COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crown Fortune International Investment Group Inc. v. Bonnefield Canada Farmland LP III,* 2023 BCCA 441

Date: 20231130
Docket: CA48737

Between:

Crown Fortune International Investment Group Inc.

Appellant
(Plaintiff)

And

Bonnefield Canadian Farmland LP III and Bonnefield GP III Inc.

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected in the summary on December 6, 2023 and the cover page was corrected on January 5, 2024.

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 14, 2022 (*Crown Fortune International Investment Group Inc. v. Bonnefield Canada Farmland LP III*, 2022 BCSC 1983, Vancouver Docket S1710113).

Counsel for the Appellant:	M.L. Bromm A. Leung
Counsel for the Respondents:	G.E.H. Cadman, K.C. T.M. Shoranick
Place and Date of Hearing:	Vancouver, British Columbia June 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 30, 2023

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appeal concerning a failed real estate transaction involving farmland in northeastern British Columbia. The transaction failed because the buyer, Crown Fortune International Investment Group Inc. ("Crown Fortune"), believed that the seller, Bonnefield Canadian Farmland LP III Inc. and Bonnefield GP III Inc. ("Bonnefield"), had an obligation to remove 39 encumbrances from title before closing. Bonnefield disputed this. The key interpretive issue at trial was whether the operative phrase of Clause 22 of the sale contract, which permits only those encumbrances "contained in the original grant or contained in any other grant or disposition from the Crown", required removal of the 39 disputed encumbrances. The judge divided the encumbrances into three categories: (1) grants of surface access rights, such as leases and rights-of-way to access oil and gas deposits; (2) assignments of rent proceeds; and (3) transfers of surface access rights from one corporation to another. The judge determined that all three categories of encumbrances were permitted by Clause 22 and thus found that Crown Fortune forfeited its deposit when it refused to close the transaction. Crown Fortune argues the judge erred in his interpretation.

Held: Appeal dismissed. The purpose of the original Crown grants referenced in Clause 22 is to preserve for the Crown, or persons acting under Crown authority, the right to access otherwise private property for the purpose of extracting resources. All three categories of encumbrances further this purpose. The first and third categories deal specifically with the access rights granted and the second category, assignments of rent proceeds, deals with the compensation payable for those rights. Accordingly, the judge did not err in finding that all three categories of encumbrances fell within Clause 22 and did not need to be removed from title prior to closing the transaction.

Reasons for Judgment of the Honourable Justice Skolrood:

[1] This appeal arises out of a failed real estate transaction involving several tracts of farmland located in northeastern British Columbia. The parties disputed whether the vendor was required to remove a number of encumbrances registered against title to the subject properties as a condition of closing, causing the transaction to collapse. The vendor declined to do so on the basis that the encumbrances were contemplated by the terms of the contract for purchase and sale.

[2] In reasons for judgment indexed at 2022 BCSC 1983, the judge agreed with the vendor and found that the purchaser was in breach by failing to complete the transaction. Based on an interpretation of the operative clause in the contract and the language of the encumbrances, the judge found that the contract did not require that the disputed encumbrances be removed. The judge ordered that the purchaser forfeit its deposit of over $1 million.

[3] The purchaser now appeals to this Court. For the reasons that follow, I would dismiss the appeal.

Background

[4] The background facts are relatively straightforward and uncontentious.

[5] On July 3, 2017, the appellant, Crown Fortune International Investment Group Inc. (“Crown Fortune”), tendered a contract (the “Contract”) to purchase 15 contiguous parcels of land (the “Properties”) located in northeastern British Columbia from the respondents Bonnefield Canadian Farmland LP III Inc. and Bonnefield GP III Inc. (“Bonnefield”).

[6] On July 5, 2017, Crown Fortune paid a refundable deposit of $50,000, and on July 25, 2017, Bonnefield accepted the Contract.

[7] The Contract stipulated a purchase price of $6,800,000, and had a closing date of October 30, 2017.

[8] At the time that Bonnefield accepted the Contract, there were 65 encumbrances registered against title to the Properties relating to oil and gas extraction. The existence of the encumbrances was generally known to Crown Fortune. Crown Fortune also knew that the Properties generated revenue from leases related to the extraction of oil and gas via pipelines and other structures.

[9] On July 28, 2017, Crown Fortune removed its "subject to" conditions, and on August 25, 2017, it paid an additional $1 million deposit.

[10] The Contract provided that Crown Fortune's purchase of the Properties would be financed in part by Bonnefield through a vendor take-back mortgage. On October 17, 2017, Bonnefield provided Crown Fortune with the terms of the mortgage, which listed all 65 encumbrances as "Permitted Encumbrances".

[11] On October 19, 2017, Bonnefield advised Crown Fortune that, pursuant to the Contract, all but two of the registered encumbrances had to be removed prior to closing. On October 23, 2017, Crown Fortune responded and took the position that all of the encumbrances were permitted to remain on title to the Properties.

[12] As a result of this dispute, the transaction did not close on October 30, 2017.

[13] On October 31, 2017, Crown Fortune commenced this action, seeking specific performance of the Contract or damages. It abandoned the claim for specific performance in an amendment filed June 5, 2018.

[14] Bonnefield filed a counterclaim in which it also sought specific performance of the Contract but it ultimately abandoned that claim and sold the Properties to other purchasers.

[15] By the time of trial, Crown Fortune acknowledged that certain of the encumbrances were permitted to remain on title but it maintained that 39 encumbrances were required to be removed under the Contract (the "Disputed Encumbrances"). Crown Fortune argues that Bonnefield was not in a position to complete the transaction because, contrary to the Contract, the Disputed Encumbrances remained on title at the time of closing. Bonnefield maintains that all

of the Disputed Encumbrances were entitled to remain on title pursuant to the Contract.

[16] Prior to this matter proceeding to trial in July 2022, Crown Fortune brought a summary trial application seeking return of the deposit funds. That application was dismissed by Justice Morellato on October 28, 2021, in reasons indexed at 2021 BCSC 2114 (the "Summary Trial Reasons").

The Title Clause of the Contract

[17] The parties' dispute centers around the wording of clause 22 of the Contract (the "Title Clause"), which provides:

> Title: Free and clear of all encumbrances except subsisting conditions, provisions, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and right of ways in favour of utilities and public authorities, the accepted tenancies and any other additional permitted encumbrances set out in schedule 22.

[18] There was no schedule 22 to the Contract.

[19] Pursuant to the Title Clause, Bonnefield was required to deliver title free and clear of all encumbrances except those "contained in the original grant or contained in any other grant or disposition from the Crown".

Relevant Statutory Provisions

[20] The operative language of the Title Clause mirrors in large part the wording of s. 23(2)(a) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*]:

> An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
>
> (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown.
>
> [Emphasis added.]

[21] Other relevant statutory provisions include:

1. ***LTA*, s. 218**:

> **218**(1) A person may and is deemed always to have been able to create, by grant or otherwise in favour of
>
> (a) the Crown or a Crown corporation or agency,
>
> (b) a municipality, a regional district, the South Coast British Columbia Transportation Authority, a local trust committee under the *Islands Trust Act* or a local improvement district,
>
> (c) a water users' community, a public utility, a pulp or timber, mining, railway or smelting corporation, or a pipeline permit holder as defined in section 1 (2) of the *Oil and Gas Activities Act*, or
>
> (d) any other person designated by the minister on terms and conditions that minister thinks proper,
>
> an easement, without a dominant tenement, to be known as a "statutory right of way" for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.
>
> …
>
> (3) Registration of an instrument granting or otherwise creating a statutory right of way
>
> (a) constitutes a charge on the land in favour of the grantee, and
>
> (b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.

Section 218 of the *LTA* empowers an owner of property, by grant or otherwise, to create a statutory right-of-way in favour of a permit holder to operate a pipeline.

2. ***Land Act*, R.S.B.C. 1996, c. 245 [*Land Act*], s. 50(1)(a)(ii)**:

> **50**(1) A disposition of Crown land under this or another Act
>
> (a) excepts and reserves the following interests, rights, privileges and titles:
>
> …
>
> (ii) a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources,

> fossils, minerals, whether precious or base, as defined in section 1 of the *Mineral Tenure Act*, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;

Section 50(2) of the *Land Act* provides that every disposition of Crown land is deemed to contain the reservations to title set out in s. 50(1)(a)(ii), above.

3. ***Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, s. 142 [*PNGA*]**:

> **142** Subject to section 39 of the *Oil and Gas Activities Act*, a person may not enter, occupy or use land
>
> (a) to carry out an oil and gas activity,
>
> (b) to carry out a related activity, or
>
> (c) to comply with an order of the commission,
>
> unless the entry, occupation or use is authorized under
>
> (d) a surface lease with the landowner in the form prescribed, if any, or containing the prescribed content, if any, or
>
> (e) an order of the board.

The Crown grants permits to corporations under the *PNGA*. In addition to the Crown itself, the owner of the property can also provide surface rights of access to a permit holder.

The Crown Grants

[22] The judge found that the original Crown grant for eight of the 15 parcels contained a version of the following reservation (RFJ at para. 37):

> Provided also that it shall at all times be lawful for Us our heirs and successors, or for any person or persons acting under our or their authority, to enter into and upon any part of the said lands and to raise and to get thereout any minerals, precious or base, including coal, petroleum, and any gas or gases, which may be found in, upon or under the said lands, and to use and enjoy and every part of the same land and of the same easements and privileges thereto belonging, for the purpose of such raising and getting, and every other purpose connected therewith, paying in respect of such raising, getting and use reasonable compensation.

[23] The judge found that the original Crown grant for the other seven parcels contained a version of the following reservation (RFJ at para. 38):

> All subsisting grants to, or subsisting rights of any person made or acquired under the …*Petroleum and Natural Gas Act*, or under any prior or subsequent enactment …of like effect.

The Judge's Reasons

[24] The judge identified the "single point of dispute" between the parties as the meaning of the phrase "contained in a grant or disposition from the Crown" as found in the Title Clause (RFJ at para. 33). Because the Title Clause permits restrictions that are contained within the original Crown grant, the key question at trial, and now on appeal, is whether each of the Disputed Encumbrances falls within the original Crown grant.

[25] The judge found that the Disputed Encumbrances fell within three general categories (RFJ at para. 24):

1. The assignment of grants (including leases, rights-of-way, and excavation and reservation rights) from the owner of the property to a corporation for the purpose of extracting gas ("Grants");

2. The assignment of rents accruing to the owner of the property to a third party ("Rent Proceeds"); and

3. The assignment of surface leases from one company, which was exercising its right to extract gas from the property under a grant, to a different company also exercising the same right ("Assignments").

[26] Put simply, the Grants in category 1 provide access rights for resource extraction purposes. These Grants give access to lands that would otherwise be private and therefore inaccessible to the grantee. The Assignments in category 3 consist of a transfer of the category 1 access rights from one corporation to another. Category 2 consists of the Rent Proceeds given in consideration for category 1 access rights.

[27] The judge concluded that all three categories of Disputed Encumbrances were contained in the original Crown grant and therefore did not need to be removed from the title in order to comply with the Title Clause.

[28] The first category identified by the judge contains 25 total encumbrances, 15 of which are surface leases between the owner of the land and the owner of a permit under the *PNGA*. These permits enable their holders to enter and use the land for the exploration, development, production, or storage of petroleum and natural gas in exchange for payment. The judge held that such a permit holder, having received a permit from the Crown to extract gas from the property, is acting as a person under Crown authority to enter into a sublease with the owner. As such, the sublease obtained by the permit holder was granted under a reservation contained in the original Crown grant and fell within the wording of the Title Clause relating to "subsisting conditions, provisions, restrictions, exceptions, or reservations, including royalties, contained in the original grant from the Crown" (RFJ at paras. 57–61).

[29] The second type of encumbrance in the first category are 10 statutory rights-of-way. These statutory rights-of-way were granted by the owner of the land to the holder of a permit under the *PNGA*. This permit allows its holder to construct, operate, and maintain a pipeline for the extraction of gas in exchange for payment.

[30] The judge noted that the original Crown grant for these Properties reserved the rights of holders of "subsisting" permits issued under the *PNGA*, or under any prior or subsequent enactment of like effect, to "enter on, use and occupy the land, for any purpose authorized by the permit, or other authority issued under it, or any prior or subsequent enactment of like effect". The judge held that the term "subsisting" refers to a valid permit regardless of when it was issued. In other words, it need not be a permit that existed at the time of the original grant. He therefore found that these encumbrances fell within the language of the Title Clause (RFJ at paras. 62–65, 66–68, 84–86, 95–96, 123–124, 131–132, 135–136, and 139–140).

[31] The second general category of encumbrances are assignments of Rent Proceeds payable under a surface lease to a third party. There are 10 such

encumbrances. The judge found that the original Crown grant contemplated payment of compensation for gas extraction and placed no restrictions on how such compensation would be paid. Thus, the assignment of Rent Proceeds by the owner fell within the reasonable compensation contemplated by the Crown grant (RFJ at paras. 71–75, 79–80, 89–90, 93–94, 101–102, 107–108, 113–114, 117–118, 121–122, 127–128).

[32] Finally, the judge found that the third category consisted of four encumbrances, namely Assignments of a surface lease from the original permit holder to a new permit holder. He held that the original Crown grant allows permit holders to enter into surface leases and thus also permits the assignment of such leases (RFJ at paras. 81–83, 99–100, 105–106, 111–112).

[33] The judge concluded that all 39 Disputed Encumbrances fell within the Title Clause and that Bonnefield was not required to remove them from title prior to closing. Accordingly, Crown Fortune's refusal to close the transaction resulted in it forfeiting its deposit (RFJ at para. 157).

Issues on Appeal

[34] Crown Fortune alleges that the judge erred:

1. By disregarding the plain language and well-established meaning of the Title Clause in favour of a purported determination of the subjective intentions of the parties; and

2. In finding that each of the 39 Disputed Encumbrances was "contained in" a Crown grant.

[35] Both alleged errors are simply different formulations of the sole issue on the appeal: did the judge err in his interpretation of the Title Clause?

Standard of Review

[36] The parties differ on the applicable standard of review.

[37] Crown Fortune submits that the applicable standard of review is correctness because the Title Clause is a standard term that uses language identical to the wording of s. 23(2)(a) of the *LTA* (see para. 18 above). This, combined with the absence of any impactful factual matrix and the fact that the interpretation of the clause will have precedential value, means that the correctness standard applies. In support of applying the correctness standard, Crown Fortune relies on *Trenchard v. Westsea Construction Ltd*., 2020 BCCA 152, where this Court said:

> [7] …the question whether the lease was a standard form document is relevant to this Court because it affects the standard of review. The reason this is relevant in this Court is that where the interpretation of a contract that is unique to the parties is at issue, this Court employs a deferential review of a judge's analysis. The judge's interpretation is treated as akin to a finding of fact, which this Court will not interfere with unless there is an extricable legal error or an obvious factual error going to the heart of the judgment. But if the contract provisions to be interpreted appear in other standard form contracts, there may be precedential value in the interpretation beyond the interests of the parties, and in those circumstances this Court reviews for correctness. This situation typically arises in connection with insurance policies in widespread use.

[38] Bonnefield submits that the appropriate standard of review is mixed: correctness for the judge's statutory interpretation analysis and palpable and overriding error for his interpretation of the Contract.

[39] Generally, contractual interpretation is a question of mixed fact and law and therefore attracts a deferential standard of review on appeal: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, at para. 50.

[40] However, Bonnefield acknowledges that the interpretation of standard form contracts may, on occasion, attract a correctness standard of review. This exception was recognized by the Supreme Court of Canada in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37:

> [48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and

> those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).

[41] Bonnefield also relies on *Mosten Investments LP v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36, where the court held that the question as to the applicable standard of review relates to the specific issue of interpretation before the court, not to the interpretation of the contract as a whole (at para. 34). In a similar vein, the court observed that the standard of review will turn, in part, on whether there are relevant factual circumstances specific to the contracting parties:

> [35] ... the question of whether there are factual circumstances of contract formation specific to the contracting parties that are probative of the meaning of contested contractual language is properly understood as key to determining whether the interpretation of that language is *an issue of standard form contract interpretation* and, as such, is subject to appellate review on the correctness standard. That is a different question than whether there are *any* surrounding circumstances relevant to the interpretation of a contract as a whole.

[42] In my view, while the Title Clause may be characterized as a standard form contract because it incorporates the language of s. 22(3)(a) of the *LTA,* which applies to every grant of indefeasible title in B.C., the interpretation of the clause involves questions of mixed fact and law. As such, it is subject to review for palpable and overriding error in accordance with the principles set out in *Sattva*, at para. 50.

[43] Assessing whether the Disputed Encumbrances fall within the Title Clause is not simply a matter of determining the meaning of the words used in the clause. Rather, it involves a consideration of the specific encumbrances as well as the language used in each of the original grants. Different considerations may apply depending upon the particular grants and encumbrances in issue.

[44] Further, there are surrounding factual circumstances, specific to the parties, that are relevant to the interpretive exercise here (*Mosten* at para. 35). Those circumstances include the history of the encumbrances, the parties' knowledge of them, and the market or industry in which both the Crown grants and the

encumbrances operate, namely the oil and gas industry. This last factor also engages the statutory regime governing that industry.

[45] In *British Columbia v. Friends of Beacon Hill Park*, 2023 BCCA 83, this Court noted the importance of considering the surrounding context when interpreting a Crown grant:

> [38] … A Crown grant is neither a statute nor (necessarily) a contract. The interpretation of a grant will depend on the circumstances, and may require consideration of principles of statutory interpretation or contractual interpretation depending on those circumstances. Context will be relevant in either case. For example, a Crown grant of land to a grantee who has paid consideration for the grant after a negotiated transaction, such as the disposition of Crown land by way of purchase pursuant to s. 45 of the Land Act, R.S.B.C. 1970, c. 17, will attract a contractual analysis. On the other hand, a Crown grant that is made pursuant to specific statutory qualifications may require the interpretation of those provisions, just as the interpretation of regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions…

[46] The Court's observations confirm that interpreting Crown grants is an exercise that does not neatly fit within the categories of contractual or statutory interpretation. Rather, the judge is required to consider a number of circumstances and interpretive principles. This multi-faceted analysis accordingly attracts deferential review. Again, interpreting the Crown grants is a necessary element of determining whether the Disputed Encumbrances fall within the Title Clause.

[47] I note that Justice Morellato held that the matter was not suitable for summary determination because it was necessary to examine the facts surrounding each encumbrance as well as the original Crown grant for each particular parcel of property, which she was unable to do on the record before her (Summary Trial Reasons, at paras. 75–78). While not binding on us, Justice Morellato's observation indicates the importance of the surrounding factual circumstances to answering the interpretive question on appeal, which in turn supports the application of the deferential standard of review.

Legal Principles

[48] In *Sattva*, the Supreme Court of Canada affirmed the modern approach to contractual interpretation:

> [47] …the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" …To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning…

[49] The Court went on to discuss the role of surrounding circumstances, noting that while such circumstances help to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties", the interpretation must be grounded in the actual text of the contract and the surrounding circumstances cannot be used to overwhelm or deviate from the words used (at para. 57). The Court emphasized that evidence of the surrounding circumstances should consist only of objective evidence of facts known to the parties at the time the contract was executed (at para. 58).

[50] I have referred above to this Court's decision in *Friends of Beacon Hill Park*, which underscored the importance of considering context when interpreting Crown grants. Also relevant is *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144, which addresses the proper approach to interpreting Crown grants.

[51] The issue before the Court there was whether a Crown grant of fee simple title also reserved title in the land traversed by the right-of-way. The grant of fee simple reserved a right-of-way in favour of a predecessor to the respondent Bonavista Energy for the purpose of operating a pipeline and well site located on the subject property. The context was an application by the appellant land owners to the Surface Rights Board of British Columbia [SRB] for compensation under the *PNGA* for damage to the land caused by Bonavista's exercise of its rights under the right-of-way.

[52] Bonavista took the position that the SRB lacked jurisdiction because the appellants were not "landowners" of the right-of-way lands because those lands had been reserved to the Crown under the original Crown grant. The SRB disagreed, holding that title to the right-of-way corridor was included in the original Crown land grant. Bonavista successfully sought judicial review. The review judge concluded that the appellants were not landowners within the meaning of the relevant provisions of the *PNGA*.

[53] This Court allowed the appeal and restored the decision of the SRB. The appeal turned largely on the proper interpretation of the original Crown grant, pursuant to which the original grantee was granted "in fee simple, the parcel of land and premises" specified in the grant. The Court held that the property encompassed by the grant included the land upon which the right-of-way traversed. However, the Crown grant contained provisos similar to what is set out in the Title Clause here. Those provisos indicated that the grant of fee simple title was subject to:

> 1. All subsisting grants to, or subsisting rights of any person made or acquired under the Mineral Tenure Act, Coal Act or [*PNGA*] or under any prior of subsequent enactment of the Province of British Columbia of like effect; and
> 2. A statutory right-of-way in favour of Imperial Oil Ltd. [Bonavista's predecessor]…including the right of the Grantor to continue or renew.

[54] The "excepting and reserving" clauses read as follows:

> EXCEPTING AND RESERVING, nevertheless to the Crown, the rights, benefits, privileges and obligations of the Grantor of the statutory right-of-way registered in the land title office under No. D15450 and PC55797.
>
> EXCEPTING AND RESERVING, nevertheless to the Grantor, its successors and assigns the exceptions and reservations of the interests, rights, privileges and titles referred to in Section 47 of the Land Act.

[55] Bonavista argued that the effect of the "excepting and reserving" clauses was to reserve title in the right-of-way lands to the Crown. It also argued that s. 23(2)(a) of the *LTA* also expressly operates to except the land covered by the right-of-way from the Crown grant of fee simple title.

[56] Justice Grauer for the Court disagreed. In coming to his conclusion, Grauer J.A. found helpful guidance for the interpretation of Crown grants in Anne Warner La

Forest, *Anger & Honsberger Law of Real Property*, loose-leaf (2019-Re. 22), 3rd ed. (Toronto: Thompsons Reuters, 2006) at s. 31:90:10:

> Much of the law that relates to the interpretation of contracts applies to Crown grants. There are, however, certain specific rules that have evolved in respect of these grants. Where the Crown is the grantor, the grant is generally to be interpreted in favour of the Crown. This rule will not apply when it would be necessary to give a forced construction in favour of the Crown. It will also not apply when a grantee gave valuable consideration. Where this is the case, the grant will be construed, where possible, in favour of the grantee. Lastly, this rule will not apply where the result would be to avoid the grant.
>
> Where possible, Crown grants are to be interpreted so that they are upheld. Crown grants are also to be interpreted so as to give effect to the plain meaning as set out in the grant…

[57] Justice Grauer held that the Crown grant expressly granted indefeasible title to the whole of the subject property, including the right-of-way lands. In his view, the "excepting and reserving" clauses identified certain rights that the title was made subject to, but did not except those rights from title (at paras. 46–47). Justice Grauer noted (at para. 54) that the concepts of "rights" and "title" are treated as distinct in the Crown grant, as well as in s. 47(1)(a) of the *Land Act* (now s. 50(1)(a)).

[58] Justice Grauer's decision underscores the necessity of reading the words of the Crown grant in their entirety and in accordance with their plain meaning. It also reinforces the relevance of the applicable statutory terms.

The Parties' Positions

[59] As reflected in the first alleged error, Crown Fortune submits that the judge disregarded the plain language of the Title Clause, specifically the phrase "contained in the original grant". Crown Fortune's central argument is succinctly stated at para. 49 of its factum:

> The Title Clause, in its natural and ordinary meaning, means that any encumbrance either specifically identified (by registration number or other unambiguous description) in the original Crown grant, or granted by the Crown in any other instrument, is "contained in" a grant from the Crown and hence permissible. Any encumbrance created by a third party and not specifically referred to in the original Crown grant is not "contained in" a grant from the Crown and is not permissible.

[60] Bonnefield submits that Crown Fortune has not identified any error in the judge's interpretation of the Title Clause and the Disputed Encumbrances. Bonnefield says that Crown Fortune takes an unduly narrow approach to the interpretation of the Title Clause by focussing on the phrase "contained in" the original grant and ignoring the words "subsisting condition, exception or reservation", which also form part of the operative language of the Title Clause.

Analysis

[61] The central issue on appeal is the meaning of the operative words of the Title Clause. However, it is necessary to first consider the Crown grants which are said by Bonnefield to provide the requisite authority to make the Disputed Encumbrances.

[62] Each of the original grants provided for fee simple title in the subject parcel to pass to the grantee. However, as discussed at paras. 22–23 above, the Crown grants contained two general types of reservations:

1. The grant for eight of the parcels reserved to the Crown, or anyone acting under the Crown's authority, the right to "enter into and upon" the subject lands in order to "raise and get thereout" any minerals, petroleum or gases located upon or under the lands and to "use and enjoy" every part of the lands for the purpose of such raising and getting, upon payment of reasonable compensation; and

2. The grants for the seven other parcels reserved "all subsisting grants to, or subsisting rights of" any person made pursuant to the *PNGA* or any subsequent enactment of like effect.

[63] As held by Grauer J.A. in *Bonavista*, the effect of the reservation clauses in that case was to identify certain rights to which the title was made subject to, but not to carve those rights *out* of the title. The right preserved under the first of these reservations was the right of the Crown, or a party acting under the authority of the Crown, to access otherwise private property for the purpose of extracting the resources identified in the reservation clause.

[64] The second category of reservations refers to rights granted under the *PNGA*. That statute provides for the granting of permits and leases to engage in the exploration for and extraction of petroleum and natural gas. The *PNGA* also provides that a party may only engage in oil and gas activity, as defined in the *PNGA*, on private land if access to the land has been granted by the owner in the form of a surface lease (s. 142). If the owner and the party seeking access cannot agree on the terms of a surface lease, an application may be made to the SRB for an order granting the right of entry on terms to be determined by the SRB (ss. 158–159).

[65] This brings me to the language of the Title Clause. As Crown Fortune submits, the concept of clear title referred to in the clause, as well as in s. 23(2)(a) of the *LTA*, has been extensively litigated. However, the focus of those decisions has generally been the meaning of the term “clear title”. See, for example: *Norfolk v. Aikens*, 1989 CanLii 245 (BC CA), 1989 CarswellBC 221; *Roland Construction Ltd. v. Williamson Pacific Developments Inc*., 1992 CanLii 1365 (BC SC), 1992 CarswellBC 1971; and *Campbell v. Frolek*, 1997 CanLii 3761 (BC CA), 1997 CarswellBC 529.

[66] These cases simply stand for the proposition that a contract of purchase and sale for clear title of a property requires that all encumbrances registered against the property be removed by the vendor, except those specifically contemplated in the contract. For example, in *Roland*, the contract contained a reservation clause similar to the Title Clause here. The court held that a right-of-way registered against the subject property did not fall within the reservation clause and thus the vendor breached the contract by failing to remove it and to deliver clear title (1992 CarswellBC 1971, at para. 12).

[67] However, these cases offer little assistance in determining *what* encumbrances fall within the Title Clause, which is the central issue on appeal. Indeed, we have not been directed to any authorities that have interpreted the phrase “contained in the original grant or contained in any other grant or disposition from the Crown”, which is the operative language of the Title Clause.

[68] Turning to the Disputed Encumbrances, I note that neither party takes issue with the judge's classification of the encumbrances into three general categories as set above at para. 25. I will therefore use the same division to conduct my analysis.

Assignment of Grants from the Property Owner to a Third Party

[69] The first encumbrance considered by the judge (Charge PS28530) falls within this category. Charge PS28530 is a surface lease between the former owners of one of the subject parcels of land (Parcel 1.3) and Canadian Forest Oil Ltd. ("CFOL") to allow CFOL to engage in "exploration, development, production or storage of petroleum and natural gas and related hydrocarbons and/or substances produced in association therewith". The judge held that CFOL had a permit from the Crown to extract gas from the property and, as such, was acting as a person under Crown authority within the meaning of the original Crown grant to enter into a lease with the owner of the property (see the language at para. 22 above). According to the judge, the surface lease was therefore granted under a reservation contained in the original Crown grant and fell within the terms of the Title Clause, which, again, excepts "subsisting conditions, provisions, restrictions, exceptions, or reservations, including royalties, contained in the original grant from the Crown" (at para. 61).

[70] Crown Fortune did not address each of the Disputed Encumbrances in its factum or in oral argument. However, as I understand its position, Charge PS28530 is said to fall outside of the Title Clause because it is not an encumbrance "contained in" the original Crown grant, because it is not specifically identified in the grant and because it was not created by the Crown but by a third party.

[71] I agree with Bonnefield that Crown Fortune's position relies on an overly narrow interpretation of both the Title Clause and the Crown grant and is inconsistent with the purpose of the original grant.

[72] As discussed above, the purpose of the original grant was to preserve for the Crown, or a party acting under Crown authority, the right to access otherwise private property for the purpose of extracting resources. The purpose is consistent with the relevant legislative provisions, including, most notably, s. 50 of the *Land Act*.

[73] It is clear from the express wording of the grant that the reservation of these rights applied not just to encumbrances existing at the time of the grant, but also to future encumbrances, as evidenced by the reference to “heirs and successors” for whom the right to “use and enjoy and every part of the same land and of the same easements and privileges thereto belonging” is expressly preserved.

[74] Crown Fortune’s position also does not accord with the language of the Title Clause, specifically the reference to encumbrances that may be contained in “any other grant or disposition form the Crown”. The plain meaning of these words contemplates that encumbrances contained in grants other than the original Crown grant are excepted from the transfer of clear title.

[75] Moreover, the Title Clause excepts “subsisting” conditions, provisions, reservations etc. While we were not provided with any authorities defining the term “subsisting”, the *Concise Oxford English Dictionary*, 12th ed., Oxford University Press, defines “subsist” to mean “remain in being, force, or effect”. For the purposes of the Title Clause, “subsisting” must be taken to mean encumbrances registered on title to a property as at the date of transfer of title, provided that they otherwise fall within the ambit of the clause. Charge PS28530 is such an encumbrance.

[76] For these reasons, Crown Fortune has not established that the judge erred in holding that Charge PS28530 was authorized by the Title Clause.

[77] The judge applied the same analysis to similar surface leases registered against Parcels 7.1A, 7.2A, 7.4A, 7.5 A, 8.1A, 8.2A, 8.3A, 8.4A, 8.5A, 8.7A, 9.2, 9.4, 12.3, and 12.4. For the same reasons, Crown Fortune has failed to demonstrate that the judge erred in his analysis or conclusions respecting these encumbrances.

[78] Also included in this first category of encumbrances are ten statutory rights-of-way granted by the owners of the land to the owner of a permit to construct, operate and maintain a pipeline for the extraction of gas (registered on Parcels 2.4, 3.4, 7.3, 7.6, 8.6, 9.3, 10.2, 10.3, and 12.2). The judge found that these encumbrances fell within the terms of the original Crown grants that reserved the rights of subsisting permit holders under the *PNGA*, or any prior or subsequent

enactment of like effect, to "enter on, or use and occupy the land, for any purpose authorized by the permit".

[79] As an example, the statutory right-of-way registered against Parcel 2.4, under Charge BV327588, was expressly granted "for the purpose of laying down and maintaining a pipeline and ancillary equipment necessary for the operation and maintenance of the Grantee's undertaking". The original Crown grant for Parcel 2.4 contained language similar to that referred to at para. 62 above, which preserved the rights of holders or owners under subsisting licenses or permits issued under the *PNGA*, or under any prior or subsequent enactment.

[80] As with the surface leases addressed above, the statutory right-of-way is consistent with both the stated purpose of the original Crown grant and with the language of the Title Clause. I note that the document granting the right-of-way does not refer to the *PNGA* or any particular statute as conferring authority for the grant. However, the right-of-way is of the type contemplated under s. 218 of the *LTA*, which I consider to be an enactment of "like effect" to the *PNGA* in that it grants rights intended to facilitate resource extraction.

[81] Again, Crown Fortune has failed to demonstrate that the judge erred in finding that these encumbrances are authorized by the Title clause.

Assignment of Grants from One Company to Another

[82] Next, I address the judge's third category of encumbrances, i.e., Assignments, as the analysis is similar to that of the first category.

[83] The judge held that four encumbrances (registered on parcels 7.2C, 8.1B, 8.2B, and 8.3B) were assignments of surface leases from the original permit holder to a new permit holder. The judge held that the initial surface leases were authorized under the Crown grants and that the "clear language" of the grant permitted an assignment of the leases (RFJ at para. 82).

[84] While the judge does not identify what "clear language" is relied upon to reach this conclusion, in effect, the judge reasoned that because the initial surface lease was authorized by the Crown grant, there is no principled reason to treat the

assignment of that lease differently. As the judge put the point, “the clear language of the grant allows an assignment of a surface lease from one permit holder to another as they are both authorized by the Crown to enter into surface leases” (RFJ at para. 82). I agree with this finding.

[85] Thus, for the reasons set out above dealing with grants of surface leases, I find that Crown Fortune has not established that the judge erred in his analysis and conclusions respecting this group of encumbrances.

Assignments of Rent Proceeds

[86] This brings me to the second category of encumbrances identified by the judge: the property owner’s assignment of the Rent Proceeds under a surface lease to a third party (registered against Parcels 7.1B, 7.2B, 7.4B, 7.5B, 8.1C, 8.2C, 8.3C, 8.4B, 8.5B, and 8.7B).

[87] The judge again found that the original Crown grant contemplated the payment of “reasonable compensation” for the raising and procuring of the resources, but placed no restrictions on how such compensation must be paid (RFJ at para. 73). As such, he determined that a wide range of payment mechanisms are permitted, which includes an assignment of Rent Proceeds. The judge also noted that the Title Clause excepts royalties contained in the original Crown grant. The judge acknowledged that if he was wrong in his analysis, then the assignments of rent would fall outside the scope of the encumbrances permitted under the title Clause (RFJ at para. 76).

[88] The reference to “payment of reasonable compensation” in the Crown grant reflects the requirement that if the Crown, or a party acting under Crown authority, is going to access private property for resource extraction purposes, compensation must be paid to the private land owner. This requirement is also contained in s. 50 of the *Land Act*. Similarly, a party acting under a surface lease or right-of-way granted by the land owner must generally pay compensation to the land owner. That compensation is set out in the instrument granting the particular right.

[89] For example, referring again to the surface lease registered against Parcel 1.3 under Charge PS28530 (see para. 69 above), the lease document established the annual rent under the lease at $2500. That is the “reasonable compensation” contemplated in the Crown grant and agreed to by the parties in order to permit the lessee to exercise the rights granted under the lease.

[90] In the event that the lessor assigns the surface lease, the lessee’s obligation to continue to pay rent is maintained and the lease assignment falls within the Title Clause.

[91] Crown Fortune submits that the assignment of Rent Proceeds is a different matter. It notes that a lessor entitled to an income stream in the form of rental payments under a surface lease may assign that right to a third party for any number of reasons, including reasons wholly unrelated to the original purpose of the Crown grant of permitting access to resources located on the property—for example as security for an unrelated loan. Crown Fortune says that the registration of the assignment against title creates a financial encumbrance resulting from a purely private transaction between assignor and assignee. As such, it is not an encumbrance contained in the original or another Crown grant nor does it fall within the terms of the Title Clause.

[92] I am unable to accede to this argument. While an assignment of Rent Proceeds is arguably somewhat more removed from the Crown grant than the encumbrances described in the first two categories above, the payment of reasonable compensation is required by the terms of the grants and is an integral aspect of the scheme by which parties are able to access otherwise private land for resource extraction purposes.

[93] Further**,** it is clear from the language used in the assignments that the assignee has considerable authority in respect of the party exercising the access rights. For example, the assignments of Rent Proceeds registered against parcels 7.1B and 7.1C, under numbers BV043630 and BV43631 contain the following terms:

> 3. The Assignee and the Assignor hereby agree that the Assignee shall have full power and authority to negotiate any change in compensation payable by the Lessee under the Lease(s) or to apply, pursuant to Part 3

> of the [*PNGA*] for an increase in all rental payments payable pursuant to the Lease(s);
>
> …
>
> The Assignor hereby covenants and agrees that:
>
> …
>
> (b) during the currency of this Assignment the Assignor will not terminate or in any way otherwise deal with the Lease(s), without the consent in writing of the Assignee first had and obtained.

[94] Under these provisions, even if the assignment is made for purely private purposes, the subject matter of the assignment i.e., the payment of Rent Proceeds, remains inextricably tied to the central purpose of the original Crown grant. In my view, there is no principled basis upon which to distinguish between the grant of access to private lands and the compensation payable for that access. Given my finding that the encumbrances relating to surface leases fall within the Title Clause, it follows that agreements relating to the Rent Proceeds payable in connection with those leases, including assignments of the Rent Proceeds, must also fall within the Clause.

[95] While the judge did not ground his decision on this issue in the purpose of the Crown grant or the specific language of the assignments, I find that Crown Fortune has not established that the judge erred in finding that these encumbrances are authorized by the Title Clause.

Conclusion

[96] I would therefore dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice De-Witt Van Oosten"