligated to take notice of a resulting or constructive trust, and may take title to the land as if the trust never existed (see sections 80(2) and 80(3) of the *Real Property Act*). District land title registrars in Manitoba are likewise under no obligation to take notice of such interests (see sections 81(1) to 81(3) of the *Real Property Act*).
3. It is also important to note that sections 62(1) and 62(2) of the *Real Property Act* limit the ability of individuals to commence actions against the registered owners of land for recovery of land except in the circumstances outlined in sections 62(1)(a) to (g) of the Act. It is possible that resulting and constructive trusts would, in many circumstances, fall under the exception outlined in section 62(1)(f), which allows parties to commence actions against registered owners for recovery of land “for rights arising or partly arising after the date of the certificate of title under which the registered owner claims.” Having said this, however, in many resulting (as opposed to constructive) trust situations, it is the actual act of gratuitously transferring the land in the first place that is the primary indicator that the trust relationship exists. It is possible that, in such cases, the exception described in section 62(1)(f) would not apply, and any such action for recovery of land would be barred by section 62(2), which states that, but for the situations described in sections 62(1)(a) to (g), “the production of the certificate of title shall be held to be an

absolute bar and estoppel of such an action against the person named in the certificate as owner of the land therein described.”

4. It is the situation described in paragraph 1(b) above that poses the most difficulty with respect to the recognition of resulting and constructive trusts by Manitoba courts, because in order to register a judgment recognizing a resulting or constructive trust against title to property, Manitoba courts must be willing to recognize the existence of such trusts in the face of section 59(1) of the *Real Property Act* in the first place (Section 59(1) guarantees indefeasibility of title subject to listed exceptions, and resulting and constructive trusts are not among the listed exceptions).
5. It is possible that, in the case of a substantive constructive trust, where it can be shown that there is a fiduciary or fiduciary-like relationship between the title holder (trustee) and the beneficiary, and the trustee has breached the duty owed to the beneficiary, section 59(1.2) of the *Real Property Act*, which provides an exception to the indefeasibility of title principle found in section 59(1) of the Act in circumstances where the registered title or interest holder in a piece of real property has acquired his or her title or interest through “fraud or a wrongful act,” may apply, allowing courts to recognize the constructive trust. However, there is no case law on this point.
6. Manitoba courts have traditionally been reluctant to recognize the existence of resulting and constructive trusts, finding that the *Fort Garry*<sup>133</sup> case, a judgment which did not deal with resulting or constructive trusts but instead with rights-of-way, prevents them from doing so.
7. There are some indications, in the more recent cases of *Molinski*<sup>134</sup> and *Hupe*,<sup>135</sup> that Manitoba courts may be willing to reconsider their position on resulting and constructive trusts and indefeasibility of title in light of the fact that *Fort Garry* may be distinguishable on the facts. However, as was emphasized quite pointedly by the Manitoba Court of Appeal in its own decision in *Hupe*, where it essentially classified the Court of Queen’s Bench motion judge’s interpretation of section 59(1) of the *Real Property Act* as *obiter dicta*, to date, there is no binding case law on this point in Manitoba. The *Hupe* case is currently scheduled for trial on the merits in 2017 in the Manitoba Court of Queen’s Bench. However, there is always the possibility that this trial may settle. Even if the matter goes to trial, there is no guarantee that this case will make its way up to the Manitoba Court of Appeal, or that the court at either the trial level or the appellate level will determine that a resulting trust exists in the circumstances of the case. Accordingly, Manitoba courts may not have the opportunity in *Hupe* to explore the intersection between section 59(1) of the *Real Property Act* and resulting trusts.
8. Not all Western Canadian jurisdictions that have adopted the Torrens system of land registration, and which consequently have indefeasibility of title provisions in their respective land titles statutes that are comparable to section 59(1) of Manitoba’s *Real*

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<sup>133</sup> *Supra* note 5.

<sup>134</sup> *Supra* note 6.

<sup>135</sup> *Supra* note 7.

*Property Act*, have taken the same approach. Saskatchewan courts appear to be unwilling to recognize the existence of resulting and constructive trusts in light of section 13(1) of *The Land Titles Act, 2000*.<sup>136</sup> In fact, it would likely be fair to say that the approach taken by Saskatchewan courts has been even more restrictive on this point than the approach taken by Manitoba courts. By contrast, Alberta and British Columbia courts appear to have taken the position that the indefeasibility of title provisions in their respective land titles statutes strongly protect *bona fide* purchasers for value without notice, but do not provide equal protection in the face of gratuitous transfers or in cases of unjust enrichment. This has left room, in Alberta and British Columbia, for resulting and constructive trusts to be recognized in judgments notwithstanding indefeasibility of title provisions.

If nothing else, the above overview reveals that at present, there is great uncertainty at law as to how Manitoba courts should interpret section 59(1) of the *Real Property Act* as it pertains to their ability to recognize resulting or constructive trusts. While Manitoba Court of Queen's Bench judges have, in the past, relied upon the *Fort Garry* case as standing for the principle that section 59(1) of the *Real Property Act* must be interpreted as a guarantee of indefeasibility of title that prevents them from recognizing the resulting or constructive trusts relationships, recent decisions of the Manitoba Court of Queen's Bench, as well as jurisprudence from Alberta and British Columbia courts, appear to cast doubt on whether *Fort Garry*, a case that does not deal with either resulting or constructive trusts, should be relied upon as standing for this principle. Manitoba Courts may, in the future, decide that *Fort Garry* is distinguishable on its facts, and that section 59(1) of the *Real Property Act* should be interpreted as creating a statutory presumption, but only a presumption, in favour of indefeasibility of title for the person whose name appears on the certificate of title, and that accordingly, resulting and constructive trusts can be recognized in appropriate circumstances. Then again, Manitoba courts may conclude that *Fort Garry* is a binding precedent, or, alternatively, may conclude that although *Fort Garry* is not a binding precedent, section 59(1) of the *Real Property Act* should still be interpreted as precluding courts from recognizing resulting and constructive trusts, even though the tests at common law for proving the existence of such trust relationships have been met. The question then becomes: should some sort of statutory amendment be considered to clarify matters?

A statutory amendment to clarify that resulting and constructive trusts cannot be recognized in the face of section 59(1) of the *Real Property Act* would be a relatively simple matter to accomplish. It would be possible, for example, to add a new subsection to section 59 of the *Real Property Act* stating, "For greater certainty, subsection (1) operates to prevent the court from recognizing resulting and constructive trust claims at law and at equity." However, this type of amendment, while adding certainty to the state of the law, may result in substantial injustices to non-title holders who have contributed substantially to the acquisition, preservation, maintenance or improvement of the title holder's property, but are denied the benefits or fruits of their contributions.

If the Government of Manitoba decided to introduce amendments to the *Real Property Act* to ensure that, notwithstanding the principle of indefeasibility of title expressed under section 59(1), courts can recognize resulting and constructive trusts in appropriate circumstances, this might

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<sup>136</sup> *Supra* note 8.

lead to more substantive fairness for people, who, based on equitable principles, are the beneficiaries of such trusts; however, introducing such amendments would be a much more complex endeavour.

One approach could be to amend section 58(1) of *The Real Property Act*, adding “trusts, whether constructive, resulting or created by declaration of trust” to the list of exceptions to indefeasibility of title found in section 58. However, amending section 58(1) in this fashion might create a conflict between this new provision and sections 80(2) and (3) and sections 81(1) to (3) of the *Real Property Act*, as well as section 62(2) of the *Real Property Act*. Sections 80(2) and (3) absolve purchasers and transferees (no mention is made of *bona fide* purchasers for value in sections 80(2) and (3)) from the need to look behind the register to recognize an unregistered trust interest in the land. Sections 81(1) to (3) prohibit the district registrar from making entries in the register containing notice of trusts, permit the registrar to refuse to register an instrument naming a transferee as a trustee, and absolve the registrar from the need to inquire into the owner’s capacity to deal with or transfer the land, even if he or she has notice that there may be a trust. Section 62(2) bars the commencement of legal actions against individuals unless they fall under one of the exceptions identified in section 62(1). It is accordingly possible that if section 58(1) is amended to create a new, explicit exception to the principle of indefeasibility of title for resulting and constructive trusts, sections 80(2) and (3) and 81(1) to (3) of the *Real Property Act*, as well as section 62(1) of the *Real Property Act*, would also require amendment.

Another possible approach to amendment might be to add a new subsection to section 59 of the *Real Property Act*, stating “Despite subsection (1), the court may recognize the existence of resulting and constructive trusts.” However, the same conflict between this new subsection and sections 80(2) and (3), sections 81(1) to (3) and section 62(2) of the *Real Property Act* would likely arise. In addition, as pertains to drafting either of these proposed amendments (adding an explicit exemption for resulting and constructive trusts to section 58(1) of the Act or adding a new subsection to section 59 of the Act, stating that courts may recognize resulting and constructive trusts notwithstanding section 59(1) of the Act), a larger problem emerges: it is difficult to contemplate crafting legislative provisions that could achieve a reasonable result in all the different types of cases in which resulting and constructive trust claims arise. The goal would presumably be to protect the principle of indefeasibility of title that underlies the Torrens system of land registration, particularly (but perhaps not exclusively) with respect to *bona fide* purchasers for value without notice, while at the same time allowing for recognition of resulting and constructive trusts. Unfortunately, there are no legislative models to consider, as no Canadian statute specifically provides for the survival of resulting and constructive trusts in the land titles registry system. Would it be sufficient, for example, to limit the protection of indefeasibility of title to *bona fide* purchasers for value? Could the statute instead refer to a rebuttable presumption of indefeasibility of title? If the latter choice is made, would this result in too much instability to the concept of “relying on the register”?

If one’s goal is to ensure that resulting and constructive trusts can be recognized in appropriate circumstances, there may be some merits associated with leaving this matter for the courts to determine, given the complexities involved in crafting the appropriate amendments. As stated previously, in *Molinski* and *Hupe*, there are indications that Manitoba courts may be willing to distinguish *Fort Garry* on the facts in some future appeal, since *Fort Garry* dealt with the

rectification of a certificate of title with respect to rights-of-way, rather than with a resulting or constructive trust claim. It is accordingly possible that at some future date, a Manitoba court will determine that section 59(1) of the *Real Property Act* merely creates a statutory presumption in favour of indefeasibility of title, which may be rebutted if there is sufficient evidence that a resulting or constructive trusts exists. This could render the need for a legislative amendment superfluous. An amendment would be rendered similarly superfluous if at some future date, the Manitoba Court of Appeal clearly section 59(1) of the *Real Property Act* operates as a statutory bar to the recognition of resulting and constructive trusts. However, as also stated previously, it is unclear when, if ever, a binding, appellate level decision respecting section 59(1) of the *Real Property Act* and resulting and constructive trusts might come before the courts for determination.

In the absence of appellate level authority, there is also the possibility that, when asked to consider this matter in the future, judges from Manitoba Court of Queen's Bench will come to different conclusions whether or not the indefeasibility of title guarantee found in section 59(1) of the *Real Property Act* effectively eliminates the ability of the courts to recognize resulting and constructive trusts, even if all the necessary elements at common law for establishing the existence of such trusts have been made out. Some judges may feel that they are bound by the Manitoba Court of Appeal's decision in *Fort Garry* while others may distinguish this case on the facts, since it did not deal with a resulting or constructive trust claim, and conclude that the Alberta and British Columbia jurisprudence provides more effective guidance. This could lead to greater confusion in the law than currently exists. It is also important to note that the *Hupe* case involves a resulting trust claim. Even if the *Hupe* case were to come before the Manitoba Court of Appeal, and the Court of Appeal were to conclude that resulting trusts could be recognized in the face of section 59(1) of the *Real Property Act*, or alternatively, that they cannot be recognized, it is unlikely that the matter of whether or not constructive trusts can be recognized notwithstanding section 59(1) of the *Real Property Act* would be addressed by the court in its ruling.

As the above overview demonstrates, while crafting appropriate legislative amendments to clarify that section 59(1) operates as a bar to recognition of resulting and constructive trusts under Manitoba law would be a relatively simple matter, such an outcome may lead to injustices for those who have contributed substantially to the acquisition, preservation, maintenance or improvement of the title holder's property but whose names do not appear on title. By contrast, crafting legislative amendments to ensure that resulting and constructive trusts may be recognized by Manitoba courts without creating conflicts between various provisions of the *Real Property Act* would likely be a challenging task. Prior to crafting such amendments, legislators would first need to decide exactly whose interests section 59(1) is designed to protect, and even then, it may not be possible to craft a provision that would take into account all of the different scenarios in which resulting and constructive trusts might arise. Having said this, however, it would likely be equally problematic to continue to wait for the case law to evolve in this area, since there is no guarantee that there will be an appellate level decision rendered in the near future that specifically addresses section 59(1) of the *Real Property Act* and whether or not it does, in fact, eliminate the ability of Manitoba courts to recognize resulting or constructive trusts.

The Commission has no specific solution to suggest at this time, but wishes to highlight the complexities inherent in this matter for legislators, legal practitioners and the courts. The Commission hopes that, in doing so, it will assist these stakeholders in grappling with these matters as they arise.

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## APPENDIX: RELEVANT SECTIONS OF *THE REAL PROPERTY ACT*<sup>137</sup>

### Restrictions on certificate

58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to

- (a) any subsisting reservation contained in the original grant of the land from the Crown;
- (b) any municipal charge, rate, or assessment, existing at the date of the certificate, or subsequently imposed on the land and any sale of the land for tax arrears for which no return has been received by the district registrar;
- (c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land;
- (d) any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land thereunder;
- (e) any drainage levy or builders' lien affecting the land;
- (f) any instrument registered and maintained in force in the general register pursuant to section 69, which describes the debtor in a name identical to that of the owner as set out in the certificate of title;
- (g) any pending litigation order issued out of a court in the province and registered since the date of the certificate of title;
- (h) any right of expropriation by statute;
- (i) the title of a person adversely in actual occupation of, and rightly entitled to, the land at the time it was brought under this Act, and who continues in such occupation;
- (j) caveats affecting the land filed since the date of the certificate;
- (k) a development plan, zoning by-law or other by-law authorized under *The Planning Act* or under the charter of any city and any by-law passed by any municipal corporation under *The Municipal Act* or the charter of any city relating to residential areas or zoning;
- (l) any zoning regulation, as that expression is defined in the *Aeronautics Act* (Canada), made under that Act and deposited in the land titles office; and
- (m) any limitation or restriction under *The Highways Protection Act* or a permit issued under *The Highways Protection Act*.

[...]

### Conclusive evidence — title paramount (indefeasible)

59(1) Every certificate of title or registered instrument, as long as it remains in force and is not cancelled or discharged, is conclusive evidence at law and in equity, as against the Crown

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<sup>137</sup> *Supra* note 1.

and all persons, that the owner is indefeasibly entitled to the land or the interest specified in the title or instrument.

**Exception — title subject to section 58**

59(1.1) Despite subsection (1), a person may show that a certificate of title is subject to any of the exceptions or reservations mentioned in section 58.

**Exception — fraud or wrongful act by owner**

59(1.2) Despite subsection (1), in a proceeding under this Act, a person may show that the owner is not entitled to the land or the interest specified in the title or the registered instrument when the owner of the land or the owner of the registered instrument has participated or colluded in fraud or a wrongful act.

[...]

**No actions of ejectment**

62(1) No action of ejectment or other action for the recovery of land under the new system lies or shall be sustained against the registered owner for the estate or interest in respect of which he is so registered, except in the following cases:

- (a) The case of a mortgagee or encumbrancer as against a mortgagor or owner of land subject to an encumbrance in default, and in that case a mortgagee or encumbrancer is entitled to bring action notwithstanding the mortgage or encumbrance is a security only.
- (b) The case of a lessor as against a lessee.
- (c) The case of a person deprived of land by fraud or error as against the person registered as owner through fraud or error, or as against a person deriving his right or title, otherwise than bona fide for value, from or through a person so registered through fraud or error.
- (d) The case of a person deprived of land included in a certificate of title of other land by misdescription of the other land or its boundaries, as against the registered owner of the other land, not being a transferee thereof bona fide for value or deriving from or through such a transferee.
- (e) The case of a registered owner claiming under the certificate of title prior in date of registration, where two or more certificates of title have been issued in respect of the same land.
- (f) For rights arising or partly arising after the date of the certificate of title under which the registered owner claims.
- (g) For rights arising under any of the matters as to which the certificate of title is subject by implication.

### **Certificate of title absolute bar**

62(2) In any other case, the production of the certificate of title shall be held to be an absolute bar and estoppel of such an action against the person named in the certificate as owner of the land therein described.

[...]

### **Definitions**

80(1) The following definitions apply in this section.

"**interest**" includes any estate or interest in land. (« intérêt »)

"**owner**" includes

- (a) the owner of any registered interest in whose name the interest is registered; or
- (b) the caveator or assignee of a caveat in whose name the caveat is registered.  
(« propriétaire »)

### **Protection for person accepting transfer**

80(2) A person who contracts for, deals with, takes or proposes to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not — except in the case of fraud or a wrongful act in which that person has participated or colluded —

- (a) required for the purpose of obtaining priority over a trust or other interest that is not registered by an instrument or caveat,
  - (i) to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest, or
  - (ii) to see to the application of the purchase money or any part of the money; and
- (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by an instrument or caveat, despite any rule of law or equity to the contrary.

### **Knowledge of trust**

80(3) A person's knowledge that a trust or interest is in existence — although it is not registered by an instrument or a caveat — shall not of itself be imputed as fraud or a wrongful act.

### **No entry of trusts**

81(1) Except in case of land, mortgages, encumbrances, or leases, held by an executor or administrator or a trustee under a will or in trust for, or to be used in connection with, a church or as a cemetery under *The Cemeteries Act*, or by a person as a trustee in bankruptcy, or under an authorized assignment, or in connection with a proposal by a debtor for a composition, extension, or scheme of arrangement, to or with his creditors under the *Bankruptcy and Insolvency Act* (Canada), the district registrar shall not make any entry in the register containing notice of trusts, expressed, implied, or constructive.

**Refusal of registration**

81(2) Where, in a transfer, mortgage, encumbrance, or lease the transferee, mortgagee, encumbrancer, or lessee is stated to be a trustee in that part of the instrument in which provision is made for setting out his name, residence, and occupation or other description, the district registrar may refuse to register the instrument.

**District registrar need not inquire**

81(3) Where a transferee, mortgagee, encumbrancer, or lessee is described as a trustee, or a trust is disclosed, in any recital, covenant, undertaking, or charge, added to the form of transfer, mortgage, encumbrance, or lease, whether or not the beneficiary or object of the trust is mentioned, that description or disclosure does not impose upon the district registrar the duty of making inquiry as to the power of the owner in respect of the land, mortgage, encumbrance, lease, or charge, or the money secured thereby; but, subject to the registration of a caveat, the land, mortgage, encumbrance, lease, or charge may be dealt with as if the description or disclosure had not been included.