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Some Aspects of Title by Registration in the Maritime Provinces of Canada

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I. Introduction

The Maritime Provinces of Canada are engaged in a complete restructuring of the present conveyancing system by the implementation of a comprehensive land management system with centralized availability of information on titles and land use. It is the hope of the proponents of the program[1] that it will result in a uniform and simple system to replace the present antiquated land registration procedure which, apart from the "conveyancing" problems caused by its lack of certainty, is seen by the proponents as a major barrier to effective management and control of land use.

Phase I of the four-phase approach[2] consists of the establishment of a second order control system of co-ordinates together with accurately located survey markers or monuments in each province and is expected to be completed in the fall of 1977. The second Phase involves the production of maps of various types and scales to meet growing demands associated with resources management, urban development and property identification. Utilization of the data resulting from these two Phases will permit the implementation in Phase III of a computerized land titles system which, it is intended, should provide insured guaranteed title to any land covered by the system, thus precluding time consuming and costly title searching and re-survey. Finally, in Phase IV, the program envisages a land data retrieval system to maximize the benefits to be derived from the other three Phases. Prince Edward Island is being used as the pilot study area for each of the Phases and an Act

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1. The program is known as the Land Registration and Information Service. It is being financed under an Agreement between the Council of Maritime Premiers and the Department of Regional Economic Expansion of Canada, dated July 12, 1973 (hereinafter referred to as "the Agreement"). Under the Agreement, the Federal Government will bear 75 per cent of the cost to a maximum, as presently agreed, of $16,404,000.

2. The Phases are described in Appendix A to the Agreement.

purporting to implement Phase III has been enacted but not proclaimed in that province.[3]

The need to develop a form of conveyancing better than that presently in existence in the Maritime Provinces was indicated in Canada, as early as 1883, by the President of the Canadian Land Law Amendment Association. He said:

> . . . I have been led to inquire why it is that real estate is burdened with a method of transfer so costly, dilatory, cumbersome, and uncertain, as compared with other kinds of property . . . In default of other reason, in view of the antiquity of the system, and the immense amount of learned labour bestowed upon it, the conclusion generally accepted was that it must be one of the natural and unavoidable evils of life that had to be patiently endured; as inevitable as the flow of time, or the tides, or the payment of taxes.[4]

This same concern has been reiterated on numerous occasions since.[5]

The major object of any system of conveyancing should be to enable a purchaser to ascertain whether his vendor can make him the "owner" free from adverse claims. This ownership, in turn, should be "stable" and "ascertainable".[6] Apparently the proponents of the Maritime Land Registration and Information Service see the "Torrens" System as the answer to "old" system conveyancing in these respects. For example, the Executive Director of the Service has written:

> A review of existing systems of land registration reveal[*sic*] that a land titles system retaining the basic Torrens principles would meet our requirements.[7]

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3. The Land Titles Act, R.S.P.E.I. 1974, c. L-6.

4. Quoted in I. Head, *The Torrens System in Alberta — A Dream in Operation* (1957), 35 Can. Bar Rev. 1 at 4 n. 7.

5. *Vide,* L. Rozovsky, *The Torrens Land Title System* (1970), 2 Ansul (No. 3) 5, and the Ontario Law Reform Commission, *Report on Land Registration,* 1971, Department of Justice, at 8. A similar opinion was expressed by the Executive Director of the Land Registration and Information Service, Mr. W. F. Roberts, at an interview with the writer in Fredericton, New Brunswick, on October 13, 1972. In a comment on the shortcomings of the present conveyancing system, Professor R.C.B. Risk states that it is only through the continuous care of lawyers and government that it has continued to work and, even then, at considerable cost in time and money. R. Risk, *The Records of Title to Land: A Plea for Reform* (1971), 21 U.T.L.J. 465 at 466.

6. Ontario Law Reform Commission, *Report on Land Registration,* 1971, *supra,* note 5 at 9-10.

7. W. Roberts, *The Planning Design and Implementation of a Computer Based Land Titles System,* unpublished paper, July 17, 1971 at 2.

It is submitted that, with the general requirements of a conveyancing system in mind, on review of the article as a whole, and the opinions expressed by the Director at an interview with the writer,[8] this means the grant of "indefeasible" title and some consideration of "fraud" and the "notice" that may amount to fraud. In fact, a "Torrens" Act dealing with these matters has been in force in Nova Scotia since 1904[9] but it has not been used, depending as it does on voluntary conversions.

II. The "Torrens" System

It is assumed that the basis of "Torrens" Acts came to Sir Robert Torrens while he occupied the post of "Collector of Customs at Port Adelaide", where he could observe the operations of the *Merchant Shipping Act*.[10] The similarity between this Act and the initial "Torrens" Act, as Head indicates,[11] is considerable.

The system was introduced into New South Wales, and the other Australian States, and New Zealand. In Canada the system operates almost exclusively in the Western provinces and in Ontario it is the dominant form of conveyancing.[12]

The initial objects of the Acts,[13] "Simplicity and cheapness", were soon noted judicially.[14] However, the principal functions of

8. *Supra*, note 5.

9. The Land Titles Act, S.N.S. 1903-4, c.47. Proclaimed: Colchester 25/5/1906; Annapolis 30/1/1907; Halifax 21/9/1907. The Act was amended as late as 1958, S.N.S. 1958, c.16. A survey conducted by the writer revealed that the legal profession was largely unaware of the existence of this enactment. A similar statute is to be found, unproclaimed, in New Brunswick, S.N.B. 1914, c.22.

10. *Merchant Shipping Act of South Australia* (1854) 17 & 18 Vict., c.104.

11. *Supra*, note 4 at 3.

12. R. Risk, *supra*, note 5. However, the Ontario system is not strictly a Torrens system. Rather it is founded on the English Registration system.

13. See, *Merchant Shipping Act* (1854) 17 & 18 Vict., c.104, preamble; D. Kerr, *The Principles of the Australian Land Titles (Torrens) System* (Adelaide: Law Book Co., 1927) at 6; B. Helmore, *The Law of Real Property in New South Wales* (2d. ed. Sydney: Law Book Co., 1966 — with supplement, 1970) at 354; H. Wiseman, *The Law Relating to the Transfer of Land* (2d ed. Melbourne: Law Book Co., 1931) at 3; T. Ruoff, *An Englishman Looks at the Torrens System* (Sydney: Law Book Co., 1951) at 91 *et seq.*; H. Spencer, *Some Principles of the Real Property (Land Titles) Acts of Western Canada* (Toronto: Carswell, 1920) at 29 — also at 33 where the author discusses the objects of "certainty of title and easy proof of it"; H. Anger and J. Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law, 1959) at 717. *Cf.* position in England — D. Jackson, *Registration of Land Interests — The English Version* (1972), 88 L.Q.R. 93; R. Stoneham, *The Law of Vendor and Purchaser* (Sydney: Law Book Co., 1964) at 372.

14. *Per* Edwards J. in *Wellington and Manawatu Railway Co.* v. *Registrar-General of Land* (1899), 18 N.Z.L.R. 250 at 253 (S.C. *in banco*).

the system are stated by Anger and Honsberger in the following terms:

> The purpose of registration is to give public notice of the nature of an interest that is claimed, to establish priorities as between claimants and to enable persons proposing to deal with the property to determine the rights of all parties claiming an interest therein and the exact limits of the property.[15]

Registration, itself, defines the extent of the "Torrens" system. In explaining the relationship between registration and the overall system, the Chief Justice of the High Court of Australia, Sir Garfield Barwick, in *Breskvar* v. *Wall*,[16] said:

> The Torrens system of registered titles of which the Act is a form is not a system of registration of title but a system of title by registration.[17]

It is on the basis of this fundamental premise that the paper will proceed. Only on registration can an interest be enforced at law and only then will the interest receive the benefit of the purpose of registration.

The initial assumption was that the "Torrens" system had overcome most of the problems of proof of title. Indeed, it was heralded as the *"infallible safeguard"* of the landowner.[18] To suggest that one system even might overcome all problems related to title is a high ideal. Nevertheless this attitude appears to have been accepted as an accurate assessment of the "Torrens" system in the Maritime Provinces.

In fact, however, by their interpretation of the "Torrens" Acts, the Courts have retained many of the principles of the common law

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15. H. Anger and J. Honsberger, *supra*, note 13 at 717. *Cf.* the opinion of the Honourable Gordon Bennet, who introduced the bill for The Land Titles Act in the Prince Edward Island Legislature, *supra*, note 3, and said:

> The basic purposes of the land titles system are:
>
> (1) to give public notice of all interests claimed against a parcel of land;
> (2) to establish priorities between persons claiming land; and
> (3) to provide an orderly method of recording title.

This appears almost identical to the opinion of Messrs. Anger and Honsberger. However, the learned authors use the word "registration" and not "land titles system". This difference in terms, it is submitted, is fundamental and leads to irreconcilable differences in the two opinions.

16. (1972), 46 A.L.J.R. 68, an appeal from the Supreme Court of Queensland.

17. *Id.* at 70.

18. E. Banks, *Torrens Title — Its Advantages to Property Owners*, Pam. vol. 358 5838 at 2 (Australian National Library); *cf.* the position in England — Jackson, *supra*, note 13.

and have applied them to the "Torrens" system. "Torrens" legislation has been interpreted in a conservative and restrictive manner[19] and has most certainly not solved all the problems of "old" system conveyancing. If Sir Robert Torrens were now to return from his presently unknown address, he would not believe the remnants of the system he introduced. Indeed, the manner in which the courts have dealt with the present. "Torrens" Acts raises doubt whether Parliament can ever free land from the common law rules of conveyancing.[20]

The barriers to effective implementation of a "Torrens" system, raised by the history of judicial interpretation of the "Torrens" Acts, appear to be further complicated in the pilot study area of Prince Edward Island because the Act there[21] does not contain even the usual "indefeasibility", "fraud" and "notice" sections. The general attitude of the courts to the "Torrens" system, coupled with the interpretative assumption that to alter or omit that which is usually found in a statute is to admit of a different legislative intention, therefore, may lead to a perpetuation of the common law of conveyancing.

This article will not examine all the proposed Phases of the scheme to introduce the new "Torrens" system but will discuss the principal aspects of Phase III. This Phase contemplates the conversion of the present registry system of conveyancing to a system of "guaranteed title by registration". Effectual land management demands security and certainty of title to land and, therefore, the legislation that is framed to implement Phase III will largely determine the credibility of the new system. The article will discuss whether, as a result of the existing security and certainty in the "Torrens" system, the "Torrens" system is the best possible system that could be introduced into the Maritimes, or whether an

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19. For example, in the *Wellington and Manawatu Railway* Case (1899), 18 N.Z.L.R. 250 at 250 (S.C. *in banco*), Edwards J. was of the opinion that the system was "wanting in elasticity" and that it protected only "simple" transactions. To this *dictum* may be noted the decisions in *Gibbs* v. *Messer*, [1891] A.C. 248 (P.C.) (Victoria); *Assets Co.* v. *Mere Roihi*, [1905] A.C. 176 (P.C.) (N.Z.); *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A.C. 491 (P.C.) (Selangor); *Munro* v. *Stuart* (1924), 41 S.R. (N.S.W.) 203 (n); *Clements* v. *Ellis* (1934), 51 C.L.R. 217; *Frazer* v. *Walker*, [1967] N.Z.L.R. 1069 (P.C.) and *Canadian Pacific Railway* v. *Turta*, [1954] S.C.R. 427; [1954] 3 D.L.R. 1, to name a few.

20. *Vide*, Rinfret C.J.C. (dissenting), in *Turta's Case*, [1954] S.C.R. 427 at 436; [1954] 3 D.L.R. 1 at 9.

21. *Supra*, note 3.

amended system granting equal or additional security should be introduced. Implementation and computerization of title will also be considered.

The article will rely on the principal decisions in New South Wales, New Zealand and Alberta. Reference will be made to decisions of other recent or high authority.

III. "Indefeasibility" of Title

A fundamental problem which has plagued the "Torrens" system is that of indefeasibility. The authorities show that there have been two approaches to the problem. They are:

(a) "Deferred Indefeasibility", which may be defined as a permitted rectification of the register, *inter partes,* so as to remove, from the register, the presently registered proprietor. However, such rectification will be denied by a transaction from the "new" presently registered proprietor to a *bona fide* purchaser for value — the approach epitomized by *Gibbs* v. *Messer.*[22] For example, if B. forges a transfer from a registered proprietor A. to C., the register may be rectified to reinstate A. as the registered proprietor. However, any transfer by C. to a third party, *bona fide* and for value, prohibits restoration of A.'s title.

(b) "Immediate Indefeasibility", which means that once a party obtains registration, subject to the exceptions to indefeasibility contained in the Acts and the possible exception expressed in *Frazer* v. *Walker*[23], irrespective of fraud or forgery, his certificate cannot be impeached. In the example, the register could not be rectified to restore title to A., even while C. remained as the registered proprietor.

It is argued that, by an adoption of "deferred" indefeasibility, there must be an examination of prior certificates of title. In the example given to explain the concept of "deferred" indefeasibility, it is argued that C. must examine the title of A. to determine the validity of the transfer to him. However, not only does such an examination fail to verify the propriety of the conduct in the transaction, but in fact, it is an examination of the "top" certificate.

A leading English authority, T. B. F. Ruoff, argues that any examination of a prior certificate of title is "a step outside the bounds of the Torrens System."[24] It should be pointed out,

22. *Supra,* note 19.
23. *Id.*
24. *Supra,* note 13 at 68.

however, that this opinion assumes that the "Torrens" Acts have eliminated the "old" title law by their plain words. In fact, they do not boast of this intention[25] but, in any event, the limited examination required by the "deferred" approach to indefeasibility is infinitely less onerous than the present "old" system in the Maritimes.

The principal support for "deferred" indefeasibility is found in the judgment of Lord Watson in *Gibbs* v. *Messer.*[26] His Lordship said, *inter alia*:

> The protection which the statute gives to a person transacting on the faith of the register is by its terms limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal . . . with a forger . . . do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.[27]

This approach has been followed in numerous decisions in all three jurisdictions[28] and is still representative of the law in Canada. Yet, almost immediately, in *Assets Co.* v. *Mere Roihi,*[29] inconsistency

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25. *Cf.*, W. Taylor, *Scotching Frazer v. Walker* (1970), 44 A.L.J. 248 at 282.
26. *Supra*, note 19.
27. *Id.* at 254-255.
28. *Clements* v. *Ellis* (1934), 51 C.L.R. 217; *Coras* v. *Webb*, [1942] Qd. S.R. 66; *Caldwell* v. *Rural Bank of New South Wales* (1951), 53 S.R. (N.S.W.) 415 — *per* Street C.J. and Owen J.; *Davies* v. *Ryan*, [1951] V.L.R. 283; *Ex parte Davy, Land Registrar Wellington; In re The Land Transfer Act* (1886), 6 N.Z.L.R. 760; *In re Mangatainoka 1 B.C. (No.2)* (1913), 33 N.Z.L.R. 23; *District Land Registrar* v. *Thompson* (1922), 41 N.Z.L.R. 627; *Re Adams and McFarland* (1914), 6 W.W.R. 1076; 20 D.L.R. 293 (Alta. S.C., T. D.); *Shelter* v. *Forshay* (1915), 8 W.W.R. 852 (Sask. S.C. in Chambers); *Brown* v. *Broughton* (1915), 25 Man. L.R. 489; 24 D.L.R. 244 (K.B.); *Mauch* v. *National Securities Ltd.*, [1919] 2 W.W.R. 740 (Alta. S.C., T.D.); *Watson* v. *Ogilvie*, [1924] 1 W.W.R. 837 (Sask. K.B.); *Lichtbuer* v. *Dupmeier*, [1941] 3 W.W.R. 64 (Sask. K.B.); *Fialkowski* v. *Fialkowski* (1911), 1 W.W.R. 216 (Alta. S.C., T.D.); *Essery* v. *Essery; Tatko* v. *Liefke (Tatko Estate) (No. 2)*, [1947] 2 W.W.R. 1044; [1948] 1 D.L.R. 405 (Alta. S.C., A.D.); *Canadian Pacific Railway* v. *Turta*, [1954] S.C.R. 427; [1954] 3 D.L.R. 1; *Kaup* v. *Imperial Oil Ltd.*, [1962] S.C.R. 170; 32 D.L.R. (2d) 112; *Queen* v. *Joslin* (1965), 51 W.W.R. 346; 51 D.L.R. (2d) 139 (Alta. S.C., A.D.); *Hager* v. *United Sheet Metal Ltd.*, [1954] S.C.R. 384; [1954] 3 D.L.R. 145; *Shilletto* v. *Plitt* (1955), 16 W.W.R. 55; [1955] 5 D.L.R. 627 (Alta. S.C., T.D.); *Morris* v. *Public Trustee* (1958), 26 W. W. R. 471 (Alta. S. C., T.D.); *Clarke* v. *Burton* (1959), 27 W.W.R. 352 (Alta. S.C., A.D.); *Imperial Oil Ltd.* v. *Conroy* (1954), 12 W.W.R. (N.S.) 569 (Alta. S.C., T.D.).
29. *Supra*, note 19.

with this initial approach can be found. In speaking of Lord Watson's advice, Lord Lindley said:

> . . . there is nothing in his judgment in favour of the view that an original registered owner claiming through a *real person* does not get a good title against everyone, except in the cases specially mentioned in the Act, fraud being one of them.[30]

Although his Lordship uses the words "original registered owner" — which does not include later registered "owners" — the judgment has been regarded as founding the line of cases adopting "immediate" indefeasibility.[31]

The circumstances giving rise to a question of whether indefeasibility is "immediate" or "deferred" involve two competing interests — one registered, or having priority in the right to registration, and the other fraudulently denied the status of a registered interest. The cause of the problem resulting from the competition is that the certificate of title, together with a transfer document, is all that is necessary to complete a dealing with land. In the terms of the Acts,[32] subject to the determination of whether indefeasibility is "immediate" or "deferred", once the transfer is registered the transferee will obtain good title, provided he is not a participant in the fraud or is held to have notice that amounts to fraud within the "Torrens" system.

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30. *Id.*, at 204.

31. *Creelman* v. *Hudson Bay Insurance Co.*, [1920] A.C. 194; *Hamilton* v. *Iredale* (1903), 3 S.R. (N.S.W.) 543 *reversing* (1903), 3 S.R. (N.S.W.) 535; *Josephson* v. *Mason* (1912), 12 S.R. (N.S.W.) 249; *Boyd* v. *Mayor etc. of Wellington*, [1924] Gaz. L.R. 489; 43 N.Z.L.R. 174; *Gallagher* v. *Thompson*, [1928] Gaz. L.R. 373; *Frazer* v. *Walker*, [1967] N.Z.L.R. 1069; *Mardon* v. *Holloway*, [1967] N.Z.L.R. 372; *Mayer* v. *Coe* (1968), 88 W.N. (N.S.W.) (Eq.) 497; *Schultz* v. *Corwill Properties Pty.* (1969), 90 W. N. (N.S.W.) (Eq.) 529. See also *Jonray (Sydney) Pty.* v. *Partridge Bros.*, [1969] N.S.W.R. 621, *cf. Travinto Nominees Pty.* v. *Vlattas* (1970), 92 W.N. (N.S.W.) 405.

32. *E.g.*, *The Land Titles Act*, R.S.A. 1970, c.198, s.63; *Land Transfer Act, 1952*, 1952, No. 52 (as amended) (N.Z.), s.62; *Real Property Act*, 1900, No. 25 (as amended) (N.S.W.), s.42. The section is usually in the following, or similar, terms:

> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall except in the case of fraud, hold the same, subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever . . .

In New South Wales and New Zealand, the Courts have adopted "immediate" indefeasibility following the decision in *Frazer* v. *Walker*.[33] Canada has, by interpreting the same words, adopted the "deferred" approach.[34]

From the volume of decisions to have considered the question of "indefeasibility",[35] it is important that the Maritime Provinces consider the alternative approaches and whether the problems caused by the question of indefeasibility cannot be avoided altogether. Rather than face these issues, it appears that the planners of the new scheme have not considered indefeasibility as important.[36]

IV. Fraud and Notice

Fraud, like indefeasibility, is an issue that should not have given rise to great concern in the "Torrens" system. However, the sections in the Acts, which state the relationship between fraud and notice, have not clearly identified the notice that may amount to fraud. They are usually in the following or similar terms:

> Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.[37]

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33. *Supra*, note 19. This statement, with respect to New Zealand, is slightly inaccurate because "immediate" indefeasibility is reflected in *Boyd* v. *Mayor etc. of Wellington*, [1924] Gaz. L.R. 489; 43 N.Z.L.R. 174. Be that as it may, that judgment of the Court of Appeal was questioned until the advice of the Board in *Frazer* v. *Walker* when the approach of the Court of Appeal was confirmed.

34. *Turta's Case*, [1954] S.C.R. 427; [1954] 3 D.L.R. 1.

35. *Vide, e.g.*, notes 28 and 31.

36. For the extent to which the courts are prepared to venture to obtain the "right result", incidentally questioning the whole concept of the "Torrens" system, see *Credit Foncier Franco-Canadien* v. *Bennett* (1963), 43 W.W.R. 545 (B.C.C.A.).

37. *The Land Titles Act*, R.S.A. 1970, c. 198, s. 203; *Land Transfer Act, 1952*, 1952, No. 52 (as amended) (N.Z.), s.182; *Real Property Act*, 1900, No. 25 (as amended) (N.S.W.), s.43. The extract is from s.43 in New South Wales.

The question is how much notice, by itself or associated with some other fact or conduct, will amount to fraud?

Fraud may arise against either the registered or the unregistered proprietor. In the first category, the problem is largely illusory and has been concluded by either "deferred" or "immediate" indefeasibility. That is to say, in questions of registration, the principal fraud is forgery.[38]

In approaching "fraud" in the second category, the courts have adopted one of two approaches. First, they have adopted the common law approach which operates on the principle that knowledge of a prior equity at the time of acquisition of an adverse interest will deny priority to a later interest.[39] Secondly, they have developed the statutory interpretation approach. This approach flows from the plain words of the Acts which require something in addition to mere knowledge to constitute fraud. Even though each statute contains the stipulation that notice of itself will not amount to fraud, a dichotomy in approach is revealed by the cases.

It follows, from the advice in *Loke Yew* v. *Port Swettenham Rubber Co.*,[40] that if an interest is acquired with knowledge of an adverse interest, together with a guarantee not to destroy that interest, there will be fraud in attempting to destroy that interest. To this conclusion can be added the advice of the Board in the *Assets Co.* case, where Lord Lindley said:

> But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.[41]

In New South Wales, however, it was held that there was no fraud where a purchaser attempted to eject lessees of the vendor, after purchase, knowing of the existence of the tenancies before purchase.[42] Prior to registration, but after settlement, the position

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38. For the example of fraud against a registered proprietor which was not forgery, see *Latec Investments Ltd.* v. *Hotel Terrigal Pty. (In Liquidation)* (1965), 39 A.L.J.R. 110. This decision follows the general approach to fraud against unregistered proprietors. The question was also discussed in *Erena Pou* v. *Nicholson*, [1923] Gaz. L.R. 176; 42 N.Z.L.R. 256. *Vide, Patrick Sheerin* v. *Thomas Sheerin* (1903), 5 Gaz. L.R. 421, where fraud against all proprietors is set out.

39. Recognized in *Le Neve* v. *Le Neve* (1747), Amb. 436.

40. *Supra*, note 19.

41. *Id.* at 210.

42. *Munro* v. *Stuart, supra*, note 19. A basically analogous approach is found in

would appear to be in line with general principles.[43] In New Zealand and Canada the decisions predominantly favour a liberal interpretation of the notice that will amount to fraud.[44]

The notice that is sufficient to amount to fraud and to deny priority to an interest acquired later in point of time seems, in all jurisdictions, to require something more than mere knowledge. However, some decisions give little indication of the nature of this additional factor. In New Zealand and Alberta it would appear to be sufficient if, having acquired notice, the holder of the later interest proceeds to registration with a knowledge or "belief" that he will defeat a holder of an interest acquired prior in point of time.[45]

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the following decisions: *Stuart* v. *Kingston* (1922), 32 C.L.R. 309; *In re Robert Beckett* (1894), 15 L.R. (N.S.W.) 94 (*in banco*); *Cooke* v. *Union Bank* (1893), 14 L.R. (N.S.W.) 249; *Fels* v. *Knowles* (1906), 26 N.Z.L.R. 604; *Ruapekapeka Sawmill Co.* v. *Yeatts*, [1958] N.Z.L.R. 265; *Union Bank of Canada* v. *Boulter-Waugh Ltd.* (1919), 58 S.C.R. 385; 46 D.L.R. 41; *Hackworth* v. *Baker*, [1936] 1 W.W.R. 321 (Sask. C.A.). The liberal interpretation to mere notice not amounting to fraud is reflected in *Bell* v. *Beckmann* (1889), 10 L.R. (N.S.W.) (Eq.) 251; *Locher* v. *Howlett* (1894), 13 N.Z.L.R. 584; *Thompson* v. *Finlay* L.R. 5 S.C. 203 (1861-1902); *Dillicar* v. *West*, [1921] N.Z.L.R. 617; *Waimiha Sawmilling Co., (In Liquidation)* v. *Waione Timber Co.*, [1926] A.C. 101 (P.C.) (N.Z.); [1923] N.Z.L.R. 1137 (C.A.); *Webb* v. *Hooper*, [1958] N.Z.L.R. 111; *Efstratiou* v. *Christine Glantschnig*, [1972] N.Z.L.R. 594; *Turner v. Clarke* (1909), 10 W.L.R. 25 (Sask. S.C., T.D.); *Independent Lumber Co.* v. *Gardiner* (1910), 13 W.L.R. 548 (Sask. S.C. *in banco*); *Chapman* v. *Edwards* (1909-12), 16 B.C.L.R. 334; (1911), 19 W.L.R. 266 (C.A.); *Fialkowski* v. *Fialkowski* (1911), 1 W.W.R. 216 (Alta. S.C., T.D.); *Arnot* v. *Peterson* (1912), 21 W.L.R. 153; 4 D.L.R. 861 (Alta. S.C., T.D.); *Sydie* v. *Saskatchewan* (1913), 25 W.L.R. 570; 14 D.L.R. 51 (Alta. S. C. *in banco*); *Ruthenian Greek Catholic Church* v. *Fetsyk* (1922), 32 Man. L.R. 452; [1922] 3 W.W.R. 872 (K.B.); *Robinson* v. *Ford* (1915), 31 W.L.R. 13; (1914) 19 D.L.R. 572 (Sask. S.C. *in banco*); *Zbryski* v. *City of Calgary* (1965), 51 D.L.R. (2d) 54 (Alta. S.C., T.D.); *Moore* v. *Moore* (1971), 16 D.L.R. (3d) 174 (B.C.C.A.).

43. *Real Property Act*, 1900, (as amended) (N.S.W.) *supra*, note 37; No. 44, 1930, s.38 (b); No. 44, 1930, s.38 (a). The new s. 42(d) reverses *Munro* v. *Stuart*, *supra*, note 19 and the new s.43A denies priority where there is notice of a prior adverse interest — *per* Taylor J. in *I.A.C. (Finance) Pty.* v. *Courtenay* (1963), 110 C.L.R. 550. *Cf.* the approach of Else-Mitchell J. in *Parkinson* v. *Braham* (1962), 62 S.R. (N.S.W.) 663 (*in banco*), which does not accord any meaning to s.42(d). The Taylor J. approach to s.43A was approved by Herron C.J. in *United Starr Bowkett Co-operative Building Society (No. 11) Ltd.* v. *Clyne* (1967), 68 S.R. (N.S.W.) 33 and apparently Barwick C.J. in *J. & H. Just (Holdings) Pty.* v. *Bank of New South Wales* (1971), 45 A.L.J.R. 625 at 629. The sufficiency of notice to deny priority is that degree required by *Hunt* v. *Luck*, [1902] 1 Ch. 428; *vide, Clyne* v. *Lowe* (1968), 69 S.R. (N.S.W.) 433.

44. *Vide*, note 42.

45. *E.g.*, *Turner* v. *Clark* (1909), 10 W.L.R. 25 (Sask. S.C., T.D.), and *Webb* v. *Hooper*, [1958] N.Z.L.R. 111.

Knowledge of a prior interest does involve knowledge that the interest may be defeated but this analysis equates mere knowledge with fraud and this does not accord with the general recognition, by the courts, that to find fraud in the "Torrens" system, there must be something further. Incidentally, it may prove more sensible to adopt the liberal approach to the notice that amounts to fraud if "immediate" indefeasibility is followed because it will circumscribe the rigours of that doctrine.

V. Alternatives for the Maritimes

It is submitted that the Maritimes might adopt one of three possible approaches to a system of "title by registration":

First, a "pure Torrens" system which would operate with the imperfections outlined above;

Secondly, a form of "title by registration" founded on the Prince Edward Island pilot study Act; or

Thirdly, some other land transfer system providing the benefits of the "Torrens" system but which, hopefully, would remedy the defects revealed in a "pure Torrens" system by litigation.

1. A "Pure Torrens" System for the Maritimes

The adoption of the present "Torrens" system in the Maritimes should only proceed after a detailed examination of the fundamental problems of that system and the first decision that must be reached is whether indefeasibility should be "deferred" or "immediate".

> Mr. Rouff suggests:
> . . . if according to the general law, it is wrong, or unjust, or impossible to recognize the registered proprietor as owner he may in suitable circumstance be deprived of his proprietorship through rectification. In that event, apart from factors like fraud, he becomes entitled to compensation.[46]

Would the adoption of this type of approach destroy the "Torrens" system? Where "deferred" indefeasibility has been preferred the answer to the question is in the negative. The logical foundation for justification of "deferred" indefeasibility is that a purchaser can

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46. T. Ruoff, ed., *Curtis and Ruoff on the Law and Practice of Registered Conveyancing* (2d ed. London; Stevens, 1965) at 78-79. The author indicated that protection should only be granted where an interest is acquired by a *bona fide* purchaser for value without notice.

more readily be compensated, in financial terms, than the deprived, "real" owner. Nevertheless, it is argued that this result will attack the conclusive nature of the register but, unfortunately, the register does not purport to be the sole record of interests in land. To this fact may be added a conclusive observation of the late J. Baalman that any reasonable demand for security would be met by "deferred" indefeasibility if a purchaser could assume that the propriety of his vendor's title was conclusively verified by the registration of his own dealing.[47] In fact, such an approach not only accords favourably with the common law but also with the opinions of the legal profession in the Maritimes.[48]

If indefeasibility is to be "immediate",[49] a liberal interpretation of the notice that is sufficient to amount to fraud is the only device available to obtain equitable relief and, then, only in a limited class of case where fraud and notice can be shown to be relevant.

It is submitted that certainty in the "Torrens" system would not be questioned if the ultimate power of disposition of property, in cases involving competing claims to indefeasibility, was left to the discretion of the court. Parties deprived of an interest, or deprived of the acquisition of an interest, should then be able to recover against the Assurance Fund if the court denied a right to possession of the property.[50] Recovery actions against the Fund, however, should not proceed in the courts but should commence by application to the Registrar or Master of Titles.

It is probable that the problems of indefeasibility could be curtailed if a different form of testing the identity of parties dealing with land was adopted. The present method has shown itself to be an instrument of fraud, particularly forgery. It has been suggested that the purchaser should ascertain that he is dealing with the registered proprietor. At least he should be required to verify the

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47. J. Baalman, *supra,* note 13 at 134.

48. These opinions were expressed in response to a survey conducted by the writer. *Cf.* T. Drummie, Q.C., who took the "immediate" approach, in a letter dated November 7, 1972. R. Blois, Q.C., at an interview, with the writer, preferred the "deferred" approach, November 15, 1972. *Vide,* the Ontario Law Reform Commission, *Report on Land Registration,* 1971, *supra,* note 5 at 27, which supports the approach accepted by the writer.

49. This result was supported by the Master of Titles for Prince Edward Island, Mr. I. McLeod, at an interview with the writer in Charlottetown, Friday, December 1, 1972.

50. Taylor, *supra,* note 25 at 252; G. Hinde, ed., *The New Zealand Torrens System: Centennial Essays* (Wellington: Butterworths, 1971) at 76-77.

transferor's signature. However, it may be argued that the most sensible result would be to place the duty of ascertaining a right to deal with property on the Registrar.

The position in England is that notice is given to the registered proprietor that an instrument is about to be registered. The registered proprietor then has a time in which he may object to the registration.[51] One commentator has written:

> . . . it appears that only one forgery in relation to documents registered at H.M. Land Registry has been successful; in that case the person not only forged the signature of the registered proprietor but murdered her.[52]

The English approach appears to offer a workable result to an almost insoluble problem.

A further fundamental problem to be considered in the present system is the inaccessibility of the Assurance Fund.[53] The view supporting protection of the Fund is that the State should not compensate a person who has not verified the *bona fides* of the party with whom he deals.

It is submitted that the Acts should give a right to compensation in *inter partes* dealings with assessment at the time the deprivation becomes apparent. Such an approach would make indefeasibility operate with equity. If the Assurance Fund were to operate in the Maritimes, in the restricted manner revealed in New South Wales,[54] it would not offer adequate protection or support to the new conveyancing system. However, in the Maritimes, Mr. Roberts has proposed a readily accessible fund.[55]

2. *The Prince Edward Island (Pilot Study) Act*

The Act implementing Phase III in Prince Edward Island[56] does not provide, directly, for indefeasibility of title in either form. Nor does

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51. H. Tebbutt, *Torrens System, Registration of Forged Transfer — Indefeasibility of Title of Registered Mortgagee* (1970), 44 A.L.J. 231.
52. *Id.* at 232.
53. Mr. Holmstead was of the opinion that the fund was so restricted that it would be "almost out of reach of any claimant however damnified". G. Holmstead, *Some Objections to the Torrens System* (1884), 4 C.L.T. 16 at 18. See also G. Hinde, *Torrens System — Effect of Registration of a Forged Instrument* (1968), 46 Can. Bar Rev. 304 at 313-314; I. McCall, *Indefeasibility Reexamined; Frazer v. Walker and Some of its Consequences* (1969-1970), 9 West. Aust. L. Rev. 324 at 343-347.
54. *Per* Street J. in *Mayer* v. *Coe* (1968), 88 W.N. (N.S.W.) (Eq.) 549 at 560.
55. W. Roberts, *supra*, note 5.
56. *Supra*, note 3.

it contain a provision to delimit the extent of notice that may amount to fraud.[57] In fact, it is doubtful whether any form of indefeasibility will be granted to a proprietor registered under this Act. It also appears that the whole of the common law of fraud and notice has been adopted.

In considering these questions, a noted authority, Victor DiCastri, wrote:

> A cursory examination appears to support the views you have expressed . . . Section 33 and 56 are troublesome: they fall short of an express declaration of indefeasibility and it would be interesting to know the intentions of the draftsman in this regard . . .
>
> While preambles to statutes are now the exception rather than the rule, this appears to be one case where a long title might have served a useful purpose in tending to show the object of the Legislation. Perhaps it was considered that "The Land Titles Act" was amply expressive of legislative intent.[58]

Professor Risk said:

> . . . I can not help remarking . . . that I suppose that the statute does give some degree of protection — the question may be, how much.[59]

These comments emphasize the inadequacy of the Act with respect to the fundamental concepts of indefeasibility, fraud and notice. If this Act is to be the one adopted throughout the Maritimes it is submitted that the security it will grant will be inadequate. The Act may prove to be a foundation for litigation if an "owner" is wrongfully deprived of his interest by fraud or forgery[60] unless it is interpreted along the lines suggested by DiCastri.[61]

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57. Mr. Innis MacLeod, Deputy Minister of the Executive Council, Nova Scotia, at an interview with the writer, Monday, November 20, 1972, was of the opinion that the new legislation should cover as many of the problems in the present systems as are apparent. The system should not be introduced with inbuilt ambiguities, he said.

58. Letter to the writer, dated October 13, 1972. The Master of Titles in Charlottetown expressed the urgent need for a review of this question: interview with the writer, Friday, December 1, 1972.

59. Letter dated October 25, 1972.

60. *Cf.* the dissenting judgment of Rinfret C.J.C. in *Turta's Case, supra,* note 19 at 9, which would likely prevail under the P.E.I. Act.

61. *Cf.* the position in British Columbia revealed by the decision in *Credit Foncier Franco-Canadien* v. *Bennett, supra,* note 36, and the *dictum* of McLaurin C.J.T.D. in *In re The Land Titles Act* (1952), 7 W.W.R. (N.S.) 46 at 48. His Lordship said, in referring to reliance placed on that certificate of title:

It is submitted that if the Prince Edward Island Act is to be adopted throughout the Maritimes, reliance could be placed on more than the top title to establish priority rights. The result would be little better than the present "registry" system: all that would be achieved would be a change from a grantor-grantee index to a parcel index and the principal purpose of the change would fail. In fact, it is submitted that it is doubtful whether the Act will grant any form of protection to an "owner" in its present form.

3. An Amended "Torrens" System

The remaining possibility is that the Maritimes might adopt legislation which would provide for another form of "title by registration". This question has been discussed in part when the amendments that could be made to the existing "Torrens" system were considered but will be elaborated upon.

Closely associated with indefeasibility is the consideration of interests that may or may not be notified on the register. It is here that many of the problems in the "Torrens" system arise. To keep the register simple, trusts and certain other stated interests may not be annotated to the register. Consequently, there may be outstanding interests which give rise to questions of fraud, notice and priority. It is submitted that the "simplicity" sought by the uncluttered register has not been achieved. In fact, in assessing questions of fraud and notice particularly, the cases reveal considerable confusion. It is, therefore, submitted that all interests in land should be registered.

A leading authority, S. R. Simpson, said:

> . . . from every point of view the prevention of error or fraud is infinitely to be preferred to any amount of indemnity.[62]

This view requires a consideration of two issues: first, whether a certificate of title, with evidentiary value, should be issued and, secondly, how the identity of the parties having a right to deal with the property should be ascertained.

> Any other view drives one to the proposition that no title can be relied on without a historical search back to the grant from the crown [*sic*]. That was certainly not the object of Torrens as far as virgin countries were concerned when this revolutionary and inexpensive scheme of titles to land was innovated.

62. *A Report on the Registration of Title to Land in the Federal Territory of Lagos*, by S. Simpson, 1957, at 33. Mr. Simpson has spent many years involved in a study of "title by registration".

It is submitted that documents evidencing the existing state of the register should not be issued if binding legal results flow from their existence. Nor should the documents have evidentiary value. It is because a certificate is issued with both of these characteristics that the frauds in the existing "Torrens" system have occurred. A system of "title by registration" would best be served, if "prevention of error or fraud" is one of the ultimate ends of the system, by the adoption of the approach stated.

To facilitate the prevention of error or fraud, a duty should be imposed upon the Registrar to ascertain whether the parties dealing with property are entitled to deal with that property. This approach would reduce, considerably, the perpetration of frauds. The verification of parties could be achieved or aided by affidavit or, as envisaged in the Maritimes, through the personal knowledge of each regional Registrar. However, any system that relied *solely* on the knowledge of the regional Registrar could be readily abused.

The principal concern of a revised "Torrens" system should be the manner in which the register itself is established. Simpson has suggested that the register should be drawn up on a debit-credit method. All interests affecting the proprietorship of land should be entered in either category.[63] Thus, for every title that holds a "credit" *(e.g.,* a dominant tenement of an easement), a title will have a "debit" *(i.e.,* the servient tenement over which the easement passes). In addition, each title to a piece of land would be constructed on this debit-credit basis. The title would contain the added rights that might be appurtenant to the land and it would also list those rights to which the property might be subject. The register could be divided into any number of compartments. However, Simpson has suggested that three would be adequate:

1. the property section — containing a brief description of the land or lease, together with particulars of its appurtenances and a reference to the registry map and sited plan;

2. the proprietorship section — containing the name and address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition; and

3. the encumbrances section — containing a note of *every* encumbrance and right affecting the land or lease.

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63. At a meeting with the writer in Halifax, October 26, 1972. *Cf.* R. Risk, *supra,* note 5 at 486 and Ontario Law Reform Commission, *Report on Land Registration,* 1971, *supra,* note 5 at 25 and 69.

The principal criticism of this all-encompassing register is the volume of work involved in its compilation and updating. However, much of this work load could be handled by the use of microfilm and the computer and, in fact, the overall plan in the Maritimes is to use as many scientific aids as possible.

The complete register presupposes that notice of its contents would be deemed to be had by all parties acquiring any interest in land. Consequently, many, if not all, of the problems relating to unregistered equitable interests in the present "Torrens" system could be avoided.

The approach outlined is not lacking in support. It has represented the law in Kenya for many years[64] and a similar result is to be found, in essence, in Nigeria and Hong Kong.

Where are the interests to be recorded? The plan in the Maritimes is to retain some of the existing regional registry offices for the recording of interests. The relationship between such offices and a central office and the problems created by retention and creation of regional offices generally have been considered in a recent article:

> The initial plan is to have only one centralized registry. This should enable easier recruitment and retention of qualified personnel. The English, who originally had only one registry office and who seemed to benefit thereby, have in the last several years opened numerous branch offices. As a consequence, many inconveniences have resulted from the mistakes of solicitors as to the appropriate office with which to deal in various matters. Otherwise, however, the problems are minimal. Nevertheless, it seems that the Scots would be well advised to use the centralized registry until sufficient personnel have been trained to permit efficient decentralization.[65]

These general reservations suggest two possible answers. First, the initial concern of the learned author, relating to the functions that may be carried out in the regional offices, would be overcome if each office could perform all activities relating to title. Secondly, the less experienced local offices could be supervised by the principal office through the computerization program. The control exercised by the central registry and the knowledge of the right to deal with property in the hands of the regional registrars would provide additional security of title. If adequate identity testing were implemented, few successful frauds could be perpetrated.

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64. *The Registered Land Act*, Kenya, 1964, c.300, s.32 (as amended).
65. T. Fiflis, *Security and Economy in Land Transactions: Some Suggestions from Scotland and England* (1968), 20 H.L.J. 171 at 194-195.

Moreover, the necessity for a large Assurance Fund would no longer exist as it would only have to provide for the limited frauds that might succeed within the envisaged system.

VI Implementation of the New System

The principal question to be determined on the adoption of a program that will meet the conveyancing needs of the Maritime Provinces is the method of implementing the new system of "title by registration". Mr. Roberts said:

> After two months of discussion . . . the committee were of opinion that a few basic facts should be emphasized during the study.
>
> Firstly, the experience of other Countries and Provinces in running two registry systems parallel to each other has shown that it takes generations, in fact, centuries for the new system to absorb the old system; thus we must have only one system.
>
> Secondly, in having only one system we must then have the capability of switching from the old to the new system of registration. In fact the old registry office must close at five o'clock one day and the land titles office open the following morning at nine o'clock with all titles recorded.[66]

The first question depends on the method of granting title under the new system. To obviate the necessity of two independent, concurrent, systems for a considerable number of years, there must be either (a) an upgrading of title from a basic common right to title, determined by a simple procedure; or, (b) a systematic search of existing titles to determine the rights of the present proprietor. If the second observation, made by Mr. Roberts, is to be operative, then, only one of the methods of acquisition of title will provide this result — the upgrading method. However, if upgrading is adopted, the protection provided by the register, against claims founded in "indefeasibility", "fraud" and "notice", will not be available to the holder of a certificate until his title has gone through the upgrading procedure.

The initial title in the upgrading program proposed in Prince Edward Island is to be issued on the basis of occupation and payment of taxes.[67] Outstanding interests not revealed by this

66. W. Roberts, unpublished paper, January or February, 1969 at 7-8. *Cf.* the Agreement between the Council of Maritime Premiers and the Government of Canada, *supra,* note 1 at paragraph 3 (3), Appendix "A", which seems to contemplate a considerably longer period for full implementation of Phase III.

67. It is proposed that, at the change-over, the new system will completely replace

method will be concluded by limitation of actions, with compensation to those wrongfully deprived of an interest in land.

It is submitted that the upgrading method of granting indefeasible title is inequitable. Rights which were enforceable before the introduction of the new system may become unenforceable and converted into an assessment against the Assurance Fund. Rather than test the validity of present rights, the proposed method may destroy such rights. The only solace to a deprived proprietor will be a financial payment for the act of statutory expropriation. This approach will place many proprietary rights in jeopardy of obliteration because the validity of a claim may not be tested within the upgrading period. It is further submitted that this form of compensated expropriation cannot be justified by an argument of efficiency. "Efficiency", alone, does not commend the upgrading approach. It is only necessary to call to mind the number of dowable interests, together with the errors that will be inevitable in a program such as is envisaged if the tests of proprietorship suggested by Mr. Roberts are accepted, to see that the possible multiplicity of claims for compensation could be astronomical.

The principal argument against systematic searching of title was expressed by Mr. Roberts, when he said:

> . . . if we search every title in New Brunswick, it would take every lawyer in New Brunswick 12 years . . .[68]

It is submitted that outright rejection of systematized searching on this basis should not be supported.

The program in the Maritimes is to be concluded within ten years. This, it is submitted, is too short a time to permit recognition and testing of claims adverse to the presumptive indefeasible title granted on the basis proposed for the Maritimes. Simpson has suggested twenty years.[69]

This whole approach was rejected by the Ontario Law Reform Commission[70] and was criticized by Professor Risk.[71] The learned author also criticized the proposal against making searches of title in the following terms:

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the old subject to the upgrading of the registered proprietor's title from the initial title to a fully indefeasible title.

68. *Supra,* note 5.

69. S. Simpson, *supra,* note 62 at 27.

70. Ontario Law Reform Commission, *Report on Land Registration,* 1971, *supra,* note 5, at 77, because ". . . in the Commission's view [it] was too complex".

71. R. Risk, *supra,* note 5 at 490.

> Another possibility is to make tentative affirmations that will become effective in some shorter time, perhaps five years, but searches would have to be made to enable these affirmations to be made, and the savings of making these searches would be negligible.[72]

In fact, it has been said that the program in the Maritimes is "using a sledge hammer to crack a nut".[73]

It is submitted that the least unpalatable of the alternatives open, within the style of upgrading, would be one based on the principle of adverse possession provided that title would not become operative for approximately twenty years. Such an approach should be accompanied by adequate notice to landholders, together with all possible interest holders in the subject land, to give them the right to have the validity of their claim tested by the existing law. But even this method would entail considerable insecurity of present rights and interests because of the precarious nature of claims until the period of possession had run.

A most effective method of conversion has been suggested by the Ontario Law Reform Commission. The Commission said:

> The Commission concludes that the major procedure for making the initial affirmation of title should be by conversion of all the parcels in specified areas, and so recommends. The alternative of conversion of individual parcels at the time of sale or mortgage should be used as a supplement.[74]

It is submitted that the opinion of the Commission should form the basic approach in the Maritime Provinces. The introduction of the new system on this basis would not depend on any form of expropriation. However, the alternative employed by the Commission of ". . . conversion of individual parcels at the time of sale or mortgage . . ." as a supplement would, it is submitted, prove to be the most effective means of introducing the new system if it proceeded on an area by area conversion program. Such an approach could be handled, logistically, by a relatively small staff.

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72. *Id.* The Master of Titles for Prince Edward Island, Mr. I. McLeod, completely disagreed with the approach proposed by Mr. Roberts. He expressed agreement with the opinion that all titles would eventually have to be searched in using the upgrading method. A similar opinion was expressed by Mr. I. MacLeod, Deputy Minister of the Executive Council, Nova Scotia.

73. Mr. S. R. Simpson, at the interview with the writer, in Halifax, October 26, 1972.

74. Ontario Law Reform Commission, *Report on Land Registration*, 1971, *supra*, note 5 at 68.

It has been suggested that, first, all land mortgaged should be converted.[75] When the staff had completed this step, it would next turn to conveyances and then complete the remainder — land not mortgaged or conveyed.[76]

The advantage of this approach is that, in each case, a search of the existing title would have been performed in the normal manner. The benefits from the search of existing titles would satisfy both the holders of interests and the governments of the Maritime Provinces. The former would have their interests safeguarded by the existing law and the latter could not be met with a large demand on the Assurance Fund. The relative simplicity of the program outlined suggests that it is regrettable that Prince Edward Island has pursued the upgrading method, a method so clearly rejected by the Ontario Commission.

It is submitted that this alternative method of implementation could accommodate any form of "Torrens" system or any other form of "registered title" or "title by registration".

On the question of exclusive use of any new system, it should be noted that the Ontario Law Reform Commission agreed with Mr. Roberts' view[77] that there should only be one system in operation at a time. It said:

> The savings from the exclusive use of a land titles system are large enough to justify the cost of conversion. It is, in effect, a good investment.[78]

However, this opinion does not mean that there will not be a period of transition which will involve the operation of a dual system. To hold otherwise would be inconsistent with the tenor of the Report.

It is universally accepted that voluntary conversion is not successful. For example, Mr. Priddle says:

> Having had several years' experience in the Land Titles Office . . . I was conversant with both systems of registration, and became increasingly of the view that not only *was* the Land Titles system fundamentally the better, but also that we could never hope to extend that system to all patented land in [Ontario] on the basis of individual voluntary applications.[79]

75. Mr. I. MacLeod, Deputy Minister of the Executive Council, Nova Scotia, at the interview with the writer, in Halifax, October 26, 1972.

76. If any defect of title were found and could not be cured, conversion would be subject to the right, or rights, involved.

77. *Supra*, note 66.

78. *Supra*, note 5 at 23.

79. R. Priddle, *New Requirements and Procedures in Land Titles and Registry Offices*, [1970] L.S.U.C. Special Lecture Series 353 at 359.

Therefore, to accommodate the program of conversion which would be consistent with that set forward in this paper, there would have to be a period where the two systems operated concurrently on a Provincial, as distinct from an area, basis.

VII. Computerization of Title

It is proposed that a computer will be used in the administration of the changeover to the new system and that title will be "computerized", whatever this expression may imply within the Maritime context. The reason was stated in a recent article as follows:

> A computer system is being considered because of its speed and dependability in processing records.[80]

Mr. Roberts added:

> In their interim [*sic*] report, the Committee was of the opinion that the use of a computer would allow for an uninterrupted switch from the old system to the new and further that a computer based land titles system is feasible.[81]

In the changeover period, it is arguable that only the computer would be adequate to the task of gathering all the taxation and occupation information for the issue of the proposed initial title. However, assuming the computer to be of use in the gathering of information, it is difficult to justify its use in the upgrading procedure because all titles would be upgraded automatically and would be in the same relative position so far as title *qua* title was concerned.

The second principal function of the computer, in the Maritime Provinces, will be to record title but this raises several problems. Computerization of title was sanctioned by the Ontario Law Reform Commission[82] reluctantly and Professor Risk warned against electronic drama with respect to Ontario in the following comments which are equally applicable to the Maritime Provinces:

> The drama of electronic technology must not be permitted to obscure more modest improvements in the management of records. The storage, retrieval, and reproduction of documents

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80. C. Carlin, *Program Development for a Computer Based Land Titles System* (1971), 25 Canadian Surveyor 188.
81. W. Roberts, *supra*, note 7.
82. Ontario Law Reform Commission, *Report on Land Registration*, 1971, *supra*, note 5 at 61. The Commission had numerous reservations. See the report at 60-61.

can be improved by using modern storage, microfilm, and reproduction equipment.[83]

In the Maritimes, those implementing the new scheme do not see the computer in the role of giving total evidence of title but, rather, as giving details of the major points of proprietorship. That is to say, in addition to the documentation required by the Acts, the computer will be interposed as a source of information relating to title generally.[84] As the computer will not purport to reflect, in enforceable terms, the true state of the register, it is submitted that it will only provide a further avenue for error in the titles office. Such a usage of the computer will not simplify the lawyer's work at all but will merely add a further complication to an already confused position.

If the computer could be used as a repository to give notice of *all* relevant interests in land, it would add substantially to both the ease with which the system could be used and to the security of title provided by the system by eliminating the need to search a title anywhere but in the printout of a particular title. However, it appears that the cost involved in its use this way would be prohibitive.

It is submitted that the computerization program with respect to Phase III is redundant but this is not to say that it will be of no value within the other proposed Phases of the overall plan.

VIII. Conclusion

If the ordinary "Torrens" system which operates in Australasia and some Canadian Provinces is to be introduced into the Maritimes, the confusions revealed in those jurisdictions will be proliferated. If the amended system is introduced, some of the defects will be circumscribed. However, whichever of the schemes is adopted, careful drafting and constant review of the system, in the light of litigation, will be critical to its efficient operation. The retention of orginal words, at any cost, has caused, and will continue to cause confusion, difficulty and hardship to proprietors — those for whom Torrens introduced his concept of "title by registration".

The complexity of the problem confronting the Maritime

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83. R. Risk, *supra,* note 5 at 482.
84. Outlined by Mr. Carlin, at an interview with the writer, in Halifax, on October 19, 1972.

Provinces is enormous. With respect to land generally, the Ontario Law Reform Commission observed:

> Land is a basic resource in any society and community. Any serious study of the means by which interests in it are to be acquired, secured and transferred is inevitably a lengthy and complex undertaking which requires the fullest consultation with large numbers of experienced personnel involved in the administration and use of the existing system.[85]

With this fundamental analysis in mind, the program cannot proceed to a completion of Phase III without a consideration of such fundamental questions as "indefeasibility", fraud and notice, methods of implementation, conversion, retrieval and recording of information relating to title.

(*Note:* Since this article was written some of the criticisms detailed by Robert Stein have been recognized and new approaches are going to be adopted, according to Charles W. MacIntosh, Q.C., Counsel to the Land Registration and Information Service.

Mr. MacIntosh also reports that the Prince Edward Island Land Titles Act, discussed by the author, will never be proclaimed because of the present proposals of the LRIS. Among those proposals is that there will be indefeasibility of title, a provision not included in the Prince Edward Island Act.

The LRIS is also planning a systematic search of all land titles and this will hopefully resolve some of the problems detailed by the author. Finally, the LRIS is of the opinion that the use of abbreviated and symbolic forms will make computerization feasible.).

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85. Ontario Law Reform Commission, *Report on Land Registration*, 1971, *supra*, note 5 at 85.