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Novel Form of Agreement to Reserve Surface Rights Payments

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Case commented on: *Schnell v Stene (Heidinger Estate)*, 2022 SKQB 146 (CanLII)

It is not uncommon for a vendor of agricultural lands in western Canada to seek to ensure that the vendor will continue to receive the benefit of surface rights payments payable under the terms of surface rights leases or right of entry orders. Perhaps the most common technique to achieve this result is by way of an agreement to assign rents. This will be effective so long as one is confident that such an agreement creates an interest in land that can be protected by way of caveat. In some jurisdictions legislation deems such an agreement to give rise to an interest in land, (see, for example, *Law of Property Act*, RSA 2000, c L-7 at s 63(1)(b)) whereas in other jurisdictions the point may be more debatable: (e.g. Alberta prior to the 1985 amendment to the *Law of Property Act*: see *Webster v Brown*, 2004 ABQB 321 (CanLII) and *Canadian Crude Separators Inc. v Mychaluk*, 1997 CanLII 14841 (AB QB), [1998] 1 WWR 545.

In this case, the vendor, Clement Heidinger took a different approach and sought to reserve well sites in the agreement for sale out of the transfer. The agreement, executed in April 1973, provided as follows:

> 7. Notwithstanding the fact that title to the said Land shall be transferred to the Purchaser so that he will become the registered and beneficial owner thereof, it is distinctly understood and agreed that so long as the surface leases described in Schedule "A" annexed hereto or any extension or renewal of any part or parts thereof remains in force, the reservation and reversion of that part of the said Land leased under the said leases shall remain in the Vendor.
>
> 8. The Vendor herby reserves all rentals and emoluments and benefits of every nature or kind reserved to him under the said surface leases or to which he may become entitled under the said surface leases.
>
> 9. The Vendor shall have the right to register and maintain against the title to the said Land a caveat based on the within Agreement and which caveat shall remain in force so long as the said surface leases or any extension of renewal thereof, shall remain in effect.
>
> 10. Notwithstanding anything herein contained, it is distinctly understood and agreed between the Parties hereto that in the event that any payments become due from Imperial Oil Ltd., its successors or assigns, with

> reference to any crop damage that may occur from and after the date hereof, then in such event, the Purchaser shall be entitled to such payments and the Purchaser shall also be entitled to any payment that may be made or payable on the abandonment of the wells referred to in the said surface leases or for the restoration thereof as defined by The Surface Rights Acquisition and Compensation Act.
>
> 11. Notwithstanding anything herein contained, it is distinctly understood and agreed that the Purchaser shall be entitled to negotiate and in his discretion approve of the terms of any arrangement whereby lands other than those presently leased under the said surface leases shall be leased or granted for the purpose of a wellsite or for any other purpose, and the Purchaser shall be entitled to all payments and benefits of every nature or description whatsoever with respect to such additional lands. (*Schnell v Stene (Heidinger Estate)*, 2022 SKQB 146 (CanLII) at para 14).

There were as many as six surface leases described in Schedule A.

At some point the purchaser, David Schnell, took the position that he was no longer bound by this arrangement and commenced this action essentially alleging that the parties could not have contemplated that this arrangement would go on indefinitely, especially since the continued profitability of the wells on the land was due to a technology (horizontal drilling) that had not been developed in 1973.

Justice Naheed Bardai rejected Schnell's arguments and confirmed that the surface rental payments should continue to be made to Heidinger estate (Clement having died in 1984). I think that the decision is clearly correct, but I have two observations about the decision. The first observation is that this was an easy case insofar as there was no intervening purchaser for value. The Heidinger interests had passed to Clement's estate and the Schnell interests had passed to Schnell Holdings (at para 5) and it is therefore difficult to understand how Schnell Holdings could claim to be in a better position than David Schnell. The matter could still be resolved by way of contract without needing to resort to property principles: see, by way of analogy, *Malmberg v Boyd*, 2020 ABQB 80 (CanLII).

The second observation is that while Justice Bardai frames the issue as one of property, and therefore has to consider whether or not the Heidinger interests amount to interests in lands (at para 26), he never really discusses the nature of the Heidinger interests (or indeed whether a caveat had been filed to protect those interests, and, if so, what was the nature of the interests in land that the Heidingers claimed to have). In my opinion the Heidinger interests are probably best described as a series of determinable equitable estates in fee simple. The legal title to the lands is in the name of Schnell or Schnell Holdings, but the Heidingers have a series of equitable estates, each of which continues for so long as that particular lease, or its extension or renewal, continues in force. Such equitable interests would be enforceable against purchasers provided they were protected by a caveat that correctly described the nature of those interests.

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