IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N :

MARY VIOLA HYCZKEWYCZ	)	***C. B. Paul*** *and*
	)	***N. Kaushal***
(Plaintiff) Respondent	)	*for the Appellant*
	)	
- and -	)	
	)	***W. S. Gange***
PAUL HUPE	)	*for the Respondent*
	)	
(Defendant) Appellant	)	
	)	*Appeal heard:*
- and -	)	***November 20, 2018***
	)	
SHARON LINDA HUPE	)	
	)	*Judgment delivered:*
(Defendant)	)	***July 3, 2019***

On appeal from 2017 MBQB 209

BEARD JA

I. THE ISSUES

[1] This appeal deals with the ownership of four parcels of land in Manitoba, and it raises issues related to whether the trial judge erred in finding that the registered ownership of those four parcels of land, as it appeared on the certificates of title issued pursuant to *The Real Property Act*, CCSM c R30 (the *RPA*), was subject to a valid and enforceable resulting trust in favour of the plaintiff, Mary Hyczkewycz (Mary).

[2] The grounds of appeal are as follows:

- the trial judge erred in law in his interpretation of section 59 of the *RPA* in concluding that a resulting trust could be enforced against an owner's registered title to land in Manitoba;

- the trial judge erred in law in applying the presumption of resulting trust;

- the trial judge erred in a number of his factual findings and in the application of the facts to the law in making other findings, the specifics of which will be dealt with later in this decision; and

- the trial judge erred in law in failing to apply the principles in *Dashevsky v Dashevsky*, 1986 CarswellMan 103 (QB (Fam Div)), that a litigant must be held to the assertions made by her to establish a benefit for an alternative purpose, whether or not the benefit was received.

II. THE FACTS

[3] The trial judge set out the evidence of the parties in considerable detail in his reasons. What follows is a summary to explain the background of the transactions related to the four parcels of land.

[4] The defendant Paul Hupe (Paul) was either living with or married to the defendant Sharon Linda Hupe (Sharon) from about 1971, when they were 21 and 18 years old respectively, until their separation in August 2009. The parties had two children and, throughout their relationship and marriage, Sharon did not work outside the home, while Paul held a variety of different

jobs. Sharon looked after all of the banking and finances for the family. In fact, Paul acknowledged that he had no knowledge of, and paid no attention to, the family's day-to-day finances, and that the first time he looked at bank statements or a cheque registry was following the separation, in the course of this litigation.

[5] The separation led to proceedings between Paul and Sharon to divide their marital property. At that time, three of the four properties now at issue did not show Mary as a registered owner on the titles, while the fourth was registered to Mary and Sharon as joint tenants. The properties are referred to as the Inkster property, the Rossmore property and the cottage properties, which are two adjacent lots. In 2013, Mary commenced this proceeding in which she claimed that she was the beneficial owner, by way of gratuitous transfer resulting trusts, of the Inkster and Rossmore properties and the half owner, together with Sharon and Paul, of the two cottage properties, and she requested an order that the titles be amended to reflect her interest.

[6] As will become evident, Mary was involved in the purchase and sale of a number of residential properties over the years, starting in or about 1965. She purchased some as residences for herself and her family and others as rental properties. These proceedings relate to only four of those properties.

[7] Mary, who was born in 1927, is the mother of three children, Sharon, Gordon and Gary, and she was Paul's mother-in-law. The children's father passed away in 1964, and Mary married Myron Hyczkewycz in 1975. Myron passed away in 1996.

[8] Mary has been estranged from her two sons for many years—her last contact with Gordon and his family was in August 1997, and she and Gary

similarly have no contact. This occurred as a result of two events. In the 1970s, Mary borrowed $10,000 from Gordon to purchase a rental property and transferred title to her residence to him as security. Sometime later, on one hour's notice, Gordon evicted Mary from her residence and took it over. She moved to the rental property and did not take steps to enforce her claim to her residence.

[9] The second event occurred in the 1990s. Myron had appointed Mary's sons as his beneficiaries. At the time of Myron's death, he and Mary were the joint owners of the Rossmore property, which Mary transferred into her name pursuant to her right of survivorship. Gordon asserted that the estate, not Mary, was entitled to ownership. Mary's entitlement prevailed, but Gordon and Gary responded by severing all remaining ties with Mary.

[10] As the trial judge stated in his reasons, Mary testified that her sons' hostile behaviour regarding her property interests was central to her decisions respecting the four parcels of land that are now at issue (see para 23).

[11] Mary had a close relationship with Sharon and Paul throughout their marriage, as evidenced by the fact that the three of them lived together for many years in more than one location, and she maintained her close relationship with Sharon after the separation. All parties agreed that Mary provided significant financial support to Paul and Sharon throughout their marriage. This was often accomplished by the transfer of funds from Mary's savings account at the Steinbach Credit Union (SCU) to Sharon and Paul's account at that branch.

Mary's Banking Arrangements

[12] Mary had a savings account at the SCU, which was located in Steinbach, and a chequing account at a different credit union in Winnipeg, while Sharon and Paul had chequing and savings accounts at the SCU. In the early 1990s, Mary added Sharon to her accounts as a joint account holder, although Mary remained responsible for her own finances and Sharon accessed these accounts only on Mary's instructions.

[13] Their arrangement was that, when Mary needed money from her savings account, Sharon would go to Steinbach and transfer the funds from Mary's savings account at the SCU to Sharon and Paul's chequing account there. Sharon would then give Mary a cheque drawn on their account which Mary would deposit into her chequing account.

The Rossmore Property

[14] Early in their marriage, Sharon and Paul lived with Mary and Myron in a house that Mary owned on Matheson Avenue. In 1975, Mary and Myron built a house on the Rossmore property and moved in. Sharon and Paul remained at the Matheson property and Mary transferred ownership to them. She gifted them her equity of approximately $20,000, and they assumed responsibility for the mortgage.

[15] As noted earlier, following Myron's death, Mary had the title to the Rossmore property transferred into her name pursuant to her right of survivorship.

[16] On November 18, 1997, following her final estrangement from Gordon and Gary, Mary executed documentation to transfer title to the Rossmore property to Sharon, with the new title issuing on December 9, 1997. Mary's evidence was that this transfer was intended to shelter the property from challenges by Gordon and Gary, while retaining ownership in the event that she needed to convert the property into cash as she grew older. She testified that this was not intended to be a gift to Sharon. While the certificate of title indicates that Sharon paid $10,000 for the property, which had a sworn value of $138,000, Mary and Sharon both stated that Mary gifted the money to Sharon, who then paid it back to Mary as payment for the property.

[17] Mary retained a lawyer, since deceased, to assist her with this transfer. At the same time, he prepared a new will for Mary naming Sharon as the principal beneficiary and a power of attorney naming Sharon as her attorney.

[18] In 2003, Sharon and Paul sold the Matheson property, netting proceeds of approximately $85,000, and they moved to the Rossmore property. They lived there with Mary until their separation. Throughout that time, Mary stated that she paid all of the costs related to this property, although Paul did provide the manpower to make certain improvements to the home.

[19] Sharon's evidence was consistent with that of Mary. Paul testified that he believed that he and Sharon owned the Rossmore property and that, after moving in, they paid all of the costs. He could not point to any documentation supporting those beliefs, which he agreed were based on assumptions.

The Inkster Property

[20] Mary purchased the Inkster property in 1979 as a rental property. In 1994, Sharon and Paul's son moved in. He could not afford to cover the entire cost of renting and maintaining the property, so Mary covered some of those costs. Mary's plan was that this property would eventually be given to her grandson, but she retained ownership so that the asset would be available to her in the event that she needed funds in her advanced years.

[21] In 2007, Mary transferred the title to this property into the names of herself and Sharon as joint tenants, her stated rationale being, again, to protect it from any potential claims by Gordon and Gary. She testified that Sharon and Paul made no contribution to the maintenance costs of this property.

[22] Sharon's evidence regarding this property was consistent with that of Mary. While Paul initially testified that he knew nothing about the transfer of ownership of this property until after the separation, in fact, he was a witness on the transfer documents. This supported Mary and Sharon's evidence that he was consulted about the transfer at the time of the transaction.

The Cottage Properties

[23] Mary testified that the parties started discussing the purchase of a cottage property in 1992. She said that this would be both for Sharon and Paul's family to use and, also, an eventual residence for her. After viewing a number of properties, in 1994, they settled on one that they purchased for $21,000. This property had only a building shell on it that required considerable work to become usable. Mary stated that she paid for the property and Sharon and Paul were to contribute the labour to make the shell

liveable. The next year, they purchased the adjacent property for $3,500, for which Mary said she paid.

[24] Mary testified that, although she paid for both properties and she was to be a 50 per cent owner, the titles were put in Sharon and Paul's names, and her name was not included as an owner. The stated reason for this was, again, to protect the properties from Gordon and Gary and, ultimately, to have Sharon and Paul own the entirety of the two properties after she died.

[25] Sharon's testimony was, essentially, consistent with Mary's. In addition, Sharon explained that it was she and Paul, but not Mary, who met with the lawyer to complete the purchase. Sharon testified that she told the lawyer about Mary's interest, but he testified that he had no recollection of that discussion. While the lawyer's file had been destroyed long ago, his reporting letters make no reference to Mary having any interest in the property.

[26] Paul stated that the purchase of a cottage was his and Sharon's idea and not Mary's. Paul denied that Mary paid for the first cottage property, other than for a sunroom. He said that Mary was involved in the purchase because of her experience with real estate purchases, and that the first time he heard of her claiming any ownership interest was after the commencement of the divorce proceedings.

[27] The most significant evidence related to the cottage is that related to whether it was Mary or Sharon and Paul who ultimately paid for the first cottage property. I will outline this evidence and address this issue later in these reasons.

The Trial Judge's Decision

[28] The trial judge found that the ownership of each property was subject to a gratuitous transfer resulting trust. He found that Mary was the beneficial owner of the entirety of the Rossmore and Inkster properties and the beneficial owner of 50 per cent of the cottage properties.

III. THE FIRST GROUND OF APPEAL: RESULTING TRUSTS AND INDEFEASIBILITY OF TITLE

(i) The Issues

[29] This ground of appeal raises the issue of whether a resulting trust related to land that is not registered or otherwise noted on the title to the land issued under the *RPA* can be enforced against a registered owner's title to the land, given the provisions regarding the indefeasibility of title contained in the *RPA*.

(ii) The Parties' Positions

[30] Mary argues that the Court should follow appellate authority from British Columbia, Alberta and Saskatchewan, which has determined that resulting trusts are enforceable within Torrens land title systems despite legislative provisions respecting indefeasibility of title. Paul, however, argues that differences in the Manitoba legislation, especially the presence of Manitoba's objects clause, being section 3 of the *RPA*, mean that the case law from the other western provinces is not persuasive, and that the Manitoba legislation can only be interpreted to mean that a person's registered title cannot be affected by a resulting trust.

(iii) The Trial Judge's Reasons

[31] After reviewing the decisions in the other western provinces, the trial judge concluded as follows (at paras 142-43):

> For the reasons articulated in ***Dunnison Estate*** [*Dunnison Estate v Dunnison*, 2017 SKCA 40] and ***Bezuko*** [*Bezuko v Supruniuk*, 2007 ABQB 204], 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.
>
> The ***RPA*** provisions protect good faith purchasers for value who relied on the register. A resulting trust does not amend the legislation. It exists between immediate parties or volunteers claiming through them, independent of the land titles register. A resulting trust is but one of a number of circumstances in which an interest in land arises by operation of law.

(iv) Standard of Review

[32] The determination of the effect of the indefeasibility provisions of the *RPA* on the enforceability of a resulting trust against land registered under the *RPA* concerns the correct interpretation of the provisions of legislation. The issue does not rely on factual findings or on the application of the facts in this case to the law. Thus, it raises a question of law and is to be reviewed on the standard of correctness. (See *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-9.)

(v) Analysis—Resulting Trusts and Indefeasibility of Title

[33] While there are decisions on the interpretation of indefeasibility legislation and its effect on the enforcement of unregistered claims, including resulting trust claims, against real property from the appellate courts in the

other western provinces, those decisions have, in some instances, come to different conclusions. There is, to my knowledge, no decision on point from this Court. Given that there are some differences between the language used in the real property title registry legislation in the various jurisdictions, it is necessary to undertake a review of the origins and goals of the registry systems to determine the correct interpretation of the current legislation in Manitoba. As all of the western jurisdictions have land registry systems based on the Torrens system of land titles (the Torrens system), this analysis requires a review of the following: (a) the origins and goals of the Torrens system; (b) the interplay between the Torrens indefeasibility principle and trusts; and (c) Manitoba's *RPA*, the effect of the indefeasibility provision and whether trusts can co-exist with indefeasibility.

[34] A number of academic texts and articles have been considered to understand the history of the Torrens system. While some are specifically referenced in these reasons, all are cited in the attached appendix.

(a) The Origins and Goals of the Torrens System

[35] To understand the Torrens system, it is necessary to understand the land titles system that it replaced, which was the English common law deeds system. Under the English common law, land was sold by deeds—private contracts between vendors and purchasers. The difficulty with the deeds system was explained by the Court in *Dunnison Estate v Dunnison*, 2017 SKCA 40, as follows (at para 65):

> Under the deeds system, an individual's title to land depended on the validity of the title of all prior owners. The process of establishing "change of title" was expensive and fraught with difficulties, not the least of which was that flaws in earlier titles

> were carried on down the line, even if later purchasers knew nothing of them. Moreover, because the historical documents supporting transfers were in private hands, there was significant potential for forgery and fraud. The system was further complicated by the courts' development of the equitable doctrine of notice, which bound landholders to claims such as mortgages, trusts and leases that were not noted on the deed but nevertheless were held to affect a new owner's title whether he or she knew or ought to have known of them.

[36] If, after completion of the purchase and sale of land, someone else came along with a better claim to the title, the purchaser would lose the land without recourse against the vendor, or the value of the land to the new owner could be nullified by instruments such as long-term leases and mortgages. This uncertainty meant that it was difficult and expensive to prove valid title, which made many people reluctant to acquire and transfer land, and it made moneylenders reluctant to take land as security for loans to acquire and improve the land. This, in turn, hindered the settlement in the 1800s of the newly opened areas in what became the prairie provinces (see Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 5-8).

[37] Earlier in the 1800s, the same concerns had arisen in Australia. In response to those concerns, a new system of land registration, credited to Robert Torrens, was developed in the mid-1850s. The fundamental change brought about by the Torrens system was that the legal ownership of land could no longer be changed by private agreements, but only upon registration in a public register. Under the Torrens system, registration conferred good title and cured defects otherwise existing in the chain of title, meaning that a person dealing with the registered title-holder could rely upon the certificate

of title to guarantee the vendor's title and had no need to search behind the certificate of title of the current registered owner to determine whether others had any interests in the land (see Taylor at pp 3, 9-10).

[38] After much lobbying from the Canada Land Law Amendment Association regarding the benefits of the Torrens system, the Minister of Justice of Canada introduced a Bill in the Senate on January 30, 1885, which would eventually bring the Torrens system to the North-West Territories (which included what is now Alberta, Saskatchewan and the three current territories). The clear understanding of the Minister of Justice was that the Torrens system would promote settlement by allowing settlers to easily deal with their land (see Taylor at p 119; and *Debates of the Senate of the Dominion of Canada, 1885*, 5-3, vol 1 (11 March 1885) at 260-61 (Hon Sir Alex Campbell)).

[39] In a similar way, in 1883, the people of Manitoba and the Manitoba premier were introduced to the advantages of the Torrens system by the Manitoba Land Law Amendment Association, which presented a draft Bill for Manitoba, adapted from an Australian Torrens statute. Like the federal initiative, it is clear that the hope for the Torrens system in Manitoba was to attract settlers and to reduce lending rates by decreasing the risk to which lenders were exposed. In April 1885, Manitoba's Attorney-General introduced a Bill to the Legislature which would eventually bring the Torrens system to Manitoba and, in doing so, he emphasised the increase in investment and reduction in the costs of borrowing that could be expected from the system (see Taylor at pp 132-33, 142).

[40] As can be seen, the Torrens systems in Manitoba, Alberta and Saskatchewan shared common, close-in-time origins. Both the Manitoba legislation and the federal legislation were clearly influenced by the Torrens land titles legislation in place in Australia in and around 1883-1885, and both pieces of legislation were introduced in the hopes that the system would encourage quick settlement in the prairie provinces by allowing quick, simple and secure land dealings.

[41] The original goal of the Torrens system, as stated by Sir Robert Torrens, was:

> . . . to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant.

(South Australia, *Parliamentary Debates*, House of Assembly, 1857-58, [204], 4 June 1857 (Robert Torrens), cited in Kim Sonja Korven, *The Emperor's New Clothes: The Myth of Indefeasibility of Title in Saskatchewan* (Thesis, University of Saskatchewan, 2012) online (pdf): <harvest.usask.ca/bitstream/handle/10388/ETD-2012-10-522/KORVEN-THESIS.pdf?sequence=4> at 18.)

[42] This goal was reflected in an early Australian Torrens statute, *The Land Transfer Act 1866 (No 1)* (Vic), 1866, which was enacted "to give certainty to the title to estates in land and to facilitate the proof thereof and also to render dealings with land more simple and less expensive", according to its preamble. Similar wording was included in later Australian Torrens statutes.

[43] This preamble was also contained in the first legislation adopting the Torrens system in Manitoba in 1885 (see *The Real Property Act of 1885*, SM 1885, c 28), which indicated that the *Act* was enacted "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 more simple and less expensive". The goal of Manitoba's current *RPA* is contained in section 3, which states:

> **Objects of the Act**
> **3** The objects of this Act are to simplify the title to land, to give certainty thereto, to facilitate the proof thereof, and to expedite dealings therewith; and the Act shall be construed in a manner to best give effect to those objects.

[44] As discussed earlier, Saskatchewan and Alberta first received the Torrens system while still part of the North-West Territories, through *The Territories Real Property Act*, SC 1886 (49 Vict), c 26, enacted in 1886. This legislation contained a preamble that stated that the *Act* was enacted "to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive". The similarity between this statement of the objects of the legislation and those in the earlier Australian and Manitoba legislation is obvious.

[45] The preamble disappeared from *The Territories Real Property Act* upon revision in 1886, but the legislation was otherwise unchanged. Despite the disappearance of the preamble following the revision, there is no question that the underlying object of the legislation remained unchanged. In this regard, see *An Act respecting the Revised Statutes of Canada*, SC 1886 (49

Vict), c 4, the legislation authorising the revision, which specifically stated (at section 8):

> **8** The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

(See also Harold Spencer, *Some Principles of the Real Property (Land Titles) Acts of Western Canada* (Toronto: Carswell, 1920) at 29; and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) ch 24 at sections 24.54 to 24.56.)

[46] Upon becoming provinces in 1905, both Alberta and Saskatchewan continued with the Torrens system, and enacted *The Land Titles Act*, SA 1906, c 24; and *The Land Titles Act*, SS 1906, c 24, respectively, which followed *The Territories Real Property Act* very closely. Neither province adopted the preamble contained in the original federal legislation, and the current legislation in both provinces contains neither a preamble nor an objects clause, as Paul has noted.

[47] Despite the absence of a preamble in the 1906 legislation, the Supreme Court of Canada used the preamble of the original *The Territories Real Property Act* to determine the purpose of Alberta's 1906 provincial legislation, due to the provenance of the provincial legislation from the earlier federal legislation. In *CPR and Imperial Oil Ltd v Turta et al*, [1954] SCR 427, Estey J, with the concurrence of three other judges, referred to the preamble in *The Territories Real Property Act* in order to determine the "intent and purpose of the [Alberta] Legislature in continuing this [Torrens]

system" via the 1906 *Land Titles Act* (Alberta) (at pp 442-43). In the same case, Rand J stated (at p 452):

> . . . The preamble to *The Territories Real Property Act*, 1886 (Can.), c. 26 which introduced the Torrens system to the western provinces indicates its objects:
>
> > Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:
>
> This general principle is subject, of course, to certain qualifications declared in the [Alberta] statute but that it expresses the broad purpose of the system is unquestionable.

[48] This review of the origins and goals of the Torrens system in the prairie provinces indicates that, despite the fact that Alberta and Saskatchewan never enacted a preamble or objects clause in their land titles legislation, the Torrens legislation in Manitoba, Alberta and Saskatchewan, like that of Australia, were all originally enacted to give certainty of title, to facilitate proof of title, and to make dealings with land more simple and less expensive. As discussed, the primary concern of those bringing the Torrens system to the prairie provinces was to facilitate the settlement of the land by providing a registration system which would allow for cheap, easy and secure sales, purchases and lending.

(b) The Interplay Between the Torrens Indefeasibility Principle and Trusts

[49] The fundamental difference between the English common law deeds system and the Torrens system is the creation of a public register which provides conclusive evidence of the state of the owner's title to land. To

accomplish this, the fundamental principle of the Torrens system is that title to land does not pass until registration, but, upon registration, title is conclusive, subject to specific legislated exceptions. Further, under the Torrens system, instruments affecting the property, such as mortgages and long-term leases, will only be effectual upon registration.

[50] Thus, under the Torrens system, a certificate of title is conclusive evidence, in law and equity, and as against the world, that the person named in the certificate owns the land or interest named in the certificate, subject only to legislated exceptions. This principle is found in section 59(1) of the *RPA*:

> **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.

[51] This has been labelled as the principle of indefeasibility of title, and was expressed in the oft-cited statement of Edward J, for the majority of the Court of Appeal of New Zealand, in *Fels v Knowles* (1906), [1907] 26 NZLR 604 (at p 620):

> . . . The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is

> authorised, as in the case of easements or incorporeal rights, to the right registered.

[52] This cardinal principle of indefeasibility of title is said to be supported by three other principles—the mirror principle, the curtain principle and the insurance principle—which characterise a Torrens system. An excellent and concise explanation of all of these principles within a Torrens system was described by Marcia Neave in her article "Indefeasibility of Title in the Canadian Context" (1976) 26 UTLJ 173 as follows (at p 174):

> . . . The state establishes title by setting up a register and guaranteeing that a person named as the proprietor in the register has a perfect title subject only to registered encumbrances and to enumerated statutory exceptions. The philosophy of a system of title registration is often described as depending on three principles. The first is the 'mirror principle' under which the register is a perfect mirror of the state of title. The second is the 'curtain principle' under which the purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register. The third is the 'insurance principle' under which the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. Together these concepts form 'the principle of indefeasibility' frequently referred to by commentators, though the phrase is not used in the legislation itself.
>
> [footnotes omitted]

[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. There are statutory exceptions and qualifications listed within the legislation, which are found in sections 58 and 59 of the *RPA*. As I will explain, beyond these statutory exceptions and qualifications, various *in personam* equitable interests,

including trusts related to land, can also supersede the principle of indefeasibility.

[54] The Torrens system does not include trusts as a statutory exception to indefeasibility and, generally, forbids the registration of trusts (see sections 49(2), 55(1) and 81(1) of the *RPA* for the only exceptions). The reason for this appears to be that trusts are seen to be antithetical to indefeasibility within the Torrens system—a certificate of title is supposed to conclusively prove to the world that the registered owner is entitled to the land absolutely and for all intents and purposes—i.e., entitled both at law *and* in equity.

[55] Despite this, it is clear that trusts related to land were not abolished with the adoption of the Torrens system. Historical records, legal texts and articles, and jurisprudence all indicate that trusts related to land can still exist under Torrens systems, that beneficiaries of a trust related to land can take steps under the Torrens system to protect their beneficial interests, and that 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.

Historical Records

[56] Torrens' own writings (see Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (Adelaide: Register and Observer General Printing Offices, 1859) indicate that trusts relating to land can still exist under his system of land registration and that beneficiaries of trusts relating to land can protect their beneficial interests. He states that trusts cannot be registered under his system, noting that "neither are parties dealing

with the trustees at all concerned or at liberty to enquire into its contents, the title derived through trustees being absolute and indefeasible so soon as registered" (at p 39). He goes on to note, however, that "beneficiaries under the trust may, at a trifling cost, lodge caveats forbidding dealing with the property without their concurrence" (*ibid*), which would provide security to the beneficiaries where a trustee's ability to deal with the land was circumscribed in some manner under the trust.

[57] That trusts related to land would continue to exist under the Torrens system and that beneficiaries could protect their interests and enforce the trusts personally against the trustees was noted in the Senate and House of Commons in relation to the Bill that would become *The Territories Real Property Act*. Sir Alex Campbell quoted from the FG Duffy edition of a text by Thomas àBeckett about the Torrens system, as follows (Debates of the Senate, 11 March 1885 at 265):

> . . . the statute will not, by registration, recognize a trust or permit the separation of legal from beneficial ownership for the purposes of dealing. . . . The trust may be created as between the parties to the instrument in any manner they please, as under the general law; and a copy of the trust deed may be deposited with the Registrar for safe custody and reference. . . . The land may be reached by the trustee, although the trust will not be attached to the land in such a manner as to be enforced against a person acquiring it, without fraud on his part; and knowledge of the trust will not in itself be imputed as fraud. . . . The principle of the Act in this respect appears to be to shift the onus of the action and responsibility from the purchaser, who is not interested under the trust, to the beneficiary, who is, and to enable the beneficiary to protect himself by proceeding against the trustee, when an improper dealing is contemplated, rather than by remaining inactive to rely upon the purchaser's knowledge of his rights as a safeguard against their violation.

> It will be remembered that a *cestui que* trust may enter a caveat under which we will receive notice of any dealing with the trust property in time to stop it. . . .
>
> [emphasis added]

Legal Texts and Articles

[58] Legal texts and articles confirm that trusts relating to land can exist within the Torrens system, that beneficiaries can protect their interests in a trust relating to land, and that beneficiaries may bring an *in personam* claim against a trustee who is registered as the owner of the land that is subject to the trust.

[59] In Louis William Coutlée, *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories* (Toronto: Carswell & Co, 1890), a text that was relatively contemporaneous with the original legislation in Manitoba and the Territories, Coutlée refers to the fact that trusts cannot be registered under the legislation, but states (at p 4):

> . . . Trusts, however, are not abolished under the new system, they may exist as between the parties . . . but the responsibility of enquiring as to trusts is shifted from the purchaser, and it now rests upon the beneficiary to take means to protect his interests against improper dealings by lodging a caveat.
>
> The system under which trusts are enforced by Courts of Equity has not been disturbed. . . .

(See also Spencer at pp 22-23.)

[60] This view was supported decades later by Victor DiCastri in *Thom's Canadian Torrens System*, 2nd ed (Calgary: Burroughs & Company, 1962), who stated (at p 167):

> Torrens' intention was to establish one estate only in land, to have this estate registered in a public register, and to provide that subject to a few specified exceptions any person who *bona fide* acquired that registered estate should upon its registration in his own name obtain an indefeasible title representing the totality of ownership; no other estates or interests were to exist. What would formerly have been an equitable estate was to be relegated to a "right" assertable and enforceable against the registered owner *in personam*. Under the provisions of the Acts the registered owner was not to be considered in any case as defeating an equitable estate in the sense understood under the rules of equity touching such an estate; he would simply be taking land free from certain personal rights enforceable in equity against the last owner. . . .

[61] DiCastri further indicates that the Torrens system does not "obliterate the doctrine of trusts which *cestuis que trustent* continue to invoke and obtain judicial succour" (at p 169), and he discusses several cases in which this has been confirmed (see pp 169-72). He concludes (at p 174):

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

[62] In his later work, DiCastri reiterates that the Torrens system was designed so that "[w]hat would formerly have been an equitable estate or interest was to be relegated to a 'right' assertable and enforceable against the

registered owner *in personam*" (see Victor DiCastri, *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2016) vol 2 at para 748).

(See also Associate Professor Bruce Ziff, "Resulting Trusts and Torrens Title" (2015) 50 RPR-ART 27.)

[63] There has also been considerable commentary in Australasia that addresses the relationship between equitable interests in land and the Torrens system.

[64] For example, Rebecca Ardagh, in "The Torrens System and the In Personam Claim" [2011] NZLawStuJl 7, cites *Frazer v Walker*, [1966] NZPC 2 at 585, then indicates (at p 3):

> . . . [T]he courts do have an inherent jurisdiction in equity and have not endorsed any attempt of indefeasibility to limit that jurisdiction; "that this principle 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". . . .
>
> [footnotes omitted]

[65] She goes on to discuss why the *in personam* claim works in relation to the indefeasibility principle subscribed to in the Torrens systems as follows (at p 4):

> . . . [T]he most important aspect of a claim in personam, arguably what makes it acceptable in a Torrens system at all, is that a claim in personam is not a claim against the title, but a claim against the registered proprietor him or herself, arising out of conduct. In a remedy of specific performance or constructive trust the courts are merely ensuring that the registered proprietor's

> conduct is corrected. Sometimes this can have an effect on the title, but is still granted to remedy the conduct of the registered proprietor. . . .
>
> [footnotes omitted]

[66] Lyria Bennett Moses & Professor Brendan Edgeworth, in their article "Taking it Personally: Ebb and Flow in the Torrens System's *In Personam* Exception to Indefeasibility" [2012] UNSWLRS 50, discuss the process of the reconciliation of common law and equitable doctrines with the Torrens system and, in particular, why resulting and constructive trusts can still arise in a Torrens system, stating (at p 16):

> Beneficiaries of resulting and constructive trusts are entitled to call for transfer of Torrens title to them against the original resulting or constructive trustee. This is because those trusts are imposed by operation of law based on proof of facts *other than* an existing proprietary interest in the land. For example, purchase money resulting trusts rely on proof that the purchase of the property was funded by a person other than the registered proprietor in the absence of an intention (actual or presumed) to benefit the registered proprietor. . . . However, resulting and constructive trusts would not ordinarily be enforceable against a registered transferee from the original resulting or constructive trustee. This is because, unless the new registered proprietor becomes bound by their own conduct, the enforcement of the trust against that subsequent registered proprietor necessarily involves reliance on the plaintiff's *in rem* rights. That is, it requires a plaintiff to assert directly that they had an interest in the land which survived the transfer, contrary to section 42.
>
> [footnotes omitted]

Section 42 of the New South Wales legislation essentially indicates that the registered proprietor of any estate shall hold that estate absolutely free from all other estates and interests that are not recorded, which corresponds to section 59(1) of the *RPA* (see the *Real Property Act 1900* (NSW) 2018/25;

and Associate Professor Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility" (2008) 32 Melbourne UL Rev 672, online (pdf): *The University of Melbourne* <law.unimelb.edu.au/__data/assets/pdf_file/0005/1705703/32_2_9.pdf>.)

Case Law

[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.

- Manitoba Jurisprudence

[68] One of the earliest Manitoba cases indicating that equitable rights continue to exist alongside Manitoba's Torrens legislation is *Re Massey & Gibson* (1890), 7 Man LR 172 (QB). Killam J stated (at pp 178-79):

> The position of trusts and equitable interests under the corresponding statute of the Colony of Victoria, is clearly stated in Mr. *A'Beckett's* work upon "*The Transfer of Land Statute*" of that colony. At p. 58 he says, "There is no doubt that, as against the proprietor, trusts and contracts may be enforced as formerly, and although a trustee may be absolute proprietor under the Act, a court of equity will reduce or deprive him of his interest or compel him to apply its proceeds as justice may require." And at p. 56, "There is this marked distinction between the statute and the general law, that the statute will not by registration recognize a trust or permit the separation of legal and beneficial ownership for the purposes of dealing. The trust may be created as between the parties to the instrument in any manner they please, as under the general law, and a copy of the trust deed may be deposited with the Registrar for safe custody and reference. The land may be reached through the trustee, although the trust will not be attached to the land in such a manner as to be enforced against a person

> acquiring it without fraud on his part." And at p. 57, "Most of the provisions of the Act as to express trusts will equally apply to the implied or constructive trusts raised by courts of equity upon contracts, or the creation of relations in which a ground for intervening to secure the performance of a moral obligation is recognized."
>
> He shows further that, the method by which a vendee of land is to protect himself from a transfer of the vendor's estate to any other than himself, is by entering a caveat against the registration of any transfer or other dealing with it.
>
> After a careful examination of our Real Property Acts and a comparison of the corresponding sections of the Victoria Act, I am of the opinion that these remarks accurately describe the position with reference to lands registered under those Acts in Manitoba.
>
> [emphasis added]

(See also Bain J's comments at p 180.)

[69] In *Dukart v District of Surrey*, [1978] 2 SCR 1039 at 1060, which refers to *Massey*, Estey J notes that "[*The Real Property Act*, RSM, c R-30] provides elsewhere for the protection of equitable interests by way of registration of a *caveat*."

[70] Other Manitoba cases that have recognised that equitable interests related to land, other than resulting trusts, can co-exist and be enforced despite the indefeasibility provisions of the *RPA* are: *Fonseca v Jones*, 1910 CarswellMan 47 (KB), aff'd 1911 CarswellMan 104 (CA); *Allison v Allison*, [1943] 3 DLR 637 (Man CA); *Rogalsky Estate v Rogalsky*, 1984 CarswellMan 197 (QB), aff'd 1986 CarswellMan 321 (CA); and *Kim v Kim*, 2014 MBCA 34, which involved the equitable interest of a purchaser.

[71] Paul relies on two Manitoba decisions in support of his position that his and Sharon's titles to the cottage properties and Sharon's titles to the Rossmore and Inkster properties should be considered indefeasible, being *Fort Garry Care Centre Ltd v Hospitality Corp of Manitoba Inc*, 1997 CarswellMan 644 (CA); and *Ehrmantraut (Bankrupt), Re*, 2008 MBCA 127. In my view, neither of these cases deals with the main issue in this case. In *Fort Garry*, there was no equitable interest or trust interest being asserted; the case merely indicated that an owner could not demand the elimination of a neighbour's right-of-way from the owner's property if the right-of-way is included in the description of the land on the owner's certificate of title—the certificate of title is conclusive in such cases. In *Ehrmantraut*, this Court determined that a resulting trust did not arise on the facts of the case, and declined to comment on the issue in indefeasibility of title under section 59 of the *RPA*.

- Supreme Court of Canada Jurisprudence

[72] While there do not appear to be any decisions from the Supreme Court of Canada that deal with the co-existence of trusts and the indefeasibility of title, there are several that deal with other equitable claims to land.

[73] *Jellett v Wilkie* (1896), 26 SCR 282, dealt with the equitable rights of a purchaser of land as against an execution creditor. Wilkie had purchased and paid for land but, before he registered the transfer, Jellett registered a writ of execution related to the vendor and still-registered owner. The Court explained that, under the common law, the purchaser had an equitable interest in the property upon paying the purchase price. It stated that, unless the

Territories Real Property Act, RSC c 51, abrogated equitable rights, the common law would hold that a purchaser paying money for property immediately attains an equitable interest in the property, which could be specifically enforced by a court of equity to protect the equitable owner. Strong CJC indicated that he had gone through the entire Act, and found "nothing abridging the equitable rights of [Wilkie] as they stood when the statute was passed" (at p 291).

[74] In the case of *Church v Hill*, [1923] SCR 642, the Court confirmed that equitable interests could be enforced with respect to the 1906 *The Land Titles Act* (Alberta) in circumstances similar to those in *Jellett*. Anglin J determined that common law principles recognised that a purchaser under a sale agreement had an enforceable equitable interest in the property and, relying in part on *Jellett*, stated that "equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected" (at p 644). (See also Mignault J's comments at pp 647-48.)

(See also *Dukart*, which recognised that equitable interests can be protected by caveat in Manitoba; and *McKillop & Benjafield v Alexander* (1912), 45 SCR 551.)

- Australasian Jurisprudence

[75] Australia had been a leader in the development and application of principles related to the Torrens system, and New Zealand soon followed, and was the origin of *Frazer*, a most influential case. In that case, their Lordships made the following observations about indefeasibility and equitable claims (at pp 5-6):

> . . . [T]heir Lordships have accepted the general principle, that registration under the Land Transfer Act 1952 confers upon a registered proprietor a [title] to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in [no] way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or equity, for such relief as a Court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and of Australia [citations omitted].
>
> Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibitions of ss. 62 and 63 may not be maintained.

(See also *Barry v Heider* (1914), 19 CLR 197 (HCA), Griffith CJ at pp 206-7; and Isaacs J at p 213.)

- Other Canadian Jurisprudence

[76] Jurisprudence from the other provinces that have adopted the Torrens system also recognises that equitable interests in the land can exist under their Torrens legislation.

[77] The Alberta Court of Appeal addressed the question of equitable interests affecting a registered title in that province in the decision of *Passburg Petroleums Ltd v Landstrom Developments Ltd*, 1984 ABCA 78, leave to appeal to SCC refused, 1984WL446346. Moir JA (McDermid JA concurring) referred to *Church* at p 405, wherein Anglin J recognised that, despite the indefeasibility principle in Torrens statutes, "equitable interests in . . . lands

may be created and will be recognized and protected" (at para 12), and more specifically noted Mignault J's statement in *Church* at p 409 that "it does not appear possible, and certainly not inter partes, to exclude from the [1906] Land Titles Act [Alberta] equitable interests in property resulting from sale agreements" (at para 13). From this, Moir JA concludes (at paras 14-15):

> The Supreme Court of Canada has made 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.
>
> Another instance of a situation in which an unregistered interest will be recognized is provided by Lord Moulton at pages 504-505 of the decision of the Privy Council in *Loke Yew v. Port Swettenham Rubber Co. Ltd*., [1913] A.C. 491: Lord Moulton says:
>
> > "Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do (emphasis added)."

(See also *Bezuko v Supruniuk*, 2007 ABQB 204 at paras 26-33, wherein Ross J rejected the former Saskatchewan position that resulting trusts could not exist under the Torrens system.)

[78] In *Dunnison*, the Saskatchewan Court of Appeal has recently reversed its previous stance on this issue and has concluded that resulting trusts can be enforced despite the indefeasibility of title provisions in their Torrens legislation. The Court acknowledged that the land titles legislation had always recognised unregistered interests '"as against the person making the same" (at para 76). The Court noted that recognising unregistered interests and resulting trusts were two different matters (see para 79) but ultimately concluded (at paras 80-81):

> Having said that, the same rationale for recognizing and enforcing unregistered instruments against the person making the same can be applied to obligations imposed on a registered owner by operation of law. Those obligations arise *inter se* between the transferor and the transferee. In the case of voluntary transfer resulting trusts, the obligation is imposed because of the circumstances under which the registered owner took title. Recognizing and enforcing such obligations does not directly interfere with the operation of *The Land Titles Act, 1978* [*The Land Titles Act*, RSS 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.
>
> Moreover, as we have indicated, the Supreme Court of Canada has sustained the existence of resulting trusts without distinction among the various types of resulting trusts. Thus, the voluntary transfer resulting trust can arise with respect to land in this jurisdiction. We also agree with the Alberta Court of Appeal in *Passburg* that "the concept of indefeasibility applies only to situations in which there is a need to rely upon the certificate of title."

[79] British Columbia takes a slightly different viewpoint, as it considers the principle of indefeasibility to be a statutory presumption, but those Courts also recognise that equitable interests, including trusts, can exist within its Torrens system. The best explanation of British Columbia's view is expressed

in the case of *Aujla v Kaila*, 2010 BCSC 1739 at paras 31-32, aff'd 2013 BCCA 158.

[80] Finally, although Ontario's Torrens land titles system differs in provenance and in details from other systems in Canada, the Ontario Court of Appeal also subscribes to the view that Ontario's Torrens legislation does not abrogate or displace the common law, and it appears to accept that a registered owner may owe *in personam* obligations. For a recent decision on this issue, see *Lawrence v Maple Trust Co*, 2007 ONCA 74 at para 51.

Summary of the Interplay Between Indefeasibility and Trusts

[81] This review of historical records, academic texts and articles, and jurisprudence reveals that all Torrens jurisdictions discussed—no matter the manner of expressing their concept of indefeasibility of title or the specific words used—accept and recognise that equitable interests in land, including trusts, can exist within the Torrens system. 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.

[82] It is further of note that, when a beneficiary of a trust proceeds against a trustee who is the registered owner of trust property registered under a Torrens statute, a court, exercising its usual equitable jurisdiction, can compel the trustee to transfer title to the property to the beneficiary in certain circumstances. This equitable remedy is summarised by Paciocco JA, for the

Court, in *Nodel v Stewart Title Guaranty Company*, 2018 ONCA 341 (at para 31):

> A trust beneficiary has an equitable entitlement to compel a trustee to use its legal ownership over the property for the benefit of the beneficiary, according to the terms of the trust. Indeed, a sole trust beneficiary who is a competent adult and absolutely entitled to the trust property can, at any time, collapse the trust and demand delivery of full title, relying on the rule in *Saunders v Vautier*, [1841] E.W.H.C. J82, affirmed (1841), E.R. 482 (Eng. Ch. Div.): Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), at pp 85-88. This right "is based upon the theory that, though title and management rest in the trustees, the significance of property lies in the right of enjoyment": *Waters' Law of Trusts*, at p. 1235.

[83] See also *Pecore v Pecore*, 2007 SCC 17 (at para 20):

> A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada*, (3d ed. 2005), at p 362.

(c) Manitoba's RPA, Indefeasibility and Trusts

[84] Having generally considered the interplay between indefeasibility and trusts in Torrens systems, some of the precise provisions of Manitoba's legislation can be considered with regard to those concepts. A comparison with the relevant legislation in other jurisdictions will be made to address Paul's arguments. The relevant statutes in Alberta and Saskatchewan are the *Land Titles Act*, RSA 2000, c L-4 (the *ALTA*); and *The Land Titles Act, 2000*, SS 2000, c L-5.1 (the *SLTA*).

Objects Clause

[85] Manitoba, alone among the prairie provinces, has an objects clause, contained in section 3 of the *RPA*, which emphasises the security of title and facility of transfer. Paul argues that the absence of such a clause in the statutes of the other western provinces means that those statutes and case law from those provinces are unhelpful in interpreting the Manitoba *RPA*. However, as discussed above, the common history and introduction of the Torrens legislation to all three prairie provinces means that each province's legislation shares the same goals or objects, whether or not they are set out in the legislation. There is, in my opinion, no basis for differentiating between the statutes in this manner.

Indefeasibility

[86] The statutory provisions that legislate indefeasibility in the three western provinces, while similar, are not identical.

[87] In Manitoba, indefeasibility of title is found in section 59(1) of the *RPA*:

> **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.
>
> [emphasis added]

[88] In Saskatchewan, indefeasibility of title is found in section 13(1) of the *SLTA*:

> **Effect of title**
> **13(1)** Where the Registrar issues a title pursuant to this Act:
>
> (a) subject to section 14, the registered owner holds the title free from all interests, exceptions and reservations; and
>
> (b) subject to section 15:
>
> (i) the title is conclusive proof that the registered owner is entitled to the ownership share in the surface parcel, mineral commodity or condominium unit for which the title has issued.
>
> [emphasis added]

[89] In Alberta, indefeasibility is found in section 62(1) of the *ALTA*:

> **Certificate as evidence of title**
> **62(1)** Every certificate of title granted under this Act . . . 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 included in the certificate for the estate or interest specified in the certificate. . . .
>
> [emphasis added]

[90] Finally, in British Columbia, indefeasibility is found in section 23(2) of the *Land Title Act*, RSBC 1996, c 250:

> **Effect of indefeasible title**
> . . .
> **23(2)** An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title. . . .
>
> [emphasis added]

[91] While the differing wording could lead to the argument that Manitoba's indefeasibility clause is somewhat stronger than Alberta's and much stronger than Saskatchewan's, the analysis of the history, academic writings and jurisprudence does not support this interpretation. All Torrens systems have a clause setting out the central principle of indefeasibility of title. Even in the Australasian colonies, only the South Australian statute, *The Real Property Act of 1886*, actually used the word "indefeasibility". In British Columbia, where the Court of Appeal has determined that the principle of indefeasibility provision is only that of a *presumption* of indefeasibility, the wording of its indefeasibility provision mirrors that in Manitoba almost completely.

[92] In my view, the differing language used in the various statutes does not change its effect; rather, it attains the same goal. I would reject Paul's argument that the use of the word "indefeasible" in Manitoba's statute leads to a different interpretation of the underlying principles related to indefeasibility than has been adopted in the other Torrens system jurisdictions. What is important is the purpose of the provision, which is to provide conclusive or indefeasible title to land.

Trusts and Caveats under the *RPA*

[93] The *RPA* contains many references to trusts and equitable interests. The definition of "land" in section 1 includes legal and equitable estates or interests therein. Section 2(8) abolishes the equitable doctrines of "notice" and "constructive notice". If the intended effect of the legislation was to abolish other equitable rights or interests, it would be expected that they would have been referenced as well, with similar strong language.

[94] Many other provisions of the *RPA* address matters that are relevant only if trusts and equitable interests related to land are still available, but they would be unnecessary if those trusts or other equitable interests had been abolished by the enactment of the indefeasibility provisions. For example, section 80(3) clarifies that a person's knowledge of the existence of a trust or interest is not, in itself, to be imputed as fraud or a wrongful act. Section 81(1) directs the district registrar to refrain from and refuse to make any entry in the register containing notice of express, implied or constructive trusts, except those appointed pursuant to a bankruptcy or will, and section 81(3) permits the district registrar to ignore any reference to a trust or trustee and to allow the land to be dealt with as if that reference had not been made, except if a caveat has been filed regarding that interest.

[95] Those provisions, and others, clearly indicate that the legislators expected that trusts of every sort would continue to operate under the general property law, but that no notice need be taken of the trusts when dealing with the land under the register unless a caveat has been filed.

Other Provisions

[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.

[98] While registering a caveat will prevent the registered owner from dealing with the land in priority to the claim of the caveator, filing a caveat is not necessary to enforce a trust. Because a trust claim against a trustee is an *in personam* claim, the beneficiary can still bring a claim against the trustee *in personam* for any remedy that a court, acting *in personam*, can grant. The caveat preserves the land until the *in personam* trust claim can be resolved (or the caveat is discharged), but it is not required in order to preserve the *in personam* trust claim against the trustee.

[99] Finally, regard should be given to section 90, which states:

> **Words of limitation not necessary**
> **90** No words of limitation are necessary in a transfer of land in order to convey all or any title therein; but every transfer, when registered, operates as an absolute transfer of all such right and title as the transferor had therein at the time of its execution, unless a contrary intention is expressed in the transfer or instrument; but nothing in this section precludes a transfer from operating by way of estoppel.

[100] While this section, by the words "absolute transfer of all such right and title as the transferor had therein", may appear to provide an absolute title to the transferee upon registration, in fact, what it addresses is the scope of the title to the land, not the transferee's interest therein, i.e., equitable or legal. To illustrate, title will issue as the entire fee simple unless, for example, mines

and minerals are specifically excluded. See, generally, *Can Superior Oil v Dist Registrar*, [1953] 3 DLR 437 (Man CA), rev'd *District Registrar Land Titles, Portage La Prairie v Canadian Superior Oil of California Ltd and Hiebert*, [1954] SCR 321, which reverses the result but deals with section 90 (then section 88) in the same manner.

(d) Conclusion—Indefeasibility and Resulting Trusts

[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] Thus, where a beneficiary seeks to enforce a resulting trust relating to land *in personam* against the trustee, he or she is asking a court to declare that a trust exists in relation to the land. If a court makes that finding, then the usual remedy is to direct the trustee to transfer title to the land to the beneficiary, although this can generally occur only if the land remains registered in the trustee's name. If the trustee has already transferred the land to a third party, the trustee could no longer be directed to transfer title to the beneficiary, although the beneficiary could still proceed *in personam* against

the trustee. Whether a court would give the beneficiary a monetary remedy would depend on the surrounding circumstances. To prevent this and 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.

[103] The trial judge concluded that a resulting trust can exist in Manitoba despite the certainty of title provisions of the *RPA* (see paras 142-43). In my view, his conclusion is correct and I would dismiss this ground of appeal.

IV. THE SECOND GROUND OF APPEAL: THE PRESUMPTION OF A RESULTING TRUST

(i) The Issue

[104] There are two issues related to the applicability of the presumption of a resulting trust: (a) does it apply to a resulting trust of property registered under the Torrens system, given the decision to the contrary in *Dunnison*; and (b) did the trial judge err in relying on the presumption where there is evidence as to the grantor's intention.

(ii) Standard of Review

[105] These issues both deal with the interpretation and application of the *RPA*, that is, with questions of statutory interpretation. Neither rely on either factual findings or the application of the facts to the law. As such, both raise questions of law and are to be reviewed on the standard of correctness.

(iii) The Trial Judge's Decision

[106] On the first issue, the trial judge stated as follows (at para 144):

> As to the presumption of resulting trust, I am not prepared to find that it does not apply to land in Manitoba. 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. If resulting trusts or other unregistered interests in land (possibly even express trusts) are posing significant problems for stakeholders in Manitoba, perhaps it is time to reform the legislation.

[107] On the second issue, it is clear that the trial judge weighed the evidence related to the claims of resulting trust, but he considered the evidence in the context of the presumption of a resulting trust in coming to his conclusion that Mary had a beneficial interest in the properties by way of a resulting trust. He was of the view that the evidence as a whole "establishes the correctness of the presumption" (at para 96). (See also, for example, paras 80, 95-96, 100-101, 107-8.)

(iv) The Parties' Positions

[108] On appeal, Paul argues that the presumption of a resulting trust only becomes relevant in the absence of evidence as to the grantor's intention. He argues that, given that Mary testified as to her intention in relation to the properties, the trial judge erred in relying on the presumption.

[109] Mary argues that the trial judge found that the evidence established the existence of resulting trusts and he did not rely on the presumption to do so.

(v) Analysis—Presumption of Resulting Trust

(a) The Law Regarding the Presumption of a Resulting Trust

[110] The legal concepts or principles of the presumption of a resulting trust and the presumption of advancement are related to the onus or burden of proof of certain resulting trusts. The leading decision from the Supreme Court of Canada regarding these presumptions is that of *Pecore*. That case dealt with the transfer of property for no value, which Rothstein J referred to as a gratuitous transfer resulting trust (see paras 20, 23-24).

[111] Rothstein J, for a majority of eight judges in *Pecore*, held that the presumption of advancement applies only where the transferee of the property was a minor child of the transferor at the time of the transfer (see para 40). As both Sharon and Paul were adults when the titles were issued, that presumption does not apply in this case.

[112] Rothstein J explained when a resulting trust arises and the presumption of resulting trust as follows (at paras 20, 22-26):

> A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner [authorities omitted]. . . .
>
> In certain circumstances which are discussed below, there will be a presumption of resulting trust. . . . [This is a] rebuttable [presumption] of law [authorities omitted]. . . . A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption. . . .

> For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597, the advantage of maintaining . . . the presumption of a resulting trust is that [it] provide[s] a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.
>
> . . .
>
> The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended. . . .
>
> The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
>
> In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

[113] In addressing the application of the presumption and the standard required to rebut it, Rothstein J stated (at paras 43-44):

> The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumption [authorities omitted]. . . . This is also my view. I see

> no reason to depart from the normal civil standard of proof. The evidence required to rebut [the presumption], therefore, is evidence of the transferor's contrary intention on the balance of probabilities.
>
> 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 in Sopinka et al. in *The Law of Evidence in Canada* [citation omitted], at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

[114] In the later decision of *Nishi v Rascal Trucking Ltd*, 2013 SCC 33, the Supreme Court of Canada upheld the doctrine of purchase money resulting trusts with respect to real estate transactions (see para 4) and applied the legal presumption of a resulting trust in that context (see para 29).

[115] In *Dunnison*, the Saskatchewan Court of Appeal determined that the presumption was contrary to, or incompatible with, sections 90(1), 118, 213(1), 243 and 244 of *The Land Titles Act*, RSS 1978, c L-5 (since repealed) (see paras 91-93).

[116] In my view, however, the Saskatchewan Court of Appeal was relying upon similar "indefeasibility" arguments which had previously led that Court to deny a place for trusts within their Torrens system. As we have seen, the historical backdrop to Torrens legislation, as well as the case law, and academic texts and articles, all indicate that trusts were to operate alongside the indefeasibility provisions of the legislation, but that any trust claims were to operate *in personam* against the trustee (who also happened to be the title holder of the land).

[117] Once it is accepted that resulting trusts can operate alongside the Torrens system, then the mechanism for determining whether a resulting trust has in fact arisen is a question outside the land titles registration system. In asking whether a resulting trust has arisen, the question is: what was the intention of the transferor or donor? The presumption simply helps to answer this question; it does not purport to conclusively decide who is the title holder of the property.

[118] To put it another way, the evidentiary provisions of the legislation discussed by the Saskatchewan Court of Appeal above operate with regard to direct challenges to title or ownership of the land itself, whereas the presumption of resulting trust operates with respect to the trustee in a personal capacity. Seen in this way, it is clear why the presumption can remain. The beneficiary is not directly challenging the certificate of title and title to the land itself; rather, he or she is challenging the person whom he or she asserts is his or her trustee. The result of the challenge may lead a court to require that the trustee transfer the land to the beneficiary, but that is simply a possible remedy that is available if the *in personam* claim is successful.

[119] In conclusion, in my view, the presumption of resulting trust continues to apply in Manitoba in disputes between registered title holders and those claiming a gratuitous transfer resulting trust and, once it is applied, it then falls upon the registered title holder to rebut the presumption. This was the conclusion of the trial judge (see para 144) and, in my view, he was correct in so concluding. Thus, I would dismiss this ground of appeal.

(b) Reliance on the Presumption of Resulting Trust

(i) The Issue

[120] Paul argues that the trial judge erred in his treatment of the presumption of a resulting trust, both in his description and in relying on it to determine Mary's intention, when there was direct evidence from Mary in that regard. His position is that the presumption of resulting trust only becomes relevant in the absence of evidence as to the grantor's intention. In making that argument, he relies upon the following statement of this Court in *Simcoff v Simcoff*, 2009 MBCA 80 (at para 36):

> . . . 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. . . .

(ii) Analysis—Reliance on the Presumption of Resulting Trust

[121] It is clear from *Pecore* that the presumption of resulting trust applies to gratuitous transfer resulting trust claims other than those made to minor children, where the presumption of advancement would apply instead (see paras 27, 40). As is clear from the facts, when the gratuitous transfers were made, the transferees, Sharon and Paul, were both adults; therefore, the presumption of advancement does not apply.

[122] That the presumption of resulting trust applies to all gratuitous transfer resulting trust claims is clear from Rothstein J's following explanation of how the presumption is to be applied (at paras 44, 55):

> . . . 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*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.
>
> Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. . . .

[123] This indicates that the presumption of resulting trust applies to every disputed claim that there was a gratuitous transfer resulting trust. Its application is not dependent on there being no, or insufficient, evidence to support the trust claim. Further, there is no suggestion that the evidence is to be weighed first and apart from the presumption and only if there is an absence of evidence or insufficient evidence regarding the transferor's intention is the presumption to be considered.

[124] While this Court in *Simcoff* stated that "[t]he presumption comes into play only if there is insufficient evidence to rebut it" (at para 36), this statement was followed by a specific reference to para 44 of *Pecore*.

[125] When para 36 of *Simcoff* is read in the context of para 44 of *Pecore*, it is clear that the sense or meaning of the words "comes into play" in *Simcoff* do not mean that the presumption is only to be considered by the judge if there has been a finding of an absence or insufficiency of evidence regarding the grantor's intention. The words "comes into play" mean that, if there is sufficient evidence to determine the grantor's intention, the determination of

that fact will be resolved on the evidence, rather than by reliance on the presumption. If, however, there is an absence or insufficiency of evidence, the presumption may be determinative.

(iii) Conclusion

[126] In my view, the presumption of resulting trust is to be considered and applied as set out in paras 44 and 55 of *Pecore* (which is not inconsistent with para 36 of *Simcoff*). Thus, I would conclude that the trial judge did not err in his treatment of the presumption of resulting trust, and I would dismiss this ground of appeal.

V. THE THIRD GROUND OF APPEAL: ERRORS OF FACT

(i) Standard of Review

[127] Paul has alleged many factual errors on the part of the trial judge. Before looking at them individually, it will be helpful to both set out the applicable standard of review and to explain how it is applied.

[128] There are a number of types of factual error; in this case, Paul alleges errors of fact; errors in the application of the facts to the law; errors related to the inferences drawn from the evidence; and errors in the assessment of credibility. In my view, the applicable standard of review for all of the factual errors in this appeal is that of palpable and overriding error.

[129] The leading decision regarding standards of review is *Housen*. Iacobucci and Major JJ, for the majority, set out the standards as follows:

- for questions of law, the standard is that of correctness—an appellate court is free to replace the opinion of the trial judge with its own (see para 8);

- for questions of fact and findings of fact, the standard is that of palpable and overriding error, which is a deferential standard (see para 10);

- for factual inferences, such as whether goods were defective, the standard is that of palpable and overriding error (see paras 19-21, 25); and

- for questions of mixed fact and law, which involve applying a legal standard to a set of facts (see para 26), the applicable standard is palpable and overriding error, unless there is an extricable error of law, in which event the standard is that of correctness (see paras 29-31, 36).

[130] In *HL v Canada (Attorney General)*, 2005 SCC 25, the Supreme Court of Canada re-visited these standards to provide some further definition to those that apply to the various categories of factual error. Fish J, for the majority, stated (at paras 52-54, 74):

> . . . In the absence of a clear statutory mandate to the contrary, appellate courts do not "rehear" or "retry" cases. They review for error.
>
> The standard of review for error has been variously described. In recent years, the phrase "palpable and overriding error" resonates throughout the cases. Its application to <u>all</u> findings of fact — findings as to "what happened" — has been universally recognized; its applicability has not been made to depend on

> whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence.
>
> . . . Nor, put differently, has the standard been said to vary according to whether our concern is with direct proof of a fact in issue, or indirect proof of facts from which a fact in issue has been inferred.
>
> [Dealing with inferences of fact] I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. . . .

[131] Fish J also reviewed the standard of palpable and overriding error, stating (at para 69):

> . . . [T]here is no meaningful difference between a standard of "clearly wrong" and a standard of "palpable and overriding error". As Iacobucci and Major JJ. noted in *Housen*, at para. 5, the *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337 (emphasis added)). Moreover, no error could lead to a reversal unless it was "overriding" in the sense that it discredits the result.

[132] Finally, a number of Paul's grounds of appeal challenge the trial judge's weighing of the evidence and his credibility findings. Credibility and the weight to be assigned to the evidence were key issues in *FH v McDougall*, 2008 SCC 53, and a significant part of the decision deals with the standard of review related to those issues. Rothstein J, for the Court, stated (at paras 57-58, 70, 72):

. . . Although *R.W.B.* [*R v B (RW)*, 1993 CarswellBC 943 (CA)] was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. (para 29)

As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence that he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

. . . Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

(ii) The Parties' Positions

[133] Paul argues that, while the trial judge made many factual errors, he arrived at one pivotal wrong conclusion which affected his other factual findings and inferences. He asserts that the trial judge erred in finding that the banking records corroborated Mary's testimony that she paid for the original cottage property when, in fact, those records could only support Paul's position that the cottage was paid for from an Autopac settlement that Sharon received around that time.

[134] Some of the other errors that Paul attributes to the trial judge relate to: payment by Sharon and Paul for the Matheson property; Paul's ability to afford to maintain that property and, therefore, their ability to pay for the cottage; and Mary's intentions with respect to the Inkster and cottage properties and whether she intended that they be returned to her.

[135] Paul also argues that contradictions in Mary's evidence, while not ignored, were minimized. Paul takes issue with the trial judge's treatment of evidence from a neighbour and from the lawyer who acted on the purchase of the cottage properties.

[136] Paul also takes issue with the trial judge's findings that Mary did not consider Sharon and Paul to be dependents, given the generous gifts that she made to them that included housing money. He argues that the significance of a finding of dependence is that there is a diminished likelihood of a resulting trust where the alleged beneficiary had demonstrated a financial responsibility to the transferee (relying on *Pecore* at para 41).

[137] Mary argues that Paul made the argument regarding payment for the cottage properties at the trial and it was considered by the trial judge. She states that the trial judge referred to the issues related to Mary's banking records that Paul raised and analysed that evidence, acknowledging its weaknesses. He then looked at other evidence directly related to that purchase and to evidence related to the relationship between Mary, Sharon and Paul over the years. Mary's position is that the trial judge weighed all of the evidence and made a determination regarding payment for the cottage properties. She argues that there was no palpable and overriding error in the trial judge's conclusion that Mary paid for the cottage properties.

[138] As regards Paul's other allegations of factual errors, Mary argues that he has misrepresented or misunderstood the evidence and the trial judge's conclusions. Again, Mary takes the position that there is nothing raised by Paul in his other allegations of factual errors that reaches the level of palpable and overriding error.

(iii) Analysis—Factual Errors

[139] As Paul argues that the trial judge's findings related to the purchase of the cottage properties were pivotal to his other findings, I will address that first.

[140] Earlier in his reasons, the trial judge stated that Mary's evidence was that she paid the entire purchase price for the cottage properties and that Sharon and Paul were to contribute labour to make the residence liveable (see para 27). He also noted that Paul testified that, while he and Sharon consulted Mary regarding the cottage, he and Sharon intended to purchase it with money from a settlement (see para 36). The trial judge then made the following credibility findings (at paras 87, 89):

> Paul's recollection also was affected by the passage of time. However, as to the question of who paid for the Cottage Properties or the carrying costs for any one of the four properties at issue, I find that Paul had little or no knowledge to begin with. It is not a situation of failed memory. By his own admission, at the relevant times, Paul was not aware of, or had not paid attention to, day-to-day finances. Those matters were left to Sharon. Paul did not look at bank records until after the commencement of the divorce proceedings and this action. Some of the positions advanced by Paul at trial were based on assumptions.
>
> On balance, and taking into account the imperfections in the evidence of Mary and Sharon identified in paragraphs 85 and 86 of these reasons, I find the evidence of Mary and Sharon is more reliable, and at times more credible, than the evidence of Paul.

[141] The trial judge had earlier reviewed the details of the evidence regarding payment for the cottage properties and the evidence of the deposits into and withdrawals from the parties' accounts (see trial judge's reasons at paras 26-28, 35). He continued in his analysis by setting out the conflicting positions regarding payment for the first cottage property as follows (at para 91):

> Mary submits her testimony is consistent with the relevant 1994 and 1995 bank records and cheques. Paul disagrees. Referencing the records, he points out that MPI settlement

> proceeds were received into Sharon and his savings account in September 1994 followed by a $20,500 withdrawal on November 4, 1994 — the same day the $20,910 which Mary and Sharon say was transferred from Mary's savings account to pay for the first cottage property. Paul argues the vast majority of the $20,910 (and the same day withdrawal of funds used to close the cottage transaction) came from Sharon and his savings account, not Mary's.

[142] The trial judge then looked at the other evidence in the case as it related to the issue of the payment for this property and came to a conclusion regarding both payment and Mary's claim (at paras 92-96):

> It is true that without more, the various credits and debits in the bank documents could support the positions of both Mary and Paul. However, there is more, especially Paul's lack of knowledge of financial affairs at the relevant time and the fact that Mary paid for the second cottage property. On the evidence before me, I find the banking records corroborate Mary's testimony rather than undermine it.
>
> What about Mr. Botan's testimony (the lawyer) that if, at the relevant time, he knew Mary was paying and to have an interest in the Cottage Properties, his practice would have been to reflect those facts in a document?
>
> I do not doubt the honesty of Mr. Botan's evidence. However, I again must consider it in the context of the evidence as a whole. This includes Sharon's handwritten notes of a discussion with Mr. Botan recording, among other aspects of the cottage transaction, that Mary was paying for the deposit and the cottage. Although not argued by counsel, I considered the possibility that Sharon's note might have been a list of matters to discuss with Mr. Botan rather than a record of what was actually discussed. In other words, it is possible that Mr. Botan did not know that the funds were coming from Mary, and Sharon's recollection of advising him is mistaken. That does not change my finding that the funds came from Mary with the intention that Sharon and Paul would hold a 50 percent interest in trust for her.

> Applying the principles set out in paragraphs 80(d) to (i) of these reasons, I find that a purchase money resulting trust exists in favour of Mary to the extent of 50 percent of the Cottage Properties.
>
> Mary paid for the Cottage Properties though title was placed in the names of Sharon and Paul upon their agreement to perform the physical labour to improve the cottage. In my opinion, Paul's evidence falls short of rebutting the legal presumption that Mary did not intend to gift her share of the Cottage Properties. In fact, the evidence as a whole establishes the correctness of the presumption.

[143] As often happens, there are points of contention regarding the evidence, which is not surprising given that these events took place 25 years ago. Another judge might have come to a different conclusion regarding payment for the first cottage property, but that is not the test to be applied. It is clear that the trial judge was aware of, and understood, the parties' positions regarding payment for the cottage and the problems with the evidence. He considered the direct evidence and also weighed that evidence together with the indirect evidence, including that regarding the relationship between Paul, Sharon and Mary, and concluded that it was Mary who had paid for the first cottage property. In my view, he made no palpable and overriding errors in either his analysis of the evidence or in his findings.

[144] I have read the entire trial transcript and reviewed the other factual errors and erroneous conclusions that Paul alleges were made by the trial judge. I agree with Mary that some are not errors at all. Others relate to factual findings and inferences that were open to the trial judge on the evidence, although other findings and inferences may have been available but were rejected by the trial judge. In my view, none of the allegations raise issues that meet the standard of palpable and overriding error, whether considered separately or together.

(iv) Conclusion

[145] In my view, the trial judge did not make any palpable and overriding errors in his factual findings, in the inferences that he drew, or in his determinations of credibility and reliability. I would, therefore, dismiss this ground of appeal.

VI. THE FOURTH GROUND OF APPEAL: APPLICATION OF *DASHEVSKY*

(i) The Parties' Positions

[146] Mary testified, and the trial judge accepted, that her motivation for not having her name on the titles to the cottage properties and the Rossmore property, and having the Inkster property registered in her name and Sharon's as joint owners, was to protect the properties from claims by her sons, Gordon and Gary (see the trial judge's reasons at paras 23, 29, 46, 60, 90, 98, 104).

[147] Paul does not contest this finding, but he argues that this motivation required a deception on Mary's part to which she attested in the formal documents that were filed in a government office to obtain the titles. The alleged deception is that she represented to the world that she had no interest in three of the properties by removing her name from the titles, but her intention was to retain the right to ownership of the properties, which was not disclosed. He argues that this deception was for an unlawful purpose because it was designed to avoid a potential claim by her sons. He argues that the transactions in this case are analogous to those that were disallowed in *Scheuerman v Scheuerman* (1916), 52 SCR 625; and *Dashevsky*.

[148] Mary argues that those cases have no application to this matter. Her position is that the circumstances that led to the titles in this case constitute, at law, resulting trusts. She states that the common law has long recognised the existence of trusts and that they are not deceptions. Rather, they are valid reflections of equitable principles. She points out that the trial judge found as a fact that the transfers were meant to protect her interests from claims by her sons and she argues that such protection is valid and legal.

(ii) The Trial Judge's Decision

[149] Both parties acknowledged at the appeal hearing that this issue was argued at the trial, but it is not mentioned in the trial judge's reasons. As a result, there is no decision to review and no standard of review to apply. Nonetheless, this ground of appeal can be dealt with based on the trial judge's factual findings.

(iii) Analysis—Application of Dashevsky

[150] In *Scheuerman*, the husband transferred land to his wife to avoid the risk that it would be seized by his judgment creditor. He alleged that there was a parol agreement with his wife that the land would remain in her name until the judgments were satisfied and then be returned to him. The wife sold the land and the husband sued for the sale proceeds, alleging that she held the land and, therefore, the proceeds in trust for him. The Court found that the presumption of advancement applied, such that there was a presumption that he, as the husband, had gifted the land to his wife and, to rebut that presumption, he had to prove that the lands were not gifted to her. To do that, he had to testify to the reason for the transfer, being to prevent the land from being taken to satisfy the judgment against him.

[151] There are five sets of reasons, with four of five justices finding that the husband could not succeed because his claim rested on an unlawful act, being the hiding of his asset from his creditor. This was characterised as follows: his actions were done with the intent to violate the law (see p 627); the transfer to the wife was a transaction for an illegal purpose (see p 629); that to evade satisfaction of the judgment was an illegal transaction to which the husband was a party (see p 632); and that the husband had put the property in his wife's name to defraud his creditors (see p 641).

[152] Brodeur J explained that "[i]n general principle fraud vitiates all contracts. The courts never assist a person who has placed his property in the name of another to defraud his creditors" (at p 641).

[153] The justices found that, as a result of the gratuitous transfer to the wife, she held the land on a resulting trust. Idington J pointed out that, had the transfer been to a stranger, the presumption of advancement would not have applied, the husband would not have been required to disclose the illegal reason for the transfer, and he may have been successful in his claim (see p 630). Thus, the illegal purpose was not the use of the resulting trust, but the underlying reason for the trust, which was found to constitute an illegal or fraudulent purpose.

[154] In the present case, the underlying purpose of the trust was to prevent Gordon and Gary from making claims of entitlement to the land or sale proceeds therefrom. On the evidence in this case, they had no legal or equitable claims to the lands or any proceeds therefrom. Further, while they might have wished to benefit from Mary's estate, there was no evidence to indicate that they had any right to do so. (See *Simcoff* at para 56.) Thus, in

my view, Mary's goal of removing her name from the titles to avoid claims by her sons was not for an illegal or fraudulent purpose.

[155] Given that there was no illegal or fraudulent purpose for the trusts in this case, I am of the view that the facts in this case are, in substance, different from those in *Scheuerman*, with the result that that decision has no application in this case.

[156] *Dashevsky* dealt with the nature of a transaction to transfer ownership of land, which arose in the context of proceedings for the sharing of marital assets following a separation. The husband acquired farm land from his parents in a transaction that was structured so that the transfer could not be characterised by the Minister of National Revenue as a gift to the husband. Some years later, the husband married and then separated. The nature of the original acquisition was important to the determination of whether any part of the value of the land was shareable. If the land was a gift to the husband, the entire value was exempted from being shared. If the husband purchased the land, then the increase in the value from the date of marriage was shareable.

[157] The trial judge found that, "having once characterized this same transaction in a manner beneficial to the parties (and, one might add, to the economic disadvantage of the minister!) it is not now open to the Dashevskys to characterize the transfers as gifts for Marital Property Act purposes" (at para 23).

[158] While neither of the purposes for the land transfer in *Dashevsky* was illegal, the trial judge determined that it was not open to the husband to fundamentally change that characterisation years later, to obtain a different benefit in different circumstances.

[159] In the present case, Mary is not changing the purpose of the transactions by which she registered the current titles. Her goal at the time of the transfers was to protect the land from claims by her sons and that remained her goal. People are entitled to structure their affairs to best suit their purposes, absent reliance on an unlawful or fraudulent purpose. Further, the use of a trust as an ownership structure is not objectionable, provided it is not to further an unlawful or fraudulent purpose. As noted above, I am of the view that Mary's purpose was neither unlawful nor fraudulent.

[160] Thus, I am of the view that neither of these decisions applies in this case and I would dismiss this ground of appeal.

VII. DECISION

[161] For the reasons set out herein, I would dismiss Paul's appeal and confirm the trial judge's decision.

[162] Mary argues for costs above the Tariff if successful, and Paul argues that no costs should be ordered against him if he is unsuccessful. In my view, there is no basis to make either order. As Mary has been successful on this appeal, I would order the usual costs on the appeal to Mary under the Tariff.

Beard JA

I agree: Hamilton JA

I agree: leMaistre JA

APPENDIX

A. Origins & Goals of the Torrens System of Land Titles in the Prairie Provinces

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Louis William Coutlée, *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories* (Toronto: Carswell & Co, 1890)

Victor DiCastri, *Thom's Canadian Torrens System*, 2nd ed (Calgary: Burroughs & Company, 1962)

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Harold Spencer, *Some Principles of the Real Property (Land Titles) Acts of Western Canada* (Toronto: Carswell, 1920)

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014)

Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008)

B. The Interplay Between the Torrens' Indefeasibility Principle and Trusts

Rebecca Ardagh, "The Torrens System and the In Personam Claim" [2011] NZLawStuJl 7

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