LAND AND TITLE IN MANITOBA

A Registrar's Perspective

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The goal of this paper is to capture in one location the knowledge that I have assembled in the twenty-six years that I have been a District Registrar with the Manitoba Land Titles System. It is my hope that those grappling with land related issues in Manitoba can benefit from my research and knowledge, using these materials as a starting position for their own analysis.

This document is intended to be neither a scholarly analysis of legal theory nor a complete summary of Manitoba's history. And while it touches very briefly on historical matters and ancient law, I present them only to provide context; there are far better sources available for both topics.

One of the chief frustrations that I have had over my career has been the vast body of knowledge that my predecessors obviously had, knowledge that they took for granted, and knowledge that has been lost to me through their retirements. In many ways, what I have attempted to do with this paper is to recapture some of that knowledge so that I can pass it down to those who come after me.

It is important to highlight the fact that this paper is not the work of one person. In preparing it, I have had the benefit of a myriad of discussions with the other land titles District and Deputy District Registrars. Our discussions have been challenging and have tested (and often changed) my own conclusions. I attribute this to the intellectual rigour and integrity of my land titles colleagues.

I also owe a debt to those educators and those members of the bar who have been generous with their own reflections. Furthermore, it is crucial to note that I have also been uniquely placed to exchange thoughts and ideas with members of the survey community of Manitoba, including various Examiners and Deputy Examiners of Survey. Knowledgeable professionals, surveyors possess an important perspective and I have been fortunate enough to have drawn upon their expertise on a regular basis throughout my career.

Last of all, I would be remiss if I did not mention the wisdom and insights that have been shared with me throughout my career by the document processing staff working in the Manitoba Land Titles System. Old system clerks, document examiners, surveys staff, team leaders, paralegals, assistant district registrars and on and on. These are the people more often than not who helped me to discover what we used to do, and why we did it. They are the ones who remembered the past and had copies of ancient Registrar-General memos and letters. And they were and continue to be instrumental in my understanding of our clients and our business, helping me to understand what it is that we need to do as we move into the future.

As you read this document, you will find mistakes; you will see gaps in my understanding, research, or both. I would be very appreciative if you could share these observations with me.

Thanks very much!

Russell Davidson
November 15, 2022

LAND AND TITLE IN MANITOBA

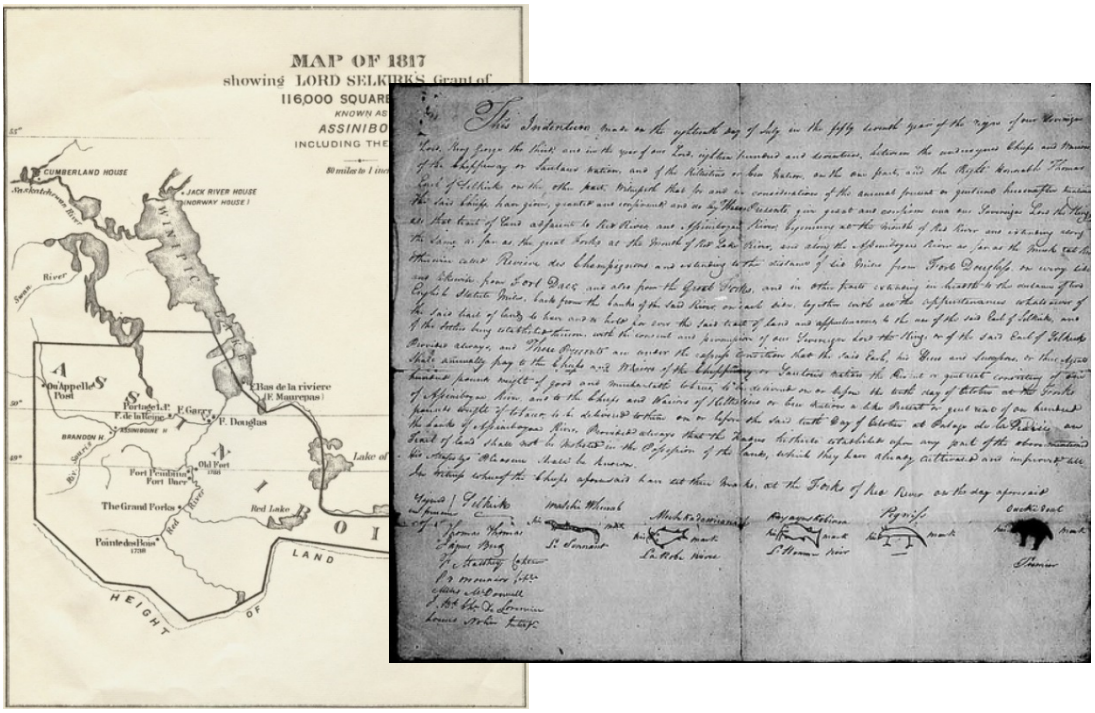
A. MANITOBA ENTERS CONFEDERATION

COLONIZATION

- King Charles II of England granted the charter that established The Governor and Company of Adventurers of England Trading into Hudson's Bay in 1670.

- The charter granted control/sovereignty to the Company over the lands draining into the Hudson's Bay. These lands became known as Rupert's Land, after Prince Rupert of the Rhine, nephew of Charles I, cousin of King Charles II and the first Governor of the Hudson's Bay Company.

- Responding to the tragic conditions of the Crofters dispossessed during "The Clearances" in Scotland, Thomas Douglas, Fifth Earl of Selkirk (Lord Selkirk), was determined to set up an agricultural colony in Rupert's Land. Following the acquisition of a large amount of stock in the Hudson's Bay Company by the Lord Selkirk and his brothers-in law, he purchased of the District of Assiniboia from the Company for the tidy sum of ten shillings. On June 12, 1811, the District of Assiniboia (the Selkirk Concession) was ceded by the Hudson's Bay Company to Lord Selkirk.



- On July 18, 1817 the Selkirk Treaty was signed between the Lord Selkirk and the indigenous leaders (Chippawa or Saulteaux and Killistine or Cree Nations) at Red River following Selkirk's purchase for the purpose of "extinguishing Indian Title" in certain of the lands that he had acquired for his settlement. The payment to each nation was 100 pounds of tobacco annually.

- In 1834, the Sixth Earl of Selkirk conveyed the Selkirk Concession back to the Hudson's Bay Company, less the lands deeded in the interim to settlers.

- By virtue of the by Deed of Surrender executed November 19, 1869, the Canadian Government (through the British Crown) acquired Rupert's Land from the Hudson's Bay Company. It was acquired for £300,000 together with the right to one twentieth of the surveyed lands in the "fertile belt" of Canada.[1]

- Anticipating this acquisition, the Government of Canada sent surveyors into the Red River Colony in preparation for further settlement. This was carried out without clear communication to those already in occupation of the lands, leaving existing settlers fearful that they would lose their homes and farms. This was particularly true of the Métis people who did not possess clear title to their lands. This survey was one of the chief triggers of the Red River Rebellion.

- Ultimately, transfer of control of the lands from the Hudson's Bay Company to the Government of Canada was accomplished by an enactment by the British Parliament.[2]

ANNO TRICESIMO PRIMO ET TRICESIMO-SECUNDO

VICTORIÆ REGINÆ.

CAP. CV.

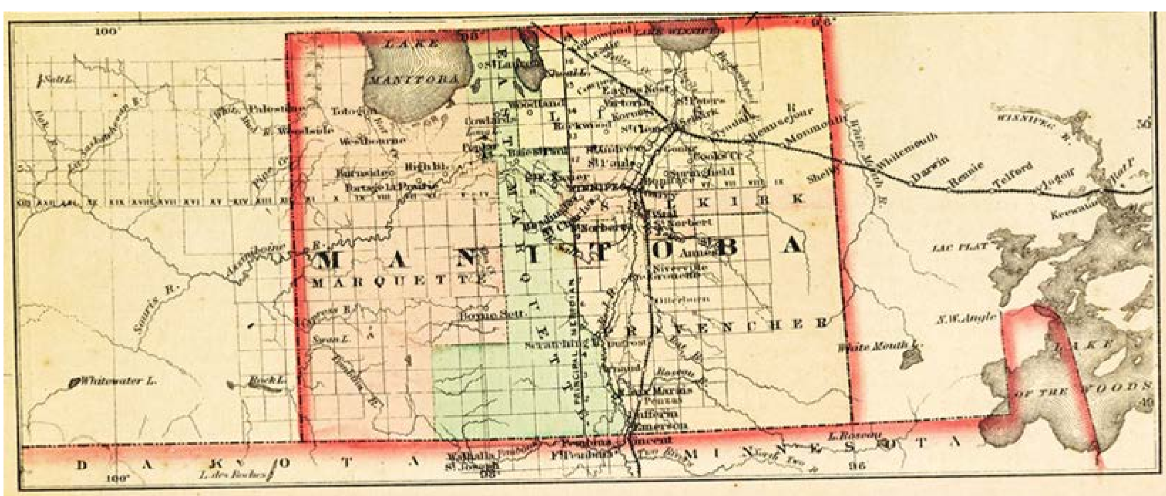
An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of *England* trading into *Hudson's Bay*," and for admitting the same into the Dominion of *Canada*.

[31st July, 1868.]

WHEREAS by certain Letters Patent granted by His late Majesty King *Charles* the Second in the Twenty-second Year of His Reign, certain Persons therein named were incorporated by the Name of "The Governor and Company of Adventurers of *England* trading into *Hudson's Bay*," and certain Lands and Territories, Rights of Government, and other Rights, Privileges, Liberties, Franchises, Powers and Authorities, were thereby granted or purported to be granted to the said Governor and Company in His Majesty's Dominions in *North America*: Recital of Charter of Hudson's Bay Company, 22 Car. 2.

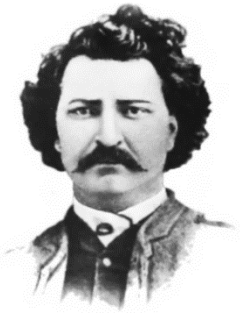
BIRTH OF A PROVINCE

- The Province of Manitoba was created in 1870 by legislation passed by the Government of Canada.[3]



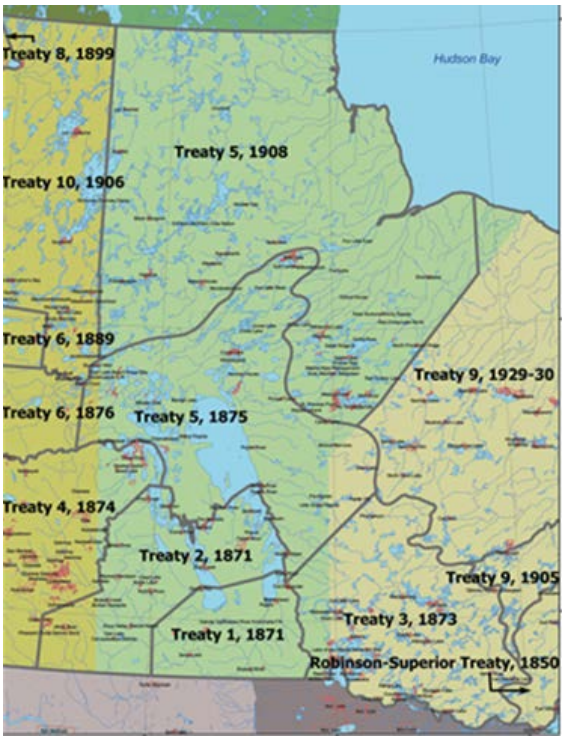
- Manitoba officially became a Canadian Province July 15, 1870. The "postage stamp" province!

- Responding to the concerns raised during the Red River Rebellion by Louis Riel and Abbé Joseph-Noël Ritchot (among others) raised, the *Manitoba Act* addressed both the existing land ownership rights as well as Métis land rights in land in the new province.



- *The Manitoba Act*:
  - Contemplated the allocation of 1.4 million acres to the children of the Métis people.[4]
  - Provided that all grants of land and interests in land made by the Hudson's Bay Company up to March 8th 1869 and all persons in occupancy of lands whose occupancy is sanctioned by the Company were to have their ownership confirmed by grants from the Crown.[5]

- The surrender by the Company was insufficient to give Canada absolute title to these lands; the rights of the indigenous peoples continued. Through a series of treaties, their leaders ceded the lands in Manitoba (and elsewhere in Canada) to the Government of Canada.



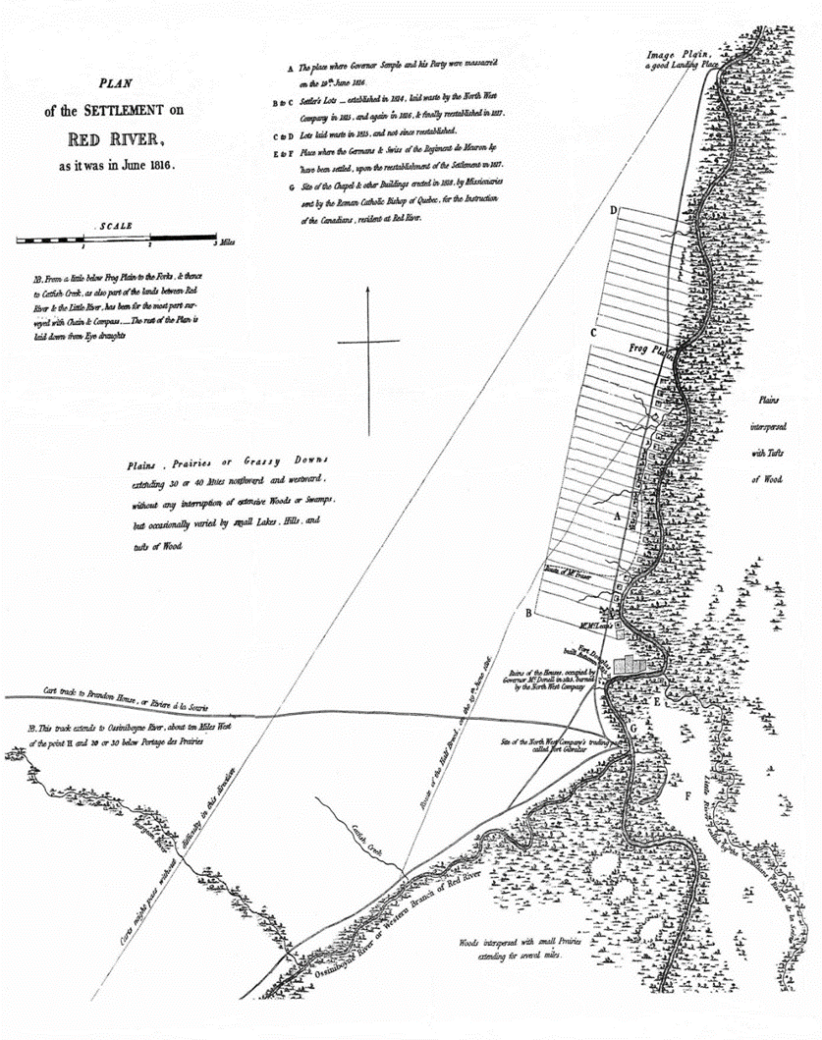
- These ancient rights were ceded in exchange for certain promises made by the Canadian government, which included (among other things), the promises of reserve lands, of schools on reserves and the preservation of hunting and fishing rights.

B. SURVEYS AND THE DESCRIPTION OF LAND

SURVEY HISTORY

- By the time Manitoba entered confederation much of the land along the Red and Assiniboine Rivers had been surveyed and conveyed:

    1. Lord Selkirk directed the first subdivision in 1814, following his purchase of the Assiniboine lands from the Hudson's Bay Company (HBC). The resulting plan by Peter Fidler, a surveyor for HBC, established 36 lots along the Red River. This was the basis for the river lot system in Manitoba.



    2. In 1835, following the re-purchase of the settlement by the Hudson's Bay Company (HBC) the HBC initiated a general survey of the colony, hiring George Taylor. This survey re-established existing lots while also apportioned new ones, recognizing changes of ownership and boundaries that had taken place as a result of sales between the colonists.

- Upon Manitoba entering the Dominion, the Dominion government initiated general surveys of Manitoba and of the Northwest Territories. The plans resulting from these surveys are collectively called the "original Dominion government surveys".

- The Dominion government survey (DGS):

    1. Re-established and again reconfigured the lots in the HBC survey;

    2. Subdivided the large HBC plan into smaller parish allotments;

    3. Developed the parish system south to the international boundary and further west to Portage la Prairie; and

    4. Established the township system (see below).

THE PARISH (RIVER LOT) SYSTEM

- The river lot system recognises the fundamental importance of rivers for early settlers, both as a source of water and for transportation.

- In a river lot system, the lands are divided up into long narrow strips that run perpendicular to the river. Typically the lot stretched back 2 miles.

- The first roads were built near and parallel to the river and were known as the River Roads.

- Another road was typically established at the two mile limit, known as the two mile road.

- Stretching back a further two miles was a second lot, sometimes called a hay lot. This is the outer two mile lot.

- River Lots were grouped into so-called parishes, including St. Vital, St. Peter, St. Paul, St. John and St. James.

- A certificate of title for land in the river lot system will:

    1. Identify whether the lot is a river lot or an out two mile lot using RL or OTM;

    2. State the lot number; and

    3. Identify in which parish the lot is located.


PLAN OF
RIVER LOTS IN THE PARISHES
— OF —
ST JOHN, ST JAMES
— AND —
ST BONIFACE
PROVINCE OF MANITOBA.
Scale of Chains
(REDUCED COPY.)
Examined and Certified
(Sd) A. H. Whitcher
Inspector of Surveys.
Dominion Lands Survey Office,
WINNIPEG
April 1874
Surveyed by
(Sd) Duncan Sinclair
(Sd) Geo. A. Phillips
Deputy Surveyors
PARISH OF ST JOHN
PARISH OF ST JAMES
PARISH OF ST BONIFACE
Explanation of Colours
Dominion Lands Office,
OTTAWA,
1st January 1875
Surveyor General

THE TOWNSHIP SYSTEM

Origin

- Enacted in 1872, the *Dominion Lands Act*[6] established the legal framework for what we refer to as the survey fabric in the Province of Manitoba.

- The Act directed that what was then called Manitoba and the North-West Territories (and is now Manitoba) and was not covered by the parish lot system be surveyed into a grid with survey monumentation physically marking the grid on the land. This survey was part of the Dominion Government Survey (DGS).

Township System Described

- The grid that forms the basis of the township system is created by a series of lines running north/south and another series of lines running east/west.

- The lines running north/south are spaced slightly more than six miles apart and run parallel to a north south line known by several names including the *prime meridian*, the *first meridian* and the *principal meridian*. The columns created by these north/south lines are known as *ranges*.

- The two ranges on either side of the prime meridian are numbered as '1', and further identified as being either east or west of the principal meridian (shortened to EPM or WPM).

- A monument commemorating the planting of the first post was erected just off the Trans-Canada highway near Headingley.

- The lines running east/west are also spaced slightly more than six miles apart and run parallel to each other and to the baseline, which is the US border. The rows created by these lines are called *townships*. The row of townships immediately to the north of the border is numbered '1' and the numbers increase as one moves north.

- The individual squares in the grid created by these parallel lines are slightly more than 6 miles x 6 miles and are also known as *townships*.

- These individual townships are identified by their township and range.

The 6 mile x 6 mile Townships

- Each township square is divided into 36 one mile x one mile squares called *sections*.

- These sections don't actually touch one another; they are separated on all sides by 99 feet set aside for roads. These are called the *road allowances* or *Dominion Government Road Allowances.*

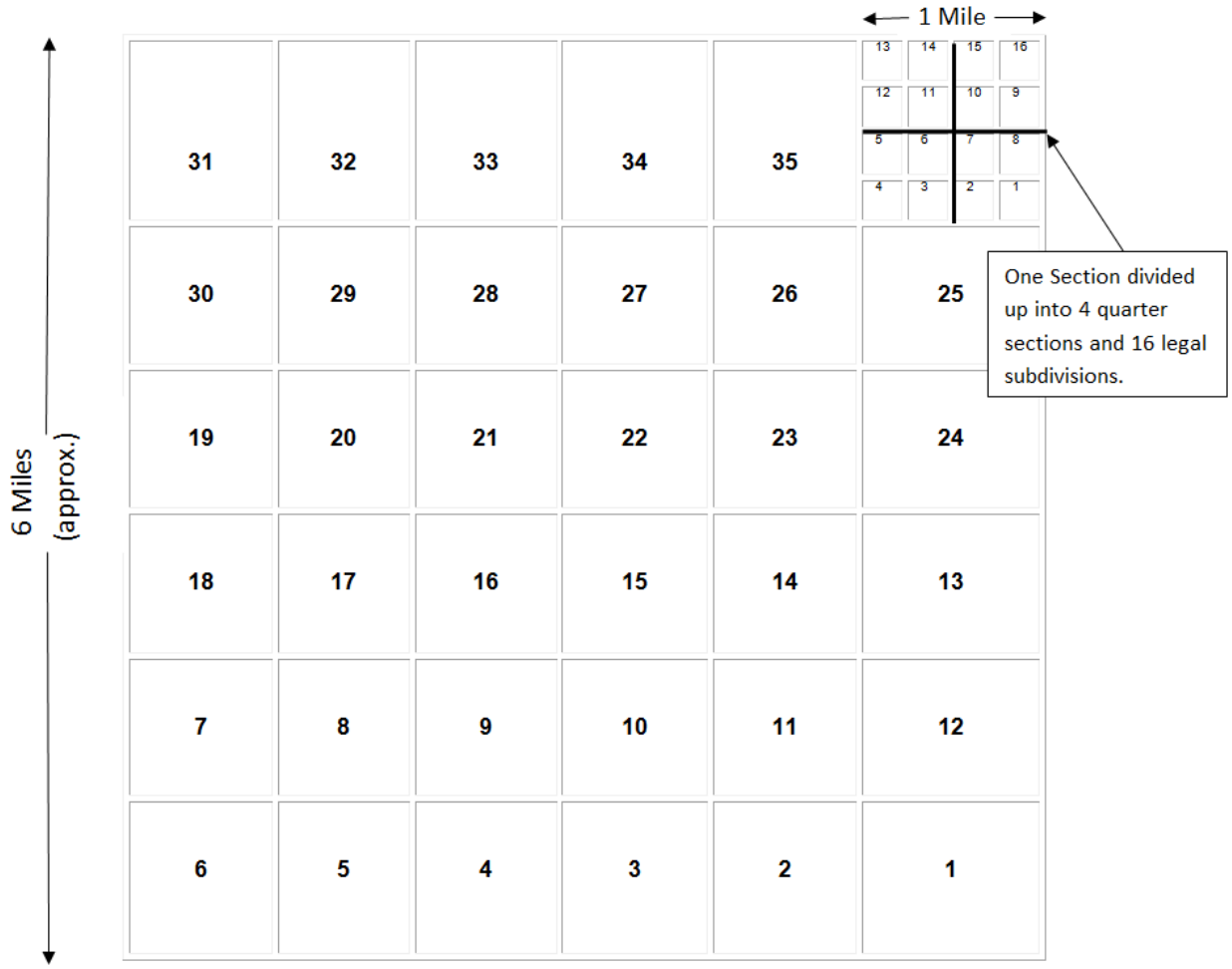
- Each section is again divided into four 1/2 mile x 1/2 mile squares called *quarter sections*. Theoretically these quarter sections contained 160 acres.

- Each quarter section can be further divided into four smaller squares called *legal subdivisions*. These legal subdivisions contain 40 acres and in theory measure 1320 feet on either side.

- The sections in a township are numbered starting from the bottom right. The numbering snakes upward, initially going left from the bottom right starting position.

- The quarter sections are described by their location in the section. NW, SW, NE, SE.

- The legal subdivisions snake through the section in the same manner as the sections snake thought the township, also starting in the bottom right. There are a total of 16 legal subdivisions in each section.

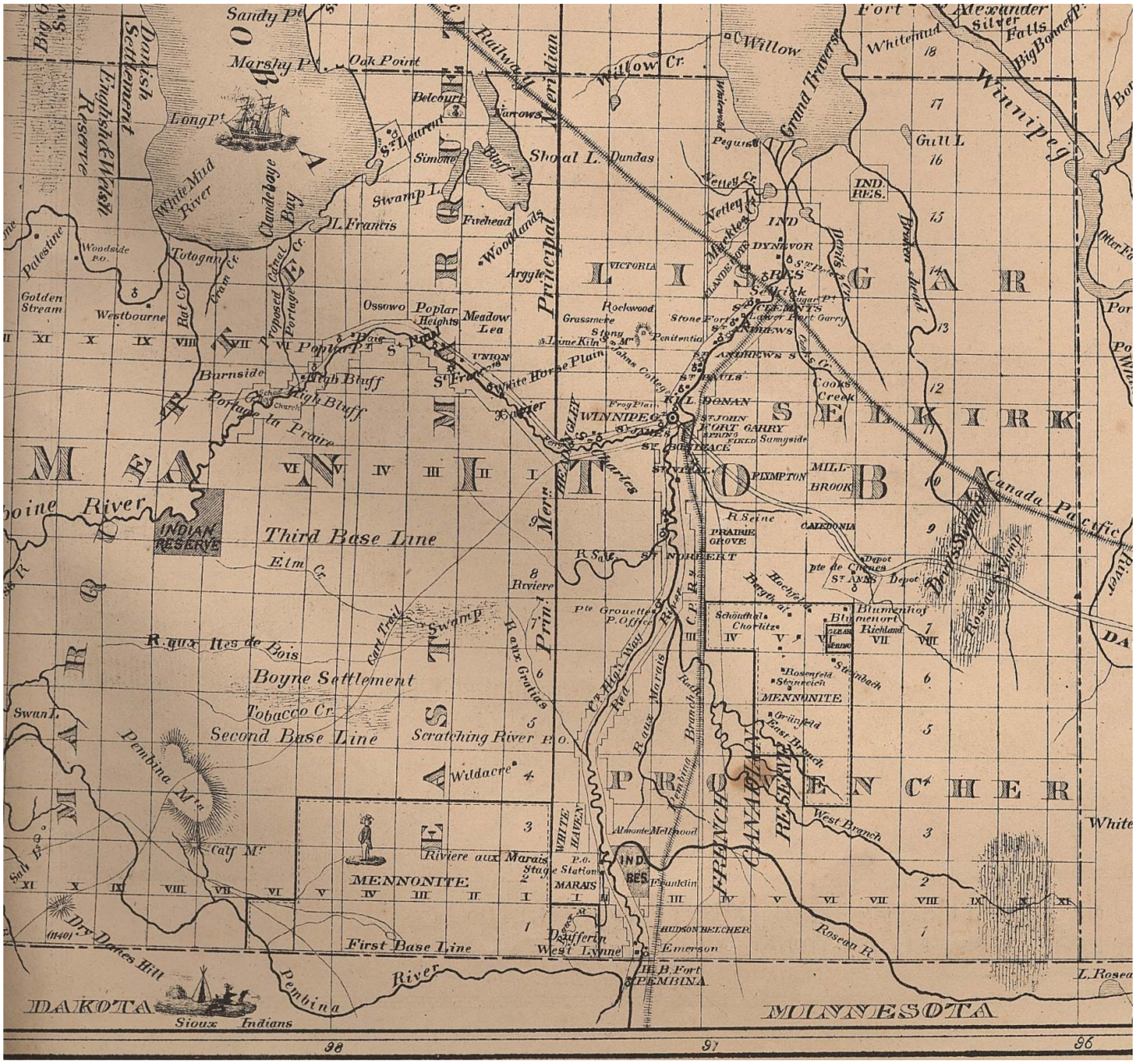


- The intent of the township survey was that any piece of land, once surveyed, could be located using a set of co-ordinates, and an individual quarter section is identified by a reference to all of the above.

  Example: If one owned the north westerly quarter section in the top right section in the township that was immediately adjacent to the US border and was immediately east of the principal meridian it would be identified as:

  North West Quarter of section 36, township one, range one, east of the principal meridian. Or more simply: NW ¼ 36-1-1 EPM.

- It is important to be cognisant of the fact that the Dominion Government Survey was done using 19th century technology (massive metal chains 66’ long, wooden stakes, in some cases pits and mounds) and as a result, given the challenges of topography, weather and temperature change, some quarter sections are not exactly 160 acres.



THE FURTHER SUBDIVISION OF RIVER LOTS AND QUARTER SECTIONS

- As one would expect, the massive river lots and quarter sections do not suit the needs of everyone. In particular, many people want much smaller pieces of land.

- Since the time of the very first surveys, people have been adjusting the borders of their lands.

- The process of taking a large piece of land and cutting it into smaller pieces is known as subdividing the lands.

- The subdivision process can involve the division of a piece of land into the smaller parts that are described using words. This is often called a 'metes and bounds' description. An example would be the splitting of the NW ¼ 36-1-1 EPM into an east and a west half. The resulting parcels could be described as follows:

  The easterly 1320 feet in perpendicular width of NW ¼ 36-1-1 EPM; and
  NW ¼ 36-1-1 EPM excepting thereout the easterly 1320 feet in perpendicular width.

Subdivision by Plan

- Subdivision can also take place by the registration of a plan of subdivision. This was the norm for multi-lot splits and is now the norm for virtually all subdivisions.

- In a plan of subdivision, the affected lands will be divided into lots, and where there are a large number of lots, the lots will be grouped by blocks.

- A Lot in a plan of subdivision will be described with reference to the lot, the block (if any), the Plan number, and the Land Titles office with jurisdiction over the lands in question (there are six offices). The description will also include the legal description of the underlying survey fabric (either the river lot or the quarter section from the Dominion Government Survey).

  - So, a subdivision in the above noted quarter section might produce the following: Lot 1, Block 1, Plan 42345 WLTO in NW ¼ 36-1-1 EPM, where the W in WLTO refers to the Winnipeg Land Titles Office.

  - And a subdivision in the outer two mile lot in a parish might look like: Lot 1 Plan 35639 WLTO in OTM 6 Parish of St. John.

Condominiums

- A condominium is another method for dividing up and parcelling off a particular piece of land and the rights associated with that land.

- Condominiums are created by the registration of a constituting document called a Condominium Declaration accompanied by a surveyed plan called a Condominium Plan and by the initial bylaw for the condominium project.

- When a condominium is created the land will be divided up into some parts that will be owned by persons individually and parts that will be owned by the unit owners in common

- The most common example is the apartment building style project where a building, and the lands upon which it is situate, are divided up.

- The parts to be owned individually (the actual apartments) are called units.

- Those parts owned in common (the halls, elevators, roof, grounds, exterior of the building, parking facilities, recreational facilities) are called the common elements.

- By owned in common the Act means owned by all of the owners of the individual units.

- On the registration of the declaration, titles will issue into the developer's name for the units, together with the associated share of the common elements. A typical title will not show the underlying survey fabric. Here is a sample:

  UNIT 1 CONDOMINIUM PLAN 41440 WLTO TOGETHER WITH AN UNDIVIDED 1.443075% INTEREST IN THE COMMON ELEMENTS AS APPURTENANT THERETO SUBJECT TO ALL ENTRIES SET OUT ON THE TITLE OF WINNIPEG CONDOMINIUM CORPORATION NO. 450.

- As well as dividing the land into units and common elements, the registration of the Condominium Plan, Declaration and bylaws creates an entity known as the Condominium Corporation. It will govern the affairs of the condominium. These corporations are governed by *The Condominium Act* and not *The Corporation Act* and are not registered with the Companies Office.[7]

- In addition to issuing the titles for all the units (which will include all of the common elements collectively), Land Titles also issues a title into the name of the Condominium Corporation.[8] This title is referred to generally as the holding title. It is a completely unique title in that it contains absolutely no land! Because there is no land in this title, the district registrar will not register charges and other encumbrances (other than certain notices under *The Condominium Act*) against this title.

- A less common type of condominium is the bare land condominium. This type of development resembles very closely a plan of subdivision, but instead of creating streets and lanes, the plan created drives and walkways, which are owned in common by the unit owners. In certain situations a developer may choose to build buildings (such as townhouses) on the bare land units prior to sale.

- Condominiums can be composed of a combination of both standard and bare land units.

- Where a condominium developer wishes to develop a condominium project in stages, this can be done. These developments are referred to as phased developments and there are special provisions in *The Condominium Act* that allow for and regulate these developments.

- It is noteworthy that despite not owning any of the condominium lands, including the common elements, a condominium corporation can grant leases and easements over the common elements where they have been authorized to do so by a bylaw of the corporation.[9]

- The affairs of condominium corporations are governed by the constituting declaration, the initial bylaw and by subsequent bylaws and amendments to the declaration and bylaws. A document called a change agreement can also be prepared to allow a unit owner to make improvements or other changes to the common elements (including improvements or changes to exclusive common elements).

- It is important to be aware of the fact that, by operation of *The Condominium Act* most condominium documents are effective only once they have been registered at a land titles office.[10]

PLAN TYPES IN USE AT LAND TITLES

- A myriad of plan types are in regular use at the land titles offices in Manitoba. Each plan type has unique features, requirements and effects. The following is a brief summary of each plan type.

Plans of Subdivision[11]

- As noted above, plans of subdivision are used to divide and reconfigure existing pieces of land. Upon registration, plans of subdivision create new legal boundaries that can be used by land titles for title issuing purposes.

- Subdivision plans must be signed by the registered owners of all the affected land. Because ownership can change in the series of documents accompanying a plan of subdivision, it is important when determining who must sign the plan to pay attention to any changes in ownership caused by documents registered prior in series to the plan.

- Lands identified on plans of subdivision as streets, lanes, public reserves or crown reserves are dedicated to and title issues into the name of the Crown or the relevant municipal government upon the filing of the plan at land titles. These titles issue clear of all encumbrances (save and except for pipeline easements) and as such the plan has the effect of discharging the encumbrances from those lands.

- Because the dedication of lands for public use will remove encumbrances automatically, and without the need for a discharge, in addition to the registered owner, the plan must be signed by the holder of those encumbrances.

Obsolete Plans of Subdivision[12]

- By by-law, municipalities in Manitoba, including the City of Winnipeg, have the ability to declare that a plan of subdivision is obsolete.

- When a plan of subdivision is declared obsolete it is no longer a plan of subdivision. Accordingly, the lots shown on the plan are no longer whole lots in a registered plan of subdivision for the purposes of *The City of Winnipeg Charter* and *The Planning Act*.[13]

- Because they are no longer lots in a plan of subdivision, where these lots are titled with other lands and they are contiguous with them (touch them), subdivision approval must be obtained before these lots can be split apart. This approval is required in all circumstances, including where the other lands are another lot in the same plan or a whole lot in a valid plan of subdivision.

- The act of declaring a plan obsolete has no effect on the dedication of lands to the public and does not close public reserves or roads.

- Where a title contains lots in an obsolete plan of subdivision, a title note will be placed on the title advising of that fact:

BY-LAW NO. 1732/77 REGISTERED SEPT. 27, 1977 AS NO. R94581 DECLARES PLAN NO. 1505 OBSOLETE. REQUIRE CONSENT FROM APPROPRIATE PLANNING AUTHORITY FOR ANY DEALING WITH ANY AFFECTED WHOLE LOT OR PART THEREOF.

- A complete list of obsolete plans can be obtained from land titles.

Plans of Survey[14]

- Plans of survey define the limits of land. These are often called parcel plans because the lands on the plan are identified by lettered parcels rather than numbered lots as on a plan of subdivision.

- They are not plans of subdivision:

  - The parcels shown on these plans are not whole lots in a plan of subdivision.

  - The boundaries on plans of survey do not create legal boundaries that can be used to subdivide the lands described in a certificate of title.

  - Subdivision approval is required to separate contiguous (touching) parcels on a plan of survey.

- The limits of the land defined can be used for various purposes, including easements, leases, and, with subdivision approval, the issuance of title.

- Parcel plans can be used where lands being subdivided do not have uniform mines and minerals reservations. In such a case, the subdivision authority will specify in their approval document how titles must issue (which parcels must be titled together and which can be titled on their own).

128(3) Plans[15]

- A plan prepared under section 128(3) is distinguished by the fact that some but not all of the boundaries in the plan are required to be surveyed. A plan prepared under 128(3) can only be prepared with the permission of the Examiner of Surveys.

- The operation of s. 128(3) can apply to any kind of plan, including a plan of subdivision or survey.

Easement Plans

- Easement plans are merely plans of survey that identify and define lands that are intended to be used for easement purposes (including statutory easements). Like all other survey plans, these are not plans of subdivision.

- None of the phrases “plan of easement”, “plan for easement” or “easement plan” appear in any relevant legislation (including *The Surveys Act*, *The Real Property Act*, *The Expropriation Act* or *The City of Winnipeg Charter*).

- On their own, easement plans do not create easements. Easements are created by agreements or declarations. The easement plan is referenced in that constituting document to identify the lands affected by the easement. These agreements or declarations are then registered in their own right or by way of caveat.

Leasehold Plans

- Leasehold plans are merely plans of survey that identify and define lands that are intended to be used for lease purposes. Like all other survey plans, these are not plans of subdivision.

- None of the phrases "plan of lease", "plan for lease" or "leasehold plan" appear in any relevant legislation (including *The Surveys Act*, *The Real Property Act*, *The Expropriation Act* or *The City of Winnipeg Charter*).

- On their own, leasehold plans do not create leases. Leases are created by agreements. The leasehold plan is referenced in that constituting document to identify the lands affected by the lease. These agreements are then registered in their own right, attached to a caveat or by way of a memorandum of lease.

Right-of-way Plans[16]

- Right-of-way plans will typically be for public roads, water control works, railways, pipelines and transmission lines.

- *These are not easement plans*. Typically, the fee simple for the lands shown on and affected by right-of-way plan will be acquired by the registrant. They can be expropriation or certificate plans prepared under *The Expropriation Act*, but they can also be plans prepared by other parties and may be accompanied by deeds or transfers for the acquisition of those lands. Historically, railways had the right to expropriate lands necessary for the construction, operation and maintenance of a railway.

Expropriation Plans[17]

- Where an authority (a municipality, the Crown, etc.) takes lands pursuant to their expropriation powers, the document that actually expropriates is called a declaration (accompanied by a confirming order). A plan of expropriation is used to identify the lands being acquired and when it is so used, it is deemed to be part of the declaration.

- Among other things, expropriation plans can be for right-of-way purposes.

- Where lands are being acquired for a highway, a drain or water control works, a plan of expropriation is always required.

- Title issues free from all charges except those that the declaration is expressed to be subject.

- Where there are Crown lands or lands that the expropriating authority already owns that are to be used in conjunction with lands being expropriated, those lands are also shown on the plan of expropriation.

Certificate Plans[18]

- "Certificate plan" is a name given these plans by convention; it is not an official name.

- In the case of a voluntary acquisition of lands by an authority (municipality, the Crown, etc.) pursuant to the provisions of *The Expropriation Act*, rather than filing a declaration and plan of expropriation, a certificate plan is registered. The certificate plan identifies the land being acquired by the authority.

- Among other things, certificate plans can be for right-of-way purposes.

- The certificate plan vests title to the lands shown on the plan into the name of the authority and will specify those encumbrances to be carried forward.

- The plan contains a certification (hence the name) that the authority either has the agreement of the owners of affected lands or is the owner of those lands. Where the plan is for a road, it will contain a statement that the road is either opened or is to be opened.

Air Space Plans[19]

- An air space plan is a plan of survey that locates three-dimensional parcels of land. The three dimensional parcels on an air space plans can be at ground level, above ground, below ground or any combination thereof. The three-dimensional parcels can, but do not need to, correspond to buildings or other structures or parts of buildings or structures.

- They are not plans of subdivision and do not on their own create legal boundaries that can be used for title issuing purposes. Subdivision approval is required to subdivide using an air space plan.

- Air space parcels can be transferred, leased, mortgaged, charged, subdivided or otherwise dealt with in the same manner as other land registered under *The Real Property Act* and can be converted into condominiums.

- The City of Winnipeg has the authority to lease the air above or below streets.

- Title for an air space plan will refer to lettered parcels and will specifically reference the air space plan:

  Air Space Parcels A, B, C, D, E, F, G, H, J AND K PLAN 47285

Condominium Plans[20]

- As also noted above, and in conjunction with the condominium declaration, condominium plans divide up the affected lands, creating legal boundaries that can be used for title issuing purposes. Unlike plans of subdivision, which divide the land in lots and public spaces (such as streets, lanes, public reserves and crown reserves), condominium plans create condominium units to be owned by the individual unit owners and common elements to be owned collectively by the owners of the condominium units.

- Condominium units can be the typical apartment style spaces or they can be bare land units. The condominium plan for an apartment style condominium will consist of multiple plan sheets and will include a plan of survey showing the perimeter of the land and buildings, diagrams showing the specifications of unit boundaries by reference to the buildings and structural and architectural plans.

- Condominium plans with bare land units consist of a single plan sheet, which sheet will show the two dimensional delineations of the lands. These plans resemble plans of subdivision in that the units look much like lots in a plan of subdivision and the common elements are typically composed of the internal roads, walkways and green spaces. Condominium plans that create bare land units must have subdivision approval. Contiguous condominium units, including bare land units, can be separated without the requirement for any further subdivision approval.

- *The Condominium Act* also allows for a third type of unit, called phasing units. These are units that at some later date will be converted into additional units or common elements. And while most phasing units are also bare land units, this does not have to be the case. Unlike regular apartment or bare land units that are identified numerically, each phasing unit will be identified on the condominium plan as a phasing unit with a letter (Phasing Unit A, Phasing Unit B, etc.).

Special Survey Plans[21]

- Special survey plans can be used to correct errors on an existing plan and to establishing boundary lines which have become doubtful or are difficult to ascertain. These are actual surveys.

- Once the special survey process is completed and the special survey is registered the boundaries of the affected lands are as shown on the special survey and not on any prior plan. The plan will change the boundaries and the special survey will govern what is owned.

- Special survey plans are initiated by land titles. Typically these plans are prepared by a surveyor engaged by land titles.

- Because affected owners can lose land, there is a public hearing process.

- Special survey plans do not change the fundamental character of the affected lands. Accordingly, in order to determine if several contiguous special survey lots can be separated from each other without formal subdivision approval, it is necessary to look to the lands prior to the registration of the special survey plan. If the special survey lots to be separated were whole lots in a registered plan of subdivision then no approval is required. Similarly, if the special survey lots were not whole lots in a plan of subdivision then subdivision approval is required.

- Titles for the lots in a special survey plan will refer to numbered lots and should specifically reference the fact that the plan is a plan of special survey:

  Lot 1 SS Plan 100 (sometimes shown as Lot 1 Special Survey Plan 100)

Special Plot Plans[22]

- Special plot plans are created when the titles in an area contain confusing and complicated metes and bounds descriptions. The purpose of the plan is to replace the complicated legal descriptions with simple images.

- These are drawn up and registered by land titles. No survey work is done in the field. There is no hearing process nor is there normally any need for consent from the owners of affected lands.

- Special plot plans *can* correct errors, or ambiguities in boundaries, but only with the approval of the registered owners affected.

- They are not plans of subdivision and the lots shown on these plans are not whole lots in a plan of subdivision.

- Special plot plans do not change the fundamental character of the affected lands. Accordingly, in order to determine if several contiguous special plot lots can be separated from each other without formal subdivision approval, it is necessary to look to the lands prior to the registration of the special plot plan. If the special plot lots to be separated were whole lots in a registered plan of subdivision then no approval is required. Similarly, if the special plot lots were not whole lots in a plan of subdivision then subdivision approval is required.

- Title for the lots in a special plot plan will refer to numbered lots and will specifically reference the fact that the plan is a special plot plan in one of two formats:

  SP Lot 1 Plan 100 (sometime shown as Special Plot Lot 1 Plan 100)

  Lot 1 SP Plan 100 (sometimes shown as Lot 1 Special Plot Plan 100)

128(4) Plans[23]

- Where it has been determined that a plan is required to describe a parcel of land, the Examiner of Surveys has the authority to allow for a plan where there is no actual field survey performed.

- Like a special plot plan, this plan is prepared solely using land titles records.

- Such a plan can be used where a metes and bounds description would be too complicated but where there is no need perform a physical survey.

Railway Deposit Plans

- The expression, “railway deposit plans”, refers to engineering plans that are deposited with land titles as a requirement of federal legislation and have no bearing on the titling, the ownership or the legal description of the affected lands.

- The first railway deposit plans were engineering plans prepared by railway companies for bridge construction, contours, elevations, and architecture or other engineering purposes. In the years following, other companies and government agencies and departments have also deposited engineering plans for safekeeping.

- The Examiner of Surveys may not accept any railway deposit plan which makes reference to title limits or survey evidence. These deposits are NOT to be used for title purposes. They are simply deposited for convenience of recording same in a public office. Railway deposits are neither examined nor approved by the Examiner of Surveys. No entry is made in files nor on titles regarding land shown on these plans.

- Although called railway deposit plans due to the historic origin, the name also includes other plans filed for engineering purposes that do not affect title. This could include bridge drawings, pipeline-engineering drawings.

Restoration Sketches[24]

- Restoration sketches are sketches prepared by surveyors for the purpose of showing restored survey monumentation.

- These plans are generally prepared under the guidelines of the Survey Outline Monument Restoration Program.

- Land titles has a fund to pay for half the cost of these plans as part of our support for maintaining the survey fabric of the province.

Plans Perpetuating Monuments[25]

- These are plans prepared by surveyors for the purposes of showing or replacing survey monumentation.

- These plans do not change boundaries.

THE DOCTRINE OF ACCRETION

- One of the most interesting phenomena associated with land is the fact that the boundaries of land do not necessarily have to be fixed in place. The boundaries of land can be and often are ambulatory. In other words, they can move. This is often, though not always the case, when one of the boundaries of a piece of land is a body of water.

- Where the boundary of lands adjoining a body of water is not fixed, but is instead of the type that is ambulatory, the boundary between the upland and the bed of the body of water can move through the build up of alluvium. This process is known as accretion.

- The law governing the process of accretion is not captured in any one piece of legislation, nor in any single judicial pronouncement. And though there are sections in both *The Real Property Act*[26] and *The Crown Lands Act*[27] that concern accretion, there are numerous issues that are not addressed by the legislative pronouncements. In addition to a lack of provincial legislation, there is also precious little case law from Manitoba. That being said, many of the principles regarding accretion are common across jurisdictions and the case law that is available distinguishes between jurisdictions only when a particular jurisdiction has unique legislation or circumstances.

- The purpose of this section is not to summarize the rights of riparian owners. Nor is it an attempt to enter into a discussion regarding the process of surveying water boundaries. The purpose of this paper is to provide an introduction to the law of accretion for those dealing with land in the province of Manitoba.

Accretion as part of the law of Manitoba

- Historically, it was the position of land titles[28] that once lands were titled, accretion could not change the boundaries of that title. Furthermore, it was deemed inappropriate for a member of land titles staff to express an opinion on accreted lands; any equitable ownership of these lands was a matter for the courts or the legislature. Land titles took no position as to whether or not the Crown, as the owner of the bed of a body of water, could be affected by accretion.

- Despite case law that suggested that the rights of owners whose lands bordered water were those that existed in the English common law,[29] it was not certain as to whether title holders in Manitoba were entitled to the ownership of accreted lands. Certain legislation[30] seemed to suggest that these registered owners did not have such a right.

- The applicability of the law of accretion in Manitoba was settled by the Supreme Court of Canada in the 1973 decision of *Chuckry* v. *The Queen*.[31] Overturning the Manitoba Court of Appeal, and adopting the dissenting opinion of Dickson, J.A.,[32] the Supreme Court ruled that the doctrine of accretion applied in the Province of Manitoba.[33]

- As a result of the *Chuckry* decisions, it is now clear that the doctrine of accretion applies in the Province, including in those situations where the boundaries of the land were defined or ascertainable.[34] A key element of the decisions is the holding that the doctrine applies so long as the adjoining lands come to the water's edge under a grant,[35] regardless of the manner of land description within said grant. This includes a delineation of a line on a plan and an expression of acreage.[36]

- Applying the Chuckry principles, grantees (and their successors) of any of the following lands would be entitled to acquire additional land by virtue of accretion:

    - The fractional NW ¼ 1-2-3 EPM

    - All that portion of the NW ¼ 1-2-3 EPM not covered by the waters of Lake…

- All that portion of the NW ¼ 1-2-3 EPM not covered by the waters of Lake…containing 23 acres…

- All that portion of the NW ¼ 1-2-3 EPM lying to the west of the west boundary of Lake…

Accretion defined

- So what exactly is accretion? While the term is not defined by any piece of legislation in Manitoba, the case law provides a number of clear guidelines:

  - Accretion occurs as a result of a slow and imperceptible process that causes the build-up of land adjoining existing land, where that land borders on a body of water, which build-up becomes the property of the owner of that adjoining land.

  - Accretion can be caused by the wind, by water or even by dereliction (the recession of water).

  - The law does not specify any specific time duration required to distinguish between events that are sudden and those that are slow and imperceptible. The required element is that the actual change be imperceptible to the human eye.

  - While the process of accretion has to be a natural process and not the deliberate act of a person, the ultimate cause of the accretion can be human action so long as the goal was not to cause accretion to occur. Accordingly, the build-up of deposits that are the unintended consequence of the construction of a jetty can still be considered to be accretion.

  - Accretion does not occur where the increase in the land caused by a sudden event such as a storm or by flooding. This sudden change, known as avulsion, does not result in an increase in ownership for the holder of the adjoining land.[37] [38]

Acquiring title to the accretion

- Following the Chuckry decision, amendments were made to both *The Real Property Act* and *The Crown Lands Act*.[39] These amendments prescribed the manner in which the owner of the lands adjoining the accretion (and entitled to the accretion) can acquire title to the accreted lands and the role of the district registrar in that process. Those early sections are very similar to the current legislation.

- The process for the titling of the accreted lands as set forth in section 51 of *The Real Property Act* is initiated by the owner of the lands adjoining the accretion filing either a request/transmission or a Real Property Application at the land titles office. The document selected will depend on whether the accreted lands are old or new system. Because the vast majority of the beds of bodies of water are under the old system, the operative document almost invariably will be the Real Property Application.

- This document is to be supported by a plan showing the accretion and either an order of the court or a certification from the minister responsible for the administration of *The Crown Lands Act*.

- Where the certification is obtained, rather than a court order, the consents of adjoining owners will also be required. No doubt this is to ensure that the accretion is apportioned appropriately

and the applicant becomes the registered owner of only those portions to which they are entitled.

- Where those consents cannot be obtained there is a thirty day notice mechanism to force the parties to go to court to protect their rights. In addition, the district registrar can dispense with this consent where the registrar is satisfied that the boundaries of the accretion do not adversely affect those neighbors. Obviously, this discretion should only ever be exercised where the registrar is completely satisfied that the accretion is fairly apportioned.

Legal characteristics of the accreted lands

- By operation of both legislation and the common law, accreted lands added to a certificate of title for the adjoining lands take on all of the legal characteristics of the adjoining lands; they become subject to the same encumbrances, liens and interests and have any reservation of mines and minerals that previously affected the adjoining lands.[40] [41]

Limitations

- The law of accretion does not entitle the owner of adjoining lands to whatever lands may accrete next to their property. Several factors limit the ability of a party to acquire ownership of the accretion:

    - *The Crown Lands Act*

    Because accretion can only occur where lands have a water boundary, the owner of lands subject to a reservation under section 4(1)(a) of *The Crown Lands* Act[42] cannot acquire any new lands created through accretion. In such a case, the ninety-nine foot strip reserved to the Crown from ordinary high water mark separates the land owner from the water.[43]

    - The boundary limits expressed in the owner's certificate of title

    An owner cannot acquire additional lands beyond the boundary limits expressed in their certificate of title.[44] This means that the extent of the accretion that an owner can acquire will be limited by the way in which the lands in their title are described. Where the lands in a title are described with reference to a section, a quarter section, a legal subdivision, or a river lot, the accretion cannot go beyond the boundary of that unit. For example, the owner of fractional LS 8 in SW ¼ 1-2-3 EPM cannot acquire ownership of lands in any of the adjoining legal subdivisions by way of accretion.

    - The limit by the water must be a natural water boundary

    In order to be entitled to accretion, the adjoining lands must have a boundary that is a natural water boundary. Where the boundary is fixed there is no entitlement to accretion.[45] Accordingly, where the lands at the edge of the water are contained within a rectilinear lot in a plan, there is no entitlement to accretion.

    - The accretion must be physically connected

    In order for nearby lands to benefit from an accretion, those lands must be physically connected to the accreted lands.[46]

- Accretion will be apportioned

Where accretion borders the lands of multiple owners, the accreted lands must be apportioned as between those owners. Surveyors have a number of manners in which that accretion can be apportioned.[47] Though not uniform in approach, in more modern times rather than adopting any one method for carrying out this apportionment, the courts have made it clear that the driving principle should be an equitable division, with the goal of ensuring access to the water for all of the affected land owners. The judgment of the surveyor, the person most familiar with the local topography, will play a large role in that process.[48]

Accretion at the Crown's discretion or as a right?

- It has been suggested that the joint effect of the amendments to both *The Crown Lands Act* and *The Real Property Act* is to take away the right of adjoining owners to accretion, giving the Province the discretionary power to grant accretion. The language in section 19 of *The Crown Lands Act* could be read in this manner as it does not *require* the relevant minister to certify the accretion; instead it provides that the minister *may* do so.

- This interpretation does not seem to accurately reflect the state of the law in Manitoba. Rather, it appears to be the law that the statutory provisions do not modify the common law rights to accretion; instead they merely provide the mechanism for the issuance of title to the equitable owner and a means of ensuring that the rights of neighboring owners are protected. This position is supported by the following:

  - According to the Supreme Court of Canada, there is a presumption that absent clear statutory language, legislation will not change existing common law rules.[49] Applying that presumption to the law of accretion, in order for the Province to have taken away property owners' equitable rights to accretion, a right explicitly recognized in Manitoba by the Supreme Court of Canada in the Chuckry case, very deliberate language would be required. No such language exists in either *The Real Property Act* or *The Crown Lands Act*.

  - The language in both *The Real Property Act* and *The Crown Lands* acknowledged the right to the accretion. *The Real Property Act* in 51(1) refers to a registered owner becoming *entitled* to be the registered owner of adjoining lands by accretion while *The Crown Lands Act* refers to the accretion as being *vested* in the adjoining owner, vested by the act of accretion, not by any grant or disposition from the Crown.

  - The role of the Crown in the accretion process is limited. Section 19 of *The Crown Lands Act* does not provide that the Crown must grant or transfer the accretion. The role of the minister, on behalf of the Crown, is simply to certify that they are satisfied that the accreted lands have become vested in the adjoining owner.

  - The certification of the minister in section 19 of *The Crown Lands Act* is not a necessary condition to title issuing into an owner for accreted lands. It is simply one mechanism. Section 51(2) of *The Real Property Act* requires *either* the minister's certificate or an order of the court declaring the accreted lands are vested in the adjoining owner.

Is a conveyance document from the Crown appropriate document?

- It has also been suggested that accreted lands are to be conveyed to the entitled adjoining owner by way of a transfer or grant of land from the Crown. If this were the true, there would then be an automatic reservation to the Crown of those reservations specified in *The Crown Lands Act*, including mines and minerals, sand and gravel and a strip of land 99 feet wide adjacent to the waters.[50] This cannot be the case for numerous reasons:

    - The only act required from the Crown in section 19 of *The Crown Lands Act* is a certification. There is no transfer of land or other conveyance document. This is not a patent or grant from the Crown. By virtue of the law of accretion, the adjoining owner is already the equitable owner of the lands. Title to the accreted lands will issue to the applicant from the document filed by them (either a Real Property Application or a Request/Transmission) and not from a grant or other Crown disposition.

    - As noted above, accreted lands take on the same legal characteristics, including reservations as to mines and minerals, as the adjoining lands.

    - The Court has co-equal authority with the minister to make a determination as to the ownership of accreted lands. A determination that the court can make regardless of the position of the minister. This would not be a power that the court could have if these were Crown lands waiting to be conveyed.

    - A grant or transfer of Crown lands is within the complete control of the minister. In particular, the Crown does not need the approval or permission from other persons and certainly not from adjoining land owners. In the case of accreted lands, there is a requirement for consents from adjoining owners.[51]

- The conclusion supported by the law is that these are not *Crown lands* for the Crown to grant or transfer. The minister has the authority to **recognize** that the former bed, "has through accretion become vested in the owner of the adjoining land…" But it is though accretion that, the upland owner, "becomes entitled to be registered as owner of adjoining land," and not by any act of the minister.

C. LAND OWNERSHIP SYSTEMS

THE OLD OLD SYSTEM

- The English common law governed conveyancing at the time Manitoba entered confederation.

- To establish ownership of land, a purchaser had to prove a chain of ownership back to a person whose ownership couldn't be challenged.

- In principle this was done by the production and examination of the title deeding instruments that formed the chain of ownership, and would include the deed to the current purchaser, the deed to the vendor in the current deed and so on back to an interest that couldn't be challenged. Such an interest could be in the form of some kind of a grant from the Crown. In practice, at common law it was enough to prove undisturbed ownership back 60 years.

- To prove the chain of ownership it was incumbent on the vendor to produce the actual documents that made up the chain of title.

Steps to convey ownership

1. The purchaser of a right had to satisfy him or herself as to the adequacy of the conveyance.
   a. Does the conveyance document adequately describe the property?
   b. Is the grantor competent? This is a particular issue, where a power of attorney, the elderly and the executors/administrators of an estate are involved.
   c. Does it conform with the law to effect a conveyance, and of the estate or interest intended?

2. The purchaser has to satisfy him or herself that the vender owns the rights he or she is purporting to convey. This means:
   a. Examining the actual documents in the chain of conveyance, starting at the current owner and going back to the Crown grant (typically). English practice developed to go back 60 years.
   b. Examining the land for signs that there is someone else with prior rights, such as:
      - Tenants under a lease
      - An easement (e.g. A road connecting a neighbouring property)
      - An active profit-à-prendre (such as a gravel pit)
      - A party in adverse possession

Impediments and complications

- There is the very real possibility of a lost document (or series of documents) in the chain of title. This could be caused by fire, flood or theft or they could simply be misplaced.

- Because the documents reside in private hands there is the very real likelihood of fraud, forgery and alteration.

- There could be unknown equities, of which the purchaser may be deemed to have constructive notice, equities that bind the vendor/the land, such as:
    - A trust
    - Inactive profits-à-prendre
    - A prior conveyance by the vendor, subsequent to which the vendor reacquired the title documents by theft or misappropriation
    - A mortgage

Consequences

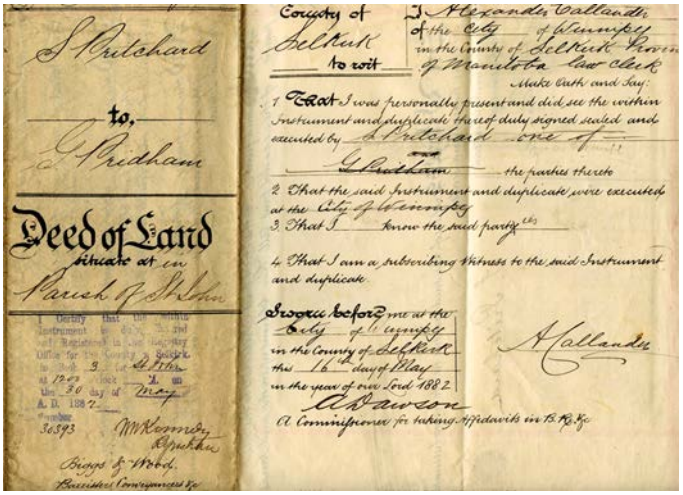
- As a result of the cumbersome process:
    - Conveyancing costs were considerable. A burden both to the individuals and to the society as a whole;
    - The conveyancing process took a considerable amount of time while these investigations were made;
    - The value and marketability of a property, either for sale purposes or for raising funds, were materially affected. The lack of secure title also affected interest rates offered by lenders who were concerned that they could lose their security.

Amelioration

- Various statutes were passed throughout the Commonwealth in an effort to counteract these issues. They introduced various systems, including deed registration, instrument registration and recording.

THE OLD SYSTEM

- The most common remedy to the problems presented by the deed system was some form of deed registration system.
- This required/allowed deeds and other instruments affecting land to be registered with a government official or in a government office.
- The introduction of the deed registry system is quite significant because it represents the introduction of government into what was essentially a private process.


S. Pritchard
to
C. Pridham
Deed of Land
situate at in
Parish of St John
County of Selkirk to wit
I Alexander Hallandale of the City of Winnipeg in the County of Selkirk Province of Manitoba law clerk Make oath and say:
1. That I was personally present and did see the within instrument and duplicate thereof duly signed sealed and executed by S. Pritchard one of the parties thereto
2. That the said instrument and duplicate were executed at the City of Winnipeg
3. That I know the said party
4. That I am a subscribing witness to the said instrument and duplicate
Sworn before me at the City of Winnipeg in the County of Selkirk this 16th day of May in the year of our Lord 1882
A Hallandale
A Commissioner for taking Affidavits in B.R. K.B.

Deed Registry Systems

The Race

- Registration was required for an interest created by a deed (mortgage or other instrument) to have priority over a later registered deed. In this system registration is paramount and notice becomes largely irrelevant.

The Notice

- The register was provided as one means of giving adequate notice of an earlier interest to those dealing with lands.

Race-Notice

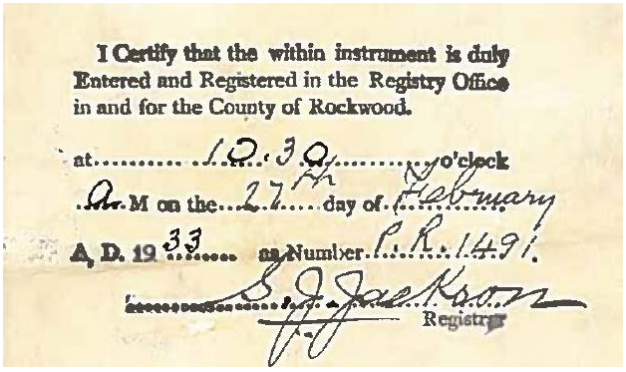
- Most common was a hybrid, a race-notice system. In such a system an interest in land was acquired where the party acquiring the interest:
  1. Has no prior notice of a competing interest (where notice means actual notice, not constructive notice); and
  2. Registers their deed (mortgage or other instrument) prior to any other party acquiring the same interest.

Manitoba's Old System Legislation

- In the earliest days, Manitoba's legislature created a pure race system.[52] The legislature changed this a mere two years later into a race-notice system.[53]

- The legislation now governing the old system is *The Registry Act*,[54] and it continues to be a race-notice system.

- The deed registration system in Manitoba initially functioned as follows:
  - Registry offices were established throughout the expanding province.
  - Deeds and other documents were brought into the offices in triplicate and assigned a registration number.
  - The copies were compared to ensure consistency.
  - A stamp was endorsed on each of the documents. The stamp included the registration number, the name of the registry office, the date and time of registration and the signature of the Registrar.


I Certify that the within instrument is duly Entered and Registered in the Registry Office in and for the County of Rockwood.

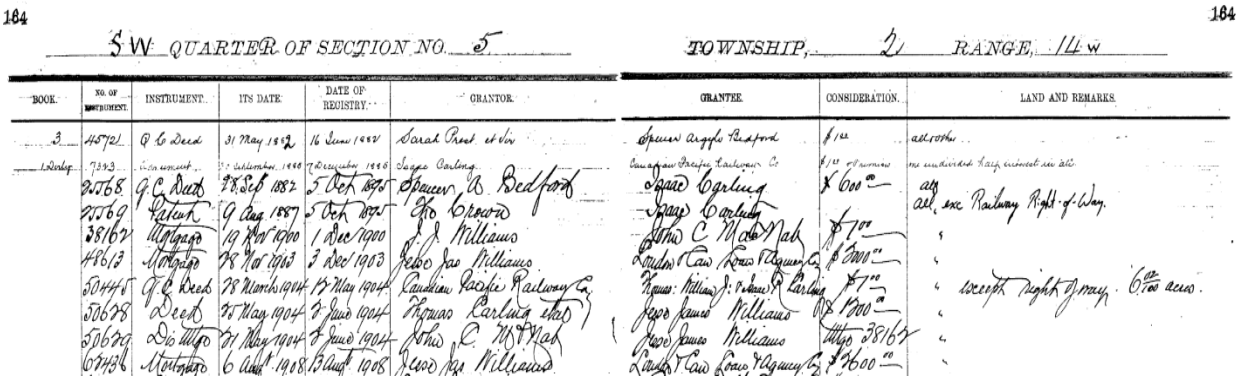
at ..... 10.30 ..... o'clock A. M on the 27th day of February

A. D. 1933 as Number R.K. 1491.

S. J. Jackson

Registrar

  - The particulars of the document (including the names of the parties, the type of instrument, a brief description of the affected lands and the information from the registration stamp), were recorded on folios in an abstract book. Abstract books were lists of all the dealings affecting a particular parcel of land.


184 184

SW QUARTER OF SECTION NO. 5 TOWNSHIP, 2 RANGE, 14 W

BOOK.	NO. OF INSTRUMENT.	INSTRUMENT.	ITS DATE.	DATE OF REGISTRY.	GRANTOR.	GRANTEE.	CONSIDERATION.	LAND AND REMARKS.
3	45721	Q C Deed	31 May 1892	16 June 1892	Sarah Reed et Vir	Spencer Argyle Bedford	$1.00	all & other
Discharge	7393	Discharge	23 September 1898	7 December 1898	Jacques Carling	Canadian Pacific Railway Co	$1.00 & Services	the undivided half interest in all
25568	Q C Deed	28 Oct 1882	5 Oct 1895	Spencer A Bedford	Jacques Carling	$ 600.00	all	
25569	Patent	9 Aug 1887	5 Oct 1895	Geo Brown				
38167	Mortgage	19 Nov 1900	1 Dec 1900	D J Williams	John C McNab	$ 700.00		
48613	Mortgage	28 Nov 1903	3 Dec 1903	Jesse Jas Williams	London & Can Loan & Agency Co	$ 2000.00		
50445	Q C Deeds	28 March 1904	15 May 1904	Canadian Pacific Railway Co	Thomas Williams D J Williams & Carling	$ 1.00	except right of way 6.00 acres	
50628	Deed	25 May 1904	2 June 1904	Thomas Carling et ux	Jesse James Williams	$ 1000.00		
50629	Do Mtge	27 May 1904	2 June 1904	John C McNab	Jesse James Williams	Mtge 38167		
67436	Mortgage	6 Aug 1908	13 Aug 1908	Jesse Jas Williams	London & Can Loan & Agency Co	$ 3600.00		

  - One copy of the deed was returned to the registrant and a third was sent offsite for backup.
  - On the next dealing affecting the lands, the lawyers involved would review the abstracts, review those of the listed documents that they felt were relevant and then give an opinion as to safe holding title.

- The registration of deeds and other instruments was a move in the right direction:
  1. It made deeds and other instruments easier to find;
  2. It preserved and protected deeds, guarding them from alteration and forgery as well as from theft, loss or accidental destruction; and
  3. It helped establish priorities and notice.

- The registration of deeds and other instruments was not a panacea.
  1. The mere fact of registration did not confer any special status on registered deeds. If there were existing defects in title or forgery, no protection was offered.
  2. The chain of title still had to be examined, with all that that entailed. In Manitoba, this typically meant examining the chain back to the original grant of the lands – a much easier thing to do admittedly in Manitoba than in England.
  3. Even an exhaustive title search of the chain of title would not give the purchaser complete security, largely because of the principle, nemo dat quod non habet ("no one gives what he does not have").

THE NEW SYSTEM

History

- In 1814 Sir Robert Richard Torrens is born in Ireland.

- By 1853 he has moved to Australia and has been appointed the Registrar-General for deeds in for South Australia.

- Seeing all of the problems associated with the old system, Torrens proposed the adoption of new system of registration.

- Note: Torrens did not invent this idea. It was already being considered in various forms in England in the early 1800's.

- With Torrens as its advocate, and against strong opposition from the legal profession, Torrens' proposal was passed into law in South Australia on January 27, 1858.

- This new system, called a Registration of Title system consisted of a government maintained database that held the following information:
  1. The description of every parcel of land covered by the system;
  2. The name of the person or persons who own the parcel of land; and
  3. A description of any rights over the parcel owned by a person or persons other than the so-called registered owner.

- Torrens system spread from Australia and for many people in the English speaking world, and for many jurisdictions the expressions, "Registration of Title" and "Torrens System" are fairly synonymous. Manitoba (and the rest of Western Canada) can be counted as among those jurisdictions that adopted a Torrens style system.

Principles of a Torrens system

Mirror principle

- The mirror principle means that the register (the Certificate of Title) shows accurately and completely the state of title to land. In addition to showing the owner of the land, it must also show any other interest in the land that is owned by another party. This would include such rights as mortgages and leases.

- This abolishes the common law doctrine of notice – if an interest isn't recorded on the title one need not be concerned with it. The fundamental idea here is that parties searching the register can rely on the results of their search without the need for further inquiries.

Curtain principle

- According to the curtain principle, those dealing with land do not need to be concerned with dealings that took place prior to those currently recorded on the register. Once again, the idea is that the title search is all that need be performed. One does not need to obtain and review copies of prior dealings to ensure that there is a safe chain of title.

Insurance principle

- An assurance fund is established to compensate those parties who suffer loss caused by fraud or by an error in the registry. Typically this fund is established though some kind of a tax imposed at the time the lands are brought under the operation of the new system.

Hallmarks of a Torrens system

- In addition to the three fundamental principles, a Torrens land titles system has the following (not always perfectly realized) elements:

1. Registration becomes Paramount
    - Rights and title pass upon the registration of instruments and not upon their execution.
    - Priorities are established by registration and not by execution.
2. Registered Owners are Protected
    - A registered owner who has not acquired his interest through his or her own fraudulent act owns his land or interest in land free from all estates or interests not noted on the register.
    - Mere possession by another shall not derogate from the registered owner's rights.
3. A transferee is not, except in the case of his own fraud, affected by any notice given him of another's equity or unregistered interest in the land.

The Goal of a Torrens system – Indefeasible title

- The goal of a Torrens system of land ownership is to give the owner of land an indefeasible title, in other words, a title that cannot be challenged. In practical terms the goal is to create a title that can only be challenged in very limited circumstances. Typically the types of challenges are established by the relevant legislation, subject to interpretation by the courts.

The New system in Manitoba

Legislation

- The first Torrens legislation[55] was passed into law in Manitoba in 1885.
- The goal was, to quote the preamble to the act, “to give certainty to the title to estates in land in the Province of Manitoba, and to facilitate the proof thereof, and also to render dealings with land simpler and less expensive.”
- The current legislation is *The Real Property Act*.[56]

Rips in the curtain & cracks in the glass - "Torrens" in Manitoba

- On first blush, the Manitoba land titles system contains all of the hallmarks of a Torrens system:

    - Section 59(1)[57] of the Act enshrines the notion of the conclusive and indefeasible title. Paraphrasing that section: Every Certificate of Title is conclusive evidence, against the government and all other parties, that the person named in the title is the owner of the land or interest in land described in that title.

    - Sections 2(8) and 80(2) & (3)[58] abolish the doctrine of notice.

    - Section 64 and 66(4) [59] establish the requirement for registration and the priority established by such registration.

    - Sections 181 through 183[60] establish the assurance fund to compensate those deprived of estates or interests in land.

- Despite this start, none of these core principles remains absolute in Manitoba; each is narrowed by legislative enactments, by *The Real Property Act* itself, as well as in a multiplicity of other statutes. The very foundation of the system, the indefeasible title, is subject to a detailed list of exceptions, [61] notably including, easements (howsoever created – no document needed), the reservations contained in the original grant or patent from the Crown and leases for less than three years.

- Section 59 of the Act addresses the situation where two titles have been created for the same piece of land. Obviously only one of the owners can continue to have title to the land, but for the owner of the title that ends up cancelled, the principle of indefeasibility won't return the lands to them. Historically, it was the owner of the earlier title that received the lands, but since 2011, that has now become subject to the discretion of the court.[62]

- *The Real Property Act* also leaves titles open to attack by the victims of fraud or other misdeeds. In 59(1.3)[63] the Act allows a former owner who was the victim of fraud or a wrongful act to have their interest in land restored (unless a court orders otherwise). This section does not require the party affected by this restoration to have been a party to or even to have had knowledge of that wrongful or fraudulent act. As in the case of the duplicate owner whose title was cancelled, a bona fides owner affected by such a restoration would likely have recourse to the assurance fund.

- Finally, section 23(1) of *The Real Property Act*[64] provides the district registrar with the authority to make corrections to the register provided that those corrections do not prejudice, "rights conferred for value." This leaves titled interest holders who have not paid consideration (people who have received interest in land by way of a gift, or as an inheritance) for their interest in land vulnerable to correction (and likely correction without compensation) by the district registrar.

- Not all exceptions to indefeasibility of title are to be found in legislative pronouncements. The Manitoba Court of Appeal in the case of *Hyczkewycz* v. *Hupe*[65] held that equitable interests, including trusts (and in this case the resulting trust) form an exception to

indefeasibility of title while the trust property is in the hands of the trustee. This is because the beneficiaries of the trust have the ability to bring an *in personam* claim against a trustee who is registered as the owner of the land that is subject to the trust. In such a matter, the court can make an award that includes the vesting of title into the name of the beneficiary. In addition, the court opined that beneficiaries under a trust can protect their rights against subsequent registered owners by the filing of a caveat.

- In addition to eroding the indefeasibility of title, Manitoba legislation is riddled with sections that create exceptions to the principles that rights in land vest on registration and that the priorities accorded those rights are to be determined by the order of registration. Sections 74 of *The Real Property Act* and 10(1) of *The Judgments Act*[66] allow a party presenting an instrument for registration to claim priority over an already (and therefore prior) registered judgment or similar instrument. Such an exception will exist where the instrument presented for registration has some kind of equitable priority over the prior registered instrument. This equitable priority in turn can arise where there is an agreement of purchase and sale or similar conveyance executed or agreed upon prior to the date of the registration of the judgment (or similar instrument).

- Section 74 is the broader of the two sections and while section 10 appears to be limited to conveyances such as sales and transfers, section 74 does not limit the nature of the instrument presented for registration, leaving the door open to claims being advanced by parties registering leases, mortgages and other such instruments. In addition, while section 10 speaks only to judgments for the payment of money, section 74 addresses a broader range of prior registrations, including judgments, order for payment of alimony or maintenance and liens in favour of various levels of government.

- Section 74 of *The Real Property Act* empowers the district registrar to take evidence and to make the determination as to the priority between the instrument presented for registration and the prior registered judgment (or similar instrument). And while that section refers very generally to an equitable entitlement to priority, section 10 provides more concrete examples of when the off-title instrument will have priority over the registered charge. That section speaks to *bona fide* agreements, transfers or options to purchase.

- Given that the source of the district registrar's authority is the broader of the two sections, the exercise of their discretion can be informed by, but will not be limited to, the specific circumstances described in section 10. And without a doubt, where circumstances fit neatly within the more narrow provisions of section 10, the district registrar can act by virtue of the broad powers in 74. Guidance from the Manitoba Court of Appeal can be found in in *Dominion Lumber Winnipeg Ltd.* v. *Manitoba (Winnipeg District Registrar).*[67]

- The net effect of the sections 74 and 10 is to give effective priority to equitable rights over prior registered instruments. The only saving grace lies in the fact that these sections are limited in their scope and only negatively impact instruments filed by claimant's whose rights are not based upon any kind of conveyance and for which they have paid no consideration.

- Section 164 of *The Condominium Act* allows another exception to the notion of registration priority: subject to very limited exceptions (which generally protect registrations by the Crown), this section provides condominium liens with priority over, "every registered and unregistered encumbrance even though the encumbrance existed before the lien arose."[68] (In this circumstance the word encumbrance is obviously used in its widest sense.)

- Section 17 of *The Mortgage Act* and section 31 of *The Builders' Liens Act*[69] further erode the principle that the priority of interests in land can be determined by their registration order. As a result of these two sections, the priority of a registered mortgage may be limited to the amounts actually advanced under that mortgage before a subsequent instrument either appears on title or advances on their charge. In addition to affecting priority, section 17 also re-introduces the doctrine of notice (almost banished by section 80 of *The Real Property Act)*. As a result of section 17, advances made under an earlier mortgage are ineffective against advances made under a later mortgage where the later mortgaged advanced first and the holder of the earlier mortgage had actual notice of that later mortgage.

- The primacy of registration over notice is further eroded by sections 5(4) and 6 of *The Homesteads* Act.[70] These sections allow a disposition to be set aside where the party who has acquired an interest in land had actual knowledge that *The Homesteads Act* evidence of the party conveying that interest was untrue. In such a case, fraud or collusion on the part of the party who has acquired the interest is not required, merely knowledge. A similar blow to the priority of registration over notice is found in *The Fraudulent Conveyances Act*. Only Equity's Darling[71] is protected in the case of a conveyance of property made with the intent to defeat or defraud creditors; only a bona fides purchaser for value with no notice or knowledge of the vendor's intent can escape the effect of this enactment.[72]

- The final exception to the principal of registration primacy comes into pay when dealing with goods that will eventually become fixtures. *The Personal Property Security Act*[73] governs the relative priority of interests in such goods. To start with, subject to certain limited exceptions, and despite the relative registration priority on title, a security interest in goods that attaches at the time of or before the goods become fixtures has priority over an existing and prior-registered interest in land. That said, if the interest in the goods attaches after the goods become fixtures then the security interest would not have priority over either an interest in land that existed on the date of fixing or the interest of a person acquired after the date of fixing but before the date of registration of the PPSN.

- As with the other fundamentals of a Torrens land titles system, access to the assurance fund is not necessarily guaranteed for those in Manitoba who have been deprived of land or an estate or interest in land. For starters, where that interest is a mines and minerals interest, *The Real Property Act* limits compensation payable to the amount paid for that interest plus $5000 on account of all other losses.[74] On its face this might seem reasonable, but it is relevant to note that mines and minerals interests are often acquired by speculators who actually pay very little for any given mineral interest, on the chance that it might later prove to be valuable.

- The Act also provides no compensation for breach of trust or for the actions by corporations or municipal governments where the party acting on their behalf lacked the necessary capacity.[75] Furthermore, for a claim to be honoured it must be brought within two years of the when the affected owner became aware or should have become aware of their loss.[76] In addition, a person who has sustained harm because they did not promptly file a caveat giving notice of their right to have the register corrected may not be entitled to compensation from the assurance fund.[77] Finally, a claim cannot be made for damages arising out of the actions of the district registrar in tax sale proceedings.[78]

- Lofty and universal principles are the hallmarks of an ideal Torrens land titles system. And while several of the exceptions outlined above are both surprising and counter-intuitive, most are necessary to enable the land titles system to function in a real world setting.

Registration vs. filing

- Parties dealing with the land titles system in Manitoba should be aware that *The Real Property* Act maintains a careful distinction between instruments that are registered and those that are merely filed and they must understand why the Act does this.

- A review of the Act discloses that a distinction is made throughout it to documents or instruments being, "registered or filed" and between, "registration or filing." These are not mere synonyms included for the sake of completeness, these are terms that have different meaning and suggest that the effect of registration is different that the effect of filing.

- Even more telling than this repeated dichotomy, are those situations where only one of the terms is used. In section 148(1) for example, a person, "may file a caveat", while in section 67(2) the Act provides that a mortgage that affects lands in multiple land titles districts, "may be registered in each of those districts."

- The primary difference between the registration of an instrument in a Torrens land titles system and the filing of it is the effect: Instruments that are registered affect the ownership of titled interests in land, they change that ownership, while instruments that are filed do not. Furthermore, in order to effect such a change, an instrument must be registered (as noted above, the paramountcy of registration is a key principle of a Torrens land titles system).

- It is telling that in 66(4)[79] reference is not made to, "registered or filed in accordance with this Act," instead it is to registration alone. Transfers, mortgages, leases and easements are registered (and thus change the ownership of interests in land) while evidence, orders, supporting materials, caveats, personal property security notices are filed.

- In Di Castri's, *Registration of Title to Land*, this distinction is noted, "An instrument is a mechanism which may or may not trigger registration."[80] This is because, in the final analysis it is title to land that is registered in a Torrens system, meaning titles and those instruments that create and change titled interests. Looking back to earlier version of the Act, the registration of title is explicitly noted. Section 64 of *The Real Property Act* of 1889[81] provides in part:

    64. Every certificate of title granted under this Act, when duly registered….

- In the 1889 version of the Act, instruments that pass title are registered, while those that do not, such as caveats, are filed, deposited or lodged.[82]

- Keeping this distinction in mind, it is helpful to be aware of the way documents were processed historically, and how those historic processes have changed. Those dealing with the current land titles system are used to one series of "registration" numbers, numbers that are assigned to all instruments presented by clients (or by internal staff), including those to be filed (such as caveats), registered (such as transfers) and deposited (such as powers of

attorney). This has not always been the case. In the past the land titles system had separate number series and these were assigned to different classes of instruments. Instruments that were filed or deposited did not necessarily receive numbers from the same series that were given to instruments that were registered.

The Real Property Application

- Given the advantages of the new system, and given that much of the land in Manitoba started out in the old system (the first Torrens act wasn't passed until 1885, 14 years after the first registry act), some mechanism is required to move lands from the operation and governance of the old system to the governance of *The Real Property Act.*

- The Real Property Application (RPA) is the document used for bringing land not previously governed by *The Real Property Act* under the control of that Act.

- Using an RPA, the applicant (being the party who believes they are entitled to own the lands under the old system) applies to Land Titles to have a new system title issue for the subject lands.

- At the discretion of the applicant, title can either issue into their name or into the same of some other person(s). Where title issues into the name of another person, the RPA is called a Directed Real Property Application.

- When an RPA is filed at Land Titles, a District (or Deputy District) Registrar examines all dealings recorded in the old system (on an abstract) affecting the lands (deeds, mortgages etc., back to the initial grant of the land from the Crown). Once they have determined with certainty that the applicant is indeed entitled to be the owner of the lands in question, they will cause title to issue.

- An approved version of the RPA form can be found on The Teranet Manitoba website.[83] The RPA form has been in use for the past 100 years with very little change.

TWO SYSTEMS CONTINUE

- The terms 'new system' and 'old system' are actually defined terms in the legislation to refer to lands under *The Real Property Act* and *The Registry Act* respectively.

- As noted, we continue to have land under the old system - land that has never been brought under the operation of *The Real Property Act*. These lands are governed by *The Registry Act*.

- Type of lands that are still under the operation of the old system:

    1. Much of northern Manitoba (ungranted crown lands);
    2. Streets and lanes in old subdivision lands where the land was brought under the operation of *The Real Property Act* one lot at a time;
    3. Farmland that has been in a family and never had to be mortgaged;
    4. Small pieces here and there;

5. A multitude of reservations held back in grants from the Crown. This includes but is not limited to mines and minerals.

- There is not now, nor has there ever been, any legal obligation requiring the owners of old system land to bring those lands under the operation of the new system.

Limitations on Old system dealings

- Despite the fact that there is no obligation requiring old system lands to be brought under the operation of *The Real Property Act*, there are a number of limitations on old system dealings and registrations:

  1. Lands granted after February of 1914 automatically come under the operation of that Act[84] and are therefore new system lands.

  2. No conveyances affecting those lands added to Manitoba (from the Northwest Territories) in 1912 can be registered under the old system.[85]

  3. Subdivisions are prohibited.[86]

  4. A dealing with a mines and minerals interests (other than a lease) is prohibited.[87]

  These restrictions may not apply to certain dispositions between the Crown Manitoba and the Crown Canada.[88]

D. ESTATES AND INTERESTS IN LAND

WHAT IS LAND?

- For the purposes of the issuance of title, land is generally understood to be the surface of the earth and everything above and everything below. The term Land is identically defined in *The Real Property Act*[89] and *The Registry Act*[90]; broadly enough to include watercourses, trees and timber and mines and minerals.

THE FEE SIMPLE – THE LARGEST INTEREST

- One will often hear the land in a title referred to as the *fee simple*, or the *fee simple absolute*. To understand the various interests that can exist in land, one has to understand the largest interest that can possibly exist. In Manitoba, that is the *fee simple absolute*.

- A fee simple owner owns a particular piece of lands subject to four restrictions. These restrictions are:

    1. Taxation;

    2. Expropriation and regulation / Eminent Domain (the ability of the Crown to either take land outright or to impose rules and regulations on what can be done with lands);

    3. Police Powers;

    4. Escheat. Pursuant to this is the principle, lands vest in the Crown where the owner dies leaving no heirs at law. This also occurs where a corporation dissolves.

- A title that is not subject to any of these restrictions is called an *allodial* title. This form of ownership is not available to persons in Manitoba.

- To be a *fee simple absolute*, as opposed to merely a *fee simple*, the interest must not be subject to any limitations, including limitations which may, if they occurred, determine (end) the ownership interest.

Conveyance of Ownership

- Under *The Registry Act* (the "old system"), title is conveyed by way of a document referred to as a deed. Deeds are documents drawn up by lawyers (with reference to precedents) - there is no approved or prescribed form.

- Under *The Real Property Act* (the "new system"), title is conveyed by way of a form called a Transfer of Land, the form of which must be approved by the Registrar General.

- In addition to conveying ownership, the Transfer of Land form is used by government to ensure compliance with several other pieces of legislation, being:

- *The Homesteads Act*[91]

  - *The Homesteads Act* creates rights in favour of off title spouses/common law partners where the property is the homestead of the couple.[92]

  - At the time of a transfer, the transferor must satisfy Land Titles that the disposition is not of a Homestead, or if it is, that off title spouse or common law partner has consented to the transfer.[93]

- *The Tax Administration and Miscellaneous Taxes Act*[94]

  - Every transfer of land must contain the fair market value[95] of the lands it affects.

  - This act creates and imposes taxes, including a tax on the conveyance of real property. The tax is a sliding scale tax based upon the fair market value of the affected lands.[96]

  - Certain transfers of land are exempt from the payment of land transfer tax.[97] If the parties to a particular transfer wish to have their conveyance exempted, the exemption evidence must be contained in the transfer.

- *The Farm Lands Ownership Act*[98]

  - The goal of *The Farm Lands Ownership Act* is to control the acquisition of farmland in Manitoba by persons who are not citizens or permanent residents of Canada.

  - Every transfer of land must contain sufficient evidence[99] to satisfy Land Titles that the affected lands are not farmlands, or if they are, that the purchaser is a citizen or permanent resident of Canada, or if they are not, that they are otherwise allowed to acquire the lands.

- Note: Evidence under the above three statutes is also required in deed and in Directed Real Property Applications. This evidence must come in the form of a statutory declaration.

OTHER ESTATES AND INTERESTS

- In addition to the fee simple absolute, there are many other *interests in land* a party may own.

- Each of these interests is created in its own way and is governed by its own rules. The rules governing the creation of these lesser interests in land arise from both the common law and legislative enactment. To be a valid interest in land there must be a basis in law.

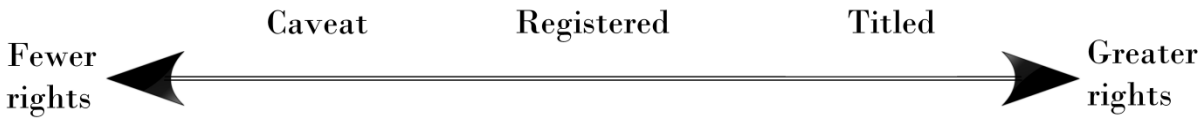
- These interests can appear on title in several different ways:

  1. Titled in their own right;

  2. Registered as an instrument on title;

  3. Notice of the interest registered by way of Caveat.

- Different rights accrue to the owner of the interest depending on method of registration. Typically, registering the interest in its own right will afford more options and more protection than registering a notice of the right by way of caveat. A titled interest will usually supersede both.



NOTICE OF AN INTEREST BY WAY OF CAVEAT

- A caveat is an instrument registered against title by a party other than the registered owner giving notice that that registrant claims to be the owner of some interest in the affected land.

- Though generally prohibited, there are situations where an owner may register a caveat against their own title. In particular, where a party believes that they have the right to have their title corrected (cancelled, restored, altered or vacated)[100] pursuant to section 148.1 of *The Real Property Act*, they have the right to register a caveat giving notice of this. Furthermore, compensation from the assurance fund may not be allowed[101] if they fail to do so.

- Caveats give notice of claims and establish priority vis-à-vis subsequently registrations.

- Caveats can give notice of any valid interest in land,[102] right from a fee simple absolute down to an easement to graze cattle.

- The interest claimed in a caveat must be a legally valid interest in the affected lands.

- The eCaveat contains a drop-down list of those valid interests in land known to the Registrars in Manitoba. If an interest is not on this list, it is not likely a valid interest in land.

- Parties will register notice of an interest in land by way of caveat for various reasons including:

    1. They have been granted a valid interest in land but the interest is not granted using the prescribed form (an equitable mortgage);

    2. The prescribed form has been used but the parties have agreed to only register a caveat;

    3. There is no prescribed form;

    4. The prescribed form contains a technical defect that prevents it from being registered.

- Whatever the reason is for using a caveat, it is important to remember that the substantive legal requirements for any interest in land apply to those interests registered by way of caveat just as they would if the interest was registered using the approved form.

- The registration of a caveat giving notice of a claim does not create an interest in land if there is not one in the first place.[103]

- These last two points are both made in *Hildebrandt* v. *Hildebrandt*.[104] In *Hildebrandt* the court held that an equitable mortgage registered by way of caveat wasn't valid where it was executed by the owner without *The Homesteads Act* consent of their spouse.

- The ruling in *Hildebrandt* makes it clear that registration of an interest in land by caveat is not a way to avoid complying with the legal requirements of that interest. The act of registering the caveat did not cure this deficiency or create the rights claimed.

- As with other rules, the principal that caveats are mere notices and do not create interests in land, is not absolute. Rather than creating new instruments, government has, through various legislative enactments, used the caveat as a vehicle for creating rights, and not merely giving notice of them. One common example would be the registration and creation of statutory easements.[105]

- The form of the caveat is approved by the Registrar-General.

- The caveator must be a person.[106] This includes a corporation[107] but would not include a partnership.

- Subject to certain exceptions,[108] the documents and agreements that give rise to the rights claimed in caveats do not have to be attached to the caveat giving notice of those interests in land. That said it is in the best interests of all concerned to attach these documents wherever possible. With the passage of time and the retirement and death of relevant parties, including lawyers, the land titles system is often the only repository for important documents.

Caveats not always a mere Notice of a Claim

- As with most general legal principles, the rule that the registration of a caveat gives notice of a claim but does not create an interest in land is not absolute.

    - The most notable exception is the statutory easement; by operation of *The Real Property Act*, an easement (a statutory easement) is actually created by and upon the registration of a caveat[109] having attached thereto a copy of the underlying agreement.

    - The legislature of Manitoba has also piggybacked on the caveat registration process, allowing for registration by way of caveat of certain agreements and other documents related to lands where the registration of the caveat does more than merely give notice of an interest in land. It is by virtue of the registration of a caveat that the agreement or document binds not only current owners of the affected land but future owners as well. The most common examples are development agreement registered pursuant to either *The Planning Act* or *The City of Winnipeg Charter*[110] or other agreements relating to the matters in Part 6 of the *Charter* (Planning and Development).[111] *The City of Winnipeg Charter* also allows for the registration by caveat of orders relating to the contravention of bylaws as part of the bylaw enforcement process.[112]

ESTATES AND INTERESTS FROM THE COMMON LAW

- The common law has given rise to a multiplicity of interests in land that can be owned by persons who do not possess the full bundle of rights associated with the *fee simple absolute.*

- These interests can be divided into rough groups:

  Rights of possession and use

  Actual possession is vested in the holder of these rights. Unlike the holder of a fee simple absolute though, these possessory rights will be limited in either time or purpose in accordance with the granting document. This group includes leases, life estates and determinable fees.

  Parties dealing with these interests should be aware of section 4 of *The Perpetuities and Accumulations Act.* That section provides that, "Successive legal interests, whether valid or invalid at common law or as executory interests, take effect in equity behind a trust."[113] Both life estates with remainders and determinable fee simples with rights of reversion are successive legal interests.

  Because of the conflict between these provisions and the operation of *The Real Property Act*, the effect this section has on certainty of title, the district registrar takes no notice of these trusts and take no steps to oversee or enforce them. In addition, the majority of practitioners in Manitoba are unaware of this section and of its effect and accordingly do not structure interests in land in accordance with it. Nonetheless, the section is part of Manitoba law.

  Rights of use

  The holders of these rights have limited access to the lands, access rights which do not amount to complete possession to the exclusion of the registered owner of the fee simple absolute. This group includes easements and profits à prendre.

  Rights of Control

  The owners of these rights have the ability to control the activity of the registered owner of the fee simple, but no rights of use or possession. This would include restrictive covenants of all varieties.

  Charges

  The rights of these parties are typically held in abeyance, subject to the owner of the fee simple performing the obligations under the charging agreement. A breach in observing these obligations will trigger a vesting of greater rights into the holder of the charge, rights that can include possession, control and even outright ownership. Charges include mortgages and encumbrances (the usage of this term will be discussed below).

- Included in this section will be those interest that have arisen from the common law, together with interests in land that are actually the creature of legislation but are similar enough that they can be grouped together.

Life Estate / Remainder Interest

- A life estate is a tenancy for that lasts only for the life of a specified person.

- Typically, the owner of a life tenancy will own the property for the term of his or her life. This need not be the case however. Like the owner of a fee simple, the owner of a life tenancy is free to transfer his or her interest in the land to a third party. Where this happens, the third party will own the property for the lifetime of the originally specified person, and not for his or her own life. The specified life cannot change on the transfer of the life tenancy because this would have the effect of transferring an interest in land not owned by the transferor - their interest is limited by their life, and so too will be the interest of any purchaser.

- The life tenant has the right to take the profits off the land[114] for the duration of his or her tenancy, but cannot impair or harm the source of the profits. The tenant is prohibited from allowing or causing the property to waste.[115]

- Typically these are interest that will be titled, however on occasion Land Titles does receive caveats giving notice of life tenancies.

Leasehold Interests

- A leasehold interest is created where a person is given:

    1. Exclusive possession of lands;

    2. For a life or for a term of years.[116]

- This exclusive possession is against all parties, including the owner of the fee simple.

- The term of years can be of any length and terms up to 999 years have been seen.

- A lease can appear on title as:

    1. A Caveat (giving notice of the lease);

    2. A Lease; or

    3. A Memorandum of Lease.

- There is no officially prescribed or approved form of Lease. This is a custom document crafted by a solicitor to meet the needs of the parties involved.

- The form of the Memorandum of Lease is approved by the Registrar-General.[117] This form is used where the Lessor wants all of the rights and protections afforded a registered lease without having to disclose any more than the most basic terms of the lease.

- If registered by either of the latter two methods, Land Titles will, upon request, issue a certificate of title for the leasehold interest. These titles can then be transferred, mortgaged, leased (creating a sub-lease) or otherwise dealt with.

Determinable Fee Simple and the Right of Reversion

- This is an ownership interest that terminates automatically upon the happening of a specified event, or more commonly, when some activity ceases. When this happens, title reverts to the original owner – at all times they had a reversionary interest/right of reversion.

- A recent example is the Human Rights Museum. The lands were conveyed to the museum, but just for so long as they are used for museum purposes.

- Another example are the lands upon which City Hall, most of the public safety building and part of the public safety building parkade are located.[118] These lands are subject to a reversionary interest, reverting to the Ross family when the lands are no longer used for "civic purposes".

- While the determinable fee simple certainly *was* a valid interest in land in Manitoba, it is not clear that this continues to be the case. The question arises by virtue of section 30(4) of *The Law of Property Act*. That section might well do away with all estates in land that are fees where the interest is less that the fee simple. It provides:

  > **No estates tail**
  >
  > 30(4) No estate in fee simple shall be changed into any limited fee or fee tail, but whatever form of words is used in any instrument, the land shall be and remain an estate in fee simple in the owner; and any limitation that would have created an estate tail shall transfer the estate in fee simple or absolute ownership that the transferor has in the land.

- Read broadly, this section might indeed prohibit the creation of (new) determinable fees (leaving existing one intact).

- There are issues that make this interpretation difficult to accept. To begin with, nowhere in *The Law of Property Act*, *The Real property Act* or indeed any other act or piece of case law have I been able to find a clear definition of what the drafters meant by a *limited* fee. I do not know if this is a term of art intended to refer to any ownership interest other than a fee simple, or if they simply slipped it in as a synonym for estate tail.

- The fact that the section heading refers only to estates tail is suggestive that a narrower intention might be possible. Also suggestive is the fact the estate tail is almost certainly a type of a limited fee. If this is true, then the section is at a minimum redundant; it unnecessarily lists the fee tail when that interest would already be included in the more general expression "any limited fee."

- In his 1990 article addressing determinable and conditional interests in land,[119] Peter Devonshire of the British Columbia bar considered Manitoba's section 30(4) and the then similarly worded Saskatchewan section.[120] He too notes the ambiguity of the section.[121]

- Conceding for a moment that the section does indeed prohibits all lesser estates, and is not merely the result of careless drafting, has implications not only for the determinable fee simple and but also for the much more common life estate. The life estate is also a limited fee, one limited to the life of the tenant. In fact, a life estate is quite similar to a determinable fee: like the determinable fee, it determines on a specified event, in its case the death of the life tenant.

- The following passage from the Introduction to Di Castri[122] suggests that if the expression limited fee has a legal meaning (and was not simply a synonym carelessly included) that meaning would certainly include the life estate:

> Estates are of varying duration and are divided into two classes; estates of freehold and estates not of freehold,[7] the former including the life estate, the fee tail and the fee simple. The life estate is the smallest freehold estate as it lasts for the life of the tenant only. The estate tail continues for as long as the original tenant or any of his descendants, but not collaterals, survive. The fee simple virtually lasts forever, and, therefore, is the nearest approach to absolute ownership in land.
>
> [7] Estates not of freehold, i.e., leaseholds, not the subject of seisin. See *Standard Life Assurance Co*. v. *Capital Assessor*, Area No. 01 (1997), 1997 CarswellBC 1020, 34 B.C.L.R. (3d) 346, 352 (C.A.).

- Reading through an older textbook on real property (*The Law of Real* Property[123]) has shed some light on this issue. In the textbook the authors note that a fee simple can be either absolute or modified and that there are four types of fee simple estates: those are the fee simple absolute, the determinable fee, the fee simple upon condition and the base fee.[124] The fee tail, on the other hand, is not a variant of a fee simple. It is a limited fee, where **limited refers to the class of persons who can acquire the property**.[125]

- Because a determinable fee is an instance of a fee simple, section 30(4) of *The Law of Property Act* does not seem to come into play: in the creation of a determinable fee, a fee simple has not been converted into a limited fee, it has been converted from a fee simple absolute into another variation of the fee simple.

Easements

- An easement is a right of use (as opposed to a right of possession) created over and upon a piece of land, the benefit of which is to another (reasonably proximate[126]) piece of land.

Essential Elements of an Easement

- The essential elements of an easement were laid out in *Re Ellenborough Park*:[127]

> For the purposes of the argument before us counsel were content to adopt, as correct, the four characteristics formulated in Dr. Cheshire's Modern Real Property (7th edn.), p. 456 et seq. They are (i) there must be a dominant and a servient tenement: (ii) an easement must accommodate the dominant tenement: (iii) dominant and servient owners must be different persons: and (iv) a right over land cannot amount to an easement unless it is capable of *forming the subject-matter of a grant*.

Dominant Lands required

- Whether they are called *easements in gross* or licenses, the granting of a right akin to an easement to a person per se, rather than to the person in their capacity as the owner of dominant lands, does not (except in the case of Statutory Easements[128]) create an easement. Nor does it create any other interest in land. This is not saying that such agreements are not valid and binding in contract as between the parties, it just means that the interest created by the agreement does not bind the subject lands.

- Because mere licenses (easements in gross) do not create an interest in land,[129] they do not run with the affected lands and cannot be protected by way of a caveat. Even where such a caveat is (by mistake) registered, it does not create rights which bind subsequent owners of the affected lands even where those parties have knowledge of the right or registration.[130]

- Other than where the easement is a Statutory Easement, Land Titles will not accept the registration of a Caveat[131] or easement agreement without the presence of dominant lands.

- The rights granted by an easement to the owner of the dominant lands do not go beyond the grant. Specifically, they do not give the owner of the dominant lands rights over the servient lands in respect of other properties owned by him or her.

Easement must accommodate the dominant tenement

- For a right granted to the owner of a dominant land to be considered an easement, it isn't enough that the right be in that person's favour allowing them some rights over the servient lands. The rights granted must facilitate the better enjoyment of the dominant lands themselves.[132]

Interest granted must be capable of forming the subject matter of a grant

- What does this mean, *capable of forming the subject matter of a grant*? In order to be capable of forming the subject matter of a grant the easement right:

    1. Must not constitute a mere right of recreation possessing no utility or benefit;

    2. Must not be expressed in terms which are too wide or vague;

    3. Must not be inconsistent with the proprietorship or possession of the servient owner:[133]

        - Where the rights granted go beyond mere use and are of a more exclusive nature, the right is likely a not a valid easement;

        - The question is, "whether the rights granted to the owner of a dominant tenement are so inconsistent with the servient owner's rights as to make an instrument something other than an easement and invalidate the grant.[134] With that said, encroachment rights and statutory easement rights are often exclusive in nature as to at least some portion of the servient lands.

    4. Must not benefit the dominant owner without activity on his part. This is subject to four exceptions:

        - The right to the flow of water through an artificial channel;

        - The right to a flow of air;

        - The right to the flow of light to a particular aperture; and

        - The right to the servient land's support for buildings on dominant land.

5. Must not require the servient owner to actively do anything (except perhaps to maintain a fence[135]).

Unique aspects of Easements Law in Manitoba

- Notwithstanding a shared history, the law of easements varies considerably from jurisdiction to jurisdiction.[136] There are a number of nuances to Manitoba law that cause it to deviate from the common law. Likely from other Canadian jurisdictions as well.

- Characteristic (i) & (ii): Section 111 *of The Real Property Act* creates a class of easements known as Statutory Easements (discussed below). These easements, which tend to be for municipal or utility purposes, do not require dominant lands.

- Characteristic (iii), the dominant and servient owners do not necessarily have to be different persons. *The Real Property Act*[137] allows for the creation of easements by declaration of the registered owner of the adjoining lands, rather than by the agreement of different owners.

Distinguished from other Interests

- Where the right is to the benefit of a person and not land, it is likely to be a licence and not an easement. Because a licence is not an interest in land it may bind the parties thereto, but it will not bind subsequent owners, even where they are aware of its existence.

- Where the right allows its owner to stop or prohibit an action on the servient lands, and is not a right of use, the right is a restrictive covenant and not an easement.

- Where the right simply allows entry for the purpose of taking or removal of a substance (such as fish, deer or other game, trees) the right is more likely a *Profit à Prendre*.

Creation of Easements Generally

- According to *Law of Real Property* by Anne Warner La Forest:[138]

  Easements can be created by statute, express grant or reservation, implied grant or reservation, prescription (where this is not precluded by statute), or proprietary estoppel.

- Once again however, the law in Manitoba in not in perfect with these general principles.

Creation of Easements in Manitoba

Creation by Agreement or Declaration

- As already noted, the common law contemplates the creation of easements by way of agreement between the owners of the affected and benefiting lands.

- As also noted, section 76(2) of *The Real Property Act* allows for the creation of easements by way of declarations executed by persons who owns both the dominant and the servient lands.

Creation by Transfer

- Historically, easements could be created in Manitoba by transfers. And rather than showing up on title as a charge, these easements were embraced in the legal descriptions for both the dominant and the servient lands.

- The continuing trouble with these easements is the complete lack of an underlying agreement to provide meaningful content. Typically, the two titles affected (the dominant and the servient titles) refer to the fact that there is a right of way and that it was created over certain lands to the benefit of other specified lands. There are no further details provided, no discussion as to the purpose of the right of way, its duration or the obligations of the parties. No doubt this is the reason these are now prohibited.[139]

- While the creation of easements by transfer of land is no longer allowed in Manitoba, there are a number of titles that continue to be affected by these easements, often leaving the owners feeling uncertain as to their respective rights and obligations.

Easement created by Order of the Court

- *The Law of Property Act*[140] allows the court to declare that an easement exists in situations where a building encroaches onto adjoining lands.

Creation by the Actions (or Inaction) of the Parties

- Unlike most other interests in land, easements can be created by the actions (and inactions) of the owners of lands, without the need for any kind of agreement or documentation. Because these easements are not created by an agreement or a conveyance, the only way the owner of the servient lands has to give notice of their interest is by way of the registration of a caveat. It is important to remember that by operation of section 58(1)(c) of *The Real Property Act*, titles in Manitoba are subject to easements howsoever created, even if they are not registered on title.

- Looking to the case law, there are three ways in which these types of easements can be created by prescription, by necessity, and (possibly) by proprietary estoppel.

Easements by prescription

- Easements by prescription are a well-established part of the law of Manitoba.[141] They arise through the long, continuous, open and notorious use of land.

- The essential elements for a prescriptive easement:

    - The continuous doing of some act by the owners of one piece of lands upon the lands of another;

    - The usage must be peaceful, open and notorious. A usage as if by right.[142]

    - There must be actual knowledge on the part of the owner of the servient land.

- The person affected by the act must have the power to prevent the either by action on their part or by action in the courts; and

- The duration of that usage, set by *The Prescription Act* of England,[143] is 20 years if no permission for the use has been granted and 40 years if oral permission has been granted.

  - Note: Manitoba looks to *The Prescriptions Act* of England because Manitoba's laws are those of England from 1870 unless they have been changed by subsequent legislation.[144] The Manitoba Courts make it clear that the old English Act is indeed still a part of the law of the Province.[145]

  - Although not explicitly stated, the Manitoba Court of Appeal strongly suggested that the 40-year period does not reset each time the title to the servient land changes.[146]

- Notes about prescriptive easements:

  - Prescriptive easements can be acquired over lands governed both *The Real Property Act* and *The Registry Act*.

  - Prescriptive easements cannot be acquired over Crown Lands.[147]

  - Prescriptive easements cannot be acquired for light.[148]

  - Prescriptive easement cannot be acquired for the protection of a treeline.[149]

  - It is not sufficient that a tenant of the affected lands has knowledge of the use of the lands. The time period for use doesn't begin until the land owner has actual knowledge. The burden for proving this knowledge rests on the party claiming the easement.[150]

Easement by necessity

- An easement by necessity arises where, on a disposition by a common owner of part of his or her land, one part is left without any legally enforceable means of access other than over the balance of the parcel of land as it existed prior to be split apart.[151]

Easement by proprietary estoppel

- The creation of an easement in equity by proprietary estoppel has not been directly addressed in Manitoba. The "appropriate circumstances" which allow for the creation of an easement by proprietary estoppel are stated in the decision of the English Court of Appeal in *Western Fish Products Ltd*. v. *Penwith (District Council).*[152]

  ... When A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B's land, such expectation arising from what he has said or done, the court will order B to grant A that right on such terms as may be just.

Registration of Easements

Attached to a Caveat

- Notice of an Easement can be registered on title by way of a caveat. In these cases, Land Titles does not scrutinize the agreement to see if the easement was properly created. To be acceptable for registration, the caveat must simply:

  i. Disclose both the dominant and servient lands affected by the easement;[153]

  ii. Be registered by the current owner of the dominant lands;

  iii. Claim/give notice of an easement; and

  iv. Disclose the basic nature of the easement.

- Easements and party walls created by way of a declaration cannot be registered by caveat. To register a caveat, there must be a pre-existing interest in land that the caveator gives notice of with their caveat. With easement and party wall declarations, there is no interest in land created until the registration of the declaration itself.[154] Simply put, there is no interest to give notice of by way of a caveat until that caveat registration has been rendered superfluous by the registration of the instrument itself.

- Because of the lack of a constituting agreement or conveyance, registration by way of caveat is the only way to give notice of easements created by prescription, necessity or proprietary estoppel.

In their own Right

- Easement agreements and declarations can be registered in their own right, pursuant to section 76 of *The Real Property Act*. Land titles scrutinizes these agreements, looking for:

  i. Proper execution and witnessing;[155]

  ii. Consents of encumbrancers;[156]

  iii. Clear statement(s) creating the easement;

  iv. A very clear description of the part of the servient lands affected; and

  v. Homesteads Act evidence and possibly consents where appropriate.

- Land Titles will not examine all of the terms of these documents (such as arbitration clauses and insurance requirements). Nor do we ensure that such terms are present.

Termination of Easements

- Easements can be terminated by express release by deed by the dominant owner, by the unity of ownership of servient and dominant land,[157] by statute (usually for public works), and by abandonment (implied release).

Discharge of registered easements

- Manitoba law requires that the discharge of an easement (registered as an easement and not as a caveat) be signed by the owners of the lands affected by it. This is to be accompanied by the consents of all interest holders *affected by the agreement.*[158] This is a much lower standard than for the initial registration; which required the consent of all of the interest holders in the lands,[159] regardless of whether they were affected by the easement. In the end, it will left to the district registrar's discretion when determining if an interest holder's consent can be dispensed with.

Abandonment / Implied Release

- It is ancient law[160] that mere non-use[161] is insufficient for an easement to be deemed to be abandoned.

- There must be some evidence that there was an intention to abandon by the dominant owner. It is a matter of intention.

- An interruption by the servient owner together with an acceptance by the dominant owner (in the way of a non-enforcements of rights) may be sufficient.[162] A period of one year has been suggested as sufficient period of interruption.[163]

Positive Covenants

- Despite a wide held belief, and the specific wording in numerous easement agreements and declarations, the positive covenants and obligations in easement agreements do not run with the servient lands and do not bind the subsequent owners of the servient lands. By virtue of privity of contract, these obligations do bind the parties to the contract, but do not bind subsequent owners.[164]

Ancillary rights

- In addition to the rights explicitly granted, an easement holder can also enjoy ancillary rights. These are rights reasonably necessary for the use the easement. The notion of ancillary rights is discussed by the Ontario Court of Appeal,[165] a decision endorsed by the Manitoba Queen's Bench in *295 Garry Street Inc*. v. *Mittal.*[166] As noted, these rights "must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable."

Easements as an Overriding Interest

Easements Survive Mortgage Sale and Foreclosure and Tax Sale Proceedings

- By virtue of legislation,[167] easements (including statutory easements) will survive both tax sale and mortgage sale and foreclosure proceedings.

- Unfortunately, the legislation does not address easements registered by way of caveat. Are these to be treated in the same manner as easements registered in their own right? Or, because they are mere claims of an interest and do not have to conform to the stringent requirements in the legislation, are they unprotected? There is no clear answer to this question. This issue is not relevant for statutory easements. The Act makes it clear that they become easements upon registration of either the agreement or a caveat with a copy of the agreement attached.

Title Subject to Easements without Specific Mention

- As one of the many exceptions to indefeasibility, titles in Manitoba are subject to easements howsoever created (and so including prescriptive easements, etc.), even if they are not disclosed on the title.[168] This exception does not extend to Statutory Easements, which become easements only upon registration.[169]

Statutory Easements

- Until 2011, the rights acquired by utility companies and by municipal governments to go onto the lands of a third party for the purpose of installing and maintaining infrastructure associated with their undertakings (wires, lines, pipes, cables, etc.) were known at law as rights *analogous* to easements. These rights were similar to easements but they were not easements; most obviously, they lacked one of the fundamental elements of an easement, the dominant lands. Prior to 2011, *The Real Property Act* allowed for the registration of caveats giving notice of these rights by the holders thereof.[170]

- In 2011, the scheme for the registration of these instruments was changed entirely. First and foremost, the legislature by decree overturned a key element of the common law and declared that, notwithstanding the lack of dominant lands, these instruments created easements[171] and not rights analogous thereto.

- It is important to note that while this is a fundamental change to the common law, it does not abolish the requirement for dominant lands entirely. To be qualify as a statutory easement, the rights granted must be:

    - For municipal or utility purposes (pipelines, power generation, wind farms, pipes, cables).[172]

    - In favor of agencies such as municipal governments or agencies providing utility services.[173]

Registration

- Statutory easements can either be registered on their own or attached to a caveat.[174]

- Because the district registrar will scrutinize the underlying agreement in both cases and because the legal rights created are identical regardless of the method of registration and because the addition of the caveat form adds nothing to the validity of the registration (it can be a source of unnecessary errors), it is the district registrar's recommendation not to attach these documents to caveats.

Unique elements

- As already noted, statutory easements do not require dominant lands.

- Unlike common law easements, affected land are only subject to statutory easements once they have been registered on title.[175]

- Once registered, statutory easements can be transferred and they can be separately titled, and those titles can be transferred and subdivided.[176]

Profit-à-Prendre

- A profit à prendre is a right to enter upon the land of another for the purposes of removing a specified good and can be for a specified term or perpetually. This good that can be removed include minerals, gravel, trees, water, fish or game.[177]

- The right is like an easement in that there is no exclusivity.

- The right is unlike an easement in that there is no requirement for dominant lands. The right can be to the benefit of dominant lands, but it need not be.[178]

- As with easements, profits à prendre cannot be unilaterally terminated by the owner of the affected lands, even upon the giving of some period of, "reasonable notice".[179]

Restrictive covenants

- Restrictive covenants are often referred to as negative easements. This description makes sense in that instead of giving the owner of the covenants the right to go onto the land of another for some purpose; it gives the owner of the covenants the right to stop the owner of the affected lands from carrying out some activity on their lands.

- Like easements, dominant lands are required for these to be valid. There is some lack of alignment in the jurisprudence as to whether the benefited lands must be ascertainable from the documents creating the restrictions [180] or if they can be ascertained using extrinsic evidence.[181] In order to avoid uncertainty, the district registrar will not allow a caveat to be registered claiming a restrictive covenant where the document does not also disclose the benefited/dominant lands.

- There are three types of Restrictive Covenants:[182]

  1. Restrictive covenants imposed by a vendor to protect unsold lands.

  2. Restrictive covenants imposed by a vendor to various purchasers who are all intended to mutually benefit and be bound by the covenants.

  3. Restrictive covenants imposed by a vendor to protect the vendor. These, while valid in contract law between parties privy thereto, do not run with the lands.[183]

Restrictive Covenants Imposed to Protect Unsold Land

- In these cases, a purchaser of land grants restrictions over a piece of land, which restriction are to the benefit of another parcel of the vendor's land. For such an agreement to be valid, the law requires:

  - The covenant or agreement must be negative in essence.

  - It must affect, and to have been intended by the original parties to affect, the land itself by controlling its use.

  - Two parcels of land must be concerned, one bearing the burden and one receiving the benefit - a servient and a dominant tenement.[184]

    The nature of the dominant lands:

    - One of the difficulties parties have when establishing a restrictive covenant is that they often do not have truly dominant lands. These agreements often specify a business location owned by the holder of the restrictions, lands that aren't genuinely benefited by the restrictions. For a restrictive covenant to be properly constituted, the servient lands must both "touch or concern"[185] the dominant lands and be proximate[186] to those lands.

    - The focus in making this determination must be on the land itself and not on the business of the landowner; the benefit must be to the lands as lands and the rules that determine this are property law rules.[187]

Restrictive Covenants Imposed to Protect Various Purchasers

- Referred to as building schemes or development schemes, these schemes are created when a party subdividing a large parcel of land imposes on each purchaser restrictions intended to benefit the other pieces of land in the subdivision. Typically, upon the sale of each parcel, a separate agreement is signed with each purchaser, and then registered against just that one parcel of land by a caveat.

- For the scheme to be valid:[188]

  1. There must be a common vendor.[189]

2. The vendor must have put the lands for sale subject to restrictions intended to be imposed on all the lots which, though not necessarily identical, create a general scheme of development;

3. The restrictions are intended to benefit all of the affected and sold lots;

4. The first purchaser had to have purchased their lot from the common vendor subject to the restrictions, with the intent that the restriction be to the benefit of all the other lots; and

5. The current owner purchased the lands aware of the restrictions.

- These schemes are recognized as being part of the law of Manitoba.[190]

Statutory Development Schemes

- While an effective tool in many circumstances, the fact that each of the constituting agreements must be registered separately at the time of sale of the affected lot, is a significant drawback to the building schemes arising from the common law.

- Responding to requests from lawyers and developers, *The Real Property Act* was amended[191] to reduce the multiplicity of agreements and registrations. As a result, when a vendor subdivides a large parcel of land into lots they can execute either a single declaration or (if lots have been sold already) a single agreement with the purchasers signing as parties thereto.[192] This single document restricts all of the lots for the benefit of all of the lots. Because of this, only one registration is required. Unlike the common law registrations, these declarations/agreements are registered in their own right[193] and not attached to a caveat.

Statutory Schemes Creating Land use Restrictions

- Land use, including building, development and subdivision is controlled in Manitoba by several legislative schemes. Inside the City of Winnipeg, land use is controlled by the provisions of *The City of Winnipeg Charter*[194] while outside the City, the operational legislation is *The Planning Act*.[195] Both of these acts give the relevant authority the ability to compel land owners to enter into land use agreements as a condition of various approvals. By virtue of these legislative schemes, the agreements can be registered against the relevant lands, giving the authorities an interest in those lands upon registration.

- It is important to keep in mind that governmental authorities have no right to unilaterally impose building, subdivision or development controls or require related agreements. In order to do so they must be empowered to do so by a specific legislative scheme.[196] That said the right to create and register these agreements has been held to implicitly include the right to amend and discharge them.[197] Furthermore, when considering the powers of a municipal government, the provisions of its constituting and authorizing legislation are not to be narrowly construed. Instead, they "must be construed in a broad and purposive manner."[198]

The Development Agreement

Outside the City of Winnipeg

- As noted, various sections of *The Planning Act*[199] allow for the creation of development agreements.

- Pursuant to the legislation, a board, council or planning commission may require the owners of affected lands to enter into a development agreement with government, the municipality or a planning district as a condition of either:

  - Subdivision approval;

  - Amending a zoning bylaw;

  - Making a variance order; or

  - Approving a conditional use.

- Among other things, development agreements can control the use of the land, the use of siting and design of buildings, parking, landscaping, the provision of open space, grading, fencing and the construction of works such as sewer and water, waste removal, drainage, public roads, connecting streets, street lighting, sidewalks and traffic control.

- Where the agreement provides that it runs with the land, it may be registered at land titles.[200] This is achieved by the registration of a caveat giving notice of the agreement. A copy of the agreement must be attached to the caveat.[201]

Within the City of Winnipeg

- *The City of Winnipeg Charter* also allows for the creation of development agreements.

- Pursuant to that legislative scheme, the city may require the owners of affected lands to enter into a development agreement with the city as a condition of the adoption of or amendment to a zoning by-law.[202]

- Among other things, such a development agreement can control the use of land, the use, siting, design and the timing of the construction of buildings, traffic control and parking facilities, landscaping, open space and the grading of land.

- Where the agreement provides that it runs with the land it may be registered at land titles.[203]

- *The City of Winnipeg Charter* also allow the City to require an owner to enter into an agreement, "respecting such matters as council considers advisable or necessary," as a condition of approving a plan of subdivision and to subsequently register these agreements at land titles.[204]

- In addition, *The City of Winnipeg Charter* allows the City to require a land owner to enter into a development agreement as a condition of approving a variance.[205]

The Conforming Construction Agreement

- *The City of Winnipeg Charter*, *The Planning Act* and *The Real Property Act* allow for the creation and registration of conforming construction agreements.

- Pursuant to the legislative scheme, a permitting authority may require the owners of affected land to enter into conforming construction agreement as a condition of issuing a building permit or making a variance order.[206]

- Conforming construction can address either the required spatial separation between buildings or access to public thoroughfares from building exits and to public streets from a parcel of land through use of neighbouring parcels of land.[207]

- These agreements, which must provide that they run with the land,[208] are to be registered in their own right and not attached to a caveat.

Mortgages

- A mortgage is a charge on land granted to secure the payment of a sum of money.

- The mortgage form is approved by the Registrar-General pursuant to *The Real Property Act*.

- The terms to a mortgage can be quite considerable and it is the general practice of lenders in Manitoba to "deposit" at Land Titles small booklets of standard mortgage terms.[209] They can then incorporate these terms by reference to the Land Titles registration number rather than attaching them to each and every mortgage.

- As with other dispositions, mortgages must contain satisfactory evidence under *The Farmlands Ownership Act* and, where appropriate, under *The Homesteads Act*.

Attributes of (new system) Mortgages in Manitoba

A Mortgage does not act as a Conveyance

- Historically (as well as in certain other jurisdictions) mortgages were a conveyance of the fee simple with the right to a re-conveyance upon payment of the monies secured thereby. This is not the case in Manitoba.[210]

Mortgages Grant (Deferred) Possession

- Notwithstanding the fact that a mortgage does not effect a conveyance, the execution of a mortgage passes to the mortgagee the same possessory rights as would have passed had the lands been vested in the mortgagee, with the owner's retaining the right to possession provided they do not default under the mortgage. The result is that a mortgage grants a deferred possession.[211]

- It is because of this deferred possession that Land Titles will not allow a joint tenant to mortgage his or her interest. To do so would likely cause a severance of the tenancy by

destroying one of its four unities, the unity of possession. This runs afoul of the rule that requires a Notice of Intent to Sever be served 30 days prior to the registration of any instrument that severs a joint tenancy where that instrument is not executed by all of the joint tenants.[212]

Priority of Advances

- As noted above in the discussion on the Torrens system, mortgage priority may be limited to the value of actual advances made.[213] In particular, advances will not have priority over:

  1. Builders' liens registered subsequent to the mortgage but prior to an advance under the mortgage.

  2. Charges registered subsequent to the mortgage but prior to an advance under the mortgage where the mortgagee has actual knowledge (and registration does not create actual knowledge) of the charge.

- While the office remains open until 4:30 pm, registrations at land titles officially stop at 3:00 pm.[214] Stopping registrations prior to office closure allows parties to do an "after 3 search" prior to advancing funds under a mortgage, particularly a construction mortgage.

The Necessity for a Principal Amount

- While the absence of a principal amount does not render a mortgage invalid,[215] a mortgage that fails to disclose a principal amount may not protect the mortgagee's security in all circumstances, and in particular as against subsequent encumbrancers.[216] Because of this, the district registrar not will accept such a mortgage without confirmation that this omission was deliberate.

Registration

- Typically mortgages (and encumbrances) are registered in their own right, using the approved mortgage form.

- Where a mortgage on the approved form contains defects that prevent it from being registered at land titles and the mortgagors cannot or will not attend to re-execute a properly drawn document, lenders will give notice of their security by way of caveat.

- In addition, it is not uncommon for parties to create charges upon lands to secure monies not using in the approved form. In these cases the parties can give notice of these charges by way of a caveat.

- These unregistered mortgages are often referred to as equitable mortgages. On application of the mortgagee, courts in Manitoba have declared these equitable mortgages to be mortgages for all purposes, allowing the mortgagee to carry out mortgage sale and foreclosure proceedings.

Debentures

- A debenture is charging document that does not use the approved mortgage form.

- In addition to whatever Manitoba land it may charge, a debenture must contain other security. It could secure personalty, be a floating debenture or charge land in a jurisdiction other than Manitoba.

- Prior to the registration of a debenture at Land Titles, it must be submitted to a district registrar for fiating as a mortgage.[217] The fiating process ensures that the debenture contains all of the required elements of a mortgage, including a specific provision charging land, the legal description and title number of the affected land and a list of those prior encumbrances that it is to be made subject to.

- Once a debenture has been fiated as a mortgage, it can either be registered immediately or it can be returned to the client for registration at a later date.

- Despite not using the approved form, debentures are to be registered in their own right and not attached to a caveat.

Dealings with a Mortgage

- Mortgages can be transferred, mortgaged, amended and postponed.

Transfer and Mortgage of Mortgages

- Where a mortgage has been transferred, the transferee steps into the shoes of the original mortgagee, with the right to amend, discharge and carry out foreclosure proceedings. At the same time, the initial mortgagee loses all right to take such action.[218]

- A mortgage of a mortgage has almost exactly the same effect as a transfer of mortgage. The only notable difference is the fact that where a mortgage has been mortgaged and not transferred, the mortgagor in the mortgage of mortgage (the original mortgagee) retains the equity of redemption, meaning that they can pay out the mortgage of mortgage and have it discharged from title.[219]

Postponement

- The registration of a postponement changes the registration priority of the instruments affected,[220] but only vis-à-vis each other.

- A postponement does not:

    - Change the priority of either of the affected instruments with regard any of the other charges registered against the affected title.

    - Affect the priority of advances. As such, if the mortgagee in a subsequent mortgage has advanced first (and by operation of *The Mortgage Act* has a priority of advances),

the mortgagee in a first mortgage cannot regain its priority over those advances by virtue of a postponement from the second mortgage. A subsequent instrument cannot postpone to a prior instrument. In practice, the parties will often execute as between themselves a "postponement of advances" agreement.

Amendment

- Virtually all of the terms of a mortgage can be amended by the registration of an amending agreement.[221] Historically prohibited, both the principal amount and the lands affected (to add new lands) can be amended.

- An amending agreement cannot:

  - Release lands. This is done by discharge.

  - Change the parties (other than to add a covenantor). This is because these are defined terms[222] that change with the land titles register:

    - The mortgagee is the owner of the mortgage. This is changes with either a transfer or a mortgage or the mortgage.

    - The mortgagor. This is the owner of the affected lands. This is changed upon a transfer of the affected lands.

Mortgagors' Rights and Protections

Criminal Interest Rate Prohibited

- Mortgages with an *effective* rate of interest in excess of 60% violate the *Criminal Code* of Canada.[223] All fees and charges assessed to a mortgagor, including loan application fees, are included when calculating the effective interest rate. The district registrar will not accept a mortgage that appears to charge a criminal rate of interest.

Mandatory Discharge and Maximum Discharge Fee

- *The Real Property Act*[224] requires the holders of mortgages and other instruments to register a discharge of their instrument within 60 days after either it has been paid out or after all of the obligations under it have been performed.

- The Act limits the amount that can be charged to prepare and file a discharge to the total of $100 (plus applicable taxes), plus all amounts actually paid the registration of the discharge and for one search of each of the titles affected by the discharge.[225]

Options where mortgagor cannot obtain a discharge

- There are a number of circumstances where a landowner cannot get a discharge from a mortgagee. Most often, this occurs with older mortgages where the mortgagee is deceased, if they were a person, or dissolved, if they were a corporation. It can also

happen where, due to the passage of time and corporate restructuring (amalgamations, etc.) the mortgagee has no record of the mortgage and is not prepared to provide discharge.

- There are three separate processes available to mortgagees, depending on the circumstances:

  1. A deceased mortgagee's estate is unprobated/unadministered

     - Where the mortgagee has passed away and there are neither letters of administration nor a grant of probate, the Registrar-General has developed a protocol that could allow the executors named in an unprobated will or those parties who would have been entitled to make application for letters of administration, to provide a discharge of the mortgage. The **Land Titles** Guide[226] document contains the complete protocol. The process is administered by the district registrar.

  2. The mortgage is statute barred

     - *The Real Property Act*[227] allows for an application to court where a mortgage is statute barred.

  3. The mortgage has been satisfied

     - Application can be made to the Registrar-General for an order discharging a mortgage that has been satisfied.[228] The application is to be submitted in eRegistration as an RGO (Registrar-General's Order) using the land titles request/transmission form.

     - The request is to be accompanied by a statutory declaration from the landowner and from anyone else with relevant knowledge. The statutory declaration must give evidence sufficient to allow the Registrar-General to conclude that the mortgage has been satisfied. Copies of supporting documents (this could include relevant correspondence from the mortgagee confirming payment, ledger books, cancelled cheques, etc.) are to be attached thereto as schedules.

     - The evidence required is very situational and there is no "one size fits all" solution.

Right to remedy a mortgage in default

- Notwithstanding any wording in a mortgage to the contrary, where a mortgagor has defaulted in a term under a mortgage, they have the right to remedy that default (including paying the costs of the mortgagee) and put the mortgage back into good standings.[229]

- This right does not arise where the default is of a type that cannot be remedied, such as where the mortgage has matured or the mortgage is payable on demand.

  - Despite language in a mortgage stating that it is payable on demand, if the parties thereto have agreed that the mortgagor can pay the debt with regular payments of

blended principle and interest and the mortgagee has indicated that they won't take proceedings so long as the payments are being made, the mortgage may not be a true demand mortgage.[230] In such a case, the mortgagor may have the right on default to remedy the default without paying the entire debt. The mere fact that a mortgagee allows payments on a demand mortgage does not automatically convert it to a conventional mortgage.[231]

Right to remedy in all cases, even with conveyance style mortgage

- In certain situations, parties will structure a loan arrangement so that it does not involve a mortgaging document. This can come in various forms, including a transaction consisting of a conveyance of land, leaseback and an option to repurchase.

- The question is, in such circumstances what rights does the mortgagor have? Can the mortgagee refuse to provide the re-conveyance where the mortgagor has defaulted under the mortgage? What happens if the mortgagor has remedied that default? Can the mortgagee refuse to allow the mortgagor to remedy the default?

- The Manitoba Court of Appeal held that conveyancers cannot remove a mortgagor's right to redeem by disguising a mortgage as some other form of transaction. Rather than being bound by the *form* of the transaction, the court stressed that the important test is to consider the *substance* of the arrangement.[232]

Right to Pay Off Mortgage in Default

- Manitoba legislation provides that where a mortgage is in default and the mortgagee, "has taken proceedings by sale or foreclosure," the owner has the right to pay out the mortgage (together with the costs of the mortgagee) without the payment of any interest penalty.[233]

Penalty Rate or Other Penalty Prohibited

- The *Interest Act* of Canada prohibits a mortgagee from charging a mortgagor a penalty rate of interest following default under a mortgage. Nor can the mortgagee charge the mortgagee any kind of fine or penalty as a result of the default.[234]

- The Supreme Court of Canada has applied this provision broadly, making it clear that it is the effect rather than the language used to describe the effect that causes a charge to run afoul of the prohibition. In a situation where a default triggers the mortgagee to raise the interest rate from a 'bonus rate' to the expressed rate in a mortgage, they have violated this prohibition.[235]

- The Ontario Court of Appeal has not allowed a rate increase that was triggered (as a term of the mortgage) by the mortgagor not paying the balance on maturity, holding that this violated the prohibition.[236]

- The Ontario Court of Appeal has indicated that where there are administrative fees charged on account of missed payments, these are allowable so long as they are real costs to the mortgagee and are not charged as a form of penalty.[237]

Encumbrances

A term with three meanings

- Encumbrance is a terms used on a daily basis by both the clients and staff of the Manitoba Land Titles System, and when they use that term, they are typically referring to the compendium of registrations that might appear on a certificate of title. Despite this ubiquitous usage, the term actually has three separate meanings in the context of *The Real Property Act*.

The large and common usage

- The term encumbrance is typically used by real estate practitioners to refer to any sort of instrument at all forming a charge on title. This usage would include mortgages, certificates of judgment, builders' liens, caveats and a host of other charges. And while this usage is contemplated by *The Real Property Act*,[238] most of the time when the Act uses that term this is not the intended meaning.

The medium usage

- The term encumbrance is more specifically defined in *The Real Property Act* for the purposes of referring to those registrations that can be amended by an amending agreement.[239] That definition comes quite close to the large usage. That said, and due to the nuances of the related sections, it does not include mortgages.

The narrow and more specific meaning

- Despite the fact that the broadest meaning is generally what practitioners mean when talk about the 'encumbrances on a title', when *The Real Property Act* refers to an encumbrance, the Act is most often relying on a much narrower and more specific meaning for the term.

- That narrower definition refers to an instrument that is like a mortgage in that it contains a charge on land. Unlike a mortgage however, there is no sum secured. Instead, the encumbrance secures a series of payments (for example, annuity payments).[240] When *The Real Property Act* uses the phrases, "*Mortgage or Encumbrance"* or "*mortgage, encumbrance, or lease"* the Act is invariably using the word in this narrower sense.

- The land titles smart mortgage form allows for the creation of either mortgages or encumbrances and, when registered using the prescribed form, the rights of the holder of an encumbrance are the same as the rights of the holder of a mortgage, including the right to initiate sale and foreclosure proceedings.

- Like a mortgage, the holder of an encumbrance can also give notice of their encumbrance by way of a caveat either if the encumbrance is not in the prescribed form or if for other reasons they cannot or prefer not to register the encumbrance in its own right.

District Registrar may remove

- The district registrar has the authority to remove an encumbrances upon being presented with sufficient evidence that the underlying annuity or other payments have been satisfied.[241]

INTERESTS IN LAND ARISING ENTIRELY FROM LEGISLATION

- A number of the interests in land that can be created or protected by way of registration arise not from the common law, but from legislation. Because these interests are not interests in land *at common law*, in order to register at land titles, claimants must comply with the specific provisions of the constituting legislation.

Judgments and Orders

- A judgment from a court of competent jurisdiction does not, in and of itself, create any interest in favour of the creditor in the lands of the judgment debtor. A judgment is simply an award of monies against one person in favour of another.

- It is by virtue of *The Judgments Act* that a certificate of judgment can be registered at Land Titles, and upon registration, form a lien on land.[242] The same is true for the registration of judgments for alimony or maintenance.[243]

- In addition to being able to register a certificate of judgment against lands owned by the judgment debtor, the judgment creditor may also register a judgment against land in which the debtor has an equitable interest.[244]

    - This would not include a property where the only rights of the debtor are those created pursuant to *The Homesteads Act*. Because of the contingent nature of those rights, they are neither vested nor future interest in land.[245] These are in fact, inchoate rights.[246]

- When registering at Land Titles, a court certified copy of the certificate of judgment must be attached to a form approved by the Registrar-General pursuant to *The Real Property Act*, being The Registration of Judgment Lien or Order Form,[247] also known as the Form 21. It is referred to as the Form 21 because when it originated it was the 21st form in the form regulation.

- While judgments initially only form a lien on the affected lands, sale proceedings can be brought against a property affected by either a certificate of judgment[248] or a maintenance order.[249] These proceedings are to be taken in the court and are subject to the provisions of *The Judgments Act*.[250]

- Despite appearing to have priority of registration, in certain situations certificates of judgment will not have priority over subsequently registered instruments.

    - A registered certificate of judgment does not form a lien on land with priority where, prior to its registration, the judgment debtor:

        - *has made a bona fide sale, exchange, conveyance or transfer, or a bona fide agreement for sale or exchange, subsisting at the time of the registration; or*

- *has given a bona fide option to purchase subsisting at the time of the registration*.[251]

- *The Real Property Act*[252] gives the district registrar the authority to adjudicate on the priority of registered judgments (including lien/charges in favour of the Province of Manitoba or a municipality) vis-à-vis subsequently registered instruments, instruments that may have equitable priority over the judgment or lien. The question of equitable priority is addressed by the Manitoba Court of Appeal in *Dominion Lumber Winnipeg Ltd.* v. *Manitoba (Winnipeg District Registrar).*[253] In that decision the court noted that judgments cannot attach to an interest in land where there has been a prior bona fides equitable conveyance of that interest in the land by the owner because that interest is no longer available to be attached.

Homestead Rights

- *The Homesteads Act* (and before it, *The Dower Act*),[254] creates rights in property occupied as a family home (the Homestead) in favour of non-owner spouses and common-law partners.

- There are two rights created by the Act:

  1. The right to a life estate on death of owner as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead.[255]

  2. The ability to prevent a disposition of the homestead without consent.[256]

- The requirement for consent applies regardless of whether a given disposition is made using the statutorily prescribed form or not and is necessary regardless of whether the disposition is registered at land titles or a caveat is registered in its place.[257]

- Because these rights are not vested,[258] but instead are inchoate,[259] caveats and judgments cannot be registered against a homestead interest. That said, specific provisions in *The Legal Aid Manitoba Act* allow a legal aid certificate to be registered against this interest.[260]

- These rights exist by operation of the Act and there is no requirement for any registration to perfect those rights.

- Despite the lack of a specific legal requirement to register at land titles, homesteads rights will not be protected in all cases, and this usually turns on the question of notice:

  1. Absent actual knowledge or (collusion in fraud) a disposition will not be invalidated despite lack of consent.[261]

  2. The **actual knowledge** of a person acquiring an interest in land can invalidate a transaction and the court can set aside a transaction unless there has been a subsequent conveyance to a bona fides purchaser for value.[262]

- Given the requirement for actual notice, a party with homestead rights is well advised to protect those rights by registration on title. The Act allows for the registration of a Homestead Notice in a prescribed form.[263]

- Where a disposition is made without consent, it is null and void (absent an intervening bona fides purchaser for value) and that disposition cannot be later resurrected.[264]

- *The Homesteads Act* does not directly list all of the circumstances that terminate homestead rights. Instead, the Act implies this list by virtue of a number of its sections. As an example, the Manitoba Court of Appeal has held that the divorce of the parties extinguishes the spouse's rights, despite the fact that the Act does not explicitly provided this.[265]

- As noted above, the rights created by *The Homesteads Act* are not vested rights. That said, these rights do fit within the definition of property under the *Bankruptcy and Insolvency Act*[266] and because of that they vest in the trustee on the bankruptcy of the non-owner spouse or common law partner.[267] Accordingly, on the bankruptcy of a non-owner spouse or common law partner, the ability to execute documents under *The Homesteads Act*, including consent and releases, vests in the trustee in bankruptcy.

Builders' Liens

- *The Builders' Liens Act*[268] creates a lien against the interest in land of a person in favour of a person who has done work on land, provided any services regarding land or supplied materials to be used in the work.[269]

- While most people are aware that a lien must be registered within 40 days, they are often unclear as to when the 40-day time clock begins to run. This is not surprising given that the answer will depend on the facts on the ground. A close review of the Act[270] is recommended.

- Although a bare bones form of the lien is set forth in the schedule to *The Builders' Liens Act*, there is a Registrar-General approved version of the form.[271]

Condominium Liens

- *The Condominium Act* provides condominium corporations a lien against an owner's unit (and the associated interest in common elements) for missed contributions to common expenses and the reserve fund,[272] a notice of which can be registered at land titles.

- The form of the notice of lien can be obtained from land titles.[273]

- It is important to be aware of the very short shelf life of these liens; a notice of a lien must be registered within three months of the date of default that gave rise to it.[274] Missing this time period is not terribly problematic if all that is lost is a monthly contribution to common expenses. It can be quite dramatic however, if the unpaid monies are regarding a special assessment following the replacement of all the windows in the complex.

- These liens have a super-priority[275] and can be enforced in the same manner as a mortgage is enforced under *The Real Property Act* (through sale and foreclosure proceedings).[276]

Personal Property Security Notices

- *The Personal Property Security Act* allows parties who have interests in personal property to protect those interests in affected lands by way of a notice registered at land titles[277] [278]. In addition to allowing for the registration of the notice, the Act sets out the methodology for determining priority regarding those interests, vis-à-vis encumbrancers of land.[279] The scheme

is not intuitive and it deviates from the priority of registration normally associated with a Torrens system.

- *The Personal Property Security Act* allows for the securitization of interests in goods that become fixtures, in growing crops, and in payments under a lease.[280]

- These interests are secured by the registration of a notice at Land Titles. The form of this notice has been approved by the Registrar-General of Land Titles pursuant to *The Real Property Act.*

Fixtures

- When asking whether something is or is not a fixture, one is in fact asking whether or not the object in question is to be considered part of the land, or a separate piece of personal property, a chattel.

- Master Harrison in *Manitoba* v. *McKinnon*[281] noted that the "seminal case" in this area is the 1902 Ontario decision in *Stack* v. *T. Eaton Co.*[282] Master Harrison quotes liberally from page 338 of that decision, wherein the court set forth the following principles:

  (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

  (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

  (3) That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

  (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

- Despite its antiquity, the case of *Stack* v. *T. Eaton Co*. continues to be the basis for the law in Manitoba.[283]

- Supporting this last point is Manitoba Court of Appeal decision in *Greater Winnipeg Gas Company* v. *Peterson and Osborne Investments Ltd.*[284] At page 507 Smith, C.J.M writes, regarding the intention of the parties, that,

  "...intention cannot override the law, and if the situation is such that in law the furnace has become a fixture, it is a fixture, notwithstanding an expression of contrary intention. Such a clause might support the continuance of a right to repossession by the vendor, but it cannot do more."

- One of the concerns conveyancing lawyers may face is whether a particular mobile home is to be considered a chattel or a fixture. In *Dunwoody Ltd*. v. *Farm Credit Corp*. the Manitoba Court of Queen's Bench focused as much on the degree of annexation as it did on the continued mobility of the home in question.[285]

- It would seem that in Manitoba, the intent of annexation is of relatively little importance, while the degree of annexation is of more importance, but even objects that are annexed to a certain degree can retain their status as a chattel where they retain the appearance of mobility!

Legal Aid Statements

- Where an individual has received legal aid, *The Legal Aid Manitoba Act*[286] allows the executive director of legal aid to register a statement against lands owned by the recipient or in which the recipient has an interest. What is unusual about this right is the fact that the interest that can be attached includes a right under *The Homesteads Act* and also land that is a family asset as defined under *The Family Property Act.*[287]

- Once registered, the statement forms a lien and charge on the land in an amount equal to the legal aid provided to the recipient, including the value of aid provided after registration.[288]

Governmental Notices

- A host of pieces of legislation give various governmental departments and agencies the authority to register notices on title. The effect of these notices is quite varied and can be severe. When title is affected by such a notice the relevant legislation should be reviewed quite carefully. Acts that allow for the registration of notices include:

  The City of Winnipeg Charter
  The Conservations Agreements Act
  The Contaminated Sites Remediation Act
  The Criminal Property Forfeiture Act
  The Efficiency Manitoba Act
  The Energy Saving Act
  The Environment Act
  The Expropriation Act
  The Heritage Resources Act
  The Municipal Act
  The Public Guardian and Trustee Act
  The Residential Tenancies Act
  The Securities Act

E. TENANCIES

- Land and the various interests in land can be owned by one person alone, or by more than one person at the same time. Tenancies describe the ownership rights that exist as between the parties who are co-owners. In Manitoba, the two ubiquitous tenancies are the tenancy in common and the joint tenancy.

TENANTS IN COMMON

- A tenancy in common is a type of concurrent ownership of land whereby multiple persons hold separate and distinct shares of the whole property.

- Where title is held by tenants in common, the interest of each of the tenants can be silent and in this case the title will read "As Tenants in Common" or the interests can be specified. These specified interests are referred to both as fractional interests or undivided interests. If, for example, there are two tenants in common and they each have equal shares, the title will show each one owning, "An undivided one-half interest".

- By virtue of *The Law of Property Act*, where property is conveyed to more than one person, absent a contrary indication in the conveyance, the persons will be deemed to hold the property as tenants in common and not as joint tenants.[289]

- Where title is silent as to an interest (and is therefore tenants in common) or provides that the parties own, "as tenants in common" and no interest is specified, there is no interest presumed. In particular, there is no legal presumption that the parties own the property in equal shares.

- Parties who hold lands as tenants in common do not have a right of survivorship upon the death of a co-tenant. Accordingly, where one tenant passes away their interest devolves to their estate in the same manner as any other property that they might own, and may be dealt with by the administrators or executors of their estate.

- There is no prohibition at law against a tenant in common separately dealing with his or her interest. This means that they may, without the approval of the other, convey or mortgage their interest.

JOINT TENANCY IN MANITOBA

- For those practicing in the area of real property law, the joint tenancy is a ubiquitous and apparently simple ownership interest. This apparent simplicity masks an area of law that has hidden complexities and unusual subtleties. The goal of this paper is to provide an overview of the law in this area as a reference point for those dealing in real property, starting from fundamental principles and moving to areas of greater uncertainty.

- A joint tenancy is a type of concurrent ownership, whereby multiple persons share ownership of the whole property

Unique features

- A joint tenancy is differentiated from a tenancy in common by two key factors:

    1. The right of survivorship – Upon the death of one joint tenant, their interest is terminated and the property devolves to the surviving joint tenant(s).

    2. The property is always owned in equal shares.

- As long as the joint tenancy is alive, a joint tenant cannot deal (transfer, lease, mortgage, etc.) with their interest separately.

- It isn't just land that can be held in joint tenancy; *The Real Property Act* contemplates parties holding mortgages, leases and encumbrances (in the narrow meaning of that word) as joint tenants.[290]

Essential elements – the four unities

- For a joint tenancy to exist, the law requires "four unities" to be present. These are the unities of time, title, interest and possession.[291]

    1. Time: the co-owners' interests in the lands must be acquired at the same time.

    2. Title: all owners must acquire their interest from the same document, be it a deed, grant or transfer.

    3. Interest: all owners must have the same interest. One cannot own one third, and the other two thirds.

    4. Possession: all owners must have the same right to possess the property. Accordingly the tenancy cannot exist where the parties have exclusive use of discrete portions of a property.

- A joint tenancy cannot exist absent any one of the four unities. If any of the four unities is destroyed, the ownership reverts to a tenancy in common.

Creation and parties

Presumption of tenancy

- Absent a contrary indication in the document, where land is conveyed to two or more persons and there is no interest expressed, at law the parties will be presumed to be tenants in common and *not joint tenants.*[292]

- An exception to the overall rule exists for trustees; trustees take title jointly. This would include the executors and administrators for the estates of deceased persons.[293]

Existing owner becoming a joint tenant

- At common law an owner could not convey lands from themselves to themselves and another party, creating a joint tenancy. Both the unity of time and title would not exist as the original owner would have acquired their interest by a different document and prior in time to any party they wished to convey an interest to.

- Legislation in Manitoba overcomes the common law obstacles and allows for the creation of a joint tenancy where the transferor is also one of the transferees.[294]

Non-persons as joint tenants

- At common law, only living persons can be joint tenants. By legislation in Manitoba, this has been extended to include corporations.[295] It has not been extended to include the Crown, nor should it - after all, *the Crown cannot die*![296]

Survivorship right exercised

- On the death of a joint tenant, the interest of that deceased joint tenant is extinguished and accrues to the survivor by operation of law.[297] The surviving joint tenant can immediately apply for title using the Land Titles Request/Transmission form.[298] Because this is not a transmission to a new owner, but is merely a request by an existing owner, the request form can be signed on behalf of the surviving tenant by their solicitor and agent. A death certificate issued by the appropriate governmental agency in the jurisdiction where the death occurred (in Manitoba, the Vital Statistics Agency) must accompany the request.

- Where the joint tenant is a corporation, their co-joint tenant can make application for title on the dissolution of that company.[299] Proof of the dissolution from the corporate registry will be required.

- Unlike a person, a corporation can be revived, even after dissolution.[300] Unfortunately, there is no law that addresses the effect that such a dissolution and revival would have on a joint tenancy, particularly one where there was no "survivorship" registered prior to the revival.

Joint tenancy not actually a joint tenancy

- Lawyers create titles with parties shown as joint tenants for reasons other than creating a true joint tenancy. Parties are added to titles for the purpose of obtaining mortgage financing, for tax purposes or for estate planning. In many such cases, although a person has been added as a joint tenant, there is no intention to create a joint tenancy. The trouble is there is a widely shared mistaken apprehension that "adding a name to title" is a perfunctory matter that is easily undone and has no actual effect on ownership.

Unities not all present

- One arrangement, used for financing purposes, involves the creation of two joint tenancy interests on one title:

- The first involves the intended owners, A & B.
- The second also involves A & B, adding in C (typically a parent) for financing purposes.
- Title is set up in such cases as A & B as joint tenants of an undivided 99/100 and A, B & C as joint tenants of the remaining 1/100.

- The question that comes up with this arrangement is whether there is actually a joint tenancy as between A, B and C in the 1/100th interest.

- In the arrangement, A & B have equal interests in the entirety of the property but C does not. C only has an equal interest in the 1/100 share.

- Despite the fact that there are numerous titles set up in this manner, I am unable to locate any specific case law that speaks to this point.

- Sir William Blackstone opined in 1893 that in a situation where there are three joint tenants, and one sells their interest to one of the other tenants, the joint tenancy in the part not sold is preserved.[301] In such a case, the parties have a unity of interest in the discrete piece they hold as joint tenants but not in the property as a whole.

- The idea that the unity of interest need only apply to the interest held jointly and is not effected by one of the joint tenants having a further and separate interest in the property is supported by Megarry & Wade in their real property textbook.[302]

- If Blackstone and Megarry & Wade have accurately stated the law, joint tenancies in the various titles created for financing purposes remain intact despite the fact that the unity of interest is only in the interest that is the subject of the joint tenancy and not in the entire property.

- Beware coming to a definitive conclusion in this matter: A US court has considered the situation where A owned a life interest and A & B were joint tenants of the remainder. In that case, the court found that, in the entirety of the property, there was not a unity of possession and accordingly there was no joint tenancy in the remainder interest.[303]

Resulting trust

- With the exception of titles affected by fraud or wrongful act,[304] and subject to a list of specific exceptions,[305] *The Real Property Act* declares that every title is, "…conclusive evidence at law and in equity, as against the Crown and all persons, that the owner is indefeasibly entitled to the land or the interest specified in the title…."[306]

- Despite this declaratory statement of indefeasible title, this is not the end of the matter; the application of trust law to the ownership of land has muddied the waters. In certain situations the courts have held that despite the clear wording of title, equitable ownership rights can trump certainty of title.

- Depending on the equities, if the court is not prepared to find that there was no joint tenancy in the first place, it may find that the party who has been gratuitously added to title (either

for estate planning, financing or tax purposes) holds their interest in trust. More specifically, there could be a finding of a resulting trust.

- In the 2009 decision of *Simcoff* v. *Simcoff*,[307] the Manitoba Court of Appeal applied the principles set out by the Supreme Court of Canada decision in *Pecore* v. *Pecore*[308] (a decision that addressed the law of resulting trust in the case of a joint bank account) to the ownership of land in joint tenancy. In the case of a conveyance creating a joint tenancy for little or no consideration, the court in *Simcoff* stated that a resulting trust can be presumed, but only if there is insufficient evidence to rebut it.[309]

- The problem is there is no certain outcome where a sham joint tenancy is created. It is possible that a sham title will be treated as indefeasible, and in such a case those who are essentially volunteers to title will be vested with rights of ownership. This could be problematic for those who are the actual purchasers of land in the event of a partition or sale application or on the death of the purchasing joint tenant (in this case, despite being the purchaser who has contributed the funds to purchase, the lands may devolve to the non-purchasing survivors, depriving the purchaser's estate entirely). On the other hand, the joint tenancy may not be treated as such and on the death of a volunteer there may be no ability to exercise survivorship rights as those rights do not in fact exist.

- Given the potential uncertainty created by a sham joint tenancy, serious consideration should be given before such an interest is casually created. Lawyers should educate lenders and accountants rather than simply accede to their wishes for a simple outcome. In certain cases, consideration should be given to sending clients for independent legal advice before a sham tenancy is created.

Dissolution of a joint tenancy

Partition or sale

- In Manitoba, the owner of a joint tenancy has the right to apply to court for an order of partition or sale.[310] The Manitoba Court of Appeal has stated that the test when considering whether or not to allow the application is not a test of fairness.[311]

- As a starting point, a joint owner is entitled to an order for partition or sale. To defeat the application, the respondent must show that the order would be oppressive or vexatious or that the applicant did not come to court with clean hands. Mere personal inconvenience is not enough. The conduct complained of must be egregious for an application for partition or sale to be rejected.

Bankruptcy

- Although the registration of a transmission by a trustee in bankruptcy has the effect of severing a title where the bankrupt holds an interest as a joint tenant,[312] it is actually the assignment in bankruptcy that severs the tenancy, regardless of the wording of the title.[313]

- A complication arises where a joint owner goes bankrupt, the trustee in bankruptcy does not take title to the bankrupt party's interest, and then the bankrupt is later discharged from the

bankruptcy. In such a case, the state of the title does not reflect the underlying ownership interest and the state of the title is unclear from this point in time.

Murder of co-joint tenant

- Because a person cannot profit from their unlawful act, when a party murders their co-joint tenant the act severs the joint tenancy.[314]

- The core requirement is the unlawful act. So, where a joint tenant kills their co-joint tenant, but they are found not guilty by reason of insanity, the tenancy is not severed.[315]

Simultaneous death of joint tenants

- Where joint tenants die at the same time or in a situation where it can't be determined who passed away first, they shall be deemed to have held the title to the property as tenants in common with equal shares.[316]

Consensual acts

- Where the parties are acting together, a joint tenancy can be severed by way of an instrument executed by all of the joint tenants or by an instrument executed by some with the consent of the balance.[317]

- The most common manner in which a joint tenancy is converted to a tenancy in common is by way of a transfer of land that changes the tenancy but does not change the parties. Such a transfer is exempt from land transfer tax.[318]

Unilateral severance by one joint tenant

- It is the right of joint tenants to sever their tenancy. At common law there is no need for the consent of, or even notice to, the other joint tenants.[319]

- While this right continues under *The Real Property Act*, there is now a requirement for the service of notice prior to the registration of a severance instrument that does not have the consent or involvement of the other joint tenants.[320] A prescribed form of the notice is approved by the Registrar-General: Form 20, *Notice of Intention to Sever Joint Tenancy*[321] (Form 20).

- The process to be followed to sever a joint tenancy by notice (in accordance with section 79 of *The Real Property Act*) is as follows:

    1. Complete the Form 20, *Notice of Notice of Intention to Sever Joint Tenancy*. Do not register this at Land Titles.
    2. Personally serve the Form 20.
    3. Wait 30 days.
    4. Register the severing instrument at Land Titles:

a. The severing instrument can be a conveyance of an interest by the joint tenant to a third party or, for a severance by a joint tenant without a disposition, the instrument can either be a Transfer of Land by the severing joint tenant to themselves or it can be a Request/Transmission (see discussion below).

b. An affidavit of service of the Form 20 (with a copy of the actual Form 20 that was served attached thereto as an exhibit) must be submitted with the severing instrument. When using eRegistration, this affidavit is to be added to the severing instrument as a supporting document.

- Where a joint tenant served with the Form 20 wishes to contest the severance, they must file evidence with the District Registrar confirming that they have taken court proceedings to oppose the severance.

- Once evidence of proceedings has been filed Land Titles will not complete the registration of the severing instrument. Nor will Land Titles process a Survivorship Request in the event that either of the joint tenants dies, not without either a court order or consent to that registration by the estate of the deceased joint tenant. This is because there is no certainty as to whether or not the joint tenancy has been severed.

Problems with the Statutory Severance Process

- Although the severance process in section 79 seems straightforward, several issues have come up in recent times:

Issue 1: The correct severing instrument

- Historically, where a party has wanted to sever a joint tenancy, but had no intention of conveying an interest to a third party, Land Titles' advice was to serve the Form 20 and then file a request to sever using the approved Request/Transmission form.

- In a matter currently before the District Registrar, a position has been taken by counsel on behalf of a registered joint owner who had been served with a notice regarding this practice. Counsel has been suggested that section 79 of *The Real Property Act* does not create a new way to sever a joint tenancy, it merely prescribes the giving of notice of an intention to register a document that would otherwise have the effect of causing a severance, one that would now be prohibited because it wasn't signed by all parties. The argument is that section 79(1) contemplates, "an instrument that has the effect of severing a joint tenancy," and a request to issue a title by one of several joint tenants is not such an instrument.

- This argument has some very serious implications. Given that many such severances occur in family law situations and in most such situations the land in question is the homestead of the parties, absent consent (and that would likely not be forthcoming) there is no way a joint tenant could create a valid disposition to a third party causing severance, not without an order of the court. This means that such a person would have no way of exercising their fundamental right to sever the joint tenancy.

- While the argument regarding the interpretation of section 79 seems compelling, Mr. Rick Wilson, Registrar-General (retired) has advised that the intention at the time that section was added to *The Real Property Act*[322] was for the severance to occur by

virtue of the Form 20, upon the expiry of the notice period. The purpose of the Request form was just to have title changed to reflect the severance that has already taken place at law.[323] This was why the Request form was added to the forms regulation at that time.

- It is worth noting that section 79(5) allows a judge to find that severance occurred before the registration of the so-called severing instrument.[324] This implies that severance may in fact occur by operation of law at the expiration of 30 days after the service of the Notice (this accords with the positon of Mr. Wilson) and not on the date that the severing instrument is registered at Land Titles.

- Assuming that a Request cannot be used, there may still be a route available to such a person. The Manitoba Court of Appeal in *Simcoff* noted that a transfer by one joint tenant to themselves will sever a joint tenancy.[325] Because such a transfer is not a disposition to a third party, no consent under *The Homesteads Act* would be required and accordingly, it would preserve the *prima facie* right joint tenants have to sever their tenancy without the consent of their co-tenants.

- While Manitoba does not have any specific section in its legislation allowing for a transfer to one's self (as there are in other jurisdictions[326]), there is no prohibition that the author is aware of. Further, it is common practice for parties to transfer land from themselves to themselves and other persons: the District Registrar would accept a transfer from A to A & B, each as to an undivided ½ interest. In such a case the party is transferring a discrete interest to themselves.

  The position of the Registrar-General

  - In light of the above, the Registrar-General has directed the Land Titles District Registrars to allow a single party severance of a joint tenancy either by a Transfer of Land by a joint tenant to themselves or by a request using the Request/Transmission form, provided in either case that the Form 20 has first been served.

Issue 2: The claim of an unequal share

- It has also been the historic practice of Land Titles to allow a party to claim more than an equal share in the Form 20. This practice has also been called into question. The position is that, absent an order or a judgment from a judge of the Court of Queen's Bench, a party to a joint tenancy cannot claim an interest larger than an equal share.

- While section 79 does not contemplate an ability to claim a larger share than an equal share, by leaving the interest claimed as a blank field in the form (to be completed by the party giving notice), the Form 20 as prescribed by regulation (delegated legislation) seems to allow a party to claim some other amount: *You are hereby notified that I claim an undivided _____ interest in the above described land.*

  Observations:

  - Severance does not mean the redistribution of interests, the settling of grievances, the recognition of equities or the adjusting of accounts; it simply means the removal of the right of survivorship.

- At common law there is no notion of a severance allowing a party to claim an unequal share.

- The provisions in section 79 of *The Real Property Act* regarding severance do not contemplate a party acquiring a greater interest than an equal interest.

- While Form 20 leaves the fractional interest to be claimed blank, it does not specifically allow or even contemplate an unequal claim. It simply is something to be filled in, rather than as a pre-printed amount. This makes sense considering that not all joint tenancies involve two people.

- For a joint tenancy to exist, the parties must have equal shares. This is more than a presumption; the ownership of equal shares is one of the *four unities*. Titles do exist where joint tenancies are set up for financing, tax or estate planning purposes and may not be joint tenancies at all.

Conclusions:

- A direct expression of intent from the legislature in *The Real Property Act* is required to override the common law.

- If the joint tenancy is a sham set up for ulterior purposes, it cannot be *severed* because it wasn't a joint tenancy in the first place. What is required in such a situation is an order of partition. Partition is a court process, not a Land Titles one, and the District Registrar has no authority to oversee such a process.

The position of the Registrar-General

- Having given the matter careful consideration, the Registrar-General has directed that the Land Titles District Registrars not allow a severance where a party is claiming an interest greater than an equal share. Those who believe they are entitled to a greater share must make application to court for an order of partition.

Judgments and judgment sales

- A certificate of judgment registered against the interest of only one joint tenant will not sever a joint tenancy; it is merely a lien or charge on the land.[327]

- Because judgments do not sever joint tenancies, and because they only affect the interest of the debtor joint tenant, they will be extinguished on the death of that joint tenant.[328]

- This said, proceedings to enforce the judgment by way of sale will sever the tenancy.[329]

Mortgage by one joint tenant

- It is not clear when a joint tenancy is severed in the case where a single joint tenant grants a mortgage of their interest alone. What is clear is that at some point in time between the granting of mortgage security and the issuance of an order of foreclosure against that interest, the tenancy is severed.

- In *Registration of Title to Land*, the author suggests that the granting of a mortgage under the old system is a conveyance and thus severs a joint tenancy, while a new system mortgage is simply a granting of security and does not sever the tenancy.[330]

- This position is supported in the Australian decision of *Lyons* v. *Lyons*, where the question of whether a new system mortgage by one of two joint tenants severed the joint tenancy was addressed. The court started from the basic principle that a new system mortgage does not pass an estate or interest in lands according to the laws governing the Torrens system of Australia.[331] *The Real Property Act* of Manitoba explicitly states that a mortgage is security but passes no estate or interest in land.[332]

- That said, the Manitoba Court of Queen's Bench in *Novak* v. *Gatien* (which did not address the distinction between old and new system mortgages) stated that the unity of title was destroyed when one joint tenant granted a mortgage.[333]

- Due to the particular nuances of mortgage law in Manitoba, it may be that the *Novak* decision is the better law. In particular, *The Real Property Act* of Manitoba gives to first mortgagees the same rights of possession and quiet enjoyment of lands that they would have had were the lands actually vested in them, rights that are held in abeyance so long as the mortgagor does not default under the mortgage.[334] The granting of these rights strikes at the unity of possession, one of the four unities of a joint tenancy.

- The only real question with a mortgage is when the severance takes place. Does it take place on the registration of the mortgage (as per the *Novak* ruling), the default (when the mortgagee's possessory rights vest), the initiation of enforcement proceedings (as with a judgment) or on the registration of a Final Order of foreclosure or Transfer under Power of Sale?

- Of note, in New Brunswick, the legislature has seen fit to explicitly settle the matter, declaring that a mortgage does not sever a joint tenancy.[335]

The position of the Registrar-General

- In Manitoba, in the interest of certainty of title, the Registrar-General has ruled that a severance of a joint tenancy is required prior to the registration of a mortgage by only one of several joint tenants.

- This requirement prevents a secret severance of a joint tenancy. After all, if the tenancy is severed by the default (or perhaps by the issuance of an order for sale or foreclosure) this could be done without any notice to the other joint tenant. A severance without notice is anathema to the spirit of section 79 of *The Real Property Act*.

- In addition to adding certainty to the process, the requirement for a severance prior to registration of a mortgage protects the rights of the lender:

    1. In the event of the death of the joint tenant who has granted security against their interest, their mortgage would be extinguished.

2. They are not faced with the prospect of having to serve a notice of their intent to sever the joint tenancy prior to one or other step in the process. This could become complicated very quickly if the other owner objected in court to the severance.

Conduct of the parties

- At common law a joint tenancy can be severed by a course of conduct or course of dealings of the owners. This has been considered by the courts on multiple occasions and the key question that must be addressed is whether or not the facts demonstrate a mutual intention to sever the tenancy.[336]
    - An agreement to sell a condominium and split the sale proceeds was held to be a course of conduct sufficient to sever a joint tenancy.[337]
    - One party leaving the marital home and engaging in some negotiations towards the disposal of jointly-held assets was not sufficient to sever a joint tenancy.[338]
    - An unregistered transfer of land signed purporting to transfer an undivided one-half interest in the family home without the consent of the owner's spouse or common law partner did not sever a joint tenancy.[339]
    - Where the owners occupying discrete portions of the overall joint tenancy, build separate homes and fence off areas from each other, they will destroy the unity of possession and sever the tenancy.[340]
- From a review of the cases, there are no hard and fast rules. Each case is driven by the facts and the circumstances must be looked at as a whole to determine if the parties mutually intended to treat the tenancy as a tenancy in common.[341]

Order of sole occupancy

- In family proceedings one party or the other is often awarded sole occupancy of a jointly owned family home. Despite the fact that only one person has occupancy, the Manitoba Court of Queen's Bench has held that this did not change the unity of possession and therefor did not sever the joint tenancy.
- The court held that unity of possession instead referred to the fact that the parties own the entire property together and not discrete portions.[342]

Revival of a joint tenancy

- Di Castri has suggested that a joint tenancy once severed can be *revived* under the appropriate circumstances. Di Castri refers to a situation where one joint tenant granted a lease to a third party for their life. In that case, despite the fact that the lease severed the tenancy, on the death of the tenant, the joint tenancy was *revived.*[343]
- While there is no Manitoba law regarding revival, it might apply in several of the unusual situations outlined above:

- The discharged bankrupt where the trustee has not taken title: This is possible because the tenancy was severed but the circumstances that led to severance have disappeared.

- The dissolved corporation that is revived before a survivorship is registered: This is unlikely. It isn't that the tenancy was severed in this situation. In this case the land vested by operation of law in the "surviving" joint tenant.

Joint tenancies and *The Homesteads Act*

- *The Homesteads Act* gives a life estate in the homestead of a couple to a non-owning surviving spouse or common law partner in the case of the owner's death. Any disposition of the property after the owner's death is subject to this right.[344] These rights exist in property held by spouses or common law partners as joint tenants[345] and these rights are unaffected by a severance of the joint tenancy.[346]

- Where there is a direct conflict between the rights of a surviving joint tenant and the homestead rights of the deceased co-joint tenant's spouse or common law partner, the rights of survivorship trump.[347]

- This decision accords with one the fundamental principles of a joint tenancy: that the right of survivorship, being an incident of the joint tenancy, vests immediately upon creation of the tenancy, and takes precedence over any disposition by an estate,[348] while the right to the life estate in *The Homesteads Act* accrues, "as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead."[349] Any gift in the will of a deceased joint tenant in the subject property would fail because once they are deceased, they have no interest left to devise.

Joint tenancy and marital property accounting

- Family law practitioners should be aware that the interest of a deceased joint tenant in joint tenancy property will be included in the inventory of their assets. The value included will be the fair market value of the property that *was* jointly held multiplied by the contribution of the deceased owner divided by the contributions of all the owners.[350]

Final thoughts

- As with any area of law, that which at first seemed to be simple, has very quickly become complex. Practitioners who are careless with fundamental principles and who do not understand the subtleties of law risk creating titles and structuring affairs in a manner that is not at all in accordance with the intention or the ultimate best interest of their clients. This is as true of joint tenancy, however basic an interest it seems, as it is any other area of the law. Particular care should be taken by those who use the joint tenancy as a vehicle to avoid the effects of other legislation or to structure affairs for a beneficial end, particularly where there is no actual intention of creating a true joint tenancy.

F. MINES AND MINERALS

CAUTION

- It is not uncommon for practitioners in the Province of Manitoba to find dealing with mines and minerals interests both confusing and intimidating. Furthermore, those who hope that a quick search at land titles will provide them with a concise and clear statement as to mines and minerals ownership in a particular parcel of land will be disappointed more often than not.

- In this section, the reader will find a history of mines and minerals law as it pertains to the Province of Manitoba, with reference to legislation, federal and provincial, and certain judicial pronouncements. This section will also provide the reader with an understanding of what is meant when land titles uses certain mines and minerals reservations in certificates of title.

- Mines and mineral ownership in Manitoba is confusing, because the law is a complex collection of statutory and common law rules and regimes, many of which leave gaps that have never been filled and questions that have never been answered. The purpose of this part of the paper is to lay a foundation upon which one can build an understanding of the law in this area. This document should not be taken as containing a final or a definitive statement of the law because such a statement is beyond its scope.

PRELIMINARY MATTERS

Sand and gravel

- Although often characterized as a mine or mineral, unless otherwise specified, sand and gravel are usually part of the surface.

- In Manitoba, as in other western provinces, we have a specific piece of legislation that enunciates quite clearly the fact that sand and gravel are part of the "surface" and are not mines or minerals (subject to certain statutory exception).[351]

- Despite the fact that this legislation was passed only in 1972,[352] it is not to be seen as a change in the law. First of all, the language of the act makes it clear that it is retroactive in its application. In addition, and according to the Supreme Court of Canada in *Western Minerals Ltd*. v. *Gaumont*,[353] this legislation (the court was actually considering a very similar Alberta Act),

  > "...is declaratory of the law. A consideration of all its provisions indicates an intention not to alter the law, but to declare what, in the view of the Legislature, it is and always has been."

- In Gaumont, the court had been asked to consider whether or not sand and gravel was a mine or a mineral.

- In rendering its decision, the court held that not only was sand and gravel not a mine or a mineral as a result of the sand and gravel legislation, it was not a mine or a mineral prior thereto either. The court looked to what those dealing with land and minerals, what famers and businessmen

took the expression minerals to mean - the vernacular - and in doing so decided that for the purposes of the common law, sand and gravel was not a mine or mineral.

- Another factor the court considered was:

> "The difference...between the ordinary soil and gravel is largely a matter of gradation in physical refinement of a common substance, and that fact may explain the natural tendency to treat the latter as ordinary roughage of the soil rather than discrete mineral substance."[354]

- The court also held that sand and gravel were not valuable stones, that expression referring to so-called "cut stone".[355]

Gold and silver

- Precious metals do not pass from the Crown unless specific words ("apt and precise words") are used to convey them from the Crown to a grantee. The precious metals are gold and silver. This Crown prerogative, known as "mines royal" dates back to at least 1568. In support of this principal is the 1889 Privy Council decision in *Attorney-General of British Columbia* v. *Attorney-General of Canada.*[356]

- Gold and silver have received peculiar treatment in federal legislation. In the first enactment of the *Dominion Lands Act,*[357] the legislation that governed the initial grants in Manitoba, contained the following language:

> 36. No reservation of gold, silver, iron, copper, or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands.

- This section seems to suggest that there was to be no reservation of any mines or minerals, even gold and silver, in these grants! This interpretation was considered and rejected by the Judicial Committee of the Privy Council in *Hudson's Bay Co*. v. *Canada* (Attorney General).[358]

- In 1879 the *Dominion Lands Act* was amended,[359] repealing the language in 36 and replacing it:

> Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead, but shall be disposed of in such manner and on such terms and conditions as may, from time to time, be fixed by the Governor in Council, by regulations to be made in that behalf...

- In 1881[360] this impact of the new section was moderated:

> 13. Any discoverer of minerals upon surveyed or unsurveyed lands who has applied for a grant of such lands before the passing of the Act forty-third Victoria, chapter twenty-six, or his assigns and associates shall be held to have the same rights as if the Act had not been passed.

- Finally, in 1883, with the passage of a revised and consolidated *Act,*[361] the issue was settled with the passage of section 43:

> 43. It is hereby declared that no grant from the Crown of lands in freehold or any lesser estate, has operated or will operate as a conveyance of the gold and silver mines therein, unless the same are expressly conveyed in such grant.

- The legislation, apparently retroactive as well as forward looking, remained essentially unchanged until 1908, at which time it disappeared. This disappearance was of no consequence of course, because by this time federal crown grants contained a reservation of all mines and minerals as a matter of course.

- As far as gold and silver are concerned, although the path was somewhat confusing, in the end the conclusion one can reach by reading the statutes and the judicial pronouncements is that gold and silver were not granted by the federal Crown unless the grant contained a specific *inclusion* of those substances.

Title not the end of the inquiry

- Where a certificate of title is silent as to mines and minerals, where it contains no such reservation, the owner of the surface may nonetheless not own the underlying mines and minerals. This can happen when the original grant of the subject lands from the Crown reserved the mines and minerals and those mines and minerals have not otherwise and subsequently acquired from the Crown (by a later grant for example). In these cases, even though the title is silent as to any mines and minerals reservation, the title will none-the-less be subject to the reservation in the grant. This is because in Manitoba, all titles are subject to subsisting reservations in the original granting document.[362]

- There are a multiplicity of reservations that could be in a grant, many of which relate to mines and minerals. Some common reservations:
  - Rights of passage over navigable waters
  - Rights of fishing
  - Rights for the mooring and landing of boats
  - Travelled roads
  - Strips of land along the border of navigable waters
  - Strips of land along Provincial or Federal borders
  - Mines and minerals
  - Sand and gravel
  - Gold and silver
  - Precious stone
  - Natural gas and related hydrocarbons
  - Coal

- Determining the reservations for a particular piece of land begins with a review of the original grant from the Crown (often referred to as the patent) for those lands. These patents will likely have been registered in the old system (though not always). Equally likely is the fact that the patent will be for a much larger piece of land than is being currently considered. For example, there is probably no discrete parent from Lot 1 Block 1 Plan 12345. A review of plan 12345 will disclose however that it is a subdivision of a particular river lot or a specific quarter section and likely the patent will be for this larger piece of land.

Cap on damages

- As a result of section 183(2) of *The Real Property Act,*[363] the ability of a party to claim against the land titles reimbursement fund for a mistake in a title, or otherwise, regarding mines and minerals is limited to $5,000.00 on top of the amount actually paid for the mineral interest. Accordingly, it is always advisable to fully research a mines and minerals interest prior to acquisition and investment.

Federal ownership of public lands upon Manitoba entering Confederation

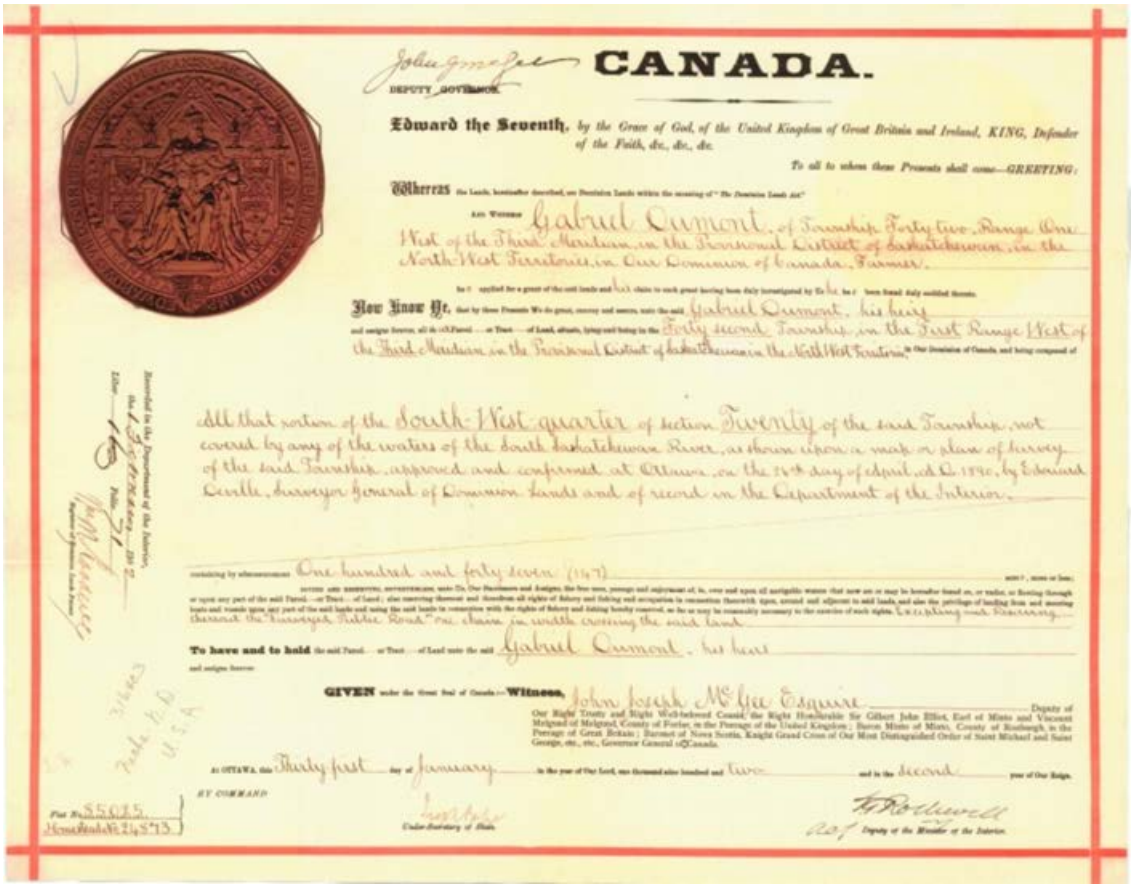
- On November 19, 1869, by Deed of Surrender, the Hudson's Bay Company transferred sovereignty of Rupert's Land to the British Crown. In 1870 the Crown transferred these lands to the Dominion of Canada. The Company received £300,000 and the right to certain lands in the "fertile belt" of Canada.

- When Manitoba entered confederation on July 15, 1870, these lands continued to be vested in and under the control of the Government of Canada,[364] there was no mass transfer of public lands from Canada to Manitoba. This continued with the 1912 expansion of the province's boundaries.[365] As a result, all grants of land to settlers had to come from the only authority with lands to grant, being the Dominion Government. As an aside, this also meant that the revenue associated with lands grants flowed to Canada and not Manitoba.

FEDERAL CROWN GRANTS

- While the ownership of certain parcels of land in Manitoba actually traces back to the Hudson's Bay Company and perhaps even Lord Selkirk, the chain of ownership for land in Manitoba typically begins with a grant from the Crown. And as noted above, the Crown in question would initially have been the Crown in right of Canada.

- While these initial grants contained various reservations, including travelled roads and navigable waters, they did not contain any reservation of mines and minerals. Nor did they contain a reservation of a strip of land at the edge of navigable waters.



CANADA.

DEPUTY GOVERNOR

Edward the Seventh, by the Grace of God, of the United Kingdom of Great Britain and Ireland, KING, Defender of the Faith, &c., &c., &c.

To all to whom these Presents shall come—GREETING:

Whereas the Lands hereinafter described, are Dominion Lands within the meaning of "The Dominion Lands Act"

AND Whereas Gabriel Dumont, of Township Forty Five, Range One West of the Third Meridian, in the Provisional District of Saskatchewan, in the North-West Territories, in Our Dominion of Canada, Farmer,

has applied for a grant of the said lands and has claim to such grant having been duly investigated by Us has been found duly entitled thereto.

Now Know Ye, that by these Presents We do grant, convey and assure, unto the said Gabriel Dumont, his heirs and assigns forever, all those Parcels or Tracts of Land, situate, lying and being in the Forty second Township, in the First Range West of the Third Meridian in the Provincial District of Saskatchewan in the North West Territories, in Our Dominion of Canada, and being composed of

All that portion of the South-West quarter of section Twenty of the said Township, not covered by any of the waters of the South Saskatchewan River, as shown upon a map or plan of survey of the said Township, approved and confirmed at Ottawa on the 14th day of April A.D. 1890, by Edouard Deville, Surveyor General of Dominion Lands and of record in the Department of the Interior.

containing by admeasurement One hundred and forty seven (147) acres, more or less;

EXCEPTING AND RESERVING, unto Us, Our Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon, all navigable waters that now are or may be hereafter found on, or under, or flowing through or upon any part of the said Parcels or Tracts of Land; also reserving thereout and therefrom all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of fishery and fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights. And also excepting and reserving thereout the Passenger Indian Road, &c. shown in yellow crossing the said land.

To have and to hold the said Parcels or Tracts of Land unto the said Gabriel Dumont, his heirs and assigns forever.

GIVEN under the Great Seal of Canada.—Witness, John Joseph McGee Esquire Deputy of Our Right Trusty and Right Well-beloved Cousin, the Right Honourable Sir Gilbert John Elliot, Earl of Minto and Viscount Melgund of Melgund, County of Forfar, in the Peerage of the United Kingdom; Baron Minto of Minto, County of Roxburgh, in the Peerage of Great Britain; Baronet of Nova Scotia, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, etc., etc., Governor General of Canada.

At OTTAWA, this Thirty first day of January in the year of Our Lord, one thousand nine hundred and two and in the second year of Our Reign.

BY COMMAND

Under-Secretary of State

Deputy of the Minister of the Interior.

Plan No. 35675
Homestead No. 21573

- On September 17, 1889 a regulation to the *Dominion Lands Act* was approved By Order in Council, section 8 of which had the effect of reserving mines and minerals from all Dominion grants issued thereafter, with the exception of those for lands that had been sold or entered as homesteads prior to that date.[366] As a consequence of this regulation, Dominion grants now began reserving mines and minerals.[367]

- Because sand and gravel are generally considered to be part of the "surface' and because there was no specific reservation in the federal grants of sand and gravel, a mines and minerals reservation in one of these grants would not have included a sand and gravel reservation.

- Where mines and minerals are reserved in a grant from the Dominion of Canada, the following reservation is used by land titles:

  Excepting thereout all Mines and Minerals as set forth in the Original Grant from the Crown

MANITOBA GRANTS AND RELATED MATTERS

Provincial grants prior to July 15, 1930

- Provincial legislation passed in 1883 confirmed the authority for the Province of Manitoba to hold and dispose of lands.[368] This legislation was very brief and made no mention of any reservations from provincial dispositions.

- In 1887, that early act was repealed and replaced by a much more comprehensive piece of legislation.[369] This new legislation was necessary because the Province was suddenly in the position to convey lands due to the swamplands transfer (see below) from the Dominion government.

- This new act reserved the mines and minerals from every grant, declaring that such mines and minerals were automatically reserved to the Province in a grant, and would only be conveyed if the grant specifically included them.[370]

Swamplands and the Hiebert case

- The Province of Manitoba was in desperate need of revenue subsequent to its admission to confederation. In 1885, Canada agreement to convey to Manitoba certain lands. These lands were submerged or swamp lands. The idea was that the Province of Manitoba would generate revenue by selling these lands.[371]

- The lands transferred by the Dominion to the Province (including 185,000 acres of railway subsidy lands conveyed May 31, 1901 - lands initially intended to assist in the construction of the Manitoba and North-Western railway) are referred to as swamplands.

- Pursuant to a Provincial Order in Council, the swamplands were to be brought under the operation of *The Real Property Act* and titles were issued into the name of HMQ Manitoba. Ultimately, Real Property Applications were filed by the Province for these lands and titles issued to His Majesty the King in Right of Manitoba for them. Despite the fact that titles existed for these lands, they were as of yet ungranted crown lands.

- In the years that followed, the Province conveyed these *swamplands* to various private individuals, often using the land titles transfer of land and not a more official looking Crown grant.

- Despite the fact that these transfers did not include an explicit reservation of mines and minerals and despite the fact that they were often not formal Crown grants, the Supreme Court of Canada ruled in 1954 that these transfers were in fact Crown grants.[372] And because they were grants from Her Majesty the Queen in right of Manitoba, the mines and minerals were automatically reserved by relevant provincial legislation.[373]

- Following this decision, and with the passage of enabling legislation[374] massive lists of all of the so-called swamplands transfers were forwarded to every land titles office in the province, and the staff of those offices were tasked with finding the current titles for those lands and then adding to them a reservation of mines and minerals.

- The following note was stamped on all the affected titles:

  > "amended _____, A.D., 19___, upon request of the Minister of Mines and Natural Resources made pursuant to C. 78 S.M. 1955 and filed as Deposit _____ production of duplicate certificate of title dispensed with."

- And for a time the following exception appeared on title:

  > "except all mines and minerals as referred to in Deposit _____."

- Land Titles did not carry this note forward perpetually, and the reference to the deposit was dropped.

- Currently, where a title has mines and minerals reserved by virtue of the Hiebert case, so called 'swamplands', (a reservation which is for all intents and purposes a reservation pursuant *to The Provincial Lands Act* of 1887), the following reservation is used by land titles:

Excepting thereout all Mines and Minerals

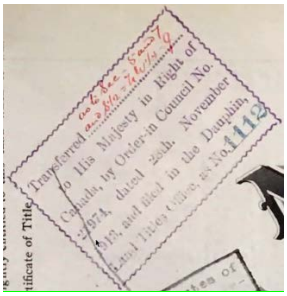
Certain swamplands returned to the Crown Canada

- While the above narrative describes the fate of *most* of the so-called swamplands, not all of these lands were conveyed by the province to grantees; some of them were eventually returned to Canada by Manitoba.

- In 1912, the boundary limits of Manitoba were substantially extended, including extending them northward to the sixtieth parallel and northeast to the shores of the Hudson's bay. By that time, both Alberta and Saskatchewan had been admitted into confederation (1905) and the federal government decided that the financial terms applicable to Manitoba, "…as altered by the increase of territory…should be on a basis of substantial equality with the financial terms enjoyed by each of the provinces of Saskatchewan and Alberta…"[375]

- To achieve this parity, it was agreed as between Manitoba and Canada that, among other things, those swamplands that had not yet been sold by Manitoba would be conveyed back to Canada.[376] Provincial Order-in-Council 21974, dated November 28, 1913 contains a list of the lands to be re-vested into the name of Canada. This Order was deposited at land titles and endorsed on the remaining swamplands titles.

- Here is a sample of such an endorsement:



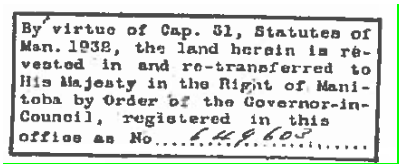
- As a result of the Order, and despite the fact that no new titles issued into the name of Canada, the lands were now ungranted federal Crown lands. More importantly, they were no longer swamplands.

- Following the conveyance to Canada, Crown grants were issued by Canada for certain of these lands to private parties, and, like other grants from the federal government, they would have held back mines and minerals (the mines and minerals reservation would accordingly be a federal and not a provincial reservation).

- As noted below in this paper, effective July 15, 1930, administration and control of all remaining ungranted/undeveloped federal Crown lands, including those mines and minerals (precious and base) reserved in Crown Canada grants, was transferred from Canada to Manitoba, effective July 15, 1930.[377]

- Provincial legislation[378] directed that the district registrars of land titles treat any order-in-council giving effect to the 1930 act as a transfer of land under *The Real Property Act*. Endorsements referencing this Act and the Order were placed on the titles for the lands that had once been swamplands, and once again, land titles did not issue new titles. As a result of the conveyance, the affected lands were again ungranted provincial lands.

- Here is a sample of such an endorsement:


By virtue of Cap. 51, Statutes of Man. 1938, the land herein is re-vested in and re-transferred to His Majesty in the Right of Manitoba by Order of the Governor-in-Council, registered in this office as No. 6460

- To complicate matters even further, in many cases where the lands were granted by Canada to private persons between 1913 and 1930, those patents were not endorsed on the relevant titles. Instead, the patents were (occasionally) endorsed on the old system abstract for the affected lands. Despite the lack of any notation on the title, the lands had indeed been granted by Canada and were no longer owned by them. Accordingly, all that remained in the name of Canada in the relevant titles by the time of the 1930 transfer to Manitoba, were the mines and minerals reserved in those grants.

- As if this all were not enough, many of the lands granted by Canada between 1913 and 1930 were eventually sold by the relevant municipal governments for unpaid taxes. In such cases, the tax transmissions are also be endorsed on the titles. This will naturally cause confusion as, on first blush, these title appears to be owned by the province and no municipal government can sell provincial lands for unpaid taxes.

- The above history should help explain why there are a number of titles in the name of "His Majesty the King in Right of Manitoba" with a number of rather confusing endorsements.

Provincial grants prior to July 15, 1930 (other than swamplands)

- Other than the swamplands grants, provincial grants prior to 1930 were few and far between. The reason was simple – the Provincial government did not have lands to grant. That said, by virtue of the 1887 *Provincial Lands Act*, any such grants issued reserved mines and minerals to the province. These grants made no mention of and did not contain any reservation of sand and gravel. Accordingly, sand and gravel went with the grant of the surface.

Provincial grants after 1930

- In 1930, by federal legislation[379] Canada transferred administration and control of all remaining ungranted and undeveloped Crown lands (this included those mines and minerals reserved in prior Crown grants), from Canada to Manitoba, effective July 15, 1930. Accordingly, and as of that date, the Crown in right of Manitoba now owned all the ungranted crown lands and interests in land in the province.

- As one would expect, grants of land subsequent to this transfer of administration and control now predominantly came from the Crown in right of Manitoba.

- *The Provincial Lands Act* was amended in 1930, reserving automatically to the Province from all dispositions a strip of land 99 feed in depth where the lands extended to an inlet of the sea or to a border.[380]

- That Act was replaced entirely in 1934 by *The Crown Lands* Act.[381] The net effect of these legislative changes was reserve to the Crown Manitoba from all dispositions of Crown land, all mines and minerals, together with a strip of land 99 feet in depth, extending from the border of navigable waters, an inlet of the sea, or a border.[382]

- While the legislation passed in the 1930s makes no mention of sand and gravel, retroactive amendments to *The Crown Lands Act* passed in 1966/7[383] would change that. By virtue of these amendments, provincial grants made after July 15, 1930 (the date of the transfer of control of ungranted lands from Canada to Manitoba), reserved not only all mines and minerals, but also all sand and gravel from the disposition.

  Note: Because this legislation only dealt with grants subsequent to July 15, 1930, and because the swamplands grants were made prior to 1930, sand and gravel is not reserved from these grants. As such, when one sees, "Excepting thereout all Mines and Minerals" one can fairly assume that there is no reservation of sand and gravel.

- For lands granted pursuant to *The Provincial Lands Act*, the following reservation is used by land titles:

  Excepting thereout all Mines and Minerals as set forth in the Provincial Lands Act

  Note: This reservation of mines and minerals may include a reservation of sand and gravel, but only if the grant was made subsequent to July 15, 1930. This reservation does not include the 99' strip reservation where the lands adjoin navigable waters but it does include a reservation along a border or an inlet of the sea.

- For lands grants pursuant to *The Crown Lands Act*, the following reservation is used by land titles:

  Excepting thereout all Mines and Minerals and other matters as set forth in the Crown Lands Act

  Note: These grants contain the largest reservation, holding back to the Crown all mines and minerals, the sand and gravel, and the 99-foot strip from lands that border navigable waters, an inlet of the sea, or a border.

Final notes regarding sand and gravel and Provincial grants

- As noted, grants from the Province of Manitoba after 1930 that reserve mines and minerals also reserve sand and gravel. It seems reasonable to conclude from this that sand and gravel are minerals. This is not an appropriate conclusion; it is merely a coincidence of two reservations rather than an expansion of the definition of mines and minerals to include sand and gravel.

- As noted above, in Manitoba (as in other western provinces), there is a specific piece of legislation regarding sand and gravel. It provides that, subject to certain statutory exceptions, sand and gravel is part of the "surface" and not a mine or minerals.[384] Accordingly, though often characterized as a mineral, unless otherwise specified, sand and gravel are part of the surface and owned by that owner. As is so often the case with mines and minerals, this is a general rule and a careful investigation of the facts of each circumstance is required.

TAX SALES

- Perhaps no mines and minerals issue has a more complex history than the mines and minerals severed and vested in the Crown (Manitoba) during the tax sale of real property. Coming to any conclusion on what is meant by "mines and minerals" in this context requires an understanding of a convoluted legislative scheme and its history.

- In 1875, the first iteration of *The Municipal Act* was enacted. This legislation contemplated the sale of real property/lands for unpaid taxes. The legislation did not provide any definition for either "real property" or "lands".[385]

- By 1886, *The Manitoba Municipal Act* governed the tax sale process. And while the act contained a definition of land, that definition made no mention of mines and minerals.[386]

- In 1890, a distinct piece of legislation was carved out of *The Municipal Act* to govern the assessment and collection of taxes, being *The Assessment Act* (also referred to as *The Municipal Assessment Act*). It appears that it is here that mines and minerals are explicitly mentioned and included in the definition of land for tax sale purposes for the first time.[387]

- In 1940, the tax sale governance moved back into *The Municipal Act*, with a new definition of land that again included mines and minerals.[388]

- A significant change to the definition of land in *The Municipal Act* occurred in 1945. The amended definition specifically excluded mines and minerals and as a result, mines and minerals were no longer subject to municipal taxation. The Act did not provide any guidance as to who owned the mines and minerals following the tax sale of the surface, nor did it define what was meant by "mines and minerals".[389]

- Between 1945 and 1968, *The Real Property Act* was amended various times to address the reservations that took place through the tax sale process. It took until the 1968 to clarify the fate of mines and minerals orphaned when the surface lands were sold for taxes. By virtue of the 1968 amendment, which was retroactive to January 1, 1945, the mines and minerals were vested in the Provincial Crown.[390]

- In the 1970 version of *The Municipal Act*, although 'land' was defined, and for the purposes of tax sales did not include mines and minerals, there was still no definition of mines and minerals.[391]

- In 1972 *The Municipal Act* was finally amended to include a definition of mines and minerals for tax sale purposes.[392] That definition incorporated by reference the definition from *The Mines Act*.

- At the same time, a definition of, "mines and minerals" was added to *The Real Property Act* for the purpose of tax sales. It provided that mines and minerals had the same meaning as the expression had in *The Municipal Act*[393] (which definition referenced *The Mines Act*).

- *The Municipal Act,* R.S.M. 1988, was the last iteration of the Act to contain a Part XVII. It was also the last version of *The Municipal Act* to contain a definition of mines and minerals for tax sale purposes. The definition had changed over time. The last version of definition[394] referenced both *The Mines and Minerals Act* and *The Oil and Gas Act.*[395]

- In 1996 *The Municipal Act*, R.S.M. 1988 was repealed in its entirety, to be replaced with a completely new act.[396] That new act remains in use.[397]

- As a consequence of the repeal and replacement, both Part XVII of the prior act, and the definition of mines and minerals contained in section 799 disappeared. The new act does not contain a replacement section, nor does it contain a replacement definition. Despite this, the definition of mines and minerals in the current version of *The Real Property Act* continues to refer to Part XVII of *The Municipal Act*![398]

- While the current *Municipal Act* does not specifically exclude mines and minerals from tax sale,[399] it seems to imply this by way of a reference to *The Real Property Act* in section 377(4)):

  Title of purchaser
  377(4) Except as otherwise provided in The Real Property Act, the registration of title to a property sold for taxes in the name of the tax sale purchaser extinguishes every interest in the property that arose or existed before the property was sold for taxes. (emphasis mine)

- On June 15, 2015 *The Peatlands Stewardship Act*[400] came into force. That act had two effects relevant to the tax sale proceedings:

  1. It removed the word "peat" from the definition of mineral in *The Mines and Minerals Act*. This is the definition of mineral that is incorporated by reference in *The Real Property Act* for the purposes of tax sales.

  2. It consequentially amended section 47 of *The Real Property Act,*[401] as follows:
     a. It added an exception of peat alongside the exception of mines and minerals into the title issuing for the lands into the name of the tax sale purchaser; and
     b. It vested the peat that was excepted from the purchaser's title into the Crown in right of Manitoba.

- It is important to note that mines and minerals are not now and have never been severed in a tax sale by the City of Winnipeg. Historically, this was simply understood to be a process that only affected entities governed by *The Municipal Act*. *The City of Winnipeg Charter* made this assumption explicit.[402]

- It is also important to note that the discussion of what is and what is not a mine or a mineral for tax sale purposes (what is severed off and vested into the name of the Crown), is predicated on the assumption that the mines and minerals are in the title for the affected lands. In the event that the affected title contains an existing reservation of, "all mines and minerals", section 802 of the old *Municipal Act*[403] provided that this is what mines and minerals meant for that act. In other words, if there is already a reservation of, "all mines and minerals" in a title, no further mines and minerals will be severed or vested:

  > … where the title of the owner of the surface does not include mines and minerals by reason of an exception or reservation of all mines and minerals, the expression "mines and minerals" has the same meaning as in the exception or reservation.

Summary

- Where a property is sold for outstanding taxes by a municipal government other than the City of Winnipeg, and that title does not have an existing reservation of "all mines and minerals", title to the mines and minerals and to the peat in the affected land are vested into Her Majesty the Queen in right of Manitoba. Due to retroactive legislation, this has been the case (other than for peat) since 1945. Prior to 1945, when a property was sold for unpaid taxes, the mines and minerals were included in the sale and therefore remained with the surface.

- Unfortunately, the expression "mines and minerals" was undefined until 1972. Even after 1972, the definition was not a stable one. Initially, the definition incorporated the definition in *The Mines Act*. By 1993, the definition included references to both *The Mines and Minerals Act* and *The Oil and Gas Act*. Because there is no current definition in either *The Real Property Act* or *The Municipal Act* and because section 47(1) of *The Real Property Act* continues to refer to Part XVII of the old *Municipal Act,* mines and minerals continues to have the meaning that it did in *The Municipal Act*, R.S.M. 1988, c. M225 immediately prior to its repeal.

- Due to the inclusion of, "oil and gas rights as defined in *The Oil and Gas Act*", into the definition of mines and minerals in *The Municipal Act*, the reservation under *The Real Property Act* cannot be equated with any other mines and minerals reservation, including the definition in *The Mines and Minerals Act.* This extra wording is particularly noteworthy due to the fact that the definition of mineral in *The Mines and Minerals Act* specifically excludes, "oil, natural gas or any other gas." The result is that the definition of mines and minerals in *The Real Property Act* is no doubt considerably wider than the definition in *The Mines and Minerals Act*.

- Given that from 1945 till 1972 there was no definition of mines and minerals at all, and given that the definition changed between 1972 and 1996, determining with certainty what exact mines and minerals were affected by a particular tax sale is quite difficult and, prior to 1972, may not be possible. Any interested party would need to determine the date of the sale and then review the operative definitions as of that date in *The Mines Act*, *The Mines and Minerals Act*, and *The Oil and Gas Act*.

- Where lands have been sold for taxes, the following reservation is used by land titles:

  Excepting thereout all Mines and Minerals and Peat vested in the Crown (Manitoba) by The Real Property Act

Sand and Gravel in Tax Sale

- One complex issue remains, and that is the effect of a tax sale (outside of the City of Winnipeg) on sand and gravel rights. A related question is whether it matters if the lands sold for taxes have already had mines and minerals severed from the surface.

Tax Sale of Property with no Prior Mines and Minerals Reservation

- As noted above, and by operation of section 47(3) of *The Real Property Act*, where a property is sold for outstanding taxes pursuant to *The Municipal Act*, title of the former owner in the mines and minerals is extinguished and those mines and minerals are vested in Her Majesty the Queen in right of Manitoba.

- As also already noted, for the limited purposes of the tax sale process, the expression "mines and minerals" in *The Real Property Act* has the same meaning as was once provided in Part XVII of the former *Municipal Act*.[404] Section 802 in Part XVII of the former act provided that:

  > **"mines"** and **"minerals"** have the meaning severally given to those words in The Mines and Minerals Act and include oil and gas rights as defined in The Oil and Gas Act…

- For the purpose of this discussion, two definitions from *The Mines and Minerals Act*[405] are relevant, both of which are contained in section 1(1) of that act:

  > **"mineral"** means a non-living substance that is formed by natural processes and is found on or under the surface of the ground, irrespective of chemical or physical state and before or after extraction, and includes mine tailings and substances that are prescribed as minerals for purposes of this Act but does not include agricultural soil, oil, natural gas or any other gas, any surface or ground water or other substance that for purposes of this Act is prescribed not to be a mineral; (« minéral »)
  >
  > **"quarry mineral"** means a mineral, other than a diamond, ruby, sapphire or emerald, that is obtained from a quarry, and includes
  >
  > (a) sand, gravel, clay, shale, kaolin, bentonite, gypsum, salt, coal and amber,
  >
  > (b) rock or stone that is used for a purpose other than as a source of metal, metalloid or asbestos, and
  >
  > (c) a mineral that is prescribed as a quarry mineral; (« minéraux de carrière »)

- Sand and gravel are clearly non-living substances formed by natural process and are found both on and under the surface of the ground. If this were not enough of a reason to classify them as minerals, the definition of quarry mineral explicitly includes sand and gravel, and to be a quarry mineral, the substance must first be a mineral (a mineral obtained from a quarry). Reading these two definitions together it seems that sand and gravel may be minerals pursuant to *The Mines and Minerals Act* and are therefore *prima facie* seem to be included in the definition of mines and minerals for the purposes of municipal tax sales and section 47 of *The Real Property Act.*

- If there were nothing else to consider, the conclusion that sand and gravel are minerals for tax sale purposes would be reasonable. There is yet one more piece of legislation to consider, and that legislation touches on the very heart of this matter; that legislation is *The Sand and Gravel Act.*[406] *The Sand and Gravel Act* is a relatively short piece of legislation. Sections 4 and 5[407] of the Act state in no uncertain terms that sand and gravel are not minerals, but are instead the property of the owner of the surface and not the owner of the mines and minerals.

- Two further sections bear upon this matter, sections 2 and 3.[408] Section 2 makes the Crown and Crown ownership subject to the Act while section 3 lists legislation not subject to the Act. It is noteworthy that *The Crown Lands Act*[409] is specifically exempted, while *The Mines and Minerals Act* is not.

- Reading the above sections of *The Sand and Gravel Act*, it is possible to conclude that an ownership of mines and minerals created, severed or reserved in favour of the Crown in right of Manitoba pursuant to statutory action, including pursuant to the joint operations of *The Real Property Act*, *The Mines and Minerals Act*, must be subject to the limitations created by *The Sand and Gravel Act*.

- This conclusion is undermined in part by subsection 7 of the Act. That section protects title to sand and gravel rights arising from an act of the legislature.[410] In light of the fact that the definition of mineral in *The Mines and Minerals Act* [411]includes quarry mineral and that definition explicitly includes, "(a) sand, gravel, clay, shale, kaolin, bentonite, gypsum, salt, coal and amber," (emphasis mine) there seems be a significant impediment for any argument in favour of applying *The Sand and Gravel Act* to this interest.

- This apparent conflict between the two lines of statutory authority may have been settled by the Manitoba Court of Appeal in the case of *Rural Municipality of Springfield* v. *The Provincial Assessor.*[412] In *Springfield* the court was called upon to determine whether the definition of real property under *The Municipal Assessment Act*[413] included sand and gravel rights. Section 1(1):

  "real property" means land and improvements on the land and includes
  (a) an interest held in land or an improvement,
  (b) air, surface or subsurface rights and interests in respect of land,
  and does not include mines or minerals; (« biens réels »)

- At paragraphs 31 and 32, Huband J.A. writing for the Court of Appeal ruled that *The Sand and Gravel Act* does not apply to the definition of real property in *The Municipal Assessment Act*, meaning that the sand and gravel were to be considered mines and minerals and not part of the surface for the purpose of that act.

  > 31 The entire statute consists of only seven sections. From a reading of it, it becomes evident that it came into existence to resolve a specific problem. Landowners had disposed of "mines and minerals" by way of sale or lease, to mining or petroleum exploration companies, without understanding that minerals might include sand and gravel deposits. The purpose of the enactment is to make it clear that when ownership of the freehold is divided, the right to sand and gravel is retained by the surface owner, and does not go with the disposition of mines and minerals.

32 Once again, the limitation on the meaning of the word "minerals" to exclude sand and gravel was crafted to achieve a particular object, and the statute is not in pari materia with the Municipal Assessment Act. Notoriously, assessment legislation contains its own unique code to determine what property is subject to assessment, and what property is excluded or exempt. It would be reckless to import into an assessment statute a definition designed for a completely unrelated purpose.

- Given the above line of reasoning, it seems likely that the same outcome would be reached by the court if called upon to consider the applicability of *The Sand and Gravel Act* to the municipal tax sale process, especially in light of an existing, specific and contrary definition. Accordingly, the tax sale reservation in a title (all mines and minerals and peat vested in the Crown (Manitoba) by *The Real Property Act*) likely includes a reservation of the sand and gravel.

What about Tax Sales Prior to 1972?

- While the above conclusion likely applies to current tax sales, does it apply to historic tax sales, and in particular, to those that took place prior to 1972? After all, it is only in 1972 that the legislation finally included a definition of mines and minerals for tax sale purposes. Pre-1972 there is no such definition; no elliptical reference to quarry minerals and no statutory scheme to give section 7 of *The Sand and Gravel Act* any opening into the discussion.

- In a discussion of the pre-1972 time period the legislative landscape is limited to a severance of undefined mines and minerals coupled with the very clear provisions of the (retroactive) *Sand and Gravel Act* which Act declared sand and gravel to be the surface unless explicitly stated to be otherwise.

- The conclusion that seems inevitable, however much it adds one more splinter to an already complex area of law, is that pre-1972 the mines and minerals referenced in the exception for "all Mines and Minerals vested in the Crown (Manitoba) by The Real Property Act", does not include sand and gravel (while after 1972 it does). This would leave the sand and gravel with the surface owner for tax sales prior to 1972.

Tax Sale of Property with a Prior Mines and Minerals Reservation

- For those situations where there is a prior reservation of mines and minerals, Part XVII of former *The Municipal Act*[414] provided that the expression mines and minerals had the same meaning as in that prior reservation. If the minerals to be severed off are the same as the minerals already severed off, there are obviously no minerals left to sever off.

- Given that there is no severance of mines and minerals where a title already contains a reservation of "all mines and minerals" (by whatever definition), there is also no severance of sand and gravel as a result of such a tax sale.

THE RAILWAY REFERENCE CASE

- In order to settle and develop the West, the railways were given the authority to take *railway purpose* lands by expropriation. This power was contained in a piece of federal legislation called *The Railway Act*. In 1903, guided by sec. 77 of the English Railway Clauses Act of 1845, a provision[415] was added to *The Railway Act* confirming that the railways did not acquire the underlying mines and minerals when using their compulsory powers (or in situations where they *could* have used their compulsory powers) unless the mines and minerals were "expressly purchased" by them. This provision was added to shield the railways from having to pay for the underlying minerals when they acquired the surface lands they needed.

- In the years that followed, a multitude of transfers were made to the railways and these conveyances rarely (if ever) specifically *included* mines and minerals. Unfortunately, the titles that issued from these conveyances did not include any mention of the fact that the mines and minerals were not included.

- In 1958 the Supreme Court of Canada was called upon to consider the effect of these transfers.[416] The court read the legislation to say that in circumstances where a railway acquired lands by compulsion, or could have acquired them by compulsion (i.e. where the lands are railway purpose lands), after February 1, 1904, the acquisition is deemed not to have included mines and minerals.[417] Only where the acquisition specifically included mines and minerals could the railway have acquired the mines and minerals.

- The result of this ruling is that upon conveyance, every railway title has to be investigated to determine if the railway actually acquired the mines and minerals under the titled lands. Where it is determined that the railway doesn't own those mines and minerals, the mines and minerals cannot be conveyed by the railway.

- In such a case, the mines and minerals must be reserved in the transfer and the issuing title in the name of the transferee will have a mines and minerals reservation added to it. At the same time, a balance title will issue into the name of the railway for the mines and minerals. Because the ownership is uncertain, this will be is a holding title only, with the railway company acting as trustee for whosoever is actually entitled to the mines and minerals. A district registrar's caveat will be registered against these mines and minerals titles to give notice of this situation and to prevent any further dealings by the railway.

- The following reservation is used by land titles:

  Excepting thereout all Mines and Minerals as reserved by virtue of The Railway Act R.S.C. CAP R58

  Note: As result of both *The Sand and Gravel Act* and the Supreme Court's decision in the Gaumont case,[418] a reservation pursuant to the *Railway Act* likely does not include the sand and gravel rights.

Not all railways and not all lands

- Any application of the ruling in the Railway Reference Case is complicated by the fact that it does not apply to every acquisition of lands by every railway; the decision applies only to certain railways and, even then, only to certain acquisitions by those companies.

Not all railways

- Because the Supreme Court of Canada restricted itself to the facts before it, we know that *The Railway Act* provisions apply to acquisitions by the Canadian Pacific Railway Company, and to the companies that were amalgamated and formed into the Canadian National Railway Company. We do not know if they apply to the Canadian National Railway Company itself. Nor do we know if they apply to acquisitions by Canadian Northern Railway System since June 6, 1919. See the comments of Justice Locke at page 311:

  > *In my opinion, we have not sufficient information to enable us to express any opinion upon the question as to whether s. 198 applies in respect of lands acquired by either the Canadian National Railway Company or any of the companies in the Canadian Northern Railway System since June 6, 1919.*

- Though not addressed in the decision by the Supreme Court, it is the considered opinion of the district registrar that titles in the name of the *Commissioners of the Transcontinental Railway*[419] are unaffected by the deemed reservation in the *Railway Act*. This is because the Transcontinental Railway line was constructed as a government railway[420] and the *Railway Act* provides that it does not apply to government railways.[421]

- Furthermore, in addition to having all of the rights of railways under the *Railway Act*,[422] the power of the Commissioners of the Transcontinental Railway to expropriate or take lands came not from the *Railway Act* (where the limitation as to the power to acquire mines and minerals can be found), but rather from its own constituting legislation,[423] where there is no limitation on the Commissioners' power to acquire mines and minerals.

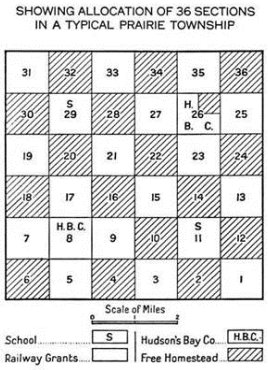
Not all lands

- Not all acquisitions by the railway are caught by this ruling. Only lands that are or could have been taken by the railway under its compulsory powers; those powers that allowed railways to take lands for railway purposes.[424] This would include railway rights-of-way, yards, wye's, extra rights-of way, station grounds, and the like. That said, if the lands were, "not a part of or used in connection with the operation of a railway system," then, according to Lord Reid, writing on behalf of the Privy Council in the Empress Hotel case, they are not railway lands.[425]

- The questions of whether certain lands are for railways purposes has been considered by the courts a number of times since the Empress Hotel case, with varying outcomes: freight and claims offices have been found to be an, "integral and necessary to the operation of a railway,"[426] while a quarry that supplied[427] necessary construction materials has not; nor has a lodge.[428]

Railway Grant lands

- As part of the compensation for building a railway line to the Pacific coast, the Canadian Pacific Railway Company was granted the right to 25,000,000 acres in a belt of land 24 miles on each side of the main line. They were given the right to select from the odd-numbered sections in the townships[429] (with the exception of sections 11 and 29, which were school lands).



- Clearly, these lands were not railway purpose lands. As such, where the subject lands are a full quarter section in an odd numbered section, absent evidence to the contrary, the presumption will be that the *Railway Act* does not apply to the lands.

No application to acquisitions after May 29, 1996

- The *Railway Act*[430] (as amended from time to time), together with the requirement that mines and minerals be expressly purchased by railway companies, continued until May 29, 1996.[431] On that date, the *Railway Act* was repealed and replaced by the *Canada Transportation Act*.[432]

- That new act did not contain provisions similar to those formerly found in the *Railway Act* regarding the need for express language where mines and minerals are acquired by railway companies. Nor did it contain any provision regarding the exception of mines and minerals from conveyances to railway companies.

- It is therefore safe to assume that the restriction on the acquisition of mines and minerals by a railway company, together with the implied exemption of mines and minerals from a conveyance to a railway company, ceased on May 29, 1996. As such, acquisitions by railway companies subsequent to that date will be treated by the district registrar in the same manner as acquisitions by any other company in-so-far as mines and minerals are concerned.

PATENTED MINERAL CLAIMS

- In general, in the Province of Manitoba, lands were (and are) granted with reference either to a particular river lot, or to a section, township and range. There are several exceptions to this rule, and the Patented (granted) Mineral Claim is one of these exceptions.

- In certain cases, rather than granting a lease or other rights to explore and exploit lands claimed by a prospector, the Crown actually granted to the claimant a fee simple for the subject lands. In these cases, the lands were granted with reference to a *surveyed mineral claim*.

- Mineral claims were described in grants with reference to a *lot and a group* (which lots and groups were assigned by the Dominion Mining Recorder), and by the name that the claimant gave to his or her mineral claim. For example:

  Lot 25, Group 174, otherwise known as the "Chicamon" Mineral Claim.

- A plan of survey showing a mineral claim would have been registered with the Department of the Interior and the grant would contain the plan's particulars, including who drew it up and its registration information with the Department of the Interior.

- When issuing title for these lands, in addition to referring to the name and to the lot and group, Land Titles also specifies the township and range in which the claim is located together with the plan number assigned to the relevant plan upon its filing at land titles. A properly worded legal description would read:

  LOT 25 GROUP 174 PLAN 3759 WLTO IN 23RD TOWNSHIP AND 14TH RANGE EPM OTHERWISE KNOWN AS CHICAMON MINERAL CLAIM

- What makes these grants particularly unusual (and relevant for these materials) is the fact that in addition to the surface, the Crown typically specifically *granted* the gold and the silver. The grants often contained the following wording:

  "…together with the right to all minerals within the meaning of the regulation for the disposal of Quartz Mining Claims on Dominion Lands found in veins, lodes or rock in place…"

- The definition of mineral for the Quartz Mining Regulation is found in a 1908 Order-in-Council:[433]

  "Mineral" shall mean all valuable deposits of gold, silver, platinum, iridium, or any of the platinum group of metals, mercury, lead, copper, iron, tin, zinc, nickel, aluminum, antimony, arsenic, barium, bismuth, boron, bromine, cadmium, chromium, cobalt, iodine, magnesium, manganese, molybdenum, phosphorus, plumbago, potassium, sodium, strontium, sulphur (or any combination of the aforementioned elements, with themselves or with any other elements), asbestos, emery, mica, mineral pigments, corundum and diamonds;

- Notwithstanding the fact that these grants included this broadly defined group of minerals, they typically contained a reservation of all coal and coal mines and placer mines. According to Wikipedia (October 25, 2010), placer mining is:

  …the mining of alluvial deposits for minerals. This may be done by open-pit (also called open-cast mining) or by various forms of tunnelling into ancient riverbeds. Excavation may be accomplished using water pressure (hydraulic mining), surface excavating equipment or tunnelling equipment.

  The name derives from Spanish, placer, meaning "sandbank." It refers to mining the precious metal deposits (particularly gold and gemstones) found in alluvial deposits—deposits of sand and gravel in modern or ancient stream beds. The metal or gemstones, having been moved by

stream flow from an original source such as a vein, is typically only a minuscule portion of the total deposit. Since gems and heavy metals like gold are considerably more dense than sand, they tend to accumulate at the base of placer deposits.

The containing material may be too loose to safely mine by tunnelling. Where water under pressure is available, it may be used to mine, move, and separate the precious material from the deposit, a method known as hydraulic mining or hydraulicking.

Notes:

1. Land titles has not developed a special wording for the reservation of coal, coal mines and placer mines in the patented mineral claims. Some titles contain an exception of the 'special reservations contained in the grant from the crown' while other titles actually refer to the coal, coal mines and placer mines.

2. All titles for patented mineral claims must be read with great care, and in all cases, specific reference should be made to the original grant from the Crown.

THE WARDLE CASE (*Wardle v. Manitoba Farm Loans Association*)

- In 1932, certain lands were sold for tax sale by the Rural Municipality of Wallace. A body known as The Manitoba Farm Loans Association[434] purchased the tax sale certificate and it was assigned to them accordingly. On August 7, 1934 title for the lands issued into the name of the Association as the tax sale certificate assignee.

- By virtue statutory amendment in 1933,[435] all lands owned by the Association were vested into the name of the Crown in right of the Province of Manitoba.

- Despite this vesting, section 79, added at the same time, made it clear that the Association would continue to have the same powers to administer the affected lands as if it had continued as the owner, including the power in the name of the Crown to transfer the lands.

- In 1937, section 78 was repealed and a substitute section was enacted. It re-vested the lands into the name of the Association.[436]

- On June 18, 1937, the Provincial Treasurer transferred the subject lands back to the Association. Notwithstanding the fact that the transfer was silent as to mines and minerals, the district registrar of the land titles office inserted the words "subject to the reservations contained in *The Crown Lands Act"* into the transfer and onto the title, believing that *The Crown Lands Act*[437] applied to the conveyance.

- In 1948, the Association transferred the subject lands to Edward G. Wardle ("Wardle"). Both the transfer and the issuing title were made subject to the reservations contained in *The Crown Lands Act.*

- The ownership of mines and minerals was eventually contested by Wardle. The question made its way to the Supreme Court of Canada.[438] Several questions addressed by the court:

1. Did the conveyance from the Province of Manitoba to the Association constitute a disposition governed by *The Crown Lands Act.*

2. Did the conveyance from the Association to Wardle constitute a *disposition* within the meaning of *The Crown Lands Act.*

3. Were the subject lands *Crown Lands* within the meaning of *The Crown Lands Act*?

- With regard the conveyance from the Crown to the Association, the court held that this did not fall within the meaning of a *disposition* in *The Crown Lands Act.*[439]

- When considering the conveyance from the Association to Wardle, the court came to the decision that the conveyance was not a disposition by the Crown. It found that the Associating was more than a mere agent of the crown, where a disposition by an agent of the Crown would have fallen within jurisdiction of *The Crown Lands Act.*[440]

- With regard the lands themselves, they were found not to be Crown Lands. While they did seem to fit within the definition of Crown Lands in section 2(b) of the Act ("includes land, whether within or without the province, vested in the Crown"), section 2 provided that the definition only applied where the context did not otherwise require. In this case the Court found that the context required otherwise.[441]

- Given that the Association was neither the Crown nor an agent of the Crown, it was decided that *The Crown Lands Act* did not apply to the disposition by it.

- In sum, despite the fact that the first conveyance was from the Crown, and despite the fact that the second conveyance actually included the *Crown Lands Act* reservation, the court held that neither was a disposition by the Crown within the meaning of *The Crown Lands Act*.

  Notes:

  1. When land titles becomes aware of a title where the mines and minerals seem, by virtue of the Wardle Case, to have been reserved in error, land titles will contact Crown Lands, reviews the circumstances with them and, where appropriate, corrects the relevant titles.

  2. Although the facts of the Wardle Case are quite unusual, the case highlights the need for clarity and certainty when a party is reserving mines and minerals and the underlying logic in the case can easily be applied to analogous situations.

  3. The definition section in the current version of *The Crown Lands Act* does not contain the expression, "unless the context otherwise requires". Accordingly, in modern times these lands would likely be deemed to be *Crown Lands* and the conveyance might well be considered a *disposition*.

THE SOLDIER SETTLEMENT / SNIDER DECISION

Comment

- Like many of the mines and minerals decisions, the decision of Stevenson J. in Canada *(Director of Soldier Settlement)* v. *Snider Estate*[442] answers some questions while leaving others without a firm or considered conclusion.

The decision

- The Soldier Settlement Board was a federal agency created to help soldiers coming back from World War I. The board sold lands to returning soldiers, granting to them either previously ungranted Crown land or lands purchased by the board. The empowering and constituting legislation was the Soldier Settlement Act,[443] which act contained an automatic reservation to the board out of all sales and grants of mines and minerals.[444]

- In January of 1920, His Majesty the King in right of Canada, as represented by the Soldier Settlement Board, acquired the subject lands by transfer of land from Herman Diercks, subject only to a reservation as to coal. The board transferred the lands in 1928 to Russell James Lynn, also reserving only the coal. Also in 1928, Lynn transferred the lands to Charlie Snider, again reserving only the coal. Charlie Snider was a bona fide purchaser for value.

- In 1930, pursuant to a transfer agreement regarding natural resources (similar to the one involving Manitoba), Canada conveyed to the Province of Alberta all remaining ungranted Federal Crown lands in that province.[445]

- In 1943, Charlie Snider transferred the S ½ of the subject lands to Tillie Snider. In 1947 and 1953 the Sniders transferred away their respective lands, holding back the mines and minerals other than the coal.

- In 1979, Canada (the Director of Soldier Settlement) applied for an order directing that title for those mines and minerals should issue into its name pursuant to the automatic reservations contained in the *Soldier Settlement Act*, which reservation would have applied to the 1928 grant to Russell James Lynn.

- The issue that the Supreme Court of Canada was asked to resolve was whether the natural resources transfer agreement between Canada and Alberta transferred to Alberta the minerals (other than coal) in the subject lands.[446]

- The court held that while the mines and minerals in the subject lands were indeed reserved out of the grant by the Soldier Settlement Board to Lynn, these minerals were then conveyed to the Province of Alberta by virtue of the Natural Resources Transfer Agreement, much like any other mineral reservation contained in a Crown grant. Furthermore, the court held that the reservations and exceptions in section 18 of the Transfer Agreement[447] did not apply to these mines and minerals.[448]

- At the time of the decision, there were numerous titles in the Manitoba Land Titles System standing in either the name of the Soldier Settlement Board or the Crown Canada for mines and minerals resulting from a reservation under section 57 of the *Soldier Settlement Act*.

- It was the opinion of the district registrar that because the provisions of the natural resources transfer agreement between Alberta and Canada were very similar to the provisions in the agreement between Manitoba and Canada, any such title might well have been in error.

- In the decades that followed, this issue was the subject of negotiations and discussions between the Province of Manitoba and the Crown in right of Canada. Ultimately, searchers combed through the Manitoba land titles database (both paper and electronic) with an eye on identifying these interests. Once the searchers had identified the titles, Canada transferred the interests to Manitoba. The transfer project was completed in early 2021. And while the project was closed, the possibility remains that the initial search may not have been perfect and there may yet be interests waiting to be transferred.

Continuing Issues

- In its decision, the Court went on to hold that the Province of Alberta was ultimately not entitled to the subject mines and minerals, this because of the title that had issued to their current owner, being a bona fides purchaser for value.[449]

- What the court did not consider the specific effect of subsection 61(1)(a) of Alberta *Land Titles Act*[450] which, like section 58(1)(c) of *The Real Property Act* of Manitoba,[451] makes all titles subject to subsisting reservations in the original grant from the crown. Given the language in subsection 51(1) of the *Soldier Settlement Act*, which suggests that these transfers might have operated as original grants, such a discussion would have been relevant.

- The court also chose not to specifically opine on whether the Federal Crown is bound by the operation and provisions of provincial land titles legislation,[452] an equally important question.

LIMITED EXPROPRIATIONS (Excepting mineral oil and natural gas)

- Oil was first produced in the Province of Manitoba in 1951.[453]

- Difficulties arose shortly thereafter when it came to settling the compensation to be paid for the oil and gas rights under lands expropriated for highways, drains and other public works.

- Rather than attempting to value these interests, a policy decision was made not to expropriate these rights. As far back as 1933, *The Expropriation Act* allowed the expropriating authority to take a limited estate in the lands required.[454]

- As a result of this policy, expropriation plans began to be endorsed with a statement indicating that the mineral oil and natural gas rights were not affected by the expropriation. The endorsement typically read as follows:

  TO BE EXPROPRIATED UNDER PART I, CHAP. 68, R.S.M. 1940
  Excepting all mineral oils and natural gas thereunder but retaining in the Crown all surface rights.

- Unfortunately, this policy was extended by the Department of Highways to all road plans, including those that affected only Crown lands (where there was no actual expropriation).

- This policy continued until 1973. According to a letter dated February 9, 1973 from J.W. deZeeuw, Director of Land Acquisition Branch, Department of the Attorney General, to the District Registrar of the Neepawa Land Titles Office, the Director advised the District Registrar that the Attorney General for the Province (the Honourable Mr. A. Mackling) had instructed him as follows:

  (1) In the case of Right of Way acquired prior to January 26, 1973, the Province of Manitoba will acquire all interests to Mines and Minerals contained in the title to the surface rights with the exception of Mineral Oils and Natural Gas.

  (2) For Right of Way acquired after January 26, 1973 the interest taken will be all contained within the Title to the surface rights.

- In addition to complicating the ownership of mines and minerals in the Province of Manitoba, this practice of leaving the mineral oils and natural gas behind following an expropriation often resulted in title to these interests being lost.

- The problem arises where then lands affected by the expropriation are subdivided and the road is (quite naturally) used as the boundary. Following such an expropriation, titles often issued (as an example) for the lands north of and south of a road running east to west, with no title at all issuing for the mineral oil and natural gas interests underneath the road itself.

- This situation was often further complicated with the registration of a plan of subdivision, which plans also neglected to show the mineral interests.

- A further layer of complexity was then added as a result of a Land Titles practice that existed during this time. Due to perceived conflicts between these limited expropriations and the provisions of *The Mines Act*[455] (which Act apparently vested all mines and minerals underneath a road into the Crown), the Registrar General of Land Titles directed the various District Registrars in the Province to refuse to issue title for these roads unless the Crown first abandoned all mines and minerals.

- This policy of refusing to issue title resulted in numerous titles affected by expropriations being kept alive following the expropriation and a subsequent transfer by the owner of the surrounding lands. These titles continue to be “live”, but only for the expropriated interest.

  Note: Unlike the root of other mines and mineral issues in this province, the practice of excepting from expropriations the mineral oils and natural gas and then the termination of this practice both arose as a consequence of government policy decisions (first in the 1950’s and then again in 1973) and not from either changes in legislation or the common law.

THE RIGHT TO WORK AND TO REMOVE MINERALS

- While the majority of this portion of the paper has been directed to the ownership of various mineral interests, mineral ownership would not be of any value if those mineral interests could not be worked and extracted. In 1953, the Judicial Committee of the Privy Council ruled that inherent in the ownership of a mineral is the right to work and remove that mineral and that that right does not need to be explicitly granted.[456]

ONE FINAL NOTE OF CAUTION

- As these materials demonstrate, and due to a shifting legislative scheme, not only is it not sufficient to review a certificate of title to determine the ownership of mines and minerals in a parcel of land, even reviewing the underlying grant may not be sufficient. Because reservations can be automatic and implied, knowledge of the operative legislative scheme is also required.

- The materials above do not contain a complete summary or the law nor are they sufficient to ground an opinion as to the ownership of either mines and minerals or sand and gravel.

G. TRANSFERS BETWEEN CROWNS (TRANSFERS OF ADMINISTRATION AND CONTROL)

CROWN INDIVISIBILITY

- Transfers of land as between the Crown (Canada) and the Crown (Manitoba) are anything but intuitive. Because of the concept of Crown indivisibility,[457] an actual transfer from one Crown to another Crown cannot take place; there is only one Crown, and because that one Crown is indivisible, it makes no legal sense to create and register a document passing ownership from the Crown to Herself.[458] Instead, all that can pass as between the various Crowns is administrative control or "administration and control".[459]

REQUIRED DOCUMENTS

- Transfers of administration and control are normally accomplished by way of a pair of corresponding Orders in Council: there will be an Order in Council from the party granting administration and control and a corresponding OIC accepting administration and control. An Order in Council can be registered at land titles on its own, and does not need to be accompanied by or attached to a transfer of land. Such an Order is deemed to be a transfer of land.[460]

Federal conveyances

- The authority for the Federal Orders in Council is clearly set out in the *Federal Real Property and Federal Immovables Act.*[461] That Act further provides that Federal Orders in Council granting administration and control are to be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.[462]

Provincial conveyances

- The authority for transfers of administration and control by the Province of Manitoba is less clear. There is certainly no section in Manitoba that corresponds to the empowering section in the *Federal Real Property and Federal Immovables Act.* This leaves open the door to the possibility that the Province might use a conveyance instrument other than an Order in Council, such as a Crown grant or a transfer. The *Federal Real Property and Federal Immovables Act* contemplates this, and accepts these Provincial documents as transfers of administration and control.[463]

REGISERABLE UNDER OLD AND NEWS SYSTEMS

- While the majority of transfer of administration and control will be registered in the new system, this need not be the case. Where the affected lands are still under the governance of *The Registry Act*, and have not been titled, these Orders in Council can be registered in the old system and will not cause new system title to issue.[464]

H. POWERS OF ATTORNEY AT LAND TITLES

THE DISTRICT REGISTRAR

- The appropriate role of a land titles district registrar when reviewing documents presented for registration generally must be determined prior to any discussion as to the requirements that such a registrar might impose when reviewing documents executed pursuant to powers of attorney. Is the registrar to limit the scope of their inquiry, ensuring that regulated documents conform to the strict requirements of relevant legislation, and no more? Or does the registrar have a larger role? The courts have held that registrars' inquiries and authority should not be limited to strict interpretation of the relevant statute. The registrar is neither a machine nor an automaton.[465]

Why a larger role for the registrar makes sense

- In a Torrens land titles system, title is guaranteed by an assurance fund, which fund is backed by the taxpayers of the relevant jurisdiction. Where a district registrar's inquiries serve to protect the integrity of that record, the likelihood of a claim against the assurance fund is substantially reduced, thus protecting both the fund and the taxpayer.

- Furthermore, there are few parties who share a district registrar's experience. The registrar sees a high volume of registrations, combined with a great variety of documents. As such, the registrar is capable of seeing trends and developments before they become obvious to people with a more limited exposure. In a world where mortgage fraud and identity theft is a reality, this is often important. Finally, because the district registrar is not directly concerned with running a daily law practice, they often have the opportunity to develop a deeper understanding of the law and the underlying legal principles.

Donor abuse

- One of the most significant responsibilities for professionals preparing or examining documents executed pursuant to powers of attorney, be they lawyers or registrars, is ensuring that the powers granted are being used in the best interests of the donor, particularly when the donors are elderly or incompetent.[466]

- In our role as registrars, we see abuses of power, abuses that the lawyers more directly involved sometimes fail to address. Often this failure is due to the inexperienced nature of the practitioner. A lawyer who is both naïve and unaware of the subtleties of the law can become the unwitting dupe to a client carrying out acts of questionable legality. Unfortunately, we also see predatory individuals assisted in their activities by lawyers who are both senior and well-experienced. Regardless of the circumstance, it falls to the registrar to question potentially illegitimate uses of powers attorneys.

INTERPRETATION OF THE GRANTING DOCUMENT

- When determining if a power exercised by an attorney is within the scope of the attorney's authority, the district registrar will be guided both by the general principles established in relevant jurisprudence and by the more specific rules to be found in legislation.

- As a starting point, the language in a power of attorney document will be strictly construed by registrars. As a result, where a power of attorney grants specific powers, and then follows up by conferring more general authorities, the general authorities will be limited to those functions necessary for the exercise of the specific powers.[467] In addition, the district registrar may not allow an attorney to exercise certain powers unless the power of attorney document specifically empowers them to do so. Finally, there are a limited number of powers that cannot be exercised by an attorney, regardless of the language in the granting instrument.

Specific powers

The power to mortgage

- Case law provides that in order for an attorney to borrow money and to mortgage property as security on behalf of a donor, the power of attorney document must specifically provide the attorney with the authority to incur debt on behalf of the donor.[468]

- Given this, when dealing with a power of attorney that contains very general and broad granting language followed by an enumerated list of specific powers, if the list does not specifically grant the power to mortgage, the district registrar will not accept a mortgage executed by the attorney.

The power to transfer

- From time to time land titles is presented with powers of attorney that empower the attorney to sell property owned by the donor. Typically these powers of attorney are drawn by individuals without the assistance of a lawyer or by legal counsel outside the jurisdiction. The question is: does a power to *sell* include the power to execute conveyance documents; can the attorney sign land titles documents, including the transfer of land?

- There is no Manitoba case law on this point, but courts from both British Columbia and New Brunswick have indicated that the power to sell includes the power to execute conveyance documents. Absent some direction to the contrary from a Manitoba Court, the district registrar will accept conveyance documents executed by an attorney who only has the power to *sell*.[469]

THE ENDURING POWER OF ATTORNEY

- At common law, the authority of an attorney to continue acting following the donor's mental incompetence was uncertain. A generally accepted line of case law suggested that the authority of the attorney was determined by the donor's incapacity.[470] This principle was ultimately confirmed by the Court of Appeal for British Columbia.[471]

- In 1974 the Law Reform Commission of Manitoba recommended that legislation be enacted to allow powers of attorney to continue after the mental incompetence of the donor. This was to allow the donor, while competent, to have a measure of control over their affairs once they became mentally incompetent, giving them the freedom to avoid having a committee

appointed.[472] *The Powers of Attorney Act* of 1980 was enacted pursuant to the Commission's recommendations and it allowed certain powers of attorney to survive the mental incompetence of the donor.

- In 1994 the Law Reform Commission revisited this issue. This time the goal of their report was to "focus on safeguards to protect donors when, due to mental incompetence, they are particularly vulnerable to financial exploitation by attorneys. It will also propose ways in which the wishes of the donor can be more effectively implemented…"[473]

- *The Powers of Attorney Act* was amended (effective April 7, 1997), reflecting the recommendations of the 1994 Law Reform Commission report. The amendments added in rules governing the witnessing of the power of attorney document, the appointment of multiple attorneys, the duty of the attorney to act, the ability of the courts to terminate the power of attorney, together with rules governing powers of attorney that come into force upon the happening of a future trigger event.

Not merely an agency relationship

- The traditional legal relationship between an attorney and the donor is one of agency, where the donor is the principal and the attorney the agent. The duties of agents and the standard of care expected from them is informed by the fact that the donor has the capacity and is free to exercise whatever level of control and direction they deem appropriate for the circumstances. This includes the ability to terminate the relationship at the discretion of the donor.

- In *Budgell* v. *Hartley Estate*, Sr. Master F.A. Lee noted that the relationship between donor and attorney undergoes a significant change when the donor becomes mentally incompetent.[474] When this occurs, the duties of the attorney increase and the relationship changes from a mere agency into a trust. The fact that the standard of care for an attorney acting for an incompetent person is the standard expected from a trustee and not a mere agent will inform the manner in which the district registrars of land titles scrutinize the actions of attorneys in such situations.

Specific actions affected by the enduring attorney's duty of care

Gifting (including conveyances for less than fair market value)

- Every attorney has a duty to act in the best interests of the donor. The effect of an attorney acting in a contrary manner is particularly acute in those situations where the donor has become mentally incompetent. Both the courts[475] and the Law Reform Commission[476] have made it clear that giving away the assets of donor, or conveying those assets for nominal value, is a breach of an attorney's duty.

- Accordingly, absent a specific grant of the power to gift, the district registrar will not accept a conveyance where the conveyance is for less than the fair market value of the subject lands. Furthermore, a clause that allows the attorney the power to *gift in the same manner as the donor did while they were competent* is still not sufficient to allow the attorney to divest the donor's property for no or nominal consideration. Much clearer and more direct language is required.

Self-dealing

- It is quite common for land titles to be presented with documents that convey the assets of the donor to the attorney themselves or to their spouses, agents, or co-attorneys. Absent compelling reasons - reasons that demonstrate that the transfer is in the best interest of the donor - the district registrar will not accept such a conveyance. This prohibition applies to conveyances that are made for estate planning purposes. These are not conveyances done in the best interests of the donor, they are done with the interests of the beneficiaries in mind, often to avoid fees associated with probate. Estate planning and testamentary dispositions are the sole purview of the donor[477] and, subject to one narrow exception, only the testator has the authority to sign a will.[478]

- As noted above, when acting for a donor who has become incompetent, the attorney moves from being a mere agent into the role of a fiduciary. The conveyance of the assets of the donor to the attorney, to a co-attorney, or to the spouse or agent of the attorney is a *prima facie* breach of the trust created by the power of attorney. On this point, both the courts (including the Supreme Court of Canada)[479] and the Manitoba Law Reform Commission[480] have been abundantly clear.

- When presented with a conveyance by the attorney that appears to breach this fundamental trust, the district registrar will require either significant proof that the conveyance is for the material betterment of the donor or a clear statement in the power of attorney document allowing the conveyance. It will *not* be sufficient to demonstrate that the donor no longer requires the asset, that the conveyance is for fair market value, that the donor would have wanted the asset conveyed to the attorney, that this is in accordance with the donor's will or estate planning, or that all other parties who may have a potential future claim to the asset (after the donor's death) consent to the conveyance.

Multiple attorneys

No concurrent attorneys

- It is not uncommon for a donor to appoint several individuals to act as their attorneys. And often these appointments contemplate attorneys acting at the same time but independently of one another (concurrent appointments). There is nothing to impede such appointments as far as common law powers of attorney are concerned. This is not the case however for enduring powers of attorney. As creatures of statute, and not the common law, enduring powers of attorney are to be governed by the provisions of their enabling legislation.

- Looking then to *The Powers of Attorney Act*, and in particular to section 17, the power to appoint multiple attorneys in enduring power of attorney is limited to appointing them jointly or successively.[481] The Act further provides that where it is unclear if the attorneys are to act jointly or successively, they are to act successively, with the first named attorney acting first.[482]

- This scheme is in accordance with the recommendation contained in the 1994 Law Reform Commission Report.[483]

- *The Powers of Attorneys Act* does not contemplate the appointment of *concurrent* attorneys in enduring powers of attorney. Furthermore, in the event that it cannot be determined if multiple attorneys are to act jointly or consecutively, acting concurrently is not provided as an option.[484]

- From time to time, solicitors acting for attorneys who appear to have been appointed to act concurrently, argue that the limitations expressed in section 17 fly in the face of the specific directions of the donor. To properly respond to this charge, it is helpful to understand why it is that these statutory provisions do not allow for concurrent appointments in enduring powers of attorney. As noted above, concurrent appointments are otherwise possible for common law powers of attorney.

- The impugned provisions in *The Powers of Attorney Act* mirror the recommendations contained in the 1994 Law Reform Commission report, which report was concerned with ensuring that the wishes of donors be *effectively* implemented and their needs be properly addressed following their lack of capacity. As stated in the report, the goal of the rules concerning multiple attorneys is to create "an opportunity for an orderly transfer of responsibility."[485] Allowing for the appointment of multiple mutually-independent attorneys does not meet this objective.

- In a scenario where two or more persons are appointed to act as attorneys with equal authority, in absence of a higher authority capable of reigning them in when they pursue contrary objectives (something the donor would normally do but cannot now due to a lack of capacity), their contrary activities will continue unchecked, to the detriment of the donor. The Act recognizes that there must be a person who has the ultimate authority and this is not possible with concurrent attorneys where the donor has become incompetent.

Joint attorneys

- Section 18 of *The Powers of Attorney Act* regulates the making of decisions by joint attorneys. This section is not intuitive and must be read very carefully. Once again, this section has the potential to fly in the face of the intentions of the donor in an enduring power of attorney. The reason is simple: the goal of the Act is to create certainty and to vest final power and final authority. Despite naming multiple attorneys to act jointly, the power and authority granted can vest in a simple majority or, where such a majority cannot be obtained, in the persons first named in the document.[486]

Joint and several attorneys

- An increasing number of powers of attorney attempt to appoint attorneys to act *jointly and severally.* The expression *joint and several* does not appear in *The Powers of Attorney Act*, nor is it a term that has any meaning as far as powers of attorney are concerned. *Joint and several* is a description of legal obligation.[487]

- When presented with a power of attorney that attempts to appoint attorneys to act *jointly and severally,* the district registrar will rely on section 17(2) of *The Powers of Attorney Act* to resolve the ambiguity that the appointment creates, treating the appointment as successive.

Foreign enduring powers of attorney

- A foreign enduring power of attorney will be valid in Manitoba only if it is valid according to the laws of the jurisdiction in which it was executed.[488] This innocuous statement has significant implications! Any lawyer preparing powers of attorney for execution outside of the province should carefully consider this statement, together with the fact that the law governing powers of attorney and their execution varies from jurisdiction to jurisdiction (two witnesses required in Ontario!).

- A simple example should help illustrate the danger: an enduring power of attorney prepared by a Manitoba lawyer, in accordance with Manitoba law, for a Manitoban, for use in in Manitoba but executed in a foreign jurisdiction will be valid in Manitoba only if it is valid in that foreign jurisdiction!

- In order to be satisfied that a foreign enduring power of attorney is suitable for use in Manitoba for dealing with Manitoba land, the district registrar will require an opinion letter as to the validity of the document from a lawyer entitled to practice in the jurisdiction in which it was executed.

Remote witnessing of enduring powers of attorney

- Rather than having clients who are out of the province execute their powers of attorney in front of a foreign witness (who will often lack the capacity to explain the document to the donor), it may be easier for all concerned to have the execution of enduring powers of attorney witnessed remotely by a Manitoba lawyer. The remote witnessing of powers of attorney is allowed under Manitoba law.[489]

- Enduring powers of attorney executed outside of Manitoba, but witnessed remotely in accordance with *The Powers of Attorney Act* (and regulations), are deemed to have been executed in Manitoba.[490] As such, they are not in fact foreign enduring powers of attorney. This means that no letter of opinion is required.

- Unlike enduring powers of attorney witnessed in person, only, "a lawyer who is a member in good standing of The Law Society of Manitoba is authorized to witness the signing or acknowledgment of an enduring power of attorney without being in the presence of the donor."[491]

- Parties witnessing remotely must strictly comply with the empowering legislation and regulation, including completing the appropriate *Certificate of Remote Witness* found in the Schedules to the Regulation.[492]

Attorney renouncing

- Once an attorney has either acted under an enduring power of attorney *or otherwise indicated acceptance of the appointment* (this is the issue), the attorney has a duty to act. This comes from section 19(1) of *The Powers of Attorney Act*.[493] The duty to act continues until leave of the court permits otherwise.[494]

- The district registrar will not accept a renunciation by an attorney under an enduring power of attorney without that renunciation having been approved by the court. It is the ruling of the Registrar-General of Land Titles that district registrars do not have the authority to make the determination as to whether or not an attorney has either acted or *otherwise indicated an acceptance the appointment*. Rick Wilson, Registrar-General, stated that this is "a judicial review process rather than an administrative or even quasi-judicial function. If the provision were only that the attorney has not acted under the powers, then it might be sufficient to take evidence from the attorney but the balance of the section is very open to interpretation."

- Attorneys making application to court to be allowed to renounce their powers should be aware of comments made by the Law Reform Commission, wherein the Commission made it clear that it did not feel that merely being named as attorney was proof that a party had accepted the appointment.[495]

THE SPRINGING POWER OF ATTORNEY

- By section 6 of *The Powers of Attorney Act*, powers of attorney in Manitoba can come into force and effect upon the happening of a trigger event. The event can be specific (such as on a specific date) or it can be contingent (upon mental incompetence). The Act allows the donor to appoint a person or persons to declare in writing that the contingent event has occurred.

Authority contingent on mental incompetence

- Where a power of attorney comes into force on mental incompetence, the district registrar will require proof that the donor is indeed incompetent. The Act allows the donor to specify the level of proof. Where the donor has not specified the level of proof required, the district registrar will require the written opinion from two doctors.[496]

SUBSTITUTE ATTORNEYS

Powers of substitute attorneys

- A substitute attorney, appointed by an attorney, has no more authority than the named attorney. If the attorney cannot exercise a particular power, the substitute attorney cannot either, even where the document creating the delegation purports to allow this. Furthermore, where an attorney is prohibited by law from doing some act (i.e. executing *Homesteads Act* consents and releases), a substitute attorney named by them cannot exercise this power.

Termination of authority of attorney and substitute attorney

- Like a common law power of attorney, enduring powers of attorney terminate on the death of the attorney.[497] Because the authority of a substitute attorney is derived through the primary attorney, the authority of a substitute attorney is terminated by the death of the primary attorney.

POWERS OF ATTORNEY BY EXECUTORS, ADMINISTRATORS & OTHER TRUSTEES

- It is an ancient rule that trustees vested with delegated powers cannot further delegate those same powers.[498] The Latin maxim *delegata potestas non potest delegari* (no delegated powers can be further delegated) applies. The exception to this rule would be where the delegation allows for further sub-delegation. In the case of executors and administrators, neither the law nor the instrument of grant gives these trustees the absolute right to delegate their powers. This leaves executors and administrators without a general power of sub-delegation and therefore without the power to appoint attorneys under a powers of attorney to carry out their duties.

- An exception to this limitation is created by section 36 of *The Trustee Act*.[499] Section 36 allows a trustee who is a person to delegate their powers where they intend to remain outside of the province for more than one month. The power does not come into effect until the attorney has left the province and is revoked by his or her return. The requirements of the legislation are very specific and a close review of section 36 is advisable and in particular of subsection 36(4).

- In accordance with subsection 36(6), the district registrar will accept a statutory declaration as proof that the authority of the delegation has come into effect and has not been revoked. The district registrar will also accept a statement of these facts inserted into the appropriate box of a conveyance document. This is based upon the rule in section 194 of *The Real Property Act* that deems a statement made in a land titles form to have the same force and effect and validity as if it were made under oath.[500]

POWERS OF ATTORNEY AND *THE HOMESTEADS ACT*

- One area of uncertainty for practitioners is the interplay between *The Homesteads Act* and powers of attorney. There are two basic restrictions that practitioners must be aware of:

    1. An attorney acting under a power of attorney cannot sign a consent to a disposition, a consent to a change of homestead or a release of homestead on behalf of the donor without both:

        i. Specific authority in the power of attorney document;[501]

        and

        ii. A properly executed Form 9 (from the regulations to *The Homesteads Act* [502]), *Acknowledgment by Spouse or Common-law Partner for Power of Attorney.* This form must be executed by the donor and attached to the power of attorney document.[503]

    2. A spouse or common-law partner acting as attorney for their spouse cannot ever sign a consent to a disposition, a consent to a change of homestead, a release of homestead[504] or a disposition of the homestead property as attorney of his or her spouse or common law partner where the donor has *Homesteads Act* rights in addition to ownership rights. This means that a person can never act as attorney for their spouse or common law partner in a disposition affecting their jointly-owned marital home.[505] This prohibition applies even where the donor provides this power and has signed the Form 9.

- Despite the other restrictions to be found in *The Homesteads Act*, there are no special requirements for attorneys signing dispositions of jointly-held homestead property on behalf of donors who have ownership rights in addition to rights under *The Homesteads Act* (in other words, the jointly-held marital home). In particular, Form 9 does not need to be attached to a power of attorney if the attorney is signing a disposition of the marital home on behalf of an incompetent owner where the spouse or common law partner is also signing that disposition.

THE DEPOSIT INDEX

- *The Real Property Act* allows for the registration of instruments in a registry called the Deposit Register or Deposit Index.[506] Solicitors acting on behalf of clients who intend to use powers of attorney on a regular basis might find it worthwhile to place the power of attorney on deposit at land titles. Once the power of attorney document is on deposit, subsequent registrations that rely on the authority in it can refer to it by registration number and need not attach a copy of it to their submission.

Revocations

- The Deposit Index is particularly useful where a power of attorney has been withdrawn or revoked and there is some concern that the attorney may continue to act, despite a lack of capacity. On every dealing under a power of attorney, the district registrar checks the Deposit Index, searching by the name of the donor.

- If there is a revocation on file, they will react accordingly and refuse to process the transaction. Accordingly, in the event there is a concern that an attorney will continue to act based upon a revoked power, it is advisable to place the revocation into the Deposit Index.

POWERS OF ATTORNEY AND CORPORATIONS

Must come from corporation

- In order to act on behalf of a corporation, the attorney must have a power of attorney from the corporation. A personal power of attorney from an individual who happens to be a corporate officer will not be sufficient to allow the attorney to act for the corporation, even if the document purports to grant this authority.

Not for indoor management

- The district registrar will not supervise the indoor management of corporations. We will neither accept nor examine powers of attorney granted by corporations to their own employees, officers or directors.

I. THE REQUEST/TRANSMISSION

- One of the most commonly used land titles form not yet addressed herein is the Request/Transmission form. This form is actually two separate forms combined into one: the Request form and the Transmission. The functions of the two forms are different, as are the rules governing the content, the evidence and the execution of these forms.

THE REQUEST

- Requests are filed at land titles for two basic reasons:

    1. To cause the issuance of a new certificate of title in circumstances where there has not been any change in the legal ownership of the land, including:
        - To change an owner's name (i.e. by marriage)
        - To correct the name of a registered owner
        - By survivorship
        - To change the address for service of an owner
        - To change corporate name by virtue of articles of amalgamation or amendment
    2. To cause the District Registrar to perform some function, including:
        - To issue a thirty day notice
        - To remove an encumbrance from title where is has expired on its face
        - To issue a refund of land transfer tax
        - For the taxation of a lawyer's accounts in mortgage foreclosure proceedings

- Because there is no legal change in ownership, the Request form can be usually signed by a solicitor and agent on behalf of the relevant registered owner.

    - Requests for a refund of land transfer tax where the applicant is submitting an exemption from tax that was missing from the original transfer form must be signed by the applicant personally.

- Also owing to the fact that there is no change in ownership (no acquisition of any interest in land), evidence under *The Farm Lands Ownership Act* is not required.

THE TRANSMISSON

- A transmission is used to change the legal ownership of land or an interest in land[507]. It is used where there is no conveyance document but there is other legal authority allowing for the change in ownership - often in cases where the registered owner is unwilling or unable to deal with their interest in land.

- Several common examples:
    - Transmissions by the executors or administrators of the estate of a deceased person
    - Transmissions by the trustees of a bankrupt person
    - Transmissions by virtue of a court vesting order
    - Transmissions based upon a final order of foreclosure or a transfer under power of sale
- Transmissions must be signed by the applicant taking title and not their solicitor and agent and, because they result in the acquisition of an interest in land, must contain evidence under *The Farm Lands Ownership Act*.

J. IMPROPER DEALINGS / UNCONSCIONABLE TRANSACTIONS

- Although a transaction may appear on its face to be legitimate, the circumstances surrounding the agreement may be such that the agreement is unenforceable. In addition, the terms of such agreements may themselves not be in accordance with the law. Because there are individuals who have demonstrated unscrupulous behaviour, care should be taken when representing parties who appear to have any kind of disability or vulnerability, where there is a clear disparity of bargaining positions or where a person is brought in to have their signature witnessed but no advice is sought.

- Manitoba Courts in recent years have issued several rulings regarding transactions that are unconscionable, improper or which violate specific provisions of Canadian or Manitoba law.

- Where a transaction appear to a District Registrar to be improper, the Registrar may either refuse to take the registration or refuse to complete processing of the registration without clear direction from a Manitoba Court.

RECENT DECISIONS

Quick Auto Lease Inc. v. Jason Hogue et al.[508]

Per Martin, J.

[35]…Without critiquing each one of these features, or others that are illustrative of the nature of the Agreement, the point is that individually and in aggregate, the terms are onerous, require significant legal sophistication to understand, are entirely one-sided and, in some instances, purport to require agreement or waiver notwithstanding the law. All in, the reasonable inference is that the overall transaction is beyond the grasp of any lay person, and designed to be that way, let alone it is grossly unreasonable.

[48] Reframed, the Agreement runs afoul of the ***CPA*** (*The Consumer Protection Act*, C.C.S.M. c. C200), the ***Interest Act***, is offensive from a standard form contract standpoint and objectively provides for interest rates that are excessive given the risks and circumstances. And, the amounts paid to Quick Auto far exceed the anticipated cost in 2004. All tolled, the situation compels relief under either component of s. 2 of the ***UTRA*** (*The Unconscionable Transactions Relief Act*, C.C.S.M. c. U20).

AAR Financial Inc. v. Keith G. Collins Ltd. et al.[509]

- A Proof of Claim from AAR Financial Inc. was disallowed in its entirety by Keith G. Collins Ltd. Trustee in Bankruptcy. The grounds for the disallowance were that the effective interest rate was a criminal rate; the cost of the loan was excessive; or the transaction was harsh or unconscionable. In court, the defendant relied in part on the *Criminal Code* and *The Unconscionable Transactions Relief Act*, C.C.S.M. c. U20. This was upheld by the court.

- Mr. Justice Kroft found that the loan arrangement with AAR Financial Inc.:
  (a) offended the section 347(1) of the Criminal Code; and
  (b) was an unconscionable transaction.

- Per Mr. Justice Kroft, "In my opinion, this is a case of a lender taking full advantage of a desperate debtor with unequal bargaining power."

Aguiar v. 5026113 Manitoba Ltd., Daylight Capital Corporation and Richard Boon[510]

- Mr. Justice Dewar declared that the subject transaction to be unconscionable.

- He held that
  - The actions of Richard Boon and his company either repudiated the subject transaction or they are in default of the transaction and are not entitled to insist upon maintaining an interest in the land
  - The transaction itself was complicated and structured in an unusual way and the parties were in an unequal position
  - On its face, the stated consideration for the transfer seems grossly undervalued
  - The transaction was not fair, just or reasonable
  - There was a need for Mr. Boon and his company to ensure the plaintiff received legal advice before concluding the transaction

Sartor et al. v. Boon, et al.[511]

66 Here, Boon's conduct went beyond an 'unconscientious use of power arising from the circumstances'. His actions did amount to deceit or circumvention.

69 In my view, Boon's actions represent a marked departure from ordinary standards of decent behaviour. His practice of seeking out the financially vulnerable has the hallmark of a predator; his suggestion to the Sartors that he was offering help was disingenuous – in fact, he was acting in aggressive pursuit of his self-interest.

76 Here, Boon's blameworthiness is high. At its essence, this was a dishonest deprivation. As stated above, while I do not think he believed his behaviour amounted to fraud, he did understand that the arrangement deprived the Sartors of rights and entitlements. In addition, the Sartors were very vulnerable and they were directly targeted by his actions. Nothing in the evidence suggests that Boon will face any other consequences for his actions, and he or others who might choose to engage in this kind of business practice need to be deterred.

Storm et al. v. 4724438 Manitoba Ltd. et al.[512]

21 …In ***Brown v. Boon***, 2018 MBCA 14 (CanLII), 420 D.L.R. (4th) 691, the court in considering Mr. Boon's actions in the context of a similar series of transactions described him as a "shrewd businessman". In my opinion this characterization is kind, if not generous when considering Mr. Boon's conduct here.

37 In this case, I am awarding solicitor and client costs on the basis that Mr. Boon was put on notice in Sartor when Suche J. delivered her reasons on November 6, 2018, stating that his conduct was reprehensible. Indeed, punitive damages were awarded against him on that basis. Nevertheless, the defendants chose to continue with litigation in this case in respect of substantially similar allegations made against him in Sartor. In doing so, the defendants not only engaged in reprehensible behaviour in their pre-litigation conduct, but continued to defend that behaviour in this action after the date of the reasons in Sartor when the court clearly put him on notice that his behaviour was reprehensible. In my opinion the continued defence of his conduct during this litigation warrants an order of solicitor and client costs.

THE LAWYER'S DUTY

- The Law Society of Manitoba has enunciated the duty and role of a lawyer in such circumstances:

  To be clear, if you are asked to "just witness the document", it is not enough to say, or even to write on the instrument, that no legal advice was sought and no legal advice given. You cannot turn a blind eye to the facts behind the disposition.[513]

ENDNOTES

[1] These lands are specified in section 17 of the *Dominion Lands Act*, 35 Victoria, c. 23 (1872).

[2] The *Rupert's Land Act*, 31 & 32 Victoria, c.105 (1868)

[3] "An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba", 33 Victoria, Chapter 3, page 20 (the *Manitoba Act*), assented May 12, 1870.

[4] The *Manitoba Act*

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that ... the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada…

[5] *The Manitoba Act*, s. 32

[6] *Dominion Lands Act*, 35 Victoria, c. 23 (1872), enacted April 14, 1872

[7] *The Condominium Act*, C.C.S.M. c. C170

Effect of registration
11(1) Upon the registration of a declaration, plan and by-law,
(c) a condominium corporation without share capital is created
(i) with a name consisting of
(A) the name of the land titles district in which the registration occurs,
(B) the words "Condominium Corporation", and
(C) the abbreviation "No." together with the next available consecutive number for a condominium corporation registered in that land titles district, and
(ii) with a membership consisting of the unit owners from time to time.

[8] *The Condominium Act*

Title in name of condominium corporation
20(1) Upon the registration of a declaration and plan, the district registrar must issue a title for the property in the name of the condominium corporation created by the registration.

[9] *The Condominium Act*

Dealing with common elements, easements
89(1) A condominium corporation may
(a) lease a part of the common elements, except those parts specified in the corporation's declaration as common elements for the exclusive use of a unit owner;
(b) grant an easement or licence through the common elements; or
(c) surrender an easement that is appurtenant to a part of the common elements;
but only if specifically authorized by its by-laws to do so.

[10] *The Condominium Act*

Title in name of condominium corporation
20(1) Upon the registration of a declaration and plan, the district registrar must issue a title for the property in the name of the condominium corporation created by the registration.

Amending a declaration or plan
23 An amendment to a declaration or plan is effective only if it is made and registered in accordance with this Part.

Registration of minor amendment
25(2) To give effect to an amendment under clause (1)(a), the condominium corporation must submit a copy of the amendment for registration and satisfy the district registrar that it is an amendment described in that clause.

Change of address
25(3) To give effect to an amendment under clause (1)(b), the condominium corporation must submit for registration a notice of the change of address in a form acceptable to the district registrar.

When by-law effective
168(1) A by-law does not take effect until
(a) it is confirmed, with or without amendment, by a vote of the unit owners who hold the specified percentage of the voting rights in the condominium corporation voted by those unit owners present in person or by proxy at the meeting to consider the by-law; and
(b) a copy of the by-law is registered by the district registrar.

When change agreement effective
179(2) A change agreement does not take effect until
(a) the requirements in clause 178(1)(a) and, if applicable, clause 178(1)(c) have been met; and
(b) the district registrar has registered the agreement.

Documents to be filed for registration
254(1) To effect an amalgamation, the proposed declaration and by-laws for an amalgamated corporation must be submitted to the district registrar for registration.

[11] *Plans of subdivision*

The Real Property Act, C.C.S.M. c. R30

Plans of subdivision
117(1) Where a person subdivides land, the plan of subdivision shall not be registered unless it is approved by the Registrar-General and in accordance with the provisions of *The Planning Act*.

Application of subsection (1)
117(2) Subsection (1) does not apply to land situated within The City of Winnipeg.

Approval required for registration
117(3) No plan of subdivision to which *The City of Winnipeg Charter* applies, shall be registered unless approval is given to the plan under that Act and unless approval is given by the Registrar-General under this Act.

Form of approval
117(4) The approval of The City of Winnipeg shall be authenticated, for the purpose of registration, by the signature of the person or persons appointed by by-law of the council for the purpose and the approval of The Municipal Board shall be by order.

Requirements of Registrar-General

117(5) Before approving a plan of subdivision, the Registrar-General may require

(a) the cancellation under *The Municipal Board Act* of any existing plans or portions thereof affecting the land in the plan of subdivision; or

(b) the inclusion in the plan of subdivision of any adjacent parcels of land which are not defined on any registered plan, and of any public streets or lanes;

or both.

Nature of plan

117(6) The plan presented to the district registrar for registration shall be in accordance with the following provisions:

(a) All roads, streets, lanes, passages, thoroughfares, squares, or reserves, appropriated or set apart for public use shall be shown as such, and distinctly delineated on the plan and have their measurements marked thereon.

(b) All allotments into which the land is divided shall be marked with distinct numbers or letters on the plan.

(c) Subject to subsection (7), each angle of each allotment shall be defined on the ground by the surveyor by a post or monument of a durable character, and the manner by which each angle is so defined shall be shown on the plan.

(d) The plan shall show distinctly a sufficient number of angular and lineal measurements, from which can be deduced the dimensions and bearing of each boundary of each and all the allotments into which the land is divided.

(e) Subject to subsection (8), the original section or parish lot lines, according to the survey thereof by the Dominion or provincial government, or a sufficient number of them to show the location and connection of the subdivision therewith, shall be shown on the plan.

(f) Where the plan is a subdivision of a lot or lots on a previously registered plan, it may be required that there be shown, in a distinct manner on the plan, the numbers or other distinguishing marks of the lot or lots subdivided, and the boundary lines thereof.

(g) Subject to subsection (9), unless the municipal board otherwise orders, a plan upon which there is indicated a portion which is vested in the Crown or municipality as provided in section 119, shall be signed by each owner and caveator or his authorized agent.

(h) Subject to subsection (9), a plan upon which there is no indication of a portion which is vested in the Crown or a municipality as provided in section 119, shall be signed by the registered owner of the land.

Authority as to survey of subdivisions

117(7) The Registrar-General may, subject to such conditions as he imposes, allow a subdivision to be made and evidenced in the following manner:

Instead of requiring a post or monument at each angle of each allotment, there shall be erected at intervals monuments of a permanent character; and the monuments, with the information on the plan showing their location, are the evidence of the block outlines of the survey, and the registered plan of the subdivision is the evidence of the manner in which each block of land is subdivided into allotments.

Clause (6)(e) dispensed with

117(8) When a connection with the original survey lines has been sufficiently shown on a previously registered plan, the provision set out in clause (6)(e) may be dispensed with.

Signature in respect of parcel

117(9) Where the Registrar-General has required under clause (5)(b) the inclusion in a plan of any adjacent parcel, the signature of an owner or caveator of the parcel is not required on the plan in respect of the parcel.

District registrar to deliver one of the plans

117(10) Forthwith after registration, the district registrar shall forward to the Examiner of Surveys, and to the clerk of the municipality in which the land is situated, one of the plans, on each of which he shall endorse a certificate of the date, number, and other particulars of the registration.

Registered within 60 days
117(11) No plan shall be registered after the expiration of 60 days from the time the Registrar-General gives his approval thereto.

Delegation of authority
117(12) The Registrar General may delegate to any member of the staff of the Land Titles Office the authority to approve plans of subdivision under this section.

Consents
118 If a consent to the registration or filing of an instrument has been granted under *The City of Winnipeg Charter*, a certificate of the consent signed by an employee of The City of Winnipeg who is designated by the city council for that purpose may accompany the instrument when it is registered or filed in a land titles office.

Plans dedicating streets
119(1) The indication upon a plan of subdivision filed or registered in a land titles office or registry office of a portion of the land covered by the plan as a street, lane, avenue, footpath, walkway, road, highway, park, public square or other means of communication not designated thereon to be of a private nature, or as a public reserve, shall be deemed a dedication of that portion of the land to the public.

Title to streets
119(2) Upon the registration or filing of a plan,
(a) the title to any portion of the land covered by the plan indicated on the plan as a street, lane, avenue, footpath, walkway, road, highway, public square or other means of communication, is vested in the Crown free from all encumbrances other than a pipeline easement, subject however to the right of the municipality to the possession thereof;
(b) the title to any portion of the land covered by the plan indicated on the plan as Crown reserve is vested in the Crown free from all encumbrances other than a pipeline easement; and
(c) the title to any portion of the land covered by the plan indicated on the plan as public reserve is vested free from all encumbrances other than a pipeline easement
(i) where the land is situated in a municipality, in that municipality, and
(ii) where the land is not situated in a municipality, in the Crown.

Definition of "pipeline easement"
119(3) In subsection (2), **"pipeline easement"** means an easement for a gas pipe line as defined in *The Gas Pipe Line Act*, or a pipeline as defined in *The Oil and Gas Act*.

[12] Obsolete Plans of Subdivision

The Planning Act, C.C.S.M. c. P80

Mandate of a special planning authority
12.2(1) The mandate of a special planning authority is, in respect of its special planning area,
(a) to hold hearings to consider
(iii) the declaration of an obsolete plan of subdivision.

Hearings by planning commission
36(1) The board of a planning district or the council of a municipality may, by by-law, assign responsibility for holding a hearing to consider any of the following matters to its planning commission:
(d) the declaration of an obsolete plan of subdivision under subsection 144(3).

Obsolete plans of subdivision
144(1) A council may, by by-law, declare that a plan of subdivision, or any part of a plan, that has been registered for eight years or more is not a registered plan of subdivision for the purpose of this Part.

Registration in land titles office
144(2) Immediately after first reading of the by-law, the council must register a certified copy of the proposed by-law in the appropriate land titles office. After registration, no person may subdivide a parcel contained in a plan of subdivision to which the proposed by-law applies, without the approval of the approving authority.

Notice and hearing
144(3) After first reading of the by-law, the council must
(a) hold a public hearing to receive representations from any person on the proposed by-law. The hearing date must be no more than 40 days after the first reading of the by-law; and
(b) give notice of the hearing in accordance with section 169.

Action of planning authority
144(4) After the public hearing, the council must
(a) give second and third readings to the by-law; or
(b) pass a resolution not to proceed, in whole or in part, with the by-law.

Decision distributed
144(5) The council must send a certified copy of a by-law or resolution made under subsection (4) to the minister and each person who made a representation at the public hearing, and must register a copy in the land titles office.

Discharge
144(6) Upon registration of the by-law or resolution at the land titles office, the copy of the proposed by-law registered under subsection (2) must be discharged from the land titles office.

Plan declared obsolete cannot be revived
144(7) After a council has passed a by-law under this section, it may not pass a subsequent by-law to revive or partially revive the plan of subdivision.

The City of Winnipeg Charter, S.M. 2002, c. 39

Declaration respecting expiry of plans
265(1) Council may, by by-law, declare that a plan of subdivision, or any part thereof, of land in the city that was registered more than eight years before the by-law is passed, is not a registered plan of subdivision for the purposes of this Part.

Notice of by-law
265(2) A notice of the passing of a by-law under subsection (1) must be sent to each person appearing on the real property assessment roll of the city as the owner of a parcel of land covered by the plan of subdivision to which the by-law applies.

Registration of by-law
265(3) A certified copy of a by-law passed under subsection (1) must be registered in the land titles office.

Coming into force of by-law
265(4) A by-law passed under subsection (1) does not come into force until subsections (2) and (3) have been complied with.

[13] *The City of Winnipeg Charter*

Exceptions to subsections (1) and (2)
263(3) Subsections (1) and (2) do not apply to instruments that have, or might have, the effect of subdividing a parcel of land where
(a) each parcel resulting from the subdivision is at least
(iv) one or more whole lots or blocks as shown in a previously registered plan of subdivision, or

(v) one or more whole lots or blocks and any existing part or parts of a lot or block contiguous thereto in a previously registered plan of subdivision; or

The Planning Act

Cases in which approval is not required

121(2) As exceptions to subsection (1), a district registrar may accept an instrument that has the effect, or may have the effect, of subdividing a parcel of land in any of the following circumstances:

(a) each parcel resulting from the subdivision consists of

(iv) one or more whole lots or blocks in a registered plan of subdivision,

(v) one or more whole lots or blocks and any existing part or parts of a lot or block contiguous thereto in a registered plan of subdivision, or

[14] *Plans of Survey*

The Real Property Act

Requirement for plan of survey

127(1) A district registrar may require an eligible grantee, as defined in subsection 111(1), or an owner of land who wishes to file an instrument or a caveat, or an assignment of an instrument or caveat, against land respecting a statutory easement to file a plan of survey if, in the opinion of the district registrar, the location of the land or statutory easement is not sufficiently defined on any registered plan, and if the owner or eligible grantee does not comply with the requirement the district registrar may

(a) in respect of an owner of land, refuse to accept for registration any instrument relating to the land; and

(b) in respect of a caveat, refuse to accept the caveat or assignment of caveat for filing or any instrument relating to the caveat for registration.

Notice of intention that plan required

127(2) A district registrar may give notice of intention that a plan of survey is required by making an entry on the certificate of title to that effect.

Approval of local authority

127(3) A plan shall not be filed by an owner of land referred to in subsection (1) unless

(a) where the land is situated in the City of Winnipeg, the plan has been approved under Part 6 of *The City of Winnipeg Charter* or consent has been granted under Part 6 of that Act to the registration or filing of the plan;

(b) where the land is situated in northern Manitoba as that expression is defined in *The Northern Affairs Act*, by the member of The Executive Council charged with the administration of that Act or a person authorized by him to approve the plan on his behalf; and

(c) subject to subsection (5), where the land is not situated in the City of Winnipeg or in northern Manitoba as that expression is defined in *The Northern Affairs Act*, the plan is approved in accordance with the provisions of *The Planning Act* and a certificate of the approval is endorsed on the plan.

Accompanying documents

127(4) Where a plan is filed by an owner of land referred to in subsection (1), unless the provisions of this subsection are waived by the district registrar, the plan shall be accompanied by documents to be registered which deal with or request a certificate of title for all parcels on the plan.

Approval under Planning Act

127(5) Approval in accordance with the provisions of *The Planning Act* and the certificate of the approval mentioned in clause (3)(c) are not required where each of the parcels shown on the plan comprises all or the balance of the land contained in a certificate of title or deed.

[15] 128(3) Plans

The Real Property Act

Evidence for unsurveyed boundaries
128(3) If in the opinion of the Examiner of Surveys it is not necessary that all or any boundaries be surveyed to determine the position of land to be dealt with, he may approve a plan upon such other evidence as he may require.

[16] Right-of-Way Plans

The Real Property Act

Plan for opening roads and drains
124(1) Where a by-law or plan for the opening up of a highway or drain is presented for registration or deposit to the district registrar under *The Municipal Act*, *The Expropriation Act*, or a city charter, the plan shall be in accordance with the following provisions:

(a) The plan shall exhibit, distinctly delineated, the width and direction of each course of the highway or drain.

(b) The manner by which the highway or drain is defined on the ground by the surveyor shall be shown on the plan.

(c) The original section or parish lot lines according to the survey thereof by the Dominion or provincial government shall be shown on the plan, and there shall also be shown a sufficient number of angular and lineal measurements to show the location and connection of the highway or drain with each original section or lot affected thereby; but when a connection with the original survey lines has been sufficiently shown on a previously registered plan, this provision may be dispensed with.

Plans forwarded Examiner of Surveys
124(2) Forthwith after the deposit, the district registrar shall forward to the Examiner of Surveys one of the plans, on which shall be endorsed by the district registrar a certificate of the date, number, and other particulars, of the deposit.

Registration to affect both systems
124(3) Where part of the land registered in a land titles office, and affected by the by-law or plan, is under the old system and part under the new system, the by-law or plan shall be registered against the land under both systems.

Lot from which lane taken
124(4) Where a portion of a lot in a plan of subdivision has been taken and vested in a municipality or the Crown for a lane, the remaining portion of the lot shall be held to be properly described in an instrument presented for registration by giving its number on the plan without specifically excepting therefrom the part so taken for a lane, and the instrument shall be read as if the lane were specifically excepted.

Plans of right-of-way
125(1) All plans of land taken for a right-of-way for any purpose, presented for filing, deposit, or registration, with the district registrar, shall state the purpose for which the land is required and be in accordance with the following provisions:

(a) The area taken from each quarter section or parish lot shall be shown on the plan.

(b) The original section or parish lot lines according to the survey thereof by the Government of Canada or the Government of Manitoba shall be shown, and a sufficient number of angular and lineal measurements to define the limits of the land taken for the right-of-way, and to show their connection with each original section or parish lot through which the right-of-way passes.

(c) Where the location of the right-of-way is through land which has been surveyed into allotments, and shown on a registered plan, the plan shall show distinctly, as to all allotments taken in whole or in part for the right-of-way, the lines of each allotment according to the plan of its survey, and a sufficient number of angular and lineal measurements to show the location and connection of the right-of-way with each registered allotment.

(d) The land so taken or required shall be defined on the ground by durable posts placed at all points designated or required by the Registrar-General, and the plan shall show the location of those posts.

One of the plans to be forwarded
125(2) Forthwith after the deposit, the district registrar shall forward to the Examiner of Surveys one of the plans on which shall be endorsed by the district registrar a certificate of the date, number, and other particulars, of the deposit.

Railway lands
126 Where, by virtue of any statute of Canada or of the province, land, or an estate or interest in land, has become vested in a railway corporation by reason of the deposit of a plan in a land titles office, a certificate or certificates of title for the land, estate, or interest, shall forthwith issue to the corporation, free from encumbrances; but this does not in any way prejudice the claim to compensation of any person entitled thereto by reason of the taking of the land, estate, or interest.

The Railway Act, SC 1903 CAP 58, 3 Edward VII

118. The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained:

(c.) purchase, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway, and also alienate, sell or dispose of, any lands or property of the company which for any reason have become not necessary for the purpose of the railway.

See also sections 134 - 174 of that Act.

[17] Expropriation Plans

The Expropriation Act, C.C.S.M. c. E190

Plan of expropriated land
4(2) The description of the land required to be given in the declaration may be given by reference to a plan prepared by a Manitoba Land Surveyor sufficiently indicating the land to be expropriated, and in that case the plan shall form a part of the declaration for all purposes.

Plans required for highways and drains
4(3) Where the land is being acquired by the authority for a highway or a drain, the description of the land shall be given by reference to a plan prepared by a Manitoba Land Surveyor which shall form part of the declaration for all purposes, and there may be shown on the plan any lands owned by the authority which are to be opened as part of the highway or used as a drain.

May be shown on plan
7(3) Where land which cannot be expropriated under subsection (1) or (2) is acquired otherwise than by expropriation in conjunction with land that is being expropriated, the land may

(a) where it is land owned by the Crown or a Crown agency, with the consent of the Lieutenant Governor in Council; and

(b) where it is land owned by or for the purposes of a corporation and used by it for the purposes mentioned in subsection (2), with the consent of the corporation;

be shown on any plan forming part of a declaration of expropriation of the land being expropriated.

Lands owned by authority shown on plan
7(4) Where lands are being acquired by an authority to be used in conjunction with lands already owned by the authority, the land already owned by the authority

(a) may be shown on any plan forming part of a declaration of expropriation of the lands being acquired; and

(b) for the purposes of subsection 13(2) shall be deemed to be part of the lands expropriated.

Crown lands shown on highways plan

7(5) Where lands being acquired by the government or a municipality for use as a highway, drain or water control work are to be used in conjunction with Crown lands or lands owned by a Crown agency, the Crown lands or lands owned by a Crown agency required for the highway, drain or water control work

(a) may, with the consent of the member of the Executive Council charged with the administration of Crown lands or the member of the Executive Council responsible for the Crown agency, as the case requires, be shown on any plan forming part of a declaration of expropriation of the lands being acquired for the highway, drain or water control work or on any plan filed under section 13 in respect of the highway, drain or water control work; and

(b) for the purposes of subsection 13(2) shall be deemed to be part of the lands expropriated.

Better description or plan required

11(2) Where a declaration is presented at the land titles office for registration, if the district registrar thinks that the land to be expropriated or the boundaries thereof cannot be accurately and readily determined by reference to the description in the declaration, or to the plan, if any, he may require from the authority a plan or a revised plan prepared by a Manitoba Land Surveyor or a better description of the lands to be expropriated, and the plan or the revised plan or the better description when filed or registered in the land titles office shall be supplementary to the declaration and in case of any conflict or inconsistency between the plan accepted by the district registrar and the description of the land contained in the declaration, the plan prevails.

[18] Certificate Plans

The Expropriation Act

Filing plan of lands for highways, etc

13(4) Subject to subsection (5), an authority may, without registering a declaration or expropriating lands, file in the proper Land Titles Office a plan prepared by a Manitoba Land Surveyor showing lands that the authority intends to use for a highway, drain, water control work, pipeline, telephone line, or electric power line or any other public purpose.

Requirements for plan

13(5) A district registrar shall not accept a plan for filing under subsection (4) unless a certificate signed by or on behalf of the authority is endorsed on or accompanies the plan certifying

(a) that all registered owners of any lands that will vest by reason of the filing of the plan have agreed with the authority on the settlement of due compensation for the land, or that the authority is the owner or entitled to be the owner of all the land affected by the plan;

(b) where any lands will vest by reason of the filing of the plan

(i) as to the interest that is to vest and whether that interest is subject to any existing interest in the lands, and

(ii) as to the provisions of any Act of the Legislature that authorizes the authority to acquire land for the purposes for which the land is to be used; and

(c) where the lands are to be used for a highway

(i) that upon the filing of the plan the lands are thereby opened and dedicated to the public use as a highway, or

(ii) that the land is not thereby opened or dedicated as a highway.

Application of subsections 7(3), (4) and (5)

13(6) Subsections 7(3), (4) and (5) apply with such modifications as the circumstances require to a plan filed under subsection (4).

Effect of filing plan

13(7) Where a plan is filed under subsection (4), subsections (1), (2) and (3) apply with such modifications as the circumstances require as though the filing of the plan were the registration of a declaration and an order confirming the declaration.

Statement upon opening or dedicating highway
13(8) Where a declaration or plan filed under this Act in respect of lands acquired or to be used for a highway indicated that the land is not opened or dedicated as a highway at the time of filing the declaration or plan, the authority responsible for the highway shall, within thirty days of the day the land is opened or dedicated as a highway, register in the appropriate land titles office a statement signed by or on behalf of the authority or stating the day upon which the land is opened or dedicated as a highway.

[19] Air Space Plans

The Real Property Act

Interpretation
133(1) In this section "**air space parcel**" means a volumetric parcel, whether or not occupied in whole or in part by a building or other structure, shown as such in an air space plan.

Creation of air space parcels
133(2) The registered owner may, with the consent of all persons appearing on the register and general register to have a charge, claim or interest in the land, create air space parcels separated by surfaces and obtain title to them by the registration of an air space plan.

Requirements of the plan
133(3) An air space plan shall not be registered unless
(a) the title to the land of which the air space parcels are part is registered under this Act;
(b) the land of which the air space parcels are part is at least a whole lot or parcel shown on a subdivision or explanatory plan registered under this Act;
(c) the plan contains the certificate of a land surveyor that he was present at and personally superintended the survey represented by the plan and that the survey and plan are correct; and
(d) the plan has been approved by the Examiner of Surveys.

Parcel may be subdivided
133(4) An air space parcel created by the plan constitutes land and may be transferred, leased, mortgaged, charged or otherwise dealt with in the same manner as other land registered under this Act and may be subdivided in accordance with *The Condominium Act*.

The City of Winnipeg Charter

General powers
204 Without limiting the generality of any other provision of this Act, the city may, for its purposes,
(a) acquire, hold, encumber, mortgage, lease, dispose of, and otherwise deal with, land, improvements and personal property, or interests in land, improvements and personal property, whether within or outside the city; and
(b) lease or otherwise authorize the use of space or air rights above or below the established grade level of a street.

[20] Condominium Plans

The Condominium Act

Definitions
1(1) The following definitions apply in this Act.
"bare land unit" means a unit defined by the delineation of its horizontal boundaries on a plan and without reference to any buildings, structures or fixtures on the plan. (« fraction de terrain nu »)
"phasing unit" means a unit described in a declaration, or in an amendment or proposed amendment to a declaration, as a unit to be converted into additional units or common elements, or both. (« partie divisible »)

"plan" means a plan, and any amendments to it, registered in accordance with Part 2 (Condominium Registrations). (« plan »)

Certain plans must comply with section 117 of Real Property Act
17 If the property is to include a bare land unit, the plan may be registered only if it also meets the requirements of section 117 of *The Real Property Act* (plans of subdivision).

[21] Special Survey Plans

The Real Property Act

Correction of errors for special plot
121(2) Where, in the opinion of the Registrar-General, a boundary to be dealt with under a special plot has become ambiguous or in error, he may correct the boundary with the written consent of the owners affected thereby, or he may have the matter dealt with under the provisions of *The Special Survey Act*.

The Special Survey Act, C.C.S.M. c. S190 (whole act), and in particular:

Direction that special survey may be made
1 The minister, upon the request of any municipality where the land to be affected is situated in the municipality, or if he thinks proper in any case without the request, and whether the land to be affected is in an organized municipality or not, may direct a special survey to be made of any land in the province, for the purpose

(a) of correcting any error or supposed error in respect of any existing survey or plan; or
(b) of plotting land not before subdivided; or
(c) of showing the divisions of lands of which the divisions are not shown on any plan of subdivision; or
(d) of fixing the location or width of any roads or highways; or
(e) of establishing any boundary lines the positions of which, owing to the obliteration of the original monuments defining them on the ground have become doubtful or difficult of being ascertained;

and upon every such special survey may have a plan prepared showing it, which special survey and plan may be made on the principle of a block-outline survey or a completed survey either in whole or in part.

Approval of plan
12 The Registrar-General may approve the special survey and plan

(a) if no complaints against the special survey or plan are received;
(b) if complaints are received, after a Municipal Board hearing has been held, if no appeal has been filed within 30 days after the date of Municipal Board order; or
(c) if an appeal of a Municipal Board order has been filed, once a final order has been made;

and may declare the survey or plan, or such portion thereof as he approves, to be the true and correct survey and plan of the land thereby affected, and may declare that all boundaries and lines fixed by the survey and plan, or part thereof so approved, are the true boundaries and lines, whether of roads, streets, lanes, rivers, or creeks, (when the rivers or creeks are defined on the plan by measurements or lines in such a manner as to be capable of absolute reproduction on the ground), or as between adjoining owners or between adjoining lots, and whether or not the boundaries and lines were in fact, before the approval, the true boundaries and lines; and, if the special survey and plan is a completed survey and plan, he may further declare that the plan or part thereof approved be substituted for all, or corresponding portions of all, former plans or surveys of the land affected that have been theretofore registered.

[22] Special Plot Plans

The Real Property Act

Plans for simplifying descriptions
121(1) The Registrar-General or a district registrar may direct that a plan compiled from documents and plans registered in a land titles office, hereinafter in this section referred to as a "special plot", be prepared by the Examiner of Surveys for the purpose of simplifying the description of the land of each owner in the area covered by the plan.

Correction of errors for special plot
121(2) Where, in the opinion of the Registrar-General, a boundary to be dealt with under a special plot has become ambiguous or in error, he may correct the boundary with the written consent of the owners affected thereby, or he may have the matter dealt with under the provisions of *The Special Survey Act*.

Approval of special plot
121(3) After completion of a special plot, the Registrar-General or a district registrar may approve it, and thereafter the plan may be registered in the proper land titles office without payment of any fees for registration or entries.

Effect of registration of special plot
121(4) Upon the registration thereof, the special plot shall become the official plan of the land affected thereby subject to any surveyed boundaries delineated upon any registered plans affecting the land, and, where he deems it desirable to do so, the district registrar may cancel the existing certificates of title and issue new certificates of title to the owners of the lots shown on the special plot.

Conveyance of portion of special plot
121(5) The owner of a lot shown on a special plot who intends to convey a portion thereof shall have a plan prepared under the provisions of this Act by a Manitoba land surveyor of

(a) the portion of the lot he intends to convey; and

(b) the balance of the lot;

and the registration of the conveyance shall be accompanied by a request to issue a new certificate of title for the balance of the lot according to the plan.

[23] 128(4) Plans

The Real Property Act

Plan based on land titles records
128(4) Where, in the opinion of the Examiner of Surveys, a survey of land on a plan is unnecessary, he may approve a plan prepared by a Manitoba land surveyor based on records in the land titles office in the district in which the land to be dealt with is situated without an actual survey and the plan shall be certified by the surveyor in an approved form.

[24] Restoration Sketches

The Survey Act

Remedying of disturbance of monuments
6 The registrar-general, upon receiving a report from any surveyor indicating the disturbance in any way of any outline monument, may require the municipality in which the monument is situated to remedy any such disturbance of monuments or surveys to his satisfaction; and if, upon being required to do so, the municipality refuses or neglects to comply with the requirement, the registrar-general shall remedy the disturbance to his satisfaction and the cost thereof shall be paid in the first place out of the Consolidated Fund, and subsequently collected from the municipality through the minister; but if the cost will exceed the sum of $1,000., the registrar-general shall not take the proceedings without the approval of the Lieutenant Governor in Council.

Records deposited in Winnipeg L.T.O.
7 A certified record in duplicate shall be deposited forthwith in the Winnipeg Land Titles Office of all surveys and restorations made under sections 5 and 6.

Certified record retained in Winnipeg L.T.O.
8 The certified record shall be retained in the Winnipeg Land Titles Office and a duplicate shall be deposited in the land titles office of the district in which the land affected is situated.

Records as evidence
9 All certified records deposited under sections 2 and 7 shall be accepted and are admissible in evidence as prima facie proof of the facts recorded therein.

[25] Plans Perpetuating Monuments

The Surveys Act, C.C.S.M. c. S240

After improvements monuments to be restored to original location
5 Where any improvement is to be made of such a character as to alter permanently the surface grade or to otherwise disturb or render practically inaccessible any outline monuments, the municipality or other person responsible for the improvement shall have a survey made under the direction of the registrar-general referencing the monuments; and during the course of completion of the improvements the monuments shall be restored to their original location or suitable monuments substituted therefor, to the satisfaction of the registrar-general.

Records deposited in Winnipeg L.T.O.
7 A certified record in duplicate shall be deposited forthwith in the Winnipeg Land Titles Office of all surveys and restorations made under sections 5 and 6.

Certified record retained in Winnipeg L.T.O.
8 The certified record shall be retained in the Winnipeg Land Titles Office and a duplicate shall be deposited in the land titles office of the district in which the land affected is situated.

Records as evidence
9 All certified records deposited under sections 2 and 7 shall be accepted and are admissible in evidence as prima facie proof of the facts recorded therein.

[26] *The Real Property Act*

Title by accretion
51(1) Where the registered owner of land bordering upon a body of water becomes entitled to be registered as owner of adjoining land by reason of accretion, he may file in the proper land titles office an application for transmission or, if the accreted land is under the old system, a real property application.

Supporting material
51(2) The application shall be supported by a plan of survey, to be filed in the land titles office, showing the limits of the accreted portion, and by

(a) an order of the court, to be filed in the land titles office, declaring that the accreted portion as shown on the plan is vested in the applicant; or

(b) a certificate under section 19 of *The Crown Lands Act*, together with the consents of the adjoining riparian owners to the issuance of title to the accreted portion shown on the plan to the applicant, and the certificate and consents shall be endorsed on the plan.

Form and consents
51(3) The certificate and the consents required under subsection (2) shall be in a form approved by the district registrar.

Dispensing with consent
51(4) The district registrar may dispense with the consent of an adjoining riparian owner if he is satisfied that the boundaries of the accreted portion shown on the plan are such that the adjoining riparian owner would not be adversely affected by the issuance of title to the applicant.

Notice where failure to consent

51(5) Where the consent of an adjoining riparian owner that has not been dispensed with cannot after due diligence be obtained, the applicant may request the district registrar to issue a notice for service upon the adjoining riparian owner, and the notice shall state that the adjoining riparian owner is required, within 30 days after service of the notice, to either give the consent or

(a) commence an action in the court disputing the right of the applicant to acquire title to the accreted land shown on the plan or to a portion thereof, as the case may be; and

(b) file a pending litigation order in the proper land titles office.

Service of notice

51(6) Unless the district registrar otherwise orders, the notice shall be served personally upon the adjoining riparian owner.

Failure to file pending litigation order

51(7) If the pending litigation order is not filed within the time limited in the notice, title to the accreted land shown on the plan may issue to the applicant, and the adjoining riparian owner named in the notice and his heirs, successors and assigns shall after issuance of the title be forever estopped and debarred from setting up any claim thereto.

Certificate of title

51(8) No separate certificate of title may be issued for the accreted land but it shall be consolidated with the adjoining land in a new certificate of title and shall be subject to the same encumbrances, liens and interests which at that time affect the title to the adjoining land.

[27] *The Crown Lands Act*, C.C.S.M. c. C340

Vesting through accretion

19 Where the minister is satisfied that title to land forming part of the bed of a body of water and reserved to the Crown out of the original grant of adjoining land from the Crown has through accretion become vested in the owner of the adjoining land, he may, in the manner required under section 51 of The Real Property Act, so certify, and thereupon, subject to such limits and rights respecting the accreted land as may be determined in a court proceeding if any taken under that section, the accreted land becomes part of the adjoining land to the same extent as if it had been included in the original grant of the adjoining land from the Crown and in each subsequent conveyance thereof.

[28] Excerpts from *Memorandum Re: Title to Properties Adjoining Rivers*, Harold McKay, Registrar-General, 6/11/1967

In dealing with this question there is one basic rule which must be kept in mind – i.e., that once a title is under The Real Property Act it, the title, does not change with changes in the river bank.

In the Rush Lake Case, 1932 S. C. Reports Justice Duff at pages 90 and 91 points out that a person claiming ownership can only have an equitable title. He has no paper title until same by a legal conveyance, a Court Order or Legislative Act vesting.

…

As a rule the accretion is not substantial, and where the river bank as shewn on the new plan reasonably coincides with the bank as shewn on the plan upon which the title was issued, in all probability this would be accepted by the Examiner of Surveys. So far as I am aware we have never had a conveyance or Court Order based upon accretion.

If a new plan is prepared which indicates substantial changes in the bank by reason of accretion or erosion and most certainly where the river has broken out into a new channel, that plan may be used so far as the land titles office is concerned, for the purpose of issuing title the same as it would make use of an explanatory plan. When the advice of the Land Titles Office Staff is sought as to ownership by virtue of accretion…we should keep in mind that our duty starts and ends with providing information as to ownership as disclosed in the title.

…

As to accretion where the bed of the river remains in the Crown - we should start with the assumption that the law of accretion does not affect the Crown. I do not mean to say this is so, but I do not recollect any authority which holds that the Crown is affected.

…

Like the Land Titles Office Staff, the position of the Surveyor may be misunderstood. His job is to go out and plot the river bank as he finds it. In the course of doing so he may have been able to form some very definitive opinion as to whether certain areas have reached the point as to growth of vegetation so as to constitute accreted lands…However, he can only give an opinion but no assurance that a certain person has acquired even an equitable title by accretion….

[29] *Patton* v. *Pioneer Navigation & Sand Co*., 1908 CarswellMan 35, 21 Man. R. 405, 7 W.L.R. 744

Macdonald, J.:

27 The laws of England as they existed in 1670, were the laws in force at the time of the grant of this territory to the Hudson's Bay Company, and such laws continued as the laws of the Hudson's Bay Territory, known as Rupert's Land, until the date of the surrender of such territory by the Hudson's Bay Company to the Crown, and later the province of Manitoba introduced the laws of England as such existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

28 To determine, therefore, the rights of the riparian owners in this province, we must look to the laws of England.

31 There is not, it is true, an express grant of the bed of the river from the Hudson's Bay Company, through whom the plaintiff derived his title, but I am of the opinion that the titles through the Hudson's Bay Company carry with them all the rights of riparian owners.

32 The case of *Bickett* v. *Morris*, L. R. 1 H. L. 47, seems to me applicable to and to govern my decision in this case. The decision in that case is, that when the lands of two co-terminous proprietors are separated from each other by a running stream of water, each proprietor is prima facie owner of the soil of the alveus or bed of the river ad medium filum aquæ. It was also held in that case that, although each was entitled to the soil, neither one had the right to do anything on his side of the river to interfere with its channel or natural course. The dredging must have an effect upon the natural flow of the water, and what may be the result?

37 After a perusal of some of the numerous cases cited by counsel on both sides, I find that the title to the alveus of the river usque a medium filum aquæ is in the plaintiff, subject to the rights of navigation and to all rights incidental thereto, and the plaintiff is entitled to an injunction restraining the defendants, their servants or agents, from digging up or removing sand or gravel anywhere in the Assiniboine river opposite to and adjoining his property in the statement of claim described.

[30] *The Water Rights Act*, 1930 (Man.), c. 47

7. ... no grant shall be made by the Crown of lands, or of any estate therein, in such terms as to vest in the grantee any exclusive or other property or interest in, or any exclusive right or privilege with respect to, any river, stream, watercourse ... or any exclusive or perpetual property, interest, or privilege, in the land forming the bed or shore thereof.

[31] *Chuckry* v. *R*., 1973 CarswellMan 100, 1973 CarswellMan 47, [1973] 5 W.W.R. 339, [1973] S.C.R. 694, 35 D.L.R. (3d) 607, 4 L.C.R. 61

[32] *Chuckry* v. *R*., 1972 CarswellMan 43, [1972] 3 W.W.R. 561, 27 D.L.R. (3d) 164, 2 L.C.R. 249 (MBCA)

[33] *Chuckry* v. *R*. (SCC)

The judgment of the Court was delivered by Spence J.:

11 With the greatest respect, I am of the opinion that Dickson J.A. has considered the question of the accreted lands and has answered all the doubts that one might have to the particular lands in question and I feel I can add but little to his carefully considered reasons. I am, therefore, of the opinion, as was Dickson J.A., that the said 59 acres of accreted lands were the property of the appellant and that he is entitled to compensation for them, either on the basis that they were expropriated or that they were injuriously affected, as, in fact, the respondent has now complete possession of those 59 acres and they are covered by water.

[34] *Chuckry* v. *R*. (MBCA)

Dickson J.A.

49 I am of opinion that the common-law doctrine of accretion is part of the law of Manitoba. It was introduced into this province as part of the laws of England on 15th July 1870 by 1874 (Man.), c. 12, assented to 22nd July 1874, in which the Legislative Assembly of Manitoba enacted that:

> The Court of Queen's Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights, according to the laws existing, or established and being in England, as such were, existed and stood, on the fifteenth day of July, one thousand eight hundred and seventy, so far as the same can be made applicable to matters relating to property and civil rights in this Province.

58 From earliest times the King has been held to be lord of the sea and owner of the foreshore and yet the doctrine has been applied.

59 In *Attorney General of British Columbia* v. *Neilson*, [1956] S.C.R. 819 at 838, 5 D.L.R. (2d) 449, Locke J. said:

> In Sir Matthew Hale's treatise *De Jure Maris*, as it appears in Hargrave's Law Tracts at p. 12, dealing with the King's right of property on the shore, it is said: —
>
> > The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.

60 The King's right of property on the shore has never prevented the application of the doctrine of accretion.

[35] *Chuckry* v. *R*. (MBCA)

Dickson J.A.

48 The test is whether the land in fact comes to the water's edge under the grant and not upon the manner of land description within the grant.

[36] *Chuckry* v. *R*. (MBCA)

Dickson J.A.

45 During argument a question was raised whether the doctrine of accretion could apply in circumstances such as are here present, namely, the former boundaries of the land are related to a defined line on a plan, i.e., the plan of 1875 and the lot acreages are stated on the plan. At one time it was doubtful whether the doctrine of accretion applied when the former boundaries of the land concerned were defined or ascertainable. The law now seems clear however that, so long as the change is gradual and imperceptible, the doctrine applies…

[37] *Neilson* v. *British Columbia (Attorney General),* 1956 CarswellBC 185, [1956] S.C.R. 819, 5 D.L.R. (2d) 449

Rand J.:

14 … A sudden reliction of the water or displacement of land leaves the boundary as it was. The essential condition is a slow and imperceptible change resulting in the projection outwards of the boundary line and the correlative annexation to the land of what was formerly below the tide line…

Locke J.:

58 In my opinion, what has been called the doctrine of accretion is accurately stated in Coulson and Forbes on Waters and Land Drainage, 6th ed. 1952, at p. 39, where it is said:

> Land formed by alluvion, or gradual and imperceptible accretion from the sea, and land gained by dereliction, or the gradual and imperceptible retreat of the sea, belongs to the owner of the adjoining terra firma. Where the increase is sudden or perceptible, the land gained still belongs to its original owner. The word "imperceptible" means imperceptible in progress, and not in result — that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year.

Clarke v. *Edmonton (City)* (1929), [1930] S.C.R. 137 (S.C.C.)

Lamont J.:

13. The term "accretion" denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

14 The fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production. *Stanley* v. *Perry*[12]; *Brighton and Hove General Gas Co*. v. *Hove Bungalows, Limited*[13].

20 … Does the fact that the lower eight feet of the bench was formed in ten years justify the conclusion that the accumulation must have been perceptible in its progress from moment to moment or from hour to hour during that time? With great deference I do not think it does… The fact that the bench was formed in fifteen years, or less, is not, in my opinion, inconsistent with the evidence of the witnesses who gave it as their opinion that the formation of the bench had been gradual and had not been perceptible from moment to moment. The test, in my opinion, is not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion", which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion", which implies a sudden and visible removal of a quantity of soil from one man's land to that of another, which may be followed and identified, or the sudden alteration of the river's channel.

[38] *Port Franks Properties Ltd*. v. *R*., 1979 CarswellNat 617, [1981] 3 C.N.L.R. 86, 99 D.L.R. (3d) 28 Federal Court of Canada

Lieff, D.J.:

A sudden change in the course of a body of water caused by a storm, flood or human interference must be distinguished from accretion and does not alter boundary lines: *Clarke* v. *City of Edmonton*, supra; *Neilson* v. *British Columbia (Attorney General)* [1956] S.C.R. 819.

[39] An Act to amend *The Crown Lands Act* and *The Real Property Act*, S.M. 1979, CAP 5. Assented to: May 11, 1979.

Sec. 24.1 of Crown Lands Act added.

1 The Crown Lands Act, being chapter C340 of the Revised Statutes, is amended by adding thereto, immediately after section 24 thereof, the following section:

Vesting through accretion.

24.1 Where the minister is satisfied that title to land forming part of the bed of a body of water and reserved to the Crown out of the original grant of adjoining land from the Crown has though accretion become vested in the owner of the adjoining land, he may, in the manner required under section 50.1 of The Real Property Act, so certify, and thereupon, subject to such limits and rights respecting the accreted land as my be determined in a court proceeding if any taken under that section, the accreted land becomes part of the adjoining land to the same extent as if it had been included in the original frant of the adjoining land from the Crown and in each subsequent conveyance therof.

Sec. 50.1 of Real Property Act added.

2 The Real Property Act, being chapter R30 of the Revisted Statutes, is amended by adding thereto, immediately after section 50 thereof, the following section:

Transmission in case of title by accretion.

50.1(1) Where the registered owner of land bordering upon a body of water becomes entitled to be registered as owner of adjoining land by reason of accretion, he may file in the proper land titles office an application for transmission or, if the accreted land is under the old system, a real property application.

Supporting material.

50.1 (2) The application shall be supported by a plan of survey, to be filed in the land titles office, showing the limits of the accreted portion, and by

(a) an order of the court, to be filed in the land titles office, declaring that the accreted portion as shown on the plan is vested in the applicant; or

(b) a certficate under section 24.1 of The Crown Lands Act, together with the consents of the adjoining riparian owners to the issuance of title to the accreted portion shown on the plan to the applicant, and the certificate and consents shall be endorsed on the plan.

Form of certificate and consents.

50.1(3) The certificate and the consents required under subsection (2) shall be in a form approved by the Registrar-General.

Dispensing with consent.

50.1(4) The district registrar may dispense with the consent of an adjoining riparian owner if he is satisfied that the boundaries of the accreted portion shown on the plan are such that the adjoining riparian owner would not be adversely affected by the issuance of title to the applicant.

Notice where failure to consent.

50.1(5) Where the consent of an adjoining riparian owner that has not been dispensed with cannot after due dilligence be obtained, the applicant may request the district registrar to issue a notice for service upon the adjoining riparian owner, and the notice shall state that the adjoining riparian owner is required, within 30 days after service of the notice, to either give the consent or

(a) commence an action in the court disputing the right of the applicant to acquire title to the accreted land shown on the plan or to a portion thereof, as the case may be; and

(b) file a certificate of lis pendens in the proper land titles office.

Service of notice.

50.1(6) Unless the district registrar otherwise orders, the notice shall be served personally upon the adjoining riparian owner.

Failure to file lis pendens.
50.1(7) If the certificate of lis pendens is not filed within the time limited in the notice, title to the accreted land shown on the plan may issue to the applicant, and the adjoining riparian owner named in the notice and his heirs, successors and assigns shall after issuance of the title be forever estopped and debarred from setting up any claim thereto.

Certificate of title to accreted land.
50.1(8) No separate certificate of title may be issued for the accreted land but it shall be consolidated with the adjoining land in a new certificate of title and shall be subject to the same encumbrances, liens and interest which at that time affect the title to the adjoining land.

[40] *Eliason* v. *Alberta (Registrar, North Alberta Land Registration District)*, 1980 CarswellAlta 268, [1980] 6 W.W.R. 361, 115 D.L.R. (3d) 360, 15 R.P.R. 232, 5 A.C.W.S. (2d) 399

Hope J.:

8 Several principles appear to be settled. Firstly, that accreted land takes on the legal characteristics of the land to which it is accreted. The texts Halsbury and Thom's Canadian Torrens System well summarize this principle. 39 Hals. (3rd) 561 says:

> Where land imperceptibly accretes to land it acquires the legal characteristics of the land to which it is added. Thus, if it accretes to freehold it becomes freehold, and if to land subject to customary rights, it is equally liable to them.

Thom's Canadian Torrens System, 2nd ed. (1962), states at p. 152:

> Accordingly land gained imperceptibly takes on the legal characteristics of the land to which it accretes. Thus it may become leasehold, copyhold or freehold and be subject to customary rights.

Further, Farnham's Law of Waters and Water Rights (1904), vol. 1, at p. 324, states:

> Newly made land is held by the same title under which former title is held and is regarded as part of it and not as having been regarded as a separate tract. The right to alluvion to be formed in the future is an inherent and essential attribute of the original proprietorship, and is a vested right which cannot be interfered with by the state. Therefore, such land cannot be treated as vacant by the state or granted to a stranger.

One of the legal characteristics of the applicant's adjoining land is the ownership of mines and minerals excepting coal, and it would therefore follow on these quoted principles that the accreted land takes on the same characteristics, including the ownership of all mines and minerals except coal.

[41] *The Real Property Act*

Certificate of title
51(8) No separate certificate of title may be issued for the accreted land but it shall be consolidated with the adjoining land in a new certificate of title and shall be subject to the same encumbrances, liens and interests which at that time affect the title to the adjoining land.

[42] *The Crown Lands Act*

Reservations
4(1) In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land,
(a) in case the land extends
(i) to the sea or an inlet thereof, or
(ii) to the shores of any navigable water or an inlet thereof, or

(iii) to the boundary line between Canada and the United States of America, or between the province and the provinces of Ontario or Saskatchewan, or the Northwest Territories or Nunavut,

a strip of land one and one-half chains in width, measured from ordinary highwater mark or from the boundary line, as the case is.

[43] *Monashee Enterprises Ltd. v. British Columbia (Minister of Recreation & Conservation)* 1981 CarswellBC 110, [1981] B.C.J. No. 652, 124 D.L.R. (3d) 372, 21 R.P.R. 184, 23 L.C.R. 19, 28 B.C.L.R. 260, 8 A.C.W.S. (2d) 466

9 It is well settled that land gained by accretion accrues to the benefit of the riparian owner (see *A.G.B.C. v. Neilson*, [1956] S.C.R. 819 at 840, 5 D.L.R. (2d) 449). It is equally well settled that to be a riparian owner, and thus to benefit from accretion, one's property must run to the shoreline (*Cockburn v. Eager* (1876), 24 Gr. 409). In this case, the riparian owner is the Crown as the owner of the one-chain strip. The land gained by accretion is added to and becomes part of the strip.

15 Since writing the above, my attention has been drawn to a number of Australian cases that bear on this subject.

16 *A. G. New South Wales v. Dickson*, [1904] A.C. 273 (P.C.), distinguished between a reservation or exception from a grant and a reservation of a right to resume at a later date land that was granted. That approach was carried forward in *McGrath v. Williams* (1912), 12 N.S.W. 477, where the Chief Judge in Equity dealt with an issue similar to the issue that is raised by this appeal. The headnote is accurate:

The plaintiff claimed to be owner in fee simple of a piece of land fronting on the north the Shoalhaven River, which is tidal. The land in question was granted by the Crown in 1843 to the plaintiff's predecessors in title. The grant was subject to certain reservations, including a reservation of "all land within one hundred feet of high-water mark on the sea coast, and on every creek, harbour and inlet of the sea." The plaintiff sought to bring the land down to high-water mark on the Shoalhaven River, under the Real Property Act, claiming that the hundred feet reservation had been eroded away. The Crown objected to the plaintiff's application on the ground that the reservation in the grant enabled the Crown at any time to take possession of a hundred feet from the existing high-water mark at the time of such taking of possession. *Held*, that the reservation operated by way of exception from the grant, and that consequently the hundred feet must be measured from high-water mark as at the date of the grant.

17 This is how the Chief Judge in Equity reasoned [pp. 480-81]:

Reservations include two classes — (*a*) where the reservation is an exception which operates at the time, and consequently the excepted land does not pass by the grant; and (*b*) where the reservation is in fact a reservation of a right to resume a part of the land granted. To quote the language of the Privy Council in *Cooper v. Stuart* (1889), 14 App. Cas. 286: "It is obvious that such a provision does not take effect immediately; it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception." In that case, there was a grant of 1400 acres reserving any quantity of land, not exceeding 10 acres, in any part of the grant, as might be required for public purposes.

In the case of the *A. G. New South Wales v. Dickson* [supra] at p. 277, there was a Crown grant of land reserving to the Crown: "All such part of the said piece or parcel of land as may be within 100 feet of high-water mark on the sea coast, or in any creek, harbour, or inlet," The Privy Council say, at p. 277: "The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of the grant, the strip was excepted from the grant. The word 'reserving' would operate as an exception."

The last case is an instance of class (*a*); *Cooper v. Stuart* (supra) is an instance of class (*b*); and the whole question is within which class does the reservation in question fall...

Reservation (3) seems to me to fall within the same class, and to be an exception out of the thing granted. There is not a suggestion in the grant that the reservation is to operate in the future by way of defeasance; on the contrary, the grant treats the reservation as one which apparently is to take effect immediately, *i.e.*, to operate by way of exception. If so, the hundred feet must be measured from high-water mark as at the date of the deed.

18 That reasoning is applicable here.

[44] *Red Deer (City)* v. *Pitt*, 2000 ABCA 281, 2000 CarswellAlta 1107, [2000] A.J. No. 1198, [2001] A.W.L.D. 10, 100 A.C.W.S. (3d) 1092, 234 W.A.C. 160, 271 A.R. 160, 71 L.C.R. 166

McClung J.A.:

We see the issue here as; Does alluvial accretion inevitably extend the ownership of land beyond the original boundaries set forth in the Certificate of Title? Mr. Justice Wilson reviewed the available authorities in Alberta led by Boychuk v. Her Majesty the Queen and Jarvie, unreported (1964) Milvain J., Trial Division, S.C. Alta., Judicial District of Lethbridge.

Clearly the boundaries of Mr. Pitt's land originated in the 1886 survey and culminated in the 1966 title which he received. The disputed accretion lies wholly within the N.W. of 18, while Mr. Pitt has title to the N.E. of 13-38-W4th.

It seems clear to us that the change of the physical boundaries of the watercourse cannot create an expanded title overriding the boundaries of the title he received. In saying so, we respectfully adopt Mr. Justice Wilson's reasoning and the remedy he chose, although we emphasize that the presence of the road allowance here forecloses ownership by either the City of Red Deer or Mr. Pitt. The disputed land is orphan land and hence belongs, as Mr. Chapman concedes, to the Crown.

[45] *Johnson* v. *Alberta* (2005), 2004 CarswellAlta 1848, 30 R.P.R. (4th) 35 (Alta. C.A.)

Rowbotham J. (ad hoc) (for the court) (orally):

11 As in this case, the claim at trial in Pitt was for accreted lands outside the landowner's quarter-section as described in the certificate of title. The trial judge in Pitt held that changes in a natural boundary cannot expand title beyond the boundaries of a section, quarter-section, or legal subdivision used in a land titles certificate to describe the title. In coming to this decision, the trial judge distinguished Clarke on the basis of the different wording used in the certificates of title. The trial judge held that, since Pitt's title was described as bounded on all sides by ATS survey boundaries, and the certificate of title in Clarke had a boundary described solely by reference to a water boundary, Clarke was distinguishable and Pitt could not have title to accreted land beyond his title description. The trial decision was upheld by this Court on the basis that physical boundaries could not create an expanded title overriding the boundaries of title in Pitt's certificate. Chuckry was not specifically discussed in the Pitt memorandum of judgment, but was relied upon by the appellant and the respondent in Pitt in submissions made to this Court.

12 In our view, the trial judge correctly concluded that Clarke and Chuckry are distinguishable. The appellants urge us to apply the decision in Chuckry to the facts of this case. The appellants rest their position primarily on the statement by Dickson J.A. (as he then was) in dissent in the Manitoba Court of Appeal in Chuckry v. R. that "[t]he test is whether the land in fact comes to the water's edge under the grant and not upon the manner of land description within the grant": (1972), 27 D.L.R. (3d) 164 (Man. C.A.), at 177. Dickson J.A.'s dissent was upheld by the Supreme Court of Canada. However, in Chuckry and Clarke, the titles described the land with three boundaries shown on a plan and the fourth boundary defined solely by a natural water boundary. That is not the case here. Under the terms of the grant, all boundaries are fixed, without reference to a water boundary. None of the Supreme Court decisions that are binding on this Court deal with the factual issues in this case.

[46] *Chuckry* v. *R*. (MBCA)

Dickson J.A.

35 If silt carried by the waters of a river gradually and imperceptibly washes up on shore to form firm ground, the doctrine holds that this accumulation of land belongs to the owner of the land immediately adjacent to it. The principle is said to be founded upon "the general security of landholders and upon the general advantage" (per Lord Shaw of Dunfermline in *Attorney General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*, [1915] A.C. 599 at 612) and on "the necessity which exists for some such rule of law, for the permanent protection and adjustment of property" (per Lord Abinger C.B. in *Re Hull & Selby Ry. Co.* (1839), 5 M. & W. 327, 151 E.R. 139 at 140).

39 There was further clarification of the concept by the Supreme Court of Canada in the *Neilson* case, supra. Their Lordships were of the opinion that the drying-up of the river bed due to the formation of silt dykes (per Rand J. at p. 827) or the formation of islands unconnected to anyone's land (per Locke J. at p. 840) did not constitute accretion and that the land thus formed belonged to the Crown. This statement of the law was accepted by Ruttan J. in the *Bulman* case when, on p. 229, he said that the vertical development through sedimentation, which was not a gradual extension of existing upland, did not establish any accretion.

Atty.-Gen. for B.C. v. *Neilson*, [1956] S.C.R. 819

Locke J.:

59 The principle is that gradual accretion enures to the land which attracts it. It applies to tidal and non-tidal and navigable or non-navigable rivers: *Foster v. Wright*[14]. It was applied in this Court to lands through which the North Saskatchewan River runs in *Clarke v. City of Edmonton*[15].

60 If the so-called ramparts which were visible to the learned judge in 1954 extended in 1930 continuously from the north-west corner of Lot 471, westerly and then southerly along the boundary of the property in dispute, and had been gradually built up by accretion commencing on the foreshore of Lot 471 (and there is no evidence that they did), a question would arise as to whether the law relating to accretion would vest such a long narrow curving strip of land in a navigable river in the owner of the land upon which the accretion commenced and from which it was extended. It is not accurate, in my opinion, on the evidence in this case to say that this narrow strip of land is undoubtedly an accretion since if, for example, the portion of it along the westerly boundary of the property was formed by alluvion at that place and did not project out from Lot 471 and was not connected to an accretion there, it would be the property of the Crown, just as the island which formed the subject matter of the grant was its property. There is a complete absence of evidence, however, as to when and in what manner these ramparts rose above the surface of the water at medium high tide.

Re Bulman's Petition, 1966 CarswellBC 60, 56 W.W.R. 225, 57 D.L.R. (2d) 658

Ruttan J.:

19 If there is either a water channel or a strip of land or a ridge or other barrier between the upland and the newly created land, no accretion can be considered. It is not joined to that land, so it cannot become part of it.

Re Darrach, 1995 CarswellPEI 121, [1995] P.E.I.J. No. 143, 135 Nfld. & P.E.I.R. 153, 420 A.P.R. 153, 58 A.C.W.S. (3d) 882

Matheson, J:

50 Applying the foregoing legal principles to this fact situation I find:

1. Parcel "A" has not "accreted" to the petitioner's Parcel "C" as it is not physically attached to it at any point. Consequently, the petitioner cannot be described as the "adjoining land owner" and cannot claim title on the basis of the doctrine of accretion.

Bruce v. *Johnson,* [1954] 1 D.L.R. 571 at 577 (Ont. Co. Ct)

12 Where an island is formed by alluvial action, it does not become the property of the owner of the adjacent mainland but remains the property of the owner of the bed of the river: *Dunphy* v. *Williams* (1874), 15 N.B.R. 350. Emphasis must be laid on the fact that in that case there was no connection by land between the new alluvial land and the mainland.

47 *Andriet* v. *Strathcona (County) No. 20*, 2008 ABCA 27, 2008 CarswellAlta 74, [2008] 5 W.W.R. 590, [2008] A.W.L.D. 1331, 164 A.C.W.S. (3d) 706, 429 W.A.C. 329, 433 A.R. 329, 64 R.P.R. (4th) 188, 86 Alta. L.R. (4th) 113

C. O'Brien J.A.:

33 George K. Allred, the land surveyor called on behalf of the County, testified that there are a number of common methods to divide up accreted lands:

(i) perpendicular from bank — the perpendicular to the bank method draws a perpendicular line from the normal course of the bank inwards to the respective original property corners;

(ii) radial line method — where a water boundary is very nearly circular, as in this case, it may be appropriate to traverse the bank; define an approximate circular arc to define the bank; calculate the centre of the circle; and then project radial lines from the centre to the respective original boundary points;

(iii) projection of boundaries — this method basically projects the side boundaries of the respective properties towards the lake;

(iv) proportional division — the new shoreline is divided up in proportion to the frontage that the original parcels had on the original shoreline; and

(v) proportional area — this method, which is similar to proportional division, attempts to proportion the area of the accreted lands in proportion to the original frontage on the riparian boundary.

48 *Paul* v. *Bates*, 1934 CarswellBC 113, [1934] B.C.J. No. 95, 48 B.C.R. 473

Robertson, J.:

20 There is no doubt that the accretion belongs to the owners of the adjoining lands and the mode in which the accretion should be divided has been laid down in *M'Taggart* v. *M'Douall* (1867), 5 M. 534, in which Lord Justice-Clerk (Inglis) said at p. 540:

> ... because where the shore is upon the open sea, and there is no opposite coast or opposite bank, a different rule must be adopted. What, then, is the rule that would be adopted in that case, following as near as possible the analogy and the principle of Campbell v. Brown. I think it is extremely well stated by the Lord Ordinary. In one passage of his note he says: "The true question to be solved was how to strike the boundary line as to properties on the shore of the open sea. Using the analogy of the case of Campbell v. Brown, the Lord Ordinary was disposed to think that the proper method was to take a line representing the line of the shore drawn at such distance seawards as to clear the sinuosities of the coast, and let fall a perpendicular from the end of the land boundary. Of course he does not mean a line representing the whole coast of the Bay of Luce, but a line fairly representing the average line of the shore, extending on either side of the land boundary. ...

21 In that case, as in this, there was no evidence before the Court upon which a division could be made and accordingly the Court directed (p. 541):

> ... that we should have a line laid down by a man of skill, representing the average line of this coast upon which the two properties are situated, and shewing in what way perpendiculars let fall from that average line upon the land boundary will divide the shore between these two properties. The precise terms of the remit may require some little attention, and I should also be very much inclined, with a view to keeping open anything that it is not at present necessary to determine, to give the parties on either side an opportunity of asking the reporter to lay down any other line that he thinks may illustrate the position of the properties, and the claims upon both sides of this action.

22 Perhaps the parties will be able to agree upon the proper line. In any event further consideration of the case is adjourned so that the parties may have an opportunity of supplying such evidence on this point as they may care to offer. All questions of costs are reserved.

Re Brew Island, 1977 CarswellBC 330, [1977] 1 A.C.W.S. 516, [1977] 3 W.W.R. 80

Meredith J.:

15 The principle of proportionate allocation of new shoreline is summarized in New Hampshire v. 6.0 Acres of Land (1958), 139 A. (2d) 75 (Supreme Court of New Hampshire), at p. 75:

> When general course of shore approximates a straight line, division of accretion is made among adjoining riparian owners by lines perpendicular to general course of original bank, or original mark of shore; but when it curves or bends, general rule is to divide newly formed shore line by giving to each owner a share of new shore line in proportion to what he held in old shore line, completing division by running a line from boundary between parties' lands on old river bank to point thus determined on newly formed shore.

Andriet v. *Strathcona* (County) No. 20

34 Mr. Allred concluded that in the case at hand, none of the methods seem to create a scheme of allocating the accreted lands to the benefit or satisfaction of the majority of the owners. In his opinion, the proportional division is usually the most equitable means of dividing up the lands. The application of other methods, such as projection of boundaries, could mean that the projected lines cross and some landowners lose their lake frontage.

35 Duncan B. Gillmore, the land surveyor called by the Andriets, set out in his report that in his opinion, the most fair and equitable method to draw the boundary lines to the existing lakeshore would be to give each owner reasonable access to the lake, even if this means deflecting their property lines, and to give each owner a percentage of the total new shoreline, roughly being the same percentage he or she had of the previous shoreline. This method seems to accord with the proportional division described by Mr. Allred and which he suggested usually provided the most equitable means of allocation.

36 It seems apparent that ensuring continued access to the water when the shoreline is receding requires an equitable division of the accreted land to prevent some of the owners losing their access to the water. The principle is clearly stated in American case authorities. The American rule is cogently articulated in Brown v. Spreckels (1906), 18 Haw. 91 (U.S. Hawaii), aff'd on other grounds Spreckels v. Brown (1909), 212 U.S. 208 (U.S.S.C.). Frear C.J., for the Hawaii Supreme Court, expressed the rule as follows:

> The correct and more general rule is that the division of accretions should be equitable with a view to giving each proprietor a fair portion of accretions and access to the water, in view of the contour and location of the respective lands before the accretions were formed.

77 For reasons that are obvious when Appendix "C" is examined, the directions provided herein for allocating the accreted lands mean that perpendicular or straight property lines cannot always be maintained and that many property lines will be required to be deflected to achieve an equitable division. As a consequence, some irregularly shaped parcels can be anticipated to be formed. While, generally speaking, the method of allocation is to be proportional division as described in the expert testimony, there is no need for slavish adherence if the result will create anomalies and other inequity. In other words, the methodology is to be applied in such a fashion as to reduce irregularities and to promote equitable division so that the owners maintain their riparian rights to the fullest extent practicable. Professional judgment of expert surveyors, with full knowledge of the topography and other relevant considerations, will be required to be exercised.

[49] *Parry Sound (District) Welfare Administration Board* v. *O.P.S.E.U., Local 324*, 2003 SCC 42, 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42

Iacobucci J.:

38 Having determined that McLeod established that an employer's right to manage the operations and direct the workforce is subject not only to the express provisions of the collective agreement but also to the right of each employee to equal treatment without discrimination, the question that arises is whether this principle applies under s. 48(12)(j) of the LRA. Put directly, did the enactment of s. 48(12)(j) displace or otherwise restrict the principles established in McLeod? If it did not, the Board was correct to conclude that the substantive rights and obligations of the Human Rights Code are implicit in a collective agreement over which an arbitrator has jurisdiction.

39 To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610 (S.C.C.), at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed." In Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law."

50 *The Crown Lands Act*

Reservations

4(1) In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land,

(a) in case the land extends

(i) to the sea or an inlet thereof, or

(ii) to the shores of any navigable water or an inlet thereof, or

(iii) to the boundary line between Canada and the United States of America, or between the province and the provinces of Ontario or Saskatchewan, or the Northwest Territories or Nunavut,

a strip of land one and one-half chains in width, measured from ordinary highwater mark or from the boundary line, as the case is;

(b) where the land borders a body of navigable water, the public right of landing from, and mooring, boats and vessels so far as is reasonably necessary;

(c) where the land borders a body of water,

(i) the bed of the body of water below ordinary highwater mark, and

(ii) the public right of passage over a portage road or trail in existence at the date of the disposition;

(d) mines and minerals, together with the right to enter, locate, prospect, mine for, and remove minerals;

(e) the right to, and to use, land necessary for the protection or development of adjacent water power; and

(f) the right to raise or lower the levels of a body of water adjacent to the land, regardless of the effect upon the land but subject to section 13.

Sand and gravel deemed to be reserved

4(2) Where mines and minerals have been, or are, reserved out of the disposition of land made under this Act or under *The Provincial Lands Act*, after July 15, 1930, the reservation shall be conclusively deemed to include, and always to have included, a reservation of sand and gravel.

51 *The Real Property Act*

Supporting material

51(2) The application shall be supported by a plan of survey, to be filed in the land titles office, showing the limits of the accreted portion, and by

…

(b) a certificate under section 19 of *The Crown Lands Act*, together with the consents of the adjoining riparian owners to the issuance of title to the accreted portion shown on the plan to the applicant, and the certificate and consents shall be endorsed on the plan.

[52] "*An Act relating to the Registration of Deeds*" 34 Victoria, Chapter 7, page 27. Assented to May 3, 1871.

9. Any Deed, Mortgage, or other instrument affecting title to land shall be considered as fraudulent and void against a subsequent *bona fide* purchaser or mortgagee, whose deed shall be first Registered.

[53] "*An Act to amend the Act concerning the Registration of Deeds and to introduce a better system of Registration*" (cited as the "*Registration of Titles (Manitoba) Act*") 36 Victoria, Chapter 18, page 43. Assented to March 8, 1873.

XLIII. After any grant from the Crown of lands in Manitoba, and Letters Patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such instrument is registered in the manner herein directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim.

XLV. The registry of any instrument, under this Act, or any former Act, shall in equity constitute notice of such instrument to all persons claiming any interest in such lands subsequent to such registry.

XLVI. Priority of registration shall in all cases prevail, unless, before such prior registration, there shall have been actual notice of the prior instrument to the party claiming under the prior registration.

[54] *The Registry Act*, C.C.S.M. c. R50. On the issue of priority and notice, it provides:

Registration operates as notice notwithstanding defect in proof for registration
53 Except as otherwise provided in *The Mortgage Act*, the registration of any instrument under this Act or any former Act relating to the registration of documents or instruments affecting lands constitutes notice of the instrument to all persons claiming any interest in the lands subsequent to the registration, notwithstanding any defect in the proof for registration.

Priority of registration without actual notice to prevail
55 Except as mentioned in sections 57 and 58, priority of registration under this Act in all cases prevails, unless, before any such prior registration, there has been actual notice of the prior instrument to the party claiming under the prior registration.

[55] "*An Act respecting Real Property in the Province of Manitoba*" (to be cited as "*The Real Property Act of 1885*") 48 Victoria, Chapter 28, page 269. It was assented to May 2, 1885, to take effect from and after July 1, 1885.

[56] *The Real Property Act*

[57] *The Real Property Act*

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

[58] *The Real Property Act*

Equitable doctrines about notice abolished
2(8) The equitable doctrines known as "notice" and "constructive notice" are abolished for the purpose of determining if conduct is fraudulent under the Act.

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

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

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

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

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

Knowledge of trust

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

See also *Angus Partnership Inc*. v. *Salvation Army (Governing Council)* 2018 ABCA 206, 2018 CarswellAlta 1049 wherein the court holds that purchasing with knowledge of an unregistered interest does not constitute fraud.

[59] *The Real Property Act*

Priority of registration

64 Instruments shall be registered in the order of the serial numbers assigned to them and entered in the daily record and instruments registered in respect of or affecting the same estates or interests shall, notwithstanding any expressed, implied or constructive notice, be entitled to priority according to the serial number.

The Real Property Act

Registration essential

66(4) No instrument is effectual to pass an interest in land under the new system or to render the land liable as security for the payment of money as against a bona fide transferee thereof, until the instrument is registered in accordance with this Act.

[60] *The Real Property Act*

Assurance fund

181(1) The government shall maintain a fund known as the "assurance fund".

Compensation from assurance fund

182 Sections 182.1 to 192 apply to a person who is entitled to compensation from the assurance fund under this Act.

Amount of compensation re estate or interest in land

183(1) Subject to this section and sections 184 to 191, compensation with respect to an estate or interest in land, other than an estate or interest in mines and minerals referred to in subsection (2), is payable as follows:

(a) with respect to the estate or interest in land

(i) if a person is deprived of an estate or interest, the value of the estate or interest, or

(ii) if the priority of an interest of a person is subordinated to another interest, the reduction in the value of the subordinated interest;

(b) reasonable expenses incurred in bringing the claim for compensation;

(c) a further sum, not exceeding $5,000, for all other losses incurred by the person claiming compensation;

(d) interest on the amount payable under clause (a) from the relevant date under subsection (3), at the prejudgment interest rate established under *The Court of Queen's Bench Act*.

[61] *The Real Property Act*

Exception — title subject to section 58

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

Restrictions on certificate

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

(a) any subsisting reservation contained in the original grant of the land from the Crown;

(b) any municipal charge, rate, or assessment, existing at the date of the certificate, or subsequently imposed on the land and any sale of the land for tax arrears for which no return has been received by the district registrar;

(c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land;

(d) any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land thereunder;

(e) any drainage levy or builders' lien affecting the land;

(f) any instrument registered and maintained in force in the general register pursuant to section 69, which describes the debtor in a name identical to that of the owner as set out in the certificate of title;

(g) any pending litigation order issued out of a court in the province and registered since the date of the certificate of title;

(h) any right of expropriation by statute;

(i) the title of a person adversely in actual occupation of, and rightly entitled to, the land at the time it was brought under this Act, and who continues in such occupation;

(j) caveats affecting the land filed since the date of the certificate;

(k) a development plan, zoning by-law or other by-law authorized under *The Planning Act* or under the charter of any city and any by-law passed by any municipal corporation under *The Municipal Act* or the charter of any city relating to residential areas or zoning;

(l) any zoning regulation, as that expression is defined in the *Aeronautics Act* (Canada), made under that Act and deposited in the land titles office; and

(m) any limitation or restriction under *The Transportation Infrastructure Act* or a permit issued under that Act.

Highways

58(2) Public highways embraced in the description of the land included in a certificate shall be deemed to be excluded.

62 *The Real Property Act*

Two certificates for same land

59(2) Where more than one certificate of title has been issued in respect of a particular estate or interest in land, the person claiming under the prior certificate appearing in the register is entitled to the estate or interest; and that person shall be deemed to hold under a prior certificate who is the holder of, or whose claim is derived directly or indirectly from the person who was the holder of, the earliest certificate issued.

Court order — two certificates for same land

59(3) Subsection (2) applies unless a court determines that it is just in the circumstances to order otherwise.

63 *The Real Property Act*

Exception — owner deprived due to fraud or wrongful act

59(1.3) Despite subsection (1), in a proceeding under this Act, an owner who is deprived of an estate or interest in land as a result of fraud or a wrongful act, is entitled to have the estate or interest restored, unless a court determines that it is just in the circumstances to order otherwise.

64 *The Real Property Act*

Correcting

23(1) Where it appears to a district registrar,

(a) that a certificate of title or other instrument has been issued in error or contains a misdescription; or

(b) that an entry or endorsement has been made in error on a certificate of title or other instrument, or been omitted therefrom; or

(c) that a certificate of title, instrument, entry, or endorsement, was fraudulently or wrongfully obtained; he may, whether the certificate or instrument is in his custody or is produced to him under a summons, without prejudicing rights conferred for value, correct the error in, or in the case of fraud or wrong cancel, the certificate of title, instrument, entry, or endorsement, or any memorial, certificate, exemplification or copy thereof, as the case requires, and may supply entries omitted.

[65] *Hyczkewycz* v. *Hupe,* 2019 MBCA 74, 2019 CarswellMan 542, [2019] 10 W.W.R. 1, 26 R.F.L. (8th) 26, 307 A.C.W.S. (3d) 448, 4 R.P.R. (6th) 186

[53] Despite the apparent acceptance that the principle of indefeasibility of title is the dominant principle of a true Torrens system, the principle of indefeasibility of title was never treated as absolute…beyond these statutory exceptions and qualifications, various in personam equitable interests, including trusts related to land, can also supersede the principle of indefeasibility.

[55] … the beneficiaries of a trust related to land can enforce the trust personally against the trustee for the return of the property if it is still in the trustee's hands.

[67] Case law in Canada has, from very early on, recognised that equitable interests in land, including trusts, continue to exist alongside the various Torrens systems, and that in personam equitable claims may be enforced against a registered proprietor of land who may be bound in equity.

[81] …It is universally recognised that the Torrens system did not abolish trusts or other equitable interests. In fact, Torrens systems allow beneficiaries of a trust relating to land to take steps to protect their beneficial interests by filing caveats. Furthermore, it is well accepted that there is nothing in the Torrens system which prevents a beneficiary of a trust relating to land from enforcing that trust against a trustee, in personam, in the courts.

[96] Other provisions of the RPA are consistent with the continuation of trusts related to land. Section 58(1)(j) states that a certificate of title will be subject to caveats affecting the land that are filed after the issuance of the certificate. Section 59(1.1) states that a person may show that a certificate of title is subject to any of the exceptions set out in section 58, which would include an interest disclosed in a caveat filed under section 58(1)(j).

[97] Section 62(1) sets out a list of matters which allow a person to bring an action for ejectment or the recovery of land, which includes section 62(1)(g), "For rights arising under any of the matters as to which the certificate of title is subject by implication." One such matter is a caveat filed under section 58(1)(j). Thus, if you have a right to file a caveat, you have the right to enforce that caveat by an action for ejectment or for the recovery of the land.

[101] In conclusion, I am of the view that a resulting trust of land in Manitoba can be enforced by an in personam claim against the trustee who appears as the registered owner on the title to the land despite the provisions regarding indefeasibility in the RPA. The history of the Torrens system reveals that it was not meant to nullify the operation of trusts completely, and the history of the legislation in western Canada indicates that it was expected that trusts regarding land would continue to be enforced in personam against trustees. Academic texts and articles, and jurisprudence from many jurisdictions that have enacted the Torrens system confirm this view. Finally, the RPA, itself, refers frequently to trusts, thereby indicating that they still operate alongside the RPA and its principle of indefeasibility.

[102] …to preserve a claim to land, the beneficiary could register a caveat against the title to the land, alleging that it is impressed with a resulting trust.

[66] *The Real Property Act*

Priority

74 Where an instrument is presented for registration and

(a) a registered certificate of judgment, or an order for payment of alimony or maintenance; or

(b) a lien or charge created by, or arising pursuant to, an Act of the Legislature in favour of Her Majesty in right of Manitoba or in favour of a municipality;

appears to affect the land described therein, but the applicant for registration claims that the certificate, lien, or charge, does not affect the land, or is not equitably entitled to priority over the instrument, notwithstanding its priority of registration, the district registrar may take such evidence under oath or otherwise in the matter as he deems necessary, and may thereupon decide whether the certificate of judgment, lien, or charge, does or does not affect the land, or whether the certificate of judgment, lien, or charge, is or is not entitled to priority over the instrument, and may register the instrument according to that decision.

The Judgments Act, C.C.S.M. c. J10

Certificate of judgment not to affect land
10(1) No judgment for the payment of money whereof a certificate has been registered binds or forms a lien or charge on land in respect of which the person who is the judgment debtor,
(a) has made a bona fide sale, exchange, conveyance or transfer, or a bona fide agreement for sale or exchange, subsisting at the time of the registration; or
(b) has given a bona fide option to purchase subsisting at the time of the registration.

Certain cases where agreement not to be deemed to be a subsisting agreement
10(2) Where, after the making of an agreement for sale of land by the person who is the judgment debtor and prior to the time of the registration,
(a) the land or the agreement has been abandoned by the purchaser; or
(b) the land is under the terms of the agreement deemed to be abandoned by the purchaser; or
(c) the agreement has become void or has been cancelled in accordance with the terms thereof;
the agreement is not a subsisting agreement within the meaning of subsection (1).

67 *Dominion Lumber Winnipeg Ltd.* v. *Manitoba (Winnipeg District Registrar)*, 1963 CarswellMan 14, 37 D.L.R. (2d) 283, 41 W.W.R. 343, wherein the court was asked to determine whether a mortgage was entitled to priority over certain prior registered judgments. In so deciding, the court noted in that:

13 …There can be no suggestion here, nor is any made, of a collusive attempt between the applicant and the registered owner (say, by backdating the mortgage) to defeat the claims of the judgment creditors. Long before the registration of these judgments, the mortgage in favour of the applicant had been executed…

15 Upon what estate or interest of Ruby Hannah Locheed did the registered certificates of judgment attach? Surely they formed a charge only upon the estate or interest which she possessed at the time of the registration of the certificate of judgment. But her estate or interest in the land was already mortgaged in favour of the applicant. True, that mortgage had not as yet been registered, but it is beyond question that it conferred rights upon the applicant.

21 In the Davidson case, supra, the contest was between the holder of an unregistered transfer and the holder of a registered certificate of judgment. The Supreme Court of Canada held that the judgment creditor could only claim upon that interest which his debtor possessed, and as the registered owner, the debtor, had disposed of his entire interest prior to the registration of the judgments, there was no interest upon which the judgments could attach.

23 …So too, in the present case, the applicant's unregistered mortgage should be deemed to be operative. At common law it created valid rights. Our statute acknowledges the existence of such rights in sec. 77. Nor does it declare that such rights are extinguished by non-registration except as against a *bona fide* transferee. The judgment creditors do not qualify as such. Hence, the applicant's mortgage must be deemed to be effectual.

68 *The Condominium Act*

Lien priority
164(1) A condominium corporation's registered lien has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose. But the lien does not have priority over
(a) a claim of the Crown (other than by way of a mortgage);

(b) a claim for taxes, charges, rates or assessments levied or recoverable under The Municipal Act or The City of Winnipeg Charter; or
(c) a prescribed lien or claim.

[69] *The Mortgage Act,* C.C.S.M. c. M200

Mortgages, how affected by conveyances subsequently registered
17 To remove doubts, every mortgage duly registered against the lands comprised therein is, and, subject to section 31 of The Builders' Liens Act, shall be deemed to be, as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through, or under him, a security upon the lands to the extent of the moneys or money's worth actually advanced or supplied to the mortgagor under the mortgage (not exceeding the amount for which the mortgage is expressed to be a security), notwithstanding that the moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any certificate of judgment or of any conveyance, mortgage, or other instrument, affecting the mortgaged lands, executed by the mortgagor or his heirs, executors, or administrators, and registered subsequently to the first-mentioned mortgage, unless before advancing or supplying the moneys or money's worth the mortgagee in the first-mentioned mortgage had actual notice of the registration of the certificate of judgment or of the execution and registration of the conveyance, mortgage, or other instrument; and the registration of the certificate of judgment, conveyance, mortgage, or other instrument, after the registration of the first-mentioned mortgage, does not constitute actual notice to the mortgagee of the judgment, conveyance, mortgage, or other instrument.

The Builders' Liens Act, C.C.S.M. c. B91

Priority of lien
31 A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments made, before registration of a claim for lien, on account of a conveyance or mortgage, have priority over the lien.

Note: It is as a result of these sections that prior to making an advance under a building mortgage, the solicitor for the mortgagee will perform an "after 3" search of the land titles registry: they want to ensure that their advance will have the same priority as their registration.

[70] *The Homesteads Act,* C.C.S.M. c. H80

Validity of documents
5(4) When proof is given in accordance with this section, no document or instrument respecting the disposition is invalid except against a person who, at the time he or she acquired an interest under the disposition,
(a) had actual knowledge of the untruth of a matter alleged as fact in an affidavit, statutory declaration or statement under subsection (1); or
(b) participated or colluded in fraud in respect of the disposition.

Disposition without consent may be set aside
6 If an owner has made a disposition to a person described in clause 5(4)(a) or (b) and that person has not made a further disposition to a bona fide purchaser for value, the court shall, on application by the owner's spouse or common-law partner, set aside the disposition.

[71] *Pilcher* v. *Rawlins* (1871-72) L.R. 7 Ch. App. 259

"The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely, that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice; and I find that the Appellants in both the cases before us are very clearly purchasers for valuable consideration without notice."
Sir G Mellish LJ at 273

[72] *The Fraudulent Conveyances Act*, C.C.S.M. c. F160

When conveyances declared void as against creditors
2 Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns.

Saving as to conveyances made bona fide and for good consideration
4 Section 2 does not extend to any estate or interest in real property or personal property conveyed upon good consideration and bona fide to any person not having, at the time of the conveyance to him, notice or knowledge of that intent.

How far valuable consideration and intent to pass interest to avail
5 Section 2 applies to every conveyance executed with the intent in that section set forth, notwithstanding that it may be executed upon a valuable consideration and with the intention, as between the parties thereto, of actually transferring to, and for the benefit of, the transferee the interest expressed to be thereby transferred, unless it is protected, under section 4, by reason of bona fides and want of notice or knowledge on the part of the purchaser.

[73] *The Personal Property Security Act,* C.C.S.M. c. P35

Application of section
36(2) Subject to the regulations, this section applies only with respect to land for which a certificate of title is issued under *The Real Property Act*.

Interest in goods before becoming fixtures
36(3) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

Priority of interest in fixture
36(4) A security interest referred to in subsection (3) is subordinate to the interest of
(a) a person who acquires for value an interest in the land after the goods become fixtures including an assignee for value of a person with an interest in the land at the time the goods become fixtures; and
(b) a person with a registered mortgage of the land who, after the goods become fixtures
(i) makes an advance under the mortgage, but only with respect to the advance, or
(ii) obtains an order for sale or foreclosure;
without fraud and before the security interest is registered in accordance with section 49.

Interest in goods after becoming fixtures
36(6) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who
(a) has an interest in the land at the time the goods become fixtures and who
(i) has not consented to the security interest,
(ii) has not disclaimed an interest in the goods or fixtures,
(iii) has not entered into an agreement under which the person is entitled to remove the goods, or
(iv) is not otherwise precluded from preventing the debtor from removing the goods; or
(b) acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the security interest in the goods is registered in accordance with section 49.

Attachment of security interest
12(1) A security interest, including a security interest in the nature of a floating charge, attaches when
(a) value is given;
(b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party; and

(c) except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10;

unless the parties specifically agree to postpone the time of attachment, in which case it attaches at the time specified in the agreement

[74] *The Real Property Act*

Amount of compensation — mines and minerals

183(2) Subject to this section and sections 184 to 191, compensation with respect to an estate or interest in mines and minerals, or any of them, in, under or upon land, is payable as follows:

(a) the money actually paid for that estate or interest in mines and minerals;

(b) a further sum, not exceeding $5,000, for all other losses, including expenses and interest, incurred by the person claiming compensation.

[75] *The Real Property Act*

Actions — trusts, corporations and municipalities

190(1) No person is entitled to compensation for any loss sustained

(a) due to the breach by a registered owner of a trust, whether an expressed, implied or constructive trust;

(b) due to a breach of trust by, or an act of misfeasance of, an executor, administrator or trustee;

(c) with respect to a corporation, by

(i) the improper execution of an instrument on behalf of the corporation, or

(ii) the lack of capacity in a corporation to deal with the estate or interest involved or to execute or take the benefit of a registered instrument; or

(d) with respect to a municipality, by

(i) the improper execution of an instrument on behalf of a municipality, or

(ii) the lack of capacity in a municipality to deal with the estate or interest involved or to execute or take the benefit of a registered instrument.

[76] *The Real Property Act*

Time limit

184(1) No person is entitled to compensation unless, before the expiration of two years after the person knows or ought to have known of the loss sustained, the person brings a claim for compensation.

Time limit for person claiming through predecessor

184(2) In the case of a claim for compensation commenced by a person claiming through a predecessor in the estate or interest in land, the person claiming through the predecessor is deemed to have knowledge of the loss sustained on

(a) the day on which the predecessor first knew or ought to have known of the loss; or

(b) the day on which the person claiming through the predecessor first knew or ought to have known of the loss;

whichever is earlier.

[77] *The Real Property Act*

Caveat — right to have registration revised

148.1 A person who has a right to have a certificate of title — or an interest affecting a certificate of title — cancelled, restored, corrected, altered or vacated has an interest that entitles the person to file a caveat.

No compensation if caveat not registered

186 No person is entitled to compensation if the loss was sustained because the person — with actual knowledge of the right to have a registration cancelled, restored, corrected, altered or vacated — failed, without reasonable excuse, to give notice of that right by promptly filing a caveat referred to in section 148.1.

[78] *The Municipal Act*, C.C.S.M. c. M225

No action against district registrar
379 No action lies or is maintainable against a district registrar, a Land Titles Office, the government or a service provider under *The Real Property Act* for damages that accrue by reason of any action by the district registrar or the Land Titles Office under this Division.

The City of Winnipeg Charter

No action against district registrar
398(2) An action does not lie and is not maintainable against the district registrar, the land titles office, a service provider under *The Real Property Act* or the government for damages that may accrue because of any action by the district registrar or the land titles office under this Division.

[79] *The Real Property Act*

Registration essential
66(4) No instrument is effectual to pass an interest in land under the new system or to render the land liable as security for the payment of money as against a bona fide transferee thereof, until the instrument is registered in accordance with this Act.

[80] Registration of Title to Land, Victor Di Castri, Carswell, February 15, 2021
Chapter 17 — Registration
1. — Title by Registration
(1) — Prefatory

[740] Registration and concurrent indefeasibility are the outstanding features of the Torrens system. Under the general law the operation of a deed rested on the deed itself, even though some form of recording may have been necessary to preserve its priority. But under the Acts it is registration which gives validity and operation to instruments. Except as against the maker of the instrument, no instrument purporting to transfer, charge, deal with or affect land or any interest in land is operative to pass that estate or interest, either at law or in equity, until the instrument is registered. The qualifications to this general statement are discussed *infra.*

It is on registration, not on an application to register, that title is acquired.

It must be emphasized that it is the title to land that is registered, not merely the instrument. "It is a system for the registration of title, not of deeds."[3] An instrument[4] is a mechanism which may or may not trigger registration. Before this point is reached the instrument must run the gamut of a critical examination process.

[81] 52 Vic. Cap. 16

[82] *The Real Property Act* of 1889 (52 Vic. Cap. 16)

130. Any person claiming any estate or interest in the land described in the application to bring the same under the new system may, at any time before the registration of the certificate of title, lodge or have lodged on his behalf a caveat with the District-Registrar in the form in Schedule O to this Act, forbidding the bringing of such land under the new system.
…
130. (3) Any beneficiary or other person claiming any estate or interest in land under the new system, or in any lease mortgage or encumbrance under the new system may lodge or have lodged on his behalf a caveat with the District-Registrar the form in Schedule P to this Act, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or owner of, or any instrument affecting such estate or interest either absolutely or until after notice of the intended registration or dealing be given to the caveator, or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat.

[83] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[84] *The Real Property Act*

Land granted by Crown
27 Where a patent or grant of land from the Crown has issued after February 20, 1914, the land is at once subject to this Act, and upon filing it and filing an application for title, the district registrar shall issue a certificate of title to the patentee or grantee or to his personal representative.

The Registry Act

No further registrations of Crown grants under old system
18(1) Where a patent from the Crown has issued after February 20, 1914, for any land in any part of the province, the land is at once subject to *The Real Property Act*; and no instrument purporting to grant, transfer, mortgage, or hypothecate the land shall thereafter be registered under this Act.

Registration of instruments affecting Crown lands
19 With the exception of
(a) a patent or grant of land from the Crown issued on or before February 20, 1914;
(b) [repealed] S.M. 1993, c. 4, s. 237;
(c) surface leases, grants of rights-of-way, and easements;
no instrument purporting to divest the Crown of a right, interest, or estate, in Crown lands, or to charge Crown lands, shall be registered under this Act.

[85] *The Registry Act*

Limitation on conveyances
18(2) No instrument purporting to grant, transfer, mortgage, or hypothecate, any land in the territory added to the Province of Manitoba by the Act, being chapter 32 of the *Statutes of Canada, 1912*, shall be registered under the old system of registration

[86] *The Registry Act*

Subdivided land to be brought under Real Property Act
47(1) Subject to subsection 37.1(2) of The Real Property Act, any owner subdividing land for any purpose shall bring his land under The Real Property Act.

[87] *The Registry Act*

Mineral interest to be under The Real Property Act
47(4) An owner dealing with a mineral interest, other than a mineral lease or instruments relating thereto, shall bring that interest under The Real Property Act.

[88] *The Registry Act*

Sections 18 and 19 not applicable
19.1 Sections 18 and 19 do not apply to
(a) Orders in Council; or
(b) any instruments that transfer administration and control of Crown lands between Canada and Manitoba.

[89] *The Real Property Act*

Definitions
1 In this Act, and in instruments purporting to be made or registered under this Act, unless the context otherwise requires

"land" means land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, and easements, appertaining thereto, and all trees and timber thereon, and all mines, minerals, and quarries, unless specially excepted;

[90] *The Registry Act*

Definitions
1 In this Act,
"land" means land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, and easements, appertaining thereto, and all trees and timber thereon, and all mines, minerals, and quarries, unless specially excepted;

[91] *The Homesteads Act*

[92] *The Homesteads Act*

Definitions
1 In this Act,

"homestead" means
(a) in the case of a residence in a city, town or village occupied by the owner and the owner's spouse or common-law partner as their home, the residence and the land on which it is situated, consisting of
(i) not more than six lots or, if the block is not subdivided into lots, one block, as shown on a plan registered in a land titles office, and
(ii) not more than one acre, if the land is not described by registered plan,
(b) in the case of a residence outside a city, town or village occupied by the owner and the owner's spouse or common-law partner as their home, the residence and the land on which it is situated, consisting of not more than 320 acres or a half section, subject to the following conditions:
(i) if the land exceeds 320 acres in the same section, the 320 acres shall be comprised of the quarter section on which the residence is situated, together with such other lands in that section as the owner or the owner's personal representative shall designate,
(ii) if the land is in more than one section, river lot or parish lot, the homestead shall be comprised of the quarter section, river lot or parish lot on which the residence is situated, together with the other lands in that section or adjacent to or across a road or highway from the section, river lot or parish lot, but if the land so described exceeds 320 acres the owner or the owner's personal representative shall designate 320 acres of the land as the homestead including the quarter section, river lot or parish lot on which the residence is situated,
(c) a unit and common interest within the meaning of *The Condominium Act*, occupied by the owner and the owner's spouse or common-law partner as their home; (« propriété familiale »)

[93] *The Homesteads Act*

Disposition prohibited without consent
4 No owner shall, during his or her lifetime, make a disposition of his or her homestead unless, subject to sections 2.1 and 2.2
(a) the owner's spouse or common-law partner consents in writing to the disposition;
(b) the disposition is in favour of the owner's spouse or common-law partner;
(c) the owner's spouse or common-law partner has released all rights in the homestead in favour of the owner under section 11;
(d) the owner's spouse or common-law partner has an estate or interest in the homestead in addition to rights under this Act and, for the purpose of making a disposition of the spouse's or common-law partner's estate or interest, is a party to the disposition made by the owner and executes the disposition for that purpose; or

(e) the court has made an order dispensing with the consent of the owner's spouse or common-law partner under section 10.

Proof of non-application of Act

5(1) Proof as to

(a) whether a person who executes a document or instrument respecting a disposition is or is not married or in a common-law relationship;

(b) whether a person who consents to a disposition is the owner's spouse or common-law partner; or

(c) whether land is or is not a homestead;

may be made by affidavit, statutory declaration or a statement authorized under section 194 of *The Real Property Act*.

[94] *The Tax Administration and Miscellaneous Taxes Act*, C.C.S.M. c. T2

[95] *The Tax Administration and Miscellaneous Taxes Act*

Affidavit of value

115(1) There shall be filed with each transfer tendered for registration an affidavit setting out the fair market value of the land as a whole with respect to which the transfer is tendered for registration.

[96] *The Tax Administration and Miscellaneous Taxes Act*

Imposition of tax

112(1) Subject to subsections (2) and (3) and sections 112.1 to 114, every person who tenders for registration a transfer shall, at the time of tendering the transfer, pay to the collector a tax calculated to the nearest dollar in accordance with the following formula:

FORMULA

Tax = 0.005 × (FMV − $30,000.) +
0.005 × (FMV − $90,000.) +
0.005 × (FMV − $150,000.) +
0.005 × (FMV − $200,000.)

[97] *The Tax Administration and Miscellaneous Taxes Act*, sections 113(1), 113(2), 113(3) and 114(1)

[98] *The Farm Lands Ownership Act*, C.C.S.M. c. F35

[99] *The Real Property Act*, section 85(3)

[100] *The Real Property Act*

Caveat — right to have registration revised

148.1 A person who has a right to have a certificate of title — or an interest affecting a certificate of title — cancelled, restored, corrected, altered or vacated has an interest that entitles the person to file a caveat.

[101] *The Real Property Act*

No compensation if caveat not registered

186 No person is entitled to compensation if the loss was sustained because the person — with actual knowledge of the right to have a registration cancelled, restored, corrected, altered or vacated — failed, without reasonable excuse, to give notice of that right by promptly filing a caveat referred to in section 148.1.

[102] *The Real Property Act*

Caveat after title under new system

148(1) A person claiming an estate or interest in land or in a mortgage, encumbrance, or lease, under the new

system, may file a caveat in an approved form, forbidding the registration of any person as transferee or owner of, or of any instrument affecting the estate or interest, unless the instrument is expressed to be subject to the claim of the caveator.

[103] *Crump* v. *Kernahan*, (1995) 32 Alta. L.R. (3d) 192, 48 R.P.R. (2d) 231

The law on this point is clear: registration of a caveat cannot by itself ground the creation of a valid restrictive covenant. As Master Funduk put it in Ram v. Jinnah (1982), 39 A.R. 40 at 49:

> A caveat cannot be a foundation for a claim against land. A caveat gives no substantive rights in itself. It is merely a warning of the existence of a claim. It creates no new rights...

See also: *Willman* v. *Ducks Unlimited (Canada)*, (2004) 187 Man. R. (2d) 263, 245 D.L.R. (4th) 319, 24 R.P.R. (4th) 150, [2005] 2 W.W.R. 1 (Man. C.A.)

[104] *Hildebrandt* v. *Hildebrandt* (2009 CarswellMan 97) (Man Q.B.)

[105] *The Real Property Act*

Registration of statutory easement
111.1(2) To register a right granted by an instrument under section 111 as a statutory easement, an eligible grantee must register,
…
(b) if the land is under the new system,
(i) the instrument granting the right, if it is in a form satisfactory to the district registrar, or
(ii) a caveat that has a copy of the instrument attached to it.

Transition — rights analogous to easements
111.2(2) A right analogous to an easement is deemed to be a statutory easement and is an easement for all purposes if,
(a) in accordance with section 111, as that provision read before the coming into force of this section, the following was registered or filed:
(i) the instrument that granted the right,
(ii) a caveat with a copy of the instrument attached; or
(b) after the coming into force of this section, an eligible grantee registers or files
(i) the instrument that granted the right, or
(ii) a caveat with a copy of the instrument attached.

[106] *The Real Property Act*, section 148(1)

[107] *The Interpretation Act*, C.C.S.M. c. I80

SCHEDULE OF DEFINITIONS (Section 17)

"person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person; (« personne »)

[108] *The Planning Act*

Registering development agreements
151(1) Any development agreement under this Act may provide that it runs with the land, and when a caveat with a copy of such an agreement attached is filed in the appropriate land titles office, the agreement binds the owner of the land affected by it, and the owner's heirs, executors, administrators, successors and assigns.

[109] *The Real Property Act*

Right becomes statutory easement on registration

111.1(1) Once the instrument is registered in accordance with subsection (2), a right granted by an instrument under section 111

(a) becomes a statutory easement and is an easement for all purposes;

(b) is an interest in land; and

(c) runs with the land notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the eligible grantee in whose favour the right was granted;

and the conditions and covenants expressed in the instrument apply to and bind the respective successors, personal representatives and assigns of the grantor and grantee, except to the extent that a contrary intention appears in the instrument.

[110] *The Planning Act*, section 151, *The City of Winnipeg Charter,* subsections 240(2) & (3)

[111] The City of Winnipeg Charter

Caveat respecting agreements

268(1) Where the city enters into an agreement pursuant to a condition imposed under this Part, a caveat giving notice of the agreement may be filed against land affected by the agreement in the land titles office and thereafter the agreement runs with the land and, without special mention in the caveat, binds the owner of the land, successors in title to the owner and heirs, executors, administrators and assigns of the owner.

[112] *The City of Winnipeg Charter*, section 184

[113] *The Perpetuities and Accumulations Act*, C.C.S.M. c. P33

[114] *Chupryk* v. *Haykowski*, 1980 CarswellMan 99, [1980] 4 W.W.R. 534, 110 D.L.R. (3d) 108, 13 R.P.R. 45, 2 A.C.W.S. (2d) 246, 3 Man. R. (2d) 216, 3 Man. R. (2d) 219

19 The relationship between a life tenant and remainderman was referred to in *Perry* v. *Perry*, 29 Man. R. 23, [1918] 2 W.W.R. 485, 40 D.L.R. 628 (C.A.), where Cameron J.A., for a unanimous court, said at p. 494:

There is, it is true a sense in which a tenant for life is trustee for the remainderman.

He [the tenant for life] is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remainderman, or acquire an outstanding title for his own exclusive benefit; but he differs from the trustee in that he may use the property for his exclusive benefit and take the income and profits. (16 *Cyc.* 616-17.)

[115] *The Law of Property Act*, C.C.S.M. c. L90

Equitable waste

12 An estate for life without impeachment of waste does not confer and shall not be deemed to confer on the tenant for life a legal right to commit waste of the description known as equitable waste unless an intention to confer the right expressly appears in the instrument creating the estate.

Waste by tenants

13(1)Subject to the express terms of a lease, or of a covenant, agreement or stipulation affecting a tenancy,

(a) every tenant for years and every tenant for life is liable to the landlord, to a trustee of a trust under which such a tenancy subsists, and to a person for the time being having a reversionary interest in the premises, for voluntary waste and for permissive waste in respect of the premises to the extent by which the interest of the landlord, the trustee and the person is detrimentally affected thereby; and

(b) every tenant at will is liable to the landlord and to a person having a reversionary interest in the leased premises for voluntary waste in respect of the premises to the extent by which the interest of the landlord and the person in the premises is detrimentally affected by the voluntary waste.

Damages and injunction
13(2) Every landlord, trustee and other person having a reversionary interest in leased premises is entitled, in respect of waste by a tenant on the premises, in an action brought in a court of competent jurisdiction to obtain damages or an injunction, or both.

Ameliorating waste
13(3) Nothing is this section abrogates, diminishes or affects the jurisdiction of a court with respect to ameliorating waste.

[116] *The Real Property Act*

Form of lease
91(1) Where land under the new system is intended to be leased or demised for a life or lives, or for a term of years, the owner may execute a lease in an approved form, setting forth therein all mortgages, encumbrances, and liens, to which the land is subject, which lease may be registered and a certificate of title for a leasehold estate may issue to the lessee.

[117] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[118] See certificate of title 2714332/1:

PARCELS A, B, C AND D PLAN 55495 WLTO SAID PARCEL B IS SUBJECT TO A CONVENANT RESPECTING A REVERSIONARY INTEREST AS SET FORTH IN DEED REGISTERED AS INSTRUMENT 43363 IN RL 8 AND 9 PARISH OF ST JOHN

[119] Peter Devonshire, *Possibilities of Reverter and Rights of Re-Entry for Condition Broken: The Modern Context for Determinable and Conditional Interests in Land*, 13 Dalhousie L.J. 650 (1990)

[120] *The Land Titles Act*, R.S.S 1978, c. L-5

243. No estate in fee simple shall be changed into any limited fee or fee tail, but the land, whatever form of words is used in any transfer, transmission or dealing, shall, except as hereinafter otherwise provided, be and remain an absolute estate in the owner for the time being.

[121] *Possibilities of Reverter and Rights of Re-Entry for Condition Broken: The Modern Context for Determinable and Conditional Interests in Land*, p. 674:

Most Canadian jurisdictions have taken the initiative of abolishing estates tail. However, in some instances uncertainty has arisen as to whether the reforming statute has also extinguished determinable and conditional fees. This is particularly borne out in the Saskatchewan Land Titles Act.
…
It may be questioned whether this effectively abolishes the creation of determinable fees and, by extension, conditions subsequent. The purview of the section is unclear and the matter does not seem to have been raised in any reported decisions. It may be conjectured that express words would have been used to identify determinable and conditional fees if a fundamental reform of these interests had been contemplated. Some support for this view can be drawn from the fact that the heading of section 243 is simply entitled "No Estates Tail." Furthermore, although not conclusive on the point, the Law Reform Commission of Saskatchewan noted the existence of determinable limitations and conditions subsequent in its report on the rules against perpetuities and accumulations.

A similar provision in the Manitoba Law of Property Act contains an additional refinement that offers some insight as to its intended scope.
…
The effect of this section hinges, in part, on whether "any limitation that would have created an estate tail" in the latter clause serves to qualify and restrict the ambit of "limited fee" in the former. Logic and consistency indicate that it should, although this in turn begs the question as to why a limited fee should be mentioned at all

if it was meant to be nothing more than a synonym for a fee tail. As in the case of the Saskatchewan Act, the section is entitled "No estates tail" and it is submitted that on balance, this provision, like its Saskatchewan counterpart, should be construed as being confined to that interest. If this was indeed the intention of the Manitoba and Saskatchewan Acts, it is unfortunate that they failed to address the subject with the same directness as corresponding legislation in other jurisdictions.

[122] Registration of Title to Land, Victor Di Castri, Carswell, February 15, 2021
Chapter 1 — Introduction
1. — Estates in Land Under the Feudal System and Warranty of Title

[123] *The Law of Real Property*, Third Edition, Megarry and Wade, Stevens & Sons Limited, London, 1966

[124] *The Law of Real Property*, Third Edition, page 75

[125] *The Law of Real Property*, Third Edition, page 83

The hall-mark of a fee tail is a limitation to a person and the heirs of *his body*, restricting inheritance to his lineal descendants, as opposed to a fee simple which could pass to collateral relations if there were no issue.

[126] *The Real Property Act*

Party wall, right of way and easement agreements
76(1) A party wall agreement, a right of way agreement or an easement agreement may be registered against the lands affected by such an agreement if, at the time it is registered,
(a) the district registrar is satisfied that the lands affected are
…
(ii) in reasonable proximity, in the case of a right of way agreement or an easement agreement;
…

[127] *Re Ellenborough Park, Re* (1955), [1956] Ch. 131, [1955] 2 All E.R. 38, [1955] 3 W.L.R. 91, 99 Sol. Jo. 418 (Eng. Ch. Div.)

[128] *The Real Property Act*

Right becomes statutory easement on registration
111.1(1) Once the instrument is registered in accordance with subsection (2), a right granted by an instrument under section 111
(a) becomes a statutory easement and is an easement for all purposes;
(b) is an interest in land; and
(c) runs with the land notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the eligible grantee in whose favour the right was granted;
and the conditions and covenants expressed in the instrument apply to and bind the respective successors, personal representatives and assigns of the grantor and grantee, except to the extent that a contrary intention appears in the instrument. (emphasis added)

[129] *Purdom* v. *Robinson*, 30 S.C.R. 64 (1899):

16 That a right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property is shown by many reported cases...

17 ...even if the original grantee did acquire under the grant a more extensive right, a personal right to use the way irrespective of the land granted, that was a mere license which could not be granted or assigned over by the original licensee since there is not known to the law such an interest in land as an easement in gross.

[130] *Willman* v. *Ducks Unlimited (Canada)*, 2004 MBCA 153, 187 Man. R. (2d) 263, 330 W.A.C. 263, 245 D.L.R. (4th) 319, 24 R.P.R. (4th) 150, [2005] 2 W.W.R. 1 (Man. C.A.)

68 I think it is worth repeating, from Anstalt that: "A mere contractual licence to occupy land is not binding on a purchaser of the land even though he has notice of the licence" (at p. 15).

[131] *Willman v. Ducks Unlimited (Canada)*

62 Anstalt restores the principle that a contractual licence does not create a property interest, which was cast in some doubt by Errington. That principle is one of long-standing in Canada. As Victor Di Castri, Q.C., Registration of Title to Land, vol. 2 (Toronto: Carswell, 1987) looseleaf, states (at para. 589):

> ... [W]hile there is no objection to a grant by way of a personal licence of a right of way, independent of the possession of any land by the grantee, the licence would not create an interest in land. The assignees of the licensor would not be bound. A personal licence and the remedy for its disturbance cannot crystallize into an interest in land and therefore is not caveatable. It is submitted that the view "that any right conferred by contract relating to land against the registered proprietor is a sufficient 'interest' to support a caveat" is too wide. The right must be capable of crystallizing into an interest in land.
> [Footnotes omitted]

63 I accept the above statement as a correct summary of the law in this province. The Agreement was a personal licence which did not create an interest in land and was not caveatable.

[132] *RPM Farms Ltd. et al. v. Laurence Jay Rosenberg et al*., 2019 MBQB 140

Justice Dewar:

[54] Fourthly, it is time to look at whether the easement was reasonably necessary to the better enjoyment of the dominant tenement. The criteria that an easement must accommodate a dominant tenement has been judicially interpreted to mean that it must be reasonably necessary to the better enjoyment of the dominant tenement…

[133] *Re Ellenborough Park, Re*

The argument in the case is found accordingly to turn upon the meaning and application to the circumstances of the present case of the second and fourth conditions; that is, first, whether the alleged easement can be said in truth to "accommodate" the dominant tenement - in other words, whether there exists the required "connection" between the one and the others and, second, whether the right alleged is "capable of forming the subject matter of a grant". The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the "grant" it is not in doubt that rights of this kind would be capable of taking effect by way of contract or license. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.

[134] *Robinson* v. *Pipito*, 2014 BCCA 200, 2014 CarswellBC 1437, paragraph 31

[135] *Jones* v. *Price*, [1965] 2 Q.B. 689 (Eng. C.A.)

[136] Registration of Title to Land, Victor Di Castri, Carswell, February 15, 2021
Chapter 18 — Statutory Exceptions to Indefeasibility of Title
9. — Easements

[822] An easement, as an interest in land, and as an exception to indefeasibility of title, is not dealt with uniformly in the Acts.[285] Thus, while it is desirable that the principles to be derived from the Torrens legislation in all jurisdictions should remain uniform, it has been said, and in particular in relation to easements, that there is no single pattern of legislation common to all jurisdictions, and that in the end, the matter is to be determined by construing the particular Act.

[137] *The Real Property Act*

Effect of declaration
76(2)A declaration made by the owner of the land has the same force and effect as an agreement referred to in subsection (1) if

(a) the declaration is set out in an instrument that is in a form approved by the district registrar;
(b) the declaration is registered; and
(c) at the time it is registered, all persons with a registered claim or interest in the land consent to the registration.

Effect of registration of declaration
76(3) A declaration registered under subsection (2) has the same force and effect as a party wall agreement, a right of way agreement or easement agreement and shall, for all purposes, be deemed to be a party wall agreement, a right of way agreement or easement agreement and **"party wall agreement"**, where used in any Act of the Legislature, includes a declaration registered under subsection (2).

[138] *Law of Real Property*, by Anne Warner La Forest, Anger & Honsberger, Third Edition, vol. 2 (Aurora: Canada Law Book, 2007) looseleaf, para. 17:20.20

[139] *The Real Property Act*

Easements not to be registered
85(2) A district registrar shall refuse to register a transfer that creates or purports to create an easement or right in the nature of an easement.

[140] *The Law of Property Act*

Encroachments on adjoining land
28 Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of Queen's Bench may, in its discretion,

(a) declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; or
(b) vest title to the land so encroached upon in the owner of the building upon payment of the value thereof as determined by the court; or
(c) order the owner of the building to remove the encroachment.

[141] See *Capar* v. *Wasylowski*, [1983] 4 W.W.R. 526, 21 Man. R. (2d) 194, 146 D.L.R. (3d) 193 (Man. Q.B.) which adopts the analysis of Pennycuick V.C. concerning the constituent elements or components of prescriptive easements in *Diment* v. *N.H. Foot Ltd.,* [1974] 1 W.L.R. 1427 at 1432-33, [1974] 2 All E.R. 785.
See also *Blankstein* v. *Walsh*, [1989] 1 W.W.R. 277, 55 Man. R. (2d) 125 (Man. Q.B.)

[142] *Klimack et al.* v. *Kroeker et al*, 2020 MBCA 98

[18] The criteria to establish a prescriptive easement, in addition to the four characteristics common to all easements, are: (1) the use and enjoyment of the easement must have been uninterrupted for the prescribed time period (to be discussed further); and (2) the easement was used and enjoyed throughout the prescribed time period "as of right"—that is, without force (nec vi), without secrecy (nec clam) and without permission (nec precario).

See also *RPM Farms Ltd. et al*. v. *Laurence Jay Rosenberg et al*., 2019 MBQB 140.

[28] There are two time periods which are specified under The Prescription Act, namely 20 years and 40 years. In respect of the period under 40 years, the criteria which need to exist in order to permit the usage to morph into an easement are:

a) the usage must be continuous;

b) the usage must be uninterrupted;
c) the usage must be open and peaceful;
d) the usage must exist for a minimum period of 20 years; and
e) the usage must be without permission, either oral or written.

[29] If the usage has occurred continuously and uninterrupted in an open and peaceful way for 40 years, the 20-year criteria continue to apply except that proof of oral permission will no longer defeat the claim to the easement.

[143] *The Prescription Act*, 1832, 2 & 3 Will. 4, c. 71

[144] *The Court of Queen's Bench Act*, CCSM c C280

Application of laws of England
33(1) The court shall decide all matters relative to property and civil rights according to the laws of England as they existed on July 15, 1870, insofar as they can be made applicable to matters relating to property and civil rights in the Province, except as they may have been changed or altered by
(a) an Act of the Legislature or of the Parliament of Canada;
(b) an Act of the Parliament of the United Kingdom affecting the province and enacted before the coming into force of the Statute of Westminster, 1931; or
(c) a rule or order of the court.

[145] *Stall* v. *Yarosz*, 47 W.W.R. 113, 43 D.L.R. (2d) 255 (Man. C.A.)

12 The common law recognized the creation of easements by long user. The *Prescription Act*, 1832, 2 & 3 Wm. IV, ch. 71, of the Imperial Parliament, as well as the common law, is, as at July 15, 1870, in force in this province except as it may have been altered by provincial or federal legislation, and there has been no change in so far as this action is concerned. Sec. 2 of that Act preserves the common-law right of acquisition of a right of way easement by prescription.

[146] *Klimack et al.* v. *Kroeker et al*, 2020 MBCA 98

[38] The Kroekers argue that, if the arrangement for use of the access road was, in fact, an oral permissive licence at the outset, the 40-year time period for the establishment of a prescriptive easement restarted each time title to the servient lots changed. I understand this argument to be that, while a 40-year easement is not defeated by oral permission (see RPM Farms at para 29), the 40-year period restarts every time there is a change in ownership as the oral permission must be renewed by the new owner. Counsel was unable to point to jurisprudence supporting this position.

[147] *The Crown Lands Act*

No title by possession
34 No person may acquire title to or any claim upon Crown land by any length of possession.

Federal Real Property and Federal Immovables Act (S.C. 1991, c. 50)

No title by prescription
14 No person acquires any federal real property or federal immovable by prescription.

[148] *The Law of Property Act*

Access and use of light
29 No person acquires a right, by prescription, to the access and use of light to any building, structure or work.

[149] *RPM Farms Ltd. et al.* v. *Laurence Jay Rosenberg et al*., 2019 MBQB 140

[59] I do not consider that a decision by an owner to plant a treeline on his neighbours' property when there is nothing preventing that owner from planting the treeline on his own property makes a subsequent claim reasonably necessary for the enjoyment of that owner's property. To suggest otherwise would be to encourage a unilateral and unnecessary expansion of the limits of that owner's property…

[150] *RPM Farms Ltd. et al*. v. *Laurence Jay Rosenberg et al.*, 2019 MBQB 140 at paragraphs 34-37

[151] *Atlas Acceptance Corp*. v. *Lakeview Development of Canada Ltd.* [1991] 6 W.W.R. 366, 74 Man. R. (2d) 276

21 The plaintiffs claim an "**easement** by **necessity**" on the ground that it is essential for them, their tenants and customers to use the alleged right of way in order to go north on Pembina Highway. *Gale on Easements*, 14th ed. (1972), defines such an easement as [p. 117]:

> A way of necessity arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the part so left inaccessible is entitled, as of necessity, to a way over the other part. The principle no doubt applies where both parts are disposed of simultaneously, either by grant *inter vivos*, or by will.

[152] *Western Fish Products Ltd*. v. *Penwith* (District Council), [1981] 2 All E.R. 204 at 217 (Eng. C.A.)

See also *Hill* v. *Nova Scotia (Attorney General)* (1997), 142 D.L.R. (4th) 230, 206 N.R. 299, 1997 CarswellNS 10, 1997 CarswellNS 11, [1997] 1 S.C.R. 69, 157 N.S.R. (2d) 81, 462 A.P.R. 81, 60 L.C.R. 161 (S.C.C.)

[153] *The Real Property Act*

Caveat to show both tenancies
154(2) A caveat that is registered to protect an interest that creates or purports to create a right of way or an easement, other than a statutory easement, must contain the legal description of the dominant and servient tenement.

[154] *The Real Property Act*

Effect of declaration
76(2) A declaration made by the owner of the land has the same force and effect as an agreement referred to in subsection (1) if

(a) the declaration is set out in an instrument that is in a form approved by the district registrar;
(b) the declaration is registered; and
…

Effect of registration of declaration
76(3) A declaration registered under subsection (2) has the same force and effect as a party wall agreement, a right of way agreement or easement agreement and shall, for all purposes, be deemed to be a party wall agreement, a right of way agreement or easement agreement and **"party wall agreement"**, where used in any Act of the Legislature, includes a declaration registered under subsection (2).

[155] *The Real Property Act*, section 72.9

[156] *The Real Property Act*

Party wall, right of way and easement agreements
76(1) A party wall agreement, a right of way agreement or an easement agreement may be registered against the lands affected by such an agreement if, at the time it is registered,

(a) the district registrar is satisfied that the lands affected are
(i) adjoining, in the case of a party wall agreement, or
(ii) in reasonable proximity, in the case of a right of way agreement or an easement agreement;

(b) the agreement has been executed by persons who are, or are entitled to be, the registered owners of the lands affected by the agreement; and
(c) all persons with a registered claim or interest in the lands affected by the agreement consent to the registration.

[157] *Attrill* v. *Platt* (1884), 10 S.C.R. 425 (S.C.C.)

5…It is manifest that one piece of land cannot be said to be burdened by a servitude in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do. There was therefore, when the title to all these lands came to be vested in the same owner, an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, ceased to be so, and became mere easements in fact — quasi-easements, as they are sometimes called…

16…It has already been shown that the renewed lease came to an end and the stipulation giving a right to purchase the mill property thereby became inoperative on the 1st May, 1870, from which date the railway company were seized in fee in possession, or with a right to the immediate possession, of the mill property and were also seized in fee of so much of block F as had not been included in the lease, and that consequently from that date all easements were extinguished by unity of ownership…

[158] *The Real Property Act*

Discharge of party wall agreement
76(5) The registration of an agreement under subsection (1) as to all or part of the lands affected thereby may be discharged by the registration of a discharge thereof in a form approved by the district registrar executed by the registered owners of all the lands against which the agreement is registered, and consent to which has been given by all persons appearing on the register to have an interest in the lands, and who are affected by the agreement.

[159] *Real Property Act*

Party wall, right of way and easement agreements
76(1) A party wall agreement, a right of way agreement or an easement agreement may be registered against the lands affected by such an agreement if, at the time it is registered,
…
(c) all persons with a registered claim or interest in the lands affected by the agreement consent to the registration.

[160] *Moore* v. *Rawson* (1824), 3 B. & C. 332; 3 L. J. K. B. 32, per Abbott C.J.:
It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burden of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining land for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect.

[161] *Pharand* v. *Jean-Louis*, [1952] O.W.N. 522, [1952] O.R. 665 at 671, (Ont. C.A.)

Non-user of a right of way did not of itself constitute an abandonment. Baker v. Harris, 65 O.L.R. 513, [1930] 1 D.L.R. 354; Seaman v. Vawdrey (1810), 16 Ves. 390, applied. The onus of establishing the extinction of a right of way by abandonment rested upon the servient owner, in this case the plaintiff. It was true that here there was continuous non-user for 21 years, while the fence was in existence, which might lead to an inference of abandonment. Bell v. Golding (1896), 23 O.A.R. 485, referred to. But abandonment of an easement, particularly where, as here, it was one created by express grant, was a matter of intention, and mere non-user did not extinguish the right. Liscombe v. Maughan, 62 O.L.R. 328, [1928] 3 D.L.R. 397, applied.

[162] *Stall* v. *Yarosz*, 47 W.W.R. 113, 43 D.L.R. (2d) 255 (Man. C.A.)

11 ... To abandon a right so secured requires intention of abandonment by the party abandoning, or an interruption of the user by the party seeking to enforce termination of the easement by such interruption and an acceptance of such interruption by non-enforcement of his rights by the other party. None of these essentials is present in this action. See Pharand v. Jean-Louis , [1952] O.R. 665 (C.A.); Liscombe v. Maughan, [1928] 62 O.L.R. 328 (C.A.); Baker v. Harris, [1930] 64 O.L.R. 513 (C.A.); and James v. Stevenson, [1893] A.C. 162, 62 L.J.P.C. 51.

[163] *Stokes et al*. v. *Composite Holdings Ltd.,* 2008 MBQB 124

13 The major provisions of the *Prescription Act* are summarized in the Manitoba Law Reform Commission Report entitled *Prescriptive Easements and Profits-à-Prendre*, 1982, as follows:

> **(iv) Interruption in use**
> At common law or under the lost modern grant doctrine any interruption in the use made by the servient owner is relevant only to the issue as to whether or not the use has been "as of right". However, section 4 of the *Prescription Act* requires that the period of use be "without interruption". No act is deemed to be an interruption unless a dominant owner has submitted to it or acquiesced in it for one year. The essential factor is not the obstruction or interruption as much as the acquiescence in it.

[164] *Austerberry* v. *Corporation of Oldham* (1885), 29 CH.D. 750(C.A.) at p. 781

But it strikes me, I confess, that there is a somewhat more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty; does a covenant to repair all this road run with the land -- that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it.

[165] *Fallowfield* v. *Bourgault*, 2003 CanLII 4266 (ON CA), [2003] O.J. No. 5206 (QL)

[166] *295 Garry Street Inc*. v. *Mittal et al*. Cited as: 2021 MBQB 215

[43] In Fallowfield, the Ontario Court of Appeal also provided useful guidance on its concept of ancillary rights, (at para. 11):

> [11] In interpreting the meaning and intent of an express easement, the concept of ancillary rights arises. The grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement. However, to imply a right ancillary to that which is expressly granted in the easement, the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable. Halsbury's explains the concept at p. 10, para. 20, in the following way:

The express grant of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment. The ancillary right thus implied must be necessary for the use and enjoyment, in the way contemplated by the parties, of the right granted; it is not sufficient that such an ancillary right would be convenient, usual, common in the district or reasonable. The most usual example of such an ancillary right is the right of the dominant owner to enter the servient tenement and execute such repairs upon the subject matter of the easement as are reasonably necessary for the enjoyment of the easement. The dominant owner is entitled to protect his right to enter and repair by preventing the doing on the servient tenement of anything which would materially interfere with or render more expensive or difficult the exercise of the right, and the court will restrain such an interference by injunction. It is no defence to proceedings by the dominant owner to show that he may still exercise his right if he only expends more money or exercises greater skill.

[167] *The Real Property Act*

Land subject to registered instruments
45(5) Land that is sold for taxes is deemed to be sold subject to
(a) easement agreements, including party wall and right of way agreements;
(b) statutory easements;

Land subject to registered instruments
141 Land that is sold under an order for sale made by the district registrar, or that vests in a mortgagee by order of foreclosure issued by the district registrar, is deemed to have been sold or vested subject to the registered instruments described in subsection 45(5).

[168] *The Real Property Act*

Restrictions on certificate
58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
(c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land;

[169] *The Real Property Act*

Non-application
58(1.1) Clause (1)(c) does not apply in respect of a right granted by an instrument under subsection 111(2) that has not been registered under subsection 111.1(2).

Right becomes statutory easement on registration
111.1(1) Once the instrument is registered in accordance with subsection (2), a right granted by an instrument under section 111
(a) becomes a statutory easement and is an easement for all purposes;
(b) is an interest in land; and
(c) runs with the land notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the eligible grantee in whose favour the right was granted;
and the conditions and covenants expressed in the instrument apply to and bind the respective successors, personal representatives and assigns of the grantor and grantee, except to the extent that a contrary intention appears in the instrument.

[170] *The Real Property Act*, November 8, 2007 to June 15, 2011

Rights analogous to easements
111(1) A right for
(a) the conveyance of water; or
(a.1) the inundation or storage of water; or
(b) drainage; or
(c) the disposal of sewage; or

(d) carrying or laying pipes or wires; or

(e) carrying, laying, erecting, or building conduits, cables, wires, poles, wind turbines or transmission lines; or

(f) the erection or maintenance of a public work as defined in The Public Works Act; or

(g) constructing, maintaining and operating a railway;

or any right of a like nature, over, upon, across, along, or under land, granted by an instrument in writing executed by the owner of the land, and by any person entitled to be registered as owner of the land, whether the land is under the old system or the new system, and, if the land has been sold by agreement for sale, by both the vendor and the purchaser under the agreement, or by his or their respective personal representatives or assigns in favour of

(h) the Crown, MTS NetCom Inc., The Manitoba Hydro Electric Board, a municipality, a local government district, an industrial townsite, or the owner of a public utility; or

(i) any corporation or person supplying water, power, light, telephone, telegraph, cable television, telecommunications, railway, fire protection, drainage, or sewage services;

is enforceable notwithstanding that the benefit of the right is not, or may not be, appurtenant or annexed to any land of the grantee; and the instrument may be registered in the land titles office of the district in which the land is situated or, if the land is under the new system, the grantee may file a caveat, having attached thereto a copy of the instrument.

[171] *The Real Property Act*

Right becomes statutory easement on registration

111.1(1) Once the instrument is registered in accordance with subsection (2), a right granted by an instrument under section 111

(a) becomes a statutory easement and is an easement for all purposes;

(b) is an interest in land; and

(c) runs with the land notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the eligible grantee in whose favour the right was granted;

and the conditions and covenants expressed in the instrument apply to and bind the respective successors, personal representatives and assigns of the grantor and grantee, except to the extent that a contrary intention appears in the instrument.

[172] *The Real Property Act*

Activities and undertakings

111(3) A right over land under this section may be granted in respect of the following activities or undertakings:

(a) constructing, erecting, laying, carrying, operating, maintaining or doing the following:

(i) storing, conveying or supplying water,

(ii) inundating land,

(iii) drainage or supplying drainage services,

(iv) disposing of sewage or supplying sewage services,

(v) supplying light, telephone, telegraph, cable television, Internet, telecommunications or fire protection,

(vi) supplying or generating power,

(vii) a public work, as defined in The Public Works Act, gas pipe line, as defined in The Gas Pipe Line Act, pipeline, as defined in The Oil and Gas Act, railway or wind turbine,

(viii) an activity or undertaking similar to those in subclauses (i) to (vii);

(b) works and facilities that are related to the activities and undertakings described in clause (a), such as pipes, conduits, cables, wires, poles, transmission lines, waterworks and water control works.

[173] *The Real Property Act*

Definition of "eligible grantee"

111(1) In this section and in sections 111.1 to 111.5, "eligible grantee" means

(a) the Crown, Manitoba Hydro, a municipality, a local government district or an industrial townsite incorporated under The Local Government Districts Act;

(b) MTS Allstream Inc. or the owner of a public utility, as defined in The Public Utilities Board Act, not otherwise described in clause (a);
(c) a person who carries on an activity or undertaking described in clause (3)(a) or acquires a right to do so; or
(d) a person in a class of persons designated by regulation.

[174] *The Real Property Act*

Registration of statutory easement
111.1(2) To register a right granted by an instrument under section 111 as a statutory easement, an eligible grantee must register,
(a) if the land is under the old system, the instrument granting the right in the registry office in the district in which the land is situated; or
(b) if the land is under the new system,
(i) the instrument granting the right, if it is in a form satisfactory to the district registrar, or
(ii) a caveat that has a copy of the instrument attached to it.

[175] *The Real Property Act*, s. 111.1(1) and

Restrictions on certificate
58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
(c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land;

Non-application
58(1.1) Clause (1)(c) does not apply in respect of a right granted by an instrument under subsection 111(2) that has not been registered under subsection 111.1(2).

[176] *The Real Property Act*, sections 111.3(1), 112(1), 112(5) and 112(6)

[177] *Stony Mountain Enterprises Ltd*. v. *Genstar Corp* [1986] 5 W.W.R. 763, 42 Man. R. (2d) 294

6 A profit à prendre is a right to enter upon the land of another to take something off that land. It may be created "for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest, such as a term of years, and is a tenement in the strict legal sense of the term": 14 Hals. (4th) 120, para. 250. It was described by Wells J. in Cherry v. Petch, [1948] O.W.N. 378 at 380 (H.C.), as follows:

It has been said that a profit à prendre is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property. It is in effect a grant of the ownership of such portions of the land as are conveyed.

If this is so, there is no necessity for such a grant being for a definite term, as is necessary in the case of a lease ...

[178] *R*. v. *Interprovincial Co-operative Ltd*. [1975] 5 W.W.R. 382, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321

66 The right to fish in Manitoba is within the class of profits à prendre, being a real property interest which may exist either in gross or as appurtenant to a dominant tenement.

Stony Mountain Enterprises Ltd. v. *Genstar Corp*. [1986] 5 W.W.R. 763, 42 Man. R. (2d) 294

7 The meaning of a right in gross is explained in 14 Hals. (4th) 118, para. 245, as follows:
Unlike an easement ... a profit à prendre may also exist in gross; that is to say it may exist as a right of property in favour of a man and his heirs or for any other estate or interest, quite unconnected with any estate or interest which the owner may have in any land. Where a profit à prendre exists in gross there is of course no dominant tenement.

[179] *R*. v. *Senick* [1982] 3 W.W.R. 589, 134 D.L.R. (3d) 586, 17 Man. R. (2d) 257 (MB CA)

14 The province of Manitoba hinges its appeal on the House of Lords decision in *Winter Garden Theatre (London)* v. *Millenium Productions,* [1948] A.C. 173, [1947] 2 All E.R. 331. In that case Winter Garden Theatre Ltd. granted a licence to Millenium Productions Ltd. to operate a theatre in a building owned by the licensor. The licence was for a general, undefined term, at a rent of £300 per week. Lord Porter in his judgment noted that the historical development of the law is against the contention that a licence, once given in general terms, can never be terminated: "*prima facie* licences are revocable" (p. 339).

[180] *Sekretov* v. *Toronto (City)* (1973), 33 D.L.R. (3d) 257, (Ont.CA)

The law of Ontario and of the other common law Provinces plainly require that the dominant land for the benefit of which a restrictive covenant is imposed in a deed from the covenantee to a purchaser of other lands of the covenantee must be ascertainable from the deed itself; otherwise, it is personal and collateral to the conveyance as being for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser. This was laid down by Judson, J., in Galbraith v. Madawaska Club Ltd., supra, in the plainest terms, the minimum requirement being, as the learned jurist stated, that the deed itself must so define the land to be benefited as to make it easily ascertainable.

See also *Canada Safeway Ltd*. v. *Thompson (City)* [1996] 10 W.W.R. 252

20 In their brief, counsel for Safeway referred to and relied upon DiCastri, in his text, Registration of Title to Land, (Carswell, 1987), where he summarizes the conditions which must be fulfilled in order to create a restrictive covenant enforceable against the covenantor and his successors in title (pp. 10-3 to 10-5):

(c) The benefitted as well as the burdened land must be defined with precision in the instrument creating the restrictive covenant. ...

[181] *Kirk* v. *Distacom Ventures Inc*. (1996) 4 R.P.R. (3d) 240, 81 B.C.A.C. 5, 132 W.A.C. 5 (BCCA)

English and Canadian courts have disagreed about the purposes for which extrinsic evidence may be used in identifying dominant land where the instrument creating a covenant is less than precise.
…
Restrictive covenants will only be unenforceable if the identity of dominant lands remains in any doubt after adducible extrinsic evidence has been considered.
…
Consideration of the deeds by which other purchasers took land from the trustee and of the 1917 trust indenture fails to clarify the ambiguity on the face of the Wickson deed. Notwithstanding the apparent intention of the trustee that there be a covenant on Lot F, it is impossible to ascertain the lands intended to benefit from the Lot F covenant. As such, the Lot F covenant is unenforceable. This finding is also fatal to Lot F being a part of an enforceable common law building scheme. This is because it is not possible to determine the area of such a scheme. To be enforceable this area must have been known to every purchaser of land within it.

[182] *Canadian Construction Co*. v. *Beaver (Alta.) Lumber Ltd*. [1955] 3 D.L.R. 502 (S.C.C.)

As pointed out by Farwell J. in delivering the judgment of the Court of Appeal in Zetland v. Driver, [1938] 2 All E.R. 158 at p. 161 covenants restricting the user of land imposed by a vendor upon a sale fall into three classes: (i) covenants imposed by the vendor for his own benefit, (ii) covenants imposed by the vendor as owner of other land of which that sold formed a part, and intended to protect or benefit such unsold land, and (iii) covenants

imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of, and be bound by, the covenants.

[183] *Hi-Way Housing (Sask.) Ltd*. v. *Mini-Mansion Construction Co*., [1980] 5 W.W.R. 367, 15 R.P.R. 216, 4 Sask. R. 415, 115 D.L.R. (3d) 145 (C.A.)

As the learned authors point out, where any one of these criteria is absent the covenant is said to be personal or collateral.

What are the consequences material to the present case that flow from a finding that the covenant is personal? First, the covenant is capable of being merged in a subsequent deed or conveyance: see Knight Sugar Co. v. Alta. Ry. & Irrigation Co., [1938] 1 W.W.R. 234, [1938] 1 All E.R. 226, [1938] 1 D.L.R. 321 (P.C.); Hashman v. Anjulin Farms Ltd., [1973] S.C.R. 268, [1973] 2 W.W.R. 361, 31 D.L.R. (3d) 490, affirming [1971] 2 W.W.R. 81, 17 D.L.R. (3d) 113, which affirmed 73 W.W.R. 44, 10 D.L.R. (3d) 228. Second, unless the covenant is merged or for some

other reason becomes emasculated, the ordinary right, in contract law, of the vendor, an original party, to enforce the covenant against the other original party to the contract, the purchaser, remains unimpaired. (It is important to emphasize and keep in mind that here we are not concerned with the rights of assignees or successors-in-title of the vendor or purchaser.) Third, a personal covenant such as the one here creates no interest in the land: see Can. Const. Co. v. Beaver (Alta.) Lbr. Ltd., supra.

[184] *Canada Safeway Ltd*. v. *Thompson (City),* [1996] 10 W.W.R. 252 (Mb QB)

19 Mr. Justice Morse, in *Lorne Ritchie Enterprises Ltd.* v. *Canada Life Assurance Co.,* [1976] 5 W.W.R. 130 (Man. Q.B.), referred to (at p. 136) and relied on the majority judgment of the Ontario Court of Appeal in *White* v. *Lauder Developments Ltd.* (1975), 60 D.L.R. (3d) 419 (Ont. C.A.), where Kelly, J.A., for the majority of the Ontario Court of Appeal, stated at p. 427:

> For the creation of such a negative easement certain qualifying conditions must be present:
> 1. The covenant or agreement must be negative in essence.
> 2. It must affect, and to have been intended by the original parties to affect, the land itself by controlling its use.
> 3. Two plots of land must be concerned, one bearing the burden and one receiving the benefit, in a sense a **servient** and a **dominant** tenement.
>
> Where any of these conditions is absent the covenant will be personal or collateral and will not impose a burden on the **servient** tenement nor confer a benefit on the **dominant** tenement.

See also *Crump* v. *Kernahan*, (1995) 32 Alta. L.R. (3d) 192, 48 R.P.R. (2d) 231 (Alta.Q.B.)

In order for a covenant to be enforceable against an assignee of the original covenantor's land, in this case Mr. Crump, equity has traditionally demanded that three conditions be fulfilled: 1) the covenant must be negative in nature; 2) the covenant must be made for the protection of land retained by the covenantee or his assignees; 3) the burden of the covenant must have been intended to run with the covenantor's land. If any of these three conditions is not met, then the burden of the covenant will not run with the land. (See R.E. Megarry and H.W.R. Wade, The Law of Real Property, 5th ed. (London: Stevens & Sons, 1984), pp. 773-80.)
And see Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co., [1980] 5 W.W.R. 367, 15 R.P.R. 216, 4 Sask. R. 415, 115 D.L.R. (3d) 145 (C.A.)

The learned authors then prescribe the need for the following three criteria (which I accept as accurate) for a covenant to be a restrictive covenant:

1. The covenant must directly affect the land of the covenantor by controlling its user.
2. The observance of the covenant must directly benefit the land of the covanantee.
3. The original contracting parties must have intended that the covenant shall run with the land.

[185] *Kelly* v. *Barrett*, [1924] 2 Ch. 379 (Eng. Ch. Div.), at 395-396

...it is an essential of effectual annexation of the benefit that they should touch or concern the land.

[186] *880682 Alberta Ltd*. v. *Molson Breweries Properties Ltd*., [2003] 2 W.W.R. 642 (Alta. Q.B.)

13 There is no real difference between the parties on the legal test that is applicable to the issues before me. The parties are agreed that, to be effective as against subsequent purchasers, a restrictive covenant must be such that the servient lands "touch or concern" the dominant lands and that the lands must be "proximate". Moreover, the parties agree that it is questions of fact as to whether the covenant touches and concerns the lands to be benefitted and proximate connections are present.

[187] *880682 Alberta Ltd*. v. *Molson Breweries Properties Ltd*., [2003] 2 W.W.R. 642 (Alta. Q.B.)

39 To this and the 200 mile distance, Counsel for Molson responded (para. 34) that 880682's "argument does not pay the requisite attention to today's business realities". But, again, the focus is on business not land, when the principles applicable to restrictive covenants relate to land not business.
…
41 …(T)he point I accept is that modern "business realities" do not change the fundamental nature of property law, and that is what I find Molson seeks to do in this case.
…
45 I find the purpose of the Restrictive Covenant here is merely collateral to land. It is in relation to a business that need have no connection to the Edmonton Lands; Molson's business could just as easily supply the market from Saskatchewan or BC or elsewhere, without having anything to do with the lands. Indeed, as Counsel for 88063 noted (para. 3):

> As admitted by the Molson representative in his cross-examination, land anywhere from Vancouver to Montreal and into the Western United States, if used as a brewery, could similarly affect the Edmonton Lands. With respect, the connection is far too tenuous to support the Covenant.

I agree with that conclusion.

[188] *Elliston* v. *Reacher*, [1908] Ch. 374

It must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. ...
…
Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the first three points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point.

[189] *Lakhani* v. *Weinstein* (1980) 16 R.P.R. 305, 31 O.R. (2d) 65, 118 D.L.R. (3d) 61 (Ont.S.C.)

Attractive as is the theory that one looks to all the evidence in order to consider whether there is that community of interest and reciprocity of obligation that defines a building scheme and that the requirements in Elliston v. Reacher are only evidence which would be conclusive, I have to consider that Elliston v. Reacher has been followed so often in our Courts that the confusion a change of law would give should occur only as a result of

the decision of a higher Court. It is for this reason that I would follow the decision in Pinewood, supra, and hold that the absence of a common vendor is fatal to the existence of a building scheme.

[190] *Jacques* v. *Alexander (District)*, 33 M.P.L.R. (2d) 81, [1996] 7 W.W.R. 677, 109 Man. R. (2d) 223

Building restrictions and building schemes that run with the land require very careful creation. As noted above, the requirements set out in Elliston v. Reacher are still applicable today. Strict scrutiny of these requirements is appropriate as these restrictions, if created, run with the land without limit on duration, subject, of course, to limits created by or through statutory authority.

[191] *The Real Property Amendment Act*, S.M. 2011, c. 33, s. 19.

[192] *The Real Property Act*

Registration of development scheme

76.2(1) A development scheme that affects two or more parcels of land may be registered if

(a) the following is registered against each of the parcels:

(i) if the parcels are owned by one registered owner, a declaration that complies with subsection (3),

(ii) if the parcels are owned by more than one registered owner, an agreement that complies with subsection (3); and

(b) the district registrar is satisfied that, at the time the declaration or agreement is registered, all persons with a registered claim or interest in any of the parcels consents to the registration.

[193] *The Real Property Act*

Effect of registration

76.3(1) Upon registration, a declaration or agreement respecting a development scheme attaches to and runs with the affected land, as provided for in the scheme, and any subsequent instrument affecting the land that is registered under this Act is subject to the development scheme, regardless of whether the scheme is mentioned in the instrument.

[194] *The City of Winnipeg Charter*

[195] *The Planning Act*

[196] *Jacques* v. *Alexander (District)*, 33 M.P.L.R. (2d) 81, [1996] 7 W.W.R. 677, 109 Man. R. (2d) 223 (ManQB)

The Building Restriction Provisions state that "[t]he burden and benefit of these restrictions and covenants shall run with the lands and shall be annexed to and run with each and every part of the land, ...". But is that wording enough? I have come to the conclusion that it is not…I have reached this conclusion for various reasons:

…

2) The LGD was attempting to do through agreement which it could only do through a zoning by-law or designation under a planning scheme. The LGD had no authority, at the time the Development Agreement was entered into, to enter into the Building Restriction Provisions with Oak Ridge Enterprises Ltd. At that time in 1977 The Planning Act, S.M. 1975, c. 29 - Cap. P80, granted the LGD the power to approve an application for subdivision subject to certain described conditions.

…

It is important to note that the Legislature, only in 1986, provided statutory power to a municipality to enter into an agreement with an owner to limit, regulate or prohibit any existing or future use of the land or building where there is no zoning by-law or planning scheme affecting the land in question. This resulted from amendments to The Planning Act proclaimed in force on November 1, 1986.

…

Because the LGD had no authority to enter into the Building Restriction Provisions, these provisions were ultra vires the LGD and are of no force and effect. These provisions are void ab initio because of lack of capacity and cannot be rendered legal and binding by any action on the part of The Local Government District of Alexander…

[197] *Hechter* v. *Winnipeg (City)*, (2004) 2 M.P.L.R. (4th) 161, 245 D.L.R. (4th) 264 (MBCA)

The applicants further argue that even if the development agreement was valid, the City had no jurisdiction to amend it without a corresponding application for the adoption of a zoning by-law in accordance with ss. 591(1) and 629(1) of the CWA. They maintain that there is no authority for the City to amend a development agreement.

I agree with the application judge and the respondents that the right to enter into an agreement must implicitly carry with it the right to rescind or amend that agreement. It does not seem practical to require the City to pass a new zoning by-law or amend the existing by-law merely to amend a development agreement when there would be no alteration to the text of the by-law itself. The express language of s. 591(1) does not make the authority of the City to enter into development agreements contingent upon the adoption of a zoning by-law.

[198] *United Taxi Drivers' Fellowship of Southern Alberta* v. *Calgary (City)* 2004 SCC 19

7 Alberta's Municipal Government Act follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature": Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26. This approach is also consistent with s. 10 of Alberta's Interpretation Act, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[199] *The Planning Act*, sections 107, 116, 135 and 150

[200] *The Planning Act*

Registering development agreements
151(1) Any development agreement under this Act may provide that it runs with the land, and when a caveat with a copy of such an agreement attached is filed in the appropriate land titles office, the agreement binds the owner of the land affected by it, and the owner's heirs, executors, administrators, successors and assigns.

[201] *The Planning Act*, section 1515(1)

[202] *The City of Winnipeg Charter*, section 240(1)

[203] *The City of Winnipeg Charter*

Registration of agreement in L.T.O.
240(2) An agreement referred to in subsection (1) may provide that it runs with the land referred to in the agreement, and an instrument that indicates the existence of the agreement may be registered against the land in the land titles office.

[204] *The City of Winnipeg Charter*

Conditions for plans of subdivision
259(1) Council may, by by-law, provide that approval of proposed plans of subdivision be made subject to one or more of the following conditions:

…

(f) that the owner of land within a proposed subdivision enter into one or more agreements with the city respecting such matters as council considers advisable or necessary, which agreements may include, without limiting the generality of the foregoing, requirements that

(i) the owner pay to the city some or all of the cost of existing or future public works, including the cost of any related environmental, engineering or other studies or reports, which benefit or will benefit the proposed subdivision,

(ii) the owner construct or pay for all or part of the capacity of the public works in excess of the capacity required for the proposed subdivision, and

(iii) the city reimburse the owner for the cost, including interest at such rate as is agreed on, of the excess capacity referred to in subclause (ii) when money is recovered by the city from owners of other lands benefited by the excess capacity or at some earlier time.

Caveat respecting agreements

268(1) Where the city enters into an agreement pursuant to a condition imposed under this Part, a caveat giving notice of the agreement may be filed against land affected by the agreement in the land titles office and thereafter the agreement runs with the land and, without special mention in the caveat, binds the owner of the land, successors in title to the owner and heirs, executors, administrators and assigns of the owner.

[205] *The City of Winnipeg Charter*

Disposition of applications for variances

248(1) An application for a variance may be

…

(b) approved subject to conditions that will ensure that any development to be carried out under the variance meets the criteria set out in subsection 247(3).

[206] *The City of Winnipeg Charter*

Agreements

240.2(1) As a condition of issuing a building permit or approving a variance, the city may require the owner or owners of each parcel affected by the permit or variance to enter into a conforming construction agreement with the city.

The Planning Act

Agreements

151.1(1) As a condition of issuing a building permit or making a variance order, a permitting authority may require the owner or owners of each parcel of land affected by the permit or order to enter into a conforming construction agreement with the authority.

The Real Property Act

Registering agreement

76.5(2) The district registrar of the appropriate land titles office must register a conforming construction agreement submitted by the permitting authority.

[207] *The Planning Act*, s. 151.1(2), *The City of Winnipeg Charter*, s. 240.2(2)

[208] *The Planning Act*, s. 151.1(3)(c), *The City of Winnipeg Charter*, s. 240.2(3)(c)

[209] *The Real Property Act*

Registration of standard terms

96(4) A person may, with the consent of a district registrar, register a deposit at the land titles office, for the District of Winnipeg, of a set of standard charge mortgage terms.

[210] *The Real Property Act*

Mortgage does not transfer any estate
98 A mortgage or an encumbrance under the new system has effect as security but does not operate as a transfer of the land charged.

[211] *The Real Property Act*

Mortgagee's rights
113 A first mortgagee, for the time being, of land under this Act, has, during the currency of his mortgage, the same rights and remedies at law and in equity as he would have had, had the legal estate in the land or term mortgaged been vested in him, with a right in the owner of the land of quiet enjoyment thereof until default in the payment of money secured thereby, or in the performance of a covenant expressed or implied therein.

[212] *The Real Property Act*

Severance of joint tenancy
79(1) The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy — other than a transmission by a trustee in bankruptcy or one giving effect to an order of the court — unless

(a) the instrument is executed by all the joint tenants;

(b) all the joint tenants, other than those executing the instrument, give their written consent to the instrument; or

(c) the district registrar is provided with evidence, satisfactory to the district registrar, that all joint tenants who have not executed the instrument or given their consent to it have been served with a notice of intent to sever, in an approved form, at least 30 days prior to the registration of the instrument.

[213] *The Mortgage Act*

Mortgages, how affected by conveyances subsequently registered
17 To remove doubts, every mortgage duly registered against the lands comprised therein is, and, subject to section 31 of The Builders' Liens Act, shall be deemed to be, as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through, or under him, a security upon the lands to the extent of the moneys or money's worth actually advanced or supplied to the mortgagor under the mortgage (not exceeding the amount for which the mortgage is expressed to be a security), notwithstanding that the moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any certificate of judgment or of any conveyance, mortgage, or other instrument, affecting the mortgaged lands, executed by the mortgagor or his heirs, executors, or administrators, and registered subsequently to the first-mentioned mortgage, unless before advancing or supplying the moneys or money's worth the mortgagee in the first-mentioned mortgage had actual notice of the registration of the certificate of judgment or of the execution and registration of the conveyance, mortgage, or other instrument; and the registration of the certificate of judgment, conveyance, mortgage, or other instrument, after the registration of the first-mentioned mortgage, does not constitute actual notice to the mortgagee of the judgment, conveyance, mortgage, or other instrument.

The Builders' Liens Act

Priority of lien
31 A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments made, before registration of a claim for lien, on account of a conveyance or mortgage, have priority over the lien.

[214] *The Real Property Act*, Land Titles Office Regulation, Regulation 74/2014

Office hours
1 Each land titles office shall be open from 8:30 a.m. to 4:30 p.m. every day except for Saturdays, Sundays and any other day or part of a day observed as a holiday in the civil service under *The Civil Service Act* or a collective agreement under that Act.

Registration hours
2(1) An instrument may be registered in a land titles office before 3:00 p.m. on any day the office is open. No instrument shall be registered after 3:00 p.m.

2(2) Despite subsection (1), when a land titles office is required to be kept open only for part of a day, an instrument may be registered before 12 noon on that day. No instrument shall be registered after 12 noon.

[215] *Re: Lambton Farmers Ltd*. (91 D.L.R. (3rd) 290))

8 As to the first question, it was agreed and seems well established that apart from a consideration of s. 72 of The Registry Act, R.S.O. 1970, c. 409, the fact that the amount for which the mortgage is expressed to be a security is not set out in terms of dollars does not render the mortgage invalid

[216] *The Mortgage Act*, s. 17

[217] *The Real Property Act*

Instruments in old form
66(5) The district registrar may permit an instrument in the old system form to be registered under the new system if
(a) the instrument deals with land that is under the new system; and
(b) the district registrar is satisfied that the instrument contains sufficient content to pass an estate or interest in land.
An instrument registered under this subsection has the same effect as, and is deemed to contain the implied covenants of, a new system instrument of like nature.

[218] *The Real Property Act*

Registration to pass rights
101(2) Upon the registration of a transfer of a mortgage, encumbrance, or lease, the mortgage or encumbrance or the estate or interest of the lessee, as set forth in the transfer, with all rights, powers, and privileges, thereto belonging or appertaining, passes to the transferee; and the transferee thereupon becomes mortgagee, encumbrancer, or lessee, and is subject to the same requirements, and liable for the same liabilities, as he would have been subject to and liable for, if so named in the original instrument.

[219] *The Real Property Act*

Mortgage of mortgage deemed a transfer
101(4) A mortgagee of a mortgage or encumbrance shall, for the purposes of this section but subject to redemption, be deemed a transferee of the mortgage or encumbrance.

[220] *The Real Property Act*

Effect of registration of postponement
109(2) Where the person executing such a postponement registers it as provided in subsection (1), the registration thereof postpones his rights under the instrument affected respecting the land described in the postponement to those arising out of the subsequent mortgage or other instrument to which it is expressed to be postponed in the same manner and to the same extent as if the instrument affected had been registered or filed immediately after the registration or filing of the mortgage or other instrument to which it is so expressed to be postponed.

[221] *The Real Property Act*, s. 110(1)

[222] *The Real Property Act*

Definitions
1 In this Act, and in instruments purporting to be made or registered under this Act, unless the context otherwise requires
"**mortgagee**" means the owner of a mortgage; (« créancier hypothécaire »)
"**mortgagor**" means the owner of land subject to a mortgage;

[223] *Criminal Code*, R.S.C., 1985, c. C-46

Criminal interest rate
347 (1) Despite any other Act of Parliament, everyone who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
(b) guilty of an offence punishable on summary conviction and liable to a fine of not more than $25,000 or to imprisonment for a term of not more than two years less a day, or to both.

Definitions
(2) In this section,
…
criminal rate means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
…
interest means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

[224] *The Real Property Act*, s. 105.1(1)

[225] *The Real Property Act*

Charge for providing discharge
105.1(3) The person who submits a discharge of an interest to a district registrar under subsection (1) must not charge an amount for preparing and registering the discharge that exceeds the maximum amount set out in the regulations.

The Real Property Act, Real Property Regulation, Regulation 198/2011

Maximum charge for providing discharge
3 For the purpose of subsection 105.1(3) of The Real Property Act, the maximum amount that a person may charge for preparing and registering a discharge of an interest is $100 plus applicable taxes and the amount paid under that Act for the registration of the discharge and for one search of each title affected by the interest being discharged.

[226] https://teranetmanitoba.ca/wp-content/uploads/2020/12/Land-Titles-Guide-V67.1-English.pdf

[227] *The Real Property Act*

Statute barred mortgage
106(1) Where a limitation imposed by *The Limitation of Actions Act* in regard to a mortgage or encumbrance made under this Act, comes into effect, a mortgagor under the mortgage or a person whose land is charged with the encumbrance may apply to the court for a declaration and order extinguishing the mortgage or encumbrance.

Court to grant order
106(2) Where, on an application made under subsection (1) the court is satisfied that the applicant is entitled to the declaration and order for which the application is made, the court shall declare that the mortgage or encumbrance is statute barred and thereby extinguished and shall, by order, direct the district registrar to note upon every certificate of title which was subject to the mortgage or encumbrance that the mortgage or encumbrance is statute barred and thereby extinguished and thereafter to treat the mortgage or encumbrance as if it had been wholly discharged by the person entitled by law to discharge it.

[228] *The Real Property Act*

Registrar-General may order discharge
107 The Registrar-General, upon proof being made to his satisfaction that all moneys due and owing upon the mortgage have been fully satisfied, and that the mortgage should be discharged, may order the district registrar to cause an entry to be made in the register discharging the mortgage, and the entry is a valid discharge of the mortgage.

[229] *The Mortgage Act*

Remedying of default by mortgagor
14 Where default has occurred in making any payment due under any mortgage or in the observance of any covenant contained therein and, under the terms of the mortgage, by reason of the default, the whole principal and interest secured thereby has become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform the covenant or pay such arrears as may be in default under the mortgage, together with costs, and he is thereupon relieved from the consequences of non-payment of so much of the mortgage money as may not then have become payable by reason of lapse of time.

[230] *Toronto Dominion Bank* v. *Pratt*, 1991 CarswellAlta 265, 30 A.C.W.S. (3d) 1064, 85 Alta. L.R. (2d) 388

22 The part of the mortgage which says that the amount secured is payable on demand cannot be read in isolation. It is elementary law that all the terms must be looked at. It is clear from the quoted clause that the mortgage is security for any liabilities that the wife has to the plaintiff. One of those is the wife's liability on the note.

23 The plaintiff cannot have it both ways. It takes the mortgage as security for all debts owing by the wife and it wants to treat the mortgage as a "demand mortgage" regardless of the structure of the other debts. If the plaintiff's position is correct it could foreclose even if the defendants had not defaulted on the note. That is not sensible.

24 By hitching the mortgage to debts which have a structured payment schedule the plaintiff hitches itself to the possible burden of s. 39. I make it clear that we are concerned only with the foreclosure. The wife is entitled to the benefit of s. 39 if the breaches which trigger the cause of action on the mortgage are non-payment of money when due.

[231] *Canadian Western Bank* v. *612284 Alberta Ltd*., 2003 ABQB 178, 2003 CarswellAlta 183, [2003] A.J. No. 224, 121 A.C.W.S. (3d) 161

9 The mortgage is a demand mortgage. A debt due on demand is in law due in full the moment that a binding contract is formed: Canada Trustco Mortgage Co. v. 112293 Holdings Ltd. (1984), 72 A.R. 357 (Alta. C.A.). The fact that the lender does not immediately demand payment and lets the borrower make regular payments on the

debt does not make the debt one payable by regular payments. Section 38(1) Law of Property Act does not apply to a mortgage debt due on demand.

[232] *Brown et al*. v *Richard Boon, Arthur Boon, Daylight capital Corporation and 4638817 Manitoba Ltd*., 2018 MBCA 14

[23]… Because such an inquiry relates to a right in equity, it must go beyond the form of the transaction that the documents purport and take into consideration not just the surrounding circumstances, but also any relevant extrinsic evidence as to the parties' real intentions. Where there is clear and conclusive evidence that the objective and purpose of the transaction is a mortgage, contractual stipulations interfering with the mortgagor's equitable right of redemption are void based on repugnancy…

[233] *The Mortgage Act*, s. 15

[234] *Interest Act*, R.S.C., 1985, c. I-15

No fine, etc., allowed on payments in arrears
8 (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

[235] *Krayzel Corp*. v. *Equitable Trust Co*., 2016 SCC 18, 2016 CSC 18, 2016 CarswellAlta 788

[236] *Walia* v. *2155982 Ontario Inc*., 2020 ONCA 493

10 First, he argues that the motion judge erred in her declaration that the condition of the mortgage increasing the rate of interest was invalid because it violated s. 8. Walia relies on the Supreme Court of Canada's decision in Krayzel Corp. v. Equitable Trust Co., 2016 SCC 18, [2016] 1 S.C.R. 273 (S.C.C.). He contends that the mortgage rate increase in the second mortgage commitment is triggered only by the passage of time and does not infringe s. 8.
…
12 Turning to the first issue, the motion judge found that the condition of the second mortgage commitment increasing the rate of interest violated s. 8. For ease of reference, the condition is set out below:
The mortgage will become due and payable at the end of the term, failing which or in default of any payment interest rate of interest will be 21% per annum.
13 During the motion, Walia conceded that the phrase "or in default of any payment" violated s. 8. However, he urged the motion judge to strike out the offending language and find that the condition, as amended, did not violate s. 8. He argued that the 21 percent interest arose only because of the passage of time (i.e. the mortgage continued past the end of the term).
14 The motion judge disagreed, and she held that even if the offending words were removed, the provision would still have the effect of an increase to 21 percent because either one of two triggering events has occurred: (1) nonpayment of a monthly payment; or (2) nonpayment of the principal on the due date.
15 In her view, the condition offended s. 8 because it did not increase the rate of interest solely because of the passage of time. To the contrary, she held that once a mortgage has matured, and it has not been repaid on the date of maturity, the balance becomes outstanding and is in arrears. Therefore, the condition in this case increased the rate because of default.
16 We agree with the motion judge's finding.
17 Generally speaking, s. 8 creates an exception to the rule that lenders and borrowers are free to negotiate and agree on any rate of interest on a loan. The purpose of s. 8 is to prohibit lenders from levying fines, penalties, or rates of interest on any arrears of principal or interest that are secured by mortgage on real property. The prohibited effect is increasing the charge on arrears beyond the rate of interest payable on principal money not in arrears: P.A.R.C.E.L. Inc. v. Acquaviva, 2015 ONCA 331, 126 O.R. (3d) 108 (Ont. C.A.), at para. 51. In order to violate s. 8, the mortgage must both: (1) stipulate for a fine, penalty, or rate of interest; and (2) have the prohibited effect: P.A.R.C.E.L., at para. 55, citing Mastercraft Properties Ltd. v. EL EF Investments Inc. (1993), 14 O.R. (3d) 519 (Ont. C.A.), at p. 522, leave to appeal refused, (1994), [1993] S.C.C.A. No. 463 (S.C.C.).

18 Brown J., writing for the majority in Krayzel, held that in assessing whether a term violates s. 8, "[w]hat counts is how the impugned term operates, and the consequences it produces, irrespective of the label used" to describe the term. If the effect of a term is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended: Krayzel, at para. 25.

19 Krayzel involved a lender who was granted a mortgage that bore interest at the prime rate plus 2.875 percent per annum. On maturity, the parties entered into a renewal agreement for several months that provided the interest rate in the last month would increase to 25 percent. The parties then entered a second renewal. The second renewal set the interest rate at 25 percent per annum, but a discounted rate would apply if the mortgage was in good standing.

20 A majority of the Supreme Court concluded that the first renewal complied with s. 8, but the second renewal did not. The majority held that an interest rate increase triggered by the mere passage of time (and not by default), such as that imposed under the first renewal agreement, did not offend s. 8: Krayzel, at para. 33.

21 The motion judge considered the Krayzel decision. She acknowledged that a rate increase triggered by the passage of time alone does not infringe s. 8. However, she reasoned that the effect of the condition was a rate increase when the mortgage became due and the entire arrears were not paid by the due date.

22 We see no error in the motion judge's analysis. In this case, on a plain reading of the condition, there can be no doubt that the increase from 12 percent to 21 percent is triggered as a result of the nonpayment of the mortgage on the expiry of its term, which is a default. We agree with the motion judge that the condition contravenes s. 8 and is invalid.

[237] *P.A.R.C.E.L. Inc. et al*. v. *Acquaviva et al*., 2015 ONCA 331)

[95] The respondents point to no evidence on the record before this court demonstrating that they incurred any actual losses as a result of late or missed payments under the Mortgage, apart from the amount of the non-payment itself. This is not a case where it is alleged that payments made by or on behalf of Parcel under the Mortgage were returned “NSF” or otherwise rejected for payment, giving rise to administrative costs for the respondents.

[96] In the absence of evidence that the charges in question reflect real costs legitimately incurred by the respondents for the recovery of the debt, in the form of actual administrative costs or otherwise, the only reason for the charges was to impose an additional penalty or fine, apart from the interest otherwise payable under the Mortgage, thereby increasing the burden on the appellants beyond the rate of interest agreed upon in the Mortgage….

[238] *The Real Property Act*

Certificate of title

51(8) No separate certificate of title may be issued for the accreted land but it shall be consolidated with the adjoining land in a new certificate of title and shall be subject to the same encumbrances, liens and interests which at that time affect the title to the adjoining land.

[239] *The Real Property Act*

Registration of postponement

109(1) Any person appearing on the register to be entitled to the benefit of

(a) a mortgage or encumbrance; or

(b) a builders' lien under The Builders' Liens Act; or

(c) a judgment, lien or other instrument which has been registered and which claims or purports to claim an interest in or a charge on the lands of a debtor; or

(d) a lease; or

(e) a caveat; or

(f) a statutory easement;

(g) a lien or charge created by, or arising under an Act of the Legislature in favour of the Government of Manitoba, or in favour of a municipality; or

(h) a notice filed under The Personal Property Security Act;

(hereinafter in this section called "the instrument affected") that has been registered or filed against any land, may postpone his rights thereunder by execution and registration of a postponement in an approved form.

Meaning of "encumbrance"
110(4) Despite section 1, in this section "encumbrance" means an instrument described in subsection 109(1), other than a mortgage.

[240] *The Real Property Act*

New system mortgage or encumbrance
96(1) Where any land, mortgage, or encumbrance, under the new system is to be charged or made security in favour of a mortgagee, the owner shall execute a memorandum of mortgage in an approved form; and, where land is to be charged with or made security for the payment of an annuity, rent charge, or sum of money in favour of an encumbrancer, the owner shall execute a memorandum of encumbrance in an approved form, and every mortgage or encumbrance shall contain an accurate statement of all prior mortgages, encumbrances, or other registered instruments, affecting the land.

[241] *The Real Property Act*

Discharge of encumbrance
104 Upon proof of the death of the annuitant, or of the occurrence of the event or circumstance upon which, in accordance with the provisions of a memorandum of encumbrance, the annuity or sum of money thereby secured is to cease to be payable, and upon proof that all arrears of the annuity and interest or money have been paid, satisfied, or discharged, the district registrar shall make an entry in the register to the effect that the annuity or sum of money is satisfied and discharged; and, upon the entry being made, the land ceases to be subject to, or liable for, the annuity or sum of money.

[242] *The Judgments Act*

Registered judgment a lien on land
2 Immediately upon a judgment for payment of money being entered or recovered in the Court of Queen's Bench or in the Federal Court of Canada for a sum exceeding $40., a certificate of judgment in the form set out in Schedule A or to the like effect under the seal of the court and signed by the registrar or a deputy registrar of the court may be registered in any Land Titles Office in the province; and from the time of the registration thereof, the judgment, except as hereinafter mentioned, binds and forms a lien and charge on all lands of the judgment debtor against which the certificate of judgment is registered by instrument charging specific land and, while registered in the general register, against all lands of the judgment debtor in the Land Titles District in which the certificate is registered that are held in a name identical to the debtor set out in the certificate of judgment, whether or not the lands are registered under The Real Property Act; and the certificate when so registered has the same effect as if the judgment debtor had under its hand and seal executed a lien charging the lands in favour of the judgment creditor.

[243] *The Judgments Act*

Registration of judgment for alimony
9(1) An order or judgment for alimony or maintenance may be registered in any Land Titles Office in Manitoba, and unless the registration is vacated or partially vacated under section 21, the registration, so long as the order or judgment registered remains in force, binds the estate and interest of every description which the defendant has in any lands in the Land Titles District where the registration is made, that are held in a name identical to the name set out in the order or judgment, and operates thereon in the same manner, and with the same effect, as the registration of a charge under the hand and seal of the defendant made by the defendant on his lands.

[244] *The Judgments Act*

Definitions
1(1)In this Act,

"land" includes all real property, and every estate, right, title, and interest in land or real property, both legal and equitable, and of whatsoever nature and kind, and any contingent, executory, or future interest therein, and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of the interest or possibility is ascertained or not, and also a right of entry, whether immediate or future, and whether vested or contingent, into and upon any land;

[245] *Holy Spirit Credit Union Ltd*. v. *Brown*, [1988] 3 W.W.R. 248, 52 Man. R. (2d) 208 (MB QB). Upheld on appeal to MB Court of Appeal without reasons: [1988] 6 W.W.R. 480

13 This provision was also interpreted by the court in Crichton v. Zelenitsky and the court held that the life estate conferred by the Act did not vest in the spouse during the lifetime of the owner. The court held further that even upon the owner's death, the life estate did not vest in the spouse but in the owner's personal representatives who might sell the homestead to satisfy debts. The court said that the life estate would vest, if at all, only upon the conveyance of the estate by the personal representatives to the surviving spouse. Again, per Bergman J.A. at p. 236, the court stated:

> In my opinion this case is governed by sec. 12 of The Dower Act. [Corresponds to s. 14(1) of the current act.] The widow takes her life estate in the homestead under the same conditions as if it had been left to her by her husband's will; in other words, she is to be regarded as a mere devisee. The claims of her husband's creditors, therefore, have priority over her life estate, and the homestead, including the life estate, is liable to be sold, if necessary, to pay debts.

Further, at p. 238, the court stated:

> A conveyance of the life estate is made necessary in all cases, not only because The Dower Act does not vest the life estate in the widow, but also because in Manitoba all the real, as well as personal, property of the deceased vests in his personal representative, notwithstanding any testamentary disposition thereof ...

14 It is clear then that a spouse has no vested interest in the homestead. Does the spouse, nevertheless, have a contingent, executory or future interest that does not vest in the owner's lifetime, but is still a tangible property interest, capable of being sold to satisfy a judgment debt?

15 Certainly, the interest, if it is an interest at all, is a future interest, dependent upon a number of contingencies: that the marriage subsists; that the homestead is not sold (with the spouse's consent); that the spouse survives the owner; and finally, that the owner's personal representatives are legally able to convey the homestead to the spouse rather than sell it for debts. If the life estate conferred by the Act is a property interest, it is surely a tenuous one, dependent as it is upon these several contingencies. In my view, the legislature never intended the spouse to have any interest whatever in the homestead during the owner's lifetime.

16 Section 14(1) of the Dower Act provides that the spouse is entitled to a life estate "as fully and effectually, and to the same effect, and under the same conditions", as if she had been left the life estate by will. The Court of Appeal has said that she is to be regarded as a "mere devisee": see the comments of Bergman J.A. above. A

beneficiary under a will has no property interest — not even a future interest — in the estate of the testator until the testator's death. Even then the property interest in the estate vests in the testator's personal representatives and not in the beneficiaries. They have a legal right to compel the personal representatives to convey specific bequests and devises to them, subject to the claims of creditors, but this is a right of action and not a right of property. If a spouse's dower rights are to be regarded as those of a devisee under a will, then the spouse has no property interest in the homestead during the owner's lifetime. I so hold.

[246] *Chartier (Bankrupt), Re*, 2013, MBCA 41

[247] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[248] *The Judgments Act*

Proceedings on registered judgment
3(1)After the registration of the certificate of judgment, the judgment creditor may, if he elects to do so, proceed upon the lien and charge thereby created; but no proceedings to realize upon a registered judgment shall be commenced until after one year from the date of the registration of a certificate in respect thereto.

Order for sale
9(2) Where there is default in payment under an order or judgment registered pursuant to subsection (1), proceedings for the sale of any land or any estate or interest in land bound by the registration may be instituted, and an order for the sale of the land or the estate or interest may be made by the Court of Queen's Bench, in the same or like manner and with the same effect with such modifications as the circumstances require as in the case of a registration pursuant to section 2, 3 or 4 as the case may be, but notwithstanding subsection 3(1) the proceedings may be instituted and the order for sale made at any time after the registration and without waiting for the expiry of a period of one year.

[249] *The Judgments Act*

Order for sale
9(2) Where there is default in payment under an order or judgment registered pursuant to subsection (1), proceedings for the sale of any land or any estate or interest in land bound by the registration may be instituted, and an order for the sale of the land or the estate or interest may be made by the Court of Queen's Bench, in the same or like manner and with the same effect with such modifications as the circumstances require as in the case of a registration pursuant to section 2, 3 or 4 as the case may be, but notwithstanding subsection 3(1) the proceedings may be instituted and the order for sale made at any time after the registration and without waiting for the expiry of a period of one year.

[250] *The Judgments Act*, s. 13

[251] *The Judgments Act*, s. 10(1)

[252] *The Real Property Act*, s. 74

[253] *Dominion Lumber Winnipeg Ltd.* v. *Manitoba (Winnipeg District Registrar)*, 1963 CarswellMan 14, 37 D.L.R. (2d) 283, 41 W.W.R. 343

[254] *The Homesteads Act*, *The Dower Act*, C.C.S.M. c. D100

[255] *The Homesteads Act*

Life estate on death of owner
21(1) Subject to sections 2.1 and 2.2, when an owner dies leaving a surviving spouse or common-law partner who has homestead rights in the property, that person is entitled to a life estate in the homestead as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead.

[256] *The Homesteads Act*

Disposition prohibited without consent
4 No owner shall, during his or her lifetime, make a disposition of his or her homestead unless, subject to sections 2.1 and 2.2

(a) the owner's spouse or common-law partner consents in writing to the disposition;
(b) the disposition is in favour of the owner's spouse or common-law partner;
(c) the owner's spouse or common-law partner has released all rights in the homestead in favour of the owner under section 11;
(d) the owner's spouse or common-law partner has an estate or interest in the homestead in addition to rights under this Act and, for the purpose of making a disposition of the spouse's or common-law partner's estate or interest, is a party to the disposition made by the owner and executes the disposition for that purpose; or

(e) the court has made an order dispensing with the consent of the owner's spouse or common-law partner under section 10.

[257] *Hildebrandt* v. *Hildebrandt* (2009 CarswellMan 97) (Man Q.B.)

46 It is Mr. Bruckshaw's last argument -- no homestead consent -- that succeeds. Section 4 of *The Homesteads Act* deals with disposition of homestead property. A "disposition" includes a legal or equitable mortgage (Section 1). Section 4 of that Act provides that "no owner shall...make a disposition of her homestead" without the consent of her spouse, a release from that spouse, or a court order dispensing with that consent, unless her spouse is a party to the disposition itself. In this case, he is not.

47 Without Mr. Hildebrandt's consent, or a court order, the "disposition" when made was invalid. It logically follows that any registration made or priority achieved as a consequence of the filing of a caveat giving notice of an invalid disposition, would itself lack essential validity.

[258] *Holy Spirit Credit Union Ltd*. v. *Brown*, [1988] 3 W.W.R. 248, 52 Man. R. (2d) 208 (MB QB). Upheld on appeal to MB Court of Appeal without reasons: [1988] 6 W.W.R. 480

[259] *Chartier (Bankrupt), Re*, 2013, MBCA 41

39 Thus, a veto right is not an estate in land or a vested interest in the homestead. Rather, it has been characterized as both an inchoate and personal right. (See Manitoba Agricultural Credit Corp. v. Kars (1992), 76 Man.R. (2d) 155 (C.A.).)

[260] *The Legal Aid Manitoba Act*, C.C.S.M. c. L105, s. 17.1(1.1)

[261] *The Homesteads Act*

Validity of documents
5(4) When proof is given in accordance with this section, no document or instrument respecting the disposition is invalid except against a person who, at the time he or she acquired an interest under the disposition,
(a) had actual knowledge of the untruth of a matter alleged as fact in an affidavit, statutory declaration or statement under subsection (1); or
(b) participated or colluded in fraud in respect of the disposition.

Onus of proof
5(5) The onus of proving actual knowledge or fraud under this section is on the person alleging it.

[262] *The Homesteads Act,* s. 6

[263] *The Homesteads Act*, s. 19(1) and see *Homesteads Forms Regulation*, Regulation 121/93, Form 7

[264] *Caisse Populaire de Saint-Boniface Ltée* v. *Hongkong Bank of Canada*, 129 Man. R. (2d) 301, 180 W.A.C. 301, 19 R.P.R. (3d) 165, [1999] 2 W.W.R. 322, 2 W.W.R. 322

25 In my opinion, a correct statement of the law, as it was prior to the enactment of The Homesteads Act, is contained in the following succinct comment of Kroft J., as he then was, in Vandermeulen v. Wieler (1980), 109 D.L.R. (3d) 357 (Man. Q.B.) at p. 364:
... a disposition of a homestead that is not consented to with the full formality required by the Dower Act is absolutely null and void for all purposes.
See to the same effect Warne v. Sweet (1980), 12 Alta. L.R. (2d) 104 (Alta. Prov. Ct.).

26 I am aware that in Toronto Dominion Bank v. Gordon, [1981] 5 W.W.R. 235 (Sask. C.A.), Bayda J.A., as he then was, concluded, based on the Saskatchewan legislation, that non-execution of a dower consent rendered the transaction unenforceable rather than a nullity. Other Saskatchewan cases have followed this reasoning:

McClenaghan v. Haley (1983), 23 Sask. R. 212 (Sask. C.A.) and Lacoursiere v. Federal Business Development Bank (1988), 66 Sask. R. 197 (Sask. C.A.).

27 Hamilton J. specifically declined to follow the decision and reasoning in Toronto Dominion Bank v. Gordon. She was quite right to do so. Her conclusion follows from the decisions in Wall v. Dyck and Rose v. Dever, and is in keeping with commercial reality that if the appropriate consent is not given by the time the transaction in question is completed, it cannot be subsequently resurrected. To hold otherwise would mean that potential mortgage lenders, and other persons concerned with real property, would find it difficult, if not impossible, to ascertain priorities of interest and the true state of the title.

See also *Hildebrandt* v. *Hildebrandt* (2009 CarswellMan 97) (Man Q.B.)

48 Given the wording of the prohibition contained in Section 4, "no owner shall...make a disposition...unless the court has made an order", it would seem on a plain reading that an order dispensing with consent is a prerequisite to a valid disposition. An order made now would not, after the fact, validate an earlier and otherwise prohibited, disposition. I accordingly find and declare the memorandum of charge to be invalid for want of a homestead consent.

[265] *Coutu Estate* v. *Coutu*, 2011 CarswellMan 329, 2011 MBCA 52, [2011]

25 Homestead rights are granted to spouses or common-law partners by The Homesteads Act, C.C.S.M., c. H80 (the Act). While there is no provision in the Act that explicitly states that the homestead rights are extinguished on divorce, this is implicit in the wording of the Act. I note, for example, that a "homestead" and an "owner" are defined in s. 1 as follows:

"homestead" means
(a) in the case of a residence in a city, town or village occupied by the owner and the owner's spouse or common-law partner as their home, the residence and the land on which it is situated
. . .
"owner" means a married person, or a person in a common-law relationship, who is an owner of a homestead.

See also *The Homesteads Act*

Vacating of notice
20(2) A homestead notice shall be vacated by the district registrar
…
(f) on the filing of proof, satisfactory to the district registrar, that the spouses are divorced;

[266] *Chartier (Bankrupt), Re*, 2013, MBCA 41

59 In consideration of the above, Mrs. Chartier's veto right fits within the wide definition of property under the BIA. That is, she has certain rights (part of a bundle) as against others, arising out of or incidental to property, and these rights are both enforceable against others, and exclusive to her.

[267] *Chartier (Bankrupt), Re*, 2013, MBCA 41

92 While the veto right has many of the characteristics of a personal right, consideration of the wide interpretation of ss. 2 and 67(1)(d) of the BIA, and the description of property in cases such as Saulnier, leads to the conclusion that the veto right is property that vests in the trustee under the BIA.

[268] *The Builders' Liens Act*

[269] *The Builders' Liens Act*

Creation of lien
13 Any person who

(a) does any work; or
(b) provides any services; or
(c) supplies any materials to be used;
in performance of a contract or sub-contract for any owner, contractor or sub-contractor has, by virtue thereof, a lien for the value of the work, services or materials which, subject to section 16, attaches upon the estate or interest of the owner in the land or structure upon or in respect of which the work was done or the services were provided or the materials were supplied, and the land occupied thereby or enjoyed therewith.

[270] *The Builders' Liens Act*, sections 43 and 44.

[271] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[272] *The Condominium Act*

Lien upon default
162(1) If a unit owner fails to contribute to the common expenses or reserve fund, the condominium corporation has a lien against the owner's unit and its share in the common elements for
(a) the unpaid amount;
(b) the interest owing on the unpaid amount; and
(c) the reasonable legal costs and expenses incurred by the corporation in collecting or attempting to collect the unpaid amount, including the costs of preparing and registering the lien and its discharge.

Lien expires unless registered
162(2) A lien under this section expires three months after the default that gave rise to the lien occurred unless, within those three months, the condominium corporation submits a notice of the lien to the district registrar for registration, in a form approved by the district registrar.

[273] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[274] *The Condominium Act*

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162(2) A lien under this section expires three months after the default that gave rise to the lien occurred unless, within those three months, the condominium corporation submits a notice of the lien to the district registrar for registration, in a form approved by the district registrar.

[275] *The Condominium Act*

Lien priority
164(1) A condominium corporation's registered lien has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose. But the lien does not have priority over
(a) a claim of the Crown (other than by way of a mortgage);
(b) a claim for taxes, charges, rates or assessments levied or recoverable under The Municipal Act or The City of Winnipeg Charter; or
(c) a prescribed lien or claim.

[276] *The Condominium Act*

Enforcing lien
162(6) The condominium corporation has the right to enforce the registered lien in the same manner as a mortgage is enforced under *The Real Property Act.*

[277] *The Personal Property Security Act*

L.T.O. registration re fixture, crop or lease

49(2) A security interest

(a) in a fixture referred to in section 36;

(b) in a growing crop referred to in section 37; or

(c) in a right to payment under a lease of real property referred to in subsection 35(10);

may be registered by causing a prescribed notice to be recorded upon the land to which the fixture is affixed, or to which the lease relates, or upon which the crops are growing.

Notice to be noted on title

49(3) The district registrar of the land titles office to which the notice in subsection (2) is tendered shall make a memorandum of the notice on the certificate of title in respect of the parcel of land to which the notice relates.

[278] https://teranetmanitoba.ca/land-titles/land-titles-forms/

[279] *The Personal Property Security Act*, s. 36

[280] *The Personal Property Security Act*, s. 36(3) for fixtures, s. 37(3) for growing crops, and s. 35(10) for payments under a lease.

[281] *Manitoba* v. *McKinnon*, 2001 CarswellMan 484, 2001 MBQB 233, 158 Man. R. (2d) 303

[282] *Stack* v. *T. Eaton Co*. (1902), 4 O.L.R. 335 (Ont. Div. Ct.)

[283] *Gates* v. *Hrynkiw*, 2005 MBQB 123, 2005 CarswellMan 197, [2005] W.D.F.L. 3463, [2005] M.J. No. 198, 140 A.C.W.S. (3d) 150, 194 Man. R. (2d) 243

26 Aside from the issues of interest and costs mentioned above, the parties have placed before this court for resolution eight further issues. They are as follows:

1. POLE SHED BUILDING

…While the wife argues that the structure may not be a fixture on the land the court is satisfied, pursuant to the principles set forth in *Stack* v. *T. Eaton Co*. (1902), 4 O.L.R. 335 (Ont. Div. Ct.) that the building is attached to the land by more than its own weight. I therefore find that the building is attached to the NW 1/4 34-18-19 W.P.M.

[284] *Greater Winnipeg Gas Company* v. *Peterson and Osborne Investments Ltd.* (1968), 65 W.W.R. 500 (Man. C.A.).

[285] *Dunwoody Ltd*. v. *Farm Credit Corp,* 1981 CarswellMan 24, 41 C.B.R. (N.S.) 209, [1982] 1 W.W.R. 190, (sub nom. *Plett* v. *Plett*) 15 Man. R. (2d) 208

Hamilton J

6 In the case at bar, the unit is described by all as a "mobile home". The agreed statement of facts uses the same description. Although the unit rests on concrete blocks above a concrete pad, and although it has a porch addition and is connected to water and hydro, it retains its original mobility. The wheels have been removed, but the frame and protruding hitch remain. Its appearance does not imply permanence. Rather it appears to retain its appearance of mobility. It is still a mobile home. If the unit is still a "mobile" home, it cannot at the same time be part of the realty.

[286] *The Legal Aid Manitoba Act*

[287] *The Legal Aid Manitoba Act*

Interpretation: "interest in land"

17.1(1.1) For greater certainty, a person has an interest in land for the purpose of section 17.1 or 17.2 if

(a) he or she has a homestead right under The Homesteads Act in the land; or

(b) the land is a family asset of the person, as defined under The Family Property Act.

[288] *The Legal Aid Manitoba Act*

Effect of registration
17.1(4) From the time of its registration, a statement registered under subsection (2) binds and forms a lien and charge on the applicant's estate or interest in the land against which it is registered for an amount equal to the cost of the legal aid provided to the applicant, before and after the date of registration; but no such statement has the effect of severing a joint tenancy or affecting a right under The Homesteads Act.

[289] *The Law of Property Act*

Land granted to two or more persons held as tenants in common
15 Where, by any letters patent, conveyance, assurance, will or other instrument executed after July 7, 1883, land is granted, conveyed or devised to, or where any certificate of title under The Real Property Act stands in the name of, two or more persons, other than executors or trustees, in fee simple or for any other estate, legal or equitable or statutory, it shall be considered that such persons take or hold as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, conveyance, assurance, will, certificate of title or other instrument that they take or hold as joint tenants.

[290] *The Real Property Act*

Joint tenancies
50(1) Where any land, mortgage, encumbrance, or lease registered under this Act is held in joint tenancy…

[291] *Chafe* v. *Hunter*, 2014 NLCA 44, Newfoundland and Labrador Court of Appeal

[6] The common law recognized four kinds of joint ownership of property, but only joint tenancy and tenancy in common are relevant to this matter and in these times. In joint tenancy, the co-owners have identical interests because they take undivided possession of the same property under the same instrument for the same interest which vests in them at the same time; and the survivor of them takes the entirety. In tenancy in common, the co-owners have undivided possession of the property but their interests need not otherwise be identical and the interest of each descends to his heirs [Anger, H.D. & Honsberger, J.D., Canadian Law of Real Property, 1959, Canada Law Book Company, Limited, 166].

[7] There are two distinguishing features of joint tenancies: the right of survivorship and the four unities. The four unities are of title, interest, possession and time. Unity of title exists when all co-owners acquire their title under the same instrument; unity of interest exists when all co-owners have an interest in the property that is identical in nature, extent and duration; unity of possession exists when all co-owners are entitled to undivided possession of the whole of the property; and unity of time exists when the interests of all co-owners vest at the same time [Ibid.].

[292] *The Law of Property Act*

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15 Where, by any letters patent, conveyance, assurance, will or other instrument executed after July 7, 1883, land is granted, conveyed or devised to, or where any certificate of title under *The Real Property Act* stands in the name of, two or more persons, other than executors or trustees, in fee simple or for any other estate, legal or equitable or statutory, it shall be considered that such persons take or hold as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, conveyance, assurance, will, certificate of title or other instrument that they take or hold as joint tenants.

[293] *The Trustee Act*, C.C.S.M. c. T160

Instrument of appointment vests property
13(1) Where, by an instrument, a new trustee is appointed to perform any trust,

(a) if the instrument contains a declaration by the appointer to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the instrument become or are the trustees for performing the trust, the instrument operates, without any conveyance or assignment, to vest in those persons, as joint tenants and for the purposes of the trust, the estate, interest, or right, to which the declaration relates.

[294] *The Law of Property Act*

Conveyance to himself jointly with another
17 Freehold land or chattels real may be conveyed by a person to himself jointly with another person by the like means by which it or they may be conveyed by him to another person.

and

The Real Property Act

Owner may transfer to self and other
88(1) An owner of land registered under this Act may make a valid transfer to himself jointly with any other person; and owners may make a valid transfer to one of their number either solely or jointly with some other person.

[295] *The Law of Property Act*

A body corporate may be a joint tenant
16(1) A body corporate is capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and, where a body corporate and an individual, or two or more bodies corporate, become entitled to any property under circumstances, or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they are entitled to the property as joint tenants; but the acquisition and holding of property by a body corporate in joint tenancy is subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

[296] *Registration of Title to Land*, Victor Di Castri, 2018 Thomson Reuters Limited, Chapter 8 — The Statutory Transfer, paragraph 2. (2) — Corporation aggregate as joint tenant

[254] The Crown cannot be a joint tenant with a subject. *Rex nunquam moritur*. "The King never dies."

[297] *Canadian Law of Real Property,* Anger, H.D. & Honsberger, J.D., Canada Law Book Company

When one joint tenant dies, there is no gap in the seisin or possession of the survivors or any partial divesting of their interests. The interest of the one who dies is simply extinguished and accrues to the survivors….
and

Sawdon Estate, 2012 ONSC 4042 (CanLII)

[20] At the time of Hilda Sawdon's death, all assets, except one bank account, were held jointly by Arthur and Hilda Sawdon with the right of survivorship. Hilda Sawdon had one bank account solely in her name. ("Hilda's Bank Account")

[21] Upon Hilda Sawdon's death, the following assets transferred to Arthur Sawdon by operation of law, without the assets becoming a part of Hilda Sawdon's estate and without the necessity of probating Hilda Sawdon's estate:
…
Their home which was jointly owned.

[298] *The Real Property Act*

Joint tenancies
50(1) Where any land, mortgage, encumbrance, or lease registered under this Act is held in joint tenancy or by one or more life tenants and one of the owners or the life tenant or one of the life tenants dies, an application to the district registrar to be registered as owner or owners thereof may be made by way of request
(a) in the case of a joint tenancy
(i) by the survivor or survivors; or
(ii) if the last survivor has died, by his personal representative, in which case the request may be included in a transmission application; and

[299] *The Law of Property Act*

Devolution of property on dissolution of body corporate
16(2) Where a body corporate is joint tenant of any property, then on its dissolution the property devolves on the other joint tenant.

[300] *The Corporations Act,* C.C.S.M. c. C225

Revival by the Director
200 Where a corporation is dissolved under section 203, 204 or 205 or under any similar provision of any Act for which this Act is substituted, any interested person may apply to the Director to have the corporation revived by filing articles of revival in the form the Director requires.

Revival by court
201 Where a corporation is dissolved on the order of a court, any interested person may apply to the court to have the corporation revived.

Certificate of revival
202(1) Upon the receipt of articles of revival in the required form, or an order of the court to revive the corporation, the Director shall issue a certificate of revival in accordance with section 255.

Rights preserved
202(2) A corporation is revived as a corporation under this Act on the date shown on the certificate of revival, and thereafter the corporation, subject to such reasonable terms as may be imposed by the court or the Director and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved.

[301] *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood*, Sir William Blackstone (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 – Book II

[*186…Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship: (l) and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; (m) for they still preserve their original constituent unities.

[302] *The Law of Real Property* (9th ed.), Megarry and Wade, Ch. 12 page 484

Unity of interest must apply to the estate which is held jointly; but if that requirement is satisfied, it does not matter that one joint tenant has a further and separate interest in the same property.[47] A conveyance "to A and B as joint tenants for lives, remainder to B in fee simple" would make A and B joint tenants for life despite the remainder to B.[48]

[303] *Greiger* v. *Pye* (1941), 297 N.W. 173, 210 (Minn.) Supreme Court of Minnesota

It may well be, as contended by plaintiffs, that Mrs. Greiger never became a joint tenant with her mother, Wilhelmine. They urge in support thereof that joint tenants must have one and the same interest; that the interests must accrue by one and the same conveyance; must commence at one and the same time; and must be held by one and the same undivided possession; in other words, there are four unities required, namely, unity of interest, title, time, and possession. Therefore, so they urge, the unity of possession is lacking since the life estate was at all times in Wilhelmine and as such destroyed the right of joint possession. They cite 14 Am.Jur., Cotenancy, § 7, and cases under notes. In the text of that section it is said: "If any one of these elements is lacking, the estate will not be one in joint tenancy."

[304] *The Real Property Act*

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

Exception — owner deprived due to fraud or wrongful act
59(1.3) Despite subsection (1), in a proceeding under this Act, an owner who is deprived of an estate or interest in land as a result of fraud or a wrongful act, is entitled to have the estate or interest restored, unless a court determines that it is just in the circumstances to order otherwise.

[305] *The Real Property Act*, s. 58(1)

[306] *The Real Property Act*, s. 59(1)

[307] *Simcoff* v. *Simcoff*, 2009 MBCA 80, 2009 CarswellMan 357, [2009] 9 W.W.R. 248, [2009] W.D.F.L. 3699, [2009] M.J. No. 265, 179 A.C.W.S. (3d) 218, 245 Man. R. (2d) 7, 466 W.A.C. 7, 49 E.T.R. (3d) 302, 82 R.P.R. (4th) 22

[308] *Pecore* v. *Pecore* (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.)

[309] *Simcoff* v. *Simcoff*

7 The mother submitted that title to the property was placed in both names solely for income tax purposes and that she had no intention in 1992 of gifting a half-interest in the property to the son. The son, on the other hand, argued that when title was put into joint names, the mother intended to do so as part of her dealings with her estate so that upon her demise, he would automatically receive full title. He submitted that his position as joint tenant was an absolute gift made to him by the mother and that she cannot now change her mind. He requested not only that the application for partition and sale be refused, but also that his position as a joint tenant be maintained so that his right of survivorship would continue and he would receive full title to the property when his mother passed on.

8 The applications judge refused the mother's request for a declaration of resulting trust. He found that, on the evidence, the mother intended a gift when she placed the property into joint tenancy.

35 The presumption of resulting trust is the general rule for gratuitous transfers. Despite this transfer of land referring to consideration of "$1.00 and other good and valuable consideration," the applications judge, correctly in my view, treated this as a gratuitous transfer. The document required a consideration to be stated, together with an acknowledgment of receipt, in order for the form to be registerable. See Victor Di Castri, Q.C., Registration of Title to Land, looseleaf (Toronto: Carswell, 1987) vol. 1 at para. 239. That would not preclude an individual from attempting to prove that the true consideration was other than that stated. In Glenelg Homestead Ltd. v. Wile, 2003 NSSC 155, 216 N.S.R. (2d) 180 (N.S. S.C.), aff'd 2005 NSCA 4, 230 N.S.R. (2d) 289 (N.S. C.A.), the trial court held (at para. 26):

Payment of a nominal sum of $1.00, in the absence of the transferee assuming some onerous obligation, does not alter a transaction from a gift to a conveyance for valuable consideration. Courts recognize a distinction between "nominal consideration" and "valuable consideration."....

36 The applications judge stated the law correctly with regard to the place of presumption of resulting trust in the law today as explained by the Supreme Court of Canada in Pecore. The presumption comes into play only if there is insufficient evidence to rebut it. The evidence required to rebut the presumption of a resulting trust is evidence on the balance of probabilities of the transferor's intention to bestow a gift on the transferee. As stated by Rothstein J. in Pecore, for the majority (at para. 44):

> As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in The Law of Evidence in Canada, [2d ed. (Markham: Butterworths Canada Ltd., 1999)] at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

310 *The Law of Property Act*

Who may be compelled to make partition or sale
19(1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

311 *Simcoff* v. *Simcoff*

50 Dealing with the first point, the applications judge erred when he applied a test of fairness to the application for partition and/or sale of the property. It is correct that the right to the partition of real property under the authority of s. 20 of the LPA is a matter in the discretion of the court. However, the court's discretion is to be exercised in a judicial manner and is governed by certain well-defined principles. Prima facie, an applicant is entitled to an order for partition and sale. To defeat such an application, a respondent must show that the order would be oppressive or vexatious or that the applicant did not come to court with clean hands. Personal inconvenience and hardship is not enough. See Shwabiuk v. Shwabiuk (1965), 51 W.W.R. 549 (Man. Q.B.).

312 *The Real Property Act*

Severance of joint tenancy
79(1) The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy — other than a transmission by a trustee in bankruptcy or one giving effect to an order of the court…

313 *Re Chisick* (1967), 62 W.W.R. 586 (Man. C.A.);

8 It is common ground that on the assignment in bankruptcy being filed with the official receiver, Mr. Chisick ceased to have any capacity to dispose of or otherwise deal with his property, which forthwith passed to and vested in the trustee named in the receiving order -- s. 41(5) of the Bankruptcy Act, R.S.C. 1952, c. 14. The definition of "property" in s. 2(o) of the Bankruptcy Act is sufficiently broad to encompass Mr. Chisick's joint-tenancy interest. Upon the bankruptcy such interest automatically vested in the trustee, subject to the mortgage encumbrance thereon.

9 It is also common ground that upon such vesting the joint tenancy was severed by operation of law: Re White, 33 O.W.N. 255, 8 C.B.R. 544, [1928] 1 D.L.R. 846, 3 Can. Abr. (2nd) 869. The trustee and Mrs. Chisick thereupon became tenants in common, each with an undivided one-half interest in the property.

314 *Novak* v. *Gatien*, 1975 CarswellMan 26, 25 R.F.L. 397, [1976] W.W.D. 48, MB QB

6 The law is clear that no one is to benefit from his own criminal act. It must therefore follow that the estate of the husband cannot be held to be the owner of the whole property by virtue of his survivorship by a short time of his wife.

7 On the other hand, it is also clear that his criminal act towards her would not vest his share in the joint tenancy in her or her estate.

9 In my opinion, the act of the husband in the murder of the wife immediately severed the joint tenancy and created a tenancy in common. That being the case, the estate of each is entitled to one-half of the proceeds of the property which I understand all parties involved wish to sell.

[315] *Manitoba (Public Trustee)* v. *LeClerc*, 1981 CarswellMan 248, 8 Man. R. (2d) 267, 123 D.L.R. (3d) 650

7 One must have sympathy for their position. Her husband killed their daughter. He should not benefit from her death if caused by his unlawful or wrongful act.

8 However, after trial by a properly constituted court Mr. LeClerc was found not guilty of an unlawful act by reason of his insanity. There was no "mens rea". If there was no unlawful act there was no wrongful act or felonious act as these words are used in the authorities.

9 LeClerc, through the Public Trustee, the statutory committee of his estate, person and effects, is therefore entitled to the "jus accresendi" of a survivor on the death of the other joint tenant.

[316] *The Survivorship Act*, C.C.S.M. c. S250

Joint tenancy
3 Unless a contrary intention appears in a written agreement to which the persons are a party, where two or more persons hold legal or equitable title to property as joint tenants or have a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, those persons shall be deemed, for the purposes of section 1, to have held the title to the property or the joint account, as the case may be, as tenants in common with equal shares.

[317] *The Real Property Act*

Severance of joint tenancy
79(1) The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy — other than a transmission by a trustee in bankruptcy or one giving effect to an order of the court — unless

(a) the instrument is executed by all the joint tenants;

(b) all the joint tenants, other than those executing the instrument, give their written consent to the instrument;

[318] *The Tax Administration and Miscellaneous Taxes Act*

Other exemptions
114(1) No tax is payable under this Part in respect of the registration of

(a) a transfer where the transferor and the transferee are the same person and the sole purpose of the transfer is

(ii) to change the form of tenure from tenancy in common to joint tenancy or to fractional interests or from joint tenancy to tenancy in common or to fractional interests;

[319] *Simcoff* v. *Simcoff*

61 As a matter of fact, at common law, it is the prima facie right of a joint tenant while alive to take action to effect a severance of a joint tenancy into a tenancy in common. In his oft-cited article, Professor A. J. McClean,

"Severance of Joint Tenancies" (1979) 57 Can. Bar Rev. 1, comments on the fundamental right to deal with joint property (at p. 2):

> .... [A] joint tenant, without the consent of or even notice to the other joint tenants, is as free to deal with his interest as any other owner, and may deal with it in such a way as to destroy one of the unities. If that happens it follows that the joint tenancy is severed.

[320] *The Real Property Act*

Severance of joint tenancy
79(1) The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy — other than a transmission by a trustee in bankruptcy or one giving effect to an order of the court — unless

> (c) the district registrar is provided with evidence, satisfactory to the district registrar, that all joint tenants who have not executed the instrument or given their consent to it have been served with a notice of intent to sever, in an approved form, at least 30 days prior to the registration of the instrument.

[321] http://www.tprmb.ca/tpr/land_titles/lto_offices/forms.html

[322] *The Real Property Act and various other Acts Amendment Act*, S.M. 1986-87, c. 4, s. 49

See also *Real Property Act Form Regulation* 281/87, Registered July 17, 1987

[323] Richard Wilson, Registrar General, email of October 29, 2018

Under 79(1)(c) it is the either the consent or the service of the notice and the expiration of the 30 days that would act as the severance. The Transfer or Request is merely the LTO form that is acceptable for registration that recognizes the severance and is not in itself the severing document.

So the answer to your question is No. It is neither the transfer nor a request but rather service of the notice to sever which if not contested would in my view be the severance. The evidence attached to a Transfer/Request merely supports the validity and capacity of the remaining joint tenants to deal with the land.

The LTO takes the registration of the Transfer/Request as the time that title may pass but I would suggest that 79(5) judge would find the earlier date to be the appropriate severance date.

I think it is just like lapsing a BL. Once notice go out, the LTO receives evidence of service and the expiry period, the LTO act on the Transfer/Request upon registration.

[324] *The Real Property Act*

Earlier effect of severance
79(5) Notwithstanding the date of registration of the instrument severing a joint tenancy, severance may take effect from a date earlier as determined by a judge on an application therefor.

[325] *Simcoff* v. *Simcoff*

65 A joint tenancy may be severed in a number of ways at common law, such as by way of executing and registering a conveyance to oneself or by one joint tenant giving the property to a third person by a valid declaration of trust. See Horne v. Horne Estate (1987), 39 D.L.R. (4th) 416 (Ont. C.A.), Bank of Montreal v. Bray (1997), 36 O.R. (3d) 99 (Ont. C.A.), and Anger & Honsberger, at para. 14:20.120. What is necessary is a course of conduct that reveals a clear intention to sever.

[326] *Registration of Title to Land*, Victor Di Castri, Carswell, February 15, 2021
Chapter 8 — The Statutory Transfer
6. — Parties
(7) — By A. to A.

[270] In some jurisdictions there are statutory declarations to the effect that a person may transfer land to himself.[334] It is provided further in the British Columbia Property Law Act[335] that a joint tenant may transfer his interest in land to himself, and that such a transfer, whether of the fee simple or of a charge, has and is deemed always to have had the same effect as to severance as a transfer to a stranger.[336]

[327] *Arnold Bros. Transport Ltd*. v. *Murphy,* 2013 MBQB 137, 2013 CarswellMan 374, [2013] 12 W.W.R. 377, [2013] M.J. No. 243, 230 A.C.W.S. (3d) 301, 295 Man. R. (2d) 66, 34 R.P.R. (5th) 217

15 A judgment effectively operates as a "... lien and charge on all lands of the judgment debtor". In accordance with the decision in Brooklands Lumber & Hardware v. Simcoe (1956), 18 W.W.R. 328 (Man. Q.B.), at 331, "... the lien and charge does not confer an estate or interest in the land", nor does it sever a joint tenancy. Instead, it creates a charge on the land, which may be enforced by a creditor's action…
and
Confab Laboratories Inc. v. *Wilding*, 2006 MBQB 197 (CanLII)

[9] The following principles emerge from these cases:
…
2. The acts of registering of a judgment or depositing a writ of execution with a sheriff do not sever a joint tenancy…

[328] *Registration of Title to Land*, Victor Di Castri, Carswell, February 15, 2021
Chapter 8 — The Statutory Transfer
2.(5)(c) — Effect of judgment and writ of execution

…should the debtor die before the debt is paid, it is extinguished with the debtor's interest in the land and the survivor holds the totality of the land free from the judgment or the writ: jus accrescendi praefertur oneribus.
and
Arnold Bros. Transport Ltd. v. *Murphy,* 2013 MBQB 137, 2013 CarswellMan 374, [2013] 12 W.W.R. 377, [2013] M.J. No. 243, 230 A.C.W.S. (3d) 301, 295 Man. R. (2d) 66, 34 R.P.R. (5th) 217

15…In the decision in Young Estate, Re (1968), 66 W.W.R. 193 (B.C. C.A.), at 202-203, such a lien or charge on a joint tenant's/judgment debtor's property was extinguished upon his death:

[329] *Confab Laboratories Inc*. v. *Wilding,* 2006 MBQB 197 (CanLII)

[9] The following principles emerge from these cases:
…
2 ….Severance occurs when proceedings are commenced to realize on the judgment or steps are taken by the sheriff to execute the writ – that is, to bring about an alienation of the judgment debtor's title. (See Power, Brooklands, Stonehouse and Re Young Estate.)

[330] *Registration of Title to Land*, Victor Di Castri, Carswell, February 15, 2021
Chapter 8 — The Statutory Transfer

[258] Whether or not a severance results where one or more, but not all, of the joint tenants creates a mortgage depends on whether the mortgage is a common law mortgage or a Torrens mortgage. The former, with its notional transfer of the legal estate, operates as a severance. It is generally considered that there is no severance under a Torrens mortgage which operates as a security, but not as a transfer of an interest in land. A Torrens mortgage is not an alienation within the meaning of the severance rules and unity of title is not destroyed.

[331] *Lyons* v. *Lyons*, [1967] V.R. 169 (S.C.)

In so far as this case decided that the surviving joint tenant was bound by the mortgage the decision was criticized as "illogical" by the Californian District Court of Appeal in People of California v Nogarr, supra. In essence the facts in Nogarr's Case were the same as in the present case. The decision of the court was that the mortgage by one joint tenant did not sever the joint tenancy.

Under the law of this state a mortgage is but a hypothecation of the property mortgaged. It creates but a charge or lien upon the property hypothecated without the necessity of a change of possession and without any right of possession in the mortgage and does not operate to pass legal title to the mortgagee. Inasmuch as the mortgage was but a lien or charge upon Calvert's [the mortgagor joint tenant] interest and as it did not operate to transfer the legal title or any title to the mortgagees or entitle the mortgagees to possession, it did not destroy any of the unities and therefore the estate in joint tenancy was not severed…

[332] *The Real Property Act*

Mortgage does not transfer any estate
98 A mortgage or an encumbrance under the new system has effect as security but does not operate as a transfer of the land charged.

[333] *Novak* v. *Gatien* [1976] W.W.D. 48; 25 R.F.L. 397, Manitoba Court of Queen's Bench

Hunt J.:

8 There are, however, a number of circumstances in which a joint tenancy may be severed so as to create a tenancy in common. The unity of title is destroyed when one joint tenant assigns or mortgages his share of that property and in that circumstance a tenancy in common in equity is created.

[334] *The Real Property Act*

Mortgagee's rights
113 A first mortgagee, for the time being, of land under this Act, has, during the currency of his mortgage, the same rights and remedies at law and in equity as he would have had, had the legal estate in the land or term mortgaged been vested in him, with a right in the owner of the land of quiet enjoyment thereof until default in the payment of money secured thereby, or in the performance of a covenant expressed or implied therein.

Right to lease land
114(1) In case default under a mortgage or encumbrance continues for the space of one month, or for such longer period of time as is therein for that purpose expressly limited, the mortgagee or encumbrancer may enter into possession of the land and receive and take the rents, issues, and profits thereof, and whether in or out of possession may make such lease of the land or of any part of it as he sees fit.

[335] *Land Titles Act* (S.N.B. 1981, c. L-1.1)
25(3) The registration of a mortgage does not have the effect of severing a joint tenancy.

[336] *Davison* v. *Davison Estate*, 2009 MBCA 100, 2009 CarswellMan 462, [2009] W.D.F.L. 4867, 180 A.C.W.S. (3d) 737, 251 Man. R. (2d) 1, 478 W.A.C. 1

5 The question of whether the evidence demonstrates a mutual intention to sever is a question of fact.

[337] *Dauk (Executor of) Estate of Corbett* v. *Estate of Corbett et al.* 2015 MBQB 181

[48] The determination of whether the joint tenancy of Margaret and Bill had been severed prior to her death depends upon whether there was an agreement to sever the joint tenancy prior to her death or, in the alternative, whether there was a course of conduct by one or both of the parties prior to Margaret's death that resulted in a termination of the joint tenancy.

[338] *Arnold Bros. Transport Ltd.* v. *Murphy*, 2013 MBQB 137, 2013 CarswellMan 374, [2013] 12 W.W.R. 377, [2013] M.J. No. 243, 230 A.C.W.S. (3d) 301, 295 Man. R. (2d) 66, 34 R.P.R. (5th) 217

52 I am satisfied that the "course of dealing" between the respondent and Murphy was insufficient to establish a mutual or unilateral intention to sever the joint tenancy despite apparent different interests. Nor was the conduct sufficient to establish a severance. The Manitoba case law has required something more than one party leaving the marital home and engaging in some negotiations towards the disposal of jointly-held assets. Importantly, no "formal" steps were undertaken to sever the tenancy despite the respondent's knowledge of that issue prior to the commencement of the divorce proceedings.

[339] *Gorski* v. *Gorski*, 2011 MBQB 125

[340] *Chafe* v. *Hunter*, 2014 NLCA 44, 2014 CarswellNfld 357, 1109 A.P.R. 324, 247 A.C.W.S. (3d) 705, 357 Nfld. & P.E.I.R. 324

33 The applications judge then found that the original grantees sub-divided the land:

> [33] I deduce from the preceding that Richard Hunter and his two sons, Hedley and William J. Hunter, subdivided the land that the Crown granted to them as joint tenants on December 13, [1913]; thereby severing the joint tenancy and converting their co-ownership of the land to a tenancy in common. As I have noted several times, a joint tenancy will only exist if the four unities are maintained. The Hunter grantees occupied distinct portions of the granted land by building houses and outbuildings on them, fencing them, cultivating gardens and harvesting the hay from them. Thus, they destroyed the unity of possession, which requires that each co-owner have an undivided possession of the whole of the property.

Conclusion

36 The applications judge's application of the law, findings of fact, and the inferences which he drew from the facts disclose neither an error in the statement or application of the law nor a palpable and overriding error in his findings of fact. Indeed, everything points to the correctness of his decision.

37 The applications judge did not err in finding that Richard, Hedley and William took the land as joint tenants but converted their ownership to a tenancy-in-common through their subsequent course of dealing with it…

[341] *Siwak* v. *Siwak*, 2016 MBQB 61, 2016 CarswellMan 93, 2016 MBQB 61, 2016 CarswellMan 93, [2016] 9 W.W.R. 61

29 In determining the “course of dealing” between the parties and what would “tip the scale” in favour of severance versus non-severance, each case is idiosyncratic and an analysis must be made of the accepted facts. The case law suggests that there is no specific formulation of facts needed for one to arrive at the conclusion that a joint tenancy had been severed. While fact patterns from prior cases are useful starting points, the entire course of conduct or the totality of the evidence in each case must be looked at to determine if the parties intended their interests to be mutually treated as constituting a tenancy in common.

[342] *Siwak* v. *Siwak*, 2016

Dunlop J.:

31 Unity of possession requires that all co-owners must collectively own the undivided whole of the property rather than, for instance, each owning a particular section of the property (Blackstone at p. 182). Unity of possession does not mean actual physical possession of the undivided whole of the property such that unity of possession could be defeated when an order sole occupancy is granted to one joint tenant by the court over another joint tenant as happened in this case.

[343] *Registration of Title to Land*, Victor Di Castri, Carswell, February 15, 2021
Chapter 8 — The Statutory Transfer
2.(5)(b) — Effect of lease by one joint tenant

On another view, if A. grants to T. a lease for life there is a severance, as both unity of title and of interest are destroyed. However, if T. dies in the lifetime of A. and B. the joint tenancy revives; aliter, if A. or B. dies during the lease.

[344] *The Homesteads Act*

Life estate on death of owner
21(1) Subject to sections 2.1 and 2.2, when an owner dies leaving a surviving spouse or common-law partner who has homestead rights in the property, that person is entitled to a life estate in the homestead as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead.

Disposition subject to life estate
21(2) Any disposition of a homestead by the owner's will is subject to the spouse's or common-law partner's entitlement to a life estate in that homestead under subsection (1).

[345] *Siwak* v. *Siwak*, 2018 MBQB 9, 2018 CarswellMan 24, [2018] 5 W.W.R. 369, 288 A.C.W.S. (3d) 383, 4 R.F.L. (8th) 291

28 Even though Mr. Siwak and Mrs. Siwak lived separate and apart for almost one year and nine months before Mrs. Siwak died and despite the fact that they engaged in a course of dealing sufficient to sever the joint tenancy, it is clear that on a strict reading of the Act, Mr. Siwak had homestead rights at the time of Mrs. Siwak's passing. One of the primary goals of homestead legislation is to provide a surviving spouse with a life estate in a homestead. Upon the death of Mrs. Siwak, Mr. Siwak realized a life estate in the property.

[346] *Siwak* v. *Siwak*, 2018 MBQB 9, 2018 CarswellMan 24, [2018] 5 W.W.R. 369, 288 A.C.W.S. (3d) 383, 4 R.F.L. (8th) 291

43 I accept that Mr. Siwak has a life estate in the property regardless of the change of title from joint tenancy to tenancy in common for the same reasons as outlined in the analysis of issue "A" herein.

[347] *Dunning* v. *Estate of Ivan Solic et al*, 2020 MBQB 37, 2020 CarswellMan 69, 316 A.C.W.S. (3d) 181, 36 R.F.L. (8th) 336, 54 C.C.P.B. (2nd) 309

47 The Registrar-General's analysis effectively delivered him to the conclusion that the parties' contest had ended in a "tie" - the petitioner's side being especially assisted by the Registrar-General's emphasis upon "a broad and liberal construction and interpretation" of her homestead rights (see: *Schreyer* v. *Schreyer*, 2009 MBCA 84 (Man. C.A.) (CanLII); Empey, Re, [1979] M.J. No. 296 (Man. Surr. Ct.) (QL); *Wimmer* v. *Wimmer* [1947 CarswellMan 32 (Man. C.A.)], 1947 CanLII 263). That assistance was articulated by the Registrar-General, thusly: "Absent specific legislation to the contrary, I am not prepared to extinguish this right" (meaning, the petitioner's "right" to a life estate in what he says is the deceased's "half joint interest").

48 But, I conclude, conversely, that such a right does not here subsist in the absence of specific legislative language. Put differently, absent express language, I am unable to conclude that petitioner's common-law partner homestead rights, acquired subsequent to the transfer of title, trump those of a surviving joint tenant, because the result rendered by the Registrar-General is less a "tie" than a defeat of the respondent Slavko Solic's rights to survivorship, secured by him years before Bill 53 became law.

[348] *Canada Government of* v. *Peters*, 1982 CanLII 2427 (SK QB)

The right of survivorship. This is, above all others, the distinguishing feature of a joint tenancy. On the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (jus accrescendi), and this process continues until there is but one survivor, who then holds the land as sole owner. This right of survivorship takes precedence over any disposition made by a joint tenant's will: jus accrescendi praefertur ultimae voluntati. The same principle applies if a joint tenant dies intestate; a joint tenancy cannot pass under a will or intestacy. For this reason, among others, joint tenants were said to be seised 'per my et per

tout,' 'my'apparently meaning 'not in the least': each joint tenant holds nothing by himself and yet holds the whole together with his fellows. Or again, a joint tenant may become entitled to nothing or to all, according to whether or not he is the last survivor. . .

[349] *The Homesteads Act*, s. 21(1)

[350] *The Family Property Act*, C.C.S.M. c. F25

Interest of deceased spouse or common-law partner in joint asset
35(3) Where a deceased spouse or common-law partner at the time of his or her death held real property, or funds in a bank account, jointly with a person other than the surviving spouse or common-law partner, the real property or funds shall be included in the inventory of assets of the deceased spouse or common-law partner
(a) in the case of funds in a bank account, to the extent that the funds were the property of the deceased spouse or common-law partner immediately before the funds were deposited; and
(b) in the case of real property, to the extent of the ratio of the contribution of the deceased spouse or common-law partner to the contribution of other parties, multiplied by the fair market value of the property on the day the spouse or common-law partner died.

[351] *The Sand and Gravel Act*, C.C.S.M. c. S15

Ownership of sand and gravel
4 Subject to section 7, the owner of the surface of any land is, and shall be deemed to have always been, the owner of and entitled to all sand and gravel within, or under the land.

Sand and gravel deemed not to be a mineral
5(1) Sand and gravel shall be deemed not to be a mine, mineral, or valuable stone, but, subject to section 7, shall be deemed to be, and have always been, a part of the surface of the land within, upon, or under which it is situated and belong to the owner thereof.

[352] *The Sand and Gravel Act*, S.M. 1972, c. 34

[353] *Western Minerals Ltd. v. Gaumont*, [1953] 1 SCR 345

[354] *Western Minerals Ltd. v. Gaumont*, [1953] 1 SCR 345, at page 352

[355] *Western Minerals Ltd. v. Gaumont*, [1953] 1 SCR 345, at page 356

[356] *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 1889, WL 10367 (Privy Council)

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as partes soli, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed.

[357] *Dominion Lands Act*, Cap. XXII, 35 Vict., 1872

[358] *Hudson's Bay Co*. v. *Canada (AttorneyGeneral)* [1929] 1 W.W.R. 287, [1929] A.C. 285, [1929] 1 D.L.R. 625

Whatever may be the effect of sec. 36 of the Act of 1872, it certainly does not amount to a provision that a grant of Dominion lands operates as a grant of the precious metals contained therein.

[359] *An Act to amend the "Dominion Lands Act, 1879*", Cap 26, 43 Vict., repealing section 36 (then numbered 37), see section 6.

[360] *An Act to amend the Dominion Lands Act*, 1879, Cap 16, 44 Vict.

[361] *Dominion Lands Act*, Cap 17, 46 Vict.

[362] *The Real Property Act*

Restrictions on certificate
58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
(a) any subsisting reservation contained in the original grant of the land from the Crown.

[363] *The Real Property Act*

Amount of compensation — mines and minerals
183(2) Subject to this section and sections 184 to 191, compensation with respect to an estate or interest in mines and minerals, or any of them, in, under or upon land, is payable as follows:
(a) the money actually paid for that estate or interest in mines and minerals;
(b) a further sum, not exceeding $5,000, for all other losses, including expenses and interest, incurred by the person claiming compensation.

[364] *An Act to Amend and Continue the Act 32 and 33 Victoria, Chapter 3; and to Establish and Provide for the Government of the Province of Manitoba (The Manitoba Act)*, CAP 3, 33 Victoria, assented May 12, 1870.

30. All ungranted or waste lands in the Province shall be, from and after the date of said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.

[365] *Manitoba Boundaries Extension Act*, S.C. 1912, CAP 32, 2 George V, c. 32 (Canada)

6. All Crown lands, mines and minerals and royalties incident thereto in the territory added to the province under the provisions of this Act, and the interest of the Crown under The Irrigation Act in the waters within such territory, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act.

See also:

The Extension of the Boundaries of the Province of Manitoba Act, 1912 (Man.), c. 6

2. (c) All Crown lands, mines and minerals and royalties incident thereto, in the territory added to the Province under the provisions of this Act, and the interest of the Crown, under 'The Irrigation Act,' in the waters within such territory, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act.

[366] Order in Council 1889-2167

Sec. 8 All patents from the Crown for lands in Manitoba and the North-West Territories, shall reserve to Her Majesty, Her Successors and Assigns forever, all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same, and for this purpose, to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same, except in the case of patents for lands which have already been sold or disposed of for valuable consideration, or for lands which have been entered as homesteads before the date upon which these regulations come into force.

[367] The September 17, 1889 date cannot be relied upon without further examination of the grant in question. Not all grants after this date automatically reserved mines and minerals. As noted, there would be no reservations from grants where the lands were sold or entered as homesteads prior to that date.

[368] *An Act Respecting the Acquisition and Sale or Disposal of Public Lands of the Province*, 1883 CAP 12 46 & 47 Vic., assented to July 7, 1883

[369] *The Manitoba Provincial Lands Act*, 1887 CAP 21, 50 Vic., assented to June 10, 1887

[370] *The Manitoba Provincial Lands Act*, 1887 CAP 21, 50 Vic.

21. It is hereby declared that no grant from the Crown of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines or any other mineral, therein, unless the same are expressly conveyed in such grant.

[371] See the *Settlement of Claims of Manitoba Act*, S.C. 48-49 Vict., 1885, Chap 50, s. 1 and for the definition of Swamplands, Order-in-Council (Canada) 1887-1037

[372] *District Registrar, Portage la Prairie* v. *Superior Oil & Hiebert*, 1954, 3 D.L.R. 705

[373] *The Manitoba Provincial Lands Act*, 1887 CAP 21, 50 Vic., assented to June 10, 1887

21. It is hereby declared that no grant from the Crown of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines or any other mineral, therein, unless the same are expressly conveyed in such grant.

[374] See both *An Act respecting the Title to Certain Lands*, C-78 S.M. 1955, and *An Act to amend An Act respecting the Title to Certain Lands*, C-66 S.M. 1956

[375] *An Act to provide for the extension of the Boundaries of the Province of Manitoba*, S.C. 2 George V., 1912, Chapter 32, preamble.

[376] *An Act to provide for the extension of the Boundaries of the Province of Manitoba*, S.C. 2 George V., 1912, Chapter 32

5.(2) Section 1 of chapter 50 of the statutes of 1885 is repealed, and all lands (known as swamp lands) transferred to the province under the said section 1, and not sold by the province prior to the time at which the terms and conditions of this Act have been agreed to by the Legislature of the province, shall be re-transferred to the Government.

An Act to provide for the Further Extension of the Boundaries of the Province of Manitoba, S.M. 2 George V., 1912, Chapter 6

2.(b) (2) Section 1 of chapter 50 of the statutes of 1885 is repealed, and all lands (known as swamp lands) transferred to the Province under the said section 1, and not sold by the Province prior to the time at which the terms and conditions of this Act have been agreed to by the Legislature of the Province, shall be re-transferred to the Government of Canada;

[377] *An Act respecting the Transfer of Natural Resources to the Province of Manitoba* (The Manitoba Natural Resources Act), S.C. 1930, Chap 29

[378] *An Act respecting Titles to Crown Lands Affected by the Natural Resources Agreement*, S.M. 1932, Chap 31

[379] *An Act respecting the Transfer of Natural Resources to the Province of Manitoba* (The Manitoba Natural Resources Act), S.C. 1930, Chap 29

[380] *The Provincial Lands Act*, SM CAP 32, 1930, assented to March 12, 1930

6. (1) There is hereby reserved to the Crown out of every disposition of provincial lands extending to the sea or any inlet thereof or to the boundary line between Canada and the United States of America or between the Province of Manitoba and the provinces of Ontario or Saskatchewan, or the Northwest Territories respectively, whether under this or any other Act of this Legislature, a strip of land one and one-half chains in width measured from the ordinary high water mark or such boundary line, as the case may be, and no building or works shall be erected on such land.

9. There is hereby reserved to the Crown out of every disposition of provincial lands under this Act all mines and minerals together with the right to enter, locate, prospect and mine upon any vacant provincial lands for minerals and such mines and minerals together with the right to enter, locate, prospect and mine such minerals shall be disposed of only in such manner and on such terms and conditions as are provided in "The Mines Act" and the regulations made thereunder.

[381] *The Crown Lands Act*, SM 1934, c. 38

[382] The Crown Lands Act, SM 1934

5. In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land,
(a) in case the land extends
(i) to the sea or an inlet thereof; or
(ii) to the shores of any navigable water or an inlet thereof; or
(iii) to the boundary between Canada and the United States of America, or between the province and the provinces of Ontario or Saskatchewan, or the Northwest Territories;

a strip of land one and one-half chains in width, measured from ordinary high-water mark or from the boundary line, as the case is; See S.M. 1930, c. 32, s. 6(1);
…
(d) mines and minerals, together with the right to enter, locate, prospect, mine for and remove minerals;

[383] *An Act to amend The Crown Lands Act*, SM 1966-67, Cap 12

1. Section 5 of The Crown Lands Act, being chapter 57 of the Revised Statutes, is amended
…
(b) by adding thereto, at the end thereof, the following subsections:
(2) Where mines and minerals have been, or are reserved out of the disposition of land made under this act or under The Provincial Lands Act, after the fifteenth day of July, 1930, the reservation shall be conclusively deemed to include, and always to have included, a reservation of sand and gravel.

[384] *The Sand and Gravel Act*

Ownership of sand and gravel
4 Subject to section 7, the owner of the surface of any land is, and shall be deemed to have always been, the owner of and entitled to all sand and gravel within, or under the land.

Sand and gravel deemed not to be a mineral
5(1) Sand and gravel shall be deemed not to be a mine, mineral, or valuable stone, but, subject to section 7, shall be deemed to be, and have always been, a part of the surface of the land within, upon, or under which it is situated and belong to the owner thereof.

[385] *An Act respecting Municipalities*, 1875, 38 Vic. Cap. 31

XIX. The assessment roll of every municipality shall be annually revised and corrected by the council thereof.

6. The council may, in each and every year after the final revision of the roll, pass a by-law for levying a rate on all real and personal property on the said roll to provide for all the necessary expenses of said municipality, and also such sum or sums of money as may be found expedient.

XXXVI. On or before the fifteenth day of January in each year the treasurer of each local municipality shall prepare a statement of all non-resident lands, or lands vacated by the owners thereof which are in arrears for taxes for the previous year within the municipality…Such statement shall give a description of all the lands in arrears…The treasurer shall state in said list or statement that all such lots or parcels of land will be offered for sale…unless in the meantime the taxes have been paid. The sale shall take place within the municipality…

[386] *The Manitoba Municipal Act*, 1886, 49 Vic. Cap. 52

2. Unless otherwise declared or indicated by the context wherever any of the following words occur in this Act they shall have the meaning herein expressed, namely:

(5.) "Land," "Lands," "Real Estate," "Real Property," shall respectively, include lands, tenements, hereditaments, and all rights thereto and interests therein; and the word "Property" shall include both real and personal property unless where it is otherwise expressed.

642. Whenever the whole or a portion of any tax on any land has been due and unpaid for more than one year after the thirty-first day of December of the year when the rate was struck, whether levied before or after the passing of this act or part before and part thereafter, such lands shall be liable to be sold for taxes…and a sale of lands for arrears of taxes so due thereon shall be held by local municipalities at least every alternate years.

[387] *The Assessment Act*, 1890, 53 Vic. Cap. 53

2. Where the words following occur in this Act or the schedules thereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

(4) "Land," "Real property" and "Real estate" respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land, and land covered with water, and all mines, minerals, quarries and fossils in and under same, except mines belonging to Her Majesty.

[388] *The Municipal Act*, R.S.M. 1940, Cap 141, PART XII

991. In this part, unless the context otherwise requires,
(d) "land" means land, messauges, tenements and hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein and whether legal or equitable, and all paths, passages, waters or watercourses, liberties, privileges, easements, mines and minerals excepting those belonging to His Majesty, and all trees and timber thereon, and includes…

992. (1) All lands shall be liable to taxation by a municipality subject to the following exemptions:

[389] *An Act to amend The Municipal Act (1)*, S.M. 1945, Chapter 71

12. Paragraph (d) of section 991 of the Act is amended,
(a) by striking out the first eight lines thereof and substituting therefore the following:

(d) "land" means land, messauges, tenements and hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein and whether legal or equitable (but not including mines and minerals) and all trees and timber thereon; and also all paths, passages, waters or watercourses, liberties, privileges, and easements, (but not including the right, interest, or estate, of an occupier under a hay permit or a grazing permit issued by the Minister of Mines and Natural Resources with respect to Crown Lands), and includes;

[390] *An Act to Amend the Real Property Act*, S.M. 1949, Chapter 52

1. The Real Property Act, being chapter 178 of the Revised Statutes of Manitoba, 1940, is amended by adding thereto, immediately following section 49 thereof, the following section:
49A. (1) Where land the title to which includes any of the reservations in favour of the Crown set forth in the Crown Lands Act or The Water Rights Act
(a) is or has heretofore been sold by a municipality or local government district for arrears of taxes all or part of which where imposed after the thirty-first day of December, 1944; and
(b) a person, a municipality or a local government district purchases the land at tax sale or otherwise becomes or has become entitled thereto as an assignee of a tax sale purchaser, and by virtue of the tax sale applies to a district registrar to bring land under The Real Property Act or for a transmission under that Act as the case requires; and
(c) the land is not redeemed;

Upon the issue of a certificate of title pursuant to the tax sale application, notwithstanding that the municipality or the local government district did not sell the reservations in favour of the Crown or any of them at the tax sale, all the reservations in favour of the Crown set forth in the Crown Lands Act and The Water Rights Act are hereby vested in His Majesty the King in right of the province and the certificate of title issued to the tax sale purchaser or his assignee shall be subject to the reservations in favour of the Crown set forth in The Crown Lands Act and The Water Rights Act.

(2) It shall be sufficient proof of the vesting of the reservations in favour of the Crown if the district registrar endorses upon the face of the certificate of title standing in the name of the registered owner whose title has been extinguished by the tax sale proceedings a memorial of the fact of the vesting of the reservations in the Crown, and , if title to the land was under the old system, if the district registrar makes an entry on the abstract of title of the fact of the vesting of the reservations in the Crown.

2. This Act shall come into force on the day it receives the royal assent but shall be retroactive and shall be deemed to have been in force on, from, and after, the first day of January, 1945.

***The Real Property Act,* SM 1954, Chapter 220**
Section 49A was re-numbered at section 50, references to King are changed to Queen, but otherwise the section is essentially the same.

***An Act to Amend the Real Property Act,* S.M. 1968, Chapter 54, sections 26 and 79**

26. Section 50 of the Act is repealed and the following section is substituted therefore:

50. (1) The words “mines and minerals” where used in this section include
(a) any fractional interest in mines and minerals; and
(b) any named mineral and any fractional interest in a named mineral.

(2) Where any land, whether the title thereto is under this Act or The Registry Act,
(a) is, or has heretofore been, sold by a municipality or local government district for arrears of taxes all or part of which were imposed after the thirty-first day of December, 1944;
(b) the purchaser at the tax sale makes application to be registered as owner of the land pursuant to the tax sale; and
(c) the land is not redeemed;
the certificate of title issued pursuant to the tax application shall except therefrom
(d) any mines and minerals not included in the title of the owner whose title is extinguished by the tax sale proceedings; and
(e) all mines and minerals to which clause (d) does not apply.

(3) Upon the issue of a certificate of title to the tax sale applicant as provided in subsection (2), the title of the former owner to all mines and minerals to which clause (e) of subsection (2) applies is extinguished; and title to those mines and minerals is vested in the Crown in right of Manitoba.

(4) It is sufficient proof of the vesting of title to mines and minerals in the Crown in right of Manitoba under section (3),

(a) where title to the land sold at the tax sale is under this Act, if the district registrar endorses a memorial of the vesting upon the certificate of title of the registered owner whose title to mines and minerals is extinguished under subsection (3); and

(b) where title to that land is under The Registry Act, if the district registrar makes an entry in the appropriate abstract book of the fact of the vesting of title to the mines and minerals in the Crown in right of Manitoba.

(Note: See Sec. 79 for effective date.)

79.(1) Section 50 of the Act, as re-enacted by section 26 of this Act, is retroactive and shall be deemed to have been in force on, from, and after, the first day of January, 1945.

(2) The district registrar, without requiring production of the duplicate title, may

(a) amend any certificate of title that is subject to the reservations in favour of the Crown, as set forth in The Crown Lands Act and The Water Rights Act, pursuant to a vesting as heretofore set forth in section 50 of the Act as it appeared before it was repealed and re-enacted by this Act, by deleting the reference to those reservations and, where applicable, excepting the mines and minerals as provided in section 50 of the Act, as re-enacted by this Act; and

(b) amend any memorial of vesting made pursuant to section 50 of the Act as it appeared before it was repealed and re-enacted by this Act, and do all things that he deems to be necessary or advisable to give effect to section 50 of the Act as re-enacted by this Act.

[391] *The Municipal Act*, S.M. 1970, Chapter 100

2(1) In this Act,

(x) "land" includes land, messuages, tenements, and hereditaments, corporeal or incorporeal, of every kind and description, whatever the estate or interest therein, whether legal or equitable; and also includes a unit specified in a plan to which The Condominium Act applies; but in part XVII does not include mines and minerals.

[392] *An Act to Amend the Municipal Act*, S.M. 1972, Chapter 42, section 21

21 Section 799 of the Act is repealed and the following section is substituted therefore:
Definitions for Part XVII

799 In this Part

(a) "land" does not include mines and minerals;

(b) "mines" and "minerals" have the meaning severally given to those words in The Mines Act, but, where the title of the owner of the surface does not include mines and minerals by reason of an exception or reservation purporting to be an exception or reservation of all mines and minerals, the expression "mines and minerals" has the same meaning as in the exception or reservation.

[393] *An Act to Amend the Real Property Act*, S.M. 1972, Chapter 37, sections 3

3. Subsection (1) of section 47 of the Act is repealed and the following subsection is substituted therefore:

Meaning of "Mines and Minerals".
47(1) In this section the expression "mines and minerals" has the same meaning as that expression has in part XVII of The Municipal Act.

Note that in 1970, section 50 of *The Real Property Act* had been re-numbered to section 47.

[394] Which definition originated from S.M. 1993, c. 4, s. 232

[395] *The Municipal Act*, R.S.M. 1988, c. M225 (as amended)

Definitions
802 In this Part

"land" does not include mines and minerals;

"mines" and "minerals" have the meaning severally given to those words in The Mines and Minerals Act and include oil and gas rights as defined in The Oil and Gas Act, but where the title of the owner of the surface does not include mines and minerals by reason of an exception or reservation of all mines and minerals, the expression "mines and minerals" has the same meaning as in the exception or reservation.

[396] *The Municipal Act*, SM 1996, c. 58

[397] *The Municipal Act*

[398] *The Real Property Act*

Meaning of "mines and Minerals"
47(1) In this section the expression "mines and minerals" has the same meaning as that expression has in Part XVII of The Municipal Act.

[399] *The Municipal Act*

Definitions
363(1) In this Division,

"property" means land other than Crown lands as defined in section 334 and includes improvements on the land.

Sale by public auction
365(3) A municipality may not sell a property for taxes except by public auction under this Division.

Registration of tax sale purchaser as owner
377(3) The district registrar must register the purchaser of property at a tax sale as owner of the property if
(a) the purchaser presents a tax sale application, accompanied by evidence satisfactory to the district registrar that notice of the sale was served as required by section 367, for registration at the Land Titles Office; and
(b) no pending litigation order is filed under subsection (2) in respect of the sale within 30 days after the date of the auction.

Title of purchaser
377(4) Except as otherwise provided in The Real Property Act, the registration of title to a property sold for taxes in the name of the tax sale purchaser extinguishes every interest in the property that arose or existed before the property was sold for taxes.

[400] *The Peatlands Stewardship Act*, C.C.S.M. c. P31

[401] *The Real Property Act*

Exceptions from title issued
47(2) Where any land, whether the title thereto is under this Act or The Registry Act,
(a) is, or has heretofore been, sold by a municipality or local government district for arrears of taxes all or part of which were imposed after December 31, 1944;
(b) the purchaser at the tax sale makes application to be registered as owner of the land pursuant to the tax sale; and
(c) the land is not redeemed;
the certificate of title issued pursuant to the tax sale application shall except therefrom
(d) any mines and minerals and peat not included in the title of the owner whose title is extinguished by the tax sale proceedings; and

(e) all mines and minerals and peat to which clause (d) does not apply.

Title extinguished
47(3) Upon the issue of a certificate of title to the tax sale applicant as provided in subsection (2), the title of the former owner to all mines and minerals and peat to which clause (2)(e) applies is extinguished; and title to those mines and minerals and peat is vested in the Crown in right of Manitoba.

[402] *The City of Winnipeg Charter,* SM 2002, c. 39

Application of Real Property Act
405 Subsections 45(1) to (4) (tax sale applications) and section 47 (mines and minerals vested in Crown) of The Real Property Act do not apply to applications for title to real property made under this Division.

[403] *The Municipal Act,* R.S.M. 1988

[404] *The Municipal Act*, SM 1996, c. 58

[405] *The Mines and Minerals Act*, C.C.S.M. c. M162

[406] *The Sand and Gravel Act*

[407] *The Sand And Gravel Act*

Ownership of sand and gravel
4 Subject to section 7, the owner of the surface of any land is, and shall be deemed to have always been, the owner of and entitled to all sand and gravel within, or under the land.

Sand and gravel deemed not to be a mineral
5(1) Sand and gravel shall be deemed not to be a mine, mineral, or valuable stone, but, subject to section 7, shall be deemed to be, and have always been, a part of the surface of the land within, upon, or under which it is situated and belong to the owner thereof.

Sand and Gravel not owned by owner of minerals
5(2) Notwithstanding any patents, titles, grants, deeds, conveyance, lease, licence, agreement, disposition, or any document, heretofore or hereafter issued or made, that conveys or reserves mines, minerals or valuable stone, but subject to section 7, the owner of the mines, minerals, or valuable stone, within, upon, or under any land is not entitled to the sand and gravel within, upon, or under that land as against the owner of the surface of that land.

[408] *The Sand and Gravel Act*

Application.
2 This Act applies to all lands in the province and to the owners thereof, including the Crown in right of Manitoba.

Act subject to Crown Lands Act
3 This Act is subject to The Crown Lands Act, and if there is a conflict or inconsistency between this Act and The Crown Lands Act the provision in The Crown Lands Act is to prevail.

[409] *The Crown Lands Act*

[410] The Sand and Gravel Act

Saving clause
7 Nothing in this Part affects the title to, or any interest in, the sand and gravel within, upon, or under any land or the right to work or remove it, that title, interest, or right arises from:
…

(b) by an Act of the Legislature or of the Parliament of Canada; that expressly grants, transfers, conveys, or disposes of, that title or interest or right with respect to sand and gravel; or

[411] *The Mines and Minerals Act*, C.C.S.M. c. M162

[412] *Rural Municipality of Springfield* v. *The Provincial Assessor*, [1992] 1W.W.R. 700

[413] *The Municipal Assessment Act*, C.C.S.M. c. M226

[414] *The Municipal Act*, SM 1996, c. 58

Definitions
802 In this Part

"mines" and "minerals" have the meaning severally given to those words in The Mines and Minerals Act and include oil and gas rights as defined in The Oil and Gas Act, but where the title of the owner of the surface does not include mines and minerals by reason of an exception or reservation purporting to be an exception or reservation of all mines and minerals, the expression "mines and minerals" has the same meaning as in the exception or reservation. (emphasis mine)

[415] *The Railway Act*, SC 1903 CAP 58, 3 EDWARD VII, assented to October 24, 1903 (the Act came into force and effect on the date of proclamation, being February 1, 1904)

132(2) The company shall not be entitled to any mines, ores, metals, coal, slate, minerals oils or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works, unless the same have been expressly purchased; and all such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby.

[416] *The Attorney General of Canada* v. *The Canadian Pacific Railway Company*, 1958, S.C.R. 285

[417] *The Attorney General of Canada* v. *The Canadian Pacific Railway Company*, 1958, S.C.R. 285, p. 213

LOCKE J.
Questions 2 and 3 may be conveniently considered together and read as follows:

2. When title to land without exception of mines and minerals is or was acquired by one of said railway companies without any proceedings being commenced under the compulsory powers given by the Railway Act but as a result of agreement made with the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired
(a) pursuant to said The Real Property Act, or
(b) by deed to which said The Law of Property Act applies?

3. When title to land without exception of mines and minerals is or was acquired by one of said railway companies by purchase after commencement but before completion of proceedings under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired
(a) pursuant to said The Real Property Act, or
(b) by deed to which said The Law of Property Act applies?

While stated without limitation, the questions obviously refer to lands acquired on and after February 1, 1904, when s. 198 came into force.

Subject to the exception above noted of such mines or minerals as are "necessary to be dug, carried away or used in the construction of the works", the conveyances, whether by transfer or by deed, are, in my opinion, to be construed as excepting all such mines and minerals. I consider that the fact that the conveyance may be made after the commencement of expropriation proceedings does not affect the matter.

[418] *Western Minerals Ltd.* v. *Gaumont*, [1953] 1 SCR 345

[419] *National Transcontinental Railway Act*, 3 EDWARD VII, Chapter 71

9. The construction of the Eastern division ... shall be under the charge and control of three commissioners ... who ... shall be a body corporate in the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "the Commissioners."

[420] *National Transcontinental Railway Act*, 3 EDWARD VII, Chapter 71

8. The Eastern division of the said Transcontinental Railway extending from ... Moncton to ... Winnipeg, shall be constructed by or for the Government in the manner hereinafter provided...

[421] *The Railway Act, SC 1903 CAP 58*, 3 EDWARD VII

3. This act shall apply to all persons ... other than Government railways ...

[422] *National Transcontinental Railway Act*, 3 EDWARD VII, Chapter 71

14. The Commissioners shall have...in addition to all the rights ... conferred by this Act, all the rights, powers, remedies and immunities ... under *The Railway Act...in* so far as they are not inconsistent with...this Act...

[423] *National Transcontinental Railway Act*, 3 EDWARD VII, Chapter 71

13. The Commissioners may ... take possession of any lands required for the purposes of the Eastern division, and they shall ... deposit of record a description and a plan thereof in the...land titles office ... and such deposit shall act as a dedication to the public of such lands, which thereupon become vested in the Crown ...

[424] The *Railway Act*

118. The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained: -
(c.) purchase, take and hold of and from any person, any lands or other property necessary for the operation of the railway…

[425] *Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City), Re* 1949 CarswellBC 115, [1949] J.C.J. No. 1, [1950] 1 W.W.R. 220, [1950] 1 D.L.R. 721, [1950] A.C. 122, 64 C.R.T.C. 266, (1949) 66 T.L.R. (Pt. 1) 34

20 It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in sec. 6 (c). In their Lordships' judgment that is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being included in the definition of "railway" indicates that the word "railway" by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of or used in connection with the operation of a railway system. The appellant founded on two general phrases which occur in the definition — "property real or personal and works connected therewith" and "other structure which the company is authorized to construct." With regard to the first of these

phrases their Lordships are of opinion that the words "connected therewith" qualify the whole phrase and refer back to the preceding words and therefore property which is not connected with the railway system is not included; with regard to the second phrase the context shows that these words were not intended to bring in structures which have no connection with a railway system merely because a railway company was authorized to construct them. The appellant is authorized by the Canadian Pacific Railway Act, 1902, to carry on a variety of undertakings including mining, electricity supply and irrigation; it cannot have been intended that structures erected solely for the purposes of these undertakings and having no connection with the railway system should be included within this definition of "railway."

[426] *Canada (Attorney General)* v. *Canadian Pacific Ltd.* 2000 BCSC 933, 2000 CarswellBC 1272, [2000] 4 C.N.L.R. 39, [2000] B.C.W.L.D. 896, [2000] B.C.J. No. 1208, [2000] B.C.T.C. 397, 33 R.P.R. (3d) 183, 79 B.C.L.R. (3d) 62, 98 A.C.W.S. (3d) 251

256 I do not consider the late presentation of the proposal, by itself, to be fatal. This property has been in legal limbo since 1989. On several occasions CPR pressed for a trial date to resolve the issue. The main cause of delay was the ongoing Federal Court litigation which occupied the other parties, and while CPR is criticized for its "use it if we have to lose it" proposal, I would not conclude on the evidence that the proposal is not a legitimate business plan presented in good faith. Essentially the restraint on alienation reduces the property's land value to CPR to zero, and makes construction of an office building a sensible business proposal in the interests of the overall railway enterprise. Further, the proposed use is for railway purposes. Freight and claims offices are integral and necessary to the operation of a railway. And while it may not strictly be "necessary" to house the office on this land, in the context of the Railway Act where the word "necessary" could rarely be applied to any parcel of land, some greater functional interpretation must be given.

[427] *Canadian National Railway* v. *Nor-Min Supplies Ltd*. 1976 CarswellOnt 410, 1976 CarswellOnt 410F, [1977] 1 S.C.R. 322, 66 D.L.R. (3d) 366, 7 N.R. 603

10 The reliance on the definition of "railway" as including "property real or personal and works connected therewith" to bring the quarry under s. 18(1) is effectively answered, in my opinion, by the judgment of the Privy Council in *C.P.R. v. Attorney-General of British Columbia*[7], the well-known *Empress Hotel* case, where, at p. 147 the Privy Council said that "there is nothing in the definition [of railway] to indicate that it was intended to include anything which is not a part of or used in connexion with the operation of, a railway system"; and it added that "the words 'connected therewith' qualify the whole phrase and refer back to the preceding words, and therefore property which is not connected with the railway system is not included". I shall come back to the *Empress Hotel* case and to the definition of "railway" in dealing with the appellant's second submission.

14…The mere economic tie-up between the C.N.R.'s quarry and the use of the crushed rock for railway line ballast does not make the quarry a part of the transportation enterprise in the same sense as railway sheds or switching stations are part of that enterprise. The exclusive devotion of the output of the quarry to railway uses feeds the convenience of the C.N.R., as would any other economic relationship for supply of fuel or materials or rolling stock, but this does not make the fuel refineries or depots or the factories which produce the materials or the rolling stock parts of the transportation system.

[428] C.B.R.T. & G.W. v. Canadian National Railway, 1972 CarswellAlta 21, [1972] 2 W.W.R. 674

20 The power to acquire and operate the Lodge is permissive. The company may have acquired and improved, and may operate the Lodge for its purposes, but that of itself does not bring the operation within s. 53. The facts do not support the view that the Lodge is necessary for its railway purposes, and, lacking necessity, it is not relevant that the Lodge may be convenient to those purposes. In brief, s. 29 does not, in my opinion, serve to make the Lodge part of the railway of the company but, rather, distinguishes it and the other permissive activities from the railway operation. I conclude, in conformity with the views expressed by Lord Reid, that the Lodge is not an undertaking within s. 92(10)(a) of the B.N.A. Act and hence cannot come within s. 53 of the federal Act.

[429] *An Act respecting the Canadian Pacific Railway*, SC 1881 CAP 1, 44 Victoria, Sec. 11

9. In consideration of the premises, the Government agree to grant to the Company a subsidy in money of $25,000,000, and in land of 25,000,000 acres, for which subsidies the construction of the Canadian Pacific Railway shall be completed and the same shall be equipped, maintained and operated,-the said subsidies respectively to be paid and granted as the work of construction shall proceed, in manner and upon the conditions following, that is to say:-…

11. The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper House, in so far as such lands shall be vested in the Government,-the Company receiving the sections bearing uneven numbers. But should any of such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to receive them as part of such grant; and the deficiency thereby caused and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted (which lakes and water stretches shall not be computed in the acreage of such sections), shall be made up from other portions in the tract known as the fertile belt, that is to say, the land lying between parallels 49 and 57 degrees of north latitude, or elsewhere at the option of the Company, by the grant therein of similar alternate sections extending back 24 miles deep on each side of any branch line or lines of railway to be located by the Company, and to be shown on a map or plan thereof deposited with the Minister of Railways; or of any common front line or lines agreed upon between the Government and the Company,-the conditions hereinbefore stated as to lands not fairly fit for settlement to be applicable to such additional grants. And the Company may with the consent of the Government, select in the North-West Territories any tract or tracts of land not taken up as a means of supplying or partially supplying such deficiency. But such grants shall be made only from lands remaining vested in the Government.

[430] *Railway Act*, R.S. c. R-3

[431] *Railway Act*

140.(1) The company is not, unless they have been expressly purchased, entitled to any mines, ores, metals, coal, slate, minerals oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

(2) All mines and minerals, except as provided in subsection (1), shall be deemed to be excepted from the conveyance of such lands to the company, unless they have been expressly named therein and conveyed thereby. R.S., c. R-2, s. 136

[432] *Canada Transportation Act*, S.C. 1996, c. 10, assented to 1996-05-29

PART VII PARTIE VII

Repeals, Transitional Provisions, Consequential and Conditional Amendments and Coming into Force
85 (1) Subject to subsection (2), the Railway Act is repealed, except to the extent that subsection 14(1), except paragraph (b), and sections 15 to 80, 84 to 89, 96 to 98 and 109 of that Act continue to apply to a railway company that has authority to construct and operate a railway under a Special Act and has not been continued under the Canada Business Corporations Act.

Repeal of certain provisions
* (2) Sections 264 to 270, 344, 345 and 358 of the Railway Act are repealed on a day to be fixed by order of the Governor in Council.
* [Note: Repeal in force July 1, 1996, see SI/96-54.]

[433] Order-in-Council 1908-1786, approved August 13, 1908

[434] Constituted by *The Manitoba Farm Loans Act*, c. 33, SM 1917)

[435] C. 13, SM 1933, adding s. 78 and s. 79 to *The Manitoba Farm Loans Act*

Section 78

Land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise is hereby vested in the Crown in right of the province, and land to which it hereafter in like manner becomes entitled shall thereupon become and be vested in the Crown in right of the Province; and the district registrar of any land titles district in which any parcel of such land is situate shall, on the request of the Provincial Treasurer, issue a certificate of title therefore in the mane of the Crown.

[436] *The Manitoba Farm Loans Act*

78. (1) Any land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise and which vested in the Crown in right of the province under section 78 which is repealed and substituted by this Act, is hereby revested in the association and may be reconveyed or retransferred, as the case may be, by conveyance or transfer under the hand of the Provincial Treasurer and no seal shall be required on any conveyance or transfer.

[437] *The Crown Lands Act*, enacted March 29, 1934 as c. 7 provided:

2. In this Act, unless the context otherwise requires, the expression
(b) "Crown Lands" includes land, whether within or without the province, vested in the Crown, and includes "provincial lands" whenever that expression is used in an Act of the Legislature;
(d) "Disposition" includes every act of the Crown whereby Crown lands or a right, interest or estate therein are granted, disposed of or affected or by which the Crown divests itself of or creates a right, interest or estate in land or permits the use of land; and the words "dispose of" shall have a corresponding meaning;

5. In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown Land
. . .
(d) mines and minerals, together with the right to enter, locate, prospect, mine for and remove minerals.

[438] *Wardle* v. *Manitoba Farm Loans Association* [1956] S.C.R. 3, [1955] 5 D.L.R. 673 (S.C.C.)

[439] *Wardle* v. *Manitoba Farm Loans Association* [1956] S.C.R. 3, [1955] 5 D.L.R. 673 (S.C.C.)

Per Justice Rand:

I am unable to agree that the revesting in the Association by the amending section 78 was a "disposition of Crown land" within s. 5 of The Crown Lands Act…

The key words are "act of the Crown"; but the revesting of lands by statute is not such an act.

And Justice Kellock:

While no doubt the statute did dispose of the lands, it was not a "disposition" with which the Minister of Mines and Natural Resources had anything to do, with which "disposition" alone the Crown Lands Act is concerned. Neither the legislation of 1937 nor the transfer executed by the Provincial Treasurer on the 18th of June, 1937, pursuant to that legislation, were in any sense ever within "the control and management" of the Minister of Mines and Natural Resources. (par. 41)

[440] *Wardle* v. *Manitoba Farm Loans Association* [1956] S.C.R. 3, [1955] 5 D.L.R. 673 (S.C.C.)

Per Justice Estey:

It, however, cannot be overlooked that the Association continued as a corporate body with the power of acquiring, holding and alienating property…I am, therefore, of the opinion that the degree of control exercised here was not sufficient to make the Association an agent of the Crown…

[441] *Wardle* v. *Manitoba Farm Loans Association* [1956] S.C.R. 3, [1955] 5 D.L.R. 673 (S.C.C.)

Per Justice Kellock:

38 While the definition in para. (b), taken alone, would, no doubt, include the lands vested in the Crown under the special legislation of 1933, it is to be observed that the expression "Crown lands" as used in the Act of 1934 is only to include lands as described in the paragraph "unless the context otherwise requires". For reasons which I proceed to give, the context of the statute, in my opinion, renders it abundantly plain that the statute has no application to the lands which the legislature had made the subject of the special Farm Loans legislation in 1933 and subsequently in 1937 and 1939.

45 It is therefore plain, in my view, that the context of the Crown Lands Act itself "otherwise requires" the exclusion from the operation of that statute of the lands here in question, any and all dealing therewith being governed by the special Farm Loans legislation to which I have referred. S. 5 of the Act of 1934 had, therefore, no relation to these lands and the transfer from the Crown to the respondent Association executed by the Provincial Treasurer pursuant to the legislation of 1937 on the 18th of June of that year became, by force of s. 78(3) of that legislation, "conclusive evidence" of the revesting of the land in the Association, including the minerals. The transfer itself did not purport to operate otherwise.

[442] *(Canada) Director of Soldier Settlement* v. *Snider Estate* [1991] 2 S.C.R. 481

[443] *The Soldier Settlement Act*, 1919, S.C. 1919

[444] *The Soldier Settlement Act*, 1919, S.C. 1919, c. 71 (later R.S.C. 1927, c. 188):

51. (1) All conveyances from the Board shall constitute new titles to the land conveyed and shall have the same and as full effect as grants from the Crown of previously ungranted Crown lands.

57. From all sales and grants of land made by the Board all mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatever.

[445] *The Natural Resources Transfer Agreement between Alberta and Canada as confirmed by Constitution Act,* 1930 (U.K.), 20 & 21 Geo. 5, c. 26

Transfer of Public Lands Generally

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom with the Province, and all sums due or

payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming

into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

[446] *(Canada) Director of Soldier Settlement* v. *Snider Estate* [1991] 2 S.C.R. 481, para. 24

2. Whether the Natural Resources Transfer Agreement made between Canada and Alberta, as confirmed by the Constitution Act, 1930 transferred the mineral estate (less coal) in the lands in question from Canada to Alberta thereby making inapplicable s. 57 of the Soldier Settlement Act, R.S.C. 1927, c. 188 as amended.

[447] *The Natural Resources Transfer Agreement between Alberta and Canada as confirmed by Constitution Act,* 1930 (U.K.), 20 & 21 Geo. 5, c. 26

General Reservations to Canada

18. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (a) any lands for which Crown grants have been made and registered under the Land Titles Act of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become the registered owner at the date upon which the agreement comes into force, or (b) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

[448] *(Canada) Director of Soldier Settlement* v. *Snider Estate* [1991] 2 S.C.R. 481

61 A. The Natural Resources Transfer Agreement did transfer the mineral estate to Alberta.

55 Moreover, I would not interpret para. 18 as extending to these mines and minerals. The section deals with "lands" and honours the distinction made in the opening clause. If it were not so restricted it would have the astonishing result, on the appellant's interpretation, of retaining for the federal Crown all the mines and minerals which the federal Crown had reserved from grants prior to 1930. For example, mines and minerals reserved from homestead grants would not pass to the province. During argument, counsel for the director conceded that those mines and minerals did pass to the province.

[449] *(Canada) Director of Soldier Settlement* v. *Snider Estate* [1991] 2 S.C.R. 481

58 The respondents or their predecessors have been the registered owners, as bona fide purchasers for value, of these mines and minerals since before 1930 and under the Land Titles Act of Alberta hold them against the provincial Crown. The appellant, I am glad to say, cannot some 50 years later, after the transfer to Alberta, invoke federal Crown ownership.

[450] *Land Titles Act*, RSA 2000, c L-4

Implied conditions

61(1) The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention in the certificate of title, subject to

(a) any subsisting reservations or exceptions, including royalties, contained in the original grant of the land from the Crown,

[451] *The Real Property Act*

Restrictions on certificate

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

(a) any subsisting reservation contained in the original grant of the land from the Crown;

[452] *(Canada) Director of Soldier Settlement* v. *Snider Estate* [1991] 2 S.C.R. 481

1. Whether the provisions of the Land Titles Act of Alberta, R.S.A. 1970, c. 198 as amended apply to or operate in respect of the mineral estate (less coal) in the lands in question so as to deprive the federal Crown of the proprietary interest reserved to it by the Soldier Settlement Act, R.S.C. 1927, c. 188, s. 57. (paragraph 24)

37 Since I have come to the conclusion that the mines and minerals were transferred to the province under the Natural Resources Transfer Agreement it will not be necessary to address the issue of whether the federal Crown is here bound by the Land Titles Act.

[453] Department of Innovation, Energy and Mines Department
https://www.manitoba.ca/iem/info/libmin/mining_in_manitoba.pdf

[454] *An Act respecting the Expropriation of Lands and Other Property*, S.M. 23 Geo 5, 1933, Cap 12 (*The Manitoba Expropriation Act*, R.S.M. c. 69, s. 1), section 10, subsection 2:

(2) Where the land is required for a limited time only, or only a limited estate, right or interest therein is required, the plan so deposited shall indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate, right or interest therein is taken, and by the deposit in such case, the right of possession for such limited time, or such limited estate, right or interest shall become and be vested in the Crown. R.S.M. c. 69, s. 11am.

[455] *An Act respecting Mines and Mining*, R.S.M. 1954, Cap 166 (*The Mines Act*, R.S.M. c. 136, s. 1)

Application of Act
3. (1) ...
(2) The mines, minerals, and mining rights in, on or under all common and public highways and road allowances shall be and are hereby vested in the Crown, and may be leased or otherwise disposed of under the regulation: Provided that this subsection does not apply to roads or highways in which the mines and minerals were expressly reserved in the Grant of the road or highway.

[456] *Borys v. Canadian Pacific Railway,* [1953] A.C. 217, 7 W.W.R. (N.S.) 546, [1953] 1 All E.R. 451, [1953] 2 D.L.R. 65 (P.C.)

38 In their Lordships' opinion the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the right of working.

[457] *Canada (Attorney General)* v. *Higbie* 1945 Carswell BC 89, [1945] 3 D.L.R. 1, [1945] S.C.R. 385

58 The orders in council may be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance. His Majesty the King does not convey to himself. As to that proposition, reference may be made to *Attorney General for British Columbia v. Attorney General for Canada*[13]; *Esquimalt and Nanaimo Railway Co. v. Treat*[14]; *Saskatchewan Natural Resources Reference*[15]. In the latter case, Mr. Justice Newcombe, delivering the judgment of this Court, stated, among other things, as follows (p. 275): —

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently

authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in *Ontario Mining Company v. Seybold*[16] where his Lordship, referring to Lord Watson's judgment in the *St. Catherines Milling* case[17], said: —

> In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the *British North America Act, 1867*, 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.' Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

458 *Crown Law*, Paul Lordon, Q.C., Butterworths, 1991, p. 283

4.6.1 Transfers between the Federal Government and the Provinces

A transfer of property between the federal government and a province is not done by ordinary conveyance, because of the principle of indivisibility of the Crown. Her Majesty is the owner of the property whether in right

of Canada or the province and cannot grant to Herself. Only administrative control of the property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third party rights are involved.

459 *Canada (Attorney General)* v. *Higbie* 1945 Carswell BC 89, [1945] 3 D.L.R. 1, [1945] S.C.R. 385

64 If, however, it had to be assumed that the orders in council were invalid without legislative approval, it should be pointed out that *The Land Act of British Columbia*, (1936) R.S.B.C., cap. 144, imposed no restriction on a transfer from the Province to the Dominion. After all, there is no real conveyance of property, since His Majesty the King remains the owner in either case and, therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion. When the Crown, in right of the Province, transfers land to the Crown, in right of the Dominion, it parts with no right. What takes place is merely a change of administrative control. *Theodore v. Duncan*[18]; *Burrard Power Co. Ltd. v. The King*[19]. In *Theodore v. Duncan*[20] Viscount Haldane delivering the judgment, stated at p. 706: —

> The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown apart from statutory authority, but is one of Ministerial administration, and this is confided to the discretion in the present instance of the same set of Ministers under both Acts. With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal.

460 *The Real Property Act*

Order in Council deemed a transfer

87 A certified copy of any order of the Governor in Council or of the Lieutenant Governor in Council or any document executed by or on behalf of either of them purporting to transfer, convey, grant, vest or assign the interest of the Crown, in any land that is under this Act to the Government of Canada or of Manitoba or to any municipality, shall be deemed to be a transfer of land under this Act and shall be so registered.

461 *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50

Powers of Governor in Council

16 (1) Despite any regulations made under subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, in accordance with any terms and subject to any conditions and restrictions that the Governor in Council considers advisable,

(e) transfer to Her Majesty in any right other than Canada administration and control of the entire or any lesser interest, or any right, of Her Majesty in any federal real property or federal immovable, either in perpetuity or for any lesser term;

(f) accept, on behalf of Her Majesty, the transfer of administration and control of real property or immovables from Her Majesty in any right other than Canada, including any such transfer made by grant, concession, vesting order, other conveyancing instrument or other transfer act;

[462] *Federal Real Property and Federal Immovables Act*

Transfers of administration and control

11 (1) An instrument transferring administration and control of federal real property or an act transferring administration and control of federal immovables to Her Majesty in any right other than Canada pursuant to regulations made under paragraph 16(2)(e) shall be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.

Effect of grant, etc.

(2) A grant, concession, vesting order or other conveyancing instrument or transfer act in favour of Her Majesty in respect of any real property or immovable belonging to Her Majesty in any right other than Canada results, on its acceptance, in Her Majesty having administration and control of the property.

[463] *Federal Real Property and Federal Immovables Act*

Powers of Governor in Council

16 (1) Despite any regulations made under subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, in accordance with any terms and subject to any conditions and restrictions that the Governor in Council considers advisable,

(f) accept, on behalf of Her Majesty, the transfer of administration and control of real property or immovables from Her Majesty in any right other than Canada, including any such transfer made by grant, concession, vesting order, other conveyancing instrument or other transfer act;

[464] *The Registry Act*

No further registrations of Crown grants under old system

18(1) Where a patent from the Crown has issued after February 20, 1914, for any land in any part of the province, the land is at once subject to *The Real Property Act*; and no instrument purporting to grant, transfer, mortgage, or hypothecate the land shall thereafter be registered under this Act.

Limitation on conveyances

18(2) No instrument purporting to grant, transfer, mortgage, or hypothecate, any land in the territory added to the Province of Manitoba by the Act, being chapter 32 of the *Statutes of Canada, 1912*, shall be registered under the old system of registration.

Registration of instruments affecting Crown lands

19 With the exception of

(a) a patent or grant of land from the Crown issued on or before February 20, 1914;

(b) [repealed] S.M. 1993, c. 4, s. 237;

(c) surface leases, grants of rights-of-way, and easements;

no instrument purporting to divest the Crown of a right, interest, or estate, in Crown lands, or to charge Crown lands, shall be registered under this Act.

Sections 18 and 19 not applicable

19.1 Sections 18 and 19 do not apply to

(a) Orders in Council; or
(b) any instruments that transfer administration and control of Crown lands between Canada and Manitoba.

[465] *Re Land Registry Act and Shaw* (1915), 8 W.W.R. 1270 (B.C.C.A.)

6 As was pointed out by their Lordships in *Manning* v. *The Commissioner of Titles* (1890) 15 App. Cas. 195, 59 L.J.P.C. 59, an officer in a position corresponding to that of the District Registrar is not to be deemed a mere machine for making registration even though the strict literal construction of the statute in the case before them would appear, if strictly construed, to make him such.

68 The respondent's contention is that it is no part of the duty of the registrar to inquire into the legality or illegality of the instrument, but his duty is to register same if it conforms to the provisions of the Land Registry Act.

69 I cannot take this view. I think the Registrar's duties are not those of a mere automaton, and the more so in a case like the present where the instrument on its face is contrary to law.

[466] *Abuse of power of attorney a growing crisis for seniors,* Vancouver Sun, Feb. 23, 2008

"It is a national and international crisis," said Laura Watts, national director of the Canadian Centre for Elder Law. "What we are seeing is increased abuse of power of attorney. It appears to be on the rise and certainly we will have more of it occur as our baby boomers age."
…
"There is one group that doesn't understand their role, the innocent misuse of power of attorney because they don't understand what they should be doing and the high level of responsibility they have. Then there is the group that uses power of attorney to ruin someone financially.
"What's different with seniors is that the results are often dramatic and often cause death."
…
"There are lots of abuses of power of attorney," said Valerie MacLean, executive director of the BC Crime Prevention Association. "Not just financial abuse, but physical abuse where seniors are intimated into signing over power of attorney.

"Power of attorney is a powerful thing and it can be misused and abused and seniors can be intimidated into appointing an abusive daughter or son as power of attorney."

www.cbc.ca/m/touch/canada/manitoba/story/1.3042512
Power-of-attorney abuse more common than we think, expert says
Apr 21, 2015 3:22 PM CT

Enduring and Springing Powers of Attorney, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 3
Evidence suggests that approximately 4% of elderly persons in Canada are victims of abuse and that up to 100,000 seniors are abused in Canada annually…Financial exploitation, including the misuse of powers of attorney, is involved in 40% of the cases reported…the problem of financial exploitation, including the abuse of powers of attorney, is likely to become even more severe in the future.

[467] *Arpin* v. *Leclaire*, 1930 CarswellMan 120, [1930] 2 D.L.R. 427

A power of attorney must be strictly construed, and where specific powers are given, followed by general powers, the general powers will be construed as relating to the specific powers, and will be confined to them. 1 Hals., p. 162, para. 353, *Coondoo* v. *Watson* (1884), 9 App. Cas. 561, *Bryant, Powes & Bryant* v. *Banque du Peuple*, [1893] A.C. 170; *Jacobs* v. *Morris*, [1902] 1 Ch. 816.

Kushnier v. *Kushnier*, 2011 CarswellMan 68, 2011 MBQB 29, [2011] 5 W.W.R. 685, 198 A.C.W.S. (3d) 539, 66 E.T.R. (3d) 10

41 I also take some comfort from the basic principles of interpretation of general powers of attorney. The existence of paragraph 24 creates in my mind some ambiguity in the interpretation of paragraph 22 of the 2007 General Power of Attorney. Craig asks that I read paragraph 22 on its own, and admittedly were I to do so, the wording to which he points might be broad enough to allow Craig the authority to revoke Kevin's appointment. However, one cannot read paragraph 22 without keeping an eye on paragraph 24, and that is where the ambiguity arises. Basic interpretation principles respecting powers of attorney executed under seal, as the 2007 General Power of Attorney purports to be, are that such documents should be strictly construed (See Henry J., at p. 678, in *Taylor v. Taylor* (1879), 2 S.C.R. 616 (S.C.C.); Sir W.J. Ritchie C.J., at p. 477, in *Churchill & Sons* v. *McKay* (1892), 20 S.C.R. 472 (S.C.C.); *Arpin* v. *Leclaire*, [1930] 2 D.L.R. 427 (Man. K.B.), at para. 15, *Potasky* v. *Potasky*, 2002 MBQB 146 (Man. Q.B.), at para. 13). In my view, that means that where there are two interpretations that can be drawn from the document, the most narrow interpretation should be adopted. This principle is to discourage attorneys from claiming more power than they really possess. The most narrow interpretation is that Craig does not have the power to revoke Kevin's position as attorney under the 2006 Specific Power of Attorney.

[468] *Andrews* v. *Sinclair*, 1923 CarswellAlta 33, 19 Alta. L.R. 463, [1923] 2 D.L.R. 903, [1923] 2 W.W.R. 166

1 I have come to the conclusion that the power of attorney did not authorize the attorney to borrow money and to give a mortgage as security for repayment. As stated in *MacKenzie on Powers of Attorney*, p. 37, "The Courts have been uncompromising on the point that an attorney must not borrow money without express authority." And in the same work at p. 33 the following passages occur:

> No matter how general the language may be, or how wide its apparent sweep, it will be presumed by the Court to be infused with the will of the principal to execute only the specific acts expressly mentioned in the power, and such other acts as may be requisite for the complete fulfilment of the principal's declared intentions.

Bank of Toronto v. *Matheson*, 1927 CarswellSask 74, [1927] 3 W.W.R. 10, 22 Sask. L.R. 127, [1927] 4 D.L.R. 328

10 This power of attorney does not confer upon Daniel Matheson the power to raise loans upon his principal's credit either for the principal himself or for his own accommodation or that of a third party. A bare power to make and endorse notes, cheques, etc., does not authorize such transactions. *Jacobs* v. *Morris*, [1902] 1 Ch. 816, 71 L.J. Ch. 363; *Jonmenjoy Coondoo* v. *Watson* (1884) 9 App. Cas. 561, 53 L.J.P.C. 80; *Elford* v. *Elford*, 64 S.C.R. 125, [1922] 3 W.W.R. 339. But it is clear upon the evidence that the original notes and the others taken from time to time were all given to cover loans made to Daniel Matheson himself. It is argued, however, that the general power conferred upon the attorney to do all "other acts and things ... for the purpose of carrying on any business in my name" provides the authority omitted from the eight matters specifiedly enumerated. But that is not so. The power to borrow money must be conferred in express terms, and cannot be read into any general authority. When this power is said to be based upon a power of attorney, the document itself must be construed strictly. *Hawtayne* v. *Bourne* (1841) 7 M. & W. 600, 10 L.J. Ex. 224; *Churchill* & *Sons* v. *McKay* (1892) 20 S.C.R. 472.

[469] *Findlay* v. *Butler*, 1977 CarswellNB 201, 19 N.B.R. (2d) 473, 30 A.P.R. 473

6 I am completely satisfied, having regard to all the circumstances, that the power of attorney given by the Sheehans to Mr. Cross on May 29th, 1973 included by implication the power in him to execute a conveyance of their property pursuant to any sale he might conclude. What he did was in any event certainly ratified by them by their acceptance of the purchase price through deposit to their accounts. As Wilson, C.J. stated in a reference, involving the adequacy of a somewhat similar power of attorney, to the Supreme Court of British Columbia in *Re Land Registry Act; re Rode's Petition* (1968) 64 W.W.R. 430 at p.432:

> I had always understood that a sale necessarily involved a change of ownership from A to B, and when dealing with real estate it is difficult to see how any change of ownership can be effected without a conveyance.

and at p. 434:

The precise wording of each document must, of course, be considered by the court, although I do find it very difficult to imagine a situation in which a valid power to sell real estate would not, under modern conditions, also imply a power to convey, because without conveyance there cannot be a transfer of ownership.

[470] *Drew* v. *Nunn* (1879), 4 Q.B.D. 661 (C.A.) and see also
Re Parks, Canada Permanent Trust Co. v. *Parks* 1956 CarswellNB 39, 8 D.L.R. (2d) 155

I think that the law is correctly stated in 1 Hals., 3rd ed., p. 244, where these cases are cited: "If the principal becomes a person of unsound mind, the agency as between the principal and agent is determined, but is not ipso facto revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal."

[471] *Parnall* v. *British Columbia*, 2004 CarswellBC 379, 2004 BCCA 100, [2004] B.C.W.L.D. 371, [2004] B.C.J. No. 347, 129 A.C.W.S. (3d) 424, 193 B.C.A.C. 309, 236 D.L.R. (4th) 433, 26 B.C.L.R. (4th) 45, 316 W.A.C. 309, 9 E.T.R. (3d) 117

9 The issue of enduring powers of attorney is spawned by the accepted wisdom that a power of attorney (a form of agency) is terminated upon the mental incapacity of the donor…the rule seems to be firmly entrenched and I think it must be the starting place for this discussion.

[472] *Report on Special, Enduring Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 14), January 8, 1974.

[473] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 1.

[474] *Budgell* v. *Hartley Estate*, 2008 MBQB 202, 2008 CarswellMan 403, 168 A.C.W.S. (3d) 895

27 … However, there is authority which suggests that, in the case of an enduring power of attorney, the relationship changes as soon as the donor lacks capacity. There appears to be a higher duty on an attorney acting under an enduring power of attorney following the event of the donor's incapacity. The attorney is no longer acting strictly as agent but as trustee. In *Agency Law Primer 2nd edition*, Cameron Harvey *1999 Thomson Canada Ltd.*, there is a quote from *Banton* v. *Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.), at pp. 239-240. This quotation is found at page 150 of the *Agency Law Primer* and reads as follows:

> An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. As an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property. In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor ... The status of such an attorney is much closer to that of a trustee than an agent of the donor…

[475] *Arpin* v. *Leclaire*, 1930 CarswellMan 120, [1930] 2 D.L.R. 427

In this Court such trusts cannot be disregarded. If we were to ignore them, the consequences would be that the land and the agreement for sale would have to be considered as sold and absolutely disposed of for the price of $1, and as these assets have a face value of about $2,500, the transaction would amount to a gift — for which there is no authorization in the power of attorney.

Lander v. *Lyall*, 2006 CarswellMan 252, 2006 MBQB 170, [2006] M.J. No. 264, 150 A.C.W.S. (3d) 495, 27 E.T.R. (3d) 21

16 With respect to the purported sale of Westbourne property, evidence brought forward by Lander, and in particular the appraisal of these lands prepared at her request by Mr. Christianson on September 15, 2004 (Ex. "B" to her affidavit sworn October 3, 2005), establishes, on balance, that Price and Lyall decided to sell property owned by Davie in which Davie had an interest to Price herself at a price of between $75,000-$84,000 when the fair market value of these lands was approximately $140,000 by September 2004, as opined by Mr. Christianson. The fair market value of these properties may have been higher in 2003, depending upon a clear analysis of the more recent (2006) values assessed by the rural municipality for these properties based on the 2003 assessment year. It is the function of an attorney who is in a trust position to take reasonable steps (and file evidence where necessary) to ensure that the donor's property is sold at or near its fair market value and for the benefit of the donor's estate (both now and after death). The efforts and Price and Lyall in that regard, and their evidence, were simply not sufficient.

[476] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 23

…(P)ermitting the attorney to give gifts or make donations to a variety of individuals or charities on behalf of the donor would, in our view, pave the way to abuses on the part of the attorney, particularly in the attorney can benefit himself or herself. When the donor has failed to provide instructions concerning gifts…we believe that the law should not presume that the donor wished to give the attorney free reign. If the donor wishes to empower the attorney to make gifts or make donations, the donor should make express provision for this in the enduring power of attorney.

[477] *Chichester Diocesan Fund and Board of Finance* v. *Simpson*, [1944] A.C. 341, at 371

It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries. To this salutary rule there is a single exception. A testator may validly leave it to his executors to determine what charitable objects shall benefit, so long as charitable and no other objects may benefit. To explain or to justify this exception is unnecessary. It conveniently and securely rests today on the theory that a charitable trust can be executed by the court, but a so-called benevolent trust cannot, for the court knows what is charitable by reference to the preamble to the statute of Elizabeth, to the objects there enumerated and all others which "by analogies are deemed within its spirit and intendment," but what is benevolent the court knows not. It is possible that the exception was originally established on some broader ground of favour to charity, but into this I need not enter. It is sufficient to say that this exception in favour of charity having been long established, there is no ground for extending it in favour of objects which are not charitable. My Lords, I concur in the motion that the appeal should be dismissed.

[478] *The Wills Act*, C.C.S.M. c. W150

Signatures required

4 Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in the presence and by the direction of the testator;

(b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and

(c) two or more of the witnesses attest and subscribe the will in the presence of the testator.

The Court of Queen's Bench Act, Court of Queen's Bench Rules, Regulation 553/88, Registered December 13, 1988

Proof to include reading of will

74.02(4) Where the testator or testatrix executed the will making his or her mark, or where the will was signed for the testator or testatrix by some other person in his or her presence and by his or her direction, the proof shall show that, before its execution, the will was read over to him or her and that he or she had knowledge of its contents and appeared to understand them.

[479] *Re Land Registry Act and Shaw* (1915), 8 W.W.R. 1270 (B.C.C.A.)

1 In my opinion it cannot be said that the Registrar was wrong in refusing to register the instrument in question without proof of the acquiescence of the donor in the transfer of the mortgage by the donee of the Power of Attorney to himself.

MacDonald v. *Taubner*, [2010] 9 W.W.R. 121 ABQB

243 A power of attorney is a unique power that embodies the law of agency, borrows from the law of contract, and adopts the law of fiduciary obligations. M. Jasmone Sweatman, *Guide to Power of Attorney*, (Aurora: Canada Law Book, 2002) states: "although the fiduciary duties of agents, attorneys, and trustees may vary in intensity, the duties are essentially the same" (at 6).

…

249 A more detailed description of the duties of an attorney is provided by M. Jasmone Sweatman, *supra* at 16:

> In addition to any duties expressed in the instrument at common law, the attorney has the duty to
> (i) not exercise the power of attorney for personal benefit unless authorized to do so by the document, or unless the attorney acts with the full knowledge and consent of his or her principal.

Manitoba Métis Federation Inc. v. *Canada (Attorney General) et al*., [2010] 12 W.W.R. 599 MBCA

204 One of the situations in which a reverse onus is applied is when a fiduciary is engaged in self-dealing or otherwise in a conflict of interest.

205 Forbidding a fiduciary from self-dealing is explained by Donovan W. M. Waters, Q.C., ed.-in-chief, *et al*., in *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) as follows (at p. 877):

> It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside. …. [N]o one may allow his duty to conflict with his interest. …

Houston v. *Houston*, [2012] 12 W.W.R. 215 (BCCA)

54 There can be no doubt that a fiduciary who engages in 'self-dealing' or who receives a secret benefit or profit from a transaction carried out on the donor's behalf, is accountable to the donor for such profit: see generally Fridman, supra, at 106-110. An obvious exception exists, however, where the donor consents to or authorizes the attorney's acting as he or she has. This concept is encapsulated in s. 27 of the Property Law Act, which was quoted by the trial judge at para. 70 of her reasons:

> Attorney cannot sell to himself or herself
> 27 A sale, transfer or charge to or in favour of himself or herself by an attorney named in a power of attorney, of land owned by the principal and purporting to be made under the power of attorney, is not valid <u>unless the power of attorney expressly authorizes it or the principal ratifies it.</u>
> [Emphasis added.]

Howlader v. *Alamgir*, 2006 CarswellOnt 3882, [2006] O.J. No. 2575, 149 A.C.W.S. (3d) 275

71 The donee of a power of attorney is an agent for the donor and, as such, owes the fiduciary obligations of an agent to his principal: see Potts J. in Anderson v. Anderson Estate (1990), 74 O.R. (2d) 58 (Ont. H.C.) at p. 64. Accordingly, an attorney may not exercise his power of attorney for his own benefit, unless expressly authorized to do so in the power of attorney itself: see Elford v. Elford (1922), 64 S.C.R. 125 (S.C.C.). Similarly, an agent or an attorney who is in a fiduciary capacity, may never act in such a way that his personal interest conflicts with his fiduciary duty: see Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592 (S.C.C.), especially at pp. 383-84.

Elford v. *Elford*, 1922 CarswellSask 162, [1922]3 W.W.R. 339, 64 S.C.R. 125, 69 D.L.R. 284

17. …She had given her husband a power of attorney conferring upon him a wide general authority to deal with them, but this general authority did not embrace the power to execute a conveyance in favour of the agent himself. Any attempt to acquire a title by such a use of the authority vested in him would be a fraud upon the power.

22 The transfer to himself executed by the defendant as his wife's attorney transgresses one of the most elementary principles of the law of agency. It was *ex facie* void and should not have been registered.

25 Nor did the defendant by making an unauthorized and illegal use of his wife's power of attorney put himself in a position to assert rights to property

39 It seems hopeless to contend that the husband (appellant) under the power of attorney which he held from his wife (respondent), could transfer to himself the properties standing in the land registration office in the name of his wife. His counsel could cite no authority permitting such a transfer, and it certainly cannot stand.

[480] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 1
Without the donor's informed consent, an attorney is prohibited from using the donor's property for his or her own benefit, must resolve conflicts of interest in favour of the donor and cannot benefit from an arrangement with the donor's property even if the donor also benefits.[4]

[4]On the subject of an attorney's fiduciary duty to the donor, see Bowstead on Agency, supra n. 2, at 48; and G.H.L. Fridman, The Law of Agency (6th ed., 1990) 48-49

[481] *The Powers of Attorney Act*, C.C.S.M. c. P97

Donor may appoint any number of attorneys
17(1) A donor may appoint any number of persons to act jointly or successively as the attorney.

[482] *The Powers of Attorney Act*

When more than one attorney
17(2) Where a donor appoints two or more attorneys without indicating in the enduring power of attorney whether they are to act jointly or successively, the attorneys shall act successively, in the order in which they are named in the document.

[483] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 15

It is possible that donors will name several attorneys to act but fail to make clear whether they are to act jointly or successively...In the absence of an indication from the donor, we recommend that multiple attorneys should be deemed to be successive. (Emphasis mine)

[484] *Man-Shield Construction Inc*. v. *Renaissance Station Inc*., 2015 MBQB 116, 2015 CarswellMan 377, [2016] 2 W.W.R. 99, 256 A.C.W.S. (3d) 63, 320 Man. R. (2d) 1

52 I also agree with Renaissance and Brad that if the power of attorney was engaged, based on s. 17(2) of *The Powers of Attorney Act*, C.C.S.M., c. P97, it would be Tom's spouse Dorothy Ann Rice, and not Brad, who would have had the power to act...
53 Tom's power of attorney appoints both Mrs. Rice and Brad as attorneys without indicating whether they are to act jointly or successively. As such, they are to act successively in the order in which they are named in the document. Mrs. Rice is named first and therefore, in any event, it was Mrs. Rice, and not Brad, who would have had the power to act.
54 In summary, I have concluded that Brad did not have actual authority to settle on behalf of Renaissance.

[485] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 29

[486] *The Powers of Attorney Act*

Decision of joint attorneys where no majority
18(2) Unless otherwise provided in the enduring power of attorney, where two or more attorneys appointed to act jointly disagree about the making of a decision and are unable to make a majority decision, the attorney first named in the document may make the decision.

[487] *Burton's Legal Thesaurus*, 4E. 2007. William C. Burton

adj. referring to a debt or a judgment for negligence, in which each debtor (one who owes) or each judgment defendant (one who has a judgment against him/her), is responsible (liable) for the entire amount of the debt or judgment.

[488] *The Powers of Attorney Act*

Recognition of foreign enduring power
25 A power of attorney executed in a place outside the province is valid as an enduring power of attorney in the province if
(a) it is valid according to the law of that place; and
(b) it provides that it is to continue despite the mental incompetence of the donor after the execution of the document.

[489] *The Powers of Attorney Act*

Remote witnessing
10.1(1) Despite subsections 10(1) and (2) but subject to subsection (2), a person authorized under the regulations may, in the manner specified in the regulations,
(a) witness a donor signing or acknowledging a signature on an enduring power of attorney without being in the presence of the donor; and
(b) sign an enduring power of attorney as a witness without being in the presence of the donor.

[490] *The Powers of Attorney Act*, *Remote Witnessing Regulation*, Regulation 80/2021

Power of attorney deemed to be executed in Manitoba
6 A power of attorney the execution of which is witnessed by videoconference in accordance with this regulation is deemed to be executed in Manitoba, regardless of the physical location of the donor or the authorized person at the time of execution.

[491] *The Powers of Attorney Act*, *Remote Witnessing Regulation*, s. 3

[492] *The Powers of Attorney Act*, Remote Witnessing Regulation, s. 5, Step 8

[493] *The Powers of Attorney Act*

Duty of attorney to act for donor
19(1) An attorney under an enduring power of attorney who knows or ought reasonably to know that the donor is mentally incompetent is under a duty to act on behalf of the donor during the mental incompetence if
(a) the attorney has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney; and
(b) the power of attorney has not been terminated.

[494] *The Powers of Attorney Act*

Renunciation of appointment as attorney
21 An attorney may not renounce the appointment as attorney while subject to the duty to act under subsection 19(1) except with the leave of the court.

[495] *Enduring and Springing Powers of Attorney*, Report of the Manitoba Law Reform Commission (no. 83), March 1994, p. 17.

..(I)t would be unfair, in our view, to impose this obligation if the attorney has not accepted the attorneyship…something more than a failure to renounce the appointment should be required before acceptance is deemed.[7] In order to be held to the duty to act, the attorney should have demonstrated his or her acceptance of the attorneyship by taking some action as attorney or by signing the document or otherwise acknowledging acceptance of the attorneyship.

[496] *The Powers of Attorney Act*

Doctors may declare mental incompetence
6(4) Where a power of attorney provides that it comes into force on the mental incompetence of the donor, two duly qualified medical practitioners may act as the declarant if the donor does not name a declarant in the power of attorney or if the named declarant is unable or unwilling to provide a declaration.

[497] *Potasky* v. *Potasky,* 2002 MBQB 146, 2002 CarswellMan 207, [2002] 7 W.W.R. 504, [2002] W.D.F.L. 206, 113 A.C.W.S. (3d) 735, 164 Man. R. (2d) 310, 44 E.T.R. (2d) 280

[498] *Combes's Case* (1614), 9 Co. Rep. 75a

[499] *The Trustee Act*

Delegation of powers during absence
36(1) A trustee intending to remain out of the province for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from the province of all or any trusts, powers, and discretions, vested in him as the trustee, either alone or jointly with any other person or persons; but a person being the only other co-trustee, and not being a trust corporation, shall not be appointed to be an attorney under this subsection.

Delegation Liability for default
36(2) The donor of a power of attorney given under this section is liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

In force while absent
36(3) The power of attorney does not come into operation unless the donor is out of the province, and is revoked by his return.

Attestation of instrument
36(4) The power of attorney shall be attested by at least one witness, and shall be filed in the land titles office of each land titles district in which the trust property or any part thereof is situated within 10 days after the execution thereof, with a statutory declaration by the donor that he intends to remain out of the province for a period exceeding one month from the date of the declaration, or from a date therein mentioned.

Verification of instrument
36(5) The execution of any such instrument shall be verified in such manner as is required by statute in the case of instruments to be registered under *The Registry Act*.

Statutory declaration

36(6) The statutory declaration aforesaid, and a statutory declaration by the donee of the power of attorney that the power has come into operation and has not been revoked by the return of the donor, is conclusive evidence of the facts stated in favour of any person dealing with the donee.

Persons without notice protected

36(7) In favour of any person dealing with the donee, any act done or instrument executed by the donee is, notwithstanding that the power has never come into operation or has become revoked by the act of the donor or by his death or otherwise, as valid and effectual as if the donor were alive and of full capacity, and had himself done the act or executed the instrument, unless the person had actual notice that the power had never come into operation or of the revocation of the power before the act was done or instrument executed.

Power of donee

36(8) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power to delegate to an attorney power to transfer any inscribed stock, but not including the power of delegation conferred by this section.

Notice of trust does not affect certain persons

36(9) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

[500] *The Real Property Act*

Effect of statement

194 Any statement set out in a document, in an approved form, and signed by the party making the statement has the same effect and validity as an oath, affidavit, affirmation, or statutory declaration, administered, sworn, affirmed or made under The Manitoba Evidence Act.

[501] *The Homesteads Act*

Authority of spouse's or common-law partner's attorney

23(1) A consent to a disposition, a consent to a change of homestead or a release may be executed by an attorney on behalf of an owner's spouse or common-law partner if the power of attorney expressly authorizes the attorney to execute a consent or release under this Act.

[502] *The Homesteads Act*, Homesteads Forms Regulation, Regulation 121/93, Registered June 28, 1993

[503] *The Homesteads Act*

Acknowledgment of power by attorney apart from owner

23(3) An owner's spouse or common-law partner who appoints an attorney to give a consent or release under this Act shall, when executing the power of attorney, acknowledge apart from the owner

(a) that the spouse or common-law partner is executing the power of attorney freely and voluntarily without any compulsion on the part of the owner; and

(b) that the spouse or common-law partner is aware of the nature and effect of the power of attorney.

Form of acknowledgment

23(4) An acknowledgment shall be a certificate in the prescribed form which shall be endorsed on or attached to the power of attorney.

[504] *The Homesteads Act*

Owner cannot be attorney
23(2) Despite subsection (1), an owner shall not execute a consent, a release, a consent to terminate a release or a discharge of homestead notice as attorney for his or her spouse or common-law partner.

[505] *The Homesteads Act*

Owner cannot be attorney
24 An owner shall not execute a disposition referred to in clause 4(d) (spouse or common-law partner as a party to a disposition) as attorney for his or her spouse or common-law partner.

Disposition prohibited without consent
4 No owner shall, during his or her lifetime, make a disposition of his or her homestead unless, subject to sections 2.1 and 2.2

(d) the owner's spouse or common-law partner has an estate or interest in the homestead in addition to rights under this Act and, for the purpose of making a disposition of the spouse's or common-law partner's estate or interest, is a party to the disposition made by the owner and executes the disposition for that purpose; or

[506] *The Real Property Act*

Entries in Deposit Register
70 Any instrument or charge conditions presented for registration other than those instruments referred to in section 69 or discharges of instruments which affect the title to the land but do not contain a land description, shall be entered in an index called the Deposit Register in the land titles office for a land titles district, and shall thereupon be deemed to be registered under both the new and old systems.

[507] *The Real Property Act*

Definitions
1 In this Act, and in instruments purporting to be made or registered under this Act, unless the context otherwise requires
…
"transmission" means the passing of title to land, mortgages, encumbrances, or leases, in any manner other than by transfer from the owner.

[508] *Quick Auto Lease Inc.* v. *Jason Hogue et al*., 2018 MBQB 126

[509] *AAR Financial Inc.* v *Keith G. Collins Ltd. et al*., February 14, 2018, BK-17-01-04437 (unreported)

[510] *Aguiar* v. *5026113 Manitoba Ltd., Daylight Capital Corporation and Richard Boon*, 2018 MBQB 70.
(Appeal dismissed – see *Aguiar* v. *5026113 et al* 2019 MBCA 47, 2019, CarswellMan 394, 305 A.C.W.S. (3d) 295)

[511] *Sartor et al*. v. *Boon, et al*., 2018 MBQB 174 (CanLII). Appeal of Mr. Boon dismissed with costs. See: AI19-30-09273 and AI19-30-09274

[512] *Storm et al.* v. *4724438 Manitoba Ltd. et al*., 2019 MBQB 20 (CanLII)

[513] Just a Witness? By Darcia Senft, Director - Policy and Ethics and Kate Craton, Insurance Counsel, The Law Society of Manitoba Communiqué 2.0, December 2015, page 10.