

# *the negotiator*

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Indefeasibility Mic Drop

The Supreme Court of Canada Issues Two New Decisions on the Duty of Good Faith



# Indefeasibility – Mic Drop

The SK Court of Appeals Defends the Torrens System

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**The Saskatchewan Court of Appeal decision in *Primrose Drilling Ventures v Registrar of Titles*, 2021 SKCA 15 has roused me from my COVID induced lethargy and inspired me to write a *Negotiator* article. Just need to reach over my growing COVID beer gut to reach the keyboard. Hrumph.**

Why am I so inspired? Partly because, you know, you can only play so much Catan in a year. But also because *Primrose* highlights the ever present tension in our legal system between:

- the fundamental, incontrovertible and unassailable necessity for certainty under a *Torrens* system of land ownership (certainty); vs
- the frustratingly common impulse to throw certainty under the bus, in the name of equity, fairness or exceptions to indefeasibility (fairness).

The odd twist in this case is that the party assaulting certainty in the name of fairness is none other than the Saskatchewan Registrar of Titles. Bizarre.

## INDEFEASIBILITY

First a tiny bit of background. The Google tells us that indefeasibility means:

A right or title in property that cannot be made void, defeated or canceled by any past event, error or omission in the title.

Indefeasibility is the cornerstone of every *Torrens* system of land registration. It is, to quote Martha Stewart, a good thing.

## TORRENS

*Torrens* is a short hand description of the statutory regimes, codified under Provincial land titles acts, that deal with title to privately held fee simple lands. A *Torrens* system:

- replaces the costly and uncertain common law rule of *nemo dat* (no one gives what they do not have), which applies to private conveyancing deed systems; and

*The issue in Primrose is a Registrar's caveat on a mineral title. A Registrar's caveat is a warning to anyone dealing with a certificate of title that the Registrar has examined the historical chain of title and discovered an error. In this case, the Registrar identified an historical registration error.*

- provides that registration of a certificate of title, or caveats (to a lesser degree), in a Government run registry, is proof of title, good against the world.

## REGISTRATION

Indefeasibility under a *Torrens* system is subject to certain statutory exceptions, but those are relatively minor, so let's not get distracted. Rather, the fundamental principle is that a new owner, through either a new certificate of title, or registration of caveat, takes its interest subject only to

prior registrations and caveats on title. This is often referred to as curtain and mirror principles.

OK, enough background. For all of you who have heard me drone on about the above ad nauseam, my apologies. However, *Primrose* has convinced me that it is crucial to keep spreading the Gospel of certainty, and the fundamental value of indefeasibility, lest we succumb to the temptations of fairness.

## LAND TITLES ACT, 2000 – AN ASIDE

Quick aside. This case also deals with possible changes in Saskatchewan *Torrens* law due to legislative changes under the Saskatchewan Land Titles Act (LTA). Remember, *Torrens* law is based solely on legislation, it is not a common law legal principle. Ergo, the particular wording of the LTA is crucial. Waaaay back in the year 2000, the Saskatchewan government chose to rewrite its perfectly good LTA under a new act called, wait for it, *The Land Titles Act, 2000* (2000 Act). Zero points for creativity in the new name. Anyway, the somewhat odd drafting changes from the old LTA to the 2000 Act had some of us concerned that the 2000 Act might someday be interpreted as a step back from Saskatchewan being a true *Torrens* system. The Court in *Primrose* goes to



great lengths to emphasise that the 2000 Act reflects a fulsome Torrens system. Phew, bullet dodged.

### REGISTRAR'S CAVEAT

The issue in *Primrose* is a Registrar's caveat on a mineral title. A Registrar's caveat is a warning to anyone dealing with a certificate of title that the Registrar has examined the historical chain of title and discovered an error. In this case, the Registrar identified an historical registration error. In 1947 the land titles office incorrectly read a transfer of land and created a certificate of title for minerals in the name of the wrong person (Upchain Error). Very sad, but as they say, life happens.

This Registrar's caveat created a cloud on title. A cloud which is super duper annoying when an oil company is like, you know, trying to lease land to drill a well. The problem being that after taking a lease, and registering a caveat, that lease and caveat are subject to the risk set out in the Registrar's caveat, as the Registrar's caveat is registered in priority to the lease caveat. If you are a low risk oil company, this means you simply cannot drill. Crap.

### A BONA FIDE PURCHASER FOR VALUE (BPFV)

My annoyance with *Primrose* is not the fact that a Registrar's caveat was filed against the mineral title. In very, very limited circumstances this may be required. My problem is that it was fundamentally obvious that the Registrar's caveat should not have been registered. The Registrar's caveat was filed in 1973, in reference to the Upchain Error in 1947. The chain of title clearly showed that after 1947 a BPFV took title to the mineral lands under a transfer of land and registration of a new certificate of title. Under a Torrens system, you simply cannot try to fix the Upchain Error after a BPFV takes title to the lands. Certainty requires that a BPFV takes free and clear of any prior infirmities or errors in the chain of title. Full stop. We are done. Go home. Nothing to see here.

### THE REGISTRAR'S POSITION

Once the Registrar was advised of the obvious wrongness (is that a word?) in the filing of the Registrar's caveat, ISC should have simply removed the caveat from title and moved on. This did not happen. Instead, the Registrar took the position that fairness matters more than certainty. As the Court states:

[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. ...

[65] 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. (emphasis mine)

To make things worse, the trial decision sided with the Registrar and pretty much ignored the wording of the 2000 Act, and 70 years of Torrens case law starting with Supreme Court of Canada decision in *Turta - Canadian Pacific Railway Co. Ltd. v Turta*, [1954] SCR 427. Arrgghh.

## THE COURT'S DECISION

Thankfully the Court of Appeal reversed the trial decision, ordered that the Registrar's caveat be removed from title and reaffirmed certainty and the black letter law principle that a BPFV takes indefeasible title upon registration:

[39] ...as Cameron J.A. said In *Olney* ... **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 was 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. ... (emphasis mine)

Or, one could reference the 2000 Act, like the Court did:

13(1) Where the Registrar issues a title pursuant to this Act:

(a) ..., the registered owner holds the title free from all interests, exceptions and reservations; and

(b) ...:

(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...

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; ...

Indefeasibility. Mic drop! Happy COVID. See everyone in 2022. Hopefully. ♣