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# GRTAs, Patch Agreements, Indefeasible Title and Collapse Orders

**By:** Nigel Bankes

**Case Commented On:** *Chesterworld Holdings Ltd v Computershare Trust Company of Canada*, 2017 ABQB 43 (CanLII)

This decision involves the interpretation of a will from 1949 as well as the validity of a gross royalty trust agreement (GRTA) and a subsequent patch agreement. Justice Park concluded that the patch agreement was incapable of saving the GRTA because it was executed by the incorrect parties (or by the correct parties but not in their correct capacity). The case may call into question the efficacy of other patch agreements that were intended to revive or extend GRTAs affected by the decision in *Guaranty Trust Co. of Canada v Hetherington*, 1989 ABCA 113 (CanLII).

Manley Hugo Unland (T) died in August 1949 possessed of 7 quarter sections of land in the Wetaskawin area as to which he held both the surface and the mineral title (excluding coal). He left individual quarter sections to some of his ten children but left the E½ of Section 15 to four of his children (Manley, Walter, William and Rita) in equal shares. Notwithstanding these specific dispositions. the penultimate operative clause of the will provided that "It is my will that all the oil rights or other mineral rights in any of my real estate be retained for a reasonable time and all monies that may be realized from them be equally divided among all my children" (the "oil rights clause").

The year before his death T (1948) granted Rio Bravo a petroleum and natural gas lease with a ten year primary term for the E½ of Section 15. That lease expired without production in 1958. After his death the executors (1953) executed a GRTA with the Prudential Trust Company for each of the NE and SE quarters of Section 15. Computershare, the defendant in this action, is the successor in interest to Prudential. The GRTA was apparently (see judgment at para 47) in the same form as the GRTA at issue in *Hetherington* (known as the PTC -1 GRT). The executors directed that gross royalty certificate units be granted to each of the ten children. The surviving executors granted a five year petroleum and gas lease for the E½ of section 15 (along with an additional quarter section) in 1971. The lease form acknowledged the existence of the Prudential GRTAs. That too expired without production. Following the decision in *Hetherington* (which concluded that a GRTA in the form at issue in that case did not survive the expiration of the lease in existence at the time the GRTA was created) a "Patch" Agreement was executed (March 10, 1993) to try and extend the life of the GRTAs and render them perpetual.

The principal question for the Court in this case was whether the Patch Agreement was executed by the correct parties. That turned on the answers to two questions: first. who were the successors in interest to the mineral interests of Manley, Walter, William and Rita, and, second, whether the oil rights clause in some way trumped what the specific dispositions otherwise required.

**The Chain of Title to the Mineral Interest in E½ of Section 15**

In 1975, T's executors transferred the mineral title to the E½ of Section 15 to ten persons (Edwin Unland, Ruby Brown, Kenneth Unland, Manley Hugo Unland, William Unland, Helen Robins, John Unland, Nettie Patterson, Walter Unland, and Rita Kimmel) who appear (at paras 30-31) to be all of T's children. For reasons not disclosed the Land Titles Office

> created a separate title evidencing Walter Unland's 1/10 interest in the mineral rights and a separate title evidencing Nettie Patterson's 1/10 interest in the mineral rights. A third title evidenced the other 8 1/10 interests in the mineral rights for Edwin Unland, Ruby Brown, Kenneth Unland, Manley Hugo Unland, William Unland, Helen Robins, John Unland and Rita Kimmel. (at para 31)

As T's children died (Helen in 1988, Walter in 1980 and Nettie in 1980) the mineral interests became further fractionated although in most cases the interests seem to have accrued (whether through survivorship or another mechanism) to the surviving children (or their executors). Justice Park reviews the complicated mineral chain of title at paras 29-42 before concluding at para 43 with the following summary of the state of the title at the time the Patch Agreement was executed:

> … the mineral owners were Edwin Unland, John Unland, Kenneth Unland, Manley Hugo Unland, William Unland, Ruby Brown, Rita Kimmel, Clifford Robins, Gloria Kijewski [the latter two as executors for Helen Robbins], Darwin Patterson, and Colleen Stewart.

Justice Park goes on to say at para 44 that "The Patch Agreement was signed by all persons who were the mineral owners as determined by actions of the testator's executors who directed the mineral rights in the East Half of Section 15 be divided into 10 fractional interests in September 1975." This conclusion is somewhat difficult to square with the list of parties to the Patch Agreement reproduced at para 16, namely – Kenneth Unland, Mary Helen Robins (by her executors Clifford Robins and Gloria Kijewski), Rita Kimmel, John M. Unland, William F. Unland, Ruby McKenney, Inez Unland, Manley Unland, Donna L. Bray, Maxwell Unland, Darwin Patterson and Colleen Stewart (i.e. the two lists of names are not the same).

This difficulty or discrepancy aside, there was of course still the question of why the mineral title ever passed to <u>all</u> of the children rather than just to the four specific beneficiaries. Justice Park effectively concluded that this was a mistake. He concluded that the executors were correct not to initially transfer the mineral title to Manley, Walter, William and Rita since T had directed the executors to retain this interest for a "reasonable time" to permit the sharing of potential mineral revenues amongst all of the children. Justice Park summarized as follows (at para 72):

> The true intent of the testator is found within the provisions of his Will. He directed the oil rights or other mineral rights in any of his real estate be retained for a reasonable time and all monies that may be realized from them be equally divided amongst all his children. He did not direct that the oil rights or other mineral rights be retained by the estate or the executors beyond a reasonable time. At the conclusion of a reasonable time the mineral titles to the NE ¼ and the SE ¼

> of Section 15 were to be transmitted or conveyed to the four named specific beneficiaries.

In this case that "reasonable time" in Justice Park's view expired long before 1975 when the executors directed that the mineral title be issued in the names of the ten children – it likely expired when the Rio Bravo lease came to an end without production in 1958. At that point the executors (at para 82)

> had the duty and the legal obligation to carry out the intention and the direction of the testator and transmit or transfer the mineral titles to the NE ¼ and SE ¼ of Section 15 to the four named beneficiaries. These 4 beneficiaries were the mineral owners and not the 10 children as directed in apparent error by the testator's executors.

This meant that the Patch Agreement should not have been executed by all of those who did execute it but only by Manley, Walter, William and Rita. While three of those parties did execute the agreement (at para 84)

> they did not execute it as mineral title owners holding their gifted original equal quarter shares. Nor was there any evidence adduced which demonstrated they were aware of their mineral title each being limited to an 11/90$^{th}$ fractional interest. This fractional interest was limited due to the testator's executors' actions in transferring fractional interests to the remaining surviving children and the heirs of their deceased siblings.

It followed that the Patch Agreement did not save the GRTAs (at para 85):

> In summary the testator's executors did not convey the mineral title interests to the proper beneficiaries. The Patch Agreement was executed by some persons who were not entitled to be mineral title owners and by three mineral title owners who executed it with incorrect and lesser mineral title interests to which they were entitled. In consequence the Patch Agreement could not confirm the validity and perpetuate each original GRT. Each original GRT is not perpetual. Rather each GRT does not survive the expiry of the initial Rio Bravo Lease. The royalty assigned under the No.2 GRT and the No.3 GRT is limited on the facts of this case, to the royalty payable under the original Rio Bravo Lease. Each GRT expired and the Patch Agreement does not save either.

This reasoning seems to make sense as matter of common law and equity. Thus we would say that there was no evidence that the transfer of title to all the children was intended to be a gift by the specific beneficiaries and that the other six children were not entitled to the benefit of any presumption of advancement.

But what about section 62 of the *Land Titles Act*, RSA 2000, c. L - 4? It seems to have been the case that at the time the Patch Agreement was executed all of those parties executing the Agreement (subject to the apparent discrepancy noted above) were all listed on title. If that were the case might not Computershare (the successor in interest to Prudential) be able to claim the benefit of section 62? Section 62 provides that:

> (1) Every certificate of title granted under this Act (except in case of fraud in which the owner has participated or colluded), so long as it remains in

> force and uncancelled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.
>
> (2) For the purpose of this section, that person is deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that the certificate of title has been surrendered and a new certificate of title has been granted on any transfer or other instrument.

That was indeed Computershare's argument.

I think that the answer to the question should turn on how Computershare protected the Patch Agreement in the Land Titles Office. It seems likely that the Patch Agreement did not afford Computershare a registerable interest and that Computershare could only protect its interest by way of caveat. If this was the case (and it seems to be – see at paras 89-90) then I don't think that section 62 would offer Computershare any protection. This is because while a caveat may protect the priority of the underlying interest, a caveat does not cure an invalidity or improve the efficacy of a flawed document (the Patch Agreement). Only actual registration of a registerable instrument can do that. Thus, the only persons who can rely on section 62 are those who transact for value on the faith of the register and then, and on that basis, get themselves on the register (e.g. as a transferee or a mortgagee). Computershare might have transacted for value but it likely did not acquire a registerable interest.

That was not however the answer that Justice Park gave. He concluded that the four specific beneficiaries were entitled to rely on the prior certificate of title (CT) exception expressly incorporated into section 62. With respect, this must be wrong. Not only is it inconsistent with the venerable judgement of the Supreme Court of Canada in *C.P.R. v Turta*, [1954] SCR 427, 1954 CanLII 58 (SCC) which narrowly circumscribes the availability of the prior CT argument (the leading judgments require the contemporaneous existence of two uncancelled CTs with respect to the same title content), but if correct it would completely undermine the mirror and curtain principles of the Torrens title system.

If, *contrary to what I suggest above with respect to the applicability of section 62*, Computershare was *prima facie* entitled to rely on section 62, it should not have had to make inquiries behind the title as to the efficacy of the Patch Agreement. The title to the minerals could be corrected as between the four specific beneficiaries and the other six interests (on the common law and equity reasoning outlined above), but in the interim those beneficially entitled would be bound by registered transactions on the faith of the register. In sum, Justice Park's final conclusion may well be correct but not because of the prior CT exception argument.

**The Collapse Order**

The "collapse procedure" was developed by the Alberta Courts as a case management practice in response to the *Hetherington* decision which affected literally thousands of GRTAs across the province. The procedure contemplated that the Court, on the application of mineral title holders or other parties, supported by evidence that the GRTA was in the same form as the PTC-1 GRT, would issue an order (a collapse Order) terminating the trust. The Order *(*see *Montreal Trust Co. of Canada v Astl*, 1999 ABQB 872 (CanLII), at para 18) varied *Astl v Montreal Trust Company of Canada*, 2002 ABCA 21 (CanLII))

> … would only become effective 45 days after the GRT unit holders had all been personally served with the collapse Order and provided no action had been started in the meantime to uphold the GRT. The process was designed to bring notice of the application to collapse to all of the unit holders to give them the opportunity to intervene and take issue with the evidence on which the application for termination was made.

Accordingly, in this case Computershare, in the event that it was unsuccessful in its efforts to maintain the efficacy of the Patch Agreement and hence the validity of the GRTA, sought (at para 56) a collapse Order. The Court granted that request (at para 91):

> At the request of Computershare a collapse Order in ordinary form will issue. It will become effective 60 days after all the GRT unit holders; the purported mineral owners; the executors of the estate of the testator; and the 4 specific beneficiaries of the mineral titles all respecting the East Half of the Section 15 have been personally served with it. If any of those persons are deceased, service will be affected upon their executors or their heirs as necessary. This 60 day period will provide each with the opportunity to launch any appropriate intervention application to this Court to uphold each GRT or the Patch Agreement. Counsel will draft the appropriate Order.

**Publication of this Decision**

Finally, a note with respect to the publication of this decision. This decision was apparently rendered in January of this year. It is now available on CanLII. I am fairly certain that it was not posted contemporaneously on CanLII; I came across it quite serendipitously. The decision is still not available on QL (Lexis Advance Quicklaw) and nor is it available (September 27, 2017) on WestlawNext Canada.

I asked Nadine Hoffman, Natural Resources, Energy & Environmental Law Librarian at the University if it was possible to ascertain the date that a decision was posted to CanLII. She in turn got in touch with Sarah Sutherland of CanLII who graciously replied as follows: "We don't have a completely firm way of doing this for every document, but you can get pretty close by right clicking on the page and selecting 'View page source', near the top you will see the following:

> <!-- sync date: July 26, 2017 1:17:57 PM EDT -->
>
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<title>CanLII - 2017 ABQB 43 (CanLII)</title>

The ‘sync date’ is generally the date the decision was added to the CanLII database. The ‘update date’ is generally the date it was made public on the site.”

On the basis of this analysis I conclude that this decision was likely not posted to CanLII until July 26.

Ms. Sutherland continued as follows: “The reason why I use the ‘generally’ is that sometimes cases get updated with new versions from the courts and the dates get updated.”

My thanks to my colleague Jonnette Watson Hamilton for her comments on an earlier draft of this post.

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