

CANADA / JUDGMENT

McDonald v. Bode Estate

2017 BCSC 515

COURT

Supreme Court of British Columbia

DECIDED

30 March 2017

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2017 BCSC 515 McDonald v. Bode Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDonald v. Bode Estate,

2017 BCSC 515

Date: 20170330

Docket: S147599

Registry: Vancouver

Between:

Laurie McDonald

Listry Hebert and

0743769 B.C. Ltd.

Petitioners

And

Hans Wilhelm Bode (Deceased), The Estate of Hans Wilhelm Bode,

Elsa Luise Bode (Deceased), the Estate of Elsa Luise Bode, and

ConocoPhillips Canada Operations Ltd.

Respondents

Corrected Reasons for Judgment: The text of the Judgment was corrected at paragraph 2 on April 20, 2017

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioners:

G. Kim

Counsel for the Respondents, Hans Wilhlem Bode, deceased and Elsa Luise Bode, deceased and their Estates:

G.D. Whidden

Counsel for the Respondent, ConocoPhillips Canada Operations Ltd.:

M. Baker, A/S

Place and Date of Hearing:

Vancouver, B.C.

March 16, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2017

Introduction

- [1] The issue raised by the petition is whether an assignment of rents, payable in accordance with a lease that is registered against title to real property in the Province, creates an interest in land, so that once registered with the Land Title Office, it survives transfer of title of that property consequent on its sale to a new owner. The parties advise that there is no decided case in British Columbia on this point.
- [2] Before I turn to the facts and my determination of the dispute, I will note that the respondents agree that the relief sought by the petitioners in respect of one of two charges registered with the Land Title Office, under number PL010090 against the real property in issue, should be granted. Accordingly, and by consent, a declaration is issued confirming that charge PL010090 expired on or after December 21, 2012, and, pursuant to s. 249 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], I order that charge is cancelled.
- [3] For the reasons that follow, the remaining relief sought in the petition is dismissed.

Facts

- [4] In this section, I outline the dispute between the parties and set out many of my findings of fact.

- [5] The property in question is described in the Land Title Office as PID 014-694-221, District Lot 155 Peace River District, Except the West 25 Metres ("Property").
- [6] The personal respondents are the executors of the estates of Hans Wilhelm Bode and Elsa Louis Bode, who at one time owned the Property as joint tenants. For convenience, and not intending any disrespect, I will refer to those respondents with reference to Mr. and Mrs. Bode, and will do so as "the Bodes".
- [7] The Bodes owned the Property in 1997. In that year, Canadian Hunter Exploration Ltd. ("Hunter") approached them to request permission to occupy a portion of the Property to drill for oil and natural gas. The Bodes agreed. They granted a 25-year surface lease over a portion of the Property to Hunter, as lessee, on October 9, 1997. It expires on October 8, 2022. The Lease was subsequently registered with the Land Title Office in Prince George on December 9, 1997, under number PL67828. It identified the Bodes as the registered owners in fee simple of the Property.
- [8] The Lease required Hunter to pay annual compensation to the Bodes. Part of the compensation included an amount in respect of Hunter's occupation and use of the Property. The Lease provided that Hunter was to pay \$4,825 for the first year, and then \$2,270 for each year thereafter. The payment was broken down into three categories for the second year and each year thereafter: (a) \$766 for "Loss of Use"; (b) \$1,500 for "Adverse effect, severance & nuisance"; and (c) \$4.00 for "Other", which was undefined. In a written addendum to the purchase and sale documents ("Addendum"), Hunter and the Bodes agreed to a periodic review of the compensation payable under the Lease.
- [9] The petitioners have referred to the compensation payable under the Lease as "Rental Payments", and I shall do so as well.
- [10] In December 1997, the Bodes sold the Property to Foothills Land and Cattle Co. Ltd. ("Foothills"). Under the terms of sale, the Bodes specifically retained the right to receive the rent paid pursuant to the Lease. The Bodes and Foothills entered into an assignment of rents, which was signed on December 19, 1997 ("Assignment of Rents").
- [11] The Assignment of Rents identified the Bodes as having been the registered owners of the Property. It stated that Foothills is "now or will be the occupier and owner of the [Property], and but for this assignment, the party entitled to receive all annual rental payments payable pursuant to the Lease." Thus, as assignees under that document, the Bodes, who would no longer be owners of the Property once the requisite transfer of title documents were registered with the Land Title Office, remained entitled to receive all rental payments in connection with the Lease.

- [12] With the assistance of counsel, the Bodes and Foothills executed a Form "C" - General Instrument, which attached the Assignment of Rents. Shortly thereafter, on December 23, 1997, they registered the General Instrument against the title to the Property with the Land Title Office, under number PL070091. The Bodes are shown as registered owners (described as "joint tenants") of the Assignment of Rents on the register maintained by the Land Title Office.
- [13] Hunter continued to pay rent to the Bodes until its interest in the Lease was acquired by the respondent, ConocoPhillips Canada Operations Ltd. ("ConocoPhillips").
- [14] ConocoPhillips is in the business of carrying out oil and natural gas exploration. It is incorporated in Alberta and is extra-provincially registered to carry on business in British Columbia. It is currently the registered owner of the Lease and has the right to occupy the Property in order to drill and otherwise explore for oil and natural gas. In return, it is obliged to pay the Rental Payments.
- [15] In May 2010, Foothills sold the Property to the petitioner, 0743769 B.C. Ltd. ("0743769").
- [16] 0743769 paid \$150,000 to purchase the Property from Foothills. There is no mention of the Assignment of Rents in the purchase and sale documents. Although income from other leases is mentioned in the Addendum, as shown in the following extract, there is no reference to the Lease involved in issue in this petition:

The Buyer and Seller agree that the 2010 income from the Proet & Progress leases will be adjusted at closing.

- [17] No issue is taken with the Bodes' submission that 0743769 had notice of the Lease and the Assignment of Rents when they purchased the Property.
- [18] Since December 2012, each of the petitioners holds a one-third interest in the Property.
- [19] No evidence was adduced to show whether the purchase price paid by 0743769 to Foothills included a value ascribed to the Assignment of Rents.
- [20] The Bodes suggest that 0743769 would have had to pay for the right to acquire it. The only evidence adduced to possibly support that submission is hearsay evidence from the petitioner, Laurie McDonald, who described a discussion between petitioners' counsel and Mr. Bode while he was alive. In para. 23 of her first affidavit, sworn September 26, 2014, she deposed:
23. I am informed by Ms. Kim and verily believe that she attempted to call Hans Bode back on May 20 and May 22, 2014, without success. I am further informed and verily believe that she finally spoke with Hans Bode on May 26, 2014, when he stated that he had intended to keep the rents associated with the Lands when he decided to sell it for a relatively low price. He further stated that while the rental payments that he received were "not much", he would expect a reasonable offer from the landowners if he were to give up the income associated with the Rental Payments.

- [21] After receiving that advice, Ms. McDonald sought to obtain from the Bodes (what she has described in her affidavit as) their rights under the Assignment of Rents. She instructed her lawyer to make an offer to the Bodes to transfer those rights. On this point, she deposed in her affidavit:
27. On or around June 30, 2014, I instructed Ms. Kim on behalf of the petitioners to make an offer to the Bodes by letter for the transfer of the rights to the Assignment of Rents. I am informed by Ms. Kim and verily believe that the June 30, 2014 letter was returned to the sender because the address was "incorrect" according to the courier service.
28. On or around July 29, 2014, I instructed Ms. Kim on behalf of the petitioners to resend our offer to the Bodes by letter for the transfer of the rights to the Assignment of Rents. I specifically instructed Ms. Kim's office to retain a bailiff service or process server in order to serve the letter on the Bodes.
29. I am informed by Ms. Kim and verily believe that since August 27, 2014, she has attempted to speak with the Bodes, but has been unsuccessful in reaching them by phone.
- [22] Not surprisingly, the Bodes did not object to this evidence from Ms. McDonald being introduced on behalf of the petitioners.
- [23] Failing a response from the Bodes, the petitioners filed the petition seeking an order that the Bodes' rights under the Assignment of Rents expired when Foothills sold the Property to 0743769.
- [24] The Bodes continued to receive Rental Payments from ConocoPhillips until the dispute that led to this proceeding arose. On May 2, 2014, the petitioners notified ConocoPhillips of their claim to the Rental Payments. Thereafter, on May 30, 2014, they clarified their position to the Bodes and ConocoPhillips that their claim is for unaccrued rent. In the following month, ConocoPhillips advised the Bodes that it would interplead the Rental Payments or make other arrangements with the parties pending their dispute. However, ConocoPhillips did not interplead and has, instead, withheld payment since October 1, 2014 pending the outcome of the petition.
- [25] ConocoPhillips took no position at the hearing of the petition. It said it will continue to withhold payment of Rental Payments pending the determination of the dispute between the petitioners and the Bodes.

Positions of the Parties

- [26] The petitioners seek an order cancelling the Assignment of Rents as a charge against the Property pursuant to s. 249 of the LTA. The petitioners argue that the document is merely a contractual agreement between its contracting parties that does not survive a transfer of title to property consequent on a purchase and sale. The petitioners' position is that assignments of rents generally as well as the Assignment of Rents do not convey an interest in property. The Assignment of Rents, they submit, is a contract that called only for the

payment of compensation. Consequently, the petitioners submit, once the Property was sold by Foothills to 0743769, it was no longer in force, such that they, not the Bodes, are entitled to payment of the Rental Payments. The petitioners also argue that they are prejudiced if the Bodes are entitled to the Rental Payments because they will receive no compensation even though they have given up occupancy and use of a substantial portion of the Property. The petitioners also say they are prejudiced if the Bodes receive the Rental Payments because, as the current owners of the Property, they are exposed to liability from potential environmental claims arising from ConocoPhillips' oil and natural gas exploration.

- [27] The Bodes oppose the relief sought by the petitioners. They claim that they remain entitled to receive all Rental Payments from ConocoPhillips. Their defence is not predicated solely on the fact of registration of the Assignment of Rents with the Land Title Office. They submit that the Assignment of Rents was intended by its covenanting parties to create an interest in land. They argue that their intent is clear on the face of the document, from their mutual execution of a General Instrument to register the Assignment of Rents, and from their joint retainer of a lawyer to prepare and register the General Instrument with the Land Title Office. Their position is that the Assignment of Rents was properly registered against title, such that notice of the registered charge was available to all interested purchasers, including 0743769. They submit that the Assignment of Rents survives any transfer of title to the Property, unless it is discharged in a subsequent sale, and for that to occur, it must be specifically addressed in the purchase and sale agreement. The Bodes also assert that 0743769 could have taken steps (but did not) to purchase their right to the Rental Payments when it bought the Property, and if it had, it would have then been in a position to discharge the Assignment of Rents from title.

Law

- [28] Neither the LTA nor the Property Law Act, R.S.B.C. 1996, c. 377 contain any specific provisions dealing with an assignment of rents.
- [29] The Personal Property Security Act, R.S.B.C. 1996, c. 359 offers no guidance because the statute specifically excludes from its ambit rents payable under a lease of land in the province: s. 4.
- [30] Given the absence of any case law decided in this province, and for guidance, the parties drew my attention to legislation and case law from Alberta and Saskatchewan, as well as one decision from the Supreme Court of Canada.
- [31] Alberta and Saskatchewan amended their real property legislation in 1985 and 2000, respectively, to add provisions which specifically include assignments of rents amongst a group of charges creating interests in land: see, e.g., Law of Property Act, S.A. 1985 c. L-8, s. 59.1, as amended, 2000, c. L-7, s. 63; The Land Titles Act, 2000, S.S. 2000, c. L-5.1, s. 144.
- [32] Until those amendments were enacted, the issue was determined on a case by case basis, with the outcome dependant on a court's determination of the intention of the parties.

- [33] The petitioners argue that in the absence of specific legislation in this province, the common law applies, just as it did in Alberta and Saskatchewan prior to the amendments to their real property legislation, such that an assignment of rents cannot create an interest in land. They submit, therefore, that the Assignment of Rents ceased to be of any force and effect upon the sale of the Property to 0743769. Relying on dicta in *Webster v. Brown*, 2004 ABQB 321 at para. 20, they assert that even though they had notice of the Assignment of Rents before 0743769 purchased the Property, it is of no consequence because an, "Invalid notice of an unenforceable claim cannot defeat the operation of the land title system."
- [34] Despite the very able submissions of counsel for the petitioners, I cannot agree. A review of the case law shows that in the absence of specific legislation, the issue is resolved, at common law, by determining the intention of the parties in each case.
- [35] In determining whether an instrument creates an interest in land, courts look to the intention of the parties as shown by the words they used in the contract documents: *Canadian Crude Separators Inc. v. Mychaluk*, [1997] A.J. No. 861 at para. 12 (Q.B.); *Canco Oil & Gas Ltd. v. Saskatchewan*, [1991] 4 W.W.R. 316 at para. 51 (Sask. Q.B.). In a more recent case, *In Sherman v. Ogonoski*, [1993] A.J. No. 508 (Q.B.), the plaintiff had retained the right in the agreement for sale to receive all payments on account of surface leases "for the lifetime of the wells". Justice Foster determined that the parties intended to create an interest in land:
- 13 The Agreement for Sale speaks of "all payments to be made and for the lifetime of the said wells." It was the declared intention of all parties that the Plaintiff receive these payments for the lifetime of the said wells. A period in this case well beyond the Agreement for Sale and the Transfer of Land. This covenant represents a collateral or independent undertaking in the sale contract. The presumption of non-merger therefore applies. There is no evidence that the parties intended that the payments cease upon transferring the lands to the Defendants.
- 14 The Defendants argue that the "lifetime of the said wells" is meaningless and indeterminate. The lifetime of the said wells is for so long as the leases remain in effect and the lessee has not ceased his use and occupation of the lands thereby terminating the lease and rental payments. The lifetime of an oil well while it may be lengthy if a lessee exercises its rights of renewal is not forever.
- [36] In other cases, however, courts have found that the parties intended the right to an assignment of rents as only a personal right that did not run with land: *Northern Bank v. Van der Geer*, 1986 ABCA 252 at paras. 13-14; *Webster v. Brown*, 2004 ABQB 321 at paras. 20-23.
- [37] In Saskatchewan, the legislature amended its legislation to expressly provide that an interest arising from an assignment of rents is deemed to be an interest in land capable of being registered. The legislation was amended retroactively so as to deem all assignments of rent registered on or after April 1, 1995 to be an interest in land. Eleven years later, a decision was issued by the Court of Queen's Bench in that province, holding that an assignment of rents

filed in 1993, before the amendments were enacted, provided only contractual rights between its parties that ceased to be of any force and effect once the land was sold: *Swenson v. Swenson*, 2006 SKQB 438 at para. 42.

[38] The petitioners also rely on certain remarks contained in a report issued by the British Columbia Law Institute in 1995 entitled *Report on Land-Related Interests and the Personal Property Security Act* at s. 143, as well as a discussion of the meaning of "rent" as found in the *Canadian Encyclopedic Digest (Western)*, *Landlord and Tenant*, VII *Rent* at s. 425 ("CED").

[39] In its report, the Law Institute noted that the effect of registering an assignment of rents was "highly speculative", adding:

The modern, and we believe better, view is to regard rent as personal property. But how far this view is reflected in current British Columbia law and practice is another matter.

[40] According to the editors of the CED, rent "issuing out of land as compensation for possession during the term" is a chose in action where it has accrued due, so as to confer a right of possession. Where rent is accruing due, however, which is what the petitioners now claim they are entitled to, it is an incorporeal hereditament that is inheritable and, as some cases have held, may found an interest in land.

[41] In this province, and in spite of the absence of a specific provision in the LTA concerning the status of an assignment of rents, the Land Title Office accepts assignments of rents documents for registration. Registration of the assignment document against title to property in British Columbia may occur following a review of the registration submission by the Director of the Land Title Office or its delegate: LTA, Division 6, ss. 233-236.

[42] The Land Title Office's "Land Title Office Electronic Forms Guidebook", at s. 5.17(1)(a), states that registration of an assignment of rents must be submitted with a Form "C":

5.17 (1) The following classes of instrument creating or constituting any of the following must be in Form C

(a) An assignment of rents that is not part of a mortgage;

[43] A Form "C" is also referred to as a "General Instrument".

[44] If the Form "C" attaching the assignment of rents is accepted for filing by the Director, then it is effective in accordance with its terms. The LTA provides:

232 (1) In this Division:

"interest" means an interest in land that is recognized under law and that is registrable under this Act;

233 (2) An instrument to which this Division applies must be in the form of a general instrument.

- (4) Part 1 of a general instrument must be in the form approved by the director, must be completed in the manner approved by the director and must contain the following:
- (a) the parties to the instrument;
 - (b) the legal description of the land affected by the instrument;
 - (c) a description of the interest created, discharged or otherwise affected by the instrument;
 - (d) the signatures of the transferor and witness in accordance with Part 5;
 - (e) the signature of the transferee if the instrument requires the signature of the transferee;
 - (f) terms that, if contained in the instrument, are required by regulation to be included in Part 1 of the instrument;
 - (g) other information required by the director.
- (5) In approving a form under subsection (4), the director may
- (a) require Part 1 of the general instrument to be on a single page,
 - (b) permit the addition of one or more pages to accommodate an additional or necessary party or any other addition the registrar requires or considers necessary,
 - (c) specify the information or material that must be set out on the first page and on any additional page,
 - (d) specify the information or material that is permitted to be set out on the first page or on any additional page, or
 - (e) specify any other requirements as to the format and content of the approved form that the director considers necessary for the purpose of this Act or for any other purpose

236 Subject to other applicable provisions of this Act being complied with, a general instrument that complies with this Division has effect in accordance with its terms.

[45] The mere fact of registration, even where the Director determines that the documents comply with the LTA, does not prove an interest in land. It must nonetheless be established from the intention of the parties. However, the parties' agreement to register, and the steps they take to do so, may be evidence of their intention to create an interest in land.

[46] Until 2002, there was a lack of clarity in Canada concerning whether the common law prohibition on the creation of an interest in land from an incorporeal hereditament continued to apply. The prohibition was firmly abolished by the Supreme Court of Canada in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 at paras. 10-21. The Court's decision in this case was released approximately eight years before 0743769 purchased the Property from Foothills. In remarking on the issue insofar as the oil and gas industry is concerned, Mr. Justice Major wrote at para. 10, in response to the appellant's submission that at common law royalties and rent cannot be interests in land, "Canadian law suggests

otherwise." He made the point, at paras. 17, 18, and 21, that the oil and gas industry is governed by a combination of statute and common law which is flexible enough to permit the creation of an interest in land from an incorporeal hereditament if that is what the parties intended. I have excerpted his remarks as they are apposite to this case:

17 The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

18 The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a profit à prendre, if that is the intention of the parties.

[Emphasis added]

[47] Prior to the Bank of Montreal decision, and in addition to Sherman, decisions from courts in Alberta and Saskatchewan took the same approach to incorporeal hereditaments (such as rents and royalty payments) in oil and gas cases, and looked to the intention of the parties to determine the issue: see, e.g., *Garland v. Jones*, [1993] 7 W.W.R. 102 (Sask. Q.B.); *Gas Exploration Co. of Alberta Ltd. v. Cugnet* (1954), 12 W.W.R. (N.S.) 177 (Sask. Q.B.); *Hughes v. Gidosh*, [1971] 1 W.W.R. 641 (Alta. Q.B.); *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1994] A.J. No. 669 (Alta. C.A.).

[48] I agree with the petitioners that the holdings in *Webster* and *Swenson*, which are relied upon by the petitioners, are distinguishable on their facts. In both of those cases, the result turned on the findings of the parties' intentions as gleaned from specific contractual language.

[49] In *Webster*, the parties agreed that no interest in land was created by the assignment. Instead, they argued that the assignment was capable of being transferred independently from the land as a chose in action. At para. 131, the Alberta court said that a "general assignment of rents" does not create an interest in land. In the result, a caveat filed with the Alberta Land Title Office was found not to elevate the assignment to a charge on the land.

- [50] There was also no mechanism in place in Alberta at that time to register an assignment of rent, which explains why the parties resorted to filing the caveat. As I have pointed out, in British Columbia, there is a means to file an assignment of rents with the Land Title Office.
- [51] In Swenson, the father of the parties inserted a clause in the sale agreement, when he sold the land to his sons, reserving to himself a lifetime interest in all surface rights. The Court found this to be an agreement concerning a lifetime interest between father and sons that expired on the sale of the land: para. 42.
- [52] In summary, the outcome of the dispute in the case at bar is dependent on whether the parties to the Assignment of Rents intended the document to create an interest in the Property.

The Intention of the Bodes and Foothills

- [53] I have determined that it was the intention of the Bodes and Foothills to create a registerable interest in land to secure the payment of the Rental Payments. Their intention is manifest from the wording of the Assignment of Rents itself and their conduct.
- [54] To start with, and after describing the transfer of title by the Bodes to Foothills, the Assignment of Rents specifically records that it is a term of the transfer of title of the Property that Foothills would grant an assignment of the annual rent to the Bodes. It is not the case, as the petitioners suggest, that the purpose of the parties' agreement was to simply provide a contractual right for the Rental Payments. Recital "D" of the Assignment of Rents states:

It was a term of the transfer of title by the Assignee [Bodes] to the Assignor [Foothills] that, concurrent with registration of the transfer, the Assignor would grant to the Assignee an assignment of the Compensation.

[Emphasis added]

- [55] "Compensation" is defined in the Recital "C" to mean "all annual rental payments payable pursuant to the Lease."
- [56] Further evidence of the parties' intention is gleaned from other clauses in the document. I will discuss them in the ensuing paragraphs of this section.
- [57] The Assignment of Rents did not prohibit Foothills from assigning its rights under the Lease to another entity. To the contrary, I infer from its language that the parties contemplated that Foothills could assign its rights under the Lease to another party. Specifically, Recital "E" states that "The Lessee or its successor in title is hereinafter called the "Occupant".
- [58] To assign or otherwise deal with the Lease, Foothills must obtain the Bodes' consent. Clause 4(b) states:
4. The Assignor [Foothills] 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, without the consent in writing of the Assignee first had and obtained.
- [59] Foothills gave to the Bodes full power and authority to deal with any subsequent occupant of the Property, to have all of Foothills rights, interest, and title to the Rental Payments, and to make demands for payment, provide receipts and releases, and to negotiate changes to the payment:
1. The Assignor does hereby assign and transfer unto the Assignee all of the right, interest and title of the Assignor in and to the Compensation.
 2. The Assignee shall have full power and authority for the Assignor to demand, sue for, recover, receive and give effectual receipts, releases and discharges for the Compensation and to negotiate any change in the Compensation.
 3. Receipts, in writing, of the Assignee shall be valid discharges to the Occupant and all other persons paying the Compensation by virtue of this Agreement and the Occupant or such other person shall not be bound or entitled to enquire into the state of the accounts between the parties to this Agreement, or see to the application of the Compensation acknowledged to be received by such receipt, or to be answerable or accountable for the misapplication or nonapplication of the Compensation.

[Emphasis added]

- [60] Foothills was provided the right to assign the Rental Payments, but clause 4 c) made any such assignment conditional, so that it must reflect the parties' intentions as reflected in their agreement.
- [61] Lastly, and also of significance is that, according to clause 4 e), the the Bodes' interest in the Rental Payments is to survive even where the Lease is "replaced":
- e) The within Assignment shall continue to be effective in respect to and notwithstanding any modifications, extensions or replacements to the Lease.
- [62] Moving away from the contents of the contract documents, I find that the actions taken by Foothills and the Bodes in retaining a lawyer to prepare and file with the Land Title Office a Form "C" - General Instrument, which they had executed as part of the closing documents, is additional evidence in this case of their intention to create an interest in land.

Conclusion

- [63] When Foothills assigned its interest in the Rental Payments to the Bodes, it, along with the Bodes, intended to create an interest in land in favour of the Bodes. The Bodes protected their interest in documents created to effect the purchase and sale of the Property. They also did so when they, along with Foothills, submitted a General Instrument - Form "C" for registration to the Land Title Office, attaching the Assignment of Rents. Those documents were accepted for filing and registered against title to the Property.
- [64] In my respectful opinion, the petitioners' claim that they are prejudiced in the event the Bodes remain entitled to the Rental Payments, due to the loss of use of their Property from ConocoPhillips' drilling and exploration and from potential exposure to environmental liability claims, is without merit. When 0743769 purchased the Property from Foothills, it was aware that the Assignment of Rents was registered as a charge against title.
- [65] Further, when 0743769 purchased the Property from Foothills, case law decided in this country since the 1950s confirmed that the common law permitted agreements concerning rents or royalties arising from leases for oil and gas exploration to create interests in land.
- [66] The Bodes are and continue to remain entitled to receive the Rental Payments in accordance with the Lease.
- [67] The relief sought by the petitioners in paras. 3 and 4 of Part 1: Orders Sought of the amended petition is denied.
- [68] Absent some matter that I am unaware of, the Bodes are entitled to their costs.

"Walker J."

The Honourable Mr. Justice Walker

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Prepared on 28 October 2026 · Esheria