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Saskatchewan Land Titles Decision Calls Out for Appellate Review

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Case Commented On: *Registrar of Titles and Great West Life Assurance Company and Primrose Drilling Ventures Ltd*, 2018 SKQB 290.

This decision deals with the power of the registrar to correct an error made back in the chain of title, the effect of a registrar's caveat, and the status of a purchaser where a title is encumbered by a registrar's caveat. Unfortunately, Justice Kovach has, in our view, reached incorrect conclusions on each of these issues. We hope that the Saskatchewan Court of Appeal has the opportunity to correct these errors.

The facts, which are borrowed by Justice Kovach (at para 5) from the brief filed by Great West Life (GWL), are quite simple. GWL became the registered owner of the SW ¼ 5-02-31 W1, including the mines and minerals (the SW ¼), in 1923. In 1947, GWL transferred the SW ¼ to Benson and Olney, reserving the mines and minerals. By mistake, the certificate of title (CT) issued to Olney did not include a reservation of mines and minerals. The judgment does not tell us, but we assume that GWL's CT was cancelled as to both the surface and the mines and minerals. In 1953 Olney transferred a 25% interest in the mines and minerals in the SW ¼ to Funkhouser. The judgment does not tell us, but we assume that this and subsequent transactions were transactions for value. We also assume that a CT was issued to Funkhouser for this 25% interest in the mines and minerals. It is surprising that the judgment is not more explicit on some of these points. There are further transactions in the chain of title, including a separation of the mineral interest into petroleum and natural gas interests and other mines and minerals interests, but nothing seems to turn on this.

The next key event occurs in 1973 when the registrar filed a registrar's caveat against the SW ¼. By then the Union Oil Company was the registered owner of both sets of mineral interests. We do not have text of the registrar's caveat, but we are given to understand that the caveat "explicitly indicates that Great-West Life reserved its ownership in the SW 5-02-31 W1 minerals, and that this reservation was not recognized in subsequent titles. The Registrar's caveat warns that any transfer or title to the subject quarter interest is subject to Great-West Life's interest" (at para 5 and see also at para 50).

In 1993, Union and Primrose entered into a purchase and sale agreement for a number of properties, including the SW ¼. For a number of years, the registrar, relying on the registrar's caveat, refused to register Primrose as the registered owner of the mines and minerals. However, in 2006 the Registrar issued titles to Primrose for both sets of minerals (i.e. the petroleum and natural gas rights and all other mines and minerals). The registrar's caveat remained on these titles.

The facts are not clear as to whether the registrar ever purported to revive the GWL mineral title or to cancel the lines of interests derived from the Funkhouser title. It seems likely therefore that this did not happen.

Most cases like this one are resolved when a party such as Primrose brings an application for a declaration as to title and to have the registrar's caveat discharged: see, for example, *Re Certain Mineral Rights*, 1956 CanLII 188 (SK QB), 19 WWR (ns) 646; *Krautt Estate v. Paine*, 1980 ABCA 275; and the companion case to this one *Olney Estate v Great-West Life Assurance Co*., 2014 SKCA 47.The applicant is then required to serve notice on all potentially interested parties back in the chain of title to give them the opportunity to appear and make arguments.

In this case, however, the matter came before the Court on the basis of a reference from the registrar relying on s.108 of *The Land Titles Act, 2000* SS 2000, c L-5.1, which provides that:

> (1) The Registrar may refer a question to the court for a decision with respect to the operation of:
> (a) the land titles registry;
> (b) this Act or the regulations; or
> (c) any other matter concerning the duties of the Registrar

The registrar posed five questions for the Court as follows (at paras 6-10), and we have indicated the Court's answers in capital letters:

> **Question No. 1:**Does an acquirer of mineral title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former *Land Titles Act*, RSS 1978, c L-5? YES
>
> **Question No. 2:** Does an acquirer of surface title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former *Land Titles Act*? YES
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> **Question No. 3:** If the answer to Question No. 1 is affirmed, does the Registrar of Titles have authority under s. 97 of *The Land Titles Act, 2000* to correct an error or omission related to a mineral title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without consent of the new title owner? YES
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> **Question No. 4:** If the answer to Question No. 2 is affirmed, does the Registrar of Titles have authority, under s. 97 of *The Land Titles Act, 2000* to correct an error or omission relating to a surface title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without the consent of the new title owner? YES
>
> **Question No. 5:** On the current facts, what is the court's determination pursuant to Part IV of *The Land Titles Act, 2000* and s. 109 in particular, respecting proper ownership of the subject quarter interest in minerals to SW 5-02-31 W1? GWL IS ENTITLED TO BE THE REGISTERED OWNER.

It is not clear to us why questions 2 and 4, which pertain to the surface title, were included in the reference.

Our short answers, in italics, are as follows:

> **Question No. 1:**Does an acquirer of mineral title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former *Land Titles Act*?
>
> *Yes, but the notice received by the transferee will not prejudice the transferee's title if the interest that the caveat seeks to protect is a nullity.*
>
> **Question No. 2:** Does an acquirer of surface title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former *Land Titles Act*?
>
> *Yes, but the notice received by the transferee will not prejudice the transferee's title if the interest that the caveat seeks to protect is a nullity.*
>
> **Question No. 3:** If the answer to Question No. 1 is affirmed, does the Registrar of Titles have authority under s. 97 of *The Land Titles Act, 2000* to correct an error or omission related to a mineral title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without consent of the new title owner?
>
> *Yes, if the interest that the caveat seeks to protect is a valid interest but not otherwise. GWL's interest was no longer a valid interest and therefore the registrar had no power to correct.*
>
> **Question No. 4:** If the answer to Question No. 2 is affirmed, does the Registrar of Titles have authority, under s. 97 of *The Land Titles Act, 2000* to correct an error or omission relating to a surface title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without the consent of the new title owner?
>
> *Yes, if the interest that the caveat seeks to protect is a valid interest but not otherwise. There is insufficient information provided about the surface titles to comment further.*
>
> **Question No. 5:** On the current facts, what is the court's determination pursuant to Part IV of *The Land Titles Act, 2000* and s. 109 in particular, respecting proper ownership of the subject quarter interest in minerals to SW 5-02-31 W1?
>
> *Primrose is entitled to: (1) a declaration that it is entitled to be the registered owner of a 25% interest in the minerals, and (2) an order discharging the registrar's caveat from title.*

Once Funkhouser obtained a CT on the faith of the register (which at the time displayed that Olney owned mines and minerals) and on the basis of a transaction for value (see our assumptions above), Funkhouser and all of Funkhouser's successors in interest obtained an indefeasible title to those mines and minerals. The registrar's decision to file a caveat in 1973 did

not change this. That caveat merely indicated that GWL might have a claim. But on the authority of *Canadian Pacific Railway v Turta*, [1954] SCR 427, it is clear that once Funkhouser was on title, GWL's only claim was a claim against the assurance fund, not a claim to get back on title. Furthermore, *Turta* also establishes that the registrar could not "correct" the register in favour of GWL once Funkhouser was on title. It is true that all purchasers whose title is registered after the registrar's caveat is filed take subject to that registrar's caveat, but a registrar's caveat cannot restore or protect an interest (GWL's mineral interest) that has already been defeated by the issuance of a new CT for value.

It follows from this that the Registrar cannot correct the register under s. 97 of *The Land Titles Act, 2000*, and neither can the court make an order under s.109 cancelling Primrose's title and restoring GWL to title. All that the Court can do is give effect to the true state of title and order the discharge of the registrar's caveat.

It remains to ask how Justice Kovach could get this so wrong.

In our view, the error stems from focusing on the current registered owner, Primrose, rather than on the position of Funkhouser (as the first party to purchase for value on the basis that the minerals were included in the title) or indeed Union (a subsequent good faith purchaser for value, who was the registered owner when the registrar filed the caveat). Justice Kovach seems to accept (at paras 40 – 43) that *Turta* would preclude the registrar from correcting the mineral title as against either of Funkhouser or Union so as to restore GWL's interest. But in his view (at paras 57 – 62), anyone who deals with that title once the registrar's caveat is on title is in a worse position because that person cannot claim to be someone whose title was obtained "in good faith for value" (to quote s 97(2) of the *Land Titles Act, 2000*).

There are at least six reasons for thinking that this must be wrong.

First, Justice Kovach overstates the effect of a caveat, whether a caveat filed by the registrar or by anybody else. A caveat only protects the interest that the caveator has (as apparently accepted by the court at para 59). Registration of a caveat may improve the priority of the caveator but it cannot give a caveator an interest that it does not have, nor cure the invalidity of an invalid interest, nor revive a dead interest. If the registrar could not correct the title the second before the caveat was filed, the mere filing of the caveat should not enhance the authority of the registrar or improve GWL's position. The caveat simply crystallizes the positions of the parties *at that time,* and at that time GWL's interest had been defeated and the registrar had no power to correct. See, *inter alia*, *Pan American Petroleum Corporation v Potapchuk* (1964) 46 W.W.R. 237, aff'd Alta CA (1965) 51 W.W.R. 700; aff'd SCC (1965) 51 WWR 767, and *Alexander v McKillop and Benjafield* 1912 CanLII 31 (SCC), 45 SCR 551.

For his conclusion, Justice Kovach seems to rely heavily on the decision of the Alberta Court of Appeal in *Krautt Estate v Paine*, 1980 ABCA 275, but in our view that decision favours Primrose rather than GWL. In *Krautt*, as a result of a registrar's error, Mary Meyers' title to mines and minerals was cancelled while the Municipal District of Success obtained a title that included the mines and minerals. Krautt purchased from the Municipal District on the faith of the register and obtained a title that included the mines and minerals. Subsequently, the registrar purported to cancel Krautt's mineral interest and revive the Meyers title. Still later, the registrar

filed a registrar's caveat against both chains of title. TCPL subsequently acquired a mineral lease from the Myers interests.

The decision in *Krautt v Paine* is relevant here for two purposes: (1) the effect of the registrar's corrections, and (2) the effect of the registrar's caveat *viz à viz* both TCPL and the Krautt interests. As to the first, Justice Laycraft for the Court held (at para 31) that since Krautt was a purchaser for value, the registrar had no authority to delete minerals from Krautt's title. Neither did the registrar have the authority to revive the Meyers title (at para 31). Having done so, the new Meyers title *might* be a good root of title for a purchaser for value, but there were no purchasers for value here since all of the successors in title before the registrar's caveat was on the Myers title (the Paine interests) were volunteers. As to the effect of the registrar's caveat, Justice Laycraft concluded (at para 38) that the caveat could protect the Krautt interest (which was an interest in having his mineral title reinstated) and that it was effective (at para 52) against TCPL. Justice Laycraft comments on this further at para 48, concluding to the effect that "A valid caveat, so filed, would protect the right of William Krautt and prevent any person from acquiring further rights except subject to his claim." There is absolutely no suggestion that the caveat could in any way benefit the Meyers title. And for good reason; Mary Meyers' title was beyond help.

Second, a transferee from the registered owner is entitled to be placed in the same position as the registered owner subject only to the interests properly protected on title. If the registrar's caveat is ineffective in protecting the claimed underlying interest, then the purchaser can take free and clear of that interest. *Holt, Renfrew & Co Limited v Henry Singer Limited*, 1982 ABCA 135, illustrates this proposition. Not only was Singer\Pekarsky able to ignore Holt Renfrew's earlier caveat because it did not protect Holt Renfrew's current lease, Holt Renfrew in turn was not bound by Pekarsky's caveat because Pekarsky, as an agent for an undisclosed principal, had no interest in the land. Furthermore, this proposition that the transferee is entitled to stand in the shoes of the transferor applies equally to purchasers and volunteers. Thus, if Funkhouser had bequeathed the interest to his daughter she would have been just as immune from GWL's claim as would any purchaser for value.

Justice Kovach characterizes Primrose's position (at para 57) as one of impermissibly "piggybacking" on Union's position. In his view there can be no piggybacking once the registrar's caveat is on title, but we think that this casts far too wide a net. We acknowledge that a transferee takes subject to all intervening caveats between when its transferor got on title and when it gets on title, but as we have said above, a caveat is only as good as the interest it protects and if the interest it protects is invalid then the transferee can piggyback. As the always wise Master Funduk said in the context of whether a caveator had an interest in land: "In law a caveat under the *Land Titles Act* is merely a warning to third parties that the caveator claims the interest specified in the charge. The fact that the caveator claims an interest does not mean he in fact has an interest. The fact that the respondent claims the letter of undertaking is an equitable mortgage does not make it so." *Frado v. Bank of Montreal*, 1984 CanLII 1226 (AB QB) (at para 5).

Third, it is simply wrong to say that a purchaser who purchases a title that is impaired by a registrar's caveat cannot be a *bona fide* purchaser. It is wrong to draw a conclusion about the *bona fides* of Primrose (at para 63) simply on the basis of the registrar's caveat especially when one considers that any competent lawyer examining the chain of title as described would

conclude that GWL's interest was dead and beyond revival. The registrar does not have a magic wand, and an ineffective caveat filed by the registrar cannot turn a *bona fide* purchaser into a *non-bona fide* purchaser any more than could an ineffective caveat filed by any other caveator. If it is not fraudulent for a purchaser to register an interest knowing that doing so will defeat an unregistered interest (*Holt Renfrew*) of which the purchaser has notice, how can it be fraudulent (or even evidence of absence of good faith) for a purchaser to proceed to register in light of a registrar's caveat which the chain of title demonstrates to be ineffective. Parties are entitled to take calculated risks and make their own assessment of the state of title without being characterized as acting in bad faith or fraudulent or in such other way as to disentitle them from the usual protections afforded by the *Land Titles Act* to a purchaser.

Fourth, Justice Kovach's conclusion makes everything depend on when the red flag raised by the registrar's caveat is resolved. If the party on title has the time, interest and resources to resolve the issue when the caveat is filed then it appears that even Justice Kovach would find for the current owner. If Union had applied to remove the registrar's caveat when it was first filed in 1973, the caveat would have been removed. But Union did not do so. Instead it sold the NW ¼ to Primrose as part of a package deal. Justice Kovach effectively requires Union, and others in its position, to get the caveat removed before it can sell its property. If Union does not do so, then its purchaser gets nothing even if the caveat protects no valid property interest. What seems particularly problematic here is that this case comes before the Court on a reference from the registrar. Had the registrar filed its reference *before* Primrose was registered as owner, Union's title would have been clarified and that clarification would have redounded to the benefit of Primrose and not GWL. The decision to postpone clarification should not have such dramatic consequences.

Fifth, Justice Kovach's conclusion seems inconsistent with earlier decisions of the Saskatchewan Court of Appeal which Justice Kovach's references in passing, specifically *Re Land Titles Act* 1952 CanLII 155 (SK CA) and *Re S 70 Land Titles Act (Saskatchewan)* 1953 CanLII 205 (SK CA). Both decisions involved the then section 70 of the *Land Titles Act* RSS 1940, c. 98 which is materially similar to section 97 of *The Land Titles Act, 2000* at issue here. In particular, both the 1940 version and the 2000 version emphasize that a correction can only be made "so far as [is] practicable without prejudicing rights obtained in good faith for value …" Thus, in *Re Land Titles,* the five person bench considered that notwithstanding the broad opening words of the section, "the Registrar may correct any error or omission if it appears to the registrar that a title has an incorrect description," (*The Land Titles Act, 2000,* s 97) these words, when read in the context of the entire Act including the indefeasibility provisions (at para 13), do not afford the registrar a broad power to correct:

> I cannot think that under the provisions of sec. 70 the registrar can do more than correct what may be called clerical errors as between parties to the transaction in respect of which the error has been made.

Similarly, in *Re S 70 Land Titles Act (Saskatchewan)* another five-person bench also emphasized the limited and not the plenary power of the registrar to make corrections. The Court observed again (at para 15) that:

> … all that is intended by sec. 70 is to give the registrar authority to correct what "appears" to him to be an error. The error must be apparent to him, it must be obvious, and there must be no need to hear any evidence in regard to it, nor to adjudge in respect of conflicting claims. No provision is made to enable the registrar to hear evidence and the provisions in regard to the production of the duplicate certificate of title or other instrument clearly indicate that the errors contemplated are those in regard to which no question can be raised.

But Justice Kovach apparently draws a different lesson from these cases. In his view they are not about the limited powers of the registrar but rather are about "[t]he type and extent of any error" and "[t]he prejudice to a subsequent acquirer in good faith and for value" (at para 37). We do not believe that these were the central issues in either of these cases and thus conclude that this is not a valid basis on which to avoid applying binding authority.

Sixth, Justice Kovach's response to Question 5 of the reference depends upon an extravagantly broad understanding of the powers of the court under the *Land Titles Act, 2000*. This part of his judgment largely draws on section 109 of the *Land Titles Act, 2000* which deals with the general powers or jurisdiction of the court. The section provides as follows:

> 109(1) In any proceeding pursuant to this Part, the court may make any order the court considers appropriate, and in so doing may direct the Registrar to, or authorize any person to apply to the Registrar to:
>
> (a) register, discharge, amend, postpone or assign an interest; or
>
> (b) transfer title or make changes to a title.
>
> (2) The court may seek assistance from the Registrar in any proceeding pursuant to this Part.
>
> (3) On an application to the court pursuant to this Part, if the judge hearing the application considers it appropriate to do so, the judge may make an order:
>
> (a) directing that a title be vested in any person; and
>
> (b) either:
>
> (i) directing the Registrar to transfer title or to make changes to a title; or
>
> (ii) authorizing any person to apply to the Registrar to transfer title or to have changes made to a title.
>
> (4) An application for an order pursuant to subsection (3) may be made:
>
> (a) on any notice that the court considers appropriate; or
>
> (b) without notice if, in the court's opinion, the circumstances warrant it.

Justice Kovach relies on the *Olney Estate* case for the proposition that section 109 is a curative and remedial provision that (at para 55) "empowers the court to make the rulings necessary, including to require the Registrar to make necessary changes." That is true, but it does not allow the Court to make up the law or to provide a remedy when the party seeking the remedy has not established its entitlement. For example, if the application of the indefeasibility provisions of the *Land Titles Act* extinguishes an interest, then the Court cannot rely on section 109 to revive that interest. And yet this is exactly what Justice Kovach purported to do (at para 61):

> I am satisfied on the facts that GWL is the owner of the subject quarter interest in the SW 5-02-31 W1 minerals. GWL intended to retain title to the mineral interests in 1947, and was wrongfully deprived of its title to the minerals due to a mistake by the Registry.

The position in *Olney Estate* was very different. In that case there had been no intervening purchaser for value between the original mistake and the filing of the registrar's caveat (and indeed the time of the action). Once the Court in that case had resolved the limitations issue in favour of GWL then it followed that GWL was entitled to have the title rectified as between the original parties (*Olney Estate* at para 15) and that the Court could rely on section 109 to make the necessary order. That is not the case here.

We have one final comment and that relates to the scope of the reference power under section 108. We have not researched the question in detail, but it is not clear to us that any of the questions, but particularly question five (which goes to the power of the Court "on the current facts"), actually fits within the scope of section 108. Section 108 seems best suited for raising abstract questions of law and not for adjudicating the *bona fides* of any particular person. *Heller v The Registrar, Vancouver Land Registration District* [1963] SCR 229 (another case emphasizing the limited authority of the registrar) warns that we should be careful not to use limited scope statutory appeals (and perhaps therefore even more so abstract references) to determine the rights of parties. The judgment of the Saskatchewan Court of Appeal in *re Section 70* contains similar observations.

We hope that Primrose has the interest and resources to take this on appeal.

This post may be cited as: Nigel Bankes and Jonnette Watson Hamilton, "Saskatchewan Land Titles Decision Calls Out for Appellate Review" (November 30, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_and_JWH_GWL_Caveat_Case_November2018.pdf