KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 25**

Date: **2024 02 20**
Docket: KBG-YT-00200-2022
Judicial Centre: Yorkton

BETWEEN:

CITY OF MELVILLE

APPLICANT

- and -

JORDAN KELLER

RESPONDENT

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released April 24, 2024. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

Milad Alishahi — for the applicant
Randy Kachur, K.C. — for the respondent

JUDGMENT — DAWSON J.
February 20, 2024

INTRODUCTION

[1] The applicant, the City of Melville [Melville], sought an order pursuant to ss. 109(1)(a) of *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*Act*] and the inherent jurisdiction of the court, directing the Registrar of Land Titles to register an easement in favour of Melville on the SE Sec 04 Twp 23 Range 06 West of the 2nd Plan No. 102280801 [Southeast Quarter 4]. The respondent, Jordan Keller, opposed the application. Thereafter, Melville sought a declaratory order, asking the court to declare that Melville had an easement on the Southeast Quarter 4 as at June 8, 1962 or January 30, 1963.

BACKGROUND FACTS

[2] On January 30, 1963, Melville caused a Caveat [Caveat] to be registered on the title for the Southeast Quarter 4. At the time the Southeast Quarter 4 was owned by the personal representatives of the estate of Edward Miller. The Caveat identified that Melville was claiming an interest as "grantee under an unregistered easement agreement dated August 23, 1962 between the personal representatives of the estate of Edward Miller and Melville". Melville, in the Caveat, claimed an interest against the whole of the Southeast Quarter 4, except for a square parcel measuring 660 feet in length and width in the northeast corner of the said Southeast Quarter 4 and, excepting all of Block 4 in the Southeast Quarter 4. In this application, Melville asserted that there was an easement in favour of Melville on the Southeast Quarter 4 in relation to a lagoon drainage line and that the Caveat should be registered and converted to an easement or the court should declare Melville had an easement.

[3] Chris Bruce [Mr. Bruce], the Acting City Manager for Melville attested, in support of Melville's application, that in 1962 Melville began working on a sewage disposal program and that it required a number of easements on various lands, including an easement on the Southeast Quarter 4. Mr. Bruce attested that the sewage disposal program required Melville to install a sewage pressure main line and lagoon drain line to the drainage ditch across the land.

[4] Mr. Bruce attested further that on June 8, 1962 Melville executed easement agreements with the then owner, Rhip William, of the Southeast Quarter 4. Melville filed in evidence a copy of an Easement Agreement between Rhip William in Melville dated June 8, 1962 on the Southeast Quarter 4.

[5] Mr. Bruce attested in his reply affidavit that on June 11, 1962 Melville passed Bylaw No. 3/62 authorizing the expropriation of the Southeast Quarter 4 for an easement for the sewage pressure main and the easement for the lagoon drain line

drainage ditch on the Southeast Quarter 4. A copy of the June 11, 1962 minutes of Melville's meeting of council minutes was filed, which refer to Bylaw 3/62 which authorized for Melville to expropriate the portions of the Southeast Quarter 4 (Exhibits "H" and "I" to the affidavit of Chris Bruce sworn January 12, 2023).

[6] Mr. Bruce attested further that on June 14, 1962 Melville gave notice to the estate of Edward Miller that Melville required two easements on the Southeast Quarter 4 in connection with the sewage disposal program. The notice advised that Melville required a right-of-way measuring 33 feet wide and 0.26 acres in length for the sewage pressure main line. The notice advised further that Melville also required a right-of-way measuring 33 feet wide and approximately 1.62 acres in length for the lagoon drain line drainage ditch. The said notice advised the Estate of Edward Miller that since the parties had been unable to come to an agreement regarding the easements, Melville intended to expropriate a portion of the Southeast Quarter 4 for the purpose of obtaining easements. A copy of the notice was filed as Exhibit "E" to Mr. Bruce's affidavit.

[7] Mr. Bruce attested further in his reply affidavit that on August 23, 1962 Melville executed an easement agreement with the administrators of the estate of Edward Miller in favour of Melville on the Southeast Quarter 4. Mr. Bruce did not attest that he had personal knowledge of this.

[8] Mr. Bruce attested that on January 28, 1963, at a city council meeting of Melville, counsel passed resolution 25/63 which resolution stated:

> Empey – That we file a caveat against the Miller Estate (SE 1/4 4-23-6-W2nd) on the basis of the present easement signed by them and that the City Clerk be authorized to sign the said caveat on behalf of the City and affix the Corporate Seal – Redenbach. Carried.
>
> (Affidavit of Chris Bruce sworn January 12, 2023, Exhibit "J")

[9] According to the minutes of the Melville council meeting dated January 28, 1963 (Exhibit "J" to the reply affidavit of Chris Bruce sworn January 12, 2023), the Melville solicitor explained to council at that meeting the progress made to date in the expropriation proceedings for the sewage lagoon situation.

[10] Thereafter on January 30, 1963 Melville registered Caveat No. 63Y00704 on the Southeast Quarter 4 (the Caveat in issue) which the Caveat claimed an interest in an unregistered easement dated August 23, 1962.

[11] Sometime after 1963, Valentine Keller and Clara Keller became the registered owners of the Southeast Quarter 4.

[12] Mr. Bruce attested that Melville has been unable to locate a copy of the Southeast Quarter 4 Easement Agreement in its records. He noted that the Caveat references the Southeast Quarter 4 Easement Agreement. The Caveat was registered on title as a "CNV Caveat".

[13] Mr. Bruce attested further that on December 11, 2012 Melville executed a public utility easement agreement with Valentine Keller and Clara Keller, the then-owners of the Southeast Quarter 4. The public utility easement agreement granted Melville a right-of-way on Lot 1 of the Southeast Quarter 4, being 70 feet in width throughout its entire length to maintain the sewage force main pipeline. The public utility easement was registered on the Southeast Quarter 4 title on December 27, 2012 as a public utility easement.

[14] In January 2019, the respondent Jordan Keller became the registered owner of the Southeast Quarter 4. At the time of Jordan Keller obtaining title, the title was subject to two caveats in favour of Melville, both registered on January 30, 1963 as Converted Instrument No. 63Y00704 (the Caveat in issue here).

[15] Mr. Bruce attested further that since 1962, Melville's sewage works have expanded and the operation of the sewage works involves the discharge of effluent on to the Southeast Quarter 4.

[16] Mr. Bruce attested that in early 2020 Melville made plans to expand the lagoon and that on February 10, 2020 Melville obtained a renewed permit from the Water Security Agency to operate a sewage works treatment system on the northeast quarter. In 2022 Melville began work to expand the lagoon in connection with the sewage works treatment system.

[17] In 2022, Melville entered upon a portion of the Southeast Quarter 4, removed a fence from the Southeast Quarter 4, and discharged sewage effluent onto a portion of the Southeast Quarter 4, without first obtaining the consent of Jordan Keller. Counsel for Jordan Keller, in correspondence to Melville dated October 3, 2022, alleged that city workers had entered upon his lands to conduct work related to the expansion without Mr. Keller's permission or consent.

[18] Jordan Keller attested in an affidavit filed in opposition to this application that he did not give Melville permission to enter upon his lands or cause damage to the lands. He attested that one source of damage caused by Melville was the discharge of sewage effluent onto a southeast portion of Southeast Quarter 4. Jordan Keller attested that such sewage effluent has damaged gravel deposits present on his land. Further, Mr. Keller attested that a Melville agent or employee removed one-half mile of fence on the Southeast Quarter 4 such that Mr. Keller could no longer pasture his livestock on this land.

[19] Mr. Keller attested further that Melville indicated that Melville responded to his complaint by telling him that Melville had an easement agreement registered against the land. But when Mr. Keller asked Melville to give him a copy of the easement

agreement, Melville was unable to tender any evidence to prove the existence of an easement agreement.

[20] When Melville was unable to provide documentation to prove the existence of an easement agreement or an easement, Mr. Keller, on November 16, 2022, caused a notice to lapse the CNV Caveats to be registered with Information Services Corporation [ISC]. The notice to lapse advised that the Caveat would lapse in 30 days unless a court order was registered against the title extending the interest. The Registrar of ISC advised that the notice period would be extended until January 31, 2023 to allow Melville to bring an application for such an order.

[21] Melville then brought the within originating application, pursuant to ss. 109(1)(a) of the *Act* and the inherent jurisdiction of the court, seeking an order directing the Registrar of Land Titles to register **an easement** in favour of Melville against the Southeast Quarter 4.

[22] Melville did not bring any application to extend or confirm the registration of the said Caveat No. 63Y00704.

[23] It is undisputed that the parties have been unable to locate the alleged easement agreement allegedly signed on August 23, 1962. Specifically, as no one has been able to locate a copy of the alleged easement agreement upon which Melville asserts the Caveat is based. Neither Mr. Keller nor Melville is able to attest as to what, if any, rights Melville has to discharge sewage effluent onto the Southeast Quarter 4.

[24] The parties came before this Court and argued the matter of Melville's application that the court order the Registrar of ISC to register an easement in favour of Melville against the Southeast Quarter 4 in January 2023. The matter was reserved. I ordered the Caveat extended while the matter was under review.

[25] While the matter was under reserve, counsel on behalf of Melville wrote, on May 10, 2023, to the Registrar of ISC requesting that the Registrar vacate the lapse procedure interest filed by Mr. Keller because, counsel advised the Registrar that Mr. Keller was no longer the owner of the Southeast Quarter 4. Counsel on behalf of Melville did not notify counsel for Mr. Keller that he was writing to the Registrar for this relief. Counsel for Melville did not advise this Court of their request to the Registrar while this matter was in reserve.

[26] On May 19, 2023 the Deputy Registrar of Titles responded to counsel for Melville stating the following:

> This reply is in response to your correspondence of May 10, 2023 requesting the Registrar of Titles to vacate the Lapse Procedure Interests Registered on Title #156463735.
>
> I am writing to advise that the Lapse Procedures registered on the subject title were validly registered under the [*sic*] *The Land Titles Act, 2000* and therefore, the Registrar does not have authority to vacate the registrations.
>
> I recognize that the transfer of ownership has created an issue regarding appropriate standing to remove the Lapse Procedure interests. However, as the matter is before the Court, your client may want to seek direction from the court with respect to removing the interests.
>
> I trust this is helpful information. Should you have any questions please feel free to contact me directly.

[27] On May 23, 2023 this Court was advised that the Southeast Quarter 4 was no longer owned by Mr. Keller. Melville at that point asserted to the court that Mr. Keller no longer had standing to lapse the Caveat.

[28] The parties came back before the court on June 6, 2023. At that appearance, counsel on behalf of Melville asserted orally that Mr. Keller had sold the Southeast Quarter 4. However, neither party provided the court with any documents or evidence in respect of the alleged transfer and neither party identified the terms of this agreement for the sale of the said land between Mr. Keller and the new owners. Counsel on behalf of Melville took the position that Mr. Keller no longer had any standing to

lapse the Caveat. Counsel on behalf of Mr. Keller maintained that Mr. Keller had standing. The court told the parties that they needed to provide evidence and argument on these new issues, not just state positions.

[29] The matter was adjourned to June 20, 2023. At that hearing, Mr. Kachur, counsel on behalf of Mr. Keller, advised that after the June 6, 2023 court appearance, he had provided a copy of the contract of purchase and sale wherein Mr. Keller sold the land and a copy of a joint profit sharing agreement that Mr. Keller entered into simultaneously with the new owners Peter, Marianne, Lucas and Nils Aeberhard [Aeberhards]. Counsel advised that Mr. Keller, prior to selling the land, registered a miscellaneous interest against gravel deposits beneath the surface of the land in the ISC Land titles registry (on July 24, 2023) pursuant to a joint profit sharing agreement (registered as Interest # 197119301).

[30] Mr. Kachur advised that he provided this information and documentation to counsel for Melville, but he had not heard back from counsel for Melville since. Mr. Kachur asserted that Mr. Keller continued to have standing at common law and pursuant to the *Act* in respect of the notice to lapse.

[31] Melville's counsel acknowledged they had received the documents from Mr. Kachur. Melville's position continued to be that Mr. Keller no longer had standing to lapse the Caveat. The court again told the parties they had to file evidence and written argument on this issue as nothing was before this Court. Melville was required to file their evidence and material by July 7, 2023. Mr. Keller was to file his response by July 28, 2023, after which time the parties would arrange for a mutually convenient date to argue the matter before the court. Melville continued to take the position that because Mr. Keller was no longer the registered owner of the land, he lost any interest that he had to continue the lapsing procedure. The issue at that point as articulated by counsel for the parties, was whether the miscellaneous interest registered by Mr. Keller

continued to give Mr. Keller standing to continue his application to lapse the CNV Caveats.

[32] Melville filed their material on July 7, 2023. Mr. Keller sought an extension of the filing deadline for his material. He filed his affidavit and brief of law on August 11, 2023.

[33] The parties eventually arranged for a date convenient to them to come back before the court. On September 28, 2023 the parties appeared before this Court. At that point, the position of Melville changed. Melville identified that based on the agreements between Mr. Keller and the new owners of the land, it was Melville's position that, while Mr. Keller did not have standing as a registered owner, Melville acknowledged that Mr. Keller continued to have a registered interest in the property and as such had standing. Melville suggested that Mr. Keller's standing was pursuant to ss. 46(1)(c) of the *Act*. This, obviously, was a significant change in the position from the one Melville had been taking for almost five months.

[34] Counsel on behalf of Melville also advised that they had reached an agreement on July 6, 2023 with the new owners of Southeast Quarter 4. He advised Melville had executed an easement agreement with the now current owners of the Southeast Quarter 4. He advised that pursuant to the terms of that new easement agreement, the new owners recognized the 1962 easement agreement and recognized that the easement was registered as a caveat. The new easement agreement executed between Melville and the current owners of the Southeast Quarter 4 is now registered against the title.

[35] Counsel on behalf of Melville took the position that despite the transfer of the property to the new owners and the registration of the easement on the property, the issue raised in the originating application is not moot. Melville took the position that despite the current registration of an easement, based on the 2023 agreement

between the current owners and Melville, Melville still needs recognition that the 1963 Caveat represented a valid easement agreement. Melville identified that if it relies only on the current registration, the easement is only effective from the date of the current easement agreement/registration. Melville identifies that if the Caveat is lapsed there is nothing to establish that Melville had a valid easement and this could result in significant liability for Melville.

[36] However, Melville was no longer asking this Court to register an easement. Melville sought declaratory relief (despite not bringing any such application nor amending its application) declaring that Melville had a valid easement based on the Caveat registered in 1963. Melville suggests that this Court has that discretion pursuant to Rule 3-49(1)(c) of *The King's Bench Rules* and s. 109 of the *Act*. Melville suggested it is in essence seeking the same relief with a minor revision.

[37] As stated, Melville stated that it no longer needs the court to order the Registrar to register an easement, but instead, it seeks a declaration that the original Caveat was an easement based on the 1962 agreement. Counsel for Melville suggests there is some evidentiary value in the fact that the current owners recognized the 1962 easement agreement, although he acknowledged it does not provide substantial evidentiary value.

[38] Counsel for Mr. Keller suggested that the fact that the current owners choose to recognize a 1962 easement has no evidentiary value and certainly does not bind Mr. Keller in any manner. Mr. Kachur suggested that the application should be determined on the basis of the original application and that the intervening events had no effect on the application.

[39] Counsel for Mr. Keller suggested that Melville's request for a declaration is simply another way of framing what they sought in the original application. Counsel for Mr. Keller pointed out that Melville should have brought an application to have the

Caveat declared valid, but instead it chose to bring an originating application seeking the registration of an easement. Counsel for Mr. Keller submitted that Melville cannot now ask for different relief. Mr. Keller indicated that the real issue continues to be whether the Caveat should be lapsed or remain on title, and as Melville is unable to prove that the Caveat supports an easement agreement, the Caveat should lapse. Mr. Keller submits that both sides are really seeking a ruling as to whether the Caveat should continue on the title.

[40] Mr. Kachur sought costs against Melville, pointing out that Melville had the sale and gravel sharing documents, but that Melville continued to file materials and deny that Mr. Keller had standing. He suggested costs should be awarded as Mr. Keller had to respond to Melville's materials and position, despite Melville now advising something different before the court.

ISSUES

1. **Does Jordan Keller continue to have standing to lapse the CNV Caveats registered by Melville after selling the land to a third party?**

2. **Should relief be granted to the applicant either directing the Registrar to register an easement and/or should the court make a declaratory relief order that Melville had a valid easement as at January 1963?**

ANALYSIS

1. Does Jordan Keller continue to have standing to lapse the CNV Caveats registered by Melville after selling the land to a third party?

[41] The *Act* and the *Land Titles Regulations, 2001*, RRS c L-5.1 Reg 1 [*LTR*] are relevant to the issue.

[42] Section 46 of the *LTR* provides the following:

> **Lapsing**
>
> 46(1) Subject to section 47, any of the following persons may apply to the Registrar to lapse a registered interest or interest share:
>
> (a) the registered owner of the affected land;
>
> (b) **the holder of an interest or share against which the interest or share sought to be lapsed is registered;**
>
> (c) **any person with a registrable interest pursuant to section 50 of the Act**;
>
> (d) a person who is a member in good standing of the Law Society of Saskatchewan acting on behalf of a person mentioned in clause (a), (b) or (c).
>
> [Emphasis added]

[43] According to ss. 2(s) of the *Act*, an "interest" is defined as "any right, interest or estate, whether legal or equitable, in, over or under land recognized at law that is less than title."

[44] Subsection 2(t) of the *Act* provides that an interest is a "person who is registered in the land titles registry as a holder of an interest".

[45] The purpose of registering an interest on title to land is to maintain a proprietary interest in the land. This is because an interest has also held to be a proprietary right, as distinct from a mere contractual right. To be valid, a registered interest is only effective according to the terms of the instrument or law on which the interest is based and is not deemed to be valid through registration. This means that an interest must be based on a valid agreement.

[46] The *Act* provides the rules, guidelines, and procedures for registration and lapsing of a legal interest in property in the province of Saskatchewan. As a result, this matter is governed by the provisions of the *Act* and the *LTR*.

[47] A caveat may lapse when a notice of lapse is filed with the Registrar pursuant to ss. 63 and 64 of the *Act* and s. 46 of the *LTR*. Once a notice to lapse a caveat is filed and the Registrar is satisfied that "the applicant has the authority to seek the lapse of the registered interest," an interest against the interest sought to be lapsed will be registered (ss. 46(2) of the *LTR*). Further, a notice will be sent to the caveator stating that the interest will lapse within 30 days unless the caveator applies for a court order to continue the registration of the interest on the affected title.

[48] Only certain individuals may apply to lapse or register a caveat. I repeat, s. 46 of the *LTR* which provides that only:

> (a) the registered owner of the affected land;
>
> (b) the holder of an interest or share against which the interest or share ought to be lapsed is registered; or
>
> (c) any person with a registrable interest pursuant to s. 50 of the *Act* may lapse a caveat registered against title (ss. 46(1) of the *LTR*).

[49] This represents a slight change from the wording of s. 159 under *The Land Titles Act*, RSS 1978, c L-5 (repealed). Pursuant to ss. 159(2), an owner or "person claiming an interest in the land" may apply to lapse a caveat under that *Act*. According to Justice Sherstobitoff in *Meadow Lake Credit Union Ltd v Korejbo* (1988), 66 Sask R 191 (CA), the phrase "person claiming an interest in the land" is contextual and will vary based on the circumstances of every case. In *Re Canadian Imperial Bank of Commerce and Wicijowski, Wenaus & Co.* (1979), 107 DLR (3d) 40 (Sask QB), the Court of Queen's Bench for Saskatchewan (as it then was) held that an equitable mortgage can confer an interest in land that is sufficient to support a caveat. An undertaking in a letter was held to comprise a registrable interest capable of supporting an application to continue a caveat (*Hornsby v Bone (Bankrupt)* (1993), 113 Sask R 1

(CA)). Similarly, in *Hagblom v Bosshart*, 2000 SKQB 99, 194 Sask R 157, albeit in the context of continuing a caveat, this Court held that an unpaid vendor's lien amounted to an interest in the land that is sufficient to support registration of a caveat.

[50] It is important to note that a person claiming an interest in the land must proffer some evidence or establish to the satisfaction of the Registrar that the applicant has the authority to seek the lapse (ss. 46(2) of the *LTR*).

[51] In this case, Mr. Keller registered a miscellaneous interest in the land titles registry on July 24, 2023. This interest was registered pursuant to the joint profit sharing agreement executed between Mr. Keller and the Aeberhards in relation to gravel deposits on the said land.

[52] Neither the new owners of the Southeast Quarter 4 (the Aeberhards) nor Melville contest the validity of the joint profit sharing agreement. The agreement is a valid legal instrument and the miscellaneous interest is thereby deemed to be a valid interest registered against the title to the lands.

[53] While Mr. Keller is no longer the registered owner of the Southeast Quarter 4, he registered a miscellaneous interest against the land (Interest # 197119301) in the land titles registry on July 24, 2023. The miscellaneous interest was issued pursuant to a joint profit-sharing agreement in respect of gravel deposits located beneath the surface of the land.

[54] Mr. Keller has a registered interest and is an "interest holder" pursuant to the *Act*. According to ss. 46(1)(b) of the *Act* "the holder of an interest or share against which the interest or share sought to be lapsed is registered" can bring an application to lapse a registered interest.

[55] Initially, Melville argued that Mr. Keller's interest is registered against gravel deposits beneath the land and, initially argued that this does not entitle him to

lapse the Caveat against the lands, because the Caveat does not interfere, interact, or converge with his interest in the gravel deposits. However, this position failed to consider the application of ss. 46(1)(c). Subsection 46(1)(c) provides that **any** person with a **registrable interest** pursuant to s. 50 of the *Act* may apply to the Registrar of Land Titles to lapse a caveat.

[56] Section 50 of the *Act* provides that a registerable interest is an interest that is "recognized at law as an interest in land." That is, an interest registered in the prescribed manner and is based on a valid legal instrument executed before the interest was registered (ss. 52(1) and (54(1)-(4)).

[57] In addition, ss. 36(2) of the *LTR* contains a list of **registrable interests** pursuant to ss. 50(1)(a) of the *Act*. The list is reproduced below:

> **36(2)** For the purposes of clause 50(1)(c) of the Act, the following are designated as registrable interests:
>
> **(a) any right or interest in land based on an agreement in writing between Canada and Saskatchewan;**
>
> (b) a Registrar's notice made in accordance with subsection 106(2);
>
> (c) an interest held by a personal representative in his or her capacity as personal representative for the estate of a deceased person;
>
> (d) an interest held by a trustee in bankruptcy in his or her capacity as trustee in bankruptcy of the bankrupt's estate;
>
> (e) a notice pursuant to clause 46(2)(b) to lapse the registration of an interest;
>
> (f) a postponement of a registered interest;
>
> (g) a revocation of a power of attorney;
>
> (h) an assignment of rents;
>
> (i) a mortgage of a lease;
>
> (j) an assignment of a lease as security;

> (k) a sheriff's notice of seizure of a security interest pursuant to *The Enforcement of Money Judgments Act*;
>
> (l) a sheriff's notice of seizure of an interest in land pursuant to *The Enforcement of Money Judgments Act*.
>
> [Emphasis added]

[58] Subsection 36(2)(a) of the *LTR* applies directly to the case at bar. Mr. Keller's miscellaneous interest was registered in the land titles registry (ISC) in the prescribed manner. He adduced a copy of the miscellaneous interest and the ISC land titles registry title to the subject lands in Exhibit "D" of his affidavit. Mr. Keller's interest is also based on an agreement in writing in the Province of Saskatchewan. This means that Mr. Keller is deemed to have a registrable interest pursuant to s. 50 of the *Act*.

[59] Mr. Keller's miscellaneous interest is registered and comprises a "registrable interest" pursuant to s. 50 of the *Act*. He continues to have standing to lapse the CNV Caveats. This is now acknowledged by Melville.

[60] The *Act* and the *LTR* stipulate that only a registered owner, an interest holder, or a person with a registrable interest may seek to lapse a caveat. Since Mr. Keller registered and continues to hold a miscellaneous interest based on a joint profit sharing agreement, he continues to have standing to lapse the CNV Caveat.

2. Should relief be granted to the applicant either directing the Registrar to register an easement and/or should the court make a declaratory relief order that Melville had a valid easement as at January 1963?

[61] The applicant, Melville, asserts that ss. 109(1)(a) of the *Act* provides that the court may make an order directing the Registrar to register an interest:

> 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
>
> …

[62] Melville suggests that an agreement for valuable consideration is sufficient to create a right to an easement and further submits that the Southeast Quarter 4 easement agreement, as evidenced by the Caveat, created a lagoon drain easement on the Southeast Quarter 4 in favour of Melville.

[63] Mr. Keller argues that the application is not a request to cure an error that occurred, but rather it is a request to register an interest, namely, an easement, that is entirely different from the interest that was registered by Melville against the title to Southeast Quarter 4, namely a caveat.

[64] Mr. Keller, as well, objects to Melville altering the relief sought, by a simple oral request from Melville, where originally it was seeking the registration of an easement, to now seeking a declaration there was an easement, without formally amending the originating application. Mr. Keller submits the application, in either event, should be dismissed with costs.

[65] Melville relies on *Moore v Mollard*, [1986] 4 WWR 424 (Sask QB) [*Moore*] as authority for its position. In *Moore* the plaintiff claimed an easement on the property of the defendants arising from a written agreement which could no longer be found. The court held that where the written instrument creating an easement had been lost, the proof of the terms of the easement may be founded on secondary evidence. Specifically, the court said at page 430:

> Proof of the terms of an easement may be founded on several types of evidence. Such evidence may include the user of the easement, the charter of the user determining the extent of the easement: see *Cowling v. Higginson* (1838), 4 M. & W. 245, 150 E.R. 1420. There is a very helpful discussion of this rule in Gale on Easements, 14th ed. (1972), at p. 265. Here we have uncontroverted testimony as to the nature and terms of an agreement: a continuous, consistent and long-standing

> course of conduct on the part of the parties, physical proof as to the location, dimensions, design, construction and use of the roadway, as a right-of-way, by them and the acknowledgement by the parties and their successors that the rights granted to Moore were intended to continue with respect to his successors. I may rely on the language of the caveat itself, also: *Doe d. Godsoe* v. *Jack* (1849), 6 N.B.R. 476 (C.A.).

[66] Melville urges the court to rely on *Moore* and asserts that *Moore* is "directly on point with this matter" (brief of law on behalf of the applicant filed January 13, 2023 at para. 37). However, *Moore* is quite factually distinct from Melville's application. I view the following factual differences to distinguish the cases.

[67] In *Moore*, the trier of fact accepted that the previous property owner of A (the property on which the easement was claimed to be), had assisted the owner of B, who had registered the interest, in building the roadway for which the easement was required (*Moore* at 426). This is compelling evidence that the previous property owner of A and current owner of B had an agreement that the easement existed. Furthermore, the current owner of B and her son both testified at the trial that they had read a copy of the agreement and that it was lost in a fire (*Moore* at 427). The son recalled having read a document that referred to the existing road and described the property on which it was located. This evidence identified that the agreement "provided access for Moore's agents, heirs, and successors and was unlimited as to time" (*Moore* at 427). The owner of property B described seeing a handwritten document that provided a "right-of-way" and that had no time limitation (*Moore* at 427). Additional evidence was provided in *Moore* that a caveat was registered by the owner of B, in which they claimed an interest as the "[g]rantee of a certain easement by way of … in an agreement in writing" (*Moore* at 426) made between themselves and the previous owner of property A.

[68] Here there is some evidence of an agreement. The notice of expropriation identified the portion of the Southeast Quarter 4 that Melville sought to expropriate and

that the land was sought for a sewage pressure main and lagoon drain line drainage ditch. The Caveat registered by Melville refers to an easement. The minutes of the meeting of Melville's counsel identifies that an easement agreement was signed by Melville and the owners of the Southeast Quarter 4. Melville registered the Caveat claiming an interest as a grantee under an unregistered easement.

[69] However, unlike *Moore* there is no evidence of the terms of the alleged easement agreement. There is no evidence respecting how long the easement was intended for, nor the extent or scope of the easement. There is no evidence as to the nature nor terms of the agreement. There is evidence that it was in support of a sewage disposal program, but that is all. There is no evidence as to terms, the length or term, any rights of access, any design, any rights of use and whether the rights or responsibilities extended to successors or assignors of the property. In *Moore*, there was evidence accepted by the trier of fact on all these points. Under the current application, there is no evidence of any of the aforementioned elements. The nature and terms of the agreement are unclear. The case of *Moore* stands for the proposition that "all the material terms of a written instrument, alleged to be lost, [must be] adequately proven" (*Moore* at 429). In this application, the material terms of the easement have not been adequately proven.

[70] As well, in *Moore*, both the previous and current owner of A, the owner of B, and the family, friends and guests of all parties had used the roadway continuously. Both the prior owner of A and the current owner of B contributed to maintenance of the road, and it was obvious to the trier of fact that it provided important access for all parties involved (*Moore* at 426). Melville, at para. 44 of its brief, argues that the lagoon drain line to the drainage ditch has been used for the same purpose continuously like *Moore*. However in *Moore* there was ample evidence regarding the maintenance and intention of the easement. In this application there is no evidence toward either point. Second, in this application, the lagoon is expanding, and the

disputed land will need work to accommodate this expansion. In *Moore* the owner of property B did not intend to change the nature of the easement or expand the roadway in any fashion.

[71] Further, even if I were satisfied that there was enough evidence concerning the nature and terms of the easement, granting the remedy under ss. 109(1)(a) of the *Act* may be a prejudicial remedy to Mr. Keller, as he obtained the property with no easement was on title. Recently the Court of Appeal in *Primrose Drilling Ventures Ltd. v Registrar of Titles*, 2021 SKCA 15, [2021] 8 WWR 241 [*Primrose*] dealt with the question of whether a caveat provides sufficient notice to a potential purchaser. While *Primrose* dealt primarily with s. 97 of the *Act*, there are some overarching principals that are helpful to this application.

[72] The argument in *Primrose* was that because a caveat was registered, this provided notice of an existing interest on a property. However, the court articulated that exactly what the caveat gives notice of is important (*Primrose* at para 69). Even if the caveat could have been indicative of a continuing interest in the land in the form of an easement, this notice ought not to affect the title of the property that the purchaser validly believed was free and clear from easements (*Primrose* at para 69).

[73] Furthermore, where there was not a proper easement registered "the Registrar cannot correct the historical mistake to the prejudice of that bona fide purchaser" (*Primrose* at para 78). *Primrose* at para 78, citing *Hudson's Bay Co. v Shivak* (1965), 52 DLR (2d) 380 (Sask CA) at 384 states that "[o]nce title issued to a *bona fide* purchaser the time for correction of the error had passed".

[74] *Primrose* and *Jen-Sim Cattle Co. Ltd. v Agricultural Credit Corporation of Saskatchewan*, 2006 SKQB 173, 268 DLR (4th) 353 [*Jen-Sim*] have often been cited in relation to the indefeasibility doctrine. *Jen-Sim* was cited in *Mauri Gwyn*

Developments Ltd. v Larson Manufacturing Company of South Dakota, Inc., 2019 SKQB 200 at para 43:

> [43] …
>
> > 18. The principle of indefeasibility provides that when title to land is transferred, the new owner takes that title free and clear of all encumbrances except those registered against the title at the time of transfer. Registration is everything. It is conclusive proof of ownership and it is conclusive proof of any interests, exceptions and/or reservations that may affect ownership.
> >
> > 19. When the new *Land Titles Act, 2000* was passed, the principle of indefeasibility continued to be a tenet of our land holding system and was enshrined in s. 13 of the *Act*. ...
> >
> > 20. In Saskatchewan, the governing principle has always been one of "immediate indefeasibility". The opportunity for rectification of the title is lost once a transfer has been registered. At that moment, the transferee becomes immediately entitled to the indefeasibility protection of the Torrens system. This principle was enunciated by the Saskatchewan Court of Appeal in *Hermanson v. Martin* (1986), [1987] 1 W.W.R. 439 (Sask. C.A.) and it was incorporated into *The Land Titles Act, 2000* by the joint operation of ss. 13(1)(b) and 15(1)(a). (See: *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Titles)*, 2005 SKQB 470, [2005] S.J. No. 675 (Q.B.)).

[75] The overarching question is when is it appropriate to use s. 109 of the *Act* as a remedy. The case of *Olney v Great West Life Assurance Company*, 2014 SKCA 47, [2014] 8 WWR 293 [*Olney*] provides, at para. 11, a general summary of what s. 109 is intended to be used for. *Olney* states that s. 109:

> [11] … is a curative provision that empowers the Court of Queen's Bench, in proceedings taken pursuant to section 107, to make any order the court considers appropriate, including orders directing or authorizing the Registrar to transfer title, vest title, or make changes to a title as the circumstances of the case suggest and the *Act* allows.

[76] However in *Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd.*, 2018 SKQB 198, 62 CBR (6th) 184, Justice Mills clarified at para. 16 that "the court's powers under s. 109 are not absolute. The

court must consider the other provisions of the *Act* and the underlying legal concepts upon which the *Act* is based when considering a s. 109 application". Justice Mills further noted that "the powers of the Registrar to alter a title under s. 109 … [are] still subject to the notion that rights obtained in good faith and for value cannot be prejudiced by such an application" (para. 24).

[77] *Primrose* also cites *Olney* and deals with s. 109 of the *Act*:

> [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* [*The Land Titles Act, 2000*] 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.

[78] The Saskatchewan Court of Appeal in *Burnouf v Burnouf*, 2022 SKCA 6, 466 DLR (4th) 521 also said the following:

> [31] Section 109 of the *LTA* [*The Land Titles Act, 2000*] has been described as a curative provision that empowers the Court of Queen's Bench to direct the Registrar to transfer title to land, make changes to title or vest title in a person. It provides as follows:
>
> **General jurisdiction of court**
>
> **109**(1) In any proceeding pursuant to this Part, the court may make any order the court considers appropriate, and in so doing may direct the Registrar to, or authorize any person to apply to the Registrar to:
>
> (a) register, discharge, amend, postpone or assign an interest; or
>
> (b) transfer title or make changes to a title.
>
> (2) The court may seek assistance from the Registrar in any proceeding pursuant to this Part.
>
> (3) On an application to the court pursuant to this Part, if the judge hearing the application considers it appropriate to do so, the judge may make an order:
>
> (a) directing that a title be vested in any person; and
>
> (b) either:
>
> (i) directing the Registrar to transfer title or to make changes to a title; or
>
> (ii) authorizing any person to apply to the Registrar to transfer title or to have changes made to a title.
>
> (4) An application for an order pursuant to subsection (3) may be made:

> (a) on any notice that the court considers appropriate; or
>
> (b) without notice if, in the court's opinion, the circumstances warrant it.

[32] In *Olney Estate v Great-West Life Assurance Company*, 2014 SKCA 47, [2014] 8 WWR 293 [*Olney*], Cameron J.A., writing for himself (with Caldwell J.A. writing concurring reasons for himself and Jackson J.A.), reflected on the nature of s. 109 of the *LTA*:

> [11] … The claim for relief was based on section 109 of *The Land Titles Act*. This is a curative provision that empowers the Court of Queen's Bench, in proceedings taken pursuant to section 107, to make any order the court considers appropriate, including orders directing or authorizing the Registrar to transfer title, vest title, or make changes to a title as the circumstances of the case suggest and the *Act* allows.

[33] In *Primrose Drilling Ventures Ltd. v Registrar of Titles*, 2021 SKCA 15, [2021] 8 WWR 241 [*Primrose Drilling*], Barrington-Foote J.A. referred to *Olney*, along with the reasons of Ball J. in *Farm Credit Canada v Gherasim*, 2016 SKQB 182 [*Gherasim*]:

> [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) [at 6–7]:
> >
> > > 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.
>
> [34] As the case law makes clear, the Court's powers under s. 109 are not absolute and must be exercised in a manner consistent with the principles that underlie the *LTA* as a whole: *Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd.*, 2018 SKQB 198 at para 16, 62 CBR (6th) 184, and *Gherasim* at para 14.

[79] Consistent with the prevailing authorities in my view, the remedy sought by Melville ought not be granted for two reasons. First, Melville has failed to give evidence surrounding the material terms of the alleged easement agreement. The Caveat was not sufficient to prove the nature and terms of the easement, including intended duration and rights and responsibilities. The case of *Moore* is factually distinguishable from the application in this regard. The applicant has not satisfied the cardinal rule in *Moore*, which is that "all the material terms of a written instrument, alleged to be lost, [must be] adequately proven" (at page 429).

[80] Second, it would be prejudicial to Mr. Keller to order the Registrar to grant an easement, or to declare there was an easement, for several reasons. The work needed to support the expanding lagoon project is a factor not favourable to granting a discretionary remedy. Mr. Keller took ownership of the property, free and clear of

easements, which engages the principal of indefeasibility. Once a title is transferred, the Registrar cannot rectify the title.

[81] Section 109 of the *Act* is not an absolute remedy. It must be used in accordance with the underlying principles of the *Act* and the jurisprudence. The defendant's rights to property obtained in good faith and for value cannot be prejudiced by granting an order to direct the Registrar to register an easement, or for this Court to grant the declaratory relief sought, which would have the same effect.

[82] Briefly, Melville also, and almost as an aside, advanced an argument of proprietary estoppel. However, this argument fails on the first branch of the test. The nature and terms of the easement are not sufficiently identified to establish its existence. Therefore, the unproven easement cannot logically act as a real representation or assurance to Melville. Secondly, it was not reasonable of Melville to rely upon an easement of which they did not know the nature and terms of. Melville has failed to satisfy me on the issue of proprietary estoppel.

CONCLUSION

[83] The application by Melville is dismissed with costs to be taxed pursuant to Schedule 1 "B-General" Column 3.

J.
C.L. DAWSON

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 25**

Date: **2024 04 24**
Docket: KBG-YT-00200-2022
Judicial Centre: Yorkton

BETWEEN:

CITY OF MELVILLE

APPLICANT

- and -

JORDAN KELLER

RESPONDENT

Counsel:

Milad Alishahi — for the applicant
Randy Kachur, K.C. — for the respondent

CORRIGENDUM to JUDGMENT
DATED February 20, 2024
April 24, 2024

DAWSON J.

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[84] Paragraph 36 should read as follows:

> However, Melville was no longer asking this Court to register an easement. Melville sought declaratory relief (despite not bringing any such application nor amending its application) declaring that Melville had a valid easement based on the Caveat registered in 1963. Melville suggests that this Court has that discretion pursuant to Rule 3-49(1)(c) of *The King's Bench Rules* and s. 109 of the *Act*. Melville suggested it is in essence seeking the same relief with a minor revision.

[85] Paragraph 49 should read as follows:

> This represents a slight change from the wording of s. 159 under *The Land Titles Act*, RSS 1978, c L-5 (repealed). Pursuant to ss. 159(2), an owner or "person claiming an

interest in the land" may apply to lapse a caveat under that *Act*. According to Justice Sherstobitoff in *Meadow Lake Credit Union Ltd v Korejbo* (1988), 66 Sask R 191 (CA), the phrase "person claiming an interest in the land" is contextual and will vary based on the circumstances of every case. In *Re Canadian Imperial Bank of Commerce and Wicijowski, Wenaus & Co.* (1979), 107 DLR (3d) 40 (Sask QB), the Court of Queen's Bench for Saskatchewan (as it then was) held that an equitable mortgage can confer an interest in land that is sufficient to support a caveat. An undertaking in a letter was held to comprise a registrable interest capable of supporting an application to continue a caveat (*Hornsby v Bone (Bankrupt)* (1993), 113 Sask R 1 (CA)). Similarly, in *Hagblom v Bosshart*, 2000 SKQB 99, 194 Sask R 157, albeit in the context of continuing a caveat, this Court held that an unpaid vendor's lien amounted to an interest in the land that is sufficient to support registration of a caveat.

[86] The second sentence in para. 73 should read as follows:

Primrose at para 78, citing *Hudson's Bay Co. v Shivak* (1965), 52 DLR (2d) 380 (Sask CA) at 384 states that "[o]nce title issued to a *bona fide* purchaser the time for correction of the error had passed".

[87] The first sentence in para. 76 should read as follows:

However in *Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd.*, 2018 SKQB 198, 62 CBR (6th) 184, Justice Mills clarified at para. 16 that "the court's powers under s. 109 are not absolute.

J.
C.L. DAWSON