Court of Appeal for Saskatchewan

Docket: CACV3328

Citation: *Primrose Drilling Ventures Ltd. v Registrar of Titles*, 2021 SKCA 15

Date: 2021-01-26

Between:

Primrose Drilling Ventures Ltd.

Appellant (Respondent)

And

Registrar of Titles

Respondent (Applicant)

And

The Great West Life Assurance Company

Respondent (Respondent)

Before:	Caldwell, Barrington-Foote and Tholl JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Barrington-Foote
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Tholl
On appeal from:	2018 SKQB 290, Regina
Appeal heard:	November 14, 2019
Counsel:	Gordon Kuski, Q.C., and Holli Kuski-Bassett for the Appellant Max Bilson for the Respondent, Registrar of Titles Jordan Hardy, Q.C., and Andrew Konopelny for the Respondent, The Great West Life Assurance Company

Barrington-Foote J.A.

I. INTRODUCTION

[1] On February 11, 1947, The Great West Life Assurance Company [GWL] transferred the surface title to SW 5-02-31 W1 to George Olney, reserving its title to the minerals. On March 6, 1947, the Master of Titles issued a certificate of title, which mistakenly included the minerals [Registrar's error], to Mr. Olney. Title to the undivided one quarter interest in those minerals at issue in this appeal [disputed interest] has since been transferred to and by a series of purchasers for value, the last being Primrose Drilling Ventures Ltd. [Primrose].

[2] This appeal arises as a result of steps taken by the Registrar of the Regina Land Titles District [Regina Registrar] and by the Registrar of Titles [Registrar] – who holds the office which, as of 2000, replaced the former offices of the Master of Titles and the registrars of the various land titles offices – with a view to correcting the Registrar's error. On July 25, 1973, the Regina Registrar filed a Registrar's caveat [Caveat], which disclosed the Registrar's error and warned that any transfer of title was subject to GWL's interest. That Caveat was registered on title when the disputed interest was purchased by Primrose and remains registered on Primrose's title. Both Primrose and GWL claim title to the disputed interest.

[3] This contest over the disputed interest finds its way to this Court as a result of questions referred by the Registrar to the Court of Queen's Bench [Registrar's reference] pursuant to s. 108 of *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*2000 Act*]. In an October 31, 2018, judgment [*QB Decision*], a judge of that Court [Chambers judge] answered those questions. In the result, he held that GWL is the owner of the disputed interest.

[4] Primrose has appealed the whole of the *QB Decision* pursuant to s. 111 of the *2000 Act*. It asserts that the *QB Decision* undermines foundational indefeasibility, "mirror" and "curtain" principles of Saskatchewan's Torrens-based land titles system, by deciding that GWL's interest has priority over the interest acquired by Primrose from the person registered as the owner of the disputed interest. The issues which arise include the effect of the Caveat, the rights of an acquirer from a bona fide purchaser for value, and the scope of the Registrar's authority to correct historical errors in the registry.

[5] For the reasons that follow, it is my respectful opinion that the *QB Decision* is incorrect and that the appeal must be allowed.

II. BACKGROUND

[6] In the *QB Decision* (at para 5), the Chambers judge adopted a comprehensive "chronology of significant facts" that had been provided by GWL. That chronology, which is a step-by-step description of the relevant dealings with the mineral title from 1923 to 2006, has not been challenged by the parties. The following summary of those dealings is sufficient for purposes of this appeal:

(a) May 2, 1923 – GWL held a 100% interest in the original surface and mineral titles to SW 5-02-31 W1.

(b) February 11, 1947 – GWL transferred the SW 5-02-31 W1 surface title to Mr. Olney. However, GWL expressly reserved its title to the minerals.

(c) March 6, 1947 – The Master of Titles mistakenly issued a certificate of title that included the mineral title to Mr. Olney.

(d) September 30, 1953 – Mr. Olney transferred title to a quarter interest in all minerals in SW 5-02-31 W1 to Ernest Montgomery Funkhouser, a bona fide purchaser for value.

(e) June 6, 1954 – Mr. Funkhouser transferred title to the one-quarter mineral interest to Woodley Canadian Oil Company.

(f) July 6, 1961 – Woodley Canadian Oil Company transferred its title to the one-quarter mineral interest to The Pure Oil Company.

(g) September 16, 1965 – The Pure Oil Company amalgamated with and continued as Union Oil Company of California Ltd.

(h) December 28, 1965 – Union Oil Company of California Ltd. transferred title to a one-quarter interest in "all mines and minerals other than petroleum and natural

gas" [residual mineral interest] to Williamson Oil & Gas Ltd. and retained title to a one-quarter interest in "petroleum and natural gas".

(i) December 28, 1965 – Title to the one-quarter interest in "petroleum and natural gas" was issued in the name of Union Oil Company of Canada Ltd.

(j) November 17, 1971 – Williamson Oil & Gas Ltd. transferred title to the residual mineral interest to Union Oil Company of Canada Ltd., which later changed its name to Unocal Canada Limited [Unocal].

(k) July 25, 1973 – The Regina Registrar filed the Caveat under s. 153 of *The Land Titles Act*, RSS 1965, c 115 [*1965 Act*], against the certificates of title for the disputed interest, then held by Unocal, which provides as follows:

> 1. Take notice that the Registrar of the Regina Land Registration District does hereby under the provisions of Subsection (b) of Section 153, of the Land Titles Act, (Cap. 115 R.S.S. 1965) prohibits the dealing with the [disputed interest] because when [GWL] transferred the above described land in transfer registered as No. AE 1382, they reserved the minerals in the said land and this reservation was not recognized in the title issuing from the said Transfer or any subsequent titles.
>
> 2. The following land is affected by this caveat: …
>
> 3. The Registrar therefore forbids the registration of any transfer or other instrument affecting such land or the granting of a certificate of title thereto except subject to the claim herein set forth.

(l) There is some indication GWL became aware of issues surrounding then title to the disputed interest in 1973; but, regardless, there is no dispute that the Caveat provided notice of the Registrar's error.

(m) January to July 1993 – Primrose agreed to purchase the disputed interest from Unocal, together with approximately 150 other properties, but does not appear to have investigated or reviewed the titles to the disputed interest at the time.

(n) September 7, 1995 – Primrose attempted to register its newly acquired interests, and, on October 3, 1995, the Regina Registrar refused to register the transfer, citing the Caveat.

(o) January 26, 2005 – The Registrar certified the certificates of title to the disputed interest. The Caveat remained on title.

(p) June 9, 2005 – Unocal transferred its two titles to the disputed interest to its wholly-owned subsidiary, Northrock Resources Ltd. [Northrock]. There is no explanation in the record for this transfer. The Chambers judge and the parties proceeded on the basis that the issue relates to Unocal, Primrose and GWL; that is, as if the transfer to Northrock had not occurred. I shall accordingly do the same.

(q) June 13, 2006 – Northrock transferred the two titles to the disputed interest to Primrose.

(r) July 5, 2006 – The Registrar issued titles to Primrose for the disputed interest. The Caveat remained on title.

(s) After the title to the disputed interest was issued, Primrose asked the Registrar to remove the Caveat. In response, the Registrar asked Primrose to surrender its titles to the disputed interest. Primrose refused.

III. THE QUEEN'S BENCH DECISION

[7] The Registrar referred five questions to the Court of Queen's Bench pursuant to s. 108 of the *2000 Act*. Although the questions were asked in the context of the competing claims of Primrose and GWL, all but the last are cast in very general terms:

> 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*?
>
> 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*?
>
> 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?
>
> 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?
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> 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?

[8] In answering the first and second questions, the Chambers judge relied principally on two sources. The first was *Land Titles in Saskatchewan: Manual of Law and Procedures*, Saskatchewan Land Title Offices, vol 1 (Regina: Saskatchewan Justice, 1988), authored by Georgina R. Jackson, Master of Titles (as she then was) [*Manual*]. The Caveat was filed pursuant to s. 153(b) of the *1965 Act*, which was as follows:

> 153 The registrar may file a caveat:
>
> …
>
> (b) to prohibit the dealing with land in respect of which it appears to him that an error has been made in the certificate of title or any other instrument, or for the prevention of threatened or apprehended fraud or improper dealing.

[9] The Chambers judge quoted the following statement from the *Manual* as to the effect of caveats in general (*QB Decision* at para 21):

> The word 'caveat' comes from the Latin verb 'caveo' meaning to beware, to be on one's guard. Any person, therefore, searching a title and finding a caveat registered against the title should be on guard before purchasing, to the extent that he or she should find out all about the caveat, what claim is made and so forth, before completing the purchase...A caveat does not prevent the registration of any instrument, but it makes a subsequent instrument subject to the claim of the caveator, providing, of course, that the caveator can substantiate the claim if called upon to do so. [Manual at 185]

[10] He quoted the following excerpt from the *Manual* as to the effect of a Registrar's caveat in particular (at para 22):

> The registrar's caveat does not correct the error, nor does it nullify any rights acquired under the error before the caveat is registered, but it prevents any further rights being acquired under the error after the date of registration of the caveat …

> … the registrar is not empowered to correct the error, but should register a caveat to keep matters as they are until a court decision can be obtained... [Manual at 209–210]

[11] The Chambers judge also relied on *Krautt Estate v Paine* (1980), 118 DLR (3d) 625 (CanLII) (Alta CA) [*Krautt*]. He noted that no Saskatchewan authority was cited to him as to the effect of a Registrar's caveat and found that the provisions authorizing Registrar's caveats in Alberta at issue in *Krautt* were substantially identical to those in the *1965 Act*. In *Krautt,* an Alberta Registrar issued titles to a municipality as a result of tax enforcement proceedings against one Mary Meyers. As a result of an error in the transfer submitted by the municipality, the municipality's titles erroneously included mineral rights. William Krautt purchased the titles, including minerals, from the municipality. Two years later, the Registrar "corrected" the error by cancelling Mr. Krautt's mineral title and reviving the Meyers mineral title, despite the fact Mr. Krautt was a bona fide purchaser for value. Ms. Meyers transferred the minerals to Ruth Huston, a volunteer. In 1973, the Registrar filed a Registrar's caveat on the Meyers titles that identified the Registrar's error. In 1977, the beneficiaries of Ms. Huston's estate – who also stood in the position of volunteers – leased the minerals to Trans-Canada Resources Ltd.

[12] In a decision authored by Laycraft J.A., the Court of Appeal for Alberta determined that the interest of Trans-Canada Resources Ltd. was subordinate to the interest of Mr. Krautt. The Chambers judge noted that Laycraft J.A. held that the question of whether Trans-Canada Resources Ltd. was a bona fide purchaser for value "turned on the effect of the Registrar's Caveat and in particular whether it is binding on Trans-Canada to prevent its acquisition of the minerals in derogation of William Krautt's title to them" (*Krautt* at para 31). The Chambers judge quoted (at para 26) the following statement by Laycraft J.A. which he held it had that effect:

> … In my view the Registrar was empowered by Section 155 to file a caveat setting forth the error which he felt had taken place on the register. 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. [*Krautt* at para 45]

[13] The Chambers judge also referred to relevant provisions of the *2000 Act*. He noted that the transition from "caveats" under the *1965 Act* to "interests" under the *2000 Act* "did not alter the validity or effect of a registered interest that had its origins as a Registrar's Caveat under the previous system" (*QB Decision* at para 28). He pointed to s. 54 of the *2000 Act* as stipulating that registration of an interest constitutes notice of that interest to third parties and gives the interest holder priority over third parties.

[14] In the result, the Chambers judge concluded that the acquirer of a mineral interest acquires title subject to a duly registered, pre-existing Registrar's caveat, and that the answer to Question No. 1 is yes. He also concluded that there is no meaningful distinction between title to minerals and title to the surface and, accordingly, that the answer to Question No. 2 is also yes.

[15] As to Question No. 3, the Chambers judge held that the Registrar's authority to correct errors pursuant to s. 97 of the *2000 Act* extended to "any error that could be corrected without requiring the hearing of evidence or an investigation that would usurp the court's role under the former versions of the Act" (*QB Decision* at para 39). Section 97 provides as follows:

> 97(1) The Registrar may correct any error or omission made in the land registry if it appears to the Registrar that:
>
> > (a) a title has been issued in error or contains an incorrect or incomplete description;
> >
> > (b) a registration contains an incorrect or incomplete description;
> >
> > (c) an entry has been made in error; or
> >
> > (d) any other prescribed circumstance exists.
>
> (2) A correction may be made pursuant to subsection (1) in any manner that the Registrar considers appropriate, so far as is practicable without prejudicing rights obtained in good faith for value.
>
> …
>
> (4) Every correction made pursuant to this section has the same validity and effect as if the error or omission had not occurred.

[16] The Chambers judge considered the meaning of "prejudicial effect", relying principally on *Canadian Pacific Railway Co. Ltd. v Turta*, [1954] SCR 427 [*Turta*]. In *Turta*, Mike Podgorny had acquired title to the petroleum as a result of a Registrar's error which wrongfully deprived CPR of title. Anton Turta acquired the petroleum interests from Mr. Podgorny. The Registrar then purported to correct the error by amending the title to show a reservation of the petroleum to CPR, which then granted a lease to Imperial Oil Limited.

[17] The Supreme Court found that Mr. Turta had title. The Chambers judge summarized the reasoning in *Turta* as follows:

> [43] The court found that the changes the Registrar had made prejudiced the rights of Mr. Turta and were therefore not authorized. Mr. Turta's rights were prejudiced because Mr. Turta was not bound to investigate how Mr. Podgorny had received his title: he was a *bona fide* purchaser for value of the land. Mr. Turta was granted a certificate of title which included the petroleum and he should not be deprived thereof. There was no notice, such as a Registrar's Caveat, that could have alerted Mr. Turta to any error of which he needed to be aware.

[18] On the basis of this reasoning and the language of s. 97 of the *2000 Act*, the Chambers judge found that the Registrar's authority to correct a title that had been issued in error continues as long as the correction does not prejudice the rights of an acquirer in good faith for value. He then found as follows:

> [47] In the present scenario the issue becomes whether effecting a correction in such circumstances would be prejudicial to the purchaser. This determination depends on whether the Registrar's Caveat was sufficiently descriptive of an error that a potential purchaser could assess its impact and reach an informed decision on a course of action.
>
> [48] The purchaser who knowingly proceeds to acquire title, in the face of a Registrar's Caveat, without clarifying legitimacy of the caveats foundation, at a minimum takes title with the Registrar's Caveat endorsed pursuant to s. 14 of the *LTA, 2000* and risks indefeasibility of the title in accordance with s. 15 of the *LTA, 2000*.
>
> …
>
> [50] Where the Registrar's Caveat provides a detailed description about the error, including information such as: owner, certificate of title number or transfer number where the error occurred, and further describes in detail subsequently affected certificates of title, it is permissible for the Registrar to make corrections under the criteria specified because to do so would not be prejudicial to the after-acquired purchaser.

[19] In the result, the Chambers judge answered Question No. 3 in the affirmative. He gave the same answer to Question No. 4, finding that there was no meaningful distinction between the Registrar's authority to correct an error or omission relating to surface title, as opposed to mineral title, issued after registration of a Registrar's caveat.

[20] Finally, the Chambers judge dealt with Question No. 5, which asked what the Court would determine as to the ownership of the disputed interest pursuant to s. 109 of the *2000 Act*. He cited *Olney v Great West Life Assurance Company*, 2014 SKCA 47, [2014] 8 WWR 293 [*Olney*], as authority for the proposition that s. 109 is to be interpreted as having a remedial effect, empowering the Court to make rulings and orders as the circumstances of the case suggest and the *Act* allows. Having reiterated his conclusions as to the effect of a caveat, he made findings which completed

his chain of reasoning; that is, that GWL is the owner of the disputed interest, and that "Primrose was not a *bona fide* purchaser for value without notice when it purchased the subject quarter interest in 1993, or when it was registered on title in 2006" (at para 62). He accordingly found that the Primrose interest is "subordinate" to GWL's ownership.

IV. STANDARD OF REVIEW

[21] This appeal is brought pursuant to s. 111 of the *2000 Act*, which provides for an appeal on a question of law. The appellate standard of review on questions of law is correctness: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. The issues raised by the parties in relation to the five questions asked by the Registrar all turn on the interpretation of the *1965 Act* and the *2000 Act* and, as such, are all questions of law.

V. POSITIONS OF THE PARTIES

[22] I will briefly summarize the positions of the parties, as their differing perspectives are of assistance in understanding the issues raised in and the disposition of this appeal.

[23] I would first note that Primrose has no issue with the proposition that a bona fide purchaser for value takes title subject to interests protected by a duly registered, pre-existing Registrar's caveat. Rather, the foundation of Primrose's claim for priority is the proposition that the title of a bona fide purchaser for value is subject to an interest protected by a Registrar's caveat only to the extent that interest is determined to be valid. Primrose argues that a caveat does not validate or increase the interest being claimed but, rather, preserves the status quo or "crystallizes" the claimed interest as of the date it is registered.

[24] On this basis, Primrose submits the conclusion that it is the lawful owner of the disputed interest is "irresistible". It contends the Registrar can only correct an error as between the original parties to the transfer in respect of which the error has been made or their volunteers. Accordingly, it says that once a bona fide purchaser for value acquires title, the time for correcting the error has passed. Here, that event occurred when Mr. Funkhouser acquired title. In Primrose's view, GWL's

title – i.e., that of the person who was wrongfully deprived of title by a Registrar's error – was extinguished when the transfer to Mr. Funkhouser occurred and it cannot be revived.

[25] The Registrar has a very different perspective. In her view, a Registrar's error does not extinguish the claim of the person that was wrongfully deprived by that error, and a caveat does not crystallize the position of the parties at the time it is filed. Rather, she contends that the Caveat recognizes what she described in her factum as the "continuing dynamic nature of an underlying claim". She notes that indefeasibility of title under a Torrens land titles system is not absolute but subject to just exceptions.

[26] The Registrar does not say Primrose was not a bona fide purchaser for value. Indeed, she suggests the question of bona fides is a red herring, as the questions posed by the Registrar's reference are based on the assumption that Primrose's rights were acquired in good faith and for value. She submits that the guidance she seeks relates to the issue of prejudice, which limits her right to correct a title pursuant to s. 97 of the *2000 Act*; that is, can the Registrar correct errors at any time, provided that the correction would not prejudice rights acquired for value? She asserts that the question of whether prejudice would occur turns on whether the party acquiring those rights had notice before doing so.

[27] In her view, a duly registered, pre-existing Registrar's caveat provides that notice. She contends that if a Registrar's caveat is sufficiently descriptive that a potential purchaser for value could assess its impact and decide on a course of action, they could not reasonably claim that the rights they later acquired were impaired by a subsequent correction. Rather, by proceeding with the acquisition, instead of insisting that the vendor remove the caveat, they would have knowingly accepted title subject to a registered interest, thereby accepting the risk of doing so. On that basis, she says that the pre-existing Registrar's caveat puts any concern with prejudice to rest.

[28] GWL's position is substantially to the same effect as that of the Registrar. It submits that GWL's interest was not extinguished when title to the mineral interests was transferred to Mr. Funkhouser, nor revived when Primrose's title was registered. Rather, GWL says that it retained an equitable interest in the minerals, which was merely unenforceable as against some parties as a result of the Torrens system. It concedes that the Registrar cannot correct the title of a bona fide purchaser for value without notice. However, like the Registrar, GWL contends that

Primrose had notice of GWL's interest in the form of the Caveat and, as such, that the Registrar has the authority to correct the title in favour of GWL. GWL emphasizes that notice is the key factor which distinguishes this case from those relied upon by Primrose.

[29] GWL submits that this result is consistent with the principle of indefeasibility, in that a good faith purchaser for value would maintain indefeasible title, subject only to interests registered against the title prior to their registration. It contends that it maintains the mirror principle, as the register would reflect the state of title. It also contends it accords with the curtain principle, noting that a prospective purchaser would not have to look behind the title, as the potential defect would be manifest on its face as a result of a Registrar's caveat. As GWL put it, purchasers have only themselves to blame if they take title without searching the register.

VI. ANALYSIS

[30] Although the Registrar has asked five questions, the first two are effectively the same, as are the third and fourth. They will accordingly be answered together.

A. Does an acquirer of mineral title or surface title take subject to the notice provided in a pre-existing Registrar's Caveat that was duly registered under the former *Land Titles Act*?

[31] This question combines Question No. 1 and Question No. 2 in the Registrar's reference. The parties agree that the Chambers judge was correct in concluding that the answer to both of those questions, taken at face value, is yes. That is unsurprising, given that they ask whether an acquirer of mineral title or surface title takes subject to the notice provided in a *duly registered*, *pre-existing* Registrar's caveat, and that the effect of a caveat filed under the *1965 Act* was specified by s. 157:

> 157 While a caveat remains in force the registrar shall not enter upon a certificate of title any memorandum of a transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land with respect to which the caveat is registered, except subject to the claim of the caveator.

[32] This section, like all Saskatchewan legislation, must be read in accordance with the modern principle of interpretation; that is, in its grammatical and ordinary sense and in light of the purpose of the *Act* and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27;

The Legislation Act, SS 2019, c L-10.2, s 2-10. In the broad terms used in the first two questions, its meaning is entirely clear. A Registrar's caveat filed pursuant to the *1965 Act* prevents any person from acquiring further rights, except subject to the claim specified in the caveat. It means what it says.

[33] The question substitutes the word "notice" for the word "claim" in s. 157. One might speculate that change was made to subtly advance the Registrar's argument that the issue of *notice* is at the heart of this appeal. Regardless, I conclude that the answer to this first question, cast as it is in very general terms, is an uncontroversial yes, and of little moment.

[34] Given that the Registrar asked these questions in the context of the GWL– Primrose contest over title, the more interesting issue implicit in the first question is not whether a duly registered pre-existing Registrar's caveat has that effect but whether the Caveat at issue in this case was "duly registered". The Registrar's authority to register a caveat pursuant to s. 153 of the *1965 Act* was discretionary. However, that discretion – like any discretionary authority granted to a decision-maker – was not unbounded. It had to be exercised in accordance with the criteria that bore upon its proper exercise: *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119; *Strom v Saskatchewan Registered Nurses Association*, 2020 SKCA 112, at paras 60–63; and *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1, where Wagner C.J.C. recently reiterated this fundamental aspect of the rule of law:

> [108] … Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. …

[35] The question, then, is whether the Regina Registrar who filed the Caveat offended this principle. The Registrar says they did not. However, she also concedes that she would have been obliged to remove the Caveat if she had been asked to do so by Unocal prior to the transfer of the title to the disputed interest to Primrose. It seems clear why the Registrar takes that position. She was well aware there was no basis for GWL to assert or enforce the claim described in the Caveat as against Unocal under our land titles regime. I agree with the Registrar on this point. Further, it

is my view that, if this is so, it follows – for the reasons I will explain – that the Regina Registrar lacked the authority to file the Caveat at all.

[36] The Regina Registrar's authority to file the Caveat turns on the interpretation of s. 153 of the *1965 Act.* I will nonetheless begin with certain provisions of the *2000 Act* relating to indefeasibility and the nature of Unocal's title, as key aspects of the analysis are substantially the same in relation to both statutes and ground my answers to the remaining questions.

[37] I would first note s. 13 of the *2000 Act*. Effective on the implementation of the *2000 Act,* Unocal had the title described in that section:

> 13(1) Where the Registrar issues a title pursuant to this Act:
>
> (a) subject to section 14, the registered owner holds the title free from all interests, exceptions and reservations; and
>
> (b) subject to section 15:
>
> (i) the title is conclusive proof that the registered owner is entitled to the ownership share in the surface parcel, mineral commodity or condominium unit for which the title has issued;
>
> (ii) the title may not be altered or revoked or removed from the registered owner[.]

[38] This provision embodies the concept of indefeasibility, which is best viewed when interpreting land titles legislation as a summary means of describing the effect of registration pursuant to the specific legislation at issue. Indefeasibility is not the same under every land titles statute that can trace its roots to the Torrens system. Nor is it absolute. The various iterations of land titles legislation in Saskatchewan have contained many "exceptions" to indefeasibility. To state the obvious, the legislation governs. This perspective is usefully explored in Kim Korven, *The Emperor's New Clothes: The Myth of Indefeasibility of Title in Saskatchewan* (Masters thesis, University of Saskatchewan, June 2012).

[39] Nonetheless, as Cameron J.A. said in *Olney* (writing for himself but with no disagreement from the majority on this point), the concept of indefeasibility is a central aspect of the scheme of the *2000 Act*:

> [17] … The subject is rooted in what is known as the Torrens system of land registration and is grounded in section 13 of *The Land Titles Act.* This section, including subsection 13(1)(b), provides that where the Registrar issues a title pursuant to the *Act*, the title is conclusive proof that the registered owner is entitled to the ownership interest for which the title issued and is not subject to alteration or revocation or removal from the registered

> owner, nor subject to an action of ejectment or any action to recover or obtain land. This provision is of critical value to the statutory scheme of which it forms part, based as it is on the Torrens system. Nevertheless, this provision is subject to certain exceptions geared in significant part to maintaining the integrity of the scheme.

[40] Sections 23 and 24 of the *2000 Act* also deal with aspects of indefeasibility, by confirming the corresponding right of an acquirer to rely on the register:

> 23(1) A person taking or proposing to take from a registered owner a transfer or an interest in land or dealing with a title:
>
> (a) is not bound:
>
> (i) to inquire into or ascertain the circumstances in or the consideration for which the registered owner or any previous registered owner acquired title; or
>
> … and
>
> (b) notwithstanding any law to the contrary but subject to sections 18 and 35, is not affected by any direct, implied or constructive notice of:
>
> (i) any trust;
>
> (ii) any other unregistered interest; or
>
> (iii) any unregistered transfer.
>
> (2) Knowledge on the part of the person that any trust or other unregistered interest or any unregistered transfer is in existence must not of itself be imputed as fraud.
>
> 24(1) A person taking or proposing to take an interest in a title or in another interest for the purpose of obtaining priority over any other trust or unregistered interest is not bound to inquire into and, subject to sections 18 and 35, is not affected by any direct, implied or constructive notice of any trust or any other unregistered interest.
>
> (2) Knowledge on the part of the person that any trust or other unregistered interest is in existence must not of itself be imputed as fraud.

[41] In *MC3 Resources Inc. v Hogan*, 2014 SKQB 109, [2014] 7 WWR 305, Pritchard J. described these provisions as follows:

> [42] Sections 23 and 24, along with ss. 13-15 and s. 47, give life to the Torrens System. These sections provide for indefeasibility of title, and correspondingly guarantee that a purchaser of real property can rely on the register to determine who has title to that property, and what interests are registered against that property (*CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles)*, 2005 SKQB 470, 273 Sask. R. 137 at paras. 14, 28). These sections are particularly important in resolving competing priority interests and in cases of fraud (*CIBC Mortgages, supra*; *Helland v. Flexxifinger QD Industries Inc.*, 2013 SKCA 30, 417 Sask. R. 1).
>
> [43] In other words, and generally speaking, a legal interest must be registered against title in order to bind a subsequent purchaser of that property. If an interest is not registered, the property will pass to the new owner free of that interest (*Jen-Sim Cattle Co. Ltd. v. Agricultural Credit Corporation of Saskatchewan*, 2006 SKQB 173, 277 Sask. R. 193 at para 18).

> [44] These sections lie at the heart of the Torrens System. They allow a purchaser of land to rely on the description of the property in the registry. A purchaser does not have to "look behind the curtain" in order to determine who actually owns the property and what interests are applied against it.

[42] This statement correctly emphasizes that, generally, a purchaser of real property can rely on the register to determine who has title and what other registered interests exist in, over or under the land that is the subject of the title. It is also the case that title will generally pass to the new owner free of unregistered interests. However, as I have noted, it is an overstatement to suggest that the registry is everything. The legislation and the case law make that clear. The description of the property in the registry is not everything. Just as indefeasibility has exceptions, so too do the mirror and curtain principles that are often said to describe the effect of registration.

[43] The *2000 Act* replaced *The Land Titles Act*, RSS 1978, c L-5 [*1978 Act*]. The *1978 Act* was very much like the *1965 Act*. In many respects, that cannot be said of the *2000 Act.* The *2000 Act* coincided with and reflected changes enabled by and that responded to the move from paper titles to an electronic registry. Importantly, it provided for the issuance of titles for ownership shares that are recorded in an ownership register established pursuant to s. 11 of the *2000 Act*, replacing the paper certificates of title at the heart of the prior system.

[44] However, the concepts embodied by ss. 13, 23 and 24 of the *2000 Act* were also fully present in the *1978 Act* and the *1965 Act*. I note, in particular, the following provisions of the *1965 Act*:

> 70. The owner of land for which a certificate of title has been granted shall hold the same subject, in addition to the incidents implied by virtue of this Act, to such encumbrances, liens, estates or interests as are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title, as mentioned in section 213.
>
> …
>
> 213.— (1) Every certificate of title and duplicate certificate granted under this Act shall, except:
>
> > (a) in case of fraud wherein the owner has participated or colluded; and
> >
> > (b) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and
> >
> > (c) so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title;

> be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.
>
> …
>
> 237.— (1) No person contracting or dealing with or taking or proposing to take a transfer, mortgage or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered…
>
> (2) Knowledge on the part of any such person that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[45] In its per curiam judgment in *Dunnison Estate v Dunnison*, 2017 SKCA 40, [2017] 8 WWR 18 [*Dunnison*], this Court described the effect of the provisions in the *1978 Act* that corresponded to ss. 70, 213 and 237 of the *1965 Act*. As the Court put the matter, responding to British Columbia authority (including in particular *Suen v Suen*, 2016 BCCA 107, 85 BCLR (5th) 294), which held that British Columbia land titles legislation creates only a rebuttable statutory presumption that registered owners hold absolute title to the land:

> [60] Saskatchewan has taken an entirely different approach to the role of the certificate of title. In our view, it runs counter to the central tenets of *The Land Titles Act, 1978* to speak of a "presumption of indefeasible title," which is capable of being rebutted as if it were an evidentiary rule. While more will be said of this later, s. 213 declares that the title is conclusive and admits of only listed exceptions. Further, in *Hermanson* (at para 56), Bayda C.J.S. concluded our legislation gives effect to the "immediate indefeasibility theory" of title, which is a legal principle rather than an evidentiary one.

[46] The same was true of the *1965 Act*, and is true of the *2000 Act.*

[47] The question arising, then, is this; if, as Cameron J.A. put it in *Olney*, Unocal's title was conclusive proof that it was entitled to the ownership interest described in its title, what was that ownership interest? What did it include? Anecdotally, the late and learned University of Saskatchewan law professor, Marjorie Benson, often referred to the full panoply of rights to real property as a "bundle of straws". Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 2, describes property in a similar fashion:

> … Property is sometimes referred to as a bundle of rights. That characterization means that property does not refer to the thing, but rather to a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people concerning claims to tangible and intangible items.
>
> (Footnotes omitted)

Here, the issue is the relationship between Unocal and GWL, concerning their competing claims to the disputed interest.

[48] The title at issue on this appeal is the mineral title. Prior to the implementation of the *2000 Act*, Unocal had fee simple title to the minerals. That title was evidenced by two separate certificates of title which described Unocal as "the owner of an estate in fee simple". One title was for "petroleum and natural gas" and the other for "all mines and minerals other than petroleum and natural gas".

[49] The *2000 Act* speaks directly to the ownership interest of a title holder. Section 195 deems titles, such as those that had been issued to Unocal, to be titles issued in accordance with s. 12(1) of the *2000 Act*. Section 12(1) provides that "[t]he Registrar shall issue a title for every ownership share recorded in an ownership register established and maintained pursuant to section 11". Section 12(7) specifies that the title acquired by the party to whom title is issued is *fee simple* title. Unocal accordingly continued to hold fee simple title after the *2000 Act* was implemented.

[50] One right among the bundle of rights that makes up an estate in fee simple is the right to alienate title to the estate and as such, to alienate all or part of the collection of rights it represents. Anne Warner La Forest, *Anger & Hornsberger, Law of Real Property*, loose-leaf (Rel 24, October 2020) 3d ed, vol 1 (Toronto: Thomson Reuters, 2019) at ch 4:40, makes that point:

> The holder of an estate in fee simple has, as the main incident of the estate, the right to freely alienate the land, that is, the right to transfer it, both *inter vivos* and on death.…
>
> The statute *Quia Emptores*…removed all restraints on alienation…[and]…is in force in all the common law jurisdictions of Canada under the rules of reception of English law. In some cases, it has been re-enacted or reprinted. The statute has been described as a pillar of real property law, for it still operates, whenever a person sells land, to put the purchaser in the vendor's place.
>
> Since 1290 then, the right of alienation has been an inseparable incident of an estate in fee simple. As a result, the courts have viewed with disfavour any attempts to place restraints on alienation whether by way of a condition or otherwise, and whether directly or indirectly.…
>
> (Footnotes omitted)

See also to the same effect, *Laurin v Iron Ore Co. of Canada* (1977), 82 DLR (3d) 634 (NLSC) at 646.

[51] It follows from all of this that Unocal, as the registered owner of an estate in fee simple to the disputed interest, had the unimpeded right both before and after the effective date of the *2000 Act* to transfer its title, or any part thereof, "free from all interests, exceptions and reservations" (*2000 Act*, s. 13(1)(a) and (b)).

[52] Indeed, having agreed to sell its entire interest to Primrose, Unocal was not only entitled but contractually *obliged* to transfer its entire interest to Primrose. The fact that Unocal had the right to transfer its title did not, of course, mean that it had the right to do so "free from all interests, exceptions and reservations" (*2000 Act*, s. 13(1)(a)). That right was subject to the exceptions specified by the *2000 Act*. The only exception at issue on this appeal is s. 14(a) of the *2000 Act*, which was relied on by the Registrar and GWL. It provides that every title is subject to "any interest that is registered against the title pursuant to this Act". Neither of the respondents claims that the s. 14(a) exception and, more particularly, the Caveat, assist GWL as against Unocal. However, both assert that s. 14(a) means that Primrose, as a *subsequent* acquirer from Unocal, takes subject to GWL's claim to the disputed interest based on the Registrar's error by reason of the Caveat.

[53] With respect, this assertion cannot be reconciled with Unocal's undisputed title to an estate in fee simple interest. A "main incident" of the title to that interest was the right to transfer it. Self-evidently, the right to transfer title has meaning only if an acquirer will receive it. Those are two sides of the same coin. Section 47(1) is also of interest in this context, speaking as it does to the effect of registration of a transfer:

> 47(1) Subject to subsections (4) and (5), every registration of a transfer operates as an absolute transfer of title.

[54] If the Caveat could prevent Unocal from transferring title to its complete estate in fee simple to third parties – all of whom would have deemed notice of GWL's claim to title as a result of the Caveat – Unocal could no longer be said to have title to such an estate. That result would be inconsistent with the grammatical and ordinary sense of ss. 12, 13 and 47(1) of the *2000 Act*, interpreted in light of the purpose of the *Act* and the intention of the Legislature. That purpose, which has two key elements, was summarized in *Dunnison*:

> [75] In summary, the purpose of our land titles legislation is to provide certainty of title and to protect persons who acquire an interest in land *bona fide*, for value and in reliance on the register from unregistered or hidden claims. In our view, however, that is not its only purpose. The legislation also establishes a predictable method of registering interests in land within an established framework. A series of legislative and regulatory provisions

> create a system upon which persons rely daily to search the registry and make personal and business decisions.

See, to the same effect, *Turta* at 443–444.

[55] Although this summary was based on the Court's analysis of the *1978 Act* and predecessor legislation, it applies equally to the *1965 Act* and the *2000 Act*. Unocal acquired its interest in reliance on the features of the *1965 Act* that embody these principles. It continued to hold that interest pursuant to the features of the *2000 Act*, which have the same effect. The interpretation proposed by the Registrar and GWL would undermine certainty of title and the corresponding protection afforded by the register. It would also interfere in the efficient functioning of the system for transferring interests in land.

[56] The conclusion that the Caveat could not affect Unocal's right to transfer, and a third party's right to acquire, Unocal's estate in fee simple is entirely consistent with the purpose and effect of a caveat. As then Master Jackson said in the *Manual*, the registration of a Registrar's caveat does not correct an error or nullify any rights acquired under the error before the caveat is registered. It provides notice that an interest has been claimed and makes subsequent instruments subject to that claim, but *only if the caveator can substantiate the claim if called upon to do so*. GWL's inability to substantiate its claim as against Unocal in this case is fatal to its claim against Unocal and, thus, against Primrose.

[57] How, then, does all of this relate to the question of whether the Regina Registrar had the authority to file the Caveat? Section 153 of the *1965 Act* provided that the Registrar could file a caveat "to prohibit the dealing with land in respect of which it appears to him that an error has been made in the certificate of title or any other instrument". Taken literally, that language could certainly comprehend the Registrar's error, as that error resulted in the erroneous issuance of a certificate of title to Mr. Olney.

[58] However, the modern principle of statutory interpretation demands a purposive interpretation of this provision. In my view, the *purpose* of a Registrar's caveat is to provide notice of claims that could, if substantiated, affect the title or registered interest affected by that caveat. Limiting s. 153 to such claims is consistent with the scheme and purpose of the *1965 Act*. It accords with the key purposes of indefeasibility, reliance on the register and transactional efficiency.

Interpreting s. 153 as authorizing the Registrar to file a caveat relating to a claim that, by its nature, could not affect the title or other interest to which the claim relates would undermine all of those purposes. The scope of the authority granted by s. 153 must be read accordingly.

[59] GWL's claim was not a claim that could affect Unocal's title. There has been no suggestion to the contrary. The Regina Registrar, like the Registrar, knew Unocal was a bona fide purchaser for value and would have removed the Registrar's caveat when asked to do so. In the result, while the answer to the first question is undoubtedly yes, it is of no avail to GWL. The Registrar was not entitled to file the Caveat. As such, the Caveat was not a "duly registered" caveat that constituted or gave notice of an interest within the meaning of the exception specified in s. 14(a) of the *2000 Act.*

[60] I would finally note that the correctness of the conclusion that the Registrar's caveat could not be filed in these circumstances can be readily illustrated by considering the effect of the alternative conclusion; that is, suppose that a caveat *could* have been filed against Unocal's title – the title of a bona fide purchaser for value – based on an error of this kind. The respondents have suggested that either Unocal or Primrose should have taken steps to remove the Caveat. The requirement to do so would, in and of itself, constitute prejudice by impeding Unocal's ability to deal with title to its estate in fee simple until it had done so. More importantly, if a caveat could have been properly filed to prevent a third party from acquiring title to a fee simple interest without being subject to GWL's claim to that title, GWL's claim would be "substantiated" in the sense necessary to justify the caveat. How, then, could the Registrar discharge the Caveat at the behest of Unocal? Unocal would be unable to sell and transfer its interest.

B. 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 surface title or 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?

[61] This question combines Question No. 3 and Question No. 4 in the Registrar's reference.

[62] To begin, it is apparent that, if the Regina Registrar lacked the authority to file the Caveat, the answer to Question No. 3 and Question No. 4 – both of which are predicated on the registration

of a Registrar's caveat providing notice of an error or omission – must also be no. However, the appeal was presented on the basis that the answer to the first question, as asked, is yes, and that implicitly, that the Caveat was duly registered. That being so, I will also address the parties' arguments on that basis.

[63] I would first note that, if this appeal is approached as relating to the Registrar's authority to correct the Registrar's error pursuant to s. 97, the above analysis relating to Unocal's fee simple title is determinative. To reiterate, for ease of reference, s. 97 provides as follows:

> 97(1) The Registrar may correct any error or omission made in the land registry if it appears to the Registrar that:
>
> (a) a title has been issued in error or contains an incorrect or incomplete description;
>
> (b) a registration contains an incorrect or incomplete description;
>
> (c) an entry has been made in error; or
>
> (d) any other prescribed circumstance exists.
>
> (2) A correction may be made pursuant to subsection (1) in any manner that the Registrar considers appropriate, so far as is practicable without prejudicing rights obtained in good faith for value.
>
> …
>
> (4) Every correction made pursuant to this section has the same validity and effect as if the error or omission had not occurred.

[64] The Registrar submits that s. 97 should be interpreted as granting the Registrar a "plenary power" to correct errors or omissions – including, in particular, any and all errors or omissions made by her office – where there is clear evidence on the face of the relevant documents to support the correction. She acknowledges that the Registrar's authority is limited by the requirement to avoid prejudicing subsequent acquirers in good faith and for value. However, it is her position that no such prejudice occurs in the following circumstances:

(a) an error has been made by the Registrar;

(b) a Registrar's caveat has been filed, which identifies the error, before a subsequent purchaser for value has taken title;

(c) the title is a certified mineral title or a surface title; and

(d) the Registrar's caveat provides a detailed description of a specific error and identifies all affected certificates of title.

[65] She submits that, in these circumstances, the Registrar is entitled to examine the title documentation and determine if there are prima facie grounds to make a correction. In her view, the key fact that distinguishes this case from *Olney* and *Krautt* is the notice provided by the Caveat; that is, when a Registrar's caveat provides sufficient notice of an error, any subsequent acquirer takes subject to the underlying claim set out in the caveat and accordingly suffers no prejudice if the Registrar corrects the title. Indeed, she asserts that there is an "underlying title" that remains valid and effective. She notes that a party who takes issue with a correction can seek relief from the court pursuant to s. 107(1)(b) of the *2000 Act*.

[66] Similarly, GWL submits that it has an *equitable* interest in the minerals, and that Primrose – having received notice of that interest pursuant to the Caveat – is not a bona fide purchaser for value *without notice* of that interest.

[67] The positions taken by the Registrar and GWL are predicated on the assertion that a party in the position of GWL has an interest in the minerals that can be asserted against Primrose. However, as is noted above, Unocal had a fee simple interest in the minerals, which included the right of alienation, free from all interests, exceptions and reservations except those specified by the *1965 Act*, and on its implementation, by the *2000 Act*. To reiterate, the right to transfer that title and the right of an acquirer to receive it, and thus to hold and exercise the bundle of rights that constitute fee simple title, are two sides of the same coin.

[68] Here, too, the only exception at issue is s. 14(a), based on the Caveat. The answer is the same as it was in the context of the first question. As GWL had no claim as against Unocal's title, there was no registered interest that could affect Unocal's right to transfer and Primrose's right to receive, hold and exercise the rights constituting a fee simple interest in the minerals. Just as Unocal was entitled to rely on the register when it acquired title to the fee simple interest, so too was Primrose when it acquired title to that fee simple interest. The transfer from Unocal to Primrose made no difference in this respect.

[69] As to the notice provided by the Caveat, the question, as Primrose correctly stated, is notice of *what*? The registration of the Caveat did nothing to improve or increase GWL's rights. GWL's rights could not be asserted against Primrose, a bona fide purchaser for value. Accordingly, even if GWL could be said to have a continuing interest in the land after Mr. Funkhouser intervened, notice of such an interest could not affect Primrose's title.

[70] For these reasons, the Registrar had no authority pursuant to s. 97 to correct title in the circumstances presented by the Primrose–GWL dispute. This interpretation of s. 97 accords with the grammatical and ordinary meaning of s. 97, read in accordance with the modern principle of statutory interpretation.

[71] This too is sufficient to dispose of the second question. However, I will briefly address certain other key arguments advanced by the parties. First, the parties differ as to whether GWL's interest was either *extinguished* or *crystallized* when the Caveat was filed. Primrose takes the position that once Mr. Funkhouser acquired the title as a bona fide purchaser for value, GWL's title was extinguished, the time for correction was done and GWL was left only with a claim against the assurance fund. The Registrar and GWL disagree. They submit that the GWL title was not extinguished, and that the state of title was not crystallized.

[72] As the above analysis demonstrates, it was not necessary to address these issues to answer the questions referred by the Registrar. The question that had to be answered was as to the relationship between competing claims in these circumstances. That answer turned on the nature of the interest in real property owned by a registered owner in the position of Unocal, and its relationship to GWL's claim, based on the relevant provisions of the *1965 Act* and the *2000 Act*. The answer does not change even if GWL could be said to have had a continuing interest in the minerals of some kind despite the transfer to Mr. Funkhouser, a bona fide purchaser for value.

[73] Second, it is my respectful opinion that the case law is not only consistent with but supports these conclusions. In *Krautt*, for example, Ms. Meyers was the person in the position of GWL; that is, she had lost title to the municipality as a result of an error. Mr. Krautt was a bona fide purchaser for value who relied on the municipality's registered title. As Laycraft J.A. said, while the municipality's title was "subject to attack it could be a good root of title for a subsequent bona fide

purchaser for value under *The Land Titles Act*" (at para 23). The Registrar purported to return the mineral title to Ms. Meyers only *after* Mr. Krautt had acquired good title.

[74] The Registrar's caveat, which sufficiently described this error in the chain of title, was filed before Trans-Canada Resources Ltd. leased the disputed minerals from the volunteers who traced their title to Ms. Meyers. Those volunteers were in no better position than Ms. Meyers: see *Kaup v Imperial Oil Ltd.*, [1962] SCR 170 [*Kaup*], and *Olney*. The Court concluded that the ownership interest of the *Krautt* estate, and the title to be issued to him, was not subject to the caveat filed by Trans-Canada Resources Ltd., which provided notice of their leasehold interest. Just as GWL's claim could not be asserted as against Unocal and Primrose, Trans-Canada's claim could not be asserted against Mr. Krautt.

[75] *Krautt* is not on all fours with this case. In *Krautt*, the contest was effectively between the person who lost title as a result of an error, and a bona fide purchaser for value who acquired the title before the caveat asserting a competing interest was filed. Here, the parties in that position would be GWL and Unocal, not GWL and Primrose. However, that distinction is of no assistance to GWL, as, for the reasons explained above, Primrose acquired the same interest as Unocal. In the result, *Krautt*, by affirming that the title acquired by Mr. Krautt was good title as against Ms. Meyers and those claiming through her, assists Primrose, not GWL.

[76] *King (Estate) v Buckle (Estate)*, 1999 ABCA 343, 250 AR 394 [*King*], is to the same effect as *Krautt*. It too involved a contest between competing estates resulting from a Registrar's error. As in *Krautt*, the Court found that the estate of Earl King, a bona fide purchaser for value who had acquired title from the party that had erroneously received it, won out as against the Buckle Estate, the last in a chain of volunteers who traced their title to the person who had erroneously lost it as a result of the error. In its per curiam decision, the Court reasoned as follows:

> [16] The impact of the decision in *Krautt* to the facts of this case is that the Appellant's claim is better than that of the Respondents. Her claim is derived from the title of King, a bona fide purchaser for value, while that of the Respondents, all volunteers, is derived from a correction made by the Registrar, which correction could not create a better title than that held by an intervening purchaser for value. *The Land Titles Act*, R.S.A. 1980, c. L-5, is not designed to protect volunteers. Rather, it is intended to protect purchasers for value. *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* (1984), 30 Alta. L.R. (2d) 379 at 384 (C.A.).

[77] The Court also made the following obiter comment as to the effect of a Registrar's caveat, which accords with the *Manual*:

> [24] … the authorities are clear that the only possible effect of the caveat would be to warn others of a possible cloud upon the title. See discussion at 731 et seq. in *Krautt*. A caveat does not create rights; it merely protects them. *Holt Renfrew & Co. v. Henry Singer Ltd. et al* (1982), 135 D.L.R. (3d) 391 at 419 (Alta. C.A.).

[78] The principles reflected in *King* and *Krautt* have also been applied by this Court in similar circumstances: see, for example, *Re Land Titles Act, Ferguson v Registrar of Land Titles* (1952), [1953] 1 DLR 36 (Sask CA) [*Ferguson*], and *Hudson's Bay Co. v Shivak,* (1965), 52 DLR (2d) 380 (Sask CA) [*Shivak*]. Both of those decisions confirm that the title of a bona fide purchaser for value that acquires title from a registered owner that has title as a result of an error by the Registrar acquires good title. For that reason, the Registrar cannot correct the historical mistake to the prejudice of that bona fide purchaser. In *Shivak*, Woods J.A., citing *Turta*, summarized the central principle engaged on the facts of that case as follows at page 384:

> It is clear from *C.P.R. and Imperial Oil Ltd. v. Turta and Sereda, Montreal Trust Co. and Turta, supra,* and *Prudential Trust Co. v. The Registrar, Land Titles Office, Humboldt Land Registration District* (1957), 9 D.L.R. (2d) 561, S.C.R. 658, that the endorsement "Minerals included" in error on Certificate No. DA 172 on February 17, 1930, may become the root of a valid and indefeasible title in the hands of subsequent *bona fide* purchasers for value. In the *Turta* case it is also made clear that neither failure on the part of the Registrar to comply with all the provisions for registration, nor any omission, mistake or misfeasance on his part in the preparation of the certificate of title shall render it a nullity: *vide* Estey, J., at p. 28. These conclusions apply with equal force to the cancellation of a certificate as well as to its preparation. Hence, Certificate No. 19-33 was cancelled by the Registrar albeit he did not strictly comply with the provisions of the Act in so doing. Once title issued to a *bona fide* purchaser the time for correction of the error had passed. It therefore follows on the present facts that when title issued to the *bona fide* purchaser there was no prior certificate within the meaning of s. 207.

[79] *Kaup* and *Olney* differ in result, in that the original owner that lost its title was able to recover it. However, in both cases, there was no intervening purchaser for value that had acquired title from a registered owner. As such, these decisions are consistent with *King*, *Krautt*, *Ferguson* and *Shivak,* and with the conclusions reached in this decision.

[80] For these reasons, the answer to the second question I have stated – and thus to Question No. 3 and Question No. 4 referred by the Registrar – is *no* in relation to a bona fide purchaser for value.

C. 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?

[81] Section 109 of the *2000 Act* 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.
>
> …
>
> (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.

[82] In *Olney*, both Caldwell J.A. and Cameron J.A. described s. 109 as a curative provision that enables the Registrar to rectify errors of the kind at issue here. However, as Caldwell J.A. also said, the Registrar's authority can only be exercised in the absence of an intervening bona fide purchaser for value. That limitation reflects the fact that the authority granted by s. 109 must be interpreted in the context of the *2000 Act* as a whole. Justice Ball's reasoning in *Farm Credit Canada v Gherasim*, 2016 SKQB 182, illustrates this contextual analysis:

> [14] The manner in which the court may exercise its discretion under s. 109 of the *Act* is not unfettered: its orders must remain consistent with the fundamental principles of the *Act* as a whole. Those principles were summarized by G.R. Jackson, then Master of Titles (now Jackson J.A. of the Saskatchewan Court of Appeal) in *Land Titles in Saskatchewan*, Vol 1 (Regina, Saskatchewan Justice, 1988):
>
> > First, a certificate of title is, subject to certain specified exceptions, conclusive of evidence of ownership, so that it can be relied upon in all transactions concerning that land. This principle is often called the principle of indefeasibility. Second, the scheme of the Act promotes facility of transfer. Relying on the principle of indefeasibility, prospective purchasers can freely deal with anyone purporting to be the registered owner of land. Third, registration of documents is compulsory which means that in order to take priority or have any effect over persons who are not parties to the transaction, the transaction or notice of the transaction must be registered or filed in the appropriate land titles office. Fourth, an

> assurance fund is created to compensate any person who suffers loss or damage through an error in the operation of the Land Titles System or through deprivation in circumstances where the principle of indefeasibility overrides previous common law rights of ownership.

[83] Here, there are intervening purchasers for value. In these circumstances and for the reasons explained above, the only conclusion consistent with the fundamental principles of the *Act* is that Primrose is the owner of the disputed interest and the Caveat must be discharged.

VII. CONCLUSION

A. Answers to the Reference Questions

[84] For these reasons, the answers to the questions referred by the Registrar 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 Caveat filed by the Registrar in this case was not a duly registered caveat**.

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 Caveat filed by the Registrar in this case was not a duly registered caveat.**

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?

> **The Registrar does not have that authority if the new title owner is a bona fide purchaser for value.**

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?

The Registrar does not have that authority if the new title owner is a bona fide purchaser for value.

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 Drilling Ventures Ltd. is the owner of the subject quarter interest in minerals to SW 5-02-31 W1.

B. Costs

[85] No costs were sought or awarded in the court below. Primrose seeks costs of this appeal. The Registrar submits that costs may be a compensable claim from the assurance fund and that Primrose should accordingly first seek recovery in the manner specified in ss. 89–92 of the *2000 Act*. Those provisions contemplate an application to the Registrar and, failing a result satisfactory to the applicant, an action to enforce the claim for a compensation. The Registrar did not take the position that this Court lacks the authority to award costs. Rather, she suggested it would be premature for the Court to make such an order.

[86] In light of the Registrar's position, the issue of this Court's authority to award costs need not be decided. Based on the very limited submissions made on this point, I am not satisfied the Court lacks jurisdiction to award costs. Although this was a reference, it was also in the context of a specific dispute. While the Registrar and her counsel participated in the appeal in a manner that was entirely appropriate to her office, her position as to the proper outcome was in support of GWL's claim and against the interests of Primrose. Primrose was entirely successful. I am loathe to send it back to test the waters of the assurance fund in relation to a claim for costs, which might well result in further litigation.

[87] In my view, it is appropriate to award one set of costs jointly as against the Registrar and GWL on Column 3.

[88] Finally, I wish to thank counsel for all parties for the quality of their factums and their oral submissions, which I found to be of great assistance.

"Barrington-Foote J.A."

Barrington-Foote J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Tholl J.A."

Tholl J.A.