CASE COMMENT: EFFECT OF *WHITE RESOURCE MANAGEMENT* v. *DURISH*

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I. INTRODUCTION

By its judgment in *White Resource Management* v. *Durish*,[1] the Supreme Court of Canada has restored and confirmed two vital aspects of title registration law. By doing so it has made a conveyancer's lot a happier one, and conveyancers should give three hearty cheers. The present writer joins the chorus.

The Supreme Court held:

(a) that section 195 of the *Land Titles Act*[2] protects a purchaser of a caveated interest against interests not registered or caveated at the time of the purchase; and

(b) that the purchaser of a caveated interest is entitled to the priority established by the seller's caveat.

Conveyancers are also likely to give cheers for the Court's decision that, as between owners of less-than-fee-simple interests,[3] the lapse of a caveat deprives the no-longer-caveated interest of its priority over a less-than-fee-simple interest protected by a later caveat, as that result is convenient for landowners and conveyancers. The present writer does not join the chorus.

Conveyancers may not be so cheerful about the Court's dictum that as between a subsequent owner and an "encumbrancer," the lapse of the "encumbrancer's" caveat does not deprive the caveated interest of an established priority over the owner. The present writer applauds the result, but will argue that the distinction between a case involving two less-than-fee-simple interests and a case involving a subsequent owner and a lesser interest is based on error.

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1 [1995] 1 S.C.R. 633, rev'g (1992), 131 A.R. 273 (C.A.), aff'g (1991), 113 A.R. (Q.B.) [hereinafter *White* v. *Durish*]. In the Supreme Court the judgment was delivered by Madame Justice McLachlin.

2 R.S.A. 1980, c. L-5.

3 Madame Justice McLachlin's judgment uses the term "encumbrancer" to mean the owner of an interest that is less than a fee simple. For reasons given in the Appendix I propose to use the clumsier words here used, or simply "lesser interest."

A. FACTS

The following are the facts that are material to the legal issues discussed in this casenote:[4]

1. Vold registered a caveat against a certificate of title to the minerals in question as the purchaser under an agreement for sale. Later, Haida registered a caveat protecting a mineral lease from the registered owner. At that point, the relevant subsisting entries on the certificate of title were as follows and in the following order:

   (a) Vold's caveat;

   (b) Haida's caveat.

2. Vold was served with a notice under section 137 of the *Land Titles Act* to take proceedings to substantiate his interest. When he did not do so, his caveat lapsed and was removed from the certificate of title. At that point, the only relevant entry against the certificate of title was Haida's caveat.

3. White then obtained a mineral lease from Vold and registered a caveat, so that the following relevant entries appeared on the certificate of title in the following order:

   (a) Haida's caveat;

   (b) White's caveat.

4. Durish then took an assignment of Haida's lease and registered a caveat, so that the following relevant entries appeared on the certificate of title in the following order:

   (a) Haida's caveat;

   (b) White's caveat;

   (c) Durish's caveat.

Durish claimed priority over White. White claimed priority over Durish. The Supreme Court held that Durish's interest was entitled to priority.[5]

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[4] The facts of the case as recited by the Supreme Court of Canada are much more complex than this summary would indicate.

[5] This statement has to be read subject to the qualification that the Court sent the case back to trial to determine a number of issues, including the continued validity of the Haida/Durish lease, which, because of the procedural path the proceedings had taken, had not been dealt with by the Court of Queen's Bench.

I will now deal with the questions decided by the Supreme Court of Canada.

II. SECTION 195 OF THE *LAND TITLES ACT* AND THE PURCHASER OF A CAVEATED INTEREST

Until 1994, s. 195 read as follows:

> 195 Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease *from the owner of any land in whose name a certificate of title has been granted* shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud. [emphasis added]

Under the rules of equity, a prior equitable interest had priority over a subsequent interest unless the purchaser of the subsequent interest was a bona fide purchaser for value without notice of the prior equitable interest. The rules went on to fix a purchaser with notice of a prior equitable interest that the purchaser could have discovered by a reasonable investigation. They made it difficult to obtain clear title to land and made the conveyancing process slow, costly and uncertain.

Section 195 of the *Land Titles Act* abolished these rules of equity and, together with other provisions of the *Act*, made the acquisition of interests in land much quicker, cheaper and more secure. Section 195 had always been regarded as giving protection to purchasers of all registered interests and of caveated interests. But, once attention was directed to the actual wording of the section, it required a robust interpretation to make it protect a purchaser from anyone but a registered owner in whose name a certificate of title had been granted. Certificates of title are commonly granted for fee simple estates, occasionally for leasehold estates, and rarely for any other kind of interest.

An important question in *White* v. *Durish* was whether Durish, who obtained an assignment of a mineral lease from a caveator, was affected by Vold's interest, which at the time of Durish's assignment was neither registered nor caveated. Justice Mason, in the Court of Queen's Bench, held that the section meant what it said, that is, it applied only to a person who dealt with an owner "in whose name a certificate of title has been granted." Haida was not an owner in whose name a certificate of title had been granted. Therefore, in his view, the section did not protect Durish's purchase from Haida. On appeal, the Court of Appeal assumed for the purposes of the decision that s. 195 *did* protect Durish. The Court, however, said that there was doubt on the point, which "is an issue best resolved by statute, and is a fit subject of inquiry by the Alberta Law Reform Institute."[6]

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[6] *Supra* note 1 at 276 (C.A.).

The Legislature, on the Alberta Law Reform Institute's recommendation,[7] moved quickly to remove doubts. It enacted a new s. 195 which protected purchasers from owners of registered and caveated interests. The amended section was declared to have applied since the *Land Titles Act* came into force.[8]

In the Supreme Court, McLachlin J. first said that she agreed that the strict application of the section to only those dealing with registered owners in fee simple[9] "is not in keeping with the principles of the Torrens system" and that "to confine the s. 195 protection to a small portion of these potential transactions — those involving the registered owner in fee simple — would be to diminish the efficacy of the Land Titles system."[10] This suggests that the Court might have interpreted the old s. 195 robustly and applied it to purchasers of all registered and caveated interests.

Then she said that "the broader interpretation favoured by the Court of Appeal is supported by" the amendment to s. 195. The amendment "is intended to be a clarification of the scope of the section, rather than an expansion of the section to cover new classes of parties."[11] The original s. 195 should be read in conformity with the amended section. In the result, s. 195, whether or not it would have done so without the amendment, protects a purchaser of a registered or caveated interest whether or not a certificate of title has been granted to the transferor or assignor. It protects past purchasers as well as future purchasers. In particular, s. 195 protected Durish, so that he was not affected by notice of Vold's interest when he took his assignment from Haida.

The amendment to s. 195 had already given the good news. However, the decision confirms it. This is a major comfort for conveyancers and their clients.

III. ASSIGNEE'S ENTITLEMENT TO PRIORITY CONFERRED BY ASSIGNOR'S CAVEAT

The Court of Appeal did not say in so many words that the purchaser of a caveated interest is *not* entitled to the priority established by the assignor's caveat. But it did say, in effect: White caveated first; Durish caveated second; therefore White was entitled to priority. It did not give Durish the priority established by Haida's caveat or give any reason for not doing so. In the result, Durish was not entitled to the benefit of Haida's caveat. That is how McLachlin J. interpreted the Court's decision.

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7 Alberta Law Reform Institute, *Section 195 of the Land Titles Act*, Report No. 63 (Edmonton: ALRI, 1993).

8 *Miscellaneous Statutes Amendment Act*, S.A. 1994, c. 23, s. 26(2).

9 As noted above, certificates of title can be granted for leasehold interests and have on occasion been granted for other interests, so s. 195, even on the narrowest construction, was not entirely limited to owners in fee simple. The point is not important and is mentioned only for complete accuracy.

10 *Supra* note 1 at 645 (S.C.C.).

11 *Ibid.*

The Supreme Court held unequivocally that "Haida's caveat gave priority to the interest described by the caveat, and Haida was free to assign that interest free of subsequent claims." To hold otherwise would "undercut the free and convenient alienability of land, one of the principles of the Torrens system."[12] This statement is framed in terms of an assignor-caveator's rights, but it necessarily establishes the right of an assignee to acquire the assigned interest in priority over interests protected by caveats registered after the assignor's caveat. The same reasoning would apply to interests protected by intervening *registrations*.

The priority of the assignor's caveat was a sufficient reason for holding that, as between Durish and White, Durish's interest was the prior interest. There was, however, a second reason. Durish had taken a transfer of the Haida caveat under s. 135.1 of the *Land Titles Act*. "Durish can therefore claim priority through the Haida caveat not only because the underlying lease which it protected was assigned to him, but also because he has taken an assignment of Haida's caveat itself."[13] This treats the "transfer" of a caveat as a transfer of priority rather than as a mere precaution against the caveator either discharging the caveat or suffering it to lapse on service of a notice to take proceedings. It thus gives additional importance to a s. 135.1 transfer.[14]

The Supreme Court's decision that Durish was entitled to the priority established by Haida's caveat is another major comfort for conveyancers and their clients. It emphasizes the importance to a purchaser of a caveated interest of getting a s. 135.1 transfer.

IV. EFFECT OF THE LAPSE OF A CAVEAT AS BETWEEN "ENCUMBRANCERS"

White claimed that:

(a) the Vold interest continued to have priority over the Haida interest despite the lapse of the Vold caveat; and that

(b) White, claiming through Vold, was entitled to assert Vold's priority over Durish, who claimed through Haida.

Durish claimed that the lapse of Vold's caveat deprived the Vold interest of its priority over the Haida interest.

Even if the Court had decided that the lapse of Vold's caveat did not deprive Vold's interest of its priority over Haida's interest, Durish would still have succeeded. As assignee of Haida's interest, Durish was entitled to the priority conferred by the Haida

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12 *Ibid.* at 646.

13 *Ibid.* at 647.

14 Section 135.1 is rather curious. It does not require the transfer of the underlying caveated interest. But the transfer of a Cheshire cat's smile (*i.e.*, the priority of an underlying interest) without the Cheshire cat (*i.e.*, the underlying interest) would be anomalous.

caveat's priority on the register, and Durish was not affected by notice of Vold's then uncaveated interest. But the Court canvassed the question of the effect of the lapse of a lesser-interest owner's caveat as against another lesser-interest owner and decided it. Then it went on to consider what it considered to be a different question, and one that did not arise in *White v. Durish*, that is, the effect of the lapse of a lesser-interest owner's caveat as against a fee simple owner, and decided that too. This casenote will discuss both questions.

A. WHAT SHOULD THE POLICY OF THE LAW BE?

There is room for different views on policy here. I will go back to some early principles.

The *Land Titles Act* permits the "registration" of specified interests.[15] Once an interest is registered, the law declares that the person in whose name it is registered is the owner of the interest and that the interest is subject, with some exceptions, only to interests that are prior to it on the register.

The *Land Titles Act* also allows the owner of an interest to "register" a caveat. Section 145 says that "[r]egistration by way of caveat has the same effect as to priority as the registration of any instrument under this Act." Section 135 provides that "[s]o long as a caveat remains in force an instrument registered subsequent to the caveat and purporting to affect the land, mortgage or encumbrance in respect of which the caveat is lodged is subject to the claim of the caveator."[16]

Registration of a caveat does not have anything to do with the existence, validity or ownership of the caveated interest. Caveats have to do with priority only.

The owner of a registrable interest has a choice. They may register the interest. Or they may register a caveat protecting the interest. But the owner of an interest that is not registrable does not have a choice. They must caveat it or risk losing it.

The *Act* requires a person who caveats an interest to attach an affidavit "that in the belief of the deponent," the caveator[17] "has a good valid claim" and that the caveat is not filed for delay or embarrassment.[18] However, the claimant does not have to prove the claim in any way.

Section 137 then provides, in effect, that a person interested in the land can serve a notice on a caveator to the effect that the caveat will lapse unless the caveator: (a) takes

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15 *E.g.*, fee simple and leasehold estates, mortgages, "encumbrances" (defined as "charges"), easements, restrictive covenants, some kinds of utility interests, party wall agreements and encroachment agreements.

16 As amended by S.A. 1982, c. 23, s. 22.

17 The word "caveator" is used in the *Land Titles Act*. While its precise relationship to the English language may be in doubt, it is convenient. It appears to be based on the use of "to caveat" as a verb. This note will follow both usages.

18 Section 131(2).

proceedings to substantiate the interest; and (b) files a certificate of *lis pendens* at the Land Titles Office within sixty days or such shorter time as the Queen's Bench may order. The person serving the notice can, if they wish, send the notice by registered mail to the address for service at the Land Titles Office. The caveat will lapse if the claimant does not commence action and file a certificate of *lis pendens* within the appropriate time.

B. WHAT IS, AND WHAT SHOULD BE THE PURPOSE OF THE SECTION 137 PROCEDURE?

It is possible for a claimant to clutter up a title and impede transactions by filing a nuisance or unjustified caveat. On the face of it, it seems fair enough that those interested in the land should be able to require a caveator to come forward and prove their claim, on pain of losing the caveat. That is, it seems fair enough if the caveator in fact does not have a valid claim.

But there is another side. Most caveats represent valid interests which are property rights. Many interests cannot be registered and therefore can be protected only by caveat. Many interests endure for long periods of time. Many caveators forget to keep addresses for service at the Land Titles Office up to date. Other caveators may be away for extended periods of time and not get notices in time. Others may be incapacitated. Others may die. The mails may miscarry so that a caveator does not receive a notice. No doubt all caveators should be alert to protect their interests. But deprivation of priority may amount to the effective deprivation of an interest. A procedure that permits the effective deprivation of a property interest by giving priority to a conflicting interest merely because, for any of the reasons listed above, an owner does not receive a notice or does not act upon it in time, is confiscatory. It confers a windfall benefit on the owners of interests the priority of which is established by the lapse.

Title registration does effectively confiscate interests that are unregistered and uncaveated. It does so in the name of facility of transfer. Facility of transfer does require that a purchaser be able to acquire an interest clear of interests not registered or caveated at the time of the purchase, so that a purchaser must be protected against an already lapsed caveat. That is, a lapsed caveat must not be allowed to take priority over a purchaser who acquires an interest after the lapse.

But once a purchaser has acquired an interest subject to a caveat that consideration no longer applies. The register was there. The purchaser could see the caveat and the interest that the caveat claimed. The purchaser acquired their interest and registered or caveated that interest subject to the interest claimed by that prior caveat, if that interest was valid. The law conferred on the interest claimed by the prior caveat priority over the purchaser's interest. The question is whether the lapse of the caveat should take away a priority established by law.

Bensette and Campbell v. *Reece*[19] shows that horrors can result from an affirmative answer. In 1927, the owner of land granted a royalty interest. In 1928, the grantees, Graham and Bensette, registered a caveat. In 1957, almost thirty years later, Reece caused notices to be served. These were sent to the address for service on the caveat. It was the address of a 1928 Saskatoon law firm's office. Happily, the successors to the old firm were still there and received the notice, a degree of continuity that is not always present. They found an address for Bensette, but their letter to that address was returned undelivered. The other caveator had died in 1937. So neither caveator commenced action in time and the caveat lapsed. No doubt the caveators should have attended to their affairs better. But if the lapse of the caveat had deprived them of their priority, the penalty would have been the loss of a valid interest.[20]

Conveyancers are likely to approve a procedure which enables the owner of an interest to get rid of a prior "encumbrance" without the necessity of going near a court. That is an efficient procedure from a landowner's point of view. The other view is that, while the "lapsing" procedure may be defensible as a means of clearing a title for sale or for getting rid of caveats that the owner of a subsequent interest knows to be unjustified, it is unnecessary to go further and allow the owner of the subsequent interest to get rid of the priority as between the two, and thus, in many cases, virtually to confiscate the interest, by a mechanical procedure of which the owner of the prior interest may have no knowledge. In my view, it is not too much to ask of an owner who wants to get rid of a prior interest subject to which the owner acquired their own interest to follow the summary originating notice procedure so that the claimant of the prior interest will lose it only after a court has approved the process.[21]

I would summarize the policy arguments as follows:

1. An interest in land is property. Its priority over other interests is an incident of that property, and depriving it of that priority may well amount to complete deprivation of the property. The *Land Titles Act* machinery should be allowed to deprive an owner of property only to promote the basic policy of the *Act*, which is facility of transfer. That basic policy is satisfied by depriving the owner of an interest of priority only as against a purchaser of a subsequent interest who took the subsequent interest at a time when the prior interest was not registered nor caveated.

2. There is no policy reason to allow the owner of a subsequent interest to obtain a windfall merely because the owner of a prior interest does not respond

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19 [1973] 2 W.W.R. 497 (Sask. C.A.) [hereinafter *Bensette*].

20 In that case, the Court held that the lapse of the caveat did not strip the caveated interest of its priority. See discussion below.

21 The *Land Recording and Registration Act* proposed for adoption by the Alberta Law Reform Institute would maintain the priority of the interest protected by the lapsed caveat against other interests acquired while the caveat was in force, except in the case of a caveat that is caused to lapse or that is discharged in the course of a conveyancing transaction. See Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta*, Report No. 69 (Edmonton: ALRI, 1993).

> quickly enough to a statutory notice. That failure does not prejudice the owner of the subsequent interest. Nor would it prejudice the owner of the subsequent interest to take the prior interest into account in valuing the subsequent interest.

So there is, in my view, a highly arguable policy question, the better answer to which is that the priority of an interest over subsequent interests acquired while it was on the register should not be affected by the lapse of a caveat. This is a question on which opinions may differ.

C. WHAT DOES THE *ACT* SAY?

As a matter of strict interpretation of the words used, a respectable argument — possibly even a persuasive argument — can be advanced that the Legislature, when it says that a subsequent interest is subject to a caveated claim "so long as a caveat remains in force"[22] means that a subsequent interest is *not* subject to a caveated claim *after* the caveat ceases to remain in force. But that conclusion is not inevitable, as the history of judicial interpretation of the *Land Titles Acts* includes examples of much more robust interpretations of the *Act* on policy grounds than would be required to hold that section 135 exhausts itself once the relative priorities of two interests have been established by registration or caveating.

It should be noted that at the time of the registration of the various caveats in *White* v. *Durish*, s. 135 read quite differently. What it said was that "so long as a caveat remains in force the Registrar shall not register" any instrument "unless the instrument is expressed to be subject to the claim of the caveator."[23] That is, the section[24] that was in force when the caveats were registered was merely a direction to the Registrar, or, alternatively, a condition of achieving registration of anything, and the Court did not direct its attention to the question whether the new s. 135 applied as among the various caveats in question here. Little is to be gained, however, by canvassing the old s. 135.

D. THE SUPREME COURT'S DECISION

In *White* v. *Durish*, the Court of Appeal held that the lapse of a caveat does not affect the priority of the caveated interest. However, it held that it would usually be an abuse of process for the owner of the no-longer-caveated interest, having taken no action in response to the statutory notice, to take steps to enforce the interest later (and, probably, even to assign it). The taint follows the interest into the hands of an assignee. So that, in the absence of something that would make the assertion of the later interest

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22 Section 135.

23 R.S.A. 1980, c. L-5.

24 The majority of the Court of Appeal said in *Passburg Petroleums Ltd.* v. *Landstrom Developments Ltd.* (1984), 53 A.R. 96 at 98 [hereinafter *Passburg*] that the pre-1982 version of s. 135 was directed to the Registrar. Justice Stevenson, at 102, characterized it as "directed to the Registrar and, inferentially to third parties."

excusable, the assignee — in this case, White — would be precluded from asserting the interest.[25]

The Supreme Court has now settled the question: *Union Bank of Canada* v. *Boulter Waugh Ltd.*[26] meant what it said. What *Boulter Waugh* said was that the lapse of a prior caveat deprived Boulter Waugh's interest of the priority the caveat had given it over the Union Bank's interest. The following passages give McLachlin J.'s interpretations of *Boulter Waugh*:

> This Court unanimously decided, on the basis of the Saskatchewan Act's equivalent of section 195, that the Bank's interest took priority over Boulter Waugh's interest, due to the lapsed caveat.
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> ... the Court refused relief to Boulter-Waugh because its caveat had lapsed, with the result that it lost priority under the *Land Titles Act*.
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> Section 135 gives priority to caveators "so long as a caveat remains in force," against another registered interest; this is the rule in *Boulter Waugh*.[27]

Essentially the Court said in *Boulter Waugh* that entries in the register establish priority. While a caveat is on the register it confers on the caveated interest priority over interests not prior to it on the register. If the caveat lapses, it no longer confers any priority on the interest.

The *Boulter Waugh* court relied on the Saskatchewan counterpart of s. 195.[28] That section protects a "person contracting or dealing with" or "proposing to take" a disposition from certain other persons. The relevant part of the protection is that the person acquiring the interest is not affected by notice of unregistered and uncaveated interests. It is not easy to see how the section can apply to a situation that arises *after* the person has completed the acquisition: it does not protect a person who *has* contracted or who *has* taken a disposition. For example, it is true that A, who acquires an interest from a registered owner, is not affected by notice of an existing unregistered and uncaveated interest held by B, but it is also true that if B gets onto the register first, B will get priority and s. 195 will not protect A.

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25 Despite this, White ultimately won in the Court of Appeal. The reason was that Durish bought in the fee simple from Vold. In the reported decision, the Court said that, having done so, Durish could not attack White's interest, which was derived from Vold, and said that it "invoked the rules of estoppel" against Durish. On an application to re-argue the appeal, the Court said that this was "not an application of the law of estoppel. In any event, even if the label is changed the result was inevitable." (*Supra* note 1 at 280 (C.A.)).

26 (1919), 58 S.C.R. 385 [hereinafter *Boulter Waugh*].

27 *Supra* note 1 at 648-51 (S.C.C.). Note that s. 135 was enacted in 1982, so that the passage cannot mean that the rule in *Boulter Waugh* came from s. 135. It is of course possible that both the Supreme Court and the Legislature had the same rule in mind, and it is also possible that s. 135 was intended to enact the rule laid down in *Boulter Waugh*, but the judgment does not give any reason for thinking that either of these propositions is correct.

28 *Land Titles Act*, S.S. 1917, c. 18, s. 194.

Unfortunately, there is little or no policy discussion of the point in either *Boulter Waugh* or in *White* v. *Durish*. The effect of *Boulter Waugh* was that the *Act* made the standing of the register conclusive, at least as between the owners of interests of the kind involved there. This is good title registration doctrine, and *White* v. *Durish* declares that it is applicable. But the courts have been willing to depart from that doctrine if achieving the purposes of title registration does not require that it be applied.

The only policy discussion of the point in *White* v. *Durish* appears in the following passage:

> The inherent value of a caveated interest typically depends on its priority with respect to other competing interests. In order to determine the value of a caveated interest, the caveator must be able to rely on the register as indicative of priorities.[29]

But this, in my submission, is beside the point. Once Caveator #2 sees Caveat #1 on the register, they know that Interest #1 is prior to Interest #2 and can determine the value of Interest #2 in the light of that knowledge. If the Court had held that the lapse of Caveat #1 did not change the relative priorities of Interests #1 and #2, Caveator #2 would still be perfectly able to determine the value of Interest #2 in the light of that knowledge. It is only things that Caveator #2 does not know about that interfere with Caveator #2's ability to determine the value of Interest #2.

However, the Supreme Court has spoken twice, and there is no court left to speak. It may still be possible to treat its decision on this point in *White* v. *Durish* as *obiter dictum*,[30] but it is more realistic to treat it as stating the law.

V. EFFECT OF THE LAPSE OF A CAVEAT AS BETWEEN AN "ENCUMBRANCER" AND A FEE SIMPLE OWNER

The Supreme Court made one further point, which is *dictum*. Having held that the lapse of a caveat deprives the caveated interest of priority over another interest less than a fee simple, the Court went on to hold that the lapse of a caveat does *not* deprive the caveated interest of priority over the fee simple owner. It did so because it was pressed with two appellate decisions, in each of which a caveator whose caveat had lapsed was awarded priority over a fee simple owner, and the Court accordingly considered whether the cases were correctly decided.

In my submission, the distinction that the Court has drawn between the relationship between two lesser interests, on the one hand, and the relationship between a lesser

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29 *Supra* note 1 at 651 (S.C.C.).

30 *Ibid.* at 647; the Court had already held that Durish was not affected by notice of Vold's interest and was entitled to the benefit of Haida's caveat, which was enough to dispose of the case.

interest and the fee simple, on the other, is founded on error.[31] I will give my reasons for that view, but first will set up two generic hypothetical cases to facilitate discussion:

Example 1

1. O is the registered owner of an estate in fee simple in a parcel.
2. O grants a lesser interest to L1, who registers a caveat.
3. O sells the fee simple interest in the parcel to O2, who becomes the registered owner subject to L1's caveat.
4. L1's caveat lapses under notice.

Example 2

1. O is the registered owner of an estate in fee simple in a parcel.
2. O grants a lesser interest to L1, who registers a caveat.
3. O grants a conflicting lesser interest to L2, who registers a caveat (The result would be the same if the interest had been granted by a previous owner).
4. L1's caveat lapses under notice.

White v. *Durish* holds that in example 1, L1's interest will continue to have priority over O2's interest,[32] but it says that in Example 2, L1's interest will lose its priority over L2's interest.

Note that the discussion is not about a case in which O grants an interest, which is caveated, and the caveat then lapses or is discharged. O, having granted the interest, cannot ignore it by getting rid of the caveat. Indeed, the lapse of a caveat would not protect any grantor of an interest against the grantee: in *White* v. *Durish*, for example, if White's caveat had lapsed, Vold could not have claimed that White's interest was not enforceable against Vold. The discussion is only about a case in which a successor has acquired the fee simple.

A. IS THERE A QUESTION OF PRIORITIES?

The first relevant passage in McLachlin J.'s judgment is as follows:

> It is well established that the interest underlying a caveat remains enforceable against the owner of land who has taken the land subject to that interest. For this reason, it is not appropriate to speak of priorities between the owner of the land and the holders of prior interest.[33]

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31 I agree that a caveated interest should continue to have priority over a subsequent purchaser despite the lapse of the caveat, but I cannot see any reason for treating the owner of a fee simple differently from the owner of another interest.

32 Although Justice McLachlin held that the question of priorities did not arise, I will give reasons for a contrary view.

33 *Supra* note 1 at 650 (S.C.C.).

It is certainly well established that the interest underlying a caveat remains enforceable against the owner of land who has taken the land subject to that interest. But that, in my submission, is precisely *because* the caveated interest has priority over the owner's fee simple interest.

Priorities are what the common law and equitable rules are all about. Not only priorities between the holders of lesser interests, but also priorities between a fee-simple owner and the holder of a lesser interest. Anger and Honsberger state the classical common law position in priority terms as follows:

> Rule 3. As between a prior equitable interest and a subsequent legal interest, the holder of the legal interest has priority if he has acquired his interest in good faith for value and without notice.[34]

The "subsequent legal interest" means a legal interest as differentiated from an equitable interest. It includes the "subsequent legal interest" of a subsequent purchaser of the fee simple.

The converse of this statement is that a prior equitable interest has priority if the holder of the legal interest acquired the interest *with* notice of the prior equitable interest. In Example 1, L1's caveat asserts the priority of L1's equitable interest over O2's fee simple interest. Indeed, the effect of a caveat is, and is only, to assert and maintain priority: s. 145 of the *Land Titles Act* says that "[r]egistration by way of caveat ... has the same effect as to priority as the registration of any instrument."

In my submission, the rules of priority apply between the holder of an equitable interest (which includes caveated lesser interests) and the purchaser of a legal estate (which includes a purchaser of the fee simple who becomes registered as owner).

B. CAN THE OWNER CONVEY ONLY WHAT THE OWNER HAS ACCORDING TO THE RECORD?

The passage from McLachlin J.'s judgment last quoted above continues:

> The owner of the land takes only what the vendor can convey according to the record at the time of conveyance. That interest is not increased by the subsequent lapse of the caveat protecting the exception. Despite the lapse of the caveat, the underlying interest remains enforceable against the owner who took subject to it.[35]

It is not, strictly speaking, correct to say that "the owner ... takes only what the vendor can convey according to the record at the time of conveyance." The material time is the time of *registration* of a conveyance. A prior interest that is registered or caveated between the execution and registration of the conveyance will take priority

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[34] A.H. Oosterhoff & W.B. Rayner, eds., *Anger and Honsberger, Law & Real Property*, 2d ed. (Aurora, Ontario: Canada Law Book, 1985) at 1592.

[35] *Supra* note 1 at 651 (S.C.C.).

over the new owner. If an existing caveat is discharged between the execution and the registration of the conveyance, the new owner will not be subject to the previously-caveated interest.

I agree that the better position is that a subsequent owner's interest should not be increased by the subsequent lapse of a caveat. That is, in my view, a salutary rule. But it should apply to owners of fee simple interests and owners of lesser interests alike, and, in my submission, there is no distinction for this purpose between them.

C. DOES THE DOCTRINE OF PRIVITY OF ESTATES APPLY?

McLachlin J. goes on to say:

> The situation between rival encumbrancers is different, as *Boulter Waugh* attests. Each encumbrancer holds an independent claim against the owner. The claimants have privity with the owner but not with each other. The obligations between each encumbrancer and the owner continue independently of the caveat. As between fellow encumbrancers, however, priority is determined by the dates of the protecting caveats.[36]

The passage says that encumbrancer-claimants have privity with the owner but not with each other. What is meant by "privity"? In Example 1, which is the kind of case that the passage deals with, it cannot mean privity of *contract*. The only thing it can mean is privity of *estate*.

But the doctrine of "privity of estate" is limited to landlords and tenants. This is what Megarry and Wade have to say about it: "Privity of estate means that there is tenure between the parties, *i.e.* that the relationship of landlord and tenant exists between them; cases in this category are thus confined to leases and tenancies...."[37]

McLachlin J. is talking in the quoted passage about *all* lesser interests, but the doctrine of privity of estate applies only between lessor and lessee. It is unlikely that the Supreme Court intended, by a passing *dictum*, to erect all lesser interests into estates and then to apply the doctrine of privity of estate to them all; but unless that was its intention, "privity," while it might help to make a distinction in a lessor-lessee case, is of no assistance to the general argument.

D. DOES THE PRIORITY SCHEME OF SS. 59 AND 16(5) OF *THE LAND TITLES ACT* APPLY TO OWNERS?

McLachlin J. states:

> It is clear from the combination of ss. 59 and 16(5) of the Act that "priority" is a concept applicable only between the holders of competing derivative interests:

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[36] *Ibid.* at 650.

[37] Rt. Hon. Sir R. Megarry & H.W.R. Wade, Q.C., *The Law of Real Property*, 5th ed. (London: Stevens & Sons Limited, 1984) at 740.

59 Instruments registered in respect of or affecting the same land have priority the one over the other according to section 16 and not according to the date of execution.

16 ...

(5) For purposes of priority between mortgagees, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

Thus a dispute between a caveator and a registered owner in fee simple is not one of "priority."[38]

But is s. 59 applicable only between "the holders of competing derivative interests"? In my submission, if "derivative interests" is intended to exclude a purchased fee simple, precisely the opposite is true: s. 59 specifically applies to transfers of fee-simple ownership in the same way as it applies to other instruments and therefore applies to a fee simple that is transferred.

Under s. 1(l), "instrument" includes a conveyance, mortgage or encumbrance, and "any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto." Thus, s. 59 says that conveyances, mortgages and such other documents "have priority the one over the other according to s. 16 and not according to the date of execution." It would be difficult to think of a clearer way of saying that the "priority" concept of the *Act* applies as between all those things, including conveyances of the fee simple. And, if the priority scheme applies to a conveyance of the fee simple, it must in common sense apply to that which is conveyed: otherwise the section would be nonsensical.

Section 59 does not of itself bring caveated interests into the priority scheme. Section 45 probably does and s. 16(5) certainly does. Section 16(5) says that the priority of caveats and instruments is determined by the serial numbers allocated to them. If there were any doubt that transfers were included in the priority scheme, s. 16(5) removes the doubt by saying that the rule is "for purposes of priority between mortgagees, transferees and others."[39]

It is a fundamental principle of title registration that an interest that gets onto the register first is enforceable with priority against all interests that are not then on the register. Sections 16(5) and 59 express that principle. I do not think that the Supreme Court can have intended, by *dictum*, to say that the sections establishing that principle do not apply to transfers of fee-simple ownership and thus to put them outside the scheme of the *Act*.

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38 *Supra* note 1 at 651 (S.C.C.).

39 "Transfer" is defined by s. 1(x) to mean "the passing of any estate or interest in land under this Act, ... as well as the instrument of transfer in the prescribed form." "Transfer" clearly includes the instrument of transfer of an estate in fee simple, and, indeed, that is what it commonly denotes.

E. EFFECT OF SECTION 135

McLachlin J. states:

> Section 135 gives priority to caveators "[s]o long as a caveat remains in force," against another registered interest; this is the rule in *Boulter Waugh*. This does not derogate from the rule, however, that an interest underlying a caveat is still enforceable against an owner; this is the rule in *Bensette* and *Passburg*.[40]

First, it should be noted that in *Boulter Waugh* there was no section that subjected later interests to prior interests "so long as a caveat remains in force," and it is unlikely that section 135 was enacted to give effect to *Boulter Waugh*.[41] So that, while section 135 can itself be construed as saying that a priority established by a caveat lasts only while the caveat remains in force, it does not strengthen *Boulter Waugh*.

Second, s. 135 does not in terms distinguish between the effect of a caveat on a fee simple owner and the effect of a caveat on the owner of a lesser interest. It simply declares that an instrument "registered subsequent to the caveat" is subject to the caveator's claim. "Instrument" includes a fee-simple transfer. If s. 135 says that the removal of the caveat deprives the caveated claim of priority, it does not differentiate between fee-simple interests and lesser interests. There is, in my submission, no support in s. 135 for a distinction between fee-simple owners and owners of lesser interests.

It is true that s. 135, however it is interpreted, does not say that a rule that operates independently of the *Act* to subject one interest to another cannot apply after a caveat is removed. As between the grantor and grantee of an interest, for example, there are other legal rules that would preserve the subjection of the grantor's interest to the grantee's interest. But there is not, in my submission, any legal rule outside the *Act* that would distinguish between the relation of a fee simple owner and owner of a lesser interest, on the one hand, and the relation between the owners of two lesser interests, on the other. The equitable rules have, in effect, been abolished by the *Act*, and all that is left is the establishment of priorities by order of registration or caveating; and whatever the remaining rules say, there is no reason, in my submission, to think that they speak differently about a purchased fee simple and a purchased lesser interest.

F. RESPECTIVE ABILITIES TO VALUE INTERESTS FOR SALE PURPOSES

McLachlin J. goes on:

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[40] *Supra* note 1 at 651 (S.C.C.).

[41] The present form of s. 135 was substituted for a section that said that "so long as a caveat remains in force the Registrar shall not register an instrument purporting to affect the land ... unless the instrument is expressed to be subject to the claim of the caveator." The section was commonly (and almost universally) ignored. It can be inferred that the new section was merely intended to give effect to the principle of the old section without requiring a specific statement in every instrument that it is subject to caveated claims.

> There is good reason to maintain the distinction between contests between different encumbrancers and between an encumbrancer and a registered owner. The inherent value of a caveated interest typically depends on its priority with respect to other competing interests. In order to determine the value of a caveated interest, the caveator must be able to rely on the register as indicative of priorities. The owner of the land, on the other hand, who takes subject to all underlying interests, is able conclusively to determine the value of his interest, regardless of priority competitions on title.[42]

This is puzzling.

In my submission, any person who acquires an interest must be able to tell from the register what interests can be enforced against him or her. That is fundamental to facility of transfer. It is true of a purchaser of a fee simple, as in Example 1 above. It is true of a purchaser of a lesser interest, as in Example 2.

In each of those examples a purchaser took subject to a caveat. O2 would take into account the effect of the caveated interest on the fee simple being acquired. L2 would take into account the effect of the caveated interest on the lease being acquired. That is because the caveated interest, if valid, could be enforced against O2 or L2.

There is no relevant distinction, in my submission, that can be made between O2's situation and L2's situation. When each acquired their interest, the value they would place on the interest would take into account the existence of the caveated lease. Telling them both that they can get rid of the caveated lease by getting rid of the caveat, if the law should tell them that, would affect them both the same way. Telling them both that they *cannot* get rid of the caveated lease, if the law should tell them that instead, would affect them both the same way.

The difficult statement is that the owner "who takes subject to all underlying interests, is able conclusively to determine the value of his interest, regardless of priority competitions on title."[43] The statement cannot mean that an owner takes subject to all underlying interests, whether or not they are on the register, because that would fly in the face of the *Act* and all title registration law. It cannot mean that an owner can determine the value of his interest regardless of what his ownership is subjected to, because that would not make sense. If it merely means that the owner is not affected by priority contests between other people, its correctness can be accepted for the purpose of argument, but it is not then relevant to the situation in which the owner is directly involved, which is what is under discussion; and it is equally applicable to lesser-interest owners, who are not concerned about priorities of interests that do not affect the interests owned by them. In my submission, a fee-simple owner is neither more nor less affected by what goes on the register than is a lesser-interest owner, subject to the qualification that the fee-simple owner is interested in goings-on that affect the fee simple while the lesser-interest owner is interested in goings-on that affect the lesser interest.

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42 *Supra* note 1 at 651 (S.C.C.).

43 *Ibid.*

There is no more and no less reason to allow a purchaser of the fee simple to get rid of the enforceability against that fee-simple owner of an interest that was caveated at the time of the fee-simple owner's purchase than there is to allow the purchaser of any other interest, registered or caveated, to get rid of the enforceability against that lesser-interest owner of an interest that was caveated at the time of purchase of the lesser interest. There is no reason to differentiate between a purchaser who derives a fee simple interest from the fee simple interest of their vendor and a purchaser who derives a mortgage interest either from the fee-simple interest of their mortgagor or from the registered-mortgage interest of their transferor.

G. *BENSETTE AND CAMPBELL* v. *REECE* AND *PASSBURG PETROLEUM*

Bensette and *Passburg* were relied on by White for the proposition that the lapse of a caveat does not alter the priority of the underlying interest. McLachlin J. held that the two cases were not about priorities at all, but rather were about whether an underlying interest exists at all if its caveat lapses or is discharged, no question of priorities being involved because questions of priorities do not arise between an owner who acquires a fee simple and the owner of an interest that was caveated at the time of the fee-simple acquisition. She therefore held that there was no conflict between the two cases and *Boulter Waugh*, which was about priorities.[44] In my submission, when Moir J.A. applied *Bensette* in *Passburg*, he spoke the language of priorities, not the language of survival and extinction. He stated at 101:

> the respondent and the appellant are in the same position as they would be in if they were immediate parties. The owner now relies on the register only in so far as any prior unregistered interests are concerned. He does not rely on the register in so far as the lessee's interest is concerned, because he knows of its existence.[45]

However, the result of the *dictum* in *White* v. *Durish* is that *Bensette* and *Passburg* are good law because they dealt with extinction in a situation in which priorities did not exist.

VI. CONCLUSION

White v. *Durish* has given invaluable service by establishing that an assignee of an interest is entitled to the priority conferred or confirmed by the assignor's caveat and that s. 195 of the *Land Titles Act* protects a non-fraudulent purchaser against any interests not caveated or registered when the purchaser registers or caveats his or her interest.

The decision also says, in a way that may be considered either an alternative ground for decision or a strongly stated dictum, that the lapse (or, presumably, the discharge) of a prior caveat deprives the caveated interest of priority over any interest less than

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[44] In so doing, she specifically rejected my suggestion that *Bensette* and *Passburg* were in conflict with *Boulter Waugh* in a previous casenote. See *ibid.* at 650-51.

[45] *Supra* note 24.

a fee simple that was caveated or registered while the prior caveat was registered. This I think to be regrettable and by no means inevitable, but it is now sufficiently embedded in the law that it will probably take legislation to change it.

The decision also says, by way of dictum, that the lapse (or, presumably the discharge)[46] of a prior caveat does *not* deprive the caveated interest of priority over the interest of a fee simple owner who acquired title subject to the caveat. I applaud the result, but have given reasons for thinking that there is no basis for distinguishing, in these circumstances, between a conflict involving a fee-simple owner and a lesser-interest owner, on the one hand, and a conflict involving two lesser-interest owners, on the other.

There is no doubt, however, where the last word lies.

[46] *Passburg* involved a discharge and was held to be good law.

ADDENDUM

The Supreme Court held in *White* v. *Durish* that, where Caveats 1 and 2 are registered against a certificate of title in that order, the removal of Caveat 1 gives Caveated Interest 2 priority over Caveated Interest 1, even though Caveated Interest 1 remains in existence. In the foregoing note I have given reasons for thinking that there is no valid land registration reason for this result and that it confers an undeserved windfall on the owner of Caveated Interest 2.

White v. *Durish* was argued on *Land Titles Act* principles. *Re Central Guaranty Trust Co. and Dixdale Mortgage Investment Corp.*[47] raises the possibility that the law of unjust enrichment might apply so as to give relief to the owner of Caveated Interest 1. Although this case was decided two months earlier than *White* v. *Durish*, I had not seen it when I wrote the foregoing casenote. *White* v. *Durish* did not refer to *Central Guaranty* and unjust enrichment was not argued, so that it remains open to the courts to hold that *White* v. *Durish* is not an authority for the proposition that the law of unjust enrichment does not apply to the hypothetical case outlined above.

In *Central Guaranty*, Central Guaranty's mortgage (Mortgage 1) was registered first. Dixdale's mortgage (Mortgage 2) was registered second. Central Guaranty, by mistake, discharged Mortgage 1, although money was still owing on it. Dixdale sold the property under its mortgage. There was no detrimental reliance on Central Guaranty's discharge by Dixdale. The proceeds of the sale amounted to less than the total of the amounts secured by Mortgages 1 and 2. The Ontario Court of Appeal ordered that Central Guaranty's claim be paid first from the sale proceeds.

The Court held: (a) that Dixdale was enriched by the discharge of Mortgage 1; (b) that Central Guaranty suffered a corresponding deprivation; and (c) that there was no juristic reason for the enrichment. Thus, it held, the three requirements of a claim for unjust enrichment by the Supreme Court in *Sorochan* v. *Sorochan*[48] and other cases were satisfied. Central Guaranty had a valid claim in unjust enrichment.

The Court noted that, if the provisions of the Ontario *Registry Act*[49] alone were considered, Dixdale's position was unanswerable. However, the *Act* did not expressly prohibit a claim for unjust enrichment; the registration requirement was not a juristic reason for Dixdale's enrichment; and allowing Central Guaranty's claim for unjust enrichment would not undermine the purpose of the registration legislation. The case did not fall within an established head of restitutionary recovery, but that should not preclude relief: the categories of restitution have not been closed.

Can the reasoning of *Central Guaranty* be extended to cover the typical removal-of-caveat case outlined at the beginning of the Addendum? I think that it might well be said that, in that hypothetical case: (a) Caveator 2 is enriched by the discharge of

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[47] (1995), 121 D.L.R. (4th) 53 (Ont. C.A.).
[48] [1986] 2 S.C.R. 38.
[49] R.S.O. 1990, c. R.20.

Caveat 1, because the leap-frogging of Interest 2 over Interest 1 will usually increase that value of Interest 2; (b) Caveator 1 suffers a corresponding deprivation; and (c) there is no more juristic reason for the enrichment in the typical caveat case than there was in *Central Guaranty.*

There are, however, some differences between the typical removal-of-caveat case and *Central Guaranty* that may give rise to difficulties. First, in *Central Guaranty*, the plaintiff conferred the enrichment by mistake which (although it could happen) is not the usual caveat case. Mistake being a frequent, though not exclusive, indicator of an unjust enrichment, its absence might be used to distinguish the *Central Guaranty* line of thinking. Second, *Central Guaranty* was about a claim to a sum of money, which lends itself more readily to the notion of enrichment than does an enhancement of the value of an interest through a change in the order of priorities. Third, a restitutionary remedy would have to be fashioned to negate the effect of a change in the order of priorities, as this is not a usual restitutionary remedy.

Central Guaranty seems to me to be based on sound principle. So, I think, would an extension of unjust enrichment law to cover the typical caveat case of the kind under discussion. But the courts might prove unwilling to make such an extension, particularly given the need to fashion an appropriate remedy, and they might prove unwilling to allow the law of unjust enrichment to make an end run around the law of land registration as it is declared by *White* v. *Durish.* Until a case arises, one can only speculate.

APPENDIX

THE SEVERAL FACES OF "ENCUMBRANCE" AND "ENCUMBRANCER"

Throughout *White* v. *Durish*, McLachlin J. uses the word "encumbrancer" to mean the owner of any interest other than a fee simple. For example, she says "each encumbrancer holds an independent claim against the owner."[50] I have preferred to use the more encumbering term "owner of a lesser interest." The reasons are that, even in ordinary common-law usage, "encumbrance" and "encumbrancer" can mean different things in different contexts, and that in Alberta, the confusion becomes almost total when the use of the terms in the *Land Titles Act* is taken into consideration.[51]

First, take "encumbrance." In the phrase "free and clear of encumbrance," it probably means what McLachlin J. uses it to mean, that is, any interest less than the fee simple. The following statement in Anger and Honsberger's *Real Property* describes the broad meaning:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee." Even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances. For example, statutory liens which clearly are encumbrances are not "granted." In addition, other liens arise by operation of law.[52]

But it is sometimes used in a narrower sense:[53]

> *incumbrance*, a claim, lien or liability attached to property, as a mortgage, registered judgment etc.

So that it is necessary always to wonder what meaning is intended.

Next, take "encumbrancer." "Encumbrancer" almost looks like someone who performs the act of "encumbrancing," but, of course, there is no verb "to encumbrance." In English usage, and in McLachlin J.'s usage, it means the holder or owner of an encumbrance. It might be a useful form of shorthand except for the existence of a most peculiar set of usages in the *Land Titles Act*.

Under section 1(f) of the *Act*, "encumbrance" means any "charge," the examples of which are all money charges on land. Then section 105(1) provides that "when land ...

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50 *Supra* note 1 at 650 (S.C.C.).

51 Sometimes the word is spelled "incumbrance." This is true particularly where English usage is strong, but even in the *Supreme Court of Canada Reports Service*, Issue 94 (Toronto: Butterworths, 1994) at 14431, the word "incumbrance" is indexed, but not "encumbrance."

52 *Supra* note 34 at 1685 [footnotes are omitted].

53 J.J.S. Wharton, *The Law Lexicon*, reprint (Fred B. Rothman & Co.: Littleton, Colorado, 1987) at 476. To much the same effect, see Rt. Hon. E. Jowitt & C. Walsh, *Jowitt's Dictionary of English Law*, 2d ed. (London: Sweet & Maxwell, 1977) at 697.

is to be charged with or made security for the payment of an annuity, rent charge or sum of money in favour of any encumbrancee, the encumbrancer shall execute an encumbrance in the prescribed form, or to the like effect." These provisions are difficult to read together, but they appear to contemplate either an arrangement under which land is to be charged with money (in which case the prescribed form must be used), or some other form of charging with money, including "mortgage, mechanics' or builders' liens, when authorized by statute, and executions against land, unless expressly distinguished."

This is bad enough, but the astute reader will have noticed that under section 105(1) the "encumbrancer" is the person who *granted* the encumbrance and not the person who holds or owns the encumbrance; that is, it reverses the English usage that is adopted by McLachlin J. This is not accidental. Section 1(h) defines "encumbrancer" as "the owner of any land or of any estate or interest in land subject to any encumbrance," and section 1(g) defines "encumbrancee" as "the owner of an encumbrance."

This is very strange. It almost looks as though someone in Alberta[54] thought that there is or should be a parallelism between the use of "mortgagor" and "mortgagee" to denote the owner of the land and the mortgage respectively, and "encumbrancor" and "encumbrancee" to denote the owner of the land and the encumbrance respectively, and then concluded that "encumbrancor" simply would not do, so that "encumbrancer" was used instead.

The word "encumbrance" is used some dozens of times in the *Land Titles Act* with different apparent meanings. Section 62, for example, implies a covenant, in every transfer where land is subject to an "encumbrance," to pay the principal money and other things "secured by the encumbrance." Here, an "encumbrance" must secure money. Under s. 52 a restrictive covenant is deemed "not to be an encumbrance" under the *Act* or the *Tax Recovery Act*. Under s. 98, a lease of "mortgaged or encumbered land" is not valid and binding against "the mortgagee or encumbrancee" unless "the mortgagee or encumbrancee" has consented to or adopts it. "Encumbrancee" has to mean the owner of the encumbrance, not the owner of the land. Section 85(3) provides that registration of a subdivision plan vests title "free of all encumbrances" to land taken for public purposes; here, "encumbrances" has to have a broad meaning.

So I think that it is better not to use "encumbrance" unless the context makes its meaning clear, and that it is better not to use "encumbrancer" and "encumbrancee" in Alberta at all, at least without an accompanying definition.

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[54] See *e.g.* the Manitoba *Real Property Act*, R.S.M. 1988, C. R-30, which defines "encumbrancer" to mean the owner of an encumbrance (not the owner of the encumbered land) and thus reverses Alberta's *Land Titles Act* usage.