Eastern Irrigation District

Phone: (403) 362-1400 | Fax: (403) 362-6206 | Email: eid@eid.ca | www.eid.ca
P.O. Box 128 | 550 Industrial Road West | Brooks, Alberta | Canada T1R 1B2

October 21, 2019

Water Users,

Re: Judicial Review of EID vs Irrigation Council Appeal Panel – Memorandum of Decision

The EID Board of Directors are pleased to release the decision of the Honourable Madam Justice J.C. Kubik in the judicial review of Eastern Irrigation District vs Irrigation Council Appeal Panel between:

Eastern Irrigation District [Applicant]
- and -
Irrigation Council Appeal Panel, Kimberley Jessie Resch, George Murray V, and Kirk Dustin Prescott [Respondents]
- and -
Alberta Irrigation Districts Association [Intervenor]

Madam Justice Kubik has ruled in favour of the EID, and other irrigation districts, as stated in paragraphs 77 and 78 of the attached decision:

> *[77] Further, I am satisfied that the Irrigation Districts Act empowers individual irrigation districts to investigate the legitimacy of title when considering whether to allocate new irrigation acres. The original decision of the Eid was therefore reasonable having regard to the scope, purpose, and intention of the legislation and the facts before it.*
>
> *[78] Accordingly, the decision of the ICAP is quashed and the EID decisions are restored.*

The respondents will now have 30 days to appeal the decision of Madam Justice Kubik to the Court of Appeal of Alberta.

Any questions which you may have regarding the attached can be directed to Ivan Friesen, General Manager (362-1400).

Yours truly,

EASTERN IRRIGATION DISTRICT

Ross Owen, Chairman
Board of Directors

/wse
Attach.

Court of Queen's Bench of Alberta

Citation: Eastern Irrigation District v Irrigation Council Appeal Panel, 2019 ABQB 809

Date: 20191018
Docket: 1808 00343 & 1808 00314
Registry: Medicine Hat

Between:

Action Number: 1808 00343

Eastern Irrigation District

Applicant

\- and -

Irrigation Council Appeal Panel, Kimberley Jessie Resch, George Murray V, and Kirk Dustin Prescott

Respondents

\- and -

Alberta Irrigation Districts Association

Intervenor

And Between:

Action Number: 1808 00314

Kimberly Jessie Resch, Kirk Dustin Prescott, and George Murray V

Applicants

\- and -

Eastern Irrigation District

Respondent

Memorandum of Decision
of the
Honourable Madam Justice J.C. Kubik

I. Introduction

[1] On April 3, 2018 the Irrigation Council Appeal Panel (hereinafter referred to as "ICAP") quashed an earlier decision of the Eastern Irrigation District (hereinafter referred to as the "EID") denying three applications for allocation of new irrigation acres. Two applications for judicial review have arisen from that decision.

[2] The first application for judicial review is that of the Eastern Irrigation District seeking review of the ICAP decision. In relation to this application, the Alberta Irrigation Districts Association (hereinafter referred to as the "AIDA") was granted intervenor status.

[3] The second application for judicial review is that of the individual Applicants for irrigation acres who were particularly affected by the ICAP decision: Kimberly Resch, Kirk Prescott, and George Murray V. They seek an order of *mandamus*, requiring the EID to add the requested irrigation acres to their respective assessment roles.

Issue for Judicial Review

[4] The broad issue for judicial review is whether individual irrigation districts, empowered under the *Irrigation Districts Act,* RSA 2000, c I-11 (*Irrigation Districts Act*), have the duty and power to examine the legitimacy of title to lands when considering whether to allocate new irrigation acres.

II. Legislative History

[5] The Eastern Irrigation District is one of thirteen irrigation districts established under the *Irrigation Districts Act.*

[6] The broad purpose of the *Irrigation Districts Act* is to provide for the formation, dissolution, and governance of irrigation districts in order that the management and delivery of water in the districts occurs in an efficient manner that provides for the needs of its users: section 2, *Irrigation Districts Act*.

[7] The thirteen established districts have legislated purposes and powers, which include:

> (a) to convey and deliver water through the irrigation works of the district in accordance with this Act,
> (b) to divert and use quantities of water in accordance with the terms and conditions of its licence under the *Water Act*,
> (c) to construct, operate and maintain the irrigation works of the district, and
> (d) to maintain and promote the economic viability of the district.
>
> Section 6(1), *Irrigation Districts Act*

[8] The legislation enables and empowers an elected board in each district to propose by-laws with respect to expansion of irrigation acre limits. Such proposed by-laws must be set forth at public meetings and are subject to approval by way of plebiscite passed by 50 percent of voting irrigators: section 12, *Irrigation Districts Act*.

[9] While giving greater autonomy to the Board within each district, the effect of the legislation is to make the Board accountable to the district's users and the public at large.

[10] On March 12, 2003, the irrigators of the EID approved *Eastern Irrigation District By-Law 840,* (2003), A By-Law Authorizing an Increase in the Irrigation Expansion Limit (hereinafter referred to as "*By-Law 840*"). *By-Law 840* came into force on March 26, 2003. The *By-Law* provided that the expansion limit acres would be allocated at a rate of 2,500 acres per year.

[11] Pursuant to *By-Law 840*, the EID established a policy entitled "Increases in Irrigation Acres, Criteria and Guidelines" (hereinafter referred to as the "Policy"). The Policy was revised during the time period 2003-2016; the version of the Policy relevant to these proceedings is dated January 26, 2016. Amongst other things, the Policy provided for the number of expansion acres that could be allocated to a single individual or corporate user. The maximum number of river expansion acres was limited to 150, and the maximum number of below reservoir acres was limited to 600.

[12] The establishment of the expansion acre limits arose from board consultations with the EID's irrigators and reflected a desire by users to ensure that as many as possible could participate in the expansion acres, to spread the benefits of irrigation amongst their many diverse farming operations, and to support the crop spectrum that existed in the district in order to provide a strong economic base for the district and the community.

III. Factual Background and Decisions Below

[13] Between 2012 and 2014 two local ranchers (and irrigators within the EID), George Murray IV and Ben Steinbach, allegedly engaged in a land transfer scheme to circumvent limitations on the number of new irrigation acres any one user could acquire. The scheme, colloquially known as the "Steinbach-Murray Shuffle", involved G.W. Murray Ranches Ltd. transferring title to Steinbach for the sum of one dollar, Steinbach applying for and being allocated new irrigation acres, and then transferring title back to G.W. Murray Ranches Ltd. for the sum of one dollar.

[14] For context in this decision, it is important to note that George Murray IV is the father of George Murray V, and that Ben Steinbach is the father of Suntana Murray. Suntana Murray is the wife of George Murray V.

[15] The Steinbach-Murray Shuffle was well known to the EID in the summer of 2017 when it received land titles evidencing that similar nominal consideration transfers were being undertaken in the District. Subsequently, the EID received three applications for allocation of new irrigation acres: an application by Kirk Prescott dated July 10, 2017, seeking allocation of 432 new irrigation acres (the "The Prescott Application"); an application by George Murray V dated August 8, 2017, seeking allocation of 140 new irrigation acres (the "Murray application"); and an application by Kimberley Resch dated September 27, 2017, seeking allocation of 406 new irrigation acres (the "Resch Application").

[16] The EID rejected all three applications. In considering the applications the EID examined the history of the land transactions.

[17] Both Resch and Prescott had acquired title to the lands from Latham Cattle Ltd. for the sum of one dollar. The value of those lands, as evidenced by the Affidavits of Value were $595,476 and $687,530, respectively. The lands in question remained subject to nearly one million dollars in mortgage indebtedness. Suntana Murray, the sole shareholder and director of Latham Cattle Ltd., executed both transfers. In addition to being the wife of George Murray V, she is a director of G.W. Murray Ranches Ltd.

[18] George Murray V had acquired his title to the land in question from G.W. Murray Ranches Ltd. for the sum of one dollar. The Affidavit of Value appended to the Transfer of Land noted its value of $141,000. Mr. Murray signed the transfer on behalf of G.W. Murray Ranches Ltd. as president of the company. The sole shareholder of G.W. Murray Ranches Ltd. is a numbered company 14731999 Alberta Ltd., and all issued voting shares in that company are held by G.W. Murray Family Trust.

[19] The Resch Application and Prescott Application were rejected on the basis that neither were the beneficial owner of the lands in question. The EID found that, based on the facts surrounding the acquisition of the Resch and Prescott titles, the benefit of assessing portions of the lands as irrigation acres would flow to George Murray V (or his family) through their beneficial interest in the shareholdings of G.W. Murray Ranches Ltd. The new irrigation acres of Mr. Murray and G.W. Murray Ranches Ltd. already exceeded the 600-acre limit.

[20] The Murray Application was rejected on the basis that George Murray V, together with G.W. Murray Ranches Ltd. already had the benefit of 600 acres of new irrigation, and therefore did not qualify for new acres.

[21] The Applicants appealed the respective EID decisions to the ICAP and all three appeals were heard concurrently. Neither Resch, Prescott, nor Murray V testified before the ICAP. Relying on section 62 of the *Land Titles Act* they each tendered, as exhibits, certified copies of the Certificates of Title evidencing their ownership of the lands and their applications for new irrigation acres. They argued they were entitled to allocation of the new acres sought because they each met the definition of the term "owner" in the Act, and the lands met the assessment criteria as set out in section 95(2) of the *Irrigation Districts Act*.

[22] The EID called three witnesses and tendered evidence with respect to the legislative history of the *Irrigation Districts Act*, the institution of *By-Law 840,* and the development of the Policy with respect to allocation of irrigation acres. In addition, the EID provided evidence with respect to the land transactions in question and the Steinbach-Murray Shuffle. The EID argued that it was obligated, having regard to its powers and purposes, to look behind the Titles to determine the beneficial ownership of the land and *bona fides* of the purported owners before allocating new irrigation acres. The purpose of this was to prevent a circumvention of the rules surrounding allocation of irrigation acres, ensure that the EID was fulfilling its statutory mandate to maintain and promote the economic viability of the district, and to meet the expectations of the district irrigators as captured in *By-Law 840*. Further, the EID argued that section 95(2)(f) of the *Irrigation Districts Act* gave it broad power to consider any other factor which would make it impractical or uneconomical to irrigate the land and this included the circumstances of legal and beneficial ownership as well as related economic units.

[23] The ICAP reviewed the EID's decisions on the basis of reasonableness. It concluded that the EID decisions were unreasonable and that the EID was bound by a strict interpretation of the term "owner" in the *Irrigation Districts Act,* which prevented it from looking beyond the face of the Certificate of Title when determining ownership.

[24] Further, the ICAP found that principles of statutory interpretation precluded the EID from relying on section 62 of the *Land Titles Act*, RSA 2000 c L-4 (*Land Titles Act)*, which addresses the validity of a title in the face of fraud or collusion.

[25] Finally, the ICAP found that section 95(2)(f) of the *Irrigation Districts Act* was not sufficiently broad to allow the EID to consider beneficial ownership or a relationship creating an economic unit as "any other factor that makes it impractical or uneconomical to irrigate the land".

[26] Accordingly, the ICAP rescinded the EID decision, but did not provide further direction. It is in this context that the application for *mandamus* was brought before the Court.

Admissibility of New Evidence on Judicial Review

[27] At the time of filing its application for judicial review, the EID filed an affidavit sworn by its Chairman, Ross Owen. The Respondents argued that the affidavit as a whole was inadmissible as it constituted fresh evidence, included argument, and unnecessarily outlined information already contained in the Record.

[28] During argument the EID conceded various paragraphs of the affidavit were inadmissible.

[29] Rule 3.22 of the *Alberta Rules of Court*, Alta Reg 124/2010, governs evidence the Court may rely on in judicial review proceedings, as follows:

(a) the certified record of the proceedings;
(b) if questioning was permitted under Rule 3.21, a transcript of that questioning;
(c) anything permitted by any other rule or by an enactment;
(d) any other evidence permitted by the Court.

[30] It is established law that new evidence is only admissible in judicial review proceedings in limited circumstances, including to show bias, to demonstrate a breach of procedural fairness, to address issues of standing, or where the tribunal under review has made no adequate record of its proceedings: (***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904).

[31] In this case the certified record of proceedings is before the Court, including a recorded copy of the ICAP hearing and certified written transcripts of that proceeding. I am satisfied there are no gaps in the record which would require the Court to exercise its discretion to allow additional evidence to supplement the record and there is no allegation of bias.

[32] Accordingly, the Affidavit of Ross Owen is inadmissible in the proceedings.

Standard of Review

[33] At section 175, the *Irrigation Districts Act* contains a privative clause which reads as follows:

> No decision, order, direction, ruling or proceeding of the Minister, the Council or the person exercising the powers or performing the duties of the Council shall be questioned or reviewed in any Court and no order shall be made or process entered or proceedings taken in any Court to question, review, prohibit or restrain the Minister or the Council or any of its proceedings.

[34] The privative clause is not a full privative clause as it neither vests exclusive nor final jurisdiction to the tribunal.

[35] Accordingly, the Court has inherent jurisdiction to review the ICAP decision.

[36] The standard of review is presumptively reasonableness. A reasonableness standard of review requires the Court to give deference to the decision making of an administrative tribunal in the interpretation of its home statute. As noted in ***Dunsmuir v New Brunswick***, 2008 SCC 9, at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

IV. Issues on Judicial Review

[37] As previously stated the broad issue for judicial review is whether individual irrigation districts, empowered under the *Irrigation Districts Act*, have the duty and power to examine the legitimacy of title to land when considering whether to allocate new irrigation acres.

[38] For the purposes of reviewing the reasonableness of the ICAP decision my analysis focuses on the three sub-issues:

1. Procedural Fairness;
2. Statutory Interpretation; and
3. Section 95(2)(f) of the *Irrigation Districts Act*.

Issue One: Procedural Fairness

[39] Did the ICAP breach its duty of procedural fairness by failing to afford the EID an opportunity to cross-examine Resch, Prescott, and Murray V?

[40] The manner in which evidence was tendered and the conduct of the ICAP proceeding is connected to the analysis of the reasonableness of the ICAP's decision.

[41] As previously noted, the land owners did not give *viva voce* testimony at the ICAP hearing; rather they tendered the certified copies of Certificate of Title as proof of their ownership of the lands. In doing so they relied on the provisions of the *Alberta Evidence Act*, RSA 2000, c A-18 (*Alberta Evidence Act*) and section 62 of the *Land Titles Act*.

[42] While before the ICAP, the EID complained that the manner in which the lands had been acquired was relevant and material to the ICAP's review of the reasonableness of the EID decision.

[43] The EID asserted that denying the right of cross-examination of those parties on their acquisition of title resulted in procedural unfairness. As part of the judicial review application, the EID argues that if its right to procedural fairness has been breached then the matter should be remitted to the ICAP with *viva voce* evidence from the parties with full right of cross-examination. Resch, Prescott, and Murray V argue that as a quasi-judicial body, the ICAP is not bound by the rules of evidence, and there was no requirement to testify in order to tender the Certificates of Title. Further, they argue that the EID could have called Resch, Prescott, and Murray V themselves, proven them adverse, and cross-examined them.

[44] While it is correct that the ICAP was not bound by the rules of evidence and could not compel Resch, Prescott, and Murray V to testify, and it is equally true that those witnesses could have been called by the EID, the EID did lead *prima facie* evidence of fraud, which remained uncontroverted by Resch, Prescott, and Murray V. The ICAP failed to consider this evidence in their analysis of the EID decision. Instead, the ICAP effectively excluded the evidence by its decision to strictly and narrowly interpret the term "owner". While not strictly a breach of the duty of procedural fairness, the manner in which the ICAP approached the evidence was results driven and unreasonable.

Issue Two: Statutory Interpretation

[45] This issue turns on whether the ICAP's strict interpretation of the word "owner" as defined in the *Irrigation Districts Act* was reasonable. From that, two sub-issues arise: first, whether an irrigation district can utilize the *Land Titles Act* definition of "registered owner" as an interpretive aid in the examination of legal and beneficial ownership; and second, whether a determination of ownership by an irrigation district can include an examination of the *bona fides* of the transfer to prevent fraudulent schemes which might serve to undermine the purpose and intent of the legislation.

A. Examination of Ownership

[46] Section 96(1) of the *Irrigation Districts Act* provides that an application for new irrigation acres must be made by an owner. Owner is a defined term in the *Irrigation Districts Act*:

> "owner", with respect to land, means
>
> (i) the registered owner of the land, or
> (ii) the purchaser

[47] Registered owner is also a defined term within the *Irrigation Districts Act*:

"registered owner", with respect to land, means the person registered in a land titles office as the owner of the fee simple in the land.

[48] The EID argued that the purpose and intent of the legislation must be considered in determining the meaning of "owner". Further, they argued that concepts of beneficial ownership and fraud must be considered by the EID in assessing applications for new irrigation acres in order that the EID properly delivers on its statutory mandate as defined by sections 2 and 6 of the *Irrigation Districts Act*.

[49] The ICAP argued at the judicial review that concepts of beneficial ownership should not be imported into the interpretation of the word "owner" without clear statutory language. The ICAP relied on the case of ***Cwalina Estate v Parkland (County)***, 2013 ABCA 343 (***Cwalina***). In ***Cwalina***, the beneficial owner had not been notified of tax arrears enforcement proceedings which resulted in lands being sold without their knowledge. The case dealt with the interpretation of the word "owner" in relation to the narrow issue of notification and service obligations under the *Municipal Government Act*, RSA 2000, c M-26. The Court of Appeal did not draw conclusions about whether the term "owner" included persons with beneficial interests. Rather, it concluded that the beneficial owner was not a person liable to pay tax arrears because they were not a registered owner. ***Cwalina*** is distinguishable from the case before me, which is one involving the application and interpretation of a particular section of enabling legislation which confers discretionary powers on the EID. As a result, purposive statutory interpretation leaves open an expansive definition of the term "owner".

[50] Purposive statutory interpretation also addresses another concern raised by the ICAP – that expanding the word "owner" in the context of the *Irrigation Districts Act* to include beneficial interests would have far-reaching effects with respect to other pieces of legislation in which "owner" is a defined term. On the contrary, purposive statutory interpretation limits this broad effect by virtue of the fact that each statute will have its own unique objectives and public policy underpinnings.

[51] The modern rule of statutory interpretation requires courts "to take a unified, textual, contextual, and purposive approach to this task... a Court must consider not only the textual wording of the statutory provision in dispute, but also the purpose of that provision and all relevant context. That includes the legislative scheme of which the provision forms a part." (Ruth Sullivan, 6th Edition (Markum: LexusNexis Canada, 2014) [Sullivan] at 7-8; ***Alberta v ENMAX Energy Corporation***, 2018 ABCA 147.)

[52] The Supreme Court of Canada in ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, stated:

> "...statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[53] The *Interpretation Act*, RSA 2000, c I-8 (*Interpretation Act)*, provides at section 9:

> An enactment shall be construed as always speaking and shall be applied to circumstances as they arise.

Section 10 further provides:

> An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[54] Len Ring gave testimony before the ICAP as to the legislative history of the *Irrigation Districts Act*. Mr. Ring was involved in public consultations leading to the development of the *Irrigation Districts Act* and worked with both the MLA Review Committee and the Alberta Justice Legislative Writer in drafting the legislation. Mr. Ring testified as to the enabling nature of the legislation, which gave individual irrigation districts greater autonomy and a mandate which involved consultation with water users in relation to expansion of irrigation limits and distribution of available irrigation acres. As noted by Mr. Ring, the common concerns expressed by users were with respect to water shortage, availability of water as a result of efficiencies, the quantity of irrigable land available, and the equitable allocation of new irrigation acres.

[55] The legislation itself contains two sections which address its purpose. First, the broad purpose of the legislation is set out in section 2, as follows:

> The purpose of this Act is to provide for the formation, dissolution and governance of irrigation districts in order that the management and delivery of water in the districts <u>occur in an efficient manner that provides for the needs of the users.</u>
>
> [Emphasis added]

[56] The more specific purpose of individual districts is set out in section 6, and amongst other things, empowers the individual districts in their delivery and management of water to <u>maintain and promote the economic viability of the district</u>.

[57] The purpose of the legislation is to ensure the efficient management and delivery of water which provides for the needs of users and maintains and promotes the economic viability of individual districts.

[58] Economic viability is directly reflected in many of the concerns raised by users in the discussions surrounding expansion limits and allocation of acres in the EID. This included managing the limits on river acres and below reservoir acres to ensure the sustainability of the resource, providing an equitable distribution of water amongst diverse farming operations, and allowing many users to participate in the expansion acres while supporting the crop spectrum existing in the district. All of this informed the development of *By-Law 840* and the Policy. It is important to recall that *By-Law 840* came into force after a plebiscite vote by users.

[59] Taken as a whole, the legislation, *By-Law 840,* and the Policy developed by the EID with respect to the expansion and allocation of these acres, was focused on fairness in the allocation of new acres - supporting as many diverse users as possible, while practicing sustainable resource management. Given that the EID was tasked under section 96 with reviewing the applications of "owners" (or purchasers with the consent of the registered owners), the element of fairness in the purpose of the legislation and the EID's accountability to users and the public gives the EID the scope and power to ensure the legitimacy of owners applying for new irrigation acres, and therefore to examine ownership, including beneficial ownership.

[60] Given the purpose of the *Irrigation Districts Act*, and the expectation of irrigators in the institution of *By-Law* 840 which deals with sustainable resource management, equitable distribution of irrigation acres and promotion of the economic viability of the EID, the very concept of ownership must be interpreted in conjunction with the *Land Titles Act* in order to give meaning to legislative intent.

B. Examination of *Bona Fides*

[61] Proof of registered ownership was made at the ICAP hearing by Resch, Prescott, and Murray V by tendering certified copies of their Certificates of Title. It was argued by their counsel that, by virtue of section 62 of the *Land Titles Act*, the Certificate of Title was conclusive proof in all Courts that the person named within is entitled to the land.

[62] Section 62 provides an exception, however, in cases of fraud or collusion by the owner. That exception means that if there is fraud or collusion the Certificate of Title cannot be relied upon as conclusive proof of ownership.

[63] The concept of fraud as it relates to land titles covers a wide range of illicit activity. As set out by Slatter J, as he then was, in ***Darnley v Tennant***, 2006 ABQB 575:

> Fraud
>
> [30] The *Land Titles Act* does not define "fraud." The outer boundaries of the concept are established:
>
> > (a) Fraud includes deceit and dishonesty and other forms of common law fraud;
> >
> > (b) Fraud does not include mere knowledge of an unregistered interest, even when combined with the knowledge that registration will defeat that interest: s. 203(3); ***Holt Renfrew & Co. v. Henry Singer Ltd.*** (1982), 1982 ABCA 135 (CanLII), 37 A.R. 90, 20 Alta. L.R. (2d) 97 (C.A.).
>
> Within these broad boundaries, the courts have not attempted to define fraud. It has been said that fraud requires "something more" than mere notice, amounting to injustice, dishonesty, or inequity: ***Holt Renfrew, supra; Boulter-Waugh & Co. v. Phillips,*** [1919] 1 W.W.R. 1046, 58 S.C.R. 385, 46 D.L.R. 41.
>
> [31] The question, then, is whether the conduct of the Applicant amounts to "something more" than mere notice, which could amount to fraud within the meaning of the *Act*. There is no actual deceit or dishonesty alleged or disclosed by the record. The "something extra" may be found in the following factors:

> (a) The Applicant was one of the actual covenantors who created the interest in land that would now potentially be defeated by the operation of s. 203;
>
> (b) The Applicant granted the Respondent rights in the land when the Applicant had a partial interest, and now the Applicant owns the whole interest. The Applicant having merely changed the quantum or extent of her interest, that interest is still subject to the rights of the Respondent.
>
> There appears to be no case in which this precise situation has arisen.
>
> [32] There are a number of cases where the purchaser of the land not only knew of the existence of an unregistered interest, but covenanted to respect that interest, or to perform the outstanding obligations of the vendor: ***Loke Yew v. Port Swettenham Rubber Co.,*** [1913] A.C. 491; ***Independent Lumber Co. v. Gardiner*** (1910), 13 W.L.R. 548 (Sask. C.A.); ***Holt Renfrew,*** *supra*. The subsequent denial by the purchaser of the unregistered interest, following upon the covenant to respect that interest, has been found to be fraud within the meaning of the *Act*. The present situation is analogous. Not only has the Applicant agreed to respect the unregistered interest, the Applicant actually created the unregistered interest (jointly with her former husband). In these circumstances, there is something in addition to mere knowledge of the unregistered interest that takes the Applicant out of s. 203.
>
> [33] There is also an argument to be made that an owner of a partial interest in land who creates a subordinate interest, and then acquires the whole fee simple or a greater interest, should not be entitled to repudiate the subordinate interest previously created by herself.
>
> [34] In conclusion, the Applicant, being one of the covenantors who created the Respondent's interest in land, is not entitled to rely on s. 203 to defeat that interest.
>
> [Emphasis in original]

[64] There was *prima facie* evidence before the EID and the ICAP of suspicious transactions which could be characterized as deceit and dishonesty on the part of Resch, Prescott, and Murray V. At the judicial review hearing before me, counsel for these parties argued that a nominal transfer based on one dollar, or love and affection, would not be uncommon in an intergenerational farming operation. However, there was no evidence before the EID or the

ICAP that this was such a transfer. The land owners offered no explanation as to their interrelationship, the intention of their nominal consideration transfers of land valued in excess of hundreds of thousands of dollars, and the fact that the transferees Resch and Prescott took title to land which was subject to nearly one-million dollars in undischarged mortgage indebtedness.

[65] In the face of this evidence, it was unreasonable for the ICAP to determine that section 62 of the *Land Titles Act* was irrelevant to the EID's analysis of ownership of the land. The term "owner" included "registered owner" as defined in accordance with registration at land titles. In tendering the Certificates of Title, Resch, Prescott, and Murray V expressly relied on section 62 of the *Land Titles* Act. That put the issues of fraud and collusion squarely before the ICAP and EID.

[66] The ICAP's conclusion that the concepts of fraud or *bona fides* were not incorporated into the *Irrigation Districts Act*, and therefore the legislature did not intend to empower the EID to consider such concepts, ignores the purpose of the legislation and the expectation of users, as reflected in *By-Law 840*, that irrigation acres would be allocated fairly in a manner which spread the benefit of irrigation amongst diverse farming operations, supported the crop spectrum in the District, and provided a strong economic base for the District and community. It was not reasonable, in light of the purpose of the legislation, for ICAP to apply a strict statutory interpretation, which excluded an examination of the *bona fides* of the land titles. It was reasonable for the EID when faced with evidence of fraud, deceit, or dishonesty in relation to ownership of the land, to investigate the *bona fides* of ownership so as to meet its statutory mandate.

[67] Another principle of statutory interpretation is relevant to this analysis. It is an important aspect of statutory interpretation that a Court (or quasi-judicial body) read legislation in a manner that leads to good, rather than bad, consequences. In this case, the potential for strict statutory interpretation to lead to "bad consequences" arises in relation to the privileges that accompany expansion acres, including voting rights.

[68] The Alberta Irrigation Districts Association (hereinafter referred to as "AIDA"), an intervenor in this matter, made submissions on this particular point, arguing that the strict interpretation of "owner" utilized by the ICAP would allow for electoral manipulation.

[69] In support of its application for intervenor status, AIDA filed the Affidavit of Margo Jarvis Redelback, executive director of AIDA. In her affidavit she set out concerns that a narrow interpretation of the word "owner" could have the effect of enabling irrigators to divide their landholdings amongst multiple corporations and thereby submit multiple ballots during voting to gain disproportionate control over the election of board members. Such a scheme could also allow owners to take disproportionate advantage of programs offered by the irrigation districts and give advantage in relation to expansion acres, amongst other things.

[70] While no direct evidence was before the ICAP of such a strategy being employed, and the issue of electoral manipulation is not live before this Court, it is important to consider this potential consequence in analyzing the reasonableness of ICAP's strict statutory interpretation of the term "owner".

[71] That the ICAP's interpretation could lead to sham land transactions for the purpose of obtaining more acres than allowed by *By-Law 840*, or lead to electoral manipulation affecting the composition and control of irrigation district boards, is not a consequence reasonably intended by

the legislature, particularly given the purpose and intent of the legislation in relation to equity, sustainability, economic viability and accountability to users. To this end, the ICAP erred in failing to consider the consequences of strict statutory interpretation.

Issue Three: Section 95(2)(f) of the *Irrigation Districts Act*

[72] Was it unreasonable for the ICAP to determine that the impugned nominal consideration land transactions did not fall within the type of "other factor" which could make it impractical or uneconomical to irrigate the land, as provided under section 95(2)(f) of the *Irrigation Districts Act*?

[73] Section 96 of the *Irrigation Districts Act* essentially provides a two-step process for the assessment of an application to add irrigation acres. The first obligation of the district is to determine whether an owner has made application for the addition of irrigation acres to the assessment role and then to apply the factors set out in section 95(2) of the *Irrigation Districts Act* to determine whether to refuse or grant the application. Standards for land classification, and land assessment criteria are established by the Minister by regulation. Section 95 relates to the assessment of land and provides as follows:

> **95(1)** If an assessment is required under this Act, the manager must assess the parcel for the purpose of determining whether to recommend to the district that an amendment be made to the assessment roll to add
>
> > (a) irrigation acres, or
> >
> > (b) acres subject to a terminable agreement or an annual agreement.
>
> **(2)** An assessment under subsection (1) must take into account the following:
>
> > (a) the classification of the land in accordance with the land classification standards referred to in section 94(a);
> >
> > (b) whether the land meets the land assessment criteria referred to in section 94(b);
> >
> > (c) whether the district is able to deliver sufficient quantities of water through the irrigation works of the district;
> >
> > (d) whether there is drainage available from that land, if required;
> >
> > (e) whether the expansion limit of the district would be exceeded;
> >
> > (f) any other factors that may make it impractical or uneconomical to irrigate the land.
>
> [Emphasis added]

[74] It is important to note that section 95 refers specifically to an assessment of land and not an assessment of ownership. The subsection (2) factors are specific to issues of irrigability and the ability of the district to deliver the necessary quantity of water. The section appears to be directed towards ensuring that irrigation acres are not provided in circumstances where irrigation

would not be feasible due to the characteristics of the land or the ability of the district to deliver water. The phrase "impractical or uneconomical to irrigate the land" is a phrase which must be read in its entirety.

[75] While there may be a broad mandate to promote economic viability and to distribute irrigation acres fairly, the economics and practicalities of irrigating a particular parcel of land would not logically seem to include an assessment of the ownership of that land. That is a separate factor covered under section 96(1). Accordingly, I am satisfied that it was reasonable for the ICAP to find that the concepts of ownership and related economic unit are not included in the powers granted under section 95(2)(f) of the *Irrigation Districts Act*. This, however, makes no difference with respect to the overall outcome of the judicial review.

V. Conclusion

[76] Therefore, with respect to the primary application for judicial review, I am satisfied that the decision of the ICAP with respect to the Resch, Prescott, and Murray V applications was unreasonable in that it did not fall within a range of possible acceptable outcomes defensible in respect of the facts and law, including principles of statutory interpretation and procedural fairness.

[77] Further, I am satisfied that the *Irrigation Districts Act* empowers individual irrigation districts to investigate the legitimacy of title when considering whether to allocate new irrigation acres. The original decision of the EID was therefore reasonable having regard to the scope, purpose, and intention of the legislation and the facts before it.

[78] Accordingly, the decision of the ICAP is quashed and the EID decisions are restored.

VI. *Mandamus* Application

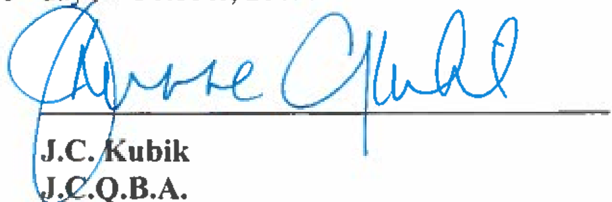
[79] Having quashed the ICAP decision and restored the decision of the EID, a determination of the application seeking *mandamus* is not necessary. Therefore, that application is dismissed.

VII. Costs

[80] The EID is entitled to one set of costs calculated on Column One of Schedule C encompassing both applications. Although there were competing applications, all matters were addressed at the same time over the course of two days of hearing.

[81] Pursuant to the order granting AIDA intervenor status, they will bear their own costs.

Heard on the 17th day of April, 2019 to the 18th day of April, 2019.
Dated at the City of Medicine Hat, Alberta this 18th day of October, 2019.



J.C. Kubik
J.C.Q.B.A.

Appearances:

W.L. McElhanney & A.W. Yiu – Ackroyd LLP
Counsel for the Eastern Irrigation District

K.L. Hurlburt, Q.C. – Emery Jamieson LLP
Counsel for the Irrigation Counsel

C.R. Jones – McMillan LLP
Counsel for the Mr. Murray, Ms. Resch, & Mr. Prescott

G.S. Fitch, Q.C. – McLennan Ross LLP
Counsel for the Alberta Irrigation Districts Association