

# Court of King's Bench of Alberta

Citation: ATB Financial v Kilpatrick, 2023 ABKB 657

Date: 20231121  
Docket: 2203 03876  
Registry: Edmonton

2023 ABKB 657 (CanLII)

Between:

**ATB Financial**

Plaintiff

- and -

**James Kilpatrick and Mandy Kilpatrick**

Defendants

**Corrected judgment:** A corrigendum was issued on November 23, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

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## Memorandum of Decision of the Honourable Applications Judge Brian W. Summers

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### Introduction

[1] This Memorandum of Decision deals with an issue of priority under the *Land Titles Act*, RSA 2000, c L-4 (“*LTA*”). More specifically, where the Registrar of Land Titles (“Registrar”) mistakenly discharges an instrument and later reregisters that instrument, do instruments duly registered in the interim period enjoy priority over that mistakenly discharged instrument?

### Facts

[2] The relevant facts in this case are not in dispute. They are as follows:

- (a) The Plaintiff ATB Financial (“ATB”) registered a first mortgage (“ATB Mortgage”) granted by the Defendants with respect to an 80 acre parcel (“Original Parcel”);
- (b) The Original Parcel was subdivided into two lots: Lots 1 and 2;
- (c) ATB submitted to Land Titles Office a partial discharge (“ATB Discharge”) of the ATB Mortgage, as against Lot 2 only;
- (d) The Registrar mistakenly registered the ATB Discharge, as against both Lots 1 and 2;
- (e) Approximately five years later a mortgage in favour of Olympia Trust Company and Kim Piccolo (collectively “Piccolo”) was registered as a first mortgage, as against Lot 1 (“Piccolo Mortgage”);
- (f) Approximately one year later the Registrar reregistered the ATB Mortgage, as against Lot 1, under Instrument number 202221726. The registration stated: “DISCHARGED BY 142089190 AND REINSTATED BY 202221726 OCT 13, 2020”; and
- (g) Foreclosure Actions were commenced under each mortgage. Lot 1 was sold in the ATB Mortgage foreclosure action and there are not enough proceeds (“Proceeds”) to pay both mortgages. The Order confirming Sale and Vesting Title directed that the Proceeds be held pending the determination of priority.

**Issue**

[3] The question for the Court on this application is simply: Which mortgage has priority?

**Discussion**

[4] Counsel for ATB relies upon the following provisions of the *LTA* to claim priority:

Correction of instrument

**187(1)** If it appears to the satisfaction of the Registrar

...

that any entry, memorandum or endorsement has been made in error on or omitted from any instrument,

...

**(4)** In the case of any instrument that comes within the provisions of subsection (1), the Registrar, whether or not the instrument is in the Registrar’s custody or has been produced to the Registrar in answer to the Registrar’s written demand, so far as practicable without prejudicing rights conferred for value, may do one or more of the following:

(a) cancel, correct or complete the register;

...

(c) correct any error or make any entry or addition in the instrument or in any entry, memorandum or other endorsement on it or in any memorial, exemplification or copy of any instrument;

...

### Entry of correction

188(1) ...

(2) Every cancellation, correction or completion in the register and every instrument or entry cancelled, corrected, completed or added to has the like validity and effect as if the error had not been made or as if the entry or addition had not been omitted (emphasis added).

[5] ATB Financial asserts that the underlined words grant the ATB Mortgage priority over the Piccolo Mortgage.

[6] Conversely, counsel for Piccolo notes that sub s 187(4) of the *LTA* only allows the Registrar to correct errors “...so far as practicable without prejudicing rights conferred for value.”

[7] There is no dispute that value was provided for the Piccolo Mortgage.

[8] In the case of *Manor Investments v Ross*, 2000 ABQB 317 (“*Manor*”) Justice Sullivan was faced with a virtually identical situation and stated (referring to the predecessor to sub s 187(4) of the *LTA*):

8. The Registrar has the authority to correct the register under s. 177 (4) of the *Land Titles Act, supra*. This section allows the Registrar to correct errors “so far as practicable without prejudicing rights conferred for value.” Practically speaking, this power to correct errors cannot be exercised to defeat a right which has been made indefeasible under other sections of the *Act*, as an unqualified power to cancel or correct the Register could strike at the very roots of indefeasibility of title: see *Re Land Titles Act, Ferguson v. Registrar of Land Titles*, 1952 CanLII 155 (SK CA), [1953] 1 D.L.R. 36 (Sask. C.A.).

9. Unlike land registry systems that exist in some other jurisdictions, the Torrens system provides a state guarantee of registered interests and an assurance fund to compensate owners whose interests are (for example) defeated due to an error made at the Land Titles Office. The operation of the system has been described thus:

... 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 authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest [...] [Emphasis added (by Sullivan, J.)]

*Fels v. Knowles (1907)*, 26 N.Z.L.R. 604 at 620 (C.A.), cited approvingly in *Boulter-Waugh & Co. Ltd. v. Union Bank of Canada*, 1919 CanLII 544 (SCC) [1919] 58 S.C.R. 385.

...

12. For the purposes of determining Manor's place in the hierarchy of interests, it is the latter number, 991 303 041, that is operative in the circumstances. Although section 178(2) of the *Act* provides that a correction has the like validity and effect as if the error had not been made, this is (sic) section does not permit the correction to defeat a properly registered interest that arose in the interim. To hold otherwise would be contrary to the purpose of the Torrens system and contrary to the principle approved by the Supreme Court of Canada in *Boulter-Waugh & Co. Ltd., supra*, that in the absence of fraud, registration gives an indefeasible title to the interest.

[9] *Manor* was specifically quoted with approval by Justice Belzil in *Royal Bank of Canada v 907593 Alberta Ltd*, 2011 ABQB 767 although the facts were slightly different.

[10] Following these authorities, I conclude that the Registrar's correction did not have the effect of granting priority to the ATB Mortgage. The operative serial number with respect to the ATB Mortgage is 202221726. Consequently, the Piccolo Mortgage having an earlier serial number, has priority to the ATB Mortgage, pursuant to sub s 14(3) of the *LTA*.

Heard on the 5<sup>th</sup> day of October, 2023.

**Dated** at the City of Edmonton, Alberta this 21<sup>st</sup> day of November, 2023.

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**Brian W. Summers**  
**A.J.C.K.B.A.**

**Appearances:**

Wesley M. Pedruski, KC  
Reynolds Mirth Richards and Farmer LLP  
for the Plaintiff

Douglas Bodner  
Douglas A. Bodner Law Office  
for the Olympia Trust and Kim Piccolo

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**Corrigendum of the Memorandum of Decision  
of  
The Honourable Applications Judge Brian W. Summers**

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Appearances have been revised to correctly identify the parties to the action.