ALBERTA LAW REFORM INSTITUTE

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SECTION 195 OF THE LAND TITLES ACT

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ALBERTA LAW REFORM INSTITUTE

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The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

The members of the Institute's Board of Directors are C.W. Dalton; The Hon. Mr. Justice J.L. Foster; A. Fruman; A.D. Hunter, Q.C. (Chairman); W.H. Hurlburt, Q.C.; H.J.L. Irwin; D.P. Jones, Q.C.; Professor F.A. Laux; Professor J.C. Levy; Professor P.J.M. Lown (Director); The Hon. Madam Justice B.L. Rawlins; and A.C.L. Sims, Q.C.

The Institute's legal staff consists of Professor P.J.M. Lown (Director); R.H. Bowes; C. Gauk; J. Henderson-Lypkie, M.A. Shone and E.T. Spink. W.H. Hurlburt, Q.C. is a consultant to the Institute.

ACKNOWLEDGEMENTS

The Institute is much indebted to the private practitioners, corporate and government counsel and academic lawyers who took the time and trouble to give their comments and advice on the questions that are discussed in this report. They are listed in Appendix A.

We are also indebted to Mr. Kenneth B. Payne and Mr. Geoffrey Ho, the Director and Assistant Director respectively of Property Registration, for their time, effort and advice.

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PART I — EXECUTIVE SUMMARY

This report recommends that section 195 of the Land Titles Act be amended at the earliest possible moment.

Section 195 says that a non-fraudulent purchaser of an interest in land is not affected by actual or constructive notice of an interest that is not registered or protected by caveat. The section protects the purchaser against finding that an off-register interest comes ahead of the purchaser. The section clearly gives that protection if the purchaser acquires an interest from an "owner in whose name a certificate of title has been granted". This is almost invariably the owner of a fee simple interest. It is not clear that the section protects a purchaser who acquires an interest from either

(a) the owner of an interest such as a mortgage or lease which is registered but for which no certificate of title has been granted, or

(b) the owner of an interest which is protected by a caveat rather than by the registration of the instrument that confers the interest.

In *White Resource Management v. Durish*,[1] the trial judge held that section 195 did not protect a person who acquired an interest that was protected by caveat. The Alberta Court of Appeal did not decide the question. The court did, however, indicate that doubt exists. It went on to express great concern about the situation if the section protects only dealings with registered titleholders. It went on to suggest, in effect, that the Institute look into the question. This report is issued in response to that suggestion.

Purchasers from registered and caveated owners have assumed that the Land Titles Act protects them against finding that off-register interests have priority over the interests they acquire. They have purchased interests and paid purchase money in reliance on that assumption. If section 195 does not apply to such transactions:

(a) the legitimate expectations of purchasers will not be met.

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1 (1991), 77 Alta. L.R. (2d) 131 (Q.B.); aff'd. on other grounds, Calgary Appeal No. 12295, October 28, 1992 (C.A.). Application for leave to re-argue dismissed, January 29, 1993.

(b) in the future, purchasers, in order to protect themselves, will have to make investigations that are extensive, expensive, time-consuming and sometimes ineffective.

(c) the purpose of the Land Titles Act, which is to make dealings in land quick, easy, safe and cheap, will be defeated.

The Institute proposes that section 195 be amended in order to avoid these consequences so that purchasers may rely on the Land Titles Office register. The amended section should make it clear that actual or constructive notice of an off-register interest does not affect a non-fraudulent purchaser who acquires an interest from the registered or caveated owner of the interest.

Part III of the report contains a draft of an amended section 195 that, in the Institute's view, would achieve this objective.

PART II — SECTION 195 OF THE LAND TITLES ACT

CHAPTER 1 — INTRODUCTION

The Court of Appeal, in its recent decision in *White Resource Management v. Durish*,[2] called attention to a serious problem in the interpretation of section 195 of the Land Titles Act. The court suggested that the issue is one that may best be resolved by statute, and is a fit subject of inquiry by the Alberta Law Reform Institute. The Institute is issuing this report in response to the court's suggestion.

The Institute already has on foot a project for the revision of the whole of the Land Titles Act, in which it proposes to issue a report recommending the adoption of a new Act. The new Act would be based on the *Model Land Recording and Registration Act* contained in the 1990 report of the Joint Committee on Land Titles entitled *Renovating the Foundation: Proposals for a Model Land Recording and Registrations Act for the Provinces and Territories of Canada*, as amended by the further report of the Joint Committee bearing the same name but entitled *Final Revisions*. The original Model Act has already been used as the model for the *Metis Land Registration Regulation*.[3]

The Institute expects to issue its final report on the main project before the end of the calendar year 1993. The proposed new Act would rectify the problem identified by the Court of Appeal in *White Resource Management*. The likelihood that this will happen suggests that nothing need be done now. However, the Institute agrees that there is a problem with section 195 that should be rectified now rather than by a future new Act. Our reasons for suggesting immediate action are as follows:

- section 195 is an important part of the indefeasibility protection conferred by the Land Titles Act and is of great importance every day to conveyancers and their clients.

- it is doubtful whether section 195 applies to purchases from owners whose interests are caveated, or from the owners of registered mortgages, leases and other lesser interests in whose name no

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2 *Supra*, note 1.

3 Alta. Reg. 361/91.

certificate of title has been granted (and indeed the wording of the section is against including such transactions).

- the adoption of a new Land Titles Act is likely to take some time, but a minor amendment could be implemented at an early date by a Miscellaneous Statutes Amendment Act.

- the amendment to section 195 that is proposed in this report would be a suitable subject for a Miscellaneous States Amendment Act because

  - it is a minor amendment.

  - it will bring the section into conformity with people's expectations.

  - it will not effect a change in the policy of the law.

CHAPTER 2 — DISCUSSION AND RECOMMENDATIONS

A. The Problem

(1) The Purpose and Effect of Section 195

The purpose of the Land Titles Act is to make dealings in land safe, easy, quick, and cheap. To achieve this purpose, it provides a register upon which everyone who wants to acquire an interest in land can rely. Anyone can identify from the register the person who can convey an interest in a parcel of land and, with some exceptions, what other interests affect the parcel. A person who acquires an interest in a parcel can, by registering or caveating the interest, ensure that the acquired interest has priority over interests that are not reflected in the register.

In the absence of a provision like section 195, the rules of equity would say that a purchaser of an interest in land takes it subject to prior interests of which the purchaser has notice. Equity would then fix a purchaser with notice of any interest which the purchaser would have discovered by making a diligent investigation. Finally, equity would fix a purchaser with any fraud that is perpetrated on the holder of any interest that is defeated or subordinated by the conveyance to the purchaser. When the rules of equity applied, purchasers, in order to protect themselves against the possible existence of unknown interests, made investigations that were extensive, expensive, time-consuming and not always successful. The rules of equity thus made the acquisition of interests in land risky, difficult, slow and expensive.

Section 195 and its predecessors have abolished those rules. Under the section, a non-fraudulent purchaser is not obliged to inquire into the circumstances under which an interest in land was acquired and is not affected by notice of an interest that is not reflected in the register. The mere knowledge that such an interest exists is not to be imputed as fraud. Other sections of the Act provide that interests have priority in accordance with the order of their registration (section 59) and that registration by way of caveat has the same effect as to priority as the registration of an instrument (section 145). In the absence of section 195, the equitable rules of notice might subvert the priority conferred by sections 59 and 145. Section 195 is therefore an important part of the protection conferred by the Land Titles Act upon persons who deal in land and helps to achieve the purposes of the Act.

(2) The Scope of Section 195

Section 195 protects a purchaser who acquires an interest from "the owner of any land in whose name a certificate of title has been granted". These words usually, though not invariably, designate an owner of a fee simple estate. The question at issue is whether the section protects a purchaser who acquires an interest from an owner whose interest is registered or caveated but in whose name no certificate of title has been granted.

The nature of the question may be illustrated by example (Example 1):

- O is the registered owner of land and a certificate of title has been granted in O's name.
- A is the owner of an interest in the land that is neither registered nor protected by caveat.
- B purchases an interest from O without fraud and registers it or protects it by caveat.

O is an owner who has the qualifications set out in section 195. B is a person who has contracted with O and taken an interest from O. Section 195 therefore applies to Example 1. B, upon registering or caveating the acquired interest, will obtain priority over A's interest that is neither caveated nor registered.

But suppose that O, instead of being the registered owner of a fee simple estate in the land, is the registered owner of a lease or other lesser interest for which no certificate of title has been granted (Example 2). Section 195 refers only to a case in which B deals with an owner in whose name a certificate of title has been granted, and no certificate of title has been granted in O's name. A strong argument can therefore be made that the section does not apply to Example 2. Then suppose that O is not a registered owner at all but has registered a caveat protecting the interest (Example 3). It can be argued even more strongly that section 195 does not apply to Example 3.

The question whether section 195 protects a purchaser of a caveated interest or of a registered interest for which no certificate of title has been granted arose in *White Resource Management*. In that case, the trial judge held that Durish,

who obtained an assignment of a caveated petroleum and natural gas lease, was not protected by section 195 and was therefore subject to the rules of equity about notice. On the appeal, the Court of Appeal did not decide whether or not the section applied, saying

> *The question of law [whether a person dealing with somebody other than the registered owner could rely on section 195] raised by the trial judge is a very difficult one. But I can and do decide this case without settling that issue. My decision, then, assumes, but does not decide, that persons in the position of Durish can indeed rely on the indefeasibility rules to defeat an unregistered interest of which they have actual notice.*
>
> *Before proceeding, I will express the reason for my hesitation to agree with the learned trial judge that only those dealing with the registered owner directly can invoke the rule in s. 195.*
>
> *That rule is the heart of the Torrens system. It provides that persons acquiring new interests in land can rely on the state of the prior existing certificate of title, and need not make any further inquiries about competing claims or title defects. More specifically, they need not take steps to protect themselves from the rigorous demands of the law of equity, and its rules about constructive notice.*
>
> *To say that the rule applies only to direct dealings with registered owners might be to limit dramatically the scope of that system. The trial ruling exposes all those who deal with registered interests other than ownership to the vagaries of the law of equity. It would mean, for example, that a caveator who takes from a caveator always takes subject to all the unregistered interests, or "equities", of which he might have constructive knowledge.*
>
> *I fear that what the trial judge said does not accord with settled practice in Alberta, and its affirmation might offer not stability but change. I fear that many Albertans, and their lawyers, for many years have dealt with registered interests less than ownership on the assumption that s. 195 governed their dealings. Worse, the "agreement for sale" protected only by caveat instead of a transfer and mortgage back, has been with us for a century. I have some difficulty accepting, for example, that those who deal with a purchaser under an agreement for sale are aware they have no protection under the Act.*

> *It may be that this is an issue best resolved by statute, and is a fit subject of inquiry by the Alberta Law Reform Institute.*

It will be seen that in the view of the Court of Appeal:

- the public expectation is that section 195 protects a purchaser of a caveated or registered interest against off-register interests even if the purchaser's grantor is not a registered owner in whose name a certificate of title has been granted

- there is a substantial doubt that section 195 protects such a purchaser.

B. Consultation

The Court of Appeal obviously thought that the scope of section 195 should be reviewed to ensure that the section applies to the acquisition of an interest from any owner whose interest is caveated or registered. The court's views are of course highly persuasive. Upon first considering them, the Institute tentatively agreed with them. The Institute also tentatively agreed

- that there is doubt that section 195 applies where the grantor of an interest is not a registered owner named in a certificate of title.

- that it is in the public interest that the doubt should, on an urgent basis, be resolved by bringing the section into line with public expectations.

We thereupon prepared a Consultation Memorandum and circulated it for comment. The memorandum posed two policy questions: (1) is there an urgent need for an amendment to section 195, or should it be dealt with as part of a general revision of the Land Titles Act? (2) should section 195 apply to dealings with all caveated and registered owners? The memorandum also put forward for discussion a draft amendment to section 195 that was intended to solve the problem.

We consulted the Land Titles Liason Committee. This Committee includes the administrators of the Land Titles system. It also includes private practitioners who are appointed by the Law Society and the Canadian Bar Association. It deals

with matters of common interest.[4] The Committee unanimously agreed that section 195 should apply to dealings with all caveated and registered owners. The practitioner members of the Committee unanimously agreed that there is an urgent need for an amendment.

We also sent copies of the Consultation Memorandum to those private practitioners, government and corporate lawyers and academic lawyers whom we had previously consulted about the desireability of adopting a new Land Titles Act based on the Model Land Recording and Registration Act. We received replies and comments from several of them.[5] We also sent the Consultation Memorandum to the CBA/Law Society Legislative Review Committee and received comments and suggestions from some of the Committee's members.[6] Finally, we obtained comments from two members of the Faculty of Law, University of Alberta.[7] All of these respondents agreed that section 195 should apply to dealings with all caveated and registered owners and that there is an urgent need for an amendment.

We think that this consultation is sufficient. The point in issue, though important, is narrow and technical. Those practising and academic lawyers whom we consulted were unanimous in their views on the policy questions. We think that their views are representative of the profession as a whole on this issue. Nor do we think it necessary to consult the public generally, as we think that on an issue of this kind the views of lawyers who engage in conveyancing reflect the interests of their clients.

It will be seen from this description that the results of consultation confirmed the Institute's tentative views. So did our further consideration of the problem.

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4 For a list of the practitioner members, see Appendix A. Mr. Kenneth B. Payne, Director of Property Registration for the province, and other administrators are also members of the Committee. One administrator thought that it would be better to leave the problem to be dealt with by a new Land Titles Act.

5 See Appendix A.

6 See Appendix A.

7 See Appendix A.

C. Recommendations

(1) Scope of Section 195

It is, in our opinion, essential that anyone dealing in land be able to ascertain from the register who owns the interest and what claims there are against it. Section 195 should therefore, in the absence of fraud, protect against the consequences of notice of interests that are not registered by instrument or caveat any purchaser who acquires an interest from an owner whose interest is registered or caveated.

RECOMMENDATION 1

We recommend that section 195 of the Land Titles Act be amended to ensure that the section applies to dealings with, and to the purchase of interests in land from, all owners whose interests are registered or caveated.

Part III of this report includes a draft amendment which we think would give effect to Recommendation 1.

(2) Early Amendment

The doubts about the application of section 195 affect many transactions every day. We think that the opinion on which purchasers and conveyancers generally act is that section 195 applies to dealings with interests for which no certificates of title have been granted. If the section does not apply to such dealings, purchasers and lenders who think that it does apply will not get the protection they expect. If purchasers and lenders realize that it is doubtful that section 195 applies, they will have to consider whether to make investigations and take other steps to protect themselves against interests that are not reflected on the register, thus defeating the purpose of the land titles system.

We think that there is an urgent need for an amendment. The draft amendment in Part III is accordingly drafted with a view to being included in a Miscellaneous Statutes Amendment Act or similar enactment. Since the amendment, in whatever form it is enacted, would be designed to bring section

195 into line with public and professional expectations, we think that it would be appropriate to include it in such an Act.

RECOMMENDATION 2

We recommend that the amendment be enacted at the earliest possible moment.

(3) Retroactivity

In our Consultation Memorandum, we expressed the tentative view that an amended section 195 should apply to past transactions as well as to future transactions. One consultant disagreed, on the principle that legislation should not derogate from existing rights. All others who considered the policy questions agreed thought that the amendment should operate retroactively. We will give our reasons for agreeing with the majority view.

First, we think that the proposed amendment will bring section 195 into line with the expectations of the public. From before the inception of the province, purchasers have bought and paid for interests in land on the faith of the register and in reliance on the abolition of the rules of equity about actual and constructive notice. Allowing new doubts about the effect of section 195 to expose settled transactions to upset would, in our view, do more damage to existing interests than giving retroactive effect to an amendment reflecting the conventional and accepted interpretation would do.

Second, we think it unlikely that anyone relied to their detriment on the restricted interpretation of section 195. Note that such reliance would occur only under the following circumstances:

(1) the person relying on the restricted interpretation was the owner of an interest.

(2) the person did not register or caveat their interest.

(3) the person deliberately refrained from registering or caveating the interest because they thought that section 195 applied only to dealings with registered titleholders.

An owner would therefore rely to their detriment on the restricted interpretation of section 195 only if they were willing to take the following risks ("class A" risks):

(1) that there might be an existing prior conflicting interest that was not registered or caveated;

(2) that a subsequent purchaser of a conflicting interest would not have actual or constructive notice of the owner's interest (because a subsequent purchaser without actual or constructive notice would obtain priority by registering or caveating the subsequent interest); and

(3) that a purchaser would purchase a conflicting interest from the registered titleholder (in which case the restricted section 195 would protect the purchaser);

but not the further risk ("class B" risk)

(4) that a non-fraudulent purchaser would purchase a conflicting interest that was caveated or registered but for which no certificate of title had been granted.

We cannot say as a matter of factual certainty that no owner of an off-register interest ever decided not to register or caveat the interest because they were willing to assume the class A risks but not the class B risk. We think, however, that we can safely say that the likelihood that any owner has gone through such a strange line of reasoning is negligible.

RECOMMENDATION 3

We recommend that section 195 as amended under Recommendation 1 apply to past as well as to future transactions.

PART III — DRAFT LEGISLATION

Section 195 of the Land Titles Act appears below in the left-hand column. A draft of an amended section 195 which, in the Institute's view, would carry out Recommendation 2 in this report, appears in the right-hand column. The words underlined in the proposed section 195(1) and (2) are changes from the wording of the present section. Section 195(3) and (4) are new.

Present section 195

195 Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Proposed section 195

195(1) Except in the case of fraud, a person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from the owner of any interest in land that is registered by instrument or caveat is not

(a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, 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 to see to the application of the purchase money or of any part thereof, or

(b) affected by any notice direct, implied or constructive, of any trust or interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

(2) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

(3) In this section, "interest" includes any estate or interest in land.

(4) This section is deemed to have been in effect since the commencement of the Land Titles Act, being chapter 24 of the Statutes of Alberta, 1906, in place of section 135 of that Act and similar sections in successor Acts.

Comments

1. Section 195 refers specifically to the acquisition of certain kinds of interests, namely, transfers, mortgages, encumbrances or leases. The substitution of "*lease or other interest*" for "or lease" in the proposed provision would make section 195 applicable to the acquisition of an interest in land of any kind.

2. Section 195, in terms, applies only to a contracting or dealing with an owner of any "land in whose name a certificate of title has been granted". The substitution of the words "*interest in land that is registered by instrument or caveat*" would make the section apply to a contracting or dealing with any owner whose interest is reflected on the register.

3. The words "*for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat*" have been inserted. Some consultants were concerned that, by exempting persons contracting with owners other than certificate of title holders from any obligation to investigate, the amended section might validate an interest that is not validated either by the general law or by the Land Titles Act. These words have been inserted to ensure that the section deals only with the effect of notice on priority.

4. The words "*interest acquired the interest*" have been substituted for "land is or was registered" in order to exempt persons contracting with owners other than certificate of title holders from any obligation to investigate in order to obtain priority.

5. The later references in draft sections 195(1) and (2) to interests that are not registered by instrument or caveat flow from the changes mentioned above.

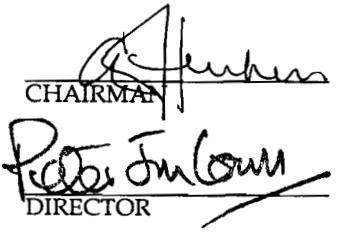
6. Section 195(3) has been added to cover a point raised by a consultant.

7. Section 195(4) is intended to make the amended section apply to past as well as to future transactions in order to conform the settled expectations of those who have dealt with land in the past.

8. Section 195 is already difficult to read. The proposed amendments would make it more difficult. The content of the section has therefore been broken down by dividing part of it into paragraphs and by dividing it into two subsections. This is not intended to affect the meaning of the section.

C.W. DALTON
A. FRUMAN
W.H. HURLBURT, Q.C.
D.P. JONES, Q.C.
J.C. LEVY
B.L. RAWLINS

J.L. FOSTER, Q.C.
A.D. HUNTER, Q.C.
H.J.L. IRWIN
F.A. LAUX
P.J.M. LOWN
A.C.L. SIMS, Q.C.



February 1993

APPENDIX A

1. PRACTITIONER MEMBERS OF THE LAND TITLES LIAISON COMMITTEE

H.J.L. Irwin
Sandra Hunt McDonald
R.J. McLeod, Q.C.
K.L. Milani
Paul H. Nothof

2. ADVISORY COMMITTEE MEMBERS WHO RESPONDED TO THE CONSULTATION MEMORANDUM

Wm. S. Connauton, Q.C.
Stephen Faulknor
Andrew R. Hudson
Eugene Kush, Q.C.
Don J. Manderscheid
Stephen G. Raby
Christine G. Rapp
Jeffrey H. Selby
John Sterk, Q.C.
H.D. Wyman, Q.C.

3. MEMBERS OF THE LEGISLATIVE REVIEW COMMITTEE WHO RESPONDED TO THE CONSULTATION MEMORANDUM

Michael Clegg, Q.C.
Grant S. Dunlop
E. Mirth, Q.C.
Cheryl A. Sanford

4. MEMBERS OF THE LAW FACULTY, UNIVERSITY OF ALBERTA, WHO RESPONDED TO THE CONSULTATION MEMORANDUM

Professor E.E. Hodgson
Professor Elaine L. Hughes