ONTARIO

Land Titles Act

R.S.O. 1990,c. L.5, s. 57(8).

NOTICE OF DETERMINATION OF LIABILITY OF THE LAND TITLES ASSURANCE FUND

IN THE MATTER OF the title to land registered in the Land Registry Office for the Land Titles Division of Durham (No. 40) formerly in the name of Syvan Developments Limited, being Part of Lots 2 and 3, Plan H50002, North Side of King Street and Part of Lots 2 and 3, South Side of Bond Street, Plan H50002, City of Oshawa, Regional Municipality of Durham, previously identified by property identifier 16314-0169 (LT), and known municipally as 16-18 King Street West, Oshawa, Ontario (the "Property"), now currently included in property identifier 16314-0650;

AND IN THE MATTER OF an Application made by **SYVAN DEVELOPMENTS LIMITED AND FIRST AMERICAN TITLE INSURANCE COMPANY** (collectively the "Applicants") pursuant to section 57 of the *Land Titles Act* for payment of compensation out of the Land Titles Assurance Fund in respect of the inclusion of the right-of-way described in Instrument No. OS115071 (the "Right-of-Way") in the parcel register for the Property and its subsequent deletion by way of exception.

I HEREBY DETERMINE THAT The Land Titles Assurance Fund is not liable for payment of compensation to the Applicants, **SYVAN DEVELOPMENTS LIMITED AND FIRST AMERICAN TITLE INSURANCE COMPANY.**

Dated at Toronto, Ontario, this 13th day of October, 2005.

Nancy R. Sills
Deputy Director of Titles

TO: Syvan Developments Limited and
First American Title Insurance Company
c/o Borden Ladner Gervais LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Attention: Simon A. Clements

ONTARIO

Land Titles Act

R.S.O. 1990, c. L.5, s. 57

IN THE MATTER OF the title to land registered in the Land Registry Office for the Land Titles Division of Durham (No. 40) formerly in the name of Syvan Developments Limited, being Part of Lots 2 and 3, Plan H50002, North Side of King Street and Part of Lots 2 and 3, South Side of Bond Street, Plan H50002, City of Oshawa, Regional Municipality of Durham, previously identified by property identifier 16314-0169 (LT), and known municipally as 16-18 King Street West, Oshawa, Ontario (the "Property"), now currently included in property identifier 16314-0650;

AND IN THE MATTER OF an Application made by **SYVAN DEVELOPMENTS LIMITED AND FIRST AMERICAN TITLE INSURANCE COMPANY** (collectively the "Applicants") pursuant to section 57 of the *Land Titles Act* for payment of compensation out of the Land Titles Assurance Fund in respect of the inclusion of the right-of-way described in Instrument No. OS115071 (the "Right-of-Way") in the parcel register for the Property and its subsequent deletion by way of exception.

REASONS FOR DECISION

This matter came before me on November 26, 2003 in Toronto, Ontario, at which time there appeared before me:

Simon A. Clements	-	Counsel for the Applicants
Clare Hynes	-	Counsel for First American Title Insurance Company
Edmond Vanhaverbeke	-	President of Syvan Developments Limited

On that date I heard evidence and legal argument. On February 12, 2004 I reconvened to hear additional legal argument from counsel for the Applicants. The matter was then adjourned sine die, pending my consideration and disposition of threshold issues, in particular the issue of whether the title insurer, First American Title Insurance Company, may claim compensation from the Land Titles Assurance Fund in the name of Syvan Developments Limited based on its right of subrogation, with the matter to be brought back on for consideration of quantum, if the Applicants were successful on the threshold issues. By letter dated September 27, 2005, I advised counsel for the Applicants that I was considering the differing provisions between Bill 156 and Bill 66 (which are discussed below) and that, in view of the testimony of Mr. Vanhaverbeke concerning the inspection of the Property, I was considering the applicability of s. 59(1)(c) of the *Land Titles Act*. On September 29, 2005, I forwarded to Applicant's counsel the provisions of the *Real Property Act 1990* received from the Parliamentary Counsel's office of New South Wales. I gave Applicant's counsel the opportunity to make additional submissions on these matters and these were received on October 3, 2005.

THE APPLICATION

Syvan Developments Limited ("Syvan") and First American Title Insurance Company ("First American") have applied for payment of compensation to First American out of the Land Titles

Assurance Fund (the "Fund") in the amount of $129,801.36, the amount of $7,490 paid for an appraisal, plus the legal fees incurred in pursuing this Application. The claim for $129,801.36 is being brought on a subrogated basis, representing the amount paid to settle Syvan's claim under the title insurance policy issued by First American, and the other amounts are being claimed by First American in its own name. This application relates to a right-of-way which Syvan thought it was acquiring when it purchased the Property, but which had been erroneously included in the description in the parcel register for the Property when it had been converted from the Registry system to the Land Titles system. The right-of-way is described in the metes and bounds description of the Property in Instrument No. OS115071 registered on August 8, 1960 (the "Right-of-Way").

THE FACTS

Syvan is a property development company and became the registered owner of the Property on October 27, 2000 for a stated purchase price of $325,000. On or about September 6, 2000, Syvan entered into an Agreement of Purchase and Sale with Venator Group Canada Inc. for the Property (the "Agreement of Purchase and Sale"). The President of Syvan, Edmond Vanhaverbeke, became aware of the Property through the Multiple Listing Service. The MLS listing did not indicate in the legal description or otherwise that the Property benefited from an easement. However, the Agreement of Purchase and Sale described the Property as "having a right of way to Prince St. as per attached Schedule C", Schedule "C" then set out a metes and bounds description of the Property, including the Right-of-Way and Mr. Vanhaverbeke was told that he would be getting a right-of-way. He was also provided with a copy of an existing survey prior to closing, which disclosed the Right-of-Way. The survey provided was a copy of the Plan by F.J. Donevan and Associates, Ontario Land Surveyors, dated the 11th day of November, 1959 and revised January 4, 1960, which is part of Schedule A to Instrument No. OS115072 registered in the Land Registry Office on August 8, 1960 with respect to the Property (the "1960 Survey").

The Property is located on the north side of King Street, between Simcoe Street and Prince Street, in the first block west of the downtown core of the City of Oshawa. In the downtown core land use on King Street, Simcoe Street and Bond Street is primarily commercial in nature. The building, which had at one time been a Woolworth's store, was reasonably priced, because there were no prospective tenants for such a large single use space consisting of approximately 11,868 square feet. Before signing the Agreement of Purchase and Sale, and subsequently after completing the purchase of the Property, Syvan spent considerable time and effort analysing the development potential of the Property and undertook feasibility studies of the development of the Property into three commercial units. The development was premised on being able to provide each unit with front and rear access. Mr. Vanhaverbeke testified that in order to divide the building into separate units, each unit had to have two means of ingress and egress to comply with the Building Code. Without the Right-of-Way, the development potential of the Property was eliminated, as there would be no rear access to the units. Prior to closing, Mr. Vanhaverbeke inspected the Property, which I will deal with below.

The purchase of the Property was completed on October 27, 2000, at which time the Property was subject to the *Land Titles Act*. Accordingly, the *Land Titles Act* applies for the purposes of this application to the Fund. At the time of the purchase, the description in the parcel register for the Property included the Right-of-Way described in Instrument No. OS115071.

At the time of purchase, Syvan and First American entered into a contract of insurance in which First American agreed to insure Syvan against loss or damage, not exceeding the amount of $325,000, for certain matters which included any defect in the title to the Property and the failure of the land to be the same as that delineated on the 1960 Survey (the "Policy"). The legal description of the Property in the Policy does not specifically reference the Right-of-Way, but it does refer to the property identifier for the Property, in which the legal description did include the Right-of-Way. First American is described in the Policy as a California corporation, registered to carry on the business of title insurance in Canada, with its principal office for Canada in Mississauga, Ontario.

Mr. Vanhaverbeke testified that prior to closing he had no actual notice of the expropriation of the Right-of-Way. After completion of the purchase, Syvan requested a surveyor to prepare an up-to-date survey of the Property. Syvan was subsequently informed by the surveyor, upon completion of

his field work and searches, that the Right-of-Way had been extinguished by means of an expropriation plan registered by the City of Oshawa on June 12, 1972, as Plan No. 220. The Right-of-Way described in the Transfer to Syvan and on the parcel register for the Property was Parts 2 and 3 on this plan. Syvan's solicitor spoke with the Land Registrar in late January or early February, 2001, who confirmed that the parcel register was incorrect in showing the Right-of-Way. When the Property had been converted from the Registry system to the Land Titles system effective February 21, 2000, the Right-of-Way had been erroneously included in the description by referring to Instrument No. OS115071 in its entirety.

The Land Registrar cautioned the parcel register on February 6, 2001, sent notice to interested parties and did not receive any objections to rectifying the parcel register. In accordance with the Land Registrar's Order registered as Instrument No. LT1027568 on May 8, 2001, the Land Registrar amended the parcel register to add the words "save and except the easement contained therein" after the reference to Instrument No. OS115071in the property description. For the sake of simplicity, I will refer to this as the deletion of the Right-of-Way.

In order to mitigate its loss, Syvan acquired Part 2 on Plan 40R-20580 from the City of Oshawa, by Transfer registered as Instrument No. DR10524 on July 30, 2001. By acquiring this part from the City of Oshawa and demolishing a part of the building on the Property, Syvan was able to secure appropriate street access to the rear of the Property. It incurred expenses in the amount of $129,801.36 to effect these changes. First American paid Syvan's claim for these expenses under the Policy.

Based on the evidence heard and submitted, I find that an error was made in converting the Property from the Registry system to the Land Titles system by showing the Right-of-Way which had been expropriated and that Syvan was a bona fide purchaser for good value without actual notice of the error.

Having made these threshold findings of fact, I will deal with the applicability of s. 59(1)(c) of the *Land Titles Act* and whether First American has recourse to the Fund in the name of the insured based on its right of subrogation.

DOES CLAUSE 59(1)(c) OF THE *LAND TITLES ACT* APPLY IN THESE CIRCUMSTANCES?

Clause 59(1)(c) of the *Land Titles Act* provides that:

59. (1) No person is entitled to recover out of the Assurance Fund any compensation,

.....

(c) *where the claimant has caused or substantially contributed to the loss by the claimant's act, neglect or default,* and the omission to register a sufficient caution, notice, inhibition or restriction to protect a mortgage by deposit or other equitable interest or any unregistered right, or other equitable interest or any unregistered interest or equity created under section 71 or otherwise shall be deemed neglect with the meaning of this clause. (Emphasis added)

Did Syvan substantially contribute to the loss by Syvan's neglect or default in failing to ascertain the location of the Right-of-Way prior to closing, which would have immediately disclosed a problem?

Location of the Right-of-Way

Prior to closing Mr. Vanhaverbeke had a copy of the 1960 Survey and a copy of the metes and bounds description of the Right-of-Way, which was part of Schedule C to the Agreement of Purchase and Sale for the Property. Prior to closing, he also inspected the Property. Plan 40R-20580, prepared after the purchase of the Property, indicates that there is a bus station and parking garage

nearby and that there is a "concrete ramp access to upper level parking". This concrete ramp blocks the Right-of-Way shown on the 1960 Survey and this was acknowledged by Mr. Vanhaverbeke when he gave oral evidence at the hearing. Mr Vanhaverbeke testified that the side door on the Property facing Prince Street, which he has indicated on Exhibit 24, looked out onto an open area which was a parking lot and he assumed that the Right-of-Way went over this land. He testified that he did not take the survey with him and actually walk the Property prior to closing the transaction.

When Mr. Vanhaverbeke looked out the side door there would have been an open area straight out from this door to Prince Street. The Right-of-Way shown on the 1960 Survey, however, runs parallel along the side of the building where this side door is located a distance of 58 feet ¼ inch to another jog in the building and then perpendicular from the side of the building out 82 feet, 5 1/8 inches to Prince Street. The configuration of the Right-of-Way on the 1960 Survey bears no resemblance to the Right-of-Way assumed by Mr. Vanhaverbeke and this would have been apparent from a cursory examination of the 1960 Survey and the physical landscape.

Importance of the Right-of-Way

The Right-of-Way was critical to the development of the Property. Paragraph 11 of the application to the Fund and paragraph 8 of Mr. Vanhaverbeke's affidavit sworn on April 3, 2002 and filed in support of the application state that:

> "Without the right-of-way, the development potential of the Property was eliminated as there would be no rear access to the units."

In his testimony at the hearing, Mr. Vanhaverbeke stated that he was only concerned about having a walkway for a fire exit for Building Code purposes and that he was not concerned about being able to bring trucks in. This is not consistent with the following statements made in Mr. Vanhaverbeke's affidavit sworn on April 3, 2002 and filed in support of the application:

a) "Syvan purchased the Property in the mistaken belief that a right-of-way ran with the Property, which allowed it adequate road access to the rear of the Property." (Paragraph 3)
b) "The right-of-way, which was shown on the Abstract index, permitted development of the Property as it provided the Property with delivery access and was located in such a manner as to allow the Property to be developed into three commercial units." (Paragraph 5)
c) "As Syvan intended to use the Property for retail outlets and as such required the right-of-way to obtain access to the rear of the building for loading merchandise, the value of the Property was severely compromised by the deletion of the right-of-way." (Paragraph 11)
d) "As an alternative, Syvan purchased adjoining land from the City of Oshawa, which allows access to the side of the building. In order to make this access possible, Syvan was required to demolish and modify part of the existing building to accommodate the newly acquired vehicle access from Bond St." (Paragraph 13)

Furthermore, attached as Exhibit D to this affidavit is a "Narrative Appraisal Report", which includes a report to the Operational Services Committee of the City of Oshawa stating in section 3.0 that:

> "Mr. Vanhaverbeke advises that he has filed a demolition permit application with the City to demolish a portion of the rear of the building in order to provide a 10 foot driveway onto Bond Street West. Acquisition of the subject property would serve to extend this driveway to the rear building and to provide a loading area for deliveries."

The discrepancy is, in my view, important. I find that vehicular access, and not just a walkway, was critical to the development of the Property. It was not a question of having a few feet for a walkway, but a 10 foot driveway, making the failure to ascertain the location of the Right-of-Way even more significant.

Findings and Determination

Counsel for the Applicants submitted that Mr. Vanhaverbeke was not negligent, that he was under no obligation to do anything which he failed to do and that he can only have been negligent if something put him on notice to make an inquiry with the Registry Office specifically about the right-of-way and he failed to do so. While s. 59(1)(c) deems the failure to register a sufficient caution, etc. to be neglect within the meaning of the clause, it does not otherwise define "neglect" and no definition is provided for "default" within the meaning of the clause. In my view there is "neglect or default" when an applicant fails to do something that a reasonable applicant, in this case a purchaser, would have done in those circumstances.

The particular facts in this case do lead me to the conclusion that there was "neglect or default" on the part of Syvan as contemplated by s. 59(1)(c) of the *Land Titles Act*. In view of

a) the information available to Mr. Vanhaverbeke prior to closing, being the 1960 Survey and the metes and bounds description of the Property,
b) what he saw when he inspected the Property,
c) the significant difference between the configuration of right-of-way assumed by Mr. Vanhaverbeke and the Right-of-Way shown on the 1960 Survey, which would have been apparent from a cursory examination of the 1960 Survey,
d) the fact that Syvan was a company in the business of property development and had particular expertise in these matters, and
e) the fact that the Right-of-Way, in particular vehicular access, was so critical to the development of the Property,

I find that Syvan should have ascertained the location of the Right-of-Way prior to closing, which would have immediately disclosed a problem, as the Right-of-Way was physically blocked by the concrete ramp, and forced Syvan to make further enquiries. I find that Syvan's neglect or default to ascertain the location of the Right-of-Way substantially contributed to the loss, such that, as stipulated in s. 59(1)(c) of the *Land Titles Act*, Syvan is not entitled to recover any compensation out of the Fund. Since the right of First American, if any, to recover compensation out of the Fund for the sum of $129,801.36, is dependent upon Syvan's right to do so, First American is likewise not entitled to recover compensation out of the Fund for this amount.

Given these findings, I do not need to consider the issue of whether, by obtaining title insurance, both applicants assumed the risk of not obtaining an up-to-date survey and on that basis substantially contributed to the loss and should be denied compensation. I note that Schedule A of the Policy of Title Insurance dated October 27, 2000 issued by First American to Syvan in respect of the Property specifically provided that:

> "The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to be the same as that delineated on the plan of survey made by F.J. Donevan and Associates, Ontario Land Surveyor and dated the 11th day of November, 1959 and revised January 4, 1960."

Although my determination that s. 59(1)(c) of the *Land Titles Act* is applicable disposes of this application in respect of the amount of $129,801.36 paid by First American to Syvan under the Policy, there was extensive legal argument and submissions on whether First American would have recourse to the Fund in the name of the insured based on its right of subrogation and I will therefore address this issue as well. The issue of whether First American is entitled to compensation out of the Fund in its own name for the appraisal fee and the legal fees incurred in pursuing this application is dependent on whether First American may come to the Fund directly under s. 57(5) of the *Land Titles Act*, and this argument is also dealt with below.

DOES FIRST AMERICAN HAVE RECOURSE TO THE FUND IN THE NAME OF THE INSURED BASED ON ITS RIGHT OF SUBROGATION OR IN ITS OWN NAME?

Entitlement to compensation from the Fund based on a right of subrogation is a novel issue, that is without precedent in Ontario or in Canada. To the best of my recollection, no Director of Titles or Deputy Director of Titles in Ontario has ever had to consider this issue, as there has never been an

application made to the Land Titles Assurance Fund by a title insurer on a subrogated basis.

The following are the provisions of the *Land Titles Act* at issue:

Remedy of person wrongfully deprived of land

57 (1) A person wrongfully deprived of land or of some estate or interest therein, by reason of the land being brought under this Act or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.

Where no compensation

(2) A person is not entitled to compensation from The Land Titles Assurance Fund in respect of an interest in land existing at the time the land is brought under this Act unless that interest is registered against the title to the land under the *Registry Act* or notice of it is given to the land registrar before the first registration under this Act of a person as owner of the land.

Purchaser or mortgagee in good faith for value not liable

(3) Subsection (1) does not render liable any purchaser or mortgagee in good faith for valuable consideration by reason of the vendor or mortgagor having been registered as owner through fraud or error or having derived title from or through a person registered as owner through fraud or error, whether the fraud or error consists in a wrong description of the property or otherwise.

Liability of Fund to compensate person wrongfully deprived

(4) If the person so wrongfully deprived is unable by such means or otherwise to recover just compensation for the person's loss, the person is entitled to have the compensation paid out of the Assurance Fund, so far as it is sufficient for that purpose having reference to other charges thereon, if the application is made within six years from the time of having been so deprived or, in the case of a person under the disability of minority, mental incompetency or unsoundness of mind, within six years from the date at which the disability ceased.

Reliance on automated index

(5) A person who suffers damage because of an error in recording an instrument affecting land designated under Part II of the *Land Registration Reform Act* in the parcel register is entitled to compensation from The Land Titles Assurance Fund.

Under section 1 of Ontario Regulation 16/99 made under the *Land Registration Reform Act*, all of Ontario is designated for the purpose of Part II of that Act. The parcel register for the Property was automated under the *Land Titles Act* at the time of the purchase by Syvan.

The Applicants' Arguments

In written and oral argument, the Applicants' counsel has advanced three arguments concerning the interpretation of ss. 57(1) to (5) of the *Land Titles Act* in favour of First American's ability to recover from the Fund:

(a) Under s. 57(5) of the *Land Titles Act* the Applicants are entitled to come directly to the

Fund for compensation, and the provisions of ss. 57(1) to (4) do not apply to qualify their entitlement to compensation. In particular, the "fund of last resort regime" in s. 57(4) requiring that the person wrongfully deprived must be "unable by such means or otherwise to recover just compensation for the person's loss" is not applicable. The Applicants submit that Syvan has a claim because of an error in the register, as Instrument No. OS115071 was not accurately recorded in the description, the loss was paid by First American, and First American is now subrogated to the rights of Syvan and entitled to compensation under s. 57(5). First American is also entitled to compensation in its own name under s. 57(5) for the appraisal fee and the legal fees incurred in pursuing this application.

(b) The provisions of s. 57(1) of the *Land Titles Act* do not apply in these circumstances, and therefore the "fund of last resort regime" in s. 57(4) of the *Land Titles Act* requiring that the person wrongfully deprived must be "unable by such means or otherwise to recover just compensation for the person's loss" is not applicable. The Applicants submit that s. 57(1) applies where the person has been deprived of an interest in land by reason of fraud or error made by a third party. They further submit that s. 57(1) is not applicable because Syvan was not wrongfully deprived of an interest in land, as it never had the Right-of-Way.

(c) If s. 57(4) of the *Land Titles Act* does apply, this provision should not be interpreted to exclude a claim based on a right of subrogation.

In interpreting these provisions, I am guided by Driedger's "modern principle" of statutory interpretation referred to in *Youssef* v. *Ontario (Ministry of Consumer and Commercial Relations)* [2003} O.J. No. 622 (unreported) at para. 12:

> In interpreting the provisions of the Act which are in issue on these appeals, I have followed the approach proposed by Elmer Driedger at page 87 of his text, *Construction of Statutes*, (2nd edition, 1983) approved by the Supreme Court of Canada in *Bell Express Vu Limited Partnership* v. *Rex*, [2002] S.C.J. No. 43, where it is set out as follows:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(A) Does s. 57(5) of the *Land Titles Act* apply in these circumstances, to the exclusion of s. 57(1) to (4) of the *Land Titles Act*?

In order to determine the correct interpretation of these provisions, I considered the history of the *Land Titles Act*. The current subsection 57(5) was added to the Act by subsection 19(4) of the *Land Registration Reform Act, 1984*, S.O. 1984, c. 32. The wording of this subsection has not changed since that time, except for a change with the revision of the statutes in 1990, to remove the year in the title of the *Land Registration Reform Act*. Initially a proposed Land Registration Reform Act was introduced as Bill 156 on December 14, 1983, and subsequently died on the Order Paper. It was reintroduced as Bill 66 on May 14, 1984, was passed by the Legislature and received Royal Assent on June 27, 1984. Bill 66 was essentially the same as Bill 156, with some important differences which are discussed in detail below.

Bill 66 contained at that time, in my view, the most sweeping land registration reforms in Ontario since the *Land Titles Act* was passed in 1885. It authorized the computerization of record keeping and property mapping and introduced the use of shorter standardized documents for land transactions.

The Ontario Law Reform Commission (the "OLRC"), created pursuant to *The Ontario Law Reform Commission Act, 1964*, S. O. 1964, c. 78, initiated a research project concerning the Law of Property

and delivered its Report on Land Registration to the Attorney General in 1971 (the "OLRC Report"). According to the *Official Report of Debates (Hansard)* , 4th Sess., 32nd Parl. (14 May 1984), the Minister at that time, the Honourable Mr. Elgie, indicated that Bill 66 "will authorize many of the proposals contained in the Ontario Law Reform Commission Report which called for automation of the land registration system." (at p. 1491)

Applicants' counsel has referred me to p. 27 of the OLRC Report, which states that:

> "…. The owner of an extinguished interest who is entitled to compensation should be able to make an immediate claim, and should not be required to pursue any remedies against wrongdoers. "

As a result, he argues that s. 57(5) should stand on its own and that the requirements in s. 57(4) requiring other remedies to be pursued should not apply. Regardless of what the OLRC recommendations were, they are no substitute for consideration of the statutory amendments which were actually passed by the Legislature in 1984.

The *Land Registration Reform Act, 1984*, was a comprehensive package of reforms which included consequential amendments to both the *Land Titles Act* and the *Registry Act*. It is only appropriate to look at the amendments to both statutes in trying to determine the intention of the Legislature. A comparison of the consequential amendments relating to the compensation provisions under both Acts, as well as a comparison of the changes to these amendments between Bill 156 and Bill 66, lead me to the clear conclusion that the Legislature did not intend that s. 57(5) under the *Land Titles Act* would stand on its own as a separate basis for compensation from the Fund. The intention of the Legislature may have been to implement the recommendation of the OLRC with respect to compensation under the *Registry Act*, but this cannot be said of the amendment under the *Land Titles Act*.

Subsection 22(36) of the *Land Registration Reform Act, 1984*, added subsection (3a) to section 108 of the *Registry Act*, which provided that:

> (3a) A person who suffers damage because of an error in recording an instrument affecting land designated under Part II of the *Land Registration Reform Act, 1984* in the abstract index is entitled to compensation from The Land Titles Assurance Fund, and clauses (2) (a) and (b) do not apply to the person's right to compensation.

As with the *Land Titles Act* amendment, the current wording of this subsection, which is now s. 116(4) of the *Registry Act*, has not changed since that time, except for a change with the revision of the statutes in 1990, to remove the year in the title of the *Land Registration Reform Act*.

Subsection 108(3a) specifically excludes the requirements under s. 108(2)(a) and (b) of the *Registry Act*. Section 108(2) is now s. 116(2) of the *Registry Act* and provides as follows:

> (2) A person is not entitled to any compensation out of The Land Titles Assurance Fund in respect of land registered under this Act unless,
>
> (a) the person has been wrongfully deprived of land for a reason set out in subsection (1);
>
> (b) the person is unable to recover what is just by way of compensation or damages from any person whose act caused the loss or who was privy to any such act; and
>
> (c) the claim for compensation is made within six years from the time the person discovered or ought reasonably to have discovered the deletion, error or omission. R.S.O. 1990, c. R.20, s. 116 (2).

The *Registry Act* amendment specifically excluded the requirements that a person must be wrongfully deprived of land and be otherwise unable to recover compensation or damages. It did maintain the requirement of a limitation period of six years. The *Land Titles Act* amendment, now s.

57(5), did not exclude the other requirements under s. 57.

Furthermore, I note that with respect to the *Registry Act* amendment to add subsection 108(3a), a change was made in the wording of this provision between Bill 156 and Bill 66. It initially provided that all of subsection (2) did not apply, but in Bill 66 it was changed to specifically exclude only clauses (2)(a) and (b), but not (c) relating to the limitation period. A correction was also made to the corresponding Land Titles amendment in s. 19(4) of the two Bills adding what is now s. 57(5) to change the term "abstract index" (a Registry system reference) to "parcel register" (the correct reference in the Land Titles system). The changes in the statutory provisions between the two bills are evidence that there was clear consideration of these requirements and that the difference between the drafting of the Registry and Land Titles provisions was not accidental. I infer that there was an intent to not abrogate the other requirements under s. 57 of the *Land Titles Act* and that it does not constitute a right of recovery from the Fund independent of ss. 57(1) to (4). Given that the reforms at that time were so significant, I think the addition of s. 57(5) to the *Land Titles Act* was to clarify that those who relied on the automated system would have recourse to the Fund, but that they must otherwise comply with the requirements for payment of compensation.

Finding and Determination

First American submitted that it was also entitled to compensation in its own name under s. 57(5) of the *Land Titles Act* for the appraisal fee of $7,490 and the legal fees incurred in pursuing this application. Since s. 57(5) does not constitute a right of recovery from the Fund independent of the other provisions, an applicant would, among other conditions, have to be wrongfully deprived of an interest in land as stipulated in s. 57(4) in order to be entitled to compensation from the Fund. Based on the evidence before me, I find that First American never had an interest in the Property of which it was wrongfully deprived, and therefore determine that the Land Titles Assurance Fund is not liable for payment of compensation to First American in respect of these amounts.

(B) The provisions of s. 57(1) of the *Land Titles Act* do not apply in these circumstances, and therefore s. 57(4) of the *Land Titles Act* does not apply.

The Applicants submit that the provisions of s. 57(1) of the *Land Titles Act* do not apply in these circumstances, and therefore the "fund of last resort regime" in s. 57(4) of the *Land Titles Act* requiring that the person wrongfully deprived must be "unable by such means or otherwise to recover just compensation for the person's loss" is not applicable.

For ease of reference, I am reproducing these provisions in full again:

> 57 (1) A person wrongfully deprived of land or of some estate or interest therein, by reason of the land being brought under this Act or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.
>
> .....
>
> (4) If the person so wrongfully deprived is unable by such means or otherwise to recover just compensation for the person's loss, the person is entitled to have the compensation paid out of the Assurance Fund, so far as it is sufficient for that purpose having reference to other charges thereon, if the application is made within six years from the time of having been so deprived or, in the case of a person under the disability of minority, mental incompetency or unsoundness of mind, within six years from the date at which the disability ceased.

The Applicants submit that s. 57(1) only applies where the person has been deprived of an interest in land by reason of fraud or error made by a third party. This is too restrictive an interpretation which does not accord with the grammatical and ordinary sense of the words. It can certainly apply in

circumstances, such as these, where a third party has benefited from an error. To illustrate this, I have excerpted the relevant portions of subsection 57(1) and in parentheses indicated how they apply:

> A person wrongfully deprived of land or of some estate or interest therein (i.e. deletion of the Right-of-Way) .... by reason of any misdescription, omission or other error ..... in an entry on the register (i.e. the incorrect inclusion of the Right-of-Way in the description of the Property), is entitled to recover what is just, by way of compensation or damages, from the person ..... who acquired the title through the ..... error (i.e. Woolworth Realty Limited, the predecessor corporation to Venator Group Canada Inc., the Vendor, was erroneously shown as owning the Right-of-Way on the parcel register for the Property).

Woolworth Realty Limited acquired title to the Property, including the Right-of-Way, by a Deed registered as Instrument No. OS115071 registered on August 8, 1960. The Right-of-Way was extinguished during its period of ownership by means of an expropriation plan registered by the City of Oshawa on June 12, 1972, as Plan No. 220. According to the recitals contained in the Transfer to Syvan, Venator Group Canada Inc., who transferred the Property to Syvan, is the successor corporation to Woolworth Realty Limited.

The Applicants submitted that Syvan was not wrongfully deprived of the Right-of-Way, because it did not own it. This does not take into account the effect of other provisions of the *Land Titles Act*. Subsection 57(1) must be read, to borrow from Driedger, in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act. Under section 88 of the *Land Titles Act*, a transfer for valuable consideration of the Property, when registered, confers on the transferee an estate in fee simple in the Property, together with all rights, privileges and appurtenances, subject to certain exceptions. Based on the evidence before me, Syvan was a bona fide purchaser for good value without actual notice that the Right-of-Way had been expropriated. As a result, under the *Land Titles Act* Syvan was, for a period of time, shown as the owner of the Right-of-Way and by reason of its subsequent deletion, was wrongfully deprived of an interest in land.

I find that s. 57(1) of the *Land Titles Act* would apply in these circumstances, with the result that being a person "so wrongfully deprived", Syvan's entitlement to have compensation paid out of the Fund would be qualified by s. 57(4) of the Act. In particular, the "fund of last resort regime" in s. 57(4) requiring that the person must be "unable by such means or otherwise to recover just compensation for the person's loss" would be applicable.

(C) If s. 57(4) of the *Land Titles Act* does apply, this provision should not be interpreted to exclude a claim to the Fund based on a right of subrogation.

Does the wording of s. 57(4) of the *Land Titles Act* exclude recovery of compensation from the Fund based on a right of subrogation, whether First American has a right of subrogation by virtue of its Policy, the Release and Acknowledgement it obtained from Syvan or at equity?

The Ontario *Land Titles Act* was first enacted in 1885 and was based on the English *Land Transfer Act, 1875*, 38 & 39 Vict. c. 87. Applicants' counsel has indicated that there was no title insurance in England or Ontario at that time. It was therefore not within the contemplation of the Legislature when the statute was enacted. Subsections 106(1) and (3) of the *Land Titles Act, 1885*, and subsections 57(1) and (4) of the *Land Titles Act*, R.S.O. 1990, c. L.5 are in essence the same provisions with the only significant difference being the addition of the words "through fraud" in subsection (1). The liability of the Fund to compensate a person wrongfully deprived was and is to this day dependent on the person being "unable by such means or otherwise to recover just compensation for the person's loss". The Fund is typically described as a fund of last resort.

Title insurance is a relatively recent development in Ontario. Applicants' counsel advised me that First American became licensed to provide title insurance here in 1991. The OLRC Report issued in 1971 had a brief discussion of title insurance. At p. 78 of the Report, the OLRC describes title insurance as " a major element in the conveyancing process in the United States, but not in other

jurisdictions" and concludes by recommending that:

> "The use of title insurance should not be encouraged and should not be an element of improvements made in land registration." (at p. 79)

Counsel submits that even if title insurance was not available in Ontario in 1984, as the legislators were aware of the OLRC Report, those responsible for drafting the *Land Registration Reform Act* must have been aware of title insurance. He further submits that the absence of a statutory provision explicitly excluding a subrogated claim must therefore be held to have been a matter of legislative choice and that this supports First American's subrogated claim from the Fund. As an example of a statutory provision excluding a subrogated claim, counsel has cited s. 22(1) of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M. 41. The lack of such an explicit exclusionary provision in the *Land Titles Act*, similar to that in the *Motor Vehicle Accident Claims Act*, does not lead me to the conclusion that subrogated claims to the Fund are permitted under the *Land Titles Act*. Given that this provision was drafted in 1885, I find that the wording of s. 57(4) requiring that the person be "unable by such means or otherwise to recover just compensation for the person's loss" is sufficiently explicit to show an intention that this be a fund of last resort, excluding the right of recovery based on subrogation. In my view this is the grammatical and ordinary sense of these words.

The failure of the Legislature to subsequently enact more explicit provisions is not significant. Title insurance is a relatively recent development. At the time that the 1984 amendments and subsequent amendments were being drafted, there had to my knowledge never been an application to the Fund by a title insurer. It was not perceived to be an issue. It could equally be argued that the Legislature felt that no action was necessary as the statutory wording was sufficient to exclude such claims.

Interpreting the statute to exclude recovery of compensation from the Fund based on a right of subrogation does not derogate from the essential purpose of land titles legislation and the insurance principle as described in *Durrani et al.* v. *Augier et al.* (2000), 50 O.R. (3d) 353 at paras. 41 and 42, by Epstein J.:

> The essential purpose of land titles legislation is to provide the public with security of title and facility of transfer: Di Castri, *Registration of Title to Land*, vol. 2 looseleaf (Toronto: Carwsell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> The philosophy of a land titles system embodies three principles, namely the mirror principle ..... ; the curtain principle .....; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 *U.T.L.J.* 173 at p. 174.

Counsel submits that protecting reasonable expectations should be included in any reconstruction of legislative intent and that compensation for errors in the automated parcel index goes to the heart of protecting reasonable expectations and allowing users of the automated index to rely on it. These are protected, but with certain preconditions, such as the individual must otherwise be unable to recover just compensation for the loss, which precondition has existed since 1885, and the individual must not substantially contribute to the loss by his or her neglect or default. The essential purpose of land titles legislation to provide the public with security of title and the insurance principle central to the philosophy of the land titles system are also unaffected. The effect of this interpretation is that if an individual has chosen to obtain title insurance, he or she must resort to this first before coming to the Fund.

Although there is no case law in Canada dealing with the right of subrogation against a Land Titles Assurance Fund, counsel has referred me to a Court of Appeal case from New South Wales, Australia, *Registrar General* v. *Gill and Anor*, unreported, C.A. 40059/92 (N.S.W.C.A.). Counsel urges me to apply the *Gill* case if s. 57(4) is applicable and find that the right of subrogation is not

excluded.

In this case, Mrs. Gill's solicitor forged a mortgage, which was registered against her property. Under the *Real Property Act 1900*, upon registration of the mortgage, there was immediate indefeasibility of the title of the mortgagee. The Law Society of New South Wales paid the debt to discharge the mortgage and then brought an action against the Registrar General for recovery of damages under s. 127 of that Act. The Law Society brought the action in its own name and in the name of Mrs. Gill relying upon its statutory right of subrogation under the *Legal Practitioners Act 1898*. The Law Society was successful both in the court of first instance and on appeal.

In order to assess the relevance of this case to the matter before me, I asked Applicants' counsel to provide me with a copy of the *Real Property Act 1900* from New South Wales, as it existed when the *Gill* case was being considered. Applicants' counsel was not able to locate this, so with his agreement I wrote directly to the Parliamentary Counsel of New South Wales. Ultimately his office was able to provide historical versions of the provisions of this Act relating to compensation. I was intent on obtaining this material, because the Ontario *Land Titles Act* was based on the *English Land Transfer Act, 1875*, while the Australian statutes were based on the Torrens system, which can differ significantly from our land titles system.

Applicants' counsel submits that the purpose and intent of sections 126 and 127 of the *Real Property Act 1900* is the same as section 57 of the Ontario *Land Titles Act* and that there is the same indefeasibility of title principle as exists in Ontario. He also submits that the New South Wales fund and access to it is similar to the Ontario fund.

While there is some similarity in wording, the statutory provisions and the scheme are different than in Ontario. Their scheme provides for court proceedings to recover damages and the ability to name the Registrar-General as nominal defendant in certain circumstances in order to recover damages out of their fund. In Ontario the *Gill* case would never have arisen, as the indefeasibility principle in the two jurisdictions differ. In Ontario the principle of deferred, as opposed to immediate, indefeasibility applies. The forged mortgage would not have been a valid mortgage and would have been removed from title, as the mortgagee did not deal with the registered owner of the property. Most importantly, however, these provisions of the *Real Property Act 1900* do not use the particular wording of s. 57(4) of the *Land Titles Act*, which specifies that the person must be "unable by such means or otherwise to recover just compensation for the person's loss". Given the Ontario *Land Titles Act* provisions, this case is not persuasive and is not applicable.

Counsel submits that protecting reasonable expectations should be included in any reconstruction of legislative intent and I dealt with that general argument above. He did not specifically argue that the principle of reasonable expectations as it relates to Canadian insurance law should apply, but this has been argued before me in the past (*viz* Reasons for decision dated February 1, 1998 in respect of the Application to the Land Titles Assurance Fund by Lorrie Risman) and it is appropriate, given that one of the Applicants is a title insurer, to address this once again.

The Land Titles Assurance Fund is a statutory scheme for compensation in limited circumstances. It is not "insurance" which is purchased or funded directly by the applicants to the Fund. A portion of the registration fees does not go into the Fund. When necessary, the Lieutenant Governor in Council increases the Fund by a payment from the government's general revenues, the Consolidated Revenue Fund. Subsection 55(2) of the *Land Titles Act* provides that:

> "Where the amount standing to the credit of the Assurance Fund is less than $1,000,000, the Assurance Fund shall be increased by payment into it from the Consolidated Revenue Fund of an amount fixed by the Lieutenant Governor in Council."

Since the Fund is not funded directly by registration fees, it cannot be characterized as an insurance policy and the principle of reasonable expectations as it relates to Canadian insurance law is not applicable.

To summarize, in applying Driedger's modern principle of statutory interpretation, I find that s. 57(4)

of the *Land Titles Act* would not permit recovery of compensation from the Fund based on a right of subrogation for the following reasons:

(a) When the Act was drafted in 1885, this was not within the contemplation of the Legislature;
(b) Given that this provision was drafted in 1885, I find that the wording of s. 57(4) requiring that the person be "unable by such means or otherwise to recover just compensation for the person's loss" is sufficiently explicit to show an intention that this be a fund of last resort, excluding the right of subrogation. In my view this is the grammatical and ordinary sense of these words.
(c) The failure of the Legislature to subsequently enact more explicit provisions is not significant. Title insurance is a relatively recent development. At the time that the 1984 amendments and subsequent amendments were being drafted, there had to my knowledge never been an application to the Fund by a title insurer. It was not perceived to be an issue. It could equally be argued that the Legislature felt that no action was necessary as the statutory wording was sufficient to exclude such claims.
(d) This interpretation of the statute does not derogate from the essential purpose of land titles legislation, the insurance principle central to a land titles system and the reasonable expectations of the users. These are protected, but with certain preconditions, such as the individual must otherwise be unable to recover just compensation for the loss, which precondition has existed since 1885, and the individual must not substantially contribute to the loss by his or her neglect or default. The effect of this interpretation is that if an individual has chosen to obtain title insurance, he or she must resort to this first before coming to the Fund.

Syvan has been able to recover its loss, as it has been indemnified by its title insurer, and the insurer would be precluded from recovering compensation from the Fund for the amount paid out under the Policy because s. 57(4) of the *Land Titles Act* excludes recovery from the Fund based on a right of subrogation.

If I had found that s. 59(1)(c) of the *Land Titles Act* was not applicable, for the reasons set out above the Applicants' arguments for recovery based on the right of subrogation would not have succeeded and compensation would have, in any event, been denied.

Dated at Toronto, Ontario, this 13th day of October, 2005.

Nancy R. Sills

Nancy R. Sills
Deputy Director of Titles

TO: Syvan Developments Limited and
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