

## TORRENS LAND SYSTEM — CAVEATS

### *BENSETTE AND CAMPBELL v. REECE*

The evolution of the effect of a caveat filed under the Land Titles Act of Saskatchewan, R.S.S. 1965, c. 115, (and most likely, of Alberta, R.S.A. 1970, c. 198) appears to have reached yet another milestone as evidenced by the majority judgment of the Court of Appeal of Saskatchewan reversing the decision of Mr. Justice Disbery in *Bensette and Campbell v. Reece*.<sup>1</sup> The facts of the case were as follows:

By an agreement in writing dated August 30, 1927, the Burke Land and Development Company Limited agreed to give, grant, bargain, sell, assign and transfer unto the plaintiff, Edward F. Bensette and William J. Graham (deceased) at the time of the action and represented therein by Shirley Sylvia Campbell) a six per cent royalty in all oil, gas, petroleum and mineral oils, mines and minerals acquired by the Burke Company in a number of parcels of land including the S.W. ¼ of Section 9 - Township 47 - Range 27 - West of the 3rd Meridian in the Province of Saskatchewan.

The plaintiff and his partner gave notice by caveat registered in the appropriate Land Titles Office as Instrument No. A.J. 3252 on May 23, 1928, on, among the lands mentioned in the agreement, the title to the S.W. ¼ of Section 9, that they claimed an interest in the land under the agreement, and reciting in the caveat that the Burke Company had sold, assigned and transferred the royalty to them.

Subsequent to the registration of the caveat, the land was transferred several times. Ultimately it was transferred to the defendant Cecil Nathaniel Reece, in whose name a certificate of title was issued on February 4, 1957, subject to the caveat.

On February 15, 1957, Reece caused notice to lapse the caveat to be served by the Registrar pursuant to section 147 of the Land Titles Act of Saskatchewan, R.S.S. 1953, c. 108.

The notice to lapse did not reach the plaintiff because the plaintiff and his partner had failed to file appropriate changes of address for service in the Land Titles Office in respect of the caveat; consequently the plaintiff took no steps to prove in court the interest claimed in the caveat within the thirty day period allowed under the Land Titles Act of Saskatchewan and the caveat, therefore, lapsed in accordance with the Act.

On April 2, 1957, a new certificate of title, free and clear of the lapsed caveat, was issued to the defendant Reece.

On August 31, 1965, the plaintiff registered another caveat, No. 65-B-07266, against the new certificate of title purporting to protect the royalty interest claimed under the agreement of August 30, 1927. The plaintiff failed to obtain a judge's order as required by the Act before filing the second caveat, but subsequently commenced the action requesting a declaration of entitlement to a six per cent royalty on all mines and minerals, an accounting for the royalty interest in respect of production prior to the date of the action and an order that caveat No. A.J. 3252 had been validly registered and that caveat No. 65-B-07266 was validly registered.

Initially, a caveat had the effect of being a temporary stop-order preventing, during a specified period after its registration, any other dealings with the land

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<sup>1</sup> (1969) 70 W.W.R. 705, *rev'd* (1973) 34 D.L.R. (3d) 723, [1973] 2 W.W.R. 497.

involved. Within that period, a caveator was permitted to register the prescribed form of instrument under the Land Titles Act relating to the interest. For example, a sales agreement could be protected by a caveat until the execution and registration of the prescribed form of transfer occurred; similarly an "equitable" mortgage could be protected pending execution and registration of the prescribed form of mortgage. Until the expiration of the specified period, no one else could "get on the register", but if the proper form was not registered within the period, the caveat would automatically cease to have any effect.<sup>2</sup>

Later on, other persons were permitted to register instruments after a caveat had been filed, but subject to the caveat, and the caveat was thought to "crystallize" all legal and equitable interests affecting the title of the lands involved as at the time of filing the caveat.<sup>3</sup>

More recently the caveat has been acknowledged to give a caveator nearly the same protection in respect of his interest as though he had registered the proper form of instrument prescribed under the Land Titles Act in respect of his interest.<sup>4</sup>

For many years, it was thought that if a caveator, in his caveat, selected and specified one or more rights granted by an agreement referred to in the caveat, his protection under the caveat was restricted to those interests therein specified.<sup>5</sup> Recently, however, that concept also seems to have been discarded and recognition is given generally to all rights and interests granted under the agreement, notwithstanding that not all the interests are specified in the caveat.<sup>6</sup> Also, caveats are now said not only to protect the caveator's interests but to protect, as well, any interests in the agreement upon which it is based in favour of any party to that agreement, other than the caveator.<sup>7</sup>

To further increase the puzzle, the *Bensette* decision appears to add two more effects to the "list". Firstly, Mr. Justice Hall declares:<sup>8</sup>

As the rights of a caveator are not created by filing the caveat, they cannot be extinguished by the lapse of the caveat, at least so long as the party who contracted to give the caveator his interest in the land remains the registered owner.

This, of course, means that privity of contract cannot be destroyed as between the original parties to a contract merely by the lapse of a caveat filed by the grantee to protect the contract, while the grantor is the registered owner of the certificate of title against which the caveat was filed. Mr. Justice Hall continues:<sup>9</sup>

If the caveat is in force at the time of transfer, the claim attaches to the estate acquired by the transferee.

He is, of course, referring to the establishment of privity of estate between a subsisting caveator and a transferee upon the registration of a transfer.

When analyzing the right to lapse a caveat the learned Justice states:<sup>10</sup>

The subsequent lapse of the caveat does not have retroactive effect. The estate acquired by a transferee, having become subject to the claim at the moment of transfer, is not improved or enhanced by the lapse. An improvement or enhancement can only be obtained by having the claim of the caveator resolved by litigation or otherwise.

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<sup>2</sup> Territories Real Property Act, R.S.C. 1886, c. 51, s. 100.

<sup>3</sup> *McKillop and Benjafield v. Alexander* (1912) 45 S.C.R. 551.

<sup>4</sup> *Gas Exploration Co. v. Cugnet* (1954) 12 W.W.R. (N.S.) 177; *Freeholders Oil Co. v. Runge* (1963) 41 W.W.R. 443.

<sup>5</sup> *Ruptash v. Zawick* [1956] S.C.R. 347.

<sup>6</sup> *Zeller's (Western) Ltd. v. Calford Properties Ltd.* [1972] 5 W.W.R. 714.

<sup>7</sup> *Hughes v. Gidosh* [1971] 1 W.W.R. 641.

<sup>8</sup> 34 D.L.R. (3d) 723 at 737.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

So long as both privity of contract and privity of estate exist between the caveator and the transferee, there can be no quarrel with that statement. However, when endeavoring to apply the foregoing concepts to the case under review, Mr. Justice Hall concludes:<sup>11</sup>

By virtue of section 150 and 157, the interest of the appellants [the caveators] in the land is attached to the title acquired by the respondent [the registered owner]. The consequence is that the respondent is in the same position with regard to the agreement of August 30, 1927, as if he were an original contracting party.

From his conclusion, it would appear that the first of the newest effects of a caveat is the establishment, by the acceptance of a certificate of title that is subject to a caveat before its creating transfer, of privity of contract between the new registered owner and the subsisting caveator who is usually claiming an interest under an agreement to which the new registered owner was not a party. The conclusion, academically and from a practical standpoint, is in my opinion, to say the least, regressive.

Secondly, Mr. Justice Woods, in the *Bensette* case, dealing with the application of section 237 of the Land Titles Act of Saskatchewan (the counterpart of section 203 of the Land Titles Act of Alberta), and in discussing the case *Union Bank of Canada v. Boulter-Waugh Ltd.* states:<sup>12</sup>

The court held that there being no fraud, the caveator, having allowed its caveat to lapse, could not invoke the knowledge of the mortgagee of the existence of the caveat or of its contents in order to maintain its priority over the mortgagee.

The contest on the present facts, however, is not between two encumbrances[sic], but rather between the registered owner of the fee simple and the owner of a royalty interest.

There seems to be the undesirable inference in the statement that henceforth, whenever a registered owner causes the lapse of a caveat protecting an agreement to which he was not a party, he may not be entitled to the same benefit (*i.e.*, the removal of the caveat without further consequences) that would have accrued to him had he merely been another encumbrancee (on the same certificate of title against which the caveat was registered) who also was not a party to the agreement protected by the caveat.

It seems, therefore, that the second of the newest effects of a caveat is to afford the caveator greater protection against a registered owner than against another encumbrancee.

The result of that protection in relation to a registered owner is, of course, the introduction of further considerable doubts as to the rights of the registered owner, particularly when considered in view of the original intent of the Torrens system (*i.e.*, that a registered owner holds his certificate of title "good as against all the world", even, on occasion, as against benefits claimed by encumbrancees in the same title).

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<sup>11</sup> *Id.* at 737, 738.

<sup>12</sup> (1919) 58 S.C.R. 385, [1919] 1 W.W.R. 1046, 46 D.L.R. 41.

<sup>13</sup> 34 D.L.R. (3d) 723 at 728.

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