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Memorandum of Law

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Classification:
Estates and trusts—Trusts—Resulting trust—Rebuttal of presumption of resulting trust—Miscellaneous

Real property—Registration of real property—Registration of land—Land titles—Miscellaneous

Author:
James Steele, J.D.

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Legal Issue:
Can a resulting trust exist in respect of land under the Torrens system? Or is such inconsistent with the concept of conclusive title?

Fact Scenario:
For estate litigators, knowledge of resulting trusts over land is important. When successfully enforced, such claims can bring valuable land back into a transferor's estate, to be distributed according to their will. For lawyers in Torrens land titles jurisdictions, however, resulting trust claims raise the issue of how such trusts interact with the principle of indefeasible title.

Other Key Words:
Torrens system, land titles, indefeasibility, conclusiveness of title, resulting trusts, presumption of resulting trust, donative intent

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Bruce Ziff, *Resulting Trusts and Torrens Title* (Toronto: Carswell, 2015) at 50 R.P.R. (5th) 27 (2015)

CONCLUSION:

In C *Dunnison Estate v. Dunnison*, [1] the Saskatchewan Court of Appeal (the "Court") issued a seminal decision on resulting trusts and the Torrens land titles system.

C *Dunnison* found no resulting trust on the facts before it. However, the Court nevertheless offered a detailed analysis of whether resulting, and other unregistered, trust interests should be enforceable against a volunteer recipient involved in a trust's creation. In concluding yes, the Court limited indefeasibility only to *bona fide* purchasers, who had relied on the register when acquiring their interest.

In other words, the Court read-in an "*in personam*" exception to certainty of title, following the reasoning employed in earlier Alberta jurisprudence. On this basis, the law in Saskatchewan is now that "resulting trusts will be recognized with respect to land." [2]

This article examines C *Dunnison's* reasoning. It argues that the recognition of resulting trusts over land is justified on philosophical, equitable and practical grounds. That said, as a matter of statutory interpretation, this paper argues that the *in personam* exception is starkly inconsistent with the explicit language currently used in Torrens statutes. As such, statutory amendment is needed to enshrine the *in personam* exception into law. Only this will bring lasting harmony between resulting trusts and the statutory Torrens system.

ANALYSIS:
Background
What are Resulting Trusts?

A trust is a fiduciary relationship. The trustee holds property for the benefit of a beneficiary, who retains the beneficial title. [3] Some trusts are intentionally created under the specified terms of a trust instrument. Resulting trusts, however, are a species of trust which arise by operation of law. [4] Where a transferor lacks donative intent, the title holder has an equitable obligation to hold the property for the benefit of the transferor. [5]

With proper legal advice, transferors of land can avoid any need to rely on a resulting trust. For instance, a person could transfer the land, but file a caveat pursuant to an express trust pursuant to s. 50 of the *Land Titles Act, 2000*, S.S. 2000, c. L-5.1 ("*2000 Act*"). [6]

That said, factual situations involving resulting trusts show no signs of going away. Reconciling resulting trust with Saskatchewan's certainty of title, therefore remains as relevant as ever.

Presumption of Resulting Trusts?

Unlike other trusts, resulting trusts are accompanied by an evidentiary presumption. When a transfer is made gratuitously, the law will actively "presume" that the transferor intended to retain beneficial title. [7] This reverses the normal legal burden of evidence, and forces the defendant to prove on a balance of probabilities that a transferor intended a full gift. [8]

The practical effect of this presumption can be very important. When a court determines whether a transfer was a gift, or not, its inquiry will turn on the intention of the donor. Many transfers are made without any sort of written agreement between the transferor and recipient. If a judge "cannot determine a transferor's true intent after weighing all the evidence, then the presumption would come into play to tip the balance in favour of a resulting trust." [9]

Resulting Trusts and the Torrens System:

Resulting trusts arise by operation of law, and therefore give rise to unregistered interests in land. How do such interests consequently interact with the Torrens system of conclusive title?

The Torrens system dominates Canada's western provinces. [10] It replaced the older and more complicated deed system, whereby land was sold by deeds. They were not valid unless a specific seller actually had the right to sell a given lot of land. To confirm title, purchasers often had to search through decades of transactions. [11] The potential for fraud or forgery was present, given that prior transfer documents were usually in private hands. [12]

To avoid this expense and uncertainty, a new system of government registration was conceived by the pioneering work of Sir Robert Torrens. [13] Aiming to produce a simple, efficient and inexpensive mode of transfer, Torrens systems trade "on the faith of the register unaffected by the secret or hidden interests of others." [14] The register became everything, [15] and a purchaser could immediately assess all the interests pertaining to a given parcel of land. [16]

With no need to second guess government records of ownership, purchasers of land no longer had to make private inquiries of prior title. [17] A "curtain" was brought down on past dealings with respect to land. [18] This concept of "indefeasibility" lies at the heart of the Torrens system. [19] In *Saskatchewan's 2000 Act* generally, conclusiveness of title is recognized as follows:

> 13. Effect of title
>
> (1) Where the Registrar issues a title pursuant to this Act:
>
> (a) subject to section 14, *the registered owner holds the title free from all interests, exceptions and reservations*;

...

[emphasis added]

...

47. Effect of transfer

(1) Subject to subsections (4) and (5), every registration of a transfer operates as an absolute transfer of title. ...

In Saskatchewan, limited exceptions to indefeasible title exist, revolving mainly around collusion with fraud, or obtaining title directly for no value from one who colluded in fraud. [20]

This raises the following question. If the Torrens registry is supposed to serve as a "mirror of title," can resulting trusts properly be enforced in respect of land in Saskatchewan? Under the reasoning prevailing prior to *Dunnison*, the answer was no. In a series of decisions, lower courts had found that resulting trusts could not be imposed on land in Saskatchewan. [21] The courts reasoned that resulting trusts are incompatible with the principles of indefeasibility and conclusiveness of title. As one Saskatchewan decision explained:

> 29 In this case the transfer recited as it must under *The Land Titles Act* that [the transferor] transferred his entire interest i.e. both legal and beneficial title. The resulting trust principle would oblige one to reach a contrary conclusion in that only legal title passed and that the beneficial interest remained with the transferor. In effect the common law would amend the Act. [22]

Another illustrative example comes in the Saskatchewan decision of *Thorsteinson v. Olson*, [23] where a mother sought back a gratuitous transfer of land made to her son. Among her requested relief, the mother claimed a resulting trust. After a lengthy review of case law in Saskatchewan, *Thorsteinson* concluded that resulting trusts were inapplicable where a transfer of land had been registered in Saskatchewan's land titles system:

> 97 Case law has consistently established that a certificate of title is conclusive evidence of ownership and, absent some limited exceptions, cannot be challenged by equitable claims including the equitable doctrine of resulting trust. This fundamental principle was explained by the Saskatchewan Court of Appeal in *Canada (Attorney General) v. Saskatchewan (Attorney General)* (1987), [1988] 5 W.W.R. 706 (Sask. C.A.) [hereinafter *A.G. Can.*] at p. 709:
>
> > *It is fundamental to the operation of the Torrens system that the certificate of title (in the words of s. 213) is "conclusive evidence ... that the person named therein" owns the "estate or interest therein specified".* In the absence of any evidence to show that the registrar added the words "minerals reserved" at some time following the issuance of the title to Nelson, I cannot find that he improperly attempted to rectify the earlier error. *I am precluded from questioning the correctness of title 227N56 since, "To hold otherwise would be contrary to the intent and purpose of the Act and would destroy the conclusive nature of the records of and in the land titles office"*, per Woods J.A. in *Hudson's Bay Co. v. Shivak* (1965), 52 W.W.R. 695, 52 D.L.R. (2d) 380 (Sask. C.A.). ...
>
> ...
>
> 103 ... *it can be stated with confidence that the doctrine of resulting trust is inapplicable where the impugned transfer of land has been registered in Saskatchewan's land titles system.* [Such a] claim requires this Court to look beyond the certificate of title and give effect to an equitable doctrine in which she claims to have retained a "beneficial interest" in the land following transfer, it is at clear odds with statute. [24]

[emphasis added]

By the time of *Dunnison*, it therefore seemed clear that a resulting trust could not be enforced in the Saskatchewan land registry system.[25]

Dunnison

Issue #1: Can unregistered resulting trust interests operate in the Torrens system?

Dunnison's facts stemmed from a deceased mother who had gratuitously transferred a cottage into joint names of herself and her two sons. After a dispute arose, Ms. Dunnison subsequently wrote one of the two sons out of her will. The mother later passed away, her estate brought an action seeking to clarify whether the transfer had been a gift, or a resulting trust. At issue was what interest the two sons had in the cottage.

At the lower court level, the court felt bound to follow the law as set out in *Thorsteinson*,[26] and found that "a resulting trust is not available in the absence of a written agreement."[27] This was appealed by the estate. As a factual matter, the Court of Appeal ultimately agreed, finding that the lower court's "conclusion that no resulting trust arose on the facts of this case is unassailable."[28]

As such, *Dunnison's* analysis of resulting trusts was *obiter*. Despite this, the Court of Appeal still proceeded to offer a *per curiam* examination of resulting trusts amidst the unique Saskatchewan's land registration legislation, changing the law in the process.

To the question of whether unregistered resulting trusts could be enforced in a system of indefeasible title,[29] *Dunnison* answered yes. What had changed since *Podboy et al?* Certainly, Saskatchewan's statutory wording had not changed since these earlier decisions rejecting resulting trusts. As such, the explanation lay in *Dunnison's* drawing of a distinction between "immediate parties", versus innocent third parties who *bona fide* had acquired land in reliance on the register.

Simply put, *Dunnison* limited the type of registered owners who were allowed to invoke indefeasibility's protection. *Dunnison's* reasoning was buttressed by Alberta jurisprudence[30] which had hels that indefeasibility of title was only intended to protect persons acquiring an interest in land *bona fide*, for value and in reliance on the register.[31]

This differentiation was seen most clearly in *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.*[32] There, the Alberta Court of Appeal reasoned that indefeasibility of title was only for the benefit of unwitting *bona fide* purchasers who had relied on title:

> [16] ... The reason for this is that the immediate party or volunteer claiming through him does not rely on the register. If "A" mortgages his land to "B", "A" does not need to look at the register to see if "B" has an interest in the land. "A" knows of "B's" interest. Even with the passage of time "A" looks only to the register to find clear title, but he knows of "B's" interest. No doubt "A" is entitled to rely upon the register in respect of any other alleged interest which he has not created but he has no need of the register to determine "B's" interest. A third party dealing with "A", on the other hand, must rely on the register and once he has taken "A's" interest he continues to rely on the register as it appeared when he purchased the land ...

In the later decision in *Bezuko v. Supruniuk*,[33] the Alberta Court of Queen's Bench confirmed that that conclusiveness of title was intended only to benefit parties who had acquired their interests in *bona fide* reliance on the register. On that basis, the court found resulting trusts could arise with respect to land in Alberta:

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

[emphasis added]

Dunnison's detailed consideration of these decisions bear witness to the influence wielded by the Alberta decisions on the Court's ultimate reasons.

The second factor shaping *Dunnison* was the Court's interpretation of the relevant provisions in of the *Land Titles Act* generally, R.S.S. 1978, c. L-5 (the "*1978 Act*") as a whole. [34] No actual statutory text in the *1978 Act* generally, prevented volunteer recipients from invoking certainty of title. However, the Court interpreted the *1978 Act* generally, in light of prior decisions expressing the purpose of Torrens legislation as being to protect persons who had acquired an interest in land *bona fide* for value. [35]

Finally, the Court took comfort from the fact that prior land titles acts in Saskatchewan had always recognized unregistered interests "as against the person making the same." [36] For instance, section 67(1) of *1978 Act* read:

67. Unregistered instrument ineffectual transfer

(1)*After a certificate of title has been granted no instrument shall until registered pass any estate or interest* in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render the land liable as security for the payment of money *except as against the person making the same.*

True, resulting trusts fell into a category different than other unregistered interests. Resulting trust interests were not "made" by any party, [37] but arose by operation of law. However, the Court held that the same rationale for recognizing unregistered instruments as against the person making the interest, applied to recognizing obligations against the registered owner on whom they were imposed by operation of law. [38]

Dunnison also relied on prior decisions holding that an "unregistered interest may exist independent of the register," [39] and that "equitable interests will be protected where land titles legislation allows." [40]

. . . . .

Dunnison began its reasons by framing its task as answering the "important question of whether voluntary transfer resulting trusts ... can exist with respect to land in this Province, given our land titles legislation." [41] To this, the Court concluded yes, declaring:

94 ... in light of *Pecore*, a voluntary transfer resulting trust can exist with respect to land in Saskatchewan. [42]

It later stated:

123 In summary, the law in Saskatchewan may be expressed as follows:

> (a) voluntary transfer resulting trusts will be recognized with respect to land but not the presumption that land is held in trust when it is transferred gratuitously;

However, C *Dunnison* injected a note of caution, questioning whether legislative intervention was needed to reconcile resulting trusts with the explicit language of Torrens statutes:

> 96 To be clear, as a matter of judge-made law, voluntary transfer resulting trusts can exist with respect to land in this Province. Having said that, we have concerns about whether such trusts truly fit with our land titles system.

The Court observed that on "the face of the *Acts*, it is difficult to determine the place of such trusts within the regimes the *Acts* create."[43] As such, the Court suggested that it may "be time to reconsider the role of voluntary transfer resulting trusts within a Torrens system ... it may be that the legislatures of the provinces will have to address this issue."[44]

Issue #2: Can a presumption of resulting trust co-exist with the Torrens system?

The second issue considered by C *Dunnison* was evidentiary in nature. It concerned whether the presumption of resulting trust was compatible with Saskatchewan's land titles system.

The Court observed that the Alberta courts had not addressed the issue,[45] leaving it as a matter of first impression for the Court of Appeal.

C *Dunnison* ultimately concluded that such a presumption could not exist, as it was incompatible with the certainty of ownership offered by a certificate of title. The Court cited provisions of the *Land Titles Act* generally, R.S.S. 1978, c. L-5[46] (found also in the current *2000 Act* generally) providing that a land transfer operates as conclusive evidence of ownership, subject only to the exceptions implied by statute.

Such provisions placed the burden of attacking a certificate of title on the person(s) challenging title. To also impose a presumption of resulting trust would reverse that statutory evidentiary burden.[47] In short, a land transfer could not concurrently be viewed as "absolute," but at the same time also "presumed" to create a trust.[48]

The Court held that:

> 91 ... *The law may still impose a resulting trust* in situations where such trusts traditionally would have arisen but, based on s. 90(1), *the burden of proof will be on the person challenging the title to establish on a balance of probabilities that the transferor lacked donative intent* and, thus, the title does not accurately reflect legal ownership of the land.
>
> [emphasis added].

Analysis of Dunnison

Dunnison and western Canadian Jurisprudence

This article begins by analysing the practical importance of C *Dunnison*. By enshrining a distinction between a *bona fide* purchaser, versus immediate parties, the author suggests that C *Dunnison* has paved the way for the lasting recognition of resulting trusts with respect to land in Saskatchewan.

Cases arising since C *Dunnison* have followed the Court's lead. In *Coates v. Coates*[49] for instance, the Saskatchewan Court of Queen's Bench Court enforced a resulting trust against a volunteer recipient. The plaintiff was a mother who had, with her deceased husband, transferred land to their children on estate planning advice, without intending to immediately convey beneficial title.

After one child had significant creditor issues, the plaintiff became concerned, asking for all children to transfer title back into her sole name. All children except the defendant signed transfer authorizations. When the one son resisted, the court found the existence of a resulting trust, and ordered the land transferred back. [50] *Coates* appeared to do so in explicit reliance on *Dunnison's* declaration that "resulting trust can exist with respect to land in Saskatchewan." [51]

Existing Alberta and British Columbia case law has earlier recognised resulting trusts in the Torrens systems of western Canada. [52] While Saskatchewan is late to the club, *Dunnison's* legacy appears to be the unification of Saskatchewan law with such jurisprudence.

Nor will *Dunnison's* influence be limited to Saskatchewan. In neighboring Manitoba, uncertainty had previously existed as to whether resulting trusts could be recognised under the Manitoba Torrens system. [53] Prior Manitoba lower court decisions had held that the indefeasibility imposed by the Manitoba *Real Property Act* generally [54] prevented recognition of unregistered trust interests. [55]

In the recent case of *Hyczkewycz v. Hupe*, [56] however, the Manitoba Court of Queen's Bench explicitly adopted the reasons in *Dunnison*, in finding that resulting trusts could exist in the Manitoba Torrens system:

> 129 As to whether a resulting trust can exist, the Saskatchewan Court of Appeal concluded it can—a significant divergence from previous cases in that province. In arriving at its conclusion, [*Dunnison*] noted at paragraphs 70 to 78:
>
> > The whole of the legislation must be considered.
> >
> > The purpose of the legislation is to provide certainty of title to protect the good faith purchaser for value, relying on the register, from unregistered or hidden claims. Another purpose is to create a predictable method of registering interests in land within an established framework.
> >
> > The legislation has always recognized certain unregistered interests (e.g., section 58(1) of the *RPA*).
>
> ...
>
> 142 For the reasons articulated in *Dunnison Estate* and in *Bezuko*, I find that a resulting trust can exist in Manitoba despite the certainty of title provisions in the *RPA*. See paragraphs 129 to 130 of these reasons.

In no small part due to *Dunnison*, resulting trusts are now recognized "in Manitoba despite the certainty of title provisions in" Manitoba *Real Property Act* generally. [57]

Dunnison: Academic and Practical Implications

Next, on a philosophical level, *Dunnison* has now reconciled Saskatchewan law with existing academic commentary.

In Di Castri's textbook *Registration of Title to Land,* [58] the author has described as settled law the notion that Torrens provisions are "for the benefit of the *bona fide* purchaser for valuable consideration only. Thus, a volunteer is not protected." [59] Di Castri went on to approve the notion that a transferor could validly enforce an *in personam* claim against an immediate transferee, with the result of re-transferring the land. [60]

Another academic publishing on the subject is Professor Bruce Ziff, and his *Principles of Property Law*. In it, Professor Ziff had previously criticized the previous Saskatchewan jurisprudence as failing "to grasp the relevance of personal rights within a Torrens framework." [61] He described as "misguided" the rationale that a resulting trust should not be

recognized simply because it would enforce an equitable interest not "noted on the register." [62] Professor Ziff noted that no reliance interests arise in the case of a gratuitous recipient. As a result, the party holding the legal estate under a resulting trust should "be compelled to respect that trust by the beneficiary. The person on title has not relied on the register." [63]

In a separate academic article considering the proper scope of the *in personam* concept within Canadian Torrens regimes, [64] Professor Ziff argued for the enforceability of unregistered interests based on a prior decision of the Privy Council from New Zealand, *Frazer v. Walker*. [65] In *Frazer*, Lord Wilberforce concluded that statutory indefeasibility "in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant." [66]

Frazer has been cited at length in Australia and New Zealand, with cases relying on it to enforce trust obligations against a trustee who otherwise enjoyed indefeasible title. [67] However, Professor Ziff notes that the *in personam* concept in *Frazer* "is little understood in Canada," and has barely been cited in Canada. [68]

It is interesting that the academic works of Ziff and Di Castri were not cited in C *Dunnison's* reasoning. Whether intended or not, however, C *Dunnison* has the effect of bringing Saskatchewan law into accord with these lines of scholarly thought.

C *Dunnison*: Practical Implications

Turning next to practical considerations, this article suggests that an *in personam* exception is desirable on the ground of simple fairness.

True, there exists an argument in favour of absolute indefeasibility. Pure certainty of title better would better guarantee land transactions which are quick, predictable and inexpensive. It would avoid the uncertainty and potentially expensive factual determinations into whether a given recipient took *bona fide* in reliance on the register, etc.

But while an impenetrable curtain over unregistered interests would bring clear ownership rules, it would also bring the potential for injustice. Simply put, it is intuitively unfair to allow a volunteer recipient of land to escape a trust obligation otherwise imposed on him by operation of law. After all, such fairness is at the heart of resulting trusts, regardless of the property type at issue. When a recipient gives no value for their newfound property, the law has long held that the equitable right of enjoyment should vest in a person different from the holder of the legal title. Put simply, the law asks who should appropriately enjoy the property in question.

This is the basic policy question running beneath the surface of C *Dunnison* and its predecessor: should the law favour total indefeasibility, or, instead recognise the equities that lie behind the resulting trust? C *Dunnison* answered in favor of fairness, and did so rightly in this author's view. Such a conclusion is especially correct when neither the recipient, nor any intervening third party, has ever relied on the certificate of title.

In summary, C *Dunnison* recognizes that deference to indefeasibility should not deny a transferor their hard-won property when there exist no countervailing interests of an innocent third party.

Future issues after C *Dunnison*:

Issue #1: Should the Torrens statutory language recognize the in personam exception?

Even after C *Dunnison*, fertile ground remains for future debate. One such issue relates to whether the *in personam* exception can co-exist with the actual statutory provisions found in the *2000 Act* generally.

The *in personam* exception implies that persons with notice of unregistered trust interests cannot invoke indefeasibility, as such persons were not innocent acquirers who took without notice. However, does such an exception truly square with the clear wording of the Torrens land statutes?

For instance, section 23 of the *2000 Act* provides that knowledge of an unregistered interest does *not* affect a person's ability to invoke indefeasibility:

> 23. Reliability of title
>
> (1)*A person taking* or proposing to take from *a registered owner a transfer or an interest in land or dealing with a title:*
>
> (a) is not bound:
>
> (i) to inquire into or ascertain the circumstances in or the consideration for which the registered owner or any previous registered owner acquired title; or
>
> (ii) to see to the application of the purchase money or any part of the purchase money; and
>
> (b) notwithstanding any law to the contrary but subject to sections 18 and 35, *is not affected by any direct,* implied or constructive *notice of:*
>
> (i)*any trust;*
>
> (ii)*any other unregistered interest;* or
>
> (iii) any unregistered transfer.
>
> (2)*Knowledge* on the part of the person *that any trust* or other unregistered interest or any unregistered transfer *is in existence must not of itself be imputed as fraud.*
>
> [emphasis added]

On its face, such language would appear to apply to a volunteer recipient who takes their title as a gratuitous transfer, even if knowing that an unregistered resulting trust interest is held by the grantor. What equity might otherwise deem as fraud, has been legislatively declared not to be fraud. [69] Nor has such language been softened by judicial interpretation. Nearly a century ago, the Supreme Court of Canada considered a predecessor provision to s. 23, and affirmed that the words mean what they say:

> I find in sec. 162 the 'very explicit language' which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. [70]

Another provision of note is s. 13(1)(b) of the *2000 Act*. It says that *all* registered owners are able to invoke the protection of indefeasibility, not just those who have made *bona fide* reliance:

> 13. Effect of title
>
> (1) Where the Registrar issues a title pursuant to this Act:

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

Conspicuously, s. 13(1)(b) does not restrict indefeasibility to *bona fide* third parties. While the legislature did take care to insert some exceptions to indefeasibility (i.e. fraud, etc.), it conspicuously offered none for resulting trusts.

As such, an outside reader of our statutory language would be forgiven for concluding that conclusiveness of title is absolute, regardless of whether a registered owner had occasion to rely on the register.[71] When courts such as *Dunnison* and *Passburg* choose to restrict indefeasibility to *bona fide* purchasers who have relied on the register,[72] they do not articulate how their exception co-exists with unambiguous statutory language which makes no such distinction.

This was alluded to in *Dunnison*, in speaking of the proper place of resulting trusts within a statutory system of indefeasible title, the Court wrote:

> 106 It may be time to reconsider the role of voluntary transfer resulting trusts within a Torrens system. A one-size-fits-all solution may not be appropriate given the significant differences in provincial land titles legislation. In light of the Supreme Court of Canada's decisions in *Pecore*, *Madsen*, *Kerr* and *Nishi*, *it may be that the legislatures of the provinces will have to address this issue*.
>
> [emphasis added]

Put strictly, is it not the task of judges to confine their decisions to the clear wording of statutory expression of indefeasibility, allowing only those exceptions that particular legislation permits? Until this statutory reality is recognized, judicial developments such as in *Dunnison* will sit uneasily.

This author suggests that the answer is to amend the *2000 Act* generally, and formally recognize resulting trusts. Western legislatures have remained passive in the face of the *in personam* exception. If, in the period which will follow *Dunnison*, the Saskatchewan legislature accepts this judicial development, the law should take the *in personam* exception out of the realm of purely judge-made law, into the fixed permanence of codified law.

The need for such amendments applies beyond Saskatchewan, for there is similarly clear legislative wording in Manitoba,[73] Alberta,[74] and British Columbia.[75] The Torrens statutes are already subject to numerous legislated exceptions. Such in turn prompts the question of why the resulting trust is not one of them. The reason for this may well have been a simple oversight at the time of drafting. Western jurisdictions could resolve the issue by simply inserting a provision for resulting trusts. It could declare that indefeasibility does not prevent a court from recognizing resulting trust claims as against an owner who acquired title with direct knowledge of such trust interests.[76]

The need for amendment is a live question for all four western provinces. Ideally, each one would coordinate, as to legislate in unison. Such coordination is not always realistic in the process of legislation. It therefore may best fall to the

Uniform Law Conference of Canada, or perhaps the law reform bodies of the involved provinces, to articulate proposals aimed at reconciling the philosophy of indefeasibility with an exception for resulting trusts. If such recognition is truly emerging in all four western provinces, it deserves the combined wisdom of all affected Torrens jurisdictions to best formulate this policy. [77]

Issue #2: Can the law recognize Resulting Trusts, but not their presumption?

There is a second issue for future analysis. It lies in *Dunnison's* decision to treat the evidentiary presumption of resulting trusts, as distinct from the trusts themselves.

Remember that *Dunnison* recognized resulting trusts, but did not recognize their accompanying presumption. The Court reasoned that the presumption was inconsistent with *a title's* conclusive evidence of ownership.

This seeming discrepancy has already received judicial comment. In the aforementioned *Hyczkewycz v. Hupe*, [78] the court felt it wrong to "hive off" the intimately related presumption of resulting trust, absent clear authority:

> 144 ... Notwithstanding the learned and cogent reasons of the Saskatchewan Court of Appeal in *Dunnison Estate*, it is my opinion that once it is accepted that resulting trusts can exist despite the *RPA*'s certainty of title provisions, *the intimately related presumption of resulting trust (which has its own legal history and rationale) cannot simply be hived off absent clear statutory or high court authority. I have seen no such authorities.*
>
> [emphasis added]

This article agrees. Why did *Dunnison* give deference to statutory indefeasibility in one context, but not in another? If *Dunnison* truly adopted an *in personam* exception to indefeasibility, did not such exception logically extend to the evidentiary presumption also? Under *Dunnison's* reasoning, once a recipient is proven to be a volunteer, why should they be entitled to invoke indefeasibility in any context?

In short, it remains for future courts to determine whether resulting trusts should not be treated as distinct from their presumption. This author suggests consistent treatment must be imposed. First, on policy grounds, the presumption of resulting trusts over land is desirable. Such a presumption arises because the law does not suppose a person intends to part with their property without some inducement. [79] Such logic applies equally to land, as to any other type of property.

Second, for the sake of consistency, if volunteers cannot hide behind indefeasibility to avoid resulting trusts, why should the same volunteers escape the important evidentiary presumption with through the law would otherwise view their gratuitous transfer?

It may well be that future courts are forced to revisit this aspect of *Dunnison's* reasoning.

Issue #3: Should indefeasibility really be limited to bona fide purchasers for value

We recall that *Dunnison* limited indefeasibility to *bona fide* purchasers who have relied on the register, *and* gave value for their land. [80]

However, what about recipients who have not given consideration, but still have incurred legitimate reliance interests. Imagine the following factual situation:

> Party A gratuitously transfers land to party B, and a resulting trust arises in favour of party A;
>
> Party B dies, leaving a will in which his son was the sole beneficiary of the land;

The son receives the land into his name on the death of party B. The son had no prior knowledge of the agreement to sell, and has acted in good faith. The son develops the land and enters into reliance interests;

Party A learns of the death, and has missed his chance to sue the Estate of party B. He sues the son, who then seeks to rely on certainty of title when though the son has given no value for the land.

Future courts may need to consider whether a party in the place of the son is indeed properly barred from invoking conclusive title, simply because he did not give "value" for the land. [81]

CONCLUSION

Dunnison makes clear one important thing: indefeasible title does not extend to any party who is immediately involved in the creation of an unregistered interest. After *Dunnison*, enforcing such interests against volunteers does "not directly interfere with the operation of the *Land Titles Act* generally, R.S.S. 1978, c. L-5, nor does it directly impact the protection afforded *bona fide* third parties who acquire an interest in land for value and in reliance on the register." [82]

On a narrower level, however, *Dunnison's* legacy can most readily be seen in the context of resulting trusts over land. *Dunnison* offers real implications for Saskatchewan estate litigators, as potential trust claimants who were previously advised of having had little chance of success, may now choose to re-visit the issue. *Dunnison* will also impact other areas of law, including commercial transactions, proactive estate planning and the division of family property. [83]

This article commends *Dunnison's* reform to Saskatchewan law. The *in personam* exception best reconciles the rationale of resulting trusts with the rationale of the Torrens system. That said, future questions remain. One is the Court's refusal to allow an evidentiary presumption will impose a powerful hurdle for many claimants. It may be inevitable that some future claimant may ask a Saskatchewan court to reconsider if such differential treatment is truly sound.

However, the most important question is raised by *Dunnison* is how to reconcile the *in personam* exception with the statutory text of the Torrens system. Over the past two decades, the same Saskatchewan statutory provisions have given rise to two diametrically lines of interpretations. Saskatchewan, and all western provinces, should turn their attention to finally codifying resulting trusts in the Torrens context.

Nor is this a question limited to the author's home province of Saskatchewan. The explicit statutory text of Saskatchewan has its counterparts in Manitoba, [84] Alberta, [85] and British Columbia, [86] none of which limit indefeasibility in the manner set out in *Dunnison*, *Passburg, et al.* [87] For all such jurisdictions, it is time to take such resulting trusts out of the realm of mere judicial discretion, to the codified certainty of legislated permanence.

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The *Land Titles Act, 2000* generally, S.S. 2000, c. L-5.1

The *Land Titles Act* generally, R.S.A. 2000, c. L-4

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C *Fort Garry Care Centre Ltd. v. Hospitality Corp. of Manitoba Inc.*, 1997 CarswellMan 644, [1997] M.J. No. 650, [1998] 4 W.W.R. 688 (Man. C.A.)

C *Podboy v. Bale*, 2001 SKQB 28, 201 Sask. R. 306 (Sask. Q.B.)

C *Winisky v. Krivuzoff*, 2003 CarswellSask 564, 2003 SKQB 345, [2003] S.J. No. 549 (Sask. Q.B.)

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C *Bezuko v. Supruniuk*, 2007 ABQB 204, [2007] 12 W.W.R. 557 (Alta. Q.B.)

Pritchett v. Esprit Exploration Ltd., 2008 ABQB 632, [2008] A.W.L.D. 4704 (Alta. Q.B.)

Dhaliwal v. Olleck, 2010 BCSC 1524, [2011] B.C.W.L.D. 485 (B.C. S.C.)

H *Thorsteinson v. Olson*, 2014 SKQB 237, [2014] 10 W.W.R. 768 (Sask. Q.B.)

C *Cosmopolitan Clothing Bank Inc. v. Archiepiscopal Corp. of Regina*, 2016 SKQB 284, 270 A.C.W.S. (3d) 889 (Sask. Q.B.)

C *Dunnison Estate v. Dunnison*, 2017 SKCA 40, [2017] 8 W.W.R. 18 (Sask. C.A.)

Hyczkewycz v. Hupe, 2017 MBQB 209, [2018] 4 W.W.R. 136 (Man. Q.B.)

Commentary Considered

Victor J. Di Castri, *Registration of Title to Land*, loose-leaf (Rel 2, 2015) vol 3 (Toronto: Carswell, 1987)

Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010)

Footnotes

1 C 2017 SKCA 40, [2017] 8 W.W.R. 18 (Sask. C.A.) [C *Dunnison*].

2 *Ibid* at para 123(a).

3 *Pritchett v. Esprit Exploration Ltd.*, 2008 ABQB 632, [2008] A.W.L.D. 4704 (Alta. Q.B.).

4 C *Dunnison*, *supra* note 1 at para 16.

5 *Ibid* at para 21.

6 *Ibid* at para 114(c).

7 *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.).

8 *Ibid* at paras 24-25.

9 *Dunnison*, *supra* note 1 at para 86.

10 Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, looseleaf, 3d ed., (Toronto: Thomson Reuters Canada, 2012) at 30-15.

11 *Dunnison*, *supra* note 1 at para 65.

12 *Ibid.*

13 Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010) at p 469.

14 *Dunnison*, *supra* note 1 at para 66.

15 *Ibid.*

16 Ziff, *supra* note 13 at p 472.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 See The *Land Titles Act, 2000*, S.S. 2000, c. L-5.1 (the "*2000 Act*") *at* s. 15(1)(a) and 15(1)(b).

21 See for instance *Podboy v. Bale*, 2001 SKQB 28, 201 Sask. R. 306 (Sask. Q.B.), *Winisky v. Krivuzoff*, 2003 CarswellSask 564, 2003 SKQB 345, [2003] S.J. No. 549 (Sask. Q.B.) [*Winisky*], *Thorsteinson v. Olson*, 2014 SKQB 237, [2014] 10 W.W.R. 768 (Sask. Q.B.) [*Thorsteinson*], *Cosmopolitan Clothing Bank Inc. v. Archiepiscopal Corp. of Regina*, 2016 SKQB 284, 270 A.C.W.S. (3d) 889 (Sask. Q.B.).

22 *Winisky*, *supra* note 21.

23 *Supra* note 21.

24 *Ibid.*

25 This was at least the case for decisions which had expressly considered the question of whether resulting trusts could co-exist with indefeasible title. There did exist a line of family property division decisions, in which Saskatchewan courts had ordered resulting trusts over land, in the context of calculating family property (see for example *Johnson v. Johnson*, 2012 SKCA 87 (Sask. C.A.) and *Raabel v. Raabel*, 2014 SKQB 129 (Sask. Q.B.)). However, these decisions had never confronted the reasoning in *Podboy*, *supra* note 21, etc.

26 *Ibid.*

27 *Douglas Dunnison (Executor) v Raymond Dunnison* January 29, 2015, unreported, Regina, SUR 183 of 2013, McMurtry, J, at p 13.

28 *Dunnison*, *supra* note 1 at para 121

29 *Ibid* at para 96.

30 Section 62(1) of Alberta's *Land Titles Act*, R.S.A. 2000, c. L-4 states:

> 62.
> (1) Every certificate of title granted under this Act (except in case of fraud in which the owner has participated or colluded), so long as it remains in force and uncancelled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land

31 *Dunnison*, *supra* note 1 at para 54. For a summary of the Alberta jurisprudence, see *Indefeasibility of Title and Resulting and Constructive Trusts*, Issue Paper #3 (Winnipeg: Manitoba Law Reform Commission, 2016) at p 40 [*Indefeasibility of Title*].

32 1984 ABCA 78, [1984] 4 W.W.R. 14 (Alta. C.A.) [*Passburg*].

33 2007 ABQB 204, [2007] 12 W.W.R. 557 (Alta. Q.B.) [*Bezuko*].

34 The *1978 Act* generally, was the statute which existed at the time of transfer in *Dunnison*, and therefore governed the appeal. However, *Dunnison's* analysis was equally applicable to the current *2000 Act* generally, (see *Dunnison*, *supra* note 1 at para 68).

35 *Dunnison*, *supra* note 1 at para 75.

36 *Ibid* at para 76.

37 *Ibid* at para 79.

38 *Ibid* at para 80.

39 *Church, Re*, [1923] S.C.R. 642, [1923] 3 W.W.R. 405 (S.C.C.). *Dunnison* also cited s. 67 of the *Land Titles Act*, R.S.S. 1978, c. L-5 ["*1978 Act*"]:39

> 67.
> (1)*After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised*, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render the land liable as security for the payment of money *except as against the person making the same*.
>
> [emphasis added]

See also s. 67(1) of *1978 Act*.

40 *Dunnison*, *supra* note 1 at para 54.

41 *Ibid* at para 1.

42 *Ibid* at para 1, 94.

43 *Ibid* at para 104.

44 *Ibid* at para 106.

45 *Ibid* at para 54 and 56.

46 The *1978 Act* generally, was the statute which existed at the time of transfer in *Dunnison*.

47 *Ibid* at para 93

48 *Ibid* at para 91.

49 2017 SKQB 303, 284 A.C.W.S. (3d) 898 (Sask. Q.B.).

50 *Ibid* at para 35–39.

51 *Ibid* at paras 31-32, citing *Dunnison*, *supra* note 1 at para 94.

52 The co-existence of resulting trusts and the certainty of title provisions has been accepted in Alberta and British Columbia as well. In British Columbia, *Frame v. Rai*, 2012 CarswellBC 3914, 2012 BCSC 1876, [2012] B.C.J. No. 2615 (B.C. S.C.), saw the court conclude that the statutory presumption of indefeasibility of title could be displaced by equitable principles, including the presumption of a resulting trust. See also *Dhaliwal v. Olleck*, 2010 BCSC 1524, [2011] B.C.W.L.D. 485 (B.C. S.C.), where the court found that the statutory presumption found in s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 had been displaced.

53 *Indefeasibility of Title*, *supra* note 31 at p 50.

54 R.S.M. 1988, c. R30 [*Real Property Act*].

55 Most of this unwillingness stems from a reliance on *Fort Garry Care Centre Ltd. v. Hospitality Corp. of Manitoba Inc.*, 1997 CarswellMan 644, [1997] M.J. No. 650, [1998] 4 W.W.R. 688 (Man. C.A.), a Manitoba Court of Appeal decision. For a summary of the prior case law on this issue in Manitoba, see *Indefeasibility of Title*, *supra* note 29 at p 36.

56 2017 MBQB 209, [2018] 4 W.W.R. 136 (Man. Q.B.) [*Hyczkewycz*].

57 *Ibid* at para 142.

58 Victor J. Di Castri, *Registration of Title to Land*, loose-leaf (Rel 2, 2015) vol 3 (Toronto: Carswell, 1987).

59 Di Castri, *ibid* at p 17-41, citing *Passburg Petroleums Ltd.*, *supra* note 32.

60 Di Castri, *ibid* at p 17-41.

61 Ziff, *supra* note 13 at p 483.

62 *Ibid.*

63 *Ibid*, citing *Bezuko*, *supra* note 33.

64 Bruce Ziff, "Resulting Trusts and Torrens Title" 50 R.P.R. (5th) 27 (2015).

65 (1966), [1967] 1 A.C. 569 (New Zealand P.C.).

66 *Ibid* at p 585.

67 *Regal Castings Ltd. v. Lightbody*, [2008] NZSC 87 (New Zealand S.C.).

68 See "Resulting Trusts and Torrens Title", *supra* note 64 at p 2.

69 *Boulter-Waugh & Co. v. Phillips* (1919), 46 D.L.R. 41, [1919] 1 W.W.R. 1046 (S.C.C.).

70 *Ibid at p* 1054. The land titles provision in *Union Bank* came from s. 162 of the Saskatchewan the *Land Titles Act*, R.S.S. 1909, c. 41. Such provision held that cases of fraud are excepted from indefeasibility, but that knowledge of an unregistered interest in the lands was not of itself to be imputed as fraud.

71 *Thorsteinson*, *supra* note 21 at para 97.

72 *Dunnison*, *supra* note 1 at para 75.

73 See s. 59 of the *Real Property Act*, R.S.M. 1988, c. R30.

74 See s. 62 of the *Land Titles Act*, R.S.A. 2000, c. L-4.

75 See s. 23 of *Land Title Act*, R.S.B.C. 1996, c. 250.

76 *Indefeasibility of Title*, *supra* note 31 at p 50.

77 On this and other suggestions in the paper, the author expresses thanks to Donovan Waters, Q.C. for insightful comments made for this paper.

78 *Supra* note 56.

79 *Dunnison*, *supra* note 1 at para 100.

80 *Ibid* at para 75.

81 This was the factual scenario which underlay *Bogdanovic v. Koteff* (1988), 12 N.S.W.L.R. 472 (New South Wales C.A.). There, the New South Wales Court of Appeal upheld the title of the son, and held that the purchaser could only have enforced against the deceased's personal representative.

82 *Dunnison*, *supra* note 1 at para 80.

83 *Ibid* at para 35.

84 See s. 59 of the *Real Property Act*, R.S.M. 1988, c. R30.

85 See s. 62 of the *Land Titles Act*, R.S.A. 2000, c. L-4.

86 See s. 23 of *Land Title Act*, R.S.B.C. 1996, c. 250.

87 None of the statutory exceptions to indefeasibility enshrined in these *Acts* refer to resulting trusts, as one of the exceptions. See *Indefeasibility of Title*, *supra* note 31 at p 31.

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