

Real Estate Tips from the Rural Viewpoint

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REAL ESTATE TIPS FROM THE RURAL VIEWPOINT

INTRODUCTION

This paper discusses some of the idiosyncrasies of rural real estate law. Transactions related to agricultural land, recreational land, acreages, and municipal lots in smaller centres, may present some interesting legal questions or facts. As a rural/regional practitioner, this paper's focus is the practical side of some encumbrances and land issues that may be unusual or out of the ordinary.

ENCUMBRANCES

1. Surface Leases

The usual way to recover oil and gas resources is by drilling a well and tying the resource into a pipeline. In order to do that on privately owned lands, the resource company must obtain permission from the owners of the surface lands, be that the fee simple holder, leasehold interest holder, or other occupant of the lands. This can be accomplished in two ways: by agreement with the land owner as required by Section 12 of the Surface Rights Act RSA 2000, c S-24 (the "Act), or by application for a right of entry order under Section 15 of the Act.

There are two forms of encumbrances that usually arise in this situation: a Surface Lease or a Surface Rights Board Order, both of which may be registered against the land. A transfer of the property will require the real estate practitioner to deal with this encumbrance. The interest will either have to be assigned to the buyer, in which case a formal assignment is documented, signed by the seller, buyer, and resource company on title. Some oil companies will accept a simple notice of change of lessor signed only by the seller with the new buyer's name, address and the effective date of the change of lessee. If the encumbrance is registered by way of Board Order, the Order will have to be amended to reflect the assignee of the ongoing rent. The Surface Rights Board will do those amendments on notice from the solicitor, quoting that the request is pursuant to section 29 of the Surface Rights Act, and usually after they are provided with the standard assignment form and a letter from counsel.

If a Board Order is present on title to a larger unsubdivided parcel of land, after subdivision into acreages or smaller lots, each lot will also be subject to the Board Order and can be removed by application to the Board under section 34(2) of the Act.

The fee simple owner of the land may, in the Offer to Purchase, reserve the right to the ongoing rentals, notwithstanding the transfer of the land to a new buyer. Until October 1, 1985, this right to retain the rentals (or any general assignment of rents) was considered a personal right that did not

run with the land. Any withholding of the rent to a landowner, even though registered by caveat against the land, was unenforceable. See **Northland Bank v. Van de Geer and Bank of Montreal** (1986), 75 A.R. 201 (C.A.).

After 1985, the *Law of Property Act*, S.A. 1985 c. L-8, s. 59.1 (now s. 63), was amended. It declared that an assignment of rents payable pursuant to a lease of land was thereafter considered to be an “equitable interest in land”. One could, thereafter, retain the rights to the rental as an encumbrance running with the land (now s. 63(2) of the Act) or for any duration chosen by the parties. The situation often arises where parents want to transfer farmlands to their children for estate planning purposes, but wish to keep a life estate in the property or just retain the revenue that was being generated during their lifetimes.

The decision of **Webster v. Brown** [2004] ABQB 321 is supportive of the above statements, but is also interesting in that it dealt with whether notice to the buyers of the assignment of rents to the seller’s parent prevented the buyers from acquiring the rental money from the oil company. The assignment was pre-1985. The court found that mere knowledge of the assignment did not amount to fraud and the buyers did acquire the rental income free of the unenforceable assignment. The Court referred to two cases in support: **Strange v. Binq Industries Inc.**, 2001 ABQB 477 and **Holt Renfrew and Co. Ltd. v. Henry Singer Ltd.** (1982), 37 A.R. 90 (C.A.).

I want to recognize Alex Kennedy of Duncan Craig LLP, who provided some valuable information on this topic. He also commented that, “in his experience, most surface lease holders will not stop paying the recorded “assignee” the annual payment for the surface lease until the caveat is removed from title, or until the “assignee” has completed an assignment of the right to collect rents back to the fee simple owner.” Even if there is no caveat registered, it is our collective experience that the oil and gas companies do not change any rental payments until so directed by receipt of a formal Assignment of Rents or until they receive the Amended Surface Rights Board Order.

It is interesting to note that the ownership of a surface lease can add significantly to the value of the property. In the Grande Prairie region, I have often heard the realtors add between \$10,000 to \$20,000 per well to an Offer to Purchase for those rights, or add from three to five times the annual revenue to the purchase price. Note that in the standard AREA Real Estate Purchase Contract there is an obligation to adjust for all rentals. This is often a trap for sellers if they have not addressed the oil lease revenue adjustment before the contract is signed. The obligation of the oil companies is to pay before the rental year commences (in advance). This is sometimes months earlier than the anniversary date. The important point is that surface leases rarely, if ever, follow the calendar year

as do land taxes. This means that the yearly adjustment must take effect from the effective anniversary date of the surface lease. If the lease begins on April 1, and the land sale closes on April 1, the seller will lose the entirety of his lease payment for that year. In my experience, sellers are often surprised by any adjustment that takes money out of their hands and pays it in favour of the buyer. On other occasions, the seller will retain the current year's lease rental income and negate the adjustment clause for that year only, or the seller may retain the revenue for a specified number of years, for the sellers' joint lives, or for as long as revenue is generated (to heirs of the sellers). A copy of our usual Assignment is attached to this paper ("Appendix "A").

One additional note; if the closing date for a land transaction is occurring at the same time as ongoing exploration for a viable oil well, or in anticipation of an imminent surface lease or rights of entry, payments for this exploration from oil companies to the seller should be negotiated and clearly allocated to the seller or buyer and adjusted if applicable.

2. Gross Royalty Trust Agreements (GRTA)

The nature of this agreement is that the royalties from a petroleum or natural gas well are given to the owners of the mineral rights. There is normally an institutional trustee appointed to receive the funds and distribute them. These agreements are considered to be interests in land and can be caveated against the mineral title. See *Scurry-Rainbow Oil Limited et al v. Burden et al* 1994 ABCA 313. While mineral titles are a fairly rare occurrence, they do crop up, often when administering an estate of a deceased person. The biggest issue in my experience is that often the GRTA was granted years previously by an elderly individual and the number of beneficiaries are now significant. Oil companies will often request that one member of a family then be the "representative" or "trustee" for that family group. The Land Titles Office will not accept a transfer of any interest in land, including the transfer of interests in a mineral title, GRTA or a Petroleum and Natural Gas Lease if the transfer is for less than an undivided 1/20 interest.

3. Water Well Agreements

It is not unusual for one water well to supply many residences, on lands usually adjacent to the water well-site. It is nothing more than a specialized form of easement and will require references to both the dominant and servient tenements. It usually protects the long term use of the water well and gives the grantee rights of access to the servient tenement to maintain and repair the well and the pipeline that is attached to it, while making that party liable for any damages that may occur as a result of the entry and repairs. It is most important to provide that the Agreement is binding on the