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Disagreement in the Court of Appeal about the Wisdom of Judicial Economy

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Cases Considered: *Calgary Jewish Academy v Condominium Plan 9110544*, 2014 ABCA 279

In this judgement, the Court of Appeal reversed the decision of Justice Adele Kent in *Calgary Jewish Academy v Condominium Plan 9110544*, 2013 ABQB 134, where she had found the Academy's lease of a portion of the Condominium Corporation's land invalid. The Court of Appeal decision is of interest because of the different approaches taken by Justices Clifton O'Brien and Alan Macleod on the one hand, and Justice Brian O'Ferrall in a concurring opinion on the other, and what those different approaches might say about the wisdom of judicial or decisional economy. The case also illustrates (yet again) that no good deed goes unpunished.

The Calgary Jewish Academy, the plaintiff in this matter, and the condominium complex, the defendant, are neighbours on land adjacent to Glenmore Trail. The Academy has operated a school on their land since 1958. In 1978, the City of Calgary made changes to Glenmore Trail that cut off emergency access to the school. Fortunately, the City owned the land adjacent to the school and leased a portion of it to the Academy for use as a parking lot and for emergency access. The lease—the first lease—was for 10 years, and the Academy had an option to renew for a further period of 10 years on the same terms and conditions. The rent was one dollar per year. A caveat claiming an interest in land pursuant to the lease was filed against the City's land.

In 1989 the city sold the land adjacent to the school to a developer, Statesman. In 1990 Statesman and the Calgary Jewish Academy entered into a new lease—the second lease—on the same terms and conditions as the Academy had with the City. Caveats protecting that second lease were filed against the titles to each of the 16 condominium units.

Shortly afterwards, Statesman asked the Academy to enter into yet another new lease that would be registered against the common property and on the Condominium Plan, rather than against the titles to the individual units. Agreeing to this request when there was nothing in it for them except their reputation as a good neighbour was the Academy's good deed that would be punished (although in the end, after expending many resources, their punishment was overruled).

The new lease—the third lease—was between the Academy and the Condominium Corporation, whose only board member was Garth Mann, the president of Statesman. A unanimous owners resolution was signed by Mann on April 10, 1991 and Mann provided a letter certifying that the lease was approved by a unanimous resolution of the Condominium Corporation. On April 16 the Court of Queen's Bench granted an order allowing the third lease to be registered against the

Condominium Additional Plan Sheet. The Academy's caveat protecting its second lease was discharged.

The timing of the third lease and its registration was crucial to the defendant's argument. Statesman began selling units in March of 1991. Francis became a purchaser of a unit under an agreement for sale in March 1991 and she took possession of the property on April 8. Smith became a purchaser of a different unit under an agreement for sale in January 1991. Any equitable interests they had as purchasers under agreements for sale therefore predated the April 10 unanimous owners resolution and the order to register the third lease.

Justice Kent held that the granting of the third lease was *ultra vires* the Condominium Corporation because not all of those with an interest in the property—i.e., Francis and Smith with their equitable interests as purchasers under agreements for sale—had approved its execution as required by section 40(2) of the *Condominium Property Act,* RSA 1980 c C-22 (now section 49 of the *Condominium Property Act*, RSA 2000, c C-22). Justice Kent held that, because the formalities of the *Condominium Property Act* were not complied with, the lease was *ultra vires* the Condominium Corporation. The lease was, in her words, a "nothing" (at para 19).

No member of the Court of Appeal that heard the appeal agreed with Justice Kent. Justices O'Brien and Macleod overturned her decision on narrow grounds that were also based on section 40 of the *Condominium Property Act*. Justice O'Ferrall relied upon much broader principles of law.

The majority in the Court of Appeal focused on the certificate presented under section 40(4) of the *Condominium Property Act,* which requires that a certificate under the seal of the corporation stating that the unanimous resolution was properly passed, the lease conforms with the terms of it, and all necessary consents have been given must accompany a lease in order for the registrar to register. Section 40(5) then states that such a certificate is conclusive proof of the facts stated in it. The majority noted (at para 6) that the phrase "conclusive proof" is used in statutes to create an irrebuttable presumption that requires a factfinder to reach a certain conclusion. As a result, the defendant could not challenge the lease based on any of the formalities included in the certificate. Thus, the majority disposed of the appeal in nine short paragraphs.

Justice O'Ferrall's judgement, concurring in the result, is much longer, although, to be fair, half of his 66 paragraph judgment is given over to a recitation of the facts and the judgement below. While concurring completely with the majority's reasons (at para 47), Justice O'Ferrall notes that this dispute could have been decided "by applying the fundamental principle of our Torrens system of land titles, namely that purchasers of real property subject to prior dispositions validly made take title subject to those dispositions" (at para 47, citing section 62 of the *Land Titles Act,* RSA 2000, c L-4). That fundamental principle is, of course, indefeasibility. Justice O'Ferrall also noted that the Court of Appeal has previously held that statutory exceptions to indefeasibility should be interpreted strictly because indefeasibility anchors the Torrens system (at para 49, citing *Petro-Canada Inc v Shaganappi Village Shopping Centre Limited,* 1990 ABCA 261 (CanLII), (1991), 109 AR 237 (CA)).

How does the indefeasibility principle apply in this case? That's where things get tricky. Section 60(1) of the *Land Titles Act* essentially says that the registered owner of land holds it subject to the encumbrances, liens, estates and interests that are endorsed on the certificate of title. The problem here was that the third lease was only registered against the common property by being endorsed on the Condominium Additional Plan Sheet on April 17, 1991, well after Francis and

Smith had acquired their interest in the land. The certificate of title that they saw before and at the time of their purchase was for the land on which the condominiums were being built, a certificate of title that showed caveats for both the first and second leases.

That set of facts led Justice O'Ferrall to apply the indefeasibility principle—and not specific provisions of the *Land Titles Act*—less than straight-forwardly. According to Justice O'Ferrall, compliance with section 40 of the *Condominium Property Act* was not necessary because the Academy's lease with the Condominium Corporation was "merely the substitution of a new party to a prior disposition, a novation, so to speak" (at para 52). Therefore, section 40 of the *Condominium Property Act* was not engaged (at para 60). Section 40 only applied to leases of the common property by the Condominium Corporation and, according to Justice O'Ferrall's reasoning, no lease was granted by the Condominium Corporation. Why not? Because all that the Condominium Corporation owned or could own was the reversion (at para 55). On this point, Justice O'Ferrall's reasoning is reminiscent of the common law's *nemo dat* doctrine, i.e., that no one can give what they do not have.

This reasoning emphasizes the first lease. Because that portion of the common property required for the Academy's parking lot and emergency access had been leased to the Academy long before the Condominium Corporation or its developer had taken title to the property and a caveat claiming an interest under the first lease was noted on the certificate of title shown to the condominium unit owners (at para 54), no lease was granted by the Condominium Corporation. Justice O'Ferrall found that the purchasers Francis and Smith had notice that some of the lands on which the condominium was being built were leased to the Academy. The caveat of the first lease and the purchasers' notice of it affecting part of the land the condominium was being built on made the third lease binding on the purchasers. The indefeasibility appears to belong to the Academy's leasehold estate, regardless of which lease was filed or registered against whichever title to what became the common property and regardless of who appeared to be granting the leasehold estate to the Academy.

Justice O'Ferrall did go on to state that, even if section 40 had to be complied with, it had been. The only parties with a registered interest in the common property at the time the unanimous resolution was passed were Statesman, the owner of all the units, and the Academy (at para 67). The parties with unregistered interests in the common property—Smith and Francis—had either agreed titles might be subject to a lease in favour of the Academy or had notice of the lease and had not acted in time to rescind the agreement (at para 68). Presumably the idea here was that persons with equitable interests in land are affected by notice of a pre-existing interest regardless of which lease was in effect at the relevant time.

It is interesting how each of the judges appear to accept that Francis and Smith, the purchasers of the condominium units, had an interest in land as purchasers under agreements for sale for which the remedy of specific performance would be available. While such status used to automatically result in the acquisition of an interest in land that could support a caveat, it has not done so for quite some time. Today, thanks to *Semelhago v. Paramadevan*, [1996] 2 SCR 415, 1996 CanLII 209 (SCC) and *1244034 Alberta Ltd. v. Walton International Group Inc*. (2007), 422 AR 189, 2008 ABCA 53 (CanLII), there is a test to be applied and met before a purchaser has an interest in land. See the Alberta Law Reform Institute's Final Report No. 97 on Contracts for the Sale and Purchase of Land: Purchasers Remedies for a summary of the change in the law and the problems it has caused purchasers.

The majority judgement—that subsections 40(4) and (5) of the *Condominium Property Act* meant what they said (at para 8)—is not only economical in the number of paragraphs and words that it uses, but it is also a good example of judicial economy. The concurring judgement of Justice O'Ferrall is not only longer, but its application of the general principle of indefeasibility seems to rely on common law and equitable principles not found in the *Land Titles Act*. It seems to be based on fairness, something the *Land Titles Act* is not noted for promoting (see, most famously, the dissenting judgment of Rinfret J in *CPR v Turta*, [1954] SCR 427, 1954 CanLII 58 (SCC) at 429-430).

"*Judicial economy"* is the phrase that is used to describe the idea of deciding the case on *narrow grounds. It is a sort of judicial minimalism, or judicial restraint, i.e., s*aying no more than necessary to justify an outcome; see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001) at 3-4. According to Professor Sunstein (at 4-5), judicial economy has at least three advantageous. First, it reduces the burdens of judicial decisions, especially on multi-member courts. Second, and more importantly, it ensures that fundamental errors are made less frequently and are less damaging. Third, it reduces the risks of unanticipated bad consequences as a result of intervening in a complex system. The second and third reasons seem *apropos* to this case.