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Conservation Easements and Fraud under the *Land Titles Act*

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Case commented on: *Nature Conservancy of Canada v Waterton Land Trust Ltd*, 2014 ABQB 303

This 130 page, 605 paragraph judgment penned by Justice Paul R. Jeffrey deals with a number of note-worthy legal issues in a fascinating factual context. The case started when the Nature Conservancy of Canada (NCC) tried to enforce a conservation easement that it had registered against its title to the Penny Ranch, a large cattle ranch near Waterton Lakes National Park in the south-west corner of the province. One of the main purposes of the conservation easement was to ensure that, when the NCC sold the Penny Ranch, development by the purchasers or their successors in title would not impede wildlife migration through the area, an area which the NCC described as the "North American Serengeti." The case ended (barring appeals) with Justice Jeffrey finding that defendant's new bison fence was not a breach of the conservation easement and ordering the NCC to pay over $700,000 to Thomas Olson for the NCC's failure to issue him a timely tax receipt. In between, numerous legal issues arose, including: (1) the nature of conservation easements under the *Alberta Land Stewardship Act*; (2) contract rectification; (3) fraud as an exception to indefeasibility; (4) rectification of a caveat with a missing page in the underlying document; and (5) damages for the late issuance of a tax receipt. In this post, I will deal with only one of those issues and that is the fraud issue. Colleagues will address some of the other issues.

General Background

The NCC is national registered charity dedicated to conserving Canada's natural heritage through land conservation. It partners with individuals, corporations, foundations and governments to protect ecologically significant land, plants and wildlife.

Thomas Olson is a tax lawyer who splits his time and his transnational tax planning and tax litigation practice between Alberta and Utah. He and his family owned three other bison ranches in Western Canada and operate a bison meat distribution business.

The Penny Ranch lies on the eastern slopes of the Rocky Mountains and within the migratory corridors of a wide variety of species. The NCC bought the ranch from Penny in 2001 for $3.3 million. The ranch consisted of eleven mostly contiguous quarter sections, plus a leased twelfth quarter section, within a narrow strip of land lying just northeast of Waterton Lakes National Park. The ranch occupied the last fringe — a five to six mile wide band — between cultivated or otherwise developed lands to the east and the mountainous lands to the west. The NCC arranged

to sell the ranch to Thomas Olson, who planned to raise wild bison there. Before selling the ranch to Olson, the NCC had a conservation easement registered against the titles to the ranch.

In July 2003 the NCC filed caveats against the titles to the Penny Ranch to protect a "placeholder" conservation easement. It was their practice to use a standard form conservation easement for this purpose and then later negotiate and revise its terms using an amending agreement to suit a specific purchaser, while still satisfying the NCC's conservation goals. In this case the placeholder conservation easement was granted by the NCC to the Alberta Conservation Association (ACA), rather than to itself. The idea was that once the NCC sold the ranch, the ACA would transfer the conservation easement back to the NCC. The placeholder conservation easement dealt with fencing, including fencing height restrictions. The parties negotiated and reached an amending agreement that included new terms for the height and location of replacement fencing on the ranch.

The first caveat the NCC filed to protect the conservation easement amending agreement had several defects. Most importantly, the filing omitted page 5 of the attached amending agreement which contained a replacement fence height restriction. The first caveat was discharged and an amended second caveat was filed against the titles to the ranch on August 3, 2004. While this second caveat corrected many of the defects of the first caveat, the entire page 5 of the five-page amending agreement attached to the caveat was still missing.

The NCC transferred the Penny Ranch to Olson on August 11, 2004 and the transaction closed on August 24, 2004.

As soon as he bought the ranch, Olson began to replace the old cattle fences around its perimeter with new fencing that he claimed would be more effective at restraining his bison, while still allowing wildlife to migrate through the ranch. The NCC claimed that the new fence violated the conservation easement because it was higher than it was allowed to be and it would obstruct migrating wildlife. When Olson disagreed and the parties were unable to settle the matter, the NCC sued to enforce the conservation easement and to force Olson to modify his new fencing.

When the placeholder conservation easement was replaced by the one negotiated by the NCC and Olson, the parties disagreed on whether the oral agreement they reached about the height and location of replacement fencing was accurately reflected in the written agreement. That is the contract rectification issue. Justice Jeffrey did rectify the amending agreement to accord with the parties' actual oral agreement, which he found to be as Olson described it. Olson claimed the conservation easement was only partially registered on the titles to the ranch because of a different lawyer's conveyancing error and that the NCC's interest in the fencing restrictions in particular was an unregistered interest. That is the land titles rectification issue based on the defective second caveat, an issue Justice Jeffrey resolved by rectifying the caveat. It had not been rectified at the Land Titles Office before Olson transferred the ranch to a third party which was a limited partnership/corporate trustee arrangement Olson had created for the purpose of holding title to the ranch. The parties disagreed on whether the fence height restriction in the conservation easement was binding on the successor in title to Olson, raising the fraud issue. Justice Jeffrey found there was no fraud.

Olson also presented a number of questions about the validity of the conservation easement itself. He argued that the fencing terms of the NCC's version did not satisfy the statutory purposes for conservation easements and the conservation easement was therefore invalid and unenforceable. He also argued that the conservation easement was invalid because of the

relationship between the NCC and the ACA before and at the time NCC sold the property to Olson. Justice Jeffrey concluded the conservation easement was valid and enforceable. He also found that Olson's fence did not breach the fencing restrictions in the rectified conservation easement.

The tax receipt issue arose because Olson had bought the ranch from the NCC at a significant premium over fair market value for a property with a conservation easement on it, with the excess understood to be his charitable donation to the NCC. However, the NCC did not issue a tax receipt for the charitable donation to Olson for more than five years because Olson had taken the position that the conservation easement was unenforceable. Olson therefore counter-claimed for damages for the NCC's failure to issue the tax receipt within a reasonable time. He was successful, with Justice Jeffrey ordering the NCC to pay Olson more than $700,000 in damages.

Facts Specific to the Fraud Issue

Olson had purchased the ranch in his personal capacity in August 2004. He was bound by whatever agreement about fence height restriction had been reached with the NCC, regardless of whether or not the amending agreement needed to be rectified and whether or not the attachment to the second caveat was missing page 5 with the fence height restrictions. However, the defective second caveat had not been rectified at the Land Titles Office before Olson transferred the ranch from himself to a third party. That third party was a limited partnership/trustee/trust arrangement that Olson had created specifically for the purpose of holding title to the ranch. The corporate trustee in that arrangement bought the ranch from Olson in March 2005 for $500,000 and the limited partner interest in the limited partnership, after Olson had been asked to help rectify the second caveat and the missing page 5 and after the NCC threatened litigation over the fencing problems. Olson encumbered the ranch with almost $2 million in mortgages and promised to continue to make the mortgage payments, but that promise was unsecured. Olson's limited partner interest was substantially redeemed for just over $1.6 million by the end of 2005.

Olson created the Waterton Land Trust on September 28, 2004. He created the Waterton Land Trust Limited Partnership as trustee for the Waterton Land Trust on March 10, 2005 by an agreement between himself and Waterton Land Trust Ltd, the trustee. The only limited partner of the Limited Partnership was Olson. The general partner of the Limited Partnership was the Waterton Land Trust. The trustee of that trust was the corporation, the Waterton Land Trust Ltd. The Waterton Land Trust Ltd. had only two directors: one a good friend of Olson and also Olson's partner in his law firm, and the other a professor of neuroscience at the University of Calgary who lived near Olson's home in the Bragg Creek area of Alberta. The trust included the use of a "protector," a role held by Olson at all relevant times. The protector oversaw the management of the trust by the trustees; had the power to appoint, remove and replace trustees; had the power to veto any decision by trustees; and had to be given 30 days' written notice of the trustees' intended exercise of many of their powers.

The trust was intended to be a typical "asset protection trust," created to ensure the preservation of the ranch and protect it from creditors through future generations. Olson had used comparable limited partnership/trust/ trustee arrangements with his other bison ranches. When the trust was created, Olson's intention was to keep the property in his name until the end of 2004 and then transfer it to the trust in early 2005. Olson wanted to remain owner of the ranch to the end of the personal tax year to mitigate the risk he might not be entitled to the charitable donation tax receipt in his personal capacity.

The Arguments and Decision on the Fraud Issue

So as things stood, the new owner — Waterton Land Trust Ltd — took title from Olson before the NCC's replacement fence height restriction was properly registered against the titles to the Penny Ranch. It took title when page 5, containing the fence restrictions, was still missing from the amending agreement attached to the conservation easement and so the NCC's interest in the fencing restrictions was an unregistered interest. Normally, under the *Land Titles Act,* RSA 2000, c L-4, sections 60, 62 and 203, that would mean that the new owner was not bound by NCC's unregistered interest.

But the NCC argued that the transfer by Olson to a limited partnership/trust/trustee over which he had effective control was a "self-serving sham transaction" (at para 273). It argued that Olson engaged in the series of transactions that culminated in the ranch being transferred to the Waterton Land Trust Ltd, while the fencing dispute remained unresolved, to ensure that the conservation easement and caveats could not be rectified and bind the new registered owner. That conduct, the NCC argued, amounted to fraud under the *Land Titles Act*.

Justice Jeffrey examined what amounts to fraud for the purposes of the Alberta land titles system (at paras 445-450). There is no definition of fraud in the *Land Titles Act.* But the statute does tell us what is not fraud. Section 203 states that mere knowledge of an unregistered interest, even when combined with the knowledge that registration will defeat that interest, is not fraud: *Holt Renfrew & Co v Henry Singer Ltd* (1982), 37 AR 90, 20 Alta LR (2d) 97 (CA). Cases consistently hold that "something more" in the way of dishonest dealings is required than just knowledge of the unregistered interest: *Holt Renfrew; Boulter-Boulter-Waugh & Co v Phillips* (1919) 58 SCR 385.

Olson made a novel argument about the test for recognizing fraud in the land titles context. He argued that *Holt Renfrew* established an additional requirement for a finding of fraud. In addition to knowledge of an unregistered interest and "something more," the holder of the unregistered interest had to rely on the new owner's fraud and had to have been induced by that reliance to conclude the transaction. Justice Jeffrey decided that Olson was wrong about the need for reliance (at para 452). An argument that reliance is required seems to be a misreading of *Holt Renfrew*, which held that reliance was required in order to find a fraudulent misrepresentation, which is what amounted to the "something more" in that case. But fraudulent misrepresentation does not have to be proved in order to prove fraud under *the Land Titles Act* and there was no allegation of fraudulent misrepresentation in this case.

Olson also submitted, rather bizarrely, that the relevant transaction was his purchase of the ranch from the NCC, i.e., that it was the transaction that had to be tainted by fraud in order for the trustee's title not to be indefeasible. The basis of this argument was not disclosed in the judgment. Justice Jeffrey held that Olson was wrong about which transaction was to be scrutinized (at para 452-454). The transaction to be examined for fraud was the sale by Olson to the limited partnership/trust/trustee.

The test for fraud used by Justice Jeffrey was thus the well-established one that requires knowledge of an unregistered interest and "something more." The NCC successfully argued that the new registered owner, Waterton Land Trust Ltd, had knowledge of the NCC's unregistered interest and knowledge that registration of the transfer to the trustee would defeat that interest because Olson personally had such knowledge and he effectively controlled the trustee and trust. The NCC did not succeed in proving that there was "something more."

Knowledge

The NCC first argued that the creation of the trust and the transfer of the Penny Ranch by Olson to the limited partnership/trust/trustee arrangement were not arm's length transactions. Justice Jeffrey agreed. He concluded (at paras 246, 275) that Olson retained *de facto* control over the various family corporations and limited partnerships and trusts, including the Waterton Land Trust, and thus he retained control of the Penny Ranch after he transferred it to the limited partnership/trust/ trustee arrangement. Justice Jeffrey enumerated three reasons for reaching the conclusion that it was "difficult to imagine a situation in which Olson could be any less of a non-arms' length party" (at para 280):

(1) As "protector" of the trust, Olson had the ability to effectively control it. His control of the trust gave him control over the Penny Ranch (at para 276).

(2) Olson also controlled the trust because the trustee's directors did not exercise independent judgment (at para 277). The director of the Waterton Land Trust Ltd responsible for the trust's purchase of the Penny Ranch was simply a "straw man" acting on Olson's directions (at paras 250, 252).

(3) Olson was not acting at arm's length to the trustee or the trust on the transfer of the ranch because, at that time, he held all of the shares of the trustee, which also served on behalf of the trust as the general partner of the limited partnership, of which he was the sole limited partner (at para 279).

"Something more"

The key question on the fraud issue was therefore whether "something more" existed. First year Property law students should recognize in the fraud-specific facts of this case a situation analogous to that in *Alberta Minister of Forestry, Lands & Wildlife v McCulloch* (1991), 83 Alta LR (2d) 156 (CA) aff'g 1991 CanLII 5819, 78 Alta LR (2d) 375 (QB).

McCulloch provides an example of "something more." In 1986, McCulloch purchased a mill site, which was subject to a caveat protecting an option to purchase the land at a specified price in favour of the Crown. In 1987, an error in the Land Titles Office resulted in the Crown's caveat being cancelled. McCulloch discovered the cancellation and told a Crown employee about it. Then, a few days later, McCulloch transferred the mill site to a numbered company of which he was the director and president. The new title in the name of the numbered company was free of the Crown caveat. The Crown sued, seeking declarations that the transfer to the numbered company was made in circumstances amounting to fraud and that the numbered company's interest in the mill site was subject to the Crown's interest. Sinclair J. found for the Crown. He held that the numbered company was deemed to have knowledge of the Crown's unregistered interest when it acquired the mill site by virtue of the knowledge of its director and president, McCulloch. While knowledge of an unregistered interest does not, by itself, constitute fraud under the *Land Titles Act*, the purpose of the transfer to the numbered company was to defeat the Crown's interest and to relieve McCulloch of his obligations to the Crown. Therefore, the court held that the numbered company acquired the parcel in circumstances amounting to fraud.

As was the case in *McCulloch* where the knowledge of its director and president was imputed to the numbered company, Justice Jeffrey had imputed Olson's knowledge about the missing page

5 in the registration of the conservation easement to the trust because of Olson's de facto control of the trust (at para 457). However, Justice Jeffrey held that Olson did not take advantage of his knowledge of the unregistered interest (at para 458). The key distinguishing fact appeared to be that more than three months passed between the time Olson learned of the defective caveat and the time he transferred the ranch to the trustee. The sale by McCulloch to the numbered company he created for the purpose of defeating the Crown's interest took place within a few days of McCulloch learning that the Crown caveat had been accidently discharged (at para 462).

Justice Jeffrey noted (at para 262) that the NCC could have filed a caveat against the title to the ranch in that three month period to protect its position against all third parties that Olson might transact with. He accepted Olson's argument that the NCC's failure to file a caveat when they learned of the missing page 5 in December 2004 did not mean that Olson's transfer three months later was either hasty or fraudulent (at para 467).

In addition, unlike McCulloch, Olson did not create the limited partnership/trust/trustee for the purpose of defeating the NCC's unregistered interest (at para 460). Olson had a long term pre-existing plan that he carried out in the normal course (at para 459). The trust had been created in September 2004, before Olson knew that the amending agreement's fencing restrictions were different from what he and the NCC had agreed on and that page 5 containing those fencing restrictions was missing from the conservation easement amending agreement attached to the second caveat (at para 256). Olson did not accelerate the timing of the transfer to Waterton Land Trust Ltd. as he had only intended to hold the ranch personally until the end of the 2004 calendar year and the transfer actually happened later than planned, in March 2004 (at para 261).The limited partnership/trust/trustee arrangement was also one that Olson had previously used for his other bison ranches (at para 258).

The NCC tried to add to the list of things that Olson did that, taken together, might amount to "something more", by arguing that Olson, a lawyer, breached the standards of professional conduct required of him by the Law Society of Alberta. They pointed specifically to his failure to disclose his awareness of the missing page 5 of the conservation easement amending agreement during the fencing negotiations with the NCC and his hasty transfer of the ranch to the limited partnership/trust/trustee arrangement. However, Justice Jeffrey held that Olson's conduct did not provide the NCC with a cause of action (at para 318). If there was any professional misconduct, it was a matter for the Law Society of Alberta.

The NCC also made an argument based on "badges of fraud," i.e., fact situations which had been accepted as circumstantial evidence of fraud (at paras 468-72). While the phrase stems from the fraudulent preferences context and is unknown in the Alberta land titles context, the argument really amounts to nothing more than a series of analogies to facts which have been held in other cases to amount to "something more." Justice Jeffrey appeared to be unpersuaded that "badges of fraud" was an appropriate approach.

Conclusion

Justice Jeffrey therefore concluded that Olson did not engage in fraudulent conduct when he

transferred the Penny Ranch from himself to the limited partnership/trust/trustee. Olson's knowledge of the NCC's unregistered interest was imputed to the new registered owner, the trustee, due to Olson's effective control of that entity. However, there was no "something more" to take the transaction beyond section 203 of the *Land Titles Act*. In applying the test set out in the leading case of *Holt Renfrew*, this case provides us with another example of drawing the line between fraud and not-fraud in the *Land Titles Act* context. Justice Jeffrey's distinguishing of *McCulloch* is one of the most valuable aspects of this case. It creates a helpful precedent by narrowing down the instances in which a transfer to an entity created and controlled by a transferor, which has the effect of defeating a prior unregistered interest that the transferor knew about, amounts to fraud.

Justice Jeffrey also dealt with a number of novel arguments. He correctly dismissed the claim that reliance was required in order to prove fraud in the land titles context. He also correctly focused the fraud inquiry on the transaction alleged to be the fraudulent one, rather than on the too-early transaction transferring the land to the party alleged to be the fraudster. Justice Jeffrey did not accept that allegations of professional misconduct might be relevant to the fraud inquiry. He also refused to accept the "badges of fraud" approach, although he did not indicate his reasons for not doing so. Aside from the fact it is not the approach adopted in the leading cases, such as *Holt Renfrew*, presumably he thought that approach added nothing to the usual exercise of analogizing and distinguishing the facts in the case in front of him from those in other cases dealing with the same issue.

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